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The *Corporate Manslaughter and Corporate Homicide Bill*

Bill 220 of 2005-06

This paper discusses the *Corporate Manslaughter and Corporate Homicide Bill 2005-06* which had its first reading in the House of Commons on 20 July 2006 and is due to be debated on its second reading on 10 October 2006.

The Bill seeks to create a new statutory offence of corporate manslaughter which will replace the common law offence of manslaughter by gross negligence where corporations are concerned. In Scotland the new offence will be called corporate homicide. An organisation will have committed the new offence if it owes a duty of care to another person in certain circumstances and there is a management failure by its senior managers which amounts to a gross breach of that duty has resulted in a person's death. The offence will be punishable by an unlimited fine and the courts will be able to make remedial orders requiring organisations to take steps to remedy the management failure concerned. The new offence will not create any individual liability. Crown immunity will not apply to the offence, although a number of public bodies and functions will be exempt from it.

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Summary of main points

Companies and other corporate bodies in England and Wales may be prosecuted in the same way as individuals for a wide range of criminal offences. They may also be prosecuted for breaches of health and safety law.

Where the acts or omissions of a company have resulted in a person's death companies may be prosecuted for the common law offence of manslaughter by gross negligence. This offence requires that it be shown that a "directing mind" within the organisation was also guilty of the offence. This is also referred to as the "identification principle". One effect of the principle has been that that, in general, only smaller companies with more basic management structures have successfully been prosecuted for corporate manslaughter. Concern about this problem has increased in recent years following a number of unsuccessful prosecutions arising from public transport disasters.

The *Corporate Manslaughter and Corporate Homicide Bill*, which was presented to the House of Commons on 20 July 2006 and is due to be debated on its second reading on 10 October 2006, represents the culmination of a long process of consultation and policy development which began with a Law Commission consultation paper published in 1994. A draft version of the Bill was considered by a joint Home Affairs and Work and Pensions select committee, which published a report earlier in this session.

The Bill will create a new statutory offence of corporate manslaughter (corporate homicide in Scotland) which will replace corporate liability for the common law offence in manslaughter by gross negligence. An organisation will have committed the new offence if:

- it owes a duty of care to another person in certain circumstances; and
- the way in which the organisation's activities have been managed or organised, by its senior managers, amounts to a gross breach of that duty; and
- this breach has caused the person's death. There will be no individual liability in respect of the new offence.

The new offence involves a number of separate elements:

- The organisation must owe a relevant duty of care to the victim. Whether or not an organisation owes a duty of care will be determined by the trial judge according to the law of negligence.
- There will be no Crown immunity in relation to the offence, but exemptions to it are provided in respect of public policy decisions and exclusively public functions as well as certain activities carried out by the armed forces, police and other law enforcement agencies, emergency services, probation services and bodies concerned with child protection.

- There must have been a “senior management failure” in that the organisation’s breach of its duty of care must have arisen as a result of the way in which any of its activities were managed or organised by its senior managers.

- The “senior management failure” must have caused the victim’s death, according to the ordinary principles of causation used in criminal cases.

- The breach of duty must have been gross. This will be so if the conduct amounting to the breach of the duty fell “far below what can reasonably be expected of the organisation in the circumstances”. Whether or not a breach was a gross breach will be a matter for the jury to decide, using a number of factors, including health and safety legislation and guidance and wider aspects of the culture of the organisation as far as health and safety was concerned.

The new offence will be punishable by an unlimited fine. The courts will also have powers to make remedial orders on organisations convicted of the offence.

The Bill has been widely welcomed, although trade unions and health and safety campaigners have expressed concern about the absence of individual liability for directors and there has been criticism of the extent of the exemptions for public bodies. Campaigners in Scotland have also been critical of the Government’s decision to extend the Bill to Scotland, where separate legislation had been proposed. The Government has taken this decision on the basis that the Bill is concerned with health and safety and with business associations, both of which are reserved matters under the *Scotland Act 1998*.

CONTENTS

I Background to the introduction of the Bill 7

A. The existing law on "corporate manslaughter" 7

B. Proposals for reform 10

C. Health and Safety Legislation 14

D. Company law, health and safety legislation and the liability of directors 15

II The *Corporate Manslaughter and Corporate Homicide Bill 2005-06* 17

A. Overview of the Bill 17

B. Organisations to whom the new offence will apply 19

C. The "relevant duty of care" 21

1. Duty of care as a component of the new offence 21

D. Removal of Crown immunity 24

1. Background 24
2. Exemptions from the ambit of the new offence 27
3. Comment on the exemptions from the new offence 30

E. Individual liability 34

F. Senior management failure 36

G. "Gross breach" – Factors for the jury to consider 38

H. Sanctions 38

I. Extension to Scotland and Northern Ireland 41

J. The potential impact of the Bill 44

III Health and safety enforcement 45

Background 45

A. "Revitalising" Health and Safety 46

1. The *Revitalising Health and Safety Strategy* 46
2. HSE Resources 48
3. The Hampton Review 49

4. Managerial failures as a factor in workplace deaths and injuries 52

5. Making directors' accountable 52

IV Comment on the Corporate Manslaughter and Corporate Homicide Bill 53

Appendix A: Health and safety at work statistics 55

1. Fatal injuries 55

2. Enforcement and penalties 59

Appendix B: Corporate Manslaughter: Development of policy issues 62

I Background to the introduction of the Bill

A. The existing law on "corporate manslaughter"

There are a number of statutory forms of unlawful killing, such as causing death by dangerous driving. Other than these, all unlawful homicides which do not constitute the offence of murder amount to manslaughter at common law. The common law offence of manslaughter covers many forms of homicide, from cases involving "voluntary manslaughter" (where an individual would have been convicted of murder but for the successful use of the statutory defences of provocation, diminished responsibility, or killing in pursuance of a suicide pact) to various forms of "involuntary manslaughter" which includes all varieties of homicide which are unlawful at common law but were committed without "malice aforethought", including some forms of accidental death. The offence of involuntary manslaughter is further divided into three broad categories:

a) manslaughter by an unlawful and dangerous act
b) manslaughter by gross negligence, and
c) what the textbook Smith and Hogan on *Criminal Law* describes as "manslaughter by subjective recklessness"[1]

Companies and other corporate bodies in England and Wales and Northern Ireland are regarded as having a legal identity for the purposes of the criminal law and may be prosecuted in the same way as individuals for a wide range of criminal offences. In some cases a company may be prosecuted as well as its individual directors or managers. Unincorporated organisations such as schools, clubs and police forces cannot be prosecuted.

Where it is claimed that the acts or omissions of a corporate body have resulted in a person's death, the corporate body may be charged with the common law offence of manslaughter by gross negligence.

For a person or corporate body to be convicted of this offence, it must be proved that there was a gross breach of a duty of care owed to a person which resulted in that person's death. Whether or not there is a duty of care in a particular case is a matter which is determined according to the civil law of negligence. "Corporate manslaughter" is the term which has often been used to describe the offence committed when a corporate body is convicted of manslaughter by gross negligence. Under the law as it currently stands, before a company or other corporate body can be convicted of manslaughter, a "directing mind" of the organisation concerned (that is, a senior individual who can be said to embody the organisation in his actions and decisions) must also be shown to have been guilty of the offence. This is referred to as the "identification principle".

The doctrine of Crown immunity currently prevents Crown bodies, such as Government departments and other public bodies which are considered for legal purposes to be part of the Crown, from being prosecuted and convicted of criminal offences. Many Crown

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[1] David Ormerod, *Smith & Hogan Criminal Law* 11th edition 2005 p.471

bodies, such as Government departments, also lack a separate legal identity for the purposes of prosecution.

Since the late 1980s, the loss of many lives in a series of public transport and other disasters has reawakened public interest in whether the corporations controlling the relevant activities can be prosecuted for manslaughter. Those disasters included:

- the loss of 187 lives when the Herald of Free Enterprise capsized in March 1987
- the King's Cross fire of November 1987, in which 31 people died
- the Piper Alpha oil platform disaster, in July 1988, in which there were 167 fatalities
- the Clapham rail crash, in which 35 people died in December 1988
- 51 deaths when the Marchioness pleasure-boat sank in the Thames in 1989.
- 7 deaths in a rail crash at Southall on 19 September 1997
- 31 deaths in a rail crash near Paddington on 5 October 1999
- 4 deaths in a rail crash near Hatfield on 17 October 2000
- 7 deaths in a rail crash near Potters Bar on 10 May 2002

The "identification principle" under the existing law prevents prosecutions for corporate manslaughter from succeeding unless it can be shown that the corporation, through the directing mind of one of its agents, performed an action or omission which fulfilled the prerequisites of the crime of manslaughter. This principle has made it difficult to secure a manslaughter conviction involving a large company because lines of responsibility are often unclear and responsibility is often delegated to lower level managers, making it impossible to pinpoint the 'directing mind' for the purposes of establishing liability. There is no statutory duty on companies or organisations to have one named director with sole responsibility for health and safety and it is therefore difficult to hold any one member of the board accountable for the purposes of imprisonment for gross breach of duties. Those prosecutions that have been successful have involved small companies with basic management structures where an individual could be identified as the 'directing mind'.

The existing law was confirmed by the Court of Appeal in February 1999.[2] Following the disastrous railway accident at Southall in September 1997, in which seven passengers died, the defendant train company was prosecuted for manslaughter. The first instance judge ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved and that where a non-human defendant is prosecuted it may only be convicted via the guilt of a human being with whom it may be identified. The Court of Appeal upheld the ruling. In delivering the judgment of the court, Rose LJ said:

> There is, as it seems to us, no sound basis for suggesting that, by their recent decisions, the courts have started a process of moving from identification to personal liability as a basis for corporate liability for manslaughter. In *Adomako* the House of Lords were, as it seems to us, seeking to escape from the unnecessarily complex accretions in relation to recklessness arising from

2 *Attorney-General's reference (No 2 of 1999*) [2000] 3 All ER 182

Lawrence [1982] AC 510 and *Caldwell* [1982] AC 341. To do so, they simplified the ingredients of gross negligence manslaughter by re-stating them in line with *Bateman*. But corporate liability was not mentioned anywhere in the submissions of counsel or their Lordship's speeches. In any event, the identification principle is in our judgment just as relevant to the actus reus as to mens rea. In *Tesco v Nattrass* at 173D Lord Reid said

> "The judge must direct the jury that if they find certain facts proved then, as a matter of law, they must find that the criminal act of the officer, servant or agent, including his state of mind, intention, knowledge or belief is the act of the Company."

In *R v HM Coroner ex.p Spooner* Bingham LJ at 16 said

> "For a company to be criminally liable for manslaughter...it is required that the mens rea and the actus reus of manslaughter should be established...against those who were to be identified as the embodiment of the company itself."

In *R v P & O European Ferries* 93 CAR 72 Turner J, in his classic analysis of the relevant principles, said at 83

> "Where a corporation through the controlling mind of one of its agents, does an act which fulfils the prerequisite of the crime of manslaughter, it is properly indictable for the crime of manslaughter."

In our judgment, unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company the company is not, in the present state of the common law, liable for manslaughter. Civil negligence rules eg as enunciated in *Wilsons & Clyde Coal Co v English* [1938] AC 57 are not apt to confer criminal liability on a company. None of the authorities relied on by [counsel for the Attorney-General] as pointing to personal liability for manslaughter by a company supports that contention.
[…]
In each case it was held that the concept of directing mind and will had no application when construing the statute. But it was not suggested or implied that the concept of identification is dead or moribund in relation to common law offences. Indeed, if that were so, it might have been expected that Lord Hoffmann, in *Associated Octel*, would have referred to the ill health of the doctrine in the light of his own speech , less than a year before, in Meridian. He made no such reference, nor was *Meridian* cited in *Associated Octel*. It therefore seems safe to conclude that Lord Hoffmann (and, similarly, the members of the Court of Appeal Criminal Division in *British Steel* and in *Gateway Food Market*) did not think that the common law principles as to the need for identification have changed. Indeed, Lord Hoffmann's speech in *Meridian*, in fashioning an additional special rule of attribution geared to the purpose of the statute, proceeded on the basis that the primary "directing mind and will" rule still applies although it is not determinative in all cases. In other words, he was not departing from the identification theory but re-affirming its existence.

Barrow in Furness Council was the first local authority to be charged with corporate manslaughter, following the deaths of seven people in 2002.[3] They died from Legionnaire's disease, whose source was the air conditioning system at a council-owned arts complex. The council was found not guilty at a trial in 2005; it had previously been prosecuted and pleaded guilty to an offence under HSWA. The design services manager, Julie Beckingham, who was also charged, was found not guilty of manslaughter at a second trial in July 2006; however, she was found guilty and fined £15,000 for offences under s.7 of HSWA.

Health and Safety Monitor reports that in her first trial, the jury failed to reach a sufficient majority verdict, having found it difficult to understand how negligence could develop into gross negligence, required to prove manslaughter. [4]

B. Proposals for reform

In recent decades there has been a tendency for common law crimes to be replaced by statutory offences. The Law Commission has also been engaged in a long term project to devise a statutory criminal code. In 1994, as part of this exercise the Law Commission published a consultation paper on the common law offence of involuntary manslaughter,[5] in which one of its provisional proposals was a special new regime applying to corporate liability for manslaughter. Following consultation, its final recommendations[6] included the creation of a new individual offence of killing by gross carelessness, and also -

> (1) that there should be a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness;
>
> (2) that (like the individual offence) the corporate offence should be committed only where the defendant's conduct in causing the death falls far below what could reasonably be expected;
>
> (3) that (unlike the individual offence) the corporate offence should not require that the risk be obvious, or that the defendant be capable of appreciating the risk; and
>
> (4) that, for the purposes of the corporate offence, a death should be regarded as having been caused by the conduct of a corporation if it is caused by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities.

Following its usual practice, the Law Commission included a draft Bill for the implementation of its recommendations.

The proposals for the new offence of corporate manslaughter interested health and safety campaigners, trade unions and others concerned about the enforcement of health

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[3] Local authorities have been recognised as corporate bodies since the 19th century.
[4] Architect not guilty of legionella manslaughter, *Health and Safety Monitor*, 29(9) September 2006
[5] *Criminal Law: Involuntary Manslaughter*, Law Commission Consultation Paper No 135, 1994
[6] *Legislating the Criminal Code: Involuntary Manslaughter* Law Com 237, March 1996

and safety legislation and the problems caused by the identification principle where corporate liability for manslaughter under the existing law was concerned.

