



Home Office

Corporate Manslaughter:

The Government's Draft Bill for Reform



Corporate Manslaughter: The Government's Draft Bill for Reform

*Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty
March 2005*

Responses to this paper and accompanying draft Bill should be sent, by 17 June 2005, to:

The Corporate Manslaughter Bill Team

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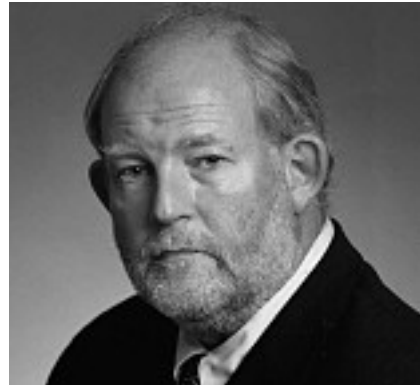
Respondents should include their name and a contact address.

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Foreword

**by the Home Secretary,
the Rt Hon Charles Clarke MP**



This Government is committed to delivering safe and secure communities, at home and in the workplace, and to a criminal justice system that commands the confidence of the public. A fundamental part of this is providing offences that are clear and effective. The current laws on corporate manslaughter are neither, as a number of unsuccessful prosecutions over the years stand testament.

I am pleased to introduce the draft Corporate Manslaughter Bill setting out the Government's proposals for reforming this important and complex area of the law. These proposals need to strike a careful balance. Companies and other organisations must be held properly to account for gross failings by their senior management which have fatal consequences. On the other hand, as an offence of homicide, corporate manslaughter charges must be reserved for the very worst cases of management failure. This offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation.

Our proposals tackle the key difficulty with the current law: the need to find a "directing mind" of a company personally guilty of gross negligence. We propose a new test that looks more widely at failings within the senior management of an organisation. But this is not about new standards. It is not my intention to propose legislation that would increase regulatory burdens, stifle entrepreneurial activity or create a risk averse culture, and I am satisfied that these proposals do not. Organisations who already take their obligations under health and safety law seriously have nothing to fear.

There would be no general Crown immunity exempting government bodies from prosecution. But accountability for strategic policy decisions and a narrow band of activities that must be performed by or on behalf of the state lies elsewhere, such as through Parliament, public inquiries or the ballot box. The draft Bill takes this into account, and the new offence would apply to Government departments and other Crown and public bodies in a way that recognises this.

It is important that we get this legislation right: that people are free to go about their work safely and that those organisations that pay scant regard for the health and safety of their workers and members of the public are held to account. I want us to test and refine these proposals with industry, unions and other interested groups before legislation is introduced into Parliament, and I welcome the process of consultation that will now follow. The draft Bill is also being published for Parliamentary pre-legislative scrutiny, and I look forward to receiving the report that will result. Details of how to contribute to the consultation process are set out in the next section.

A handwritten signature in black ink, appearing to read 'Chl Clarke', with a long, sweeping underline that extends to the right.

CHARLES CLARKE

Introduction

1. The Government is strongly committed to modernising the criminal justice system: supporting the needs of the victim, protecting workers and the public and enabling justice to be done. Current laws on corporate manslaughter link a company's guilt to the gross negligence of a person embodying the organisation. This fails to reflect the reality of modern corporate life, operates too restrictively and fails to deliver an effective sanction. The Government is clear that reform is required and made change a part of its manifesto in 2001. Consultation has shown strong support for reform.
2. The draft Bill sets out proposals for a new, specific offence of corporate manslaughter. An organisation would be prosecuted for this if a gross failing by its senior managers to take reasonable care for the safety of their workers or members of the public caused a person's death. The new offence would apply as now to all companies and other types of incorporated body (including many in the public sector, such as local authorities). And, for the first time, Government departments and other Crown bodies would also be liable to prosecution.
3. A key part of these proposals is striking the right balance between a more effective offence and legislation that would unnecessarily impose a burden on business. The draft Bill achieves this by focussing on what is currently wrong with the law: the need to find a very senior individual personally guilty of gross negligence manslaughter before the company itself can be convicted. At the heart of the new offence, therefore, is a more effective means of attributing to an organisation failures in the way its activities are organised or managed at a senior level.
4. However, as an extremely grave criminal offence, key elements of the current law are retained: the need for an organisation to owe a duty of care to the victim and the high threshold that conduct must have been grossly negligent. Clear and explicit links are also built into the offence to duties that organisations must already comply with under health and safety legislation, providing clarity about the standards against which conduct will be judged. These elements are considered in more detail below.

5. Overall, therefore, the proposals create an offence that should be more effective for prosecuting companies and other organisations but which remains targeted at the worst cases of management failure causing death. It will continue to complement other forms of accountability for failing to maintain appropriate standards, such as specific offences under health and safety law, rather than replacing these. As a corporate offence tackling the specific problem of holding organisations to account, the offence will not apply to individual directors or others. But proceedings for manslaughter, or under health and safety law, will continue to be possible against individuals where their conduct makes them liable.
6. The draft Bill is therefore primarily designed to secure in a wider range of cases a conviction for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved. The extra deterrent effect of a possible corporate manslaughter conviction for organisations who consistently fail to meet proper standards of health and safety will also provide a further driver for ensuring safe working practices. The UK has a very strong health and safety record but there remain unacceptably high levels of work-related deaths each year. The Health and Safety Executive (HSE) considers that the majority of these are preventable.
7. The Government recognises the importance and difficulty of getting legislation in this complex area affecting the criminal liability of organisations right. That is why we are publishing this Bill in draft, providing an opportunity for consultation and comment. The draft Bill is also being published for pre-legislative scrutiny by Parliament, a process under which a Parliamentary committee or committees consider the draft legislation and makes recommendations. The Government very much encourages responses from industry, trades unions and other interested parties. These should be sent to:

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NEED FOR REFORM

8. As the law currently stands, before a company can be convicted of manslaughter proof is required that a 'directing mind' (that is, an individual at the very top of the company, who can be said to embody the company in his actions and decisions) is themselves guilty of manslaughter. Only then can the company be convicted. This is known as the 'identification' principle. Without sufficient evidence to convict such an individual, the prosecution of the company must fail.
9. The result of the identification principle has been that large companies with complex management structures have proved difficult to prosecute for manslaughter under the current law. Since 1992 there have been 34 prosecution cases for work-related manslaughter but only six, small, organisations have been convicted.
10. This has given rise to public concern that the law is not delivering justice, a feeling that has been underlined by the lack of success of corporate manslaughter prosecutions following a number of public disasters. Examples of such incidents include the Herald of Free Enterprise Ferry disaster in 1987 and the Southall rail disaster in 1997; prosecutions failed in both cases. The reasons why such proceedings were unsuccessful are complex and the proposals for a new offence do not mean that each of these cases would now necessarily be successfully prosecuted. However, the proposals would enable more prosecutions to proceed by tackling the key difficulties presented by the current law.
11. The proposals in the draft Bill have their starting point in the Law Commission's 1996 report "Legislating the Criminal Code: Involuntary Manslaughter" (Law Com No 237)¹. This included a proposal for a new offence of corporate manslaughter and provided the basis for the Government's subsequent consultation paper in 2000 "Reforming the Law on Involuntary Manslaughter: the Government's Proposals"².
12. Over 150 responses dealt specifically with the question of corporate manslaughter. These came from a wide range of organisations covering industry, unions, the public sector and victims' groups, as well as from members of the public, and gave strong support to the proposal for a new, specific offence. A summary of these is published separately on the Home Office website³.

¹ <http://www.lawcom.gov.uk/files/lc237.pdf>

² <http://www.homeoffice.gov.uk/docs/invmans.html>

³ www.homeoffice.gov.uk

THE OFFENCE

13. The offence set out in the draft Bill is designed to tackle the difficulties created by the identification principle by providing a new basis for corporate liability for manslaughter. This is addressed through a new test that focuses on management failures at a senior level within the organisation.
14. Drawing on the Law Commission's proposals, the new offence would be based on failures in the way an organisation's activities were managed or organised – referred to as a "management failure" – an approach that focuses on the arrangements and practices for carrying out the organisation's work, rather than any immediate negligent act by an employee (or potentially someone else) causing death. The offence is, however, designed to capture truly corporate failings in the management of risk, rather than purely local ones. It therefore applies to management failings by an organisation's senior managers – either individually or collectively.
15. Other elements of the offence build on the current law relating to gross negligence manslaughter. The organisation will need to have owed a duty of care to the victim and the draft Bill spells out clearly the sort of activities to which this must relate. The management failure must amount to a gross breach of the duty to take reasonable care: the sort of high threshold that currently applies and which remains appropriate for an offence of this gravity. The draft Bill provides a framework for assessing an organisation's conduct, including a clear link with standards imposed by health and safety legislation and guidance on how these should be discharged.

THE SCOPE OF THE OFFENCE

16. 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.
17. 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 service 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 new offence would mean excluding circumstances that might currently be prosecuted, which would not be appropriate without sound reasons.