At the Labour Party's first conference after its election victory in May 1997, the then Home Secretary Jack Straw announced that the Government would enact the recommendations for the new offence of corporate killing[7]. An interdepartmental working group of officials and lawyers was then set up to consider the proposals in detail, examining how the proposed offences would work in practice. The result was the publication by the Home Office of a further consultation paper in May 2000.[8] The Government accepted the Law Commission proposals in principle. It accepted most of the detailed recommendations and explained its reasons where it had reached different conclusions.

The main difference in substance concerned which sort of body could be held liable for the new offence. The Law Commission had recommended that only incorporated bodies should be liable. This would include bodies incorporated by private or local Act of Parliament (such as certain public utility companies) or special public Acts (including a number of organisations in the public sector such as local authorities) and those established by Royal Charter (such as the BBC and some universities) as well as limited companies. They thought that while many unincorporated bodies (eg partnerships and hospital trusts) were for practical purposes indistinguishable from corporations, the individuals who comprised such associations could be criminally liable for manslaughter, and the problematical question of attributing the conduct of individuals to the body itself did not arise. Moreover, some incorporated bodies, such as a partnership of two, with no employees, could be unfairly disadvantaged by being charged with the corporate offence, which would not require foreseeability.

The Government thought that proposal could lead to an inconsistency of approach and that the distinctions might appear arbitrary. They put forward their preferred alternative, that the new offence could be committed by "undertakings" as used in the *Health and Safety at Work Act 1974*. It could apply to "all employing organisations" including schools, hospital trusts, partnerships, and unincorporated charities as well as one- or two-person businesses. This meant that a total of 3½ million enterprises might become potentially liable to the offence of corporate killing. The paper invited comments on that option, as well as on whether Crown immunity should apply (thus exempting a number of government bodies and quasi-government bodies). Views were also sought on a number of other issues, including whether health and safety enforcing authorities should have powers to investigate and bring prosecutions for the new offence.

The Law Commission had made a firm recommendation that it should not be possible for an individual to be caught by the new offence in any way, and the Commission's draft Bill included express provision to ensure that it would not be. They said:

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7 "Six disasters: 368 people dead: no successful prosecutions: now the Government acts", 2 Oct 1997, *The Independent*

8 *Reforming the law on involuntary manslaughter: the Government's proposals*: Home Office: May 2000

> We intend that no individual should be liable to prosecution for the corporate offence, even as a secondary party. Our aim is, first, that the new offences of reckless killing and killing by gross carelessness should replace the law of involuntary manslaughter for individuals; and second, that the offence of killing by gross carelessness should be adapted so as to fit the special case of a corporation whose management or organisation of its activities is one of the causes of a death. The indirect extension of an individual's liability, by means of the new corporate offence, would be entirely contrary to our purpose.
>
> There will no doubt be many cases in which the conduct of one or more of the company's employees will amount to the commission of one of the two "individual" offences; but where that conduct does not fulfil the requirements of liability for one of those two offences, we would not wish an individual employee to be caught by the corporate offence. We doubt whether, in practice, it would be possible for an individual employee to be a secondary party to the corporate offence without committing the offence of reckless killing or that of killing by gross carelessness; but we take the view that it is desirable, by means of express legislative provision, to obviate the need for prosecutors and courts even to consider the question of secondary liability for the corporate offence. We recommend that the offence of corporate killing should not be capable of commission by an individual, even as a secondary party.[9]

However, in its notes on the Law Commission's draft Bill, the Government proposed that the subsection should be removed, explaining that -

> The Government considers that there is no good reason why an individual should not be convicted for aiding abetting, counselling or procuring an offence of corporate killing.[10]

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

The consultation period closed on 1 September 2000.

The Labour Party Manifesto of 16 May 2001 stated: -

> Law reform is necessary to make provisions against corporate manslaughter.

In November 2001, following the acquittal of Euromin and its general manager, of the manslaughter by gross negligence of an employee working at Shoreham Docks, the Director of Public Prosecutions David Calvert-Smith QC repeated his call for a change in the law. His decision to prosecute followed a ruling in March 2000 by the Divisional Court

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[9] *Legislating the Criminal Code: Involuntary Manslaughter* Law Com 237, March 1996, para 8.58

[10] p 32

that the Crown Prosecution Service should reconsider its earlier decision not to prosecute.[11]

On 21 May 2003 the Home Office issued a press release saying that a draft Bill would be published and that a timetable and further details would be announced in the autumn of that year.[12]

The press reported that discussions within the Government were contributing to the delay in introducing the draft Bill. The *Independent* reported in November 2003:

> David Blunkett, the Home Secretary, has won approval from the Cabinet to publish a draft Bill on corporate manslaughter during the new parliamentary session, which begins on November 26. He hopes that Parliament will approve a final Bill next year.
>
> The Government will hail the move as a breakthrough because prosecutions for corporate killing have been notoriously difficult. Only eight company directors and five firms have been convicted in England and Wales. ..Mr Blunkett's move may not go far enough for campaigners demanding a new law. Home Office proposals are likely to involve unlimited fines for companies rather than penalties such as jail sentences for individual directors.
>
> Downing Street is nervous of making directors a target after being lobbied furiously by business groups. They warned that such a move would result in "scapegoats" and lead to a "blame culture" that would encourage cover-ups after accidents and prevent lessons being learnt. Business leaders have also pressed the Department of Trade and Industry on the issue.
>
> Ministerial sources say Mr Blunkett has fought hard for the proposal during cabinet discussions on the programme for the next parliamentary session. One said yesterday: "This looked like a dead duck, but a deal has now been done and it will go ahead."[13]

At the end of December 2003, the *Financial Times* reported that the Bill had suffered a further delay, amid Government indecision over its drafting.[14]

The Government's draft *Corporate Manslaughter Bill* was eventually published in March 2005.[15] It set out the Government's proposals, based on the Law Commission's proposals, with some modifications, including provisions applying the new offence to Crown bodies. The draft Bill was subject to pre-legislative scrutiny by the Home Affairs and Work and Pensions select committees in the House of Commons. The committees

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[11] *DPP calls for change in law after Euromin manager acquitted of manslaughter*, CPS press notice 137/01, 29 November 2001

[12] "Government to tighten laws on corporate killing", Home Office Press Notice 142/2003, 21 May 2003

[13] "Blunkett bill to take aim at firms that cause fatal accidents; corporate manslaughter: cabinet approves home office move to overcome",*The Independent,* 10 November 2003

[14] "Indecision spells setback for corporate killing bill", *Financial Times,* 27 December 2003

[15] Cm 6497

published a joint report in December 2005[16] to which the Government responded in March 2006.[17]

The Bill was finally introduced in the House of Commons as the *Corporate Manslaughter and Corporate Homicide Bill* [18]on 20 July 2006. It is due to be debated on second reading on 10 October 2006. It seeks to create a new offence, to be called corporate manslaughter in England and Wales and Northern Ireland and corporate homicide in Scotland.

C. Health and Safety Legislation

Although the *Corporate Manslaughter and Corporate Homicide Bill* is intended to change the current law on manslaughter, it also represents a significant enhancement of the status of health and safety law because the tests for culpability will be focussed on existing health and safety duties and guidance, principally those made under the *Health and Safety at Work etc Act* 1974 (HSWA). The 1974 Act is the overarching legislation governing health and safety in the workplace in the United Kingdom. Its non-prescriptive general duties[19] are designed to keep the risks arising from work related activities as low as reasonably practicable.

Some of the essential features of Act are as follows:

- It requires all employers to provide for their employees, *as far as is reasonably practicable*, a healthy and safe workplace.

- It requires employers to ensure that persons not in its employment (including non-employees and contractors visiting the workplace, paying customers, passers-by and local residents) are not exposed to risks to their health and safety.

- It requires employees to take reasonable precautions for the safety of themselves and of others.

Part One of the *Health and Safety at Work Etc. Act* 1974 imposes direct and positive general duties of care on the following to take action:

- The employer to their employees (section 2)
- The employers and self-employed to those other than employees including the public (section 3)
- Controllers of premises (section 4)
- Controllers of premises relating to harmful emissions (section 5)
- Designers, manufacturers, importers and suppliers of goods and substances for use at work (section 6)

[16] HC 540 I-III available on the internet at http://pubs1.tso.parliament.uk/pa/cm200506/cmselect/cmhaff/540/540i.pdf

[17] Cm 6755 available on the internet at http://www.official-documents.co.uk/document/cm67/6755/6755.pdf

[18] Bill 220 of 2005-06

[19] Statutory duties are distinct from common law duties of negligence. A breach of general duties will not give rise to civil liability; breach of statutory duties will give rise to civil liability.

– Employees to themselves and other people who may be affected by their acts *or omissions* at work (section 7)

The HSWA established the Health and Safety Commission (HSC), an independent body, which is responsible for administration of the Act, and the Health and Safety Executive (HSE), the Executive arm of the Commission. HSE has day-to-day responsibility (in conjunction with local authorities and other designated authorities) for enforcing health and safety legislation, having taken over the various original pre-HSWA Inspectorates. These include the factories, chemicals, agriculture, offshore oil and gas, and nuclear inspectorates. Railways safety passed to the Office of the Rail Regulator when responsibility was transferred from the HSE in April 2006.

Subordinate legislation, mainly in the form of Orders and Regulations, made under HSWA and other legislation, constitutes the legal framework that governs health and safety in the workplace and elsewhere. The provisions are mandatory, breach being an offence. The Health and Safety Commission also issues Approved Codes of Practice (ACoPs), covering and explaining the Regulations as well as written and verbal guidance, to help employers and employees interpret their statutory and regulatory duties and adopt good working practices in the context of the hazards that might arise in connection with their undertakings.

D. Company law, health and safety legislation and the liability of directors

Under the *Companies Act 1985* companies have a legal entity that is distinct from those people that own or work for them. At one time it was thought that a company could not commit a criminal offence because it lacked two elements that are required to establish liability where most criminal offences are concerned, namely the capacity to do the act (*actus reus*) or to have a blameworthy mind (*mens rea*). It is now established that a company can 'act' through the actions of its controlling directors or managers.

Companies have a general legal duty to maintain a safe workplace. Section 2 of HSWA states; "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

Prosecution for failures in their duty under sections 2 and 3 of HSWA is the main instrument by which negligent companies are pursued for health and safety offences in the UK today. The duties under sections 2-6 of HSWA apply to the company as an entity, in its role as employer, occupier, etc. They do not impose any general duties on company directors themselves to take any particular action to comply with the company's obligations under HSWA, although their failure to act may mean that the company fails to comply with health and safety legislation and therefore may be committing an offence.

Section 37(1) of HSWA enables individual company directors to be prosecuted in limited circumstances. The test for ascertaining whether directors, managers or other similar persons are liable is whether the offence has been committed with the consent or connivance of, or is attributable to neglect on the part of, such a person:

> Where an offence under any at the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The definition of managers encompasses not only those at boardroom level, but others designated as senior managers. The case of *R v Boal*, a case under the *Fire Precautions Act 1971* limited the meaning of 'managers' to those in positions of real authority and power to decide corporate strategy, not junior officials or "underlings" carrying out these decisions.

HSE's Operational Circular sets out some of the criteria that will be taken into account when deciding whether to prosecute a director.

> To prosecute someone under section 37 you need to be able to prove that:
> The Evidential Test
>
> a body corporate has committed an offence under a relevant statutory provision; and
>
> a person is a "director, manager, secretary or other similar office holder" within the terms of section 37; and that either
>
> - the person was aware of what was going on and agreed to it, (consent); or
> - the person was aware of what was going on (connived); or
> - what was going on was attributable to the neglect of the person, in relation to an obligation or duty on the part of the person.
>
> The Public Interest Test
>
> 2 As well as being able to prove a case under section 37, you also need to decide whether a prosecution ought to be taken. Action under section 37 should generally be targeted at those persons who could have taken steps to prevent the offence. For a section 37 offence your considerations should include whether:
>
> - the matter was, in practice, clearly within the director/manager's effective control -were the steps that could reasonably have been taken to avoid the offence fall properly and reasonably within their duties, responsibilities and scope of functions?
> - ·the director/manager had personal awareness of the circumstances surrounding, or leading to, the offence;
> - the director/manager failed to take obvious steps to prevent the offence;
> - the director/manager has had previous advice/warnings regarding matters relating to the offence. (This may also include whether previous advice to the company meant that he/she had the opportunity to take action. In such a case you would need to show that he/she knew, or ought reasonably to have known, about the advice/warning.)
> - the director/manager was personally responsible for matters relating to the offence, e.g. had the individual manager personally instructed,

sanctioned or positively encouraged activities that significantly contributed to or led to the offence.

- prosecution would be seen by others as fair, appropriate and warranted.
- the individual knowingly compromised safety for personal gain, or for commercial gain of the body corporate, without undue pressure from the body corporate to do so. [20]

Detailed information on the criteria for proceeding against 'director, manager, Secretary or other similar officer' under s.37 of HSWA can be found on the HSE website. [21]

The main penalties for offences under the *Companies Act 1985* are imprisonment, fines and/or disqualification from holding a directorship (under the provisions of the *Company Directors Disqualification Act 1986*).

Although they are still rare, there has been an increase in successful prosecutions of individual directors or managers responsible for workplace deaths.

Statistics on health and safety, including statistics on prosecutions and convictions, are available in a separate chapter oft his paper.

II The *Corporate Manslaughter and Corporate Homicide Bill 2005-06*

A. Overview of the Bill

Clause 18 of the *Corporate Manslaughter and Corporate Homicide Bill* would abolish the application to corporate bodies of the existing common law offence in England and Wales and Northern Ireland of manslaughter by gross negligence. All future prosecutions of corporations for manslaughter by gross negligence will have to be brought using a new statutory offence of corporate manslaughter. The equivalent common law offence in Scotland of culpable homicide will not be affected by this provision. In Scotland the new offence will be called corporate homicide.

It will not be possible for individuals to be prosecuted or convicted in relation to the new statutory offence although they will still be liable to prosecution for the common law offence of manslaughter or for any other criminal offences which fit the circumstances of the particular case.

Prosecutions for the new offence in England and Wales will require the consent of the Director of Public Prosecutions and in Northern Ireland they will require the consent of the Director of Public Prosecutions for Northern Ireland.

[20] Prosecuting Individuals, HSE Operational Circular 130/8 HSC July 2003 http://www.corporateaccountability.org/dl/HSEOCsMisc/IndividualProsec.doc

[21] http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying/directors.htm

An organisation will have committed the new offence if it owes a duty of care to another person in certain circumstances and the way in which the organisation's activities have been managed or organised by its senior managers amounts to a gross breach of that duty; and this breach has caused the person's death.