18. A particular issue here relates to the application of the new offence to the Crown and other government bodies. There are important differences between public bodies and bodies in the private sector and the new offence must apply in a way that recognises this. In particular, an offence of corporate manslaughter is not an appropriate way of holding the Government or public bodies to account for matters of public policy or uniquely public functions. Government departments and other public authorities are subject to a range of accountability mechanisms including through Ministers in Parliament, the Human Rights Act, public inquiries and other independent investigations, judicial review and Ombudsmen. These provide the appropriate forum for the scrutiny of such issues. A new offence needs to complement, not compete with, this accountability.
19. We have considered carefully how this should be reflected in the draft Bill. We are clear that the sort of blanket exemption from prosecution provided by Crown immunity is not appropriate: the Crown should not be exempt where it is in no different position to other employers or organisations. One option would be to apply the offence to Crown bodies only as employer or occupier, but we believe that this would be overly restrictive for the Crown and fail to address the position of bodies outside the Crown. We consider the better approach is to set out in detail for all organisations the sort of activities covered by the offence.
20. As mentioned above, it would not be right, without sound reasons, for the scope of the new offence to be narrower than that of gross negligence manslaughter, which already applies to all companies and a wide range of bodies in the public sector (including local authorities, NHS trusts and the vast majority of statutory bodies). The list of activities to which the offence applies therefore needs broadly to include the sorts of activities these bodies undertake. On the other hand, where Government bodies are not themselves providing front-line services, but are setting the framework within which these must operate or are centrally procuring goods or services supplied by others, then it must be possible to explore and debate the wider policy issues involved. This requires a different sort of accountability to that

provided by criminal proceedings and is achieved through the sort of mechanisms highlighted above. These areas are not in any event currently covered by gross negligence manslaughter and we do not regard it appropriate that they should be brought within the scope of the new offence.

21. The draft Bill therefore proposes an offence that applies where an organisation owes a duty of care:
 - as employer or occupier of land,
 - when supplying goods or services or when engaged in other commercial activities (for example, in mining or fishing).

22. The draft Bill specifically exempts certain functions that might be regarded as core public functions: activities performed by the Government under the prerogative or those that are a *type* of activity (whether performed by a private or public sector body) that requires a statutory or prerogative basis. Examples of this might include the Government providing services in a civil emergency or functions relating to the custody of prisoners. The personal liability of individuals undertaking such functions will remain, as is proper, under the criminal law. However, organisational failings in these areas are more appropriately matters for wider forms of public and democratic accountability. Deaths in prisons are, for example, already subject to rigorous independent investigations through public inquests before juries and through independent reports capable of ranging widely over management issues and publishable post inquest.

23. The draft Bill also makes clear that decisions involving matters of public policy are outside the scope of the offence. Cases under the law of negligence already make it clear that public authorities will rarely owe a duty of care where a decision involves weighing competing public interests dictated by financial, economic, social or political factors, which the courts are not in a position to reach a view on. The draft Bill makes clear that that principle is explicit for the new offence, which would not therefore apply to deaths resulting from such public policy decisions.

24. The effect is to create a broad level playing field between public and private sectors. Both are treated in the same way in their roles as employers and occupiers of premises and when providing goods and services or operating commercially. But the offence does not apply to activities that the private sector either does not do, or cannot do without particular lawful authority, which are areas more appropriately subject to other lines of accountability.

MANAGEMENT FAILURE BY SENIOR MANAGERS

25. The heart of the new offence lies in the requirement for a management failure on the part of its senior managers. This is intended to replace the identification principle with a basis for corporate liability that better reflects the complexities of decision taking and management within modern large organisations, but which is also relevant for smaller bodies.
26. The test for management failure focuses on the way in which a particular activity was being managed or organised. This means that organisations are not liable on the basis of any immediate, operational negligence causing death, or indeed for the unpredictable, maverick acts of its employees. Instead, it focuses responsibility on the working practices of the organisation. It also ensures that the offence is not limited to questions about the individual responsibility of senior managers, but instead considers wider questions about how, at a senior management level, activities were organised and managed.
27. In particular, this allows senior management conduct to be considered collectively, as well as individually. This does not mean that we have replaced the requirement to identify a single directing mind with a need to identify several, nor does it involve aggregating individuals' conduct to identify a gross management failure. It involves a different basis of liability that focuses on the way the activities of an organisation were in practice organised or managed.
28. The proposals require a management failure by the organisation's *senior managers*. This ensures that the new offence is targeted at failings in the strategic management of an organisation's activities, rather than failings at relatively junior levels. Our intention is to target failings where the corporation as a whole has inadequate practices or systems for managing a particular activity. It is in these circumstances that the Government considers it appropriate for liability for causing death to be attributed to the organisation.
29. The definition of a senior manager is drawn to capture only those who play a role in making management decisions about, or actually managing, the activities of the organisation *as a whole or a substantial part of it*. This is the crucial first threshold to be passed. The definition then requires the person to play a "significant" role. This represents a second threshold for those whose management responsibilities bear on the organisation as a whole or a substantial part of it. The term "significant" is intended to capture those whose role in the relevant management activity is decisive or influential, rather than playing a minor or supporting role.
30. What amounts to a "substantial" part of an organisation's activities will be important in determining the level of management responsibility engaging the new offence. This will

depend on the scale of the organisation's activities overall. It is intended to cover, for example, management at regional level within a national organisation such as a company with a national network of retail outlets, factories or operational sites. And where an organisation pursues a handful of activities in roughly equal proportion (for example, a company that has manufacturing, retail and distribution operations), those responsible for the overall management of each division. Levels below this will potentially be covered depending on whether business units can sensibly be said to represent a substantial part of the organisation's overall activities. The definition will apply with different effect within different organisations, depending on their size. Management responsibilities that might be covered by the offence within a smaller organisation, such as a single retail outlet or factory, may well be at too low a level within an organisation that operates on a much wider scale. This reflects the intention to criminalise under this offence management failings that can be associated with the organisation as a whole, which will capture different levels of responsibility depending on the size of the organisation. However, it would still be the case that other forms of accountability, such as health and safety offences, would apply in wider circumstances.

31. We look forward to receiving comments on this key aspect of our proposals. We would in particular welcome views on whether the proposals for defining a senior manager, in terms of the management of the whole or a substantial part of the organisations activities and playing a significant role in such management responsibilities, as illustrated above, strike the right balance.

GROSS BREACH AND STATUTORY CRITERIA

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

needed in respect of this. The draft Bill therefore provides a range of **statutory criteria** for providing a clearer framework for assessing an organisation's culpability. These are not exclusive and would not prevent the jury taking account of other matters they considered relevant. We are very much interested in further debate on whether the criteria proposed are appropriate or whether further or different criteria would be helpful.

APPLICATION

34. In their 1996 report, the Law Commission recommended that a new offence should apply only to corporate bodies and should not extend to unincorporated bodies, who have no distinct legal personality. In its consultation paper in 2000, the Government proposed applying the offence to all 'undertakings', covering trades, businesses and other employing activities, whether incorporated or not. The paper also sought comments on applying the offence in a limited way to the Crown by enabling the civil courts to make a declaration of non-compliance with statutory requirements requiring immediate action on the part of the Crown. Respondents to the consultation exercise favoured an offence that applied as widely as possible, including criminal prosecution for the Crown.
35. The draft Bill applies the new offence to corporations and to a wide range of Crown bodies but not to unincorporated bodies.

CORPORATIONS

36. The main driver for reform has been the difficulties identified in the prosecution of companies, particularly large corporations, under the current laws relating to gross negligence manslaughter. The new offence will follow the current law in applying to all corporate bodies. This includes companies incorporated under company law as well bodies, primarily in the public sector, that are incorporated under statute or Royal Charter. These include local authorities, NHS trusts and many Non-Departmental Public Bodies.
37. The Government's consultation paper in 2000 invited comments on whether action should be possible against **parent or other group companies** if it could be shown that their own management failures were a cause of the death concerned. A large majority of respondents agreed with this proposal, but in most cases on the basis that the parent company should only be liable where their own management failings had been a direct cause of death. Under the Bill, a parent company (as well as any subsidiary) would be liable to prosecution where it owed a duty of care to the victim in respect of one of the activities covered by the offence and a gross management failure by its senior managers caused death.

THE CROWN

38. The Government recognises the need for it to be clearly accountable where management failings on its part lead to death. There will therefore be no general Crown immunity providing exemption from prosecution. However, there is an important question about the sort of activities which might lead to liability on the part of Crown and other government bodies, and the application of the offence to these functions is considered in more detail above (see “The scope of the offence”, page 9).
39. An important aspect of applying the new offence to the Crown is clearly setting out the particular Crown bodies to which the new offence will apply, as these generally have no separate legal status from the Crown itself. The draft Bill achieves this by applying the new offence to a list of bodies in a schedule to the draft Bill. (This is in addition to Crown bodies that are incorporated and so can be covered by the offence without this mechanism). The schedule currently focuses on Ministerial and non-Ministerial Government Departments. Further work is required to develop this list, particularly to consider the position of executive agencies and other bodies that come under the ambit of Departments.
40. It is important that by applying criminal proceedings for this sort of offence to the Crown, we do not adversely affect matters of national security or the defence capability. Investigations into, and prosecutions of, the security and intelligence agencies run a high risk of compromising the necessary secrecy under which they must operate and we do not propose that the new offence should apply to these bodies. It is also important that the ability of the Armed Forces to carry out, and train for, combat and other warlike operations is not undermined. The law already recognises that the public interest is best served by the Armed Forces being immune from legal action arising out of combat and other similar situations and from preparation for these, and this is recognised in the offence. We also consider it important that the effectiveness of training in conditions that simulate combat and similar circumstances should not be undermined and these too are not covered by the offence. However, the offence would otherwise apply to the Armed Forces.