The new offence involves a number of separate elements:

- The organisation must owe a relevant duty of care to the victim. Whether or not an organisation owes a duty of care will be a matter for the judge to determine according to the law of negligence. The relevant duties of care are defined in Clause 3(1). Clauses 4 to 8 provide exclusions and restrictions on the application of this definition to public policy decisions and exclusively public functions, military activities, policing and law enforcement, emergency services, child protection and probation functions.

- The organisation must have been in breach of that duty of care as a result of the way in which any of its activities were managed or organised by its senior managers. The Explanatory Notes describes this element as "senior management failure"

- The "senior management failure" must have caused the victim's death. The principles of causation used to determine liability in criminal cases will apply in relation to this question. This means that as long as the senior management failure can be shown to have been a cause of death it need not have been the sole cause, although in certain circumstances intervening acts may be considered to have broken the chain of causation.

- The breach of duty must have been gross. Clause 1(3) provides that this will be so if the conduct alleged to amount to a breach of the duty concerned "falls far below what can reasonably be expected of the organisation in the circumstances". This is similar to the threshold for the common law offence of manslaughter by gross negligence. Whether or not a breach was a gross breach will be a matter for the jury to decide. Clause 9 of the Bill sets out a number of factors for the jury to take into account when considering this issue, including health and safety legislation and guidance. The jury will also be able to consider the wider context in which health and safety breaches took place within an organisation, including attitudes, accepted practices and other aspects of the organisational culture.

The new offence will be punishable by an unlimited fine. The courts will also have powers under Clause 10 to make remedial orders, on applications by the prosecution, requiring organisations convicted of the offence to take specific steps to remedy the management failures that resulted in death and any other matters that appear to the court to have resulted from those management failures and to have been a cause of death. Failure to comply with a remedial order will be an indictable offence punishable by an unlimited fine.

B. Organisations to whom the new offence will apply

Only "organisations" will be liable to be convicted of the new offence of corporate manslaughter. By virtue of Clause 1(2) the organisations to which the new offence will apply will be

- Corporations, including any incorporated bodies but excluding any corporation sole, such as sole traders
- Any of the department or other public bodies set out in Schedule 1, which lists the principal Government departments and other similar organisations
- Police forces, defined in Clause 13(1) as being the main regional police forces within the UK, the British Transport Police Force, the Civil Nuclear Constabulary and the Ministry of Defence Police.

The definition of a corporation as any incorporated body except a corporation sole follows the Law Commission's original recommendations.[22] One effect of this definition is that the activities of partnerships, sole traders and other unincorporated bodies, including certain clubs and associations, will not be covered by the new offence. The joint select committee which considered the draft Bill expressed some concern about this:

> 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.[23]

In its response to the joint committee's report on the draft Bill the Government said:

> 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.

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[22] Law Commission Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter*, HC 171, 1995-96, para. 19

[23] Home Affairs and Work and Pensions Committees First Joint Report of Session 2005-06 *Draft Corporate Manslaughter Bill* HC 540-I Session 2005-06 para. 62
http://pubs1.tso.parliament.uk/pa/cm200506/cmselect/cmhaff/540/540i.pdf

> 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.[24]

The Secretary of State will be able to make orders by statutory instrument amending the list in Schedule 1 of those departments and bodies which will be liable to be prosecuted and convicted of the new offence although they are not incorporated bodies. The draft Bill provided for these orders to be subject to negative resolution procedure but following the recommendation of the joint select committee[25] the Bill now requires the orders to be approved by Parliament under the affirmative resolution procedure, unless they are the result of a department or other body being abolished, changing its name, or transferring functions to or from organisations to which the new offence already applies. In these latter cases the negative resolution procedure will apply.

Police forces were not included in the equivalent provision in the Government's draft version of the Bill, but in its introduction to the draft Bill the Government set out its intention that they should be included. It gave assurances to the Home Affairs and Work and Pensions Select Committees that they would be included in the final form of the Bill when it was introduced.[26] Certain policing activities will be exempt from the new offence as a result of the provisions of Clauses 4 and 6, which are discussed below.

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[24] 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* Cm 6755 March 2006 p.4 http://www.official-documents.co.uk/document/cm67/6755/6755.pdf

[25] Ibid. para. 67

[26] Home Affairs and Work and Pensions Committees First Joint Report of Session 2005-06 *Draft Corporate Manslaughter Bill* HC 540-1 paragraphs 68-71

C. The "relevant duty of care"

1. Duty of care as a component of the new offence

The civil courts have developed the concept of duty of care through judgments made in relation to the law of negligence over many years. In a number of circumstances the fact that a duty of care exists will no longer be questioned but the cases in which such a duty may be held to exist are not closed. The approach taken by the courts in determining whether or not a duty of care should be held to exist is summarised in the report of the joint committee on the draft Bill as follows:

> The question of whether a "duty of care" does exist is generally determined by reference to three broad criteria: (a) is the damage foreseeable? (b) is the relationship between the defendant and victim sufficiently proximate? (c) is it fair just and reasonable to impose such a duty?[27]

As has been noted earlier in his paper,[28] the common law offence of manslaughter by gross negligence applies where a duty of care is owed by the accused to the victim under the law of negligence and a gross breach of that duty has resulted in the victim's death. The Government has expressly used the same civil law concept of a duty of care in the definition of the new statutory offence of corporate manslaughter. In its introduction to the draft Bill the Government said it preferred this approach to the Law Commission's proposed definition for the following reasons:

> The Government has considered this issue carefully. The Law Commission proposed that a new offence be based on a failure to ensure the health and safety of employees or members of the public. However, the relationship between this and duties imposed by health and safety legislation, as well as duties imposed under the common law to take reasonable care for the safety of others, was left undefined. We do not consider that this is satisfactory; the offence needs to be clear on the circumstances in which an organisation has an obligation to act. This is important for an offence that is likely to be based on what an organisation has failed to do.
>
> Our starting point has been the current offence of gross negligence manslaughter, which applies where a duty of care is owed at common law (in the context of the tort of negligence). Such duties include the duties owed by employers to employees, transport companies to passengers, manufacturers to the users of products, the duties owed by construction companies and those owed by a range of other services providers. We think this provides a sensible approach because organisations will be clear that the new offence does not apply in wider circumstances than the current offence of gross negligence manslaughter, to which all companies and other corporate bodies are already subject. By the same token, adopting a significantly narrower basis for the offence would mean excluding circumstances that might currently be prosecuted, which would not be appropriate without sound reasons.[29]

[27] HC 540-I para. 95
[28] on p.7
[29] Cm 6497 paras. 16-17

The Bill does not, however, provide that the new offence should apply in all the circumstances in which a duty of care might be held to arise. Rather the offence will only apply where the duty of care is a "relevant duty of care" for the purposes of the new offence. Clause 3(1) provides that a "relevant duty of care" is any of the following duties of care owed by an organisation "under the law of negligence":

- A duty owed by the organisation as an employer to employees and people working or performing services for the organisation, such as the duty to provide a safe system of work.
- A duty owed by the organisation as an occupier of premises, including land. This includes a duty to ensure the safety of buildings.
- A duty owed in connection with the supply of goods and services, the carrying on of construction or maintenance operations, the carrying on of any other activity on a commercial basis or the use or keeping on any plant, vehicle or other thing.

These duties are generally owed at common law, that is, as a result of principles developed through case-law, although in some cases, such as the duty owed by an occupier, statutory provisions have superseded the common law rules.

The joint committee noted in its report on the draft Bill that while some witnesses had welcomed the Government's approach to the definition of the new offence others had questioned whether it was appropriate to use a civil law concept as the basis for a criminal offence. Some witnesses had argued that determining whether or not a duty of care exists under the law of negligence in a particular case is a highly complicated legal question, which has developed through case-law over time and is still subject to change and that the use of the concept would therefore add an unnecessary complexity to the Bill. Witnesses also suggested to the committee that there could be cases, particularly involving deaths caused by public bodies, where a death would occur as a result of a failure by senior managers which fell far below what could reasonably be expected in the circumstances, and yet those circumstances would not give rise to a civil law "duty of care".[30]

The joint committee's report recommended that the concept of "duty of care" be removed from the Bill:

> We accept that the definition of the offence needs to make clear which are the circumstances in which an organisation has an obligation to act, and in which a serious breach of that obligation leading to death could make it liable for prosecution for corporate manslaughter. We are not, however, convinced that this clarity would be achieved by the proposal to limit the scope of the offence to those situations in which an organisation owes a duty of care in negligence. This legal concept is unclear and is not fixed – the situations in which a duty of care may be owed in negligence will develop in accordance with judicial decisions. Furthermore, we consider that different rules should apply to determine when a person owes a duty of care for another's health and safety in the context of liability for damages under the civil law and in the context of liability under the criminal law.

[30] HC 540-I Session 2005-06 paras. 98-101

> 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.[31]

The report also recommended that:

> 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.[32]

In its response to the joint committee's report the Government set out its views on these recommendations in some detail. It began by saying:

> 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.

The Government also set out its reasons for specifying "relevant" categories of duty of care in respect of which the new offence would apply:

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[31] *ibid.* paras.104-105
[32] *ibid.* para.108

> 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).[33]

D. Removal of Crown immunity

1. Background

The report of the joint committee on the *Draft Corporate Manslaughter Bill* described the doctrine of Crown immunity as follows:

> The legal doctrine of Crown immunity holds that unless Parliament intends otherwise, onerous legislation does not apply to the Crown. The Crown for this purpose is not limited to the monarch personally, but extends to all bodies and persons acting as servants or agents of the Crown, whether in its private or public capacity, including all elements of the Government, from Ministers of the Crown downwards. Government departments, civil servants, members of the armed forces and other public bodies or persons are, therefore, included within the scope of the immunity.[34]

The *Crown Proceedings Act 1947* removed Crown immunity from civil proceedings for negligence and set out provisions governing the liability of the Crown for negligence. Crown immunity still applies where criminal proceedings are concerned.

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[33] *ibid.* paras.10-11
[34] *ibid.* para. 200

In its 2000 consultation paper the Government said it proposed to retain Crown immunity from prosecution for involuntary manslaughter and would instead provide a separate declaratory remedy for bodies and persons acting as servants or agents of the Crown.[35] When the draft Bill was published in March 2005, however, it contained a clause expressly designed to remove Crown immunity and ensure that the new offence of corporate manslaughter would apply to the Crown. In the introduction to the draft Bill the Government said:

> The Government recognises the need for it to be clearly accountable where management failings in its part lead to death. There will therefore be no general Crown immunity providing exemption from prosecution.[36]

Clause 11 of the current Bill is intended to have the same effect, confirming that the Bill and the new offence apply to the Crown. Clauses 12 and 13 seek to deal with a number of technical difficulties that might arise in connection with the application to the armed forces and to police forces of the new offence and the "duty of care" which is an integral part of it.

Crown immunity will still apply where prosecution for offences under health and safety legislation is concerned. The application of health and safety law to Crown bodies is described in a note issued by the Cabinet Office in June 2001.[37] Crown bodies are expected to comply with the general duties under the *Health and Safety at Work etc. Act 1974* (HSWA) and relevant statutory provisions, but they are currently excluded under Section 48(1) of HSWA from the provisions for statutory enforcement, including prosecution and the imposition of penalties.

In 2001, Crown immunity prevented the prosecution of the Royal Mint for health and safety offences in relation to the death of John Wynne, aged 50, who was killed when a six-tonne furnace fell on him at the Royal Mint in Llantrisant, South Wales.

Although Crown immunity applies to a Crown body, there is no clear definition of what a Crown body is. The enabling statute of an organisation will often state whether or not a particular organisation should be treated as acting on behalf of the Crown. On its website the Centre for Corporate Accountability (CCA) notes that the general trend is for enabling statutes to state that a new organisation is not a Crown body.[38] The CCA's website includes the following extract from a Home Office document which discusses whether or not a public sector organisation can be considered an agent of the Crown, and therefore subject to Crown immunity, when the legislation under which the organisation was established makes no mention of this point:

> "The question of whether an organisation can claim Crown immunity depends upon the degree of control which the Crown through its ministers, can exercise over in the performance of its duties. The fact that a Minister of the Crown

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[35] *Reforming the Law on Involuntary Manslaughter: The Government's Proposals*, Home Office May 2000 para 3.2.8

[36] *Corporate Manslaughter: The Government's Draft Bill for Reform* Cm 6497 2005 para. 38

[37] *Information Note for Personnel Managers, PIN 45 Procedures for enforcing health and safety requirements in Crown Bodies*, Cabinet Office, June 2001.

[38] http://www.corporateaccountability.org/rb/gb/CrownBodies.htm#What

> appoints the members of such a body, is entitled to require them to give him information and is entitled to give them direction of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the Crown will be more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of Government.
>
> There is no doubt that Government Departments are Crown bodies. The prison service - since it is also a department within the Home Office - is also a Crown body. Police forces are however not Crown bodies. [39]

The Houses of Parliament do not have Crown immunity but enjoy parliamentary privilege. However, the House of Commons Commission has agreed that HSWA and subordinate legislation apply by analogy. Crown immunity does not apply to the Scottish Parliament, the Welsh Assembly or the Greater London Assembly.

The Health and Safety Executive (HSE) is the relevant enforcement authority for Crown bodies, and may issue non-statutory Crown Enforcement Improvement and Prohibition Notices. They may also censure the Crown body in circumstances when a prosecution would otherwise have been brought.

A 'Crown censure' is the formal recording of a decision by the HSE that, but for Crown immunity, the evidence of a Crown body's failure to comply with health and safety law would have been sufficient to provide a realistic prospect of conviction in the courts (in line with the Code of Crown Prosecutions). Details of Crown censures are recorded in the HSE annual report and on the HSE website.

A Crown censure differs from a trial, as it is chaired not by a judge, but a senior HSE inspector; no witnesses are called and the public is not allowed to attend. The CCA comments on Crown censure:

> The aim of the hearing is to "seek acknowledgment of the problem and to obtain an undertaking to improve standards of health and safety." [40]

Under Section 48(2) of HSWA, individual ministers and Crown servants may in some circumstances be prosecuted for health and safety offences. If convicted, they can be fined or even imprisoned for certain offences.

The Government has been seeking to reduce Crown immunity gradually by removing it when new legislation is enacted. For example, Section 60 of the *NHS and Community Care Act 1990* states that, from 1 April 1991, with limited exceptions, "no health service body shall be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown", thereby removing hospitals from Crown immunity.