UNINCORPORATED BODIES

41. Corporate bodies, of the sort described above, have a distinct legal personality that exists independently of those forming or employed by it. But other forms of association, such as some types of partnership, trade unions, some registered friendly societies and more informal groups and societies, do not have a distinct legal personality. This is not simply a legal technicality but means that they do not exist as a legal person in the way that corporations do. As such, they cannot currently be prosecuted for gross negligence manslaughter, although individual members might.

42. This has implications for the proposed offence. Care needs to be taken when considering what duties of care could and should be assigned to an unincorporated body itself for the purposes of the offence. The concept of management failure has less ready application in the absence of a recognised structure where designated post holders must be appointed and formally represent the company. And there are questions about the appropriateness of prosecuting a body with no separate status, and with a potentially changing membership, for an offence that seeks to identify failings within the organisation that can be considered as failings of the body itself.
43. In our view, extending the new offence to unincorporated bodies is not a question of reforming the current law, *where it already applies*, to make it operate in a more effective way. Rather, it raises a prior question of whether the law should be extended to apply to a new range of organisations. We have not established that the inability to bring a prosecution against an unincorporated body *itself* for manslaughter, as opposed to any of its members individually, creates a problem in practice. And in light of the difficulties highlighted above, the Government believes it is right to proceed cautiously in this area. The draft Bill does not therefore apply the offence to unincorporated bodies although we will keep this position under review. We look forward to receiving comments on this, particularly in respect of the practical issues identified.
44. The one exception that we propose to this approach is in respect of the police. Whilst the new offence would apply to police authorities (as incorporated bodies), police forces themselves are not incorporated and therefore would not be covered. (Nor are they Crown bodies and so they are not covered by that aspect of our proposals either). We do not consider that, in principle, police forces should be outside the scope of the offence and our intention is that legislation should in due course extend to them. We are currently considering how best to achieve this, given their particular legal status.

INDIVIDUALS

45. The Law Commission in its 1996 report argued that it would not be appropriate for an offence that deliberately stressed the liability of the corporation itself to involve punitive sanctions for individuals. Secondary liability for the new offence should only extend to individuals in circumstances where they were themselves guilty of manslaughter.
46. In its consultation paper in 2000, the Government expressed concern that without punitive sanctions against company officers, there would be insufficient deterrent force to the new proposals. The paper therefore asked for views on whether individual officers contributing to a management failure should face disqualification. It further sought views on whether

imprisonment should be available in proceedings for a separate offence of contributing to a management failing that had caused death, and the sort of sanctions that should be available.

47. These proposals received a great deal of comment from respondents, with strong opinions on both sides and views evenly split. 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.
48. However, this does not mean that individuals will not be accountable for their actions in these cases. They will remain liable to prosecution for individual offences, including gross negligence manslaughter and under health and safety law, where it can be shown that their personal conduct amounts to an offence. Disqualification proceedings under existing legislation will also be possible in certain circumstances.

OTHER ISSUES

CAUSATION

49. An important element of the new offence is that the management failure must have caused the victim's death. The ordinary rules of causation will apply to determine this question. This means that the management failure must have made more than a minimal contribution to the death and that an intervening act did not break the chain of events linking the management failure to death.
50. When they reported, the Law Commission were concerned that the rules that at that time governed when an intervening act would break the chain of causation meant that it would be very difficult to establish that a management failure had caused death, as opposed to the more immediate, operational cause. They proposed a specific provision in their draft Bill to deal with this.
51. The case law in this area has, however, developed since the Law Commission reported and we are satisfied that no separate provision is now needed. An intervening act will only break the chain of causation if it is extraordinary – and we do not consider that corporate liability should arise where an individual has intervened in the chain of events in an extraordinary

fashion causing the death, or the death was otherwise immediately caused by an extraordinary and unforeseeable event.

SANCTIONS

52. As an offence that applies to organisations, we consider that the appropriate sanction would be a financial penalty. The draft Bill makes provision for this and organisations found guilty of corporate manslaughter would face an unlimited fine. Where the circumstances of the case merit, a fine can be set at a very high level.
53. There is a good argument, however, that fining a Crown body serves little practical purpose and simply involves a recycling of public money through the Treasury and back to the relevant body to continue to provide its services. And regulatory legislation that currently binds the Crown has stopped short of providing for criminal proceedings and fines for Crown bodies. Whilst the draft Bill currently provides for a Crown body to be liable to a financial penalty, we would welcome thoughts on this issue.
54. In addition to a fine, the courts would be able to impose remedial orders on offending organisations, akin to those available for health and safety offences. This would enable the courts to require that specific remedial action be taken to address, within a specified time, the failures that led to death.

EXTENT

55. The new offence would apply to England and Wales. All companies, including foreign-registered companies, would be subject to prosecution. Our proposals follow the recommendations of the Law Commission, accepted in the Government's consultation paper in 2000, that the offence should apply provided that the injury that results in death occurs in a place where the English courts have jurisdiction. This would be the case whether the relevant management failure took place here or, as might be the case with a foreign company, abroad.
56. The new offence would not, however, have extra-territorial jurisdiction. As we set out in the consultation paper, there would be very considerable practical difficulties if we were to attempt to extend our jurisdiction over the operations abroad of companies registered in England and Wales. Such difficulties would mean that the offence would in practice be unenforceable.

INVESTIGATION AND PROSECUTION

57. The consultation paper in 2000 invited views on whether health and safety enforcing authorities in England and Wales should be given powers to investigate and prosecute the

new offence, in addition to the police and Crown Prosecution Service. This attracted a range of comment, and little consensus of opinion.

58. The Government recognises the importance of police involvement in clearly signalling the position of the new offence as a serious offence under the general criminal law, rather than an offence that might be characterised as regulatory. The draft Bill proposes no change to the current responsibilities of the police to investigate, and the CPS to prosecute, corporate manslaughter. It is, of course, important for the expertise of health and safety enforcing authorities such as HSE to be effectively harnessed in an investigation, not only to pursue questions of liability under more specific legislation, but also to provide advice and assistance to the police in investigating corporate manslaughter. The police already work jointly with the HSE and other enforcement authorities when investigating work-related deaths and a protocol for liaison between agencies has been developed. The Government will continue to keep the adequacy and effective implementation of these arrangements under review.
59. Nothing in the proposed Bill affects the role and powers of the independent accident investigation branches who undertake the investigation of air, marine and rail accidents independently of any criminal investigation to establish cause, examine the consequences and identify safety lessons in line with international treaties and European directives.
60. The consultation paper in 2000 also dealt with the question of consent to private prosecutions. It proposed that there should be no requirement for individuals to obtain the consent of the Director of Public Prosecutions to bring proceedings for the new offence. There was significant concern amongst respondents that this would lead to insufficiently well-founded prosecutions, which would ultimately fail, and would place an unfair burden on the organisation involved with possible irreparable financial and personal harm. The Government recognises these concerns and the draft Bill specifically requires the consent of the DPP before proceedings can be instituted.

REGULATORY IMPACT

61. A regulatory impact assessment (RIA) has been published separately. The vast majority of organisations who will be subject to the new offence (those who are not part of the Crown) are already liable to prosecution for gross negligence manslaughter, key elements of which are retained (including the sort of circumstances covered by the offence). The proposals do not create any new regulatory burdens and the new offence is clearly linked to existing

health and safety duties. As such, we expect any additional costs, associated for example with taking advice on the new proposals and checking health and safety compliance, to be modest. Some expenditure on health and safety measures might result from the introduction of the new offence for companies currently paying little attention to their health and safety obligations. We have not been able to put specific figures to this and any costs incurred here have already been factored into regulatory impact assessments relating to the relevant health and safety measures.

62. In summary, we have identified costs of some £14.5 million to industry. A 1% increase in compliance with health and safety measures would provide some £200-300 million in savings in the costs associated with workplace injuries and death. We will continue to develop the RIA in the light of comments on the draft Bill and would welcome further information from respondents on potential costs.

SCOTLAND AND NORTHERN IRELAND

63. 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 a Bill's provisions should also extend to that jurisdiction. Scottish Ministers will be consulting separately on proposals for reforming Scottish law.

RESPONDING

64. The Government has published its proposals for reform in draft to provide an opportunity for consultation and comment and would welcome responses. These should be sent by **17 June 2005** to:

The Corporate Manslaughter Bill Team
Home Office
Fry Building, 2nd Floor
2 Marsham Street
London SW1P 4DF
Or e-mailed to: corporatemanslaughterbill@homeoffice.gsi.gov.uk

Respondents should include their name and a contact address⁴.