Although immunity from prosecution will be lifted from most Crown bodies under the terms of the Bill these bodies will still have Crown immunity from prosecution for

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[39] ibid.
[40] http://www.corporateaccountability.org/rb/gb/CrownBodies.htm

breaches under health and safety law, such as breaches which resulted in injury rather than death or breaches which came within one of the exemptions in the Bill. In 2000 the Government made a commitment to remove Crown immunity from statutory health and safety enforcement when Parliamentary time allowed.[41] In its reply to the report of the joint committee on the draft *Corporate Manslaughter Bill* the Government said of the Bill's provisions on Crown immunity:

> 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.[42]

Information about the Government's strategy for dealing with health and safety issues is set out in more detail in Part III of this paper.

2. Exemptions from the ambit of the new offence

While stating that it was proposing to remove any general Crown immunity from prosecution for the new offence, the Government noted in its introduction to the draft Bill[43] that there were important questions about the sort of activities which might lead to liability on the part of the Crown and other government bodies and the way in which the new offence might apply to these functions. The Government has sought to address its concerns about this issue in Clauses 4 to 8 of the Bill by providing specific exemptions for particular public bodies or functions. These exemptions provide that the duties owed by certain public bodies under the law of negligence are either:

- Not "relevant" duties of care at all for the purposes of the offence, or
- Are restricted to the duties owed by employers, such as the duty to ensure a safe place of work, and the duties owed by occupiers of premises, such as the duty to ensure that premises are safe.

In some of these cases the bodies concerned would not be considered to owe a duty of care under the civil law of negligence in the circumstances specified in the Bill but the Government is keen to avoid any doubt and ensure that their exemption from liability is made explicit on the face of the Bill.

The particular exemptions, set out in more detail below, cover

- public policy decisions, "exclusively public functions" and inspections;
- military activities,
- policing and law enforcement,
- emergency services; and
- child protection and probation functions.

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[41] *Revitalising Health and Safety: Strategy Statement*, June 2000 Action Point 15

[42] *The Government Reply to the first joint report from the Home Affairs and Work and Pensions Committees Session 2005-06*, HC 540, Cm 6755, p.23

[43] *Corporate Manslaughter: The Government's Draft Bill for Reform*, Cm 6497, 2005, para. 38

a. Public policy decisions, "exclusively public functions" and statutory inspections

Clause 4 of the Bill seeks to exempt from the new offence any decisions by public authorities on matters of public policy, including in particular the allocation of public funds or the weighing of competing public interests, regardless of whether such decisions result in a person's death. This reflects the position in the civil law of negligence, under which some decisions taken by public bodies are not susceptible to review by the courts.

A public authority will not be liable in respect of the new offence for a breach of a duty of care owed in respect of something done in the exercise of an "exclusively public function" or a statutory inspection unless the organisation owes the duty as an employer or an occupier of premises. "Exclusively public functions" are defined in Clause 4(4) as functions that fall within the prerogative of the Crown or that are, by their nature, exercisable only with statutory authority or with authority conferred by the exercise of the prerogative.

b. Military activities

Many operational military activities will be "exclusively public functions" within the terms of Clause 4 and will be outside the ambit of the new offence on those grounds except where the Ministry of Defence's duties as an employer or occupier of premises are concerned. Clause 5 will go further than this and exempt certain military activities from the offence entirely by providing that the Ministry of Defence does not owe a relevant duty of care in respect of these activities at all. The activities to which this complete exemption applies are:

- operations, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in which members of the armed forces come under attack or face the threat of attack or violent resistance, and
- activities carried out in preparation or direct support of such operations.

The Explanatory Notes on the Bill comment that military authorities are rarely held to owe a duty of care in these circumstances under the civil law of negligence, but that the Government is keen to ensure that the fact that these activities will not be covered by the new offence is made explicit on the fact of the Bill. The complete exemption also covers hazardous training for these types of operation.

Clause 5 also exempts the activities of special forces from the new offence by providing that any duty owed by the Ministry of Defence in respect of them is not a "relevant duty of care".

c. Policing and law enforcement

Under Clause 6 of the Bill, police forces and other public authorities involved in law enforcement will, like the armed forces, be entirely exempt from the new offence in relation to:

- operations, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in which the police come under attack or face the threat of attack or violent resistance, and
- activities carried out in preparation or direct support of such operations.

As with the exemption for the armed forces in Clause 5, the law of negligence rarely holds police forces liable in these circumstances but the Government wishes to make explicit the fact that they are exempt from the new offence. The exemption also extends to training for these types of operation.

Police forces and other public authorities involved in law enforcement will also be more generally exempt from the new offence in respect of "policing and law enforcement activities" except where their duties of care as employers or occupiers of premises are concerned.

The exemptions for police forces and other law enforcement authorities will not prevent individual police officers or other law enforcement officials from being prosecuted for offences they are alleged to have committed in circumstances that have resulted in a person's death.

d. Emergency services

The Government is keen to ensure that the new offence does not apply to the emergency services in circumstances where they are responding to emergencies or what are believed to be emergencies. It has therefore provided in Clause 7 that this aspect of the activities of the emergency services is not a "relevant duty of care" except where the emergency services' duties as employers or occupiers of premises are concerned. The services covered by this exemption are:

- fire and rescue authorities in the UK;
- other organisations employing fire-fighters;
- NHS bodies and those providing ambulance services or services for the transport of organs or blood under contract for NHS bodies;
- rescue services such as the Coastguard and the Royal National Lifeboat Institution; and
- the armed forces.

The Explanatory Notes comment that:

> Generally, public bodies such as fire authorities and the Coastguard do not owe duties of care in this respect and therefore would not be covered by the offence in any event. In some circumstances ambulance services do. The new offence provides a consistent approach to the application of the offence to emergency services, covering organisations in respect of their responsibilities to provide safe working conditions for employees and in respect of their premises, but excluding wider issues about the adequacy of their response to emergencies.[44]

[44] Explanatory Notes para.38

e. Child protection and probation functions

Clause 8 of the Bill is designed to ensure that the new offence does not apply to:

- local authorities in respect of their statutory child protection functions and responsibilities, or
- probation services and their equivalents in Scotland and Northern Ireland in respect of their statutory responsibilities concerning the supervision of offenders and the provision of accommodation in approved premises.

The offence will apply to local authorities and probation services in relation to their duties as employers to ensure the safety of their employees and their duties as occupiers of premises to ensure the safety of any premises they occupy. The Explanatory Notes comment that:

> It is unlikely that such bodies would owe a duty of care should a person be killed in connection with such activities (for example, if a child was not identified as being at risk and taken into care and was subsequently fatally injured). This clause makes it clear that such circumstances are not covered by the offence.[45]

3. Comment on the exemptions from the new offence

While the Government's decision to remove Crown immunity in relation to the new offence has been broadly welcomed, there has been criticism of the extent of the exemptions provided in Clauses 4 to 8 of the Bill, particularly where the exemptions for "exclusively public functions", the armed services and the police are concerned. In its report on the draft Bill the joint committee welcomed the proposal to remove Crown immunity but expressed concern that the force of what it termed "this historic development" would be substantially weakened by some of the broad exemptions included in what was then the draft Bill. Some of the witnesses to the committee had noted that in practice, Crown immunity would be retained because the Bill's exemptions would apply almost exclusively to public bodies.

The joint committee agreed that there should be an exemption to the offence for public policy decisions, but considered that it should only apply at a high level of public policy decision-making.[46] Where the exemption for exclusively public functions was concerned the committee felt that the definition of "exclusively public functions" was unsatisfactory because there was a lack of clarity about the situations in which it would apply.[47] The committee went on to say:

> 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

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[45] *ibid*. para. 40
[46] HC 540-I 2005-06 para.233
[47] *ibid*, para. 213

> 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. [48]

In its introduction to the draft Bill the Government gave "functions relating to the custody of prisoners" as an example of an exclusively public function, which would therefore be exempt from the new offence of corporate manslaughter. The joint committee expressed particular concern about this:

> 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.[49]

In its reply to the committee's report the Government set out its general approach to the lifting of Crown immunity in respect of the new offence:

> 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

[48] *ibid.* para.217
[49] *ibid.* para.227

> 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. [50]

The Government went on to make the following comments about the exemption for "exclusively public functions" in general and the particular issue of deaths in custody:

> 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

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[50] Cm 6755, March 2006, p.21

> 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. [51]

While recognising that there should be some form of exemption for the armed forces the joint committee considered that the exemption provided for them in the Bill was too widely drawn, in that "preparation" for combat operations could encompass routine training, for which such an exemption could not be justified.[52] In its reply the Government said that it took the view that the concept of preparation for combat operations did not include routine training, which would therefore be covered by the Bill. The Government added that it would consider whether this part of the Bill could be clarified.[53]

The joint committee was also concerned that the inclusion of the operational activities of the police and fire services within the ambit of the offence might encourage a culture that was risk averse within these services.[54] In its reply to the committee's report the Government said:

> 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.[55]

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[51] ibid. p22-23
[52] ibid. para. 239
[53] ibid.
[54] HC 540-I, 2005-06, para. 245
[55] Cm 6755, March 2006, p.22

E. Individual liability

Clause 17 of the Bill expressly provides that there will be no individual liability in respect of the new offence. It will still be possible for individuals to be prosecuted for, and convicted of, the common law offence of manslaughter by gross negligence, offences under health and safety legislation or any other relevant offences if the necessary elements of these offences can be established. The Home Affairs and Work and Pensions Committees joint report on the *Draft Corporate Manslaughter Bill* noted that between April 1999 and September 2005, 15 directors or business owners had been personally convicted of manslaughter by gross negligence. The report also noted that since 1986 only eight company directors had been disqualified for up to two years under the *Health and Safety at Work Act 1974* for health and safety offences that were the result of their personal consent, connivance or neglect.[56]

The Law Commission had argued in its 1996 report that an offence targeting the liability of corporations should not involve punitive sanctions against individuals. The Commission suggested that secondary liability for its proposed new offence should only be imposed on individuals where they were themselves guilty of manslaughter.

In its 2000 consultation paper the Government subsequently suggested that without punitive sanctions against company officers, the proposed new offence might not provide a sufficient deterrent. The paper asked for views on which sanctions should be available in respect of the new offence, whether individual officers contributing to management failure should face disqualification, and whether imprisonment should be available in proceedings for a separate offence of contributing to a management failure that caused death.

In its introduction to the draft Bill, published in 2005, the Government noted that there had been considerable comment on these proposals, with strong opinions on both sides and views evenly split. The Government added that:

> We are clear that the need for reform arises from the law operating in a restricted way for holding organisations themselves to account for gross negligence leading to death. Our proposal to tackle this focuses on changing the way in which an offence of manslaughter applies to organisations, and this is a matter of corporate not individual liability. We do not therefore intend to pursue new sanctions for individuals or to provide secondary liability.[57]

In its report on the draft Bill the joint committee noted that the witnesses who had given evidence to their inquiry had been divided on this issue, with half of the evidence, and particularly the evidence from representatives of industry, agreeing with the Government. Many other witnesses had argued, however, that an absence of punitive sanctions against individuals would provide an insufficient deterrent and would be unsatisfactory for those who wish to see justice delivered to the families of victims. The joint committee concluded that:

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[56] HC 540-I 2005-06, paras. 299-300

[57] Cm 6497, March 2005, para. 47

> 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.
>
> 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.[58]

The joint committee's report recommended that where an individual was found guilty of this secondary offence the maximum penalty should be set at 14 years, by analogy with the offence of causing death by dangerous driving.[59]

In its reply to the report the Government said:

> 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 connivance1, 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

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[58] HC 540-I, 2005-06, paras. 308-9

[59] ibid. para.314

> 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.[60]

F. Senior management failure

In its 1996 report which recommended a new offence of "corporate killing", the Law Commission had proposed that a death be regarded as having been caused by the conduct of an organisation if it was caused by a failure in the way in which the corporation's activities were managed or organised to ensure the health and safety of persons employed in or affected by such activities.[61]

In its draft Bill the Government did not adopt this approach, preferring instead to focus on "management failure" on the part of an organisation's "senior managers". This is also the approach taken in the final version of the Bill, Clause 1(1) of which defines the new offence in terms of the way in which an organisation's activities are managed and organised by its senior managers. Clause 2 provides that a person is a "senior manager" of an organisation if he plays a significant role in:

- The making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or
- The actual managing or organising of the whole or a substantial part of those activities.

The introduction to the draft Bill said of the concept of management failure by senior managers:

> This is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies.
>
> The test for management failures focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or indeed for

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60 Cm 6755, p.29-30

61 Law Commission report No. 237, Legislating the Criminal Code: Involuntary Manslaughter: Item 11 of the Sixth Programme of Law Reform: Criminal Law HC 171 1995-96 pp.127-131

> the unpredictable, maverick acts of its employees. Instead, it focuses responsibility on the working practices of the organisation. It also ensures that the offence is not limited to questions about the individual responsibility of senior managers, but instead considers wider questions about how, at a senior management level, activities were organised and managed.[62]

In its report the joint committee expressed a number of concerns about the "senior manager" test. These are set out in the report's conclusions and recommendations:

> **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)[63]

In its reply to the report the Government said it accepted the report's recommendation that the test be reconsidered:

> 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.
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> 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

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[62] Cm 6497, paras. 25-26

[63] HC 540-I p.96

> 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.[64]

The Explanatory Notes for the version of the Bill that has now been introduced in the House of Commons say that the Government is still considering whether the "senior management failure" test can be improved.[65]

G. "Gross breach" – Factors for the jury to consider

For the new offence to apply it would have to be proved that there was a "gross breach" of the relevant duty of care. Clause 1(3) provides that this condition will be satisfied if the conduct alleged to amount to a breach of the duty concerned "falls far below what can reasonably be expected of the organisation in the circumstances".

Whether or not a breach is a gross breach would be a matter for the jury to decide. Clause 9 of the Bill sets out a number of factors for the jury to take into account when considering this issue, including health and safety legislation and guidance. Guidance from the Health and Safety Executive does not currently enjoy this status under health and safety law.

The Explanatory Notes comment that:

> To provide a clearer framework for assessing an organisation's culpability, clause 9 sets out a number of matters for the jury to consider. In particular, these put the management of an activity into the context of the organisation's obligations under health and safety legislation, the extent to which the organisation was in breach of these and the risk to life that is involved. Clause 9 also provides for the jury to consider the wider context in which these health and safety breaches occurred, including cultural issues within the organisation such as attitudes or accepted practices that tolerated breaches. When considering breaches of health and safety duties, juries may also consider guidance on how those obligations should be discharged. Guidance does not provide an authoritative statement of required standards and therefore the jury is not required to consider the extent to which this is not complied with. However, where breaches of relevant health and safety duties are established, guidance may assist a jury in considering how serious this was.
>
> These factors are not exhaustive and clause 9(4) provides that the jury is also to take account of any other relevant matters.[66]

H. Sanctions

Clause 1(5) provides that an organisation convicted of the new offence will be liable to an unlimited fine.