64. The Government is also publishing the draft Bill for pre-legislative scrutiny by Parliament. This will proceed in the normal manner of Select Committees, by holding hearings and receiving written evidence. A report making recommendations will then be published. Further arrangements for this process will be announced in due course.

⁴ The information you send us may be passed to colleagues within the Home Office and other Government Departments and will be made available to the Parliamentary pre-legislative scrutiny process (see paragraph 64). It also may be published in a summary of responses received in response to these proposals. More generally, all information in responses, including personal information, may be subject to publication or disclosure under freedom of information legislation. If a correspondent requests confidentiality, this cannot be guaranteed and will only be possible if considered appropriate under the legislation. Any such request should explain why confidentiality is necessary. Any automatic confidentiality disclaimer generated by your IT system will not be considered as such a request unless you specifically include a request, with an explanation, in the main text of your response.

Corporate Manslaughter Bill

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DRAFT

OF A

B I L L

TO

Create, and to make provision in connection with, a new offence of corporate manslaughter.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Corporate manslaughter

1 The offence

- (1) An organisation to which this section applies is guilty of the offence of corporate manslaughter if the way in which any of the organisation’s activities are managed or organised by its senior managers—
 - (a) causes a person’s death, and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (2) The organisations to which this section applies are—
 - (a) a corporation;
 - (b) a government department or other body listed in the Schedule.
- (3) The Secretary of State may amend the Schedule by order.
- (4) An organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine.
- (5) An individual cannot be guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter.
- (6) Proceedings for an offence under this section may not be instituted without the consent of the Director of Public Prosecutions.
- (7) In this Act “senior manager”, “gross breach”, “relevant duty of care” and “corporation” have the meaning given by sections 2 to 5.

2 Senior manager

A person is a “senior manager” of an organisation if he plays a significant role in—

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

3 Gross breach

- (1) A breach of a duty of care by an organisation is a “gross” breach if the failure in question constitutes conduct falling far below what can reasonably be expected of the organisation in the circumstances.
- (2) In deciding that question the jury must consider whether the evidence shows that the organisation failed to comply with any relevant health and safety legislation or guidance, and if so—
 - (a) how serious was the failure to comply;
 - (b) whether or not senior managers of the organisation—
 - (i) knew, or ought to have known, that the organisation was failing to comply with that legislation or guidance;
 - (ii) were aware, or ought to have been aware, of the risk of death or serious harm posed by the failure to comply;
 - (iii) sought to cause the organisation to profit from that failure.
- (3) In subsection (2) “health and safety legislation or guidance” means—
 - (a) any enactment dealing with health and safety matters, including in particular the Health and Safety at Work etc. Act 1974 (c. 37), or any legislation made under such an enactment;
 - (b) any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under an enactment or otherwise) by an authority responsible for the enforcement of any enactment or legislation of the kind mentioned in paragraph (a).
- (4) Subsection (2) does not prevent the jury from having regard to any other matters they consider relevant to the question.

4 Relevant duty of care

- (1) A “relevant duty of care”, in relation to an organisation, means a duty owed under the law of negligence by the organisation—
 - (a) to its employees as such,
 - (b) in its capacity as occupier of land, or
 - (c) in connection with—
 - (i) the supply by the organisation of goods or services (whether for consideration or not), or
 - (ii) the carrying on by the organisation of any other activity on a commercial basis,otherwise than in the exercise of an exclusively public function.
- (2) An organisation that is a public authority does not owe a duty of care for the purposes of this Act in respect of a decision as to matters of public policy

(including in particular the allocation of public resources or the weighing of competing public interests).

- (3) Whether for the purposes of this Act a particular organisation owes a duty of care to a particular individual is a question of law.

The judge must make any findings of fact necessary to decide that question.

- (4) In this section –

“exclusively public function” means a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred –

- (a) by the exercise of that prerogative, or
- (b) by or under an enactment;

“the law of negligence” includes the Occupiers’ Liability Act 1957 (c. 31), the Defective Premises Act 1972 (c. 35) and the Occupiers’ Liability Act 1984 (c. 3);

“public authority” has the same meaning as in section 6 of the Human Rights Act 1998 (c. 42) (disregarding subsections (3)(a) and (4) of that section).

5 Corporation

“Corporation” does not include a corporation sole but includes any body corporate wherever incorporated.

Remedial orders

6 Power to order breach etc to be remedied

- (1) A court before which an organisation is convicted of corporate manslaughter may order it to take specified steps to remedy –

- (a) the breach mentioned in section 1(1);
- (b) any matter that appears to the court to have resulted from that breach and to have been a cause of the death.

- (2) The order must specify a period within which the steps are to be taken.