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[64] Cm 6755 p.14-15

[65] Explanatory Notes para. 16

[66] Explanatory Notes paras. 41-42

The courts will also have powers under Clause 10 to make remedial orders, on applications by the prosecution, requiring organisations convicted of the offence to take specific steps to remedy the management failures that resulted in death. They could also be required to remedy any other matters that appeared to the court to have resulted from those management failures and to have been a cause of death. The draft Bill had provided that failure to comply with a remedial order would be punishable by a fine of up to £20,000 on summary conviction by magistrates or by an unlimited fine on conviction on indictment at the Crown Court. However the final version of the Bill provides only for conviction on indictment in such cases and the imposition of an unlimited fine.

In its report on the draft Bill the joint committee made the following recommendations about levels of fines for the new offence:

> 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.[67]

In its reply to the report the Government said:

> 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

[67] HC 540-I 2005-06 para. 268

> the courts have sufficient authority to require this information from the parties involved in the case where necessary.[68]

In its introduction to the draft Bill the Home Office invited comments on the argument that fining a Crown body served little practical purpose and was simply the recycling of public money through the Treasury and back to the relevant body to continue to provide services. In its report on the draft Bill the joint committee said:

> Some organisations agreed with this argument. Others pointed out that money might not pass back to a fined body and then the public services it delivered would suffer. A number of witnesses also raised concerns that remedial orders would place the courts in the difficult position of telling the Government how to govern.
>
> However, a majority of the evidence submitted to us expressed the view that fines and remedial orders should apply to Crown bodies, arguing that this was important to ensure that justice was seen to be done. [69]

The joint committee's report concluded that it was important that Crown bodies did not escape sanction and said that fines and remedial orders could serve a purpose in signalling culpability.[70] The report added that the committees did, however, consider some of the arguments advanced against imposing fines and remedial orders on Crown bodies to be valid and felt that these concerns its case in arguing that remedial orders and fines provided an inadequate range of sentencing options and that a wider range of sanctions was essential.[71]

In its reply to the committees' report the Government said of the proposed imposition of fines and remedial orders on public bodies:

> 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.[72]

Of the argument that there should be a wider and more innovative package of sanctions for the new offence the Government said:

> 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

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[68] Cm 6755 p.26
[69] HC 540-I 2005-06 paras. 279-280
[70] ibid. para. 282
[71] ibid paras. 282 & 287
[72] Cm 6755 p.27

> 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.[73]

I. Extension to Scotland and Northern Ireland

The Government's draft *Corporate Manslaughter Bill* extended to England and Wales only. Manslaughter is also an offence in Northern Ireland and the identification principle poses similar problems there. The Scottish equivalent of the offence of manslaughter in England and Wales and Northern Ireland is known as culpable homicide. This offence differs from manslaughter in a number of ways but problems over the identification of directing minds in cases of culpable homicide involving companies and other corporate bodies have also arisen in Scotland.

In its introduction to the draft Bill the Government said:

> Criminal law in Northern Ireland is the responsibility of the Secretary of State for Northern Ireland and is a devolved matter in Scotland. The Secretary of State intends to consult in Northern Ireland on the proposal that the Bill's provisions should also extend to that jurisdiction. Scottish ministers will be consulting separately on proposals for reforming Scottish law.[74]

In May 2005 the Northern Ireland Office published a consultation paper on *Corporate Manslaughter: Northern Ireland – Proposals for a New Offence* with a deadline for comments of 25 August 2005. The consultation paper is available on the Northern Ireland Office website.[75]

The joint Home Affairs and Work and Pension committee that reported on the draft Corporate Manslaughter Bill commented:

> We heard evidence from representatives from industry that it was important that there was as little practical difference between the law in England and Wales and the rest of the UK. For example, Cameron McKenna Solicitors submitted:
>
> > "It is regrettable that there is a separate process underway to review the law in Scotland. The Scottish law of culpable homicide for companies is already different to that of England and Wales. The government should endeavour to promote a consistent UK-wide reform".

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[73] ibid. p.28

[74] *Corporate Manslaughter: The Government's Draft Bill for Reform* Cm 6497 March 2005 para.63

[75] http://www.nio.gov.uk/corporate_manslaughter_northern_ireland_-_proposals_for_a_new_offence.pdf?keywords=corporate+manslaughter

> The Northern Ireland Office (NIO) took the view that "the same proposals should be consulted upon in Northern Ireland and, subject to that consultation, that the Bill to be brought forward in due course for England and Wales should be extended also to Northern Ireland".[76]

An Expert Group was set up by the Scottish Executive in 2005 to review the law in Scotland on corporate liability for culpable homicide. The Group published its report in November 2005. The report, which recommended that a new statutory offence of corporate killing be introduced in Scotland for organisations guilty of recklessness which results in the death of employees or members of the public, is available, along with other related papers, on the Scottish Executive website.[77] The joint committee examining the draft Corporate Manslaughter Bill made the following comments about the Expert Group's proposals:

> The Group published its conclusions on 17 November 2005. Its proposals for reform go much further than the draft Bill in certain respects. These include provisions that:
>
> - there be created a secondary offence for directors or senior managers where their actions and omissions directly contributed to the death and a stand alone individual offence which would apply to any person who causes a death through their work, without requiring that the employing organisation is guilty of corporate killing;
> - the offence should apply to unincorporated bodies;
> - the offence should apply to situations where the management failure took place in Scotland but the death took place abroad;
> - the removal of Crown immunity should be more extensive than in the draft Bill; and
> - the offence should be subject to wider penalties than fines and remedial orders.
>
> The Group wrote:
>
> > "the majority of members feel that alignment is secondary to getting the law right in Scotland. We all agree that alignment need not be on the basis of the current Home Office proposals, on which we have a number of reservations. Indeed the Group believes that the approach which we outline… provides a useful basis for amending the law in all UK jurisdictions, not just in Scotland".
>
> 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.[78]

In its reply to the committee's report, published in March 2006, the Government said:

[76] HC 540-I 2005-06 paras 255-256
[77] http://www.scotland.gov.uk/Topics/Justice/criminal/Corporate/finalreport
[78] HC 540-I 2005-06 paras. 257-259

> 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.[79]

The Government's *Corporate Manslaughter and Corporate Homicide Bill 2005-06* seeks to create a new offence in England and Wales, Scotland and Northern Ireland. The offence will be called corporate manslaughter in England and Wales and Northern Ireland and corporate homicide in Scotland but its constituent elements will be broadly the same in all three jurisdictions.

An article published in the *Scotsman* on 8 August 2006 commented:

> Many in Scotland, including trade unions and safety campaigners, are dismayed there will be no separate Scottish legislation. Such a law had previously been repeatedly promised by Cathy Jamieson, the justice minister, most recently at this year's STUC conference, where she gave a commitment to press ahead with "workable" legislation on corporate homicide before the summer recess. This commitment followed the appointment of an expert panel by the Scottish Executive last year, whose report was published last November and promised reform described by Jamieson as "radical and innovative".
>
> The recommendations of the expert panel were far-reaching and fundamentally different to the stance taken by Westminster. The panel proposed a new law which would make individuals personally liable in the criminal courts and subject to prison sentences. In sharp contrast, the Westminster bill does not apply to individuals, thereby removing prison as an option.[80]

The Bill is being extended to Scotland because lawyers in Whitehall and the Scottish Executive have concluded that the Scottish executive has no power to enact separate Scottish legislation in this area because the Bill covers health and safety and business associations, both of which are matters reserved to the Westminster Parliament under

[79] Cm 6755 p.25
[80] "More a fudge than a reform" – *Scotsman* 8 August 2006

Schedule 5 of the *Scotland Act 1998*. An article in the *Financial Times* quoted the Scottish Executive's view that a Sewel motion was unnecessary:

> As a result, the Westminster Bill covers Scotland. Given that the Bill is wholly reserved there is no need for the Scottish Parliament to give its consent.[81]

The *Financial Times* said Scottish trade unions had attacked the Government's decision not to go ahead with the measures that had been recommended by the Expert Group in Scotland. It added:

> However, the decision to legislate on easing the prosecution of companies for fatal accidents only at Westminster will be welcomed by employers, who had warned that tougher rules could lead to miscarriages of justice and deter companies from locating in Scotland.[82]

J. The potential impact of the Bill

The Government's estimate of the financial effects of the Bill, set out in the Bill's Explanatory Notes, includes estimates both of the costs to industry and of the number of additional cases involving the new offence:

> Because the Bill does not introduce any new regulatory burden for industry or the public sector, costs arising from the offence are expected to be small. However, it is possible that organisations may seek legal advice and undertake additional training in preparation for the Bill and estimates of these costs across industry are around £12 million.
>
> It is estimated there will be 10 - 13 additional cases of corporate manslaughter/homicide a year following implementation of the offence. Costs of defending these are likely to be around £5 - 6.5 million. The costs of prosecution service preparation for these cases is expected to be £2 - 2.5 million and court costs are expected to be £0.1 - 0.2 million. However, because the offence is aimed at the sort of behaviour which would already be subject to prosecution (either under the existing law of corporate manslaughter or health and safety law), not all of these costs will be in addition to costs currently incurred both by defendants and the Crown. In addition there are likely to be savings as a result of fewer cases of corporate manslaughter failing at court which currently can result in large sums being awarded by the courts to defendants in respect of costs.[83]

The Explanatory Notes also contain a summary of the Bill's regulatory impact assessment, which includes the following comments:

> The offence will apply to all corporate bodies, the Crown and the police. However, the offence does not introduce new standards for the management of health and safety and therefore does not increase regulatory burdens for these organisations.
>
> Some costs may be incurred as a result of organisations seeking legal advice or implementing training and there will be some increased costs of criminal trials (as

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[81] "Scottish unions attack changes on corporate killing" – *Financial Times* 21 July 2006

[82] ibid.

[83] Explanatory notes paras. 68-69

detailed above). These costs are likely to be in total £19.2 - 21.2 million. These costs need to be seen in the light of any savings as a result of fewer workplace injuries and accidents. The cost to society as a whole of workplace accidents and ill-health is estimated to be £20 - 32 billion. It is hoped that the effect of the Bill will be to encourage organisations which are not complying with health and safety laws to do so. In particular, it should provide an added incentive to organisations with very poor safety standards to improve. In overall terms, the costs identified with the new offence amount to less than 0.1% of the costs of work-related accidents and ill-health, so even a very small reduction in work-related deaths and injury as a result of better compliance would represent significant savings.

On balance, respondents agreed with the Government's assessment in 2005 that there would be little additional cost to those organisations already complying with health and safety, particularly as the offence would be linked to existing health and safety obligations and targeted at the most serious cases.[84]

III Health and safety enforcement

Background

Officials of designated enforcement authorities enforce health and safety legislation; in most workplaces these are the Inspectorate of the HSE and environmental health officers in local authorities. The HSE may work with other agencies to enforce the law in specialist areas, such as food safety or major hazard sites.[85] Inspectors have wide powers to enter workplaces, to inspect them and take samples and to require premises to be sealed off. If necessary they can obtain the help of the police. They are able to issue enforcement notices of improvement, requiring matters to be put right within a specified time, or prohibition notices of further activity where circumstances are thought to be particularly dangerous. They also have powers to seize articles or substances. Employers have the right of appeal against these. HSE’s Enforcement Policy was last updated in January 2002.

In cases of serious breaches of the law[86] or where a death has taken place, inspectors may take employers or site owners to court, where fines of £5,000 up to £20,000 pounds may be imposed for cases heard in magistrates’ courts (summary trials without a jury), or unlimited fines and imprisonment for cases heard in the Crown Court.[87] There is pressure for cases involving workplace fatalities or serious injuries to be heard in Crown Courts, where increased penalties and sentencing powers are available, on indictment.

The HSE's ‘name and shame’ enforcement database[88] was launched in October 2000. It gives details of all successful prosecutions carried out by HSE and names the convicted

[84] ibid. paras. 72-74

[85] See HSE Framework of Accountabilities http://www.hse.gov.uk/aboutus/framework/f-2001-3.htm

[86] Circumstances where prosecution is likely, as set out in HSC’s Enforcement Policy Statement.

[87] Ian James and David Preece, *Jordan’s Health and Safety management*. Jordans. 2000 pp1-3

[88] www.hse-databases.co.uk/prosecutions

defendants. In October 2001 the database was expanded to include all improvement and enforcement notices served by the HSE.

As has been mentioned earlier in this paper, current health and safety law has no jurisdiction over Crown bodies, although the Government has said it will remove Crown immunity from statutory health and safety enforcement when parliamentary time allows.

A. “Revitalising” Health and Safety

In the thirty-two years since HSWA was enacted it is generally agreed to have been a success; the number of reported accidents has been significantly reduced and workplace fatalities have fallen by over two thirds.[89] Nevertheless, the Government has noted that that is aware that the world of work has changed since it was enacted and that more could be done to make the workplace safer. European laws, and the impact of work related ill health and the management of sickness absence on productivity have also been forces for change.

1. The *Revitalising Health and Safety Strategy*

The Deputy Prime Minister, John Prescott, launched the HSC’s *Revitalising Health and Safety Strategy*” in June 2000.[90] The Strategy set out the Government's ten-year plan for better health and safety; new minimum targets to reduce workplace deaths, injuries and illness formed its centrepiece.

- to cut deaths and major injury accidents by 10% by 2010;
- to reduce the rate of work related ill-health by 20% by 2010;
- to cut working days lost due to health and safety failure by 30% by 2010; and;
- to achieve half of the improvement by 2004. [91]

The targets aimed to prevent up to 3,000 work-related major injuries and deaths a year, as well as reduce work related ill health by about 80,000 cases and reduce working days lost by about 7.5 million annually.

Progress on the Strategy was reviewed in 2003. The Department for Work and Pensions’ (DWP) autumn performance report showed slippage against the targets.[92] HSE reports no change in the incidence rate of fatal and major injury for the 2004-05 periods.[93]

In order to refocus efforts and resources, *A Strategy for workplace health and safety in Great Britain to 2010 and beyond* was published in February 2004.[94] This laid out a

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[89] HSE Memorandum to Work and Pensions Committee HC 1143 2005-06

[90] DETR Press Notice 402, *Tough New Targets to Cut Workplace Deaths, Injuries and Illness-Prescott*, 7 June 2000

[91] More detail on the strategy can be found in Library Note SNSC-1701 *Health and Safety-Revitalising Strategy*

[92] DWP Autumn Performance Report 2004 Outstanding targets from Spending Review 2000 Appendix One http://www.dwp.gov.uk/publications/dwp/2004/autumnreport/outstanding-sr2k/home.asp

[93] HSE Memorandum to Work and Pensions Committee HC 1143 2005-06

[94] http://www.hse.gov.uk/aboutus/hsc/strategy.htm

seven point strategy, with the focus on outcomes based on risk assessments, more targeting of resources on a limited number of properly resourced programmes of activity, and more evidence and evaluation as the basis for policies. More education and preventative advice would replace routine workplace inspections. The strategy also set out a new direction for roles of the HSC, HSE and local authorities.

The rationale is to tackle the most significant hazards and industries where large numbers are employed and the incidence rate of injuries or ill health is high. Inspection visits will no longer be made routinely to all workplaces as in the past, but focus instead on those assessed to be of greater risk.

The HSC Strategic Plan 2001/04[95] identified eight priority areas that visiting inspectors are required to focus their enforcement activities on. These include; falls from height, workplace transport, musculoskeletal disorders, work related stress and slips and trips. The priority sectors identified include construction, agriculture and the health services.

The eight work streams are now branded under the HSE's 'Fit3' Strategic Delivery Programme. [96] This aims to deliver a 3% reduction in the incidence of work related fatal and major injuries each year, a requirement set out under the 2005-2008 Department of Work and Pensions (DWP) Public Service Agreement:

> By 2008 improve health and safety outcomes in Great Britain through progressive improvement in the control of risks in the workplace. [97]

The full list of PSA targets is set out in the Health and Safety Commission's Business Plan 2005/06-2007/08, which are, by 2007/08, to reduce:

- the incidence rate of fatal and major injuries by 3%;
- the incidence rate of work-related ill health by 6%;
- the number of working days lost per 100,000 workers from injury and ill health by 9%;
- the number of events reported by licence holders, which HSE's Nuclear Installations Inspectorate judges as having the potential to challenge a nuclear safety system by 7.5%;
- the number of major and significant hydrocarbon releases in the offshore oil and gas sector by 45%;
- the number of relevant RIDDOR2 reportable dangerous occurrences in the onshore sector by 15%. [98]

[95] http://www.hse.gov.uk/aboutus/plans/hscplans/plan0104.htm

[96] Two Strategic Delivery Programmes (SDPs), Fit for work, fit for life, fit for tomorrow (Fit3), and Major Hazards, will be supported by four Strategic Enabling Programmes

[97] Spending Review 2004 Public Service Agreements 2005-2008 Chapter 15, DWP http://www.hm-treasury.gov.uk/media/658/F3/sr04_psa_ch15.pdf

[98] The Health and Safety Commission Business Plan 2005/06-2007/08 http://www.hse.gov.uk/aboutus/plans/hscplans/0506/plan0506.pdf

2. HSE Resources

The level and prioritizing of HSC/E resources, sufficient to carry out its enforcement duties and meet its targets, has proved controversial. Employers and trade unions have expressed concern that efficiency cuts mean that fewer workplaces will be inspected and opportunities to give advice and enforce the law on the ground will become limited.

In 2004 the Communication Workers Union (CWU) reflected the concerns of many industry bodies and employers when it said it viewed,

> the question of "resources" as a crucial issue which goes to the heart of many arguments relating to the way in which the HSC/E does or should function. … We believe that the HSE is not sufficiently well resourced to meet its objectives and the work of the HSE needs to be adequately resourced.[99]

In the same year, the Work and Pensions Select Committee looked into the work of the HSC and HSE in the light of these concerns. Although the Committee recognized that efficiency gains might be achieved at the administrative level, it recommended that the number of inspectors in HSE's Field Operations Directorate [FOD] should be doubled so that each workplace could be inspected at least every 5 years and so that each new workplace is inspected in its first year of operation. [100]

Industry remains concerned that the shift in balance away from workplace inspections and prosecutions places workers' lives at risk. The trade union, Prospect, which represents some HSE staff, notes that in 2001-02 the average frequency of workplace inspections was once in every seven years; by 2006, it says, this has fallen to once every thirteen years. [101]

Under-reporting of absences and near misses may mask further deficiencies in workplace safety. The HSE Absence, Sickness and (ill) Health (SWASH) report 2005 published in July 2006, suggests small private businesses in particular are significantly less likely to report true absence levels.[102]

The DWP is required to make a five per cent efficiency gain in funding terms by 2008 under the PSA target. In August 2006 the HSE Chief Executive Geoffrey Podger was reported as having advised staff that that between 250 and 350 posts would need to be lost by 2008 if HSE is to remain within Government budget limits; the majority to be met through voluntary redundancy and natural wastage.[103]

In a memorandum to the Work and Pensions Select Committee in 2006 the HSE noted:

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[99] CWU Response to HSC Consultative Document *Health & Safety Regulation And Recognition Towards Good Performance In Health And Safety* December 2004

[100] *The Work of the Health and Safety Commission and Executive*, Work and Pensions Select Committee fourth report HC 456 2003-04

[101] Danger: HSE jub cuts are threat to workers health, *Profile*, September 6/06

[102] Survey of Workplace Absence Sickness and (Ill) Health (SWASH) – 2005, HSE, July 2006

[103] Union warns of job losses at HSE, *Personnel Today*, 14 August 2006

> 33. The HSC workplace strategy recognises these pressures and sets out how HSE must prioritise its work to make the most effective use of its resources while continuing to meet its responsibilities. "
>
> 34. HSE is protected as a front-line service, although additional resource must be linked to delivery as part of the DWP drive for more effective and efficient ways of working. As the HSC strategy is implemented and the evidence develops, resources will be prioritised and targeted at those areas where they will have the greatest impact.

The *Health and Safety Commission Business Plan 2005/06-2007/08* notes further efficiency measures are required as it strives to direct resources in target areas:

> 56. The allocation of resources in 2005/06, shown above, reflects a continuing drive to reduce spend on corporate support, and redirect resources into work directly contributing to delivery. HSE will also continue to work at improving management of its sickness absence.
>
> 57 HSE's Board set an efficiency target of £50 million savings for 2005/06 to 2007/08, of which half are to be cash releasing. HSE's efficiency plan sets out how this challenging target will be achieved. Some key areas include:
>
> - improving operational productivity by increasing the proportion of time spent by inspectors dealing with duty holders;
> - reducing the cost of our asset base – for example, through the use of "hot desking" to make the best use of accommodation.

3. The Hampton Review

The maximum penalty that can be imposed at a Crown Court for a breach of Section 2(1) of the HSWA is an unlimited fine. Company directors convicted of a breach of HSWA Section 37 may be disqualified, for up to 2 years, from being the director of a company, under s2 (1) of the *Company Directors Disqualification Act 1986*.

There have been calls for increases in the maximum financial penalties that may be imposed on companies who fail to act to improve health and safety. This issue was amongst those raised in the review of regulatory inspection and enforcement carried out in 2004 at the Government's requests by Philip Hampton. Mr Hampton was asked by the Chancellor of the Exchequer, Gordon Brown, to lead a review of regulatory inspection and enforcement with a view to reducing the administrative cost of regulation to the minimum consistent with maintaining high standards in regulatory outcomes. The review engaged with numerous stakeholders including regulators, business and local government. Its final report was published on 16 March 2004.

The Report details the aims of the review and problems with current practice.

> The review's aim has been to identify ways in which the administrative burden of regulation on businesses can be reduced, while maintaining or improving regulatory outcomes. It has considered the work of 63 national regulators and 468 local authorities.
> […]

> The current regulatory system contains much that is good, and many examples of excellent, innovative practice. However, the review believes that:
>
> - the use of risk assessment is patchy;
> - regulators do not give enough emphasis to providing advice in order to secure compliance;
> - there are too many, often overlapping, forms and data requirements with no scheme to reduce their number;
> - regulators lack effective tools to punish persistent offenders and reward compliant behaviour by business;
> - the structure of regulators, particularly at local level, is complex, prevents joining up, and discourages business-responsive behaviour; and
> - there are too many interfaces between businesses and regulators.[104]

The report set out ten principles of inspection and enforcement, most of them administrative and aimed at reducing duplication and unnecessary bureaucracy, and made a number of recommendations including:

- reducing inspection rates where risks are low, but enhancing rates where necessary
- making much more use of advice, again applying the principle of risk assessment
- applying tougher and more consistent penalties where these are deserved
- entrenching reform by requiring all new policies and regulations to consider enforcement, and use existing structures wherever possible.

Another of the key recommendations of the Report was that over the next two to four years 31 of the 63 national regulators should be consolidated into seven bodies, one of which is an expanded HSE.

The new expanded bodies would be the:

- Health and Safety Executive;
- Food Standards Agency;
- Environment Agency;
- a new consumer and trading standards agency;
- a new rural and countryside inspectorate (the new integrated agency);
- a new animal health inspectorate; and
- a new agricultural inspectorate.[105]

The expanded role of the HSE would involve taking on four extra inspectorate roles, namely:

> - The inspection functions of the Coal Authority
> - DTI Engineering Inspectorate
> - Adventure Activity Licensing Authority

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[104] Reducing administrative burdens: effective inspection and enforcement, March 2005 http://www.hm-treasury.gov.uk/media/AAF/00/bud05hampton_641.pdf

[105] Hampton Review, Treasury Press Notice 4, 16 March 2005

• Gangmasters Licensing Authority.

Detailed plans to merge the four Authorities under the HSE are in development. The HSC outlined some governance issues with respect to the merged bodies, in a merger report in 2005. [106]

The HSE timetable for development of plans and merger implementation is October 2006, with all mergers expected to be complete by October 2009.[107]

The Health and Safety Commission issued a press notice welcoming the recommendations of the Hampton Review, and in particular:

> we strongly welcome the recommendations to increase penalties, and to augment the range of sanctions available to our inspectors by using administrative penalties and to explore the use of restorative justice orders – issues which we already have under consideration. [108]

The Hampton recommendations will also have implications for local authorities, whose interests will be considered by the Local Authority Better Regulations sub-group,[109] part of the Better Regulation Executive [BRE]. [110]

The Hampton Review made recommendations about the current penalty system for businesses that consistently flout the law. The BRE site notes that the current system:

> “..is often cumbersome, inconsistent, and inefficient. The UK system is characterised by a heavy reliance on criminal prosecution to deliver sanctions for regulatory offences. Criminal prosecution is a time-consuming and expensive process and may be a disproportionate response in all but the most serious cases. In addition, Hampton found that the fines handed down in Magistrates courts were often too low to eliminate any economic benefit derived from the non-compliance and fine levels were also inconsistent across the country.
>
> One of the recommendations in the Hampton Report was that the BRE undertake a comprehensive review of the penalty systems and suggest reforms to address some of these shortcomings. [111]

The BRE Penalties Review was initiated in September 2005. The review published its first document *'Regulatory Justice: Sanctioning in a post-Hampton World'* on 7 December 2005. [112] Work on the review has continued; a consultation in the interim report was

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[106] HSE’s Hampton Merger Programme, HSC Paper HSC05/121 http://www.hse.gov.uk/aboutus/hsc/meetings/2005/111005/c121.pdf

[107] HSC/E Draft Simplification Plan Milestones (2) http://www.hse.gov.uk/consult/condocs/simplification.htm

[108] HSC Issues Response to the Hampton Report, HSC press release C007:05, 16 March 2005

[109] http://www.cabinetoffice.gov.uk/regulation/labreg/index.asp

[110] http://www.cabinetoffice.gov.uk/regulation/

[111] Penalties Review Discussion Paper: Regulatory Justice: Sanctioning in a post-Hampton World BRE webpage: http://www.cabinetoffice.gov.uk/regulation/mergers_and_penalties/penalties_review.asp

[112] *'Regulatory Justice: Sanctioning in a post-Hampton World'*, Cabinet Office BRE December 2005 http://www.cabinetoffice.gov.uk/regulation/documents/pdf/penaties.pdf

issued to stakeholders in spring 2006. The final report and recommendations will be published in autumn 2006. [113]

4. Managerial failures as a factor in workplace deaths and injuries

Whilst it is generally acknowledged that workplace safety has improved under HSWA, deaths in the workplace still occur on a daily basis.

HSE studies in the late 1980s concluded that between 70-85% of workplace deaths could be attributed to management failures and were therefore, preventable, yet according to a CCA / Unison report, only about 30% of workplace deaths result in a prosecution for a health and safety offence. [114]

The outcome of inquiries into a number of major disasters found that, failures at managerial levels were at least as important as technical failure and human error, in causing the accidents. In 2003 a research report published by HSE commented:

> For example, in the report of the Public Inquiry into the Piper Alpha disaster, Lord Cullen stated: "I am convinced from the evidence…that the quality of safety management by operators is fundamental to offshore safety. No amount of detailed regulations for safety improvements could make up for deficiencies in the way that safety is managed by operators" (Cullen, 1990, pg. 301) Similarly, Mr. Justice Sheen (1987, pg. 14) investigating the sinking of the Herald of Free Enterprise concluded, "a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company…From top to bottom the body corporate was infected with the disease of sloppiness." [115]

5. Making directors' accountable

The Work and Pensions Select Committee recommended in 2004 that the Government fulfill its promise set out in the *Revitalising Strategy*, to impose statutory duties on directors.[116]

In its response the Government said it had no immediate plans to legislate in this way:

> The Government believes that there is already an appropriate balance of legislative and voluntary responsibilities on directors for occupational health and safety, and has no immediate plans to legislate as recommended. It, along with HSC, will continue to encourage and persuade directors in organisations across all sectors to take their responsibility seriously and to provide leadership on

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[113] Cabinet Office News Release MR 1/06, *Macrory Regulatory penalties review interim report published* May 2006

[114] *Safety Lottery: How the Level of Enforcement of Health and Safety Depends on Where you Work* Centre for Corporate Accountability / Unison 2003 http://www.corporateaccountability.org/dl/LocAuth/safetylottery.pdf

[115] The role of managerial leadership in determining workplace safety outcomes Prepared by the University of Aberdeen for the Health and Safety Executive, HSE Research Report 044 2003 http://www.hse.gov.uk/research/rrpdf/rr044.pdf

[116] Work and Pensions Committee fourth report *The work if the Health and Safety Commission and Executive*, HC 456 2003-04

> occupational health and safety…HSC has been asked to build on and invigorate the current voluntary measures in place.[117]

After consulting with stakeholders the HSC announced in May 2006 that it would not pursue the development of statutory duties for directors and would instead be publishing revised guidance in the spring of 2007. [118]

Current voluntary guidance to directors' duties was published in July 2001. [119] It does not have the status of an Approved Code of Practice.[120] It imposes no legal requirements and breaches of it carry no penalty. The guidance is aimed at commercial enterprises, public bodies and voluntary organisations. It encourages companies to nominate a director who will champion health and safety matters in the organisation, and to ensure that individual members of the board recognise their personal liabilities and responsibilities under the law. The organisation should also have a clear health and safety policy, and ensure that all board decisions reflect the organisation's health and safety policy.

The current Bill will not impose new duties on directors or amend company law. Some campaigners see this as a further failure to hold senior officials directly to account for deaths that have occurred due to gross negligence in the execution of their duty of care.

IV Comment on the Corporate Manslaughter and Corporate Homicide Bill

The Trades Union Congress (TUC) General Secretary, Brendan Barber, welcomed the Bill, saying that it had been a long time coming. He added that he hoped the focus on wider management failures within an organisation would make the prosecution of negligent organisations more likely. However, he also urged the Government to look at the issue of placing specific health and safety duties on directors of companies either through the Bill or in separate legislation.[121]

Failure to comply with a prohibition notice under health and safety law is one of the few offences that can lead to the imprisonment of a company director or senior manager. The *Health and Safety Bulletin* has commented that the use of remedial orders in the Bill may weaken the penalties on offer for the new offence of corporate manslaughter compared with those available under health and safety legislation, arguing that

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[117] Work and Pensions Committee Government response to the Committee's fourth report *The work if the Health and Safety Commission and Executive*, HC 1137 2003-04, 27 October 2004

[118] *Directors role in improving health and safety performance - possible legislative options* HSC/06/044 July 2006 http://www.hse.gov.uk/aboutus/hsc/meetings/2006/090506/c44.pdf

[119] Directors responsibilities for health and safety INDG343 HSE 02/02 http://www.hse.gov.uk/pubns/indg343.pdf

[120] An Approved Code of Practice (ACoP) as designated under s.16 of HSWA has no statutory force but a prosecutor can take to court a failure to comply with a provision of the ACoP as proof that the defendant has contravened the regulation to which the offence relates.

[121] "TUC on Corporate Manslaughter Bill" – TUC press release 20 July 2006

> "Given that the corporate manslaughter charge is reserved for the gravest of offences, it seems ridiculous that a director cannot be imprisoned for a failure to remedy matters that led to a death, but can be for a failure to remedy matters that led to the risk of a death."[122]

The Centre for Corporate Accountability said it was disappointed by the Bill. Its briefing paper contains the following summary of its views:

> There is much in this bill that we support – key elements of the legal test, and some removal of crown immunity – however there is much that we do not.
>
> We are very concerned that after twelve years of debate, the Government has brought forward a bill that may well not result in increased accountability of large organisations. This is particularly because of the 'senior manager' test. Unless this aspect of the bill is significantly amended so that the offences can be triggered by failures wider than those carried out by an organisation's senior managers (as currently defined) we fear that this bill may reproduce some of the key problems of existing law in this area, and thus will not succeed in achieving very much.
>
> We are also concerned at the very wide exemptions that exist in the bill – which in particular limit the Bill's application to public bodies. We do not think it is justified that police, prisons, emergency services and child custody services should be immune from prosecution in relation to deaths of members of the public arising from their activities. We also think that the 'duty of care' test should be replaced with a test involving statutory duties.
>
> We are concerned that individual offences for aiding and abetting, and that private prosecutions are prohibited by the bill. We see no reason for prohibiting individual offences and private prosecutions for this area of criminal law, where these are allowed in other areas of criminal law. Equally, we believe the threat of individual accountability by managers and directors of a company will help them focus on their moral and legal obligation to run safe companies, and to take action if they work for a company that might negligently kill people.[123]

Business leaders welcomed the Bill. The deputy director-general of the CBI, John Cridland, said:

> So far, the government has taken a sensible approach and rightly continues to focus on collective responsibility and company liability rather than trying too hold one person accountable for corporate failure.[124]

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[122] What's in a name: the draft Corporate Manslaughter Bill, *Health and Safety Bulletin* 338 May 2005

[123] "The Corporate Manslaughter and Homicide Bill" - Centre for Corporate Accountability Briefing Paper 20 September 2006 http://www.corporateaccountability.org/dl/manslaughter/reform/ccabriefing2006.pdf

[124] "Business welcome corporate killing bill" – *Financial Times* 23 July 2006

Appendix A: Health and safety at work statistics

1. Fatal injuries

a. Workers

The Health and Safety Executive's publication *Statistics of Fatal Injuries 2005/06* provides historical trends in fatal injuries to workers and members of the public in Great Britain.[125] In 2005/06[126] 212 workers were killed in work related accidents in Great Britain. This is equivalent to a fall of 4.9% on 2004/05.

Table 1 displays the number and rate of fatal injuries to workers in Great Britain since 1992/93. The number of fatal injuries to all workers was 37.5% lower in 2005/06 compared with 1992/93.

Table 1

Number and rate of fatal injuries to workers

	Employees		Self-employed		All workers	
	Number	Rate(a)	Number	Rate(b)	Number	Rate(c)
1992/93	276	1.3	63	2.0	339	1.4
1993/94	245	1.2	51	1.6	296	1.2
1994/95	191	0.9	81	2.5	272	1.1
1995/96	209	1.0	49	1.5	258	1.0
1996/97	207	0.9	80	2.3	287	1.1
1997/98	212	0.9	62	1.8	274	1.0
1998/99	188	0.8	65	1.9	253	0.9
1999/00	162	0.7	58	1.7	220	0.8
2000/01	213	0.9	79	2.4	292	1.0
2001/02	206	0.8	45	1.3	251	0.9
2002/03	183	0.7	44	1.3	227	0.8
2003/04	168	0.7	68	1.8	236	0.8
2004/05	172	0.7	51	1.3	223	0.8
2005/06	160	0.6	52	1.4	212	0.7

Notes: (a) per 100,000 employees.
(b) per 100,000 self-employed.
(c) per 100,000 workers.
Source: HSE, Statistics of Fatal Injuries 2005/06

Figures 1 and 2 below show the number and rate of fatal injuries to workers broken down by those who are employees and those who are self-employed.

[125] HSE, *Statistics of Fatal Injuries 2005/06*, 2006
[126] Please note that all HSE statistics provided in this paper for 2005/06 are provisional only.

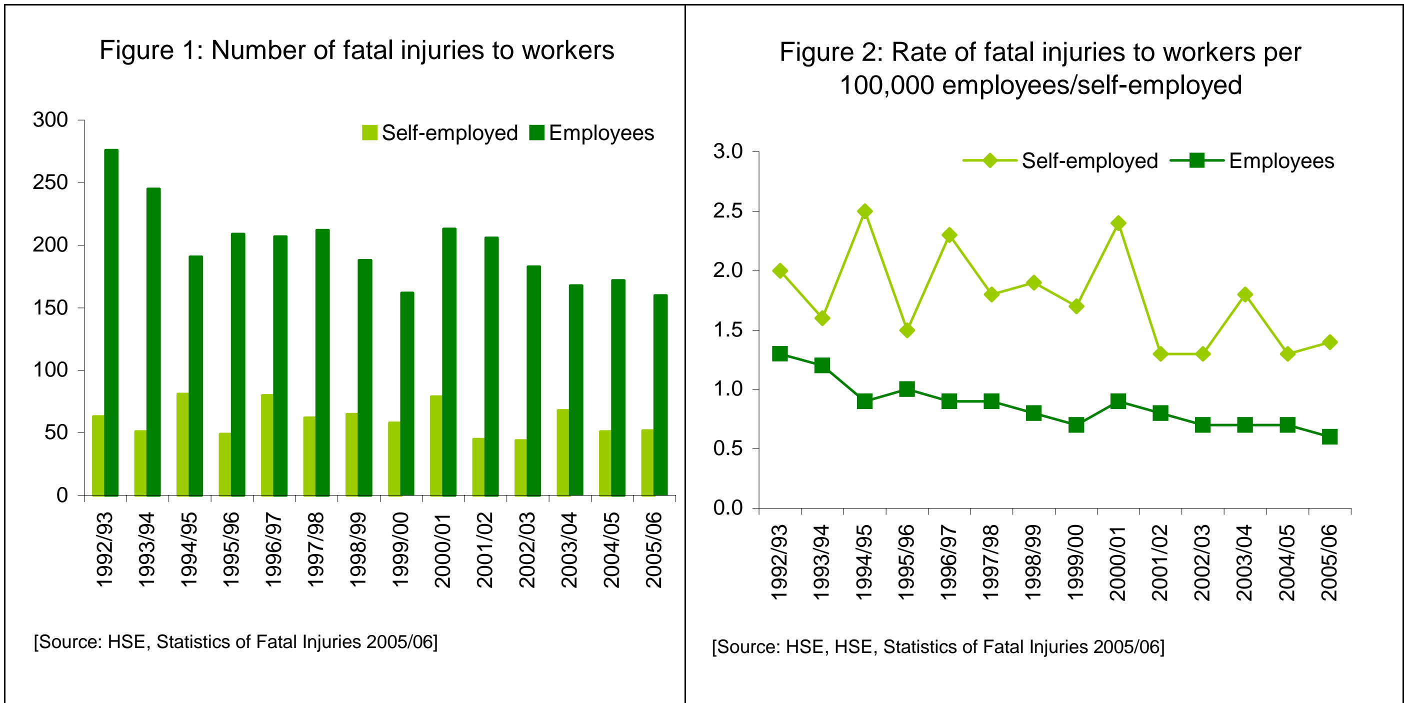


Table 2 below displays the number of fatal injuries to workers in 2004/05 and 2005/06 broken down by industry. Of the 212 fatal injuries to workers, 59 (27.8%) occurred in the construction industry, 33 (15.6%) in agriculture, forestry and fishing, 45 (21.2%) in manufacturing, and 69 (32.5%) in services. Fatal injuries in the manufacturing and services sectors both rose by two compared with the 2004/05, however the number of workers fatally injured in construction was the lowest on record in 2005/06.

Table 2

Number and rate of fatal injuries to workers by industry

	2004/05		2005/06	
	Number	Rate(a)	Number	Rate(a)
Agriculture, hunting, forestry & fishing	42	10.4	33	8.1
Extractive and utility supply industries	2	1.2	6	3.6
Manufacturing industries	43	1.3	45	1.4
Construction	69	3.5	59	3.0
Service industries	67	0.3	69	0.3
All industries	223	0.8	212	0.7

Note: (a) per 100,000 workers.
Source: HSE, Statistics of Fatal Injuries 2005/06

b. Members of the public

Members of the public are also killed in workplace settings. In 2005/06, 384 members of the public were killed in workplace related accidents in Great Britain. Some of these were children. Farm accidents and trespassing incidents, including on railways and construction sites, are common causes of child deaths in workplaces.

Table 3 displays recent trends in the level of members of the public being killed or injured in workplace settings in Great Britain. The level of fatal injuries has remained broadly

consistent over the time-period shown. The number of fatal injuries to members of the public was 4.6% higher in 2005/06 compared with 1996/97.

Table 3

Fatal injuries to members of the public

	Agriculture, hunting, forestry & fishing	Extractive and utility supply industries	Manufacturing industries	Construction	Service industries			All industries
					Suicides/tres-passers on railways	Other railway	Other services	
1996/97	9	3	1	3	252	23	76	367
1997/98	11	1	1	6	265	46	63	393
1998/99	9	2	0	3	247	36	72	369
1999/00	8	2	4	6	274	60	82	436
2000/01	7	3	2	8	300	30	94	444
2001/02	2	3	3	5	266	36	78	393
2002/03	3	4	0	5	257	44	83	396
2003/04	7	3	3	4	243	35	79	374
2004/05	3	1	3	8	253	32	70	370
2005/06	10	0	1	5	254	36	78	384

Notes: (a) per 100,000 employees.
(b) per 100,000 self-employed.
(c) per 100,000 workers.
Source: HSE, Statistics of Fatal Injuries 2005/06

c. *International comparisons*

Table 4 below displays the incidence rate, per 100,000 persons employed, of fatal accidents in work in a number of European countries between 1994 and 2003.[127] Of the countries displayed, in 2003 the UK had the lowest incidence rate of fatal accidents (1.1 per 100,000 persons employed). In comparison Austria had an incidence rate of 4.8 in 2003 and, in 2002 Portugal recorded an incidence rate of 7.6 fatal accidents per 100,000 persons employed.

[127] Please note that data in table 4 varies in terms of methodology and definition to United Kingdom specific data contained in this paper.

Table 4

Rate of fatal accidents at work: European comparisons

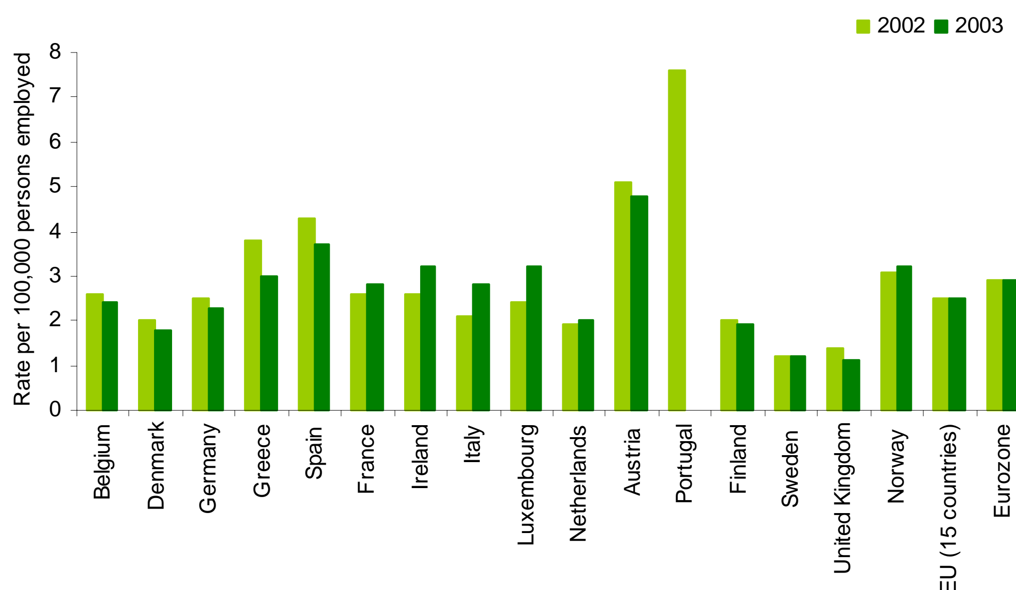
Per 100,000 persons employed

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Belgium	6.0	5.9	5.5	3.1	3.1	3.3	3.1	3.8	2.6	2.4
Denmark	2.8	3.3	3.0	2.3	3.1	2.2	1.9	1.7	2.0	1.8
Germany	3.7	3.0	3.5	2.7	3.0	2.4	2.1	2.0	2.5	2.3
Greece	4.3	4.3	3.7	2.8	3.7	6.3	2.7	2.9	3.8	3.0
Spain	7.0	7.0	5.9	6.3	5.5	5.0	4.7	4.4	4.3	3.7
France	4.3	3.5	3.6	4.1	4.0	3.4	3.4	3.2	2.6	2.8
Ireland(b)	3.9	4.2	3.3	7.1	5.9	7.0	2.3	2.6	2.6	3.2
Italy	5.3	4.8	4.1	4.2	5.0	3.4	3.3	3.1	2.1	2.8
Luxembourg	..	..	..	..	..	..	6.8	1.7	2.4	3.2
Netherlands	..	..	..	3.0	..	2.3	2.3	1.7	1.9	2.0
Austria	5.3	6.7	6.0	5.3	5.1	5.1	5.1	4.8	5.1	4.8
Portugal	8.4	7.9	9.8	8.3	7.7	6.1	8.0	9.0	7.6	..
Finland	3.6	2.8	1.7	2.8	2.4	1.8	2.1	2.4	2.0	1.9
Sweden	2.1	2.3	2.1	2.2	1.3	1.1	1.1	1.4	1.2	1.2
United Kingdom	1.7	1.6	1.9	1.6	1.6	1.4	1.7	1.5	1.4	1.1
Norway	..	..	..	1.4	4.3	2.4	3.8	3.2	3.1	3.2
EU (15 countries)(b)	3.9	3.7	3.6	3.4	3.4	2.9	2.8	2.7	2.5	2.5
Euro-zone(b)	4.6	4.2	4.1	3.8	4.0	3.3	3.2	3.1	2.9	2.9

Notes: .. Not available
(a) Figures for 2003 are provisional values only.
(b) From 1998 figures exclude road traffic accidents and transport accidents on board any means of transport in the course of work.
Source: Eurostat database

Figure 3 below compares rates in 2003 with 2002 rates for each of the countries in the above table.

Figure 3: Rate of fatal accidents at work: European comparisons



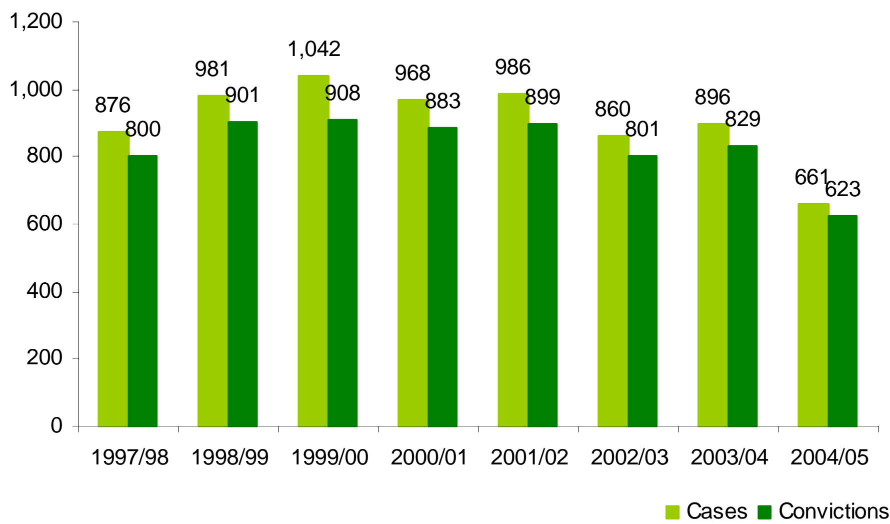
[Source: Eurostat database]

2. Enforcement and penalties

In 2004/05, 623 duty-holders were convicted following HSE Field Operations Directorate (FOD) investigations in Great Britain. The average fine per case was £13,551.

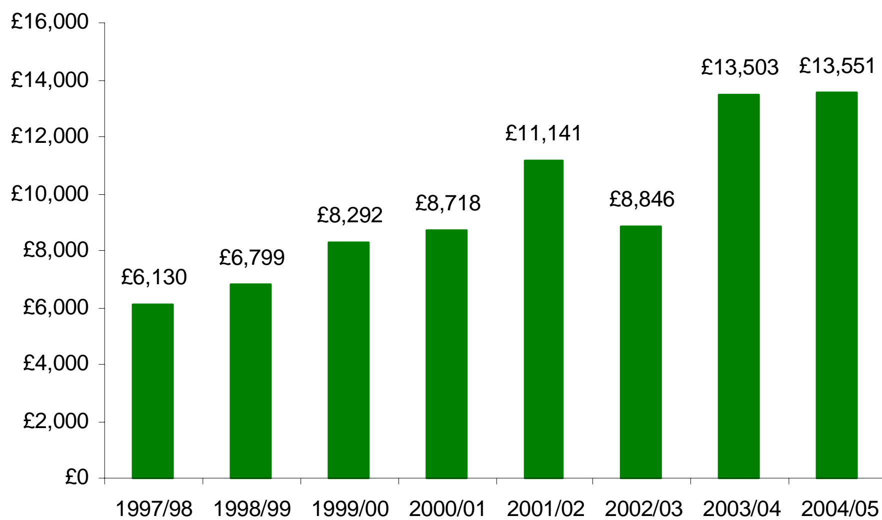
Figure 3 below displays the total number of cases prosecuted by the HSE FOD and the number of duty holders convicted. As a proportion of number of cases prosecuted, the number of duty holders convicted has increased from 91.3% in 1997/98 to 94.3% in 2004/05. Figure 4 shows the average fine per duty holder convicted.

Figure 4: Total Number Of Cases Prosecuted By HSE's Field Operations Directorate, and Number of Duty Holders Convicted



[Source: HSE, Health & Safety Offences and Penalties 2004/05]

Figure 5: Average fines per duty holder convicted

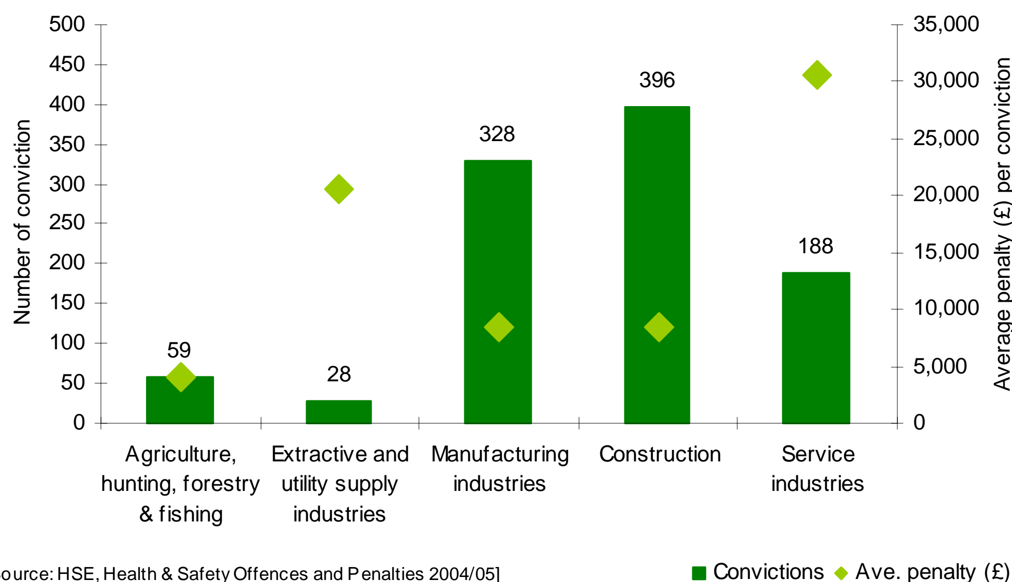


[Source: HSE, Health & Safety Offences and Penalties 2004/05]

a. By main sector

Figure 5 displays the number of convictions following HSE investigated offences and the average penalty per conviction in 2005/06. Table 5 displays these data since 1996/97.

Figure 6: Convictions and average penalties following HSE investigated offences, 2004/05



[Source: HSE, Health & Safety Offences and Penalties 2004/05]

Table 5

Offences prosecuted leading to conviction, and average fine per conviction

	Agriculture, hunting, forestry & fishing		Extractive and utility supply industries		Manufacturing industries		Construction		Service industries	
	Convic-tions	Average penalty	Convic-tions	Average penalty	Convic-tions	Average penalty	Convic-tions	Average penalty	Convic-tions	Average penalty
1996/97	87	£1,101	37	£1,780	477	£7,372	385	£3,934	209	£5,305
1997/98	69	£1,316	26	£19,192	438	£5,760	544	£3,123	207	£5,872
1998/99	102	£1,391	34	£8,916	551	£4,077	565	£5,516	260	£5,932
1999/00	107	£3,751	65	£10,644	606	£7,373	542	£4,296	296	£10,579
2000/01	71	£2,090	23	£14,589	572	£6,158	530	£4,692	294	£9,468
2001/02	115	£1,997	36	£26,444	615	£8,611	442	£7,450	314	£8,795
2002/03	68	£2,606	28	£13,721	522	£5,020	434	£5,745	221	£10,330
2003/04	81	£2,889	34	£33,729	502	£8,642	418	£9,615	282	£10,458
2004/05	59	£3,974	28	£20,496	328	£8,368	396	£8,421	188	£30,537

Note: Standard Industry Classification (SIC92)
Source: HSE, Health & Safety Offences and Penalties 2004/05

b. Manslaughter cases and convictions

The Centre for Corporate Accountability (CCA) provides data on the prosecutions of companies, directors, senior managers and business owners in work-related manslaughter cases. Table 7 below summarises manslaughter conviction in England and Wales between December 1989 and August 2006.

Table 7

Manslaughter Cases: convictions

Incidents (involving at least one death) that have resulted in conviction	Total deaths involved in these incidents	Companies convicted	Company directors convicted	Business owners (i.e. sole traders or partners) convicted	Other individuals convicted
24	55	7	14	7	6

Source: Centre for Corporate Accountability

Of these, six directors, six business owners, and four employees have served jail sentences; a further eight suspended sentences were issued. Further details of individual convictions are available on the CCA's website.[128]

Table 8 provides details of manslaughter cases resulting in acquittals in England and Wales.

Table 8

Manslaughter Cases - acquittals

Incidents (involving at least one death) that have resulted in acquittal	Total deaths involved in these incidents	Companies acquitted	Company directors acquitted	Business owners (i.e. sole traders or partners) acquitted	Other individuals acquitted
24	379	11	20	9	5

Source: Centre for Corporate Accountability

[128] http://www.corporateaccountability.org/manslaughter/cases/main.htm

Appendix B: Corporate Manslaughter: Development of policy issues

The following table is taken from the report of the joint committee on the draft Bill.[129] Of the issues the only significant change since the publication of the draft Bill concerns territoriality, in the final version of the Bill extends to Scotland, where the new offence will be called corporate homicide.

Annex 1 – Table showing development of current policy

Policy issue	Law Commission 1996 Paper	Government Consultation Paper 2000	Draft Bill
Who the Bill applies to	Any corporation, however and wherever incorporated (so including abroad), other than a corporation sole, but not unincorporated bodies or individuals, even as a second party.	All forms of undertaking, including partnerships, schools, unincorporated charities and small businesses; also parent and other groups companies if it could be shown that their own management failures were a cause of the death concerned.	Corporations, but not unincorporated bodies; also parent corporations (as well as any subsidiary) if a gross management failure by their senior managers caused death.
Application to the Crown	No comment	Welcomed views on the applications of Crown immunity to the offence of corporate killing.	Removal of Crown immunity with exemptions.
Causation	Separate provision, to the effect that management failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.	Separate provision, to the effect that management failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.	No separate provision. The Home Office argue that case law in this area has developed since the Law Commission reported and that no separate provision is now needed.
Management Failings	Defined as failures in the way an organisation's activities are managed or organised.	Defined as failures in the way an organisation's activities are managed or organised.	Defined as failures in the way an organisation's activities are managed or organised by an organisation's *senior managers*.

[129] HC 540-I p.102-104

Corporate Behaviour Caught (Gross Breach)	Conduct that falls far below what can reasonably be expected in the circumstances	Conduct that falls far below what can reasonably be expected in the circumstances.	Conduct that falls far below what can reasonably be expected in the circumstances, with a range of factors for assessing a company's culpability.
Relevant Duty of Care	Ensuring the health and safety of employees or members of the public. No definition of the relationship between this and duties imposed by health and safety legislation and duties imposed under the common law to take reasonable care for the safety of others.	Ensuring the health and safety of employees or members of the public. No definition of the relationship between this and duties imposed by health and safety legislation and duties imposed under the common law to take reasonable care for the safety of others.	That owed under the law of negligence by an organisation: as employer or occupier of land when supplying goods or services or when engaged in other commercial activities (for example, in mining or fishing), other than when carrying out exclusively public functions. The draft bill also exempts decisions involving matters of public policy.
Sanctions	Fines and powers to courts to give remedial orders.	Fines and powers to courts to give remedial orders, plus individual sanctions (see below).	Fines and powers to courts to give remedial orders.
Territorial Application	Liability for the corporate offence only if the injury that results in death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject.	Liability for the corporate offence only if the injury that results in death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject	Liability for the corporate offence only if the injury that results in death is sustained in such a place that the English courts would have had jurisdiction over the offence had it been committed by an individual other than a British subject.
Individual Liability for Directors	None, apart from through existing health and safety law and individual manslaughter law.	Any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's	No new sanctions or plans to pursue secondary liability for individuals.

		death should be subject to a disqualification from acting in a management role in any undertaking carrying on a business or activity in Great Britain; also invited views on whether officers of undertakings if they contribute to the management failure resulting in death, should be liable to a penalty of imprisonment in separate criminal proceedings.	
Private prosecutions	No consent from the Director of Public Prosecutions required.	No consent from the Director of Public Prosecutions required.	Consent of the Director of Public Prosecutions required before proceedings for the new offence can be instituted.
Powers to investigate and prosecute	No comment.	The health and safety enforcing authorities and possibly other enforcement agencies should investigate and prosecute the new offences, in addition to the police and CPS; also invited views on whether it would ever be appropriate to permit the prosecuting authority to institute proceedings to freeze company assets before criminal proceedings start to prevent assets being transferred to evade fines or compensation orders.	The current responsibilities of the police to investigate and the CPS to prosecute corporate manslaughter will not change. The Home Office argues that the police and CPS already work jointly with the HSE and a protocol for liaison between agencies has been developed.