- (3) The period so specified may be extended or further extended by order of the court on an application made before the end of that period or extended period.

- (4) An organisation that fails to comply with an order under this section is guilty of an offence and liable –

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction, to a fine not exceeding £20,000.

The Crown

7 Application to Crown bodies

- (1) An organisation that is a servant or agent of the Crown is not immune from prosecution under this Act for that reason.

- (2) Anything done, or omitted to be done, purportedly by a government department or other body listed in the Schedule, but in law by the Crown, is to

be treated for the purposes of this Act as done or omitted to be done by the department or other body itself.

- (3) A person in employment under or for the purposes of a government department or other body listed in the Schedule is to be treated for the purposes of this Act as employed by that department or other body.
- (4) Subject to section 4(2), for the purposes of this Act—
 - (a) a government department or other body listed in the Schedule, or
 - (b) a corporation that is a servant or agent of the Crown,owes whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown.

8 Criminal procedure

- (1) Any provision about criminal proceedings against corporations contained in or made under any enactment (whenever passed or made) applies, subject to such adaptations or modifications as may be prescribed, in relation to proceedings under this Act against a government department or other body listed in the Schedule.
- (2) In subsection (1) “prescribed” means prescribed by an order made by the Secretary of State.

9 Transfer of functions

- (1) This section applies where—
 - (a) a person’s death has occurred, or is alleged to have occurred, in connection with the carrying out of functions (“the relevant functions”) by an organisation within paragraph (a) or (b) of section 7(4) (a “Crown body”), and
 - (b) subsequently there is a transfer of the relevant functions, with the result that they are still carried out but no longer by that organisation.
- (2) Any proceedings instituted against a Crown body after the transfer for an offence under this Act in respect of the person’s death are to be instituted against—
 - (a) the Crown body, if any, by which the relevant functions are currently carried out;
 - (b) if no Crown body currently carries out the functions, the Crown body by which they were last carried out.
- (3) If the transfer occurs while proceedings for an offence under this Act in respect of the person’s death are in progress against a Crown body, the proceedings are to be continued against—
 - (a) the Crown body, if any, by which the relevant functions are carried out as a result of the transfer;
 - (b) if as a result of the transfer no Crown body carries out the functions, the same Crown body as before.

10 Armed forces

- (1) The reference to activities in section 1(1) does not include—
 - (a) activities carried on by members of the armed forces in the course of or in preparation for, or directly in support of, any combat operations;

- (b) the planning of any such operations.
- (2) For the purposes of this Act a person serving in the armed forces is to be treated as employed by the Ministry of Defence.
- (3) In this section –
 - “armed forces” means any of the naval, military or air forces of the Crown raised under the law of the United Kingdom;
 - “combat operations” means –
 - (a) operations, including peacekeeping operations and operations for dealing with terrorism or civil unrest, in which members of the armed forces come under attack or face the threat of attack or armed resistance;
 - (b) training that is designed to simulate operations of a kind mentioned in paragraph (a).
- (4) A reference in this section to members of, or persons serving in, the armed forces includes –
 - (a) members of the reserve forces (within the meaning given by section 1(2) of the Reserve Forces Act 1996 (c. 14)) when in service or undertaking training or duties;
 - (b) persons serving on Her Majesty’s vessels (within the meaning given by section 132(1) of the Naval Discipline Act 1957 (c. 53)).

11 Crown application

To the extent provided by this Act, it binds the Crown.

General and supplementary

12 Orders

- (1) An order under this Act is to be made by statutory instrument.
- (2) A statutory instrument containing an order that includes provision made by virtue of section 1(3) or 8 is subject to annulment in pursuance of a resolution of either House of Parliament.

13 Abolition of liability of corporations for manslaughter at common law

The common law offence of manslaughter by gross negligence is abolished in its application to corporations.

14 Consequential amendments

- (1) In Part 1 of Schedule 5 to the Police and Criminal Evidence Act 1984 (c. 60) (serious arrestable offences), after paragraph 3 there is inserted –
 - “3A Corporate manslaughter.”
- (2) In the following provisions of the Coroners Act 1988 (c. 13), after “manslaughter” there is inserted “, corporate manslaughter” –
 - (a) section 11(6) (no finding of guilt at coroner’s inquest) (twice);
 - (b) subsection (1)(a)(i) of section 16 (adjournment of inquest in event of criminal proceedings);

- (c) subsections (1)(a) and (2)(a) of section 17 (coroner to be informed of result of criminal proceedings).

15 Commencement and saving

- (1) The preceding provisions of this Act come into force on such day as the Secretary of State may appoint by order.
- (2) This Act does not apply in relation to anything done or omitted before it comes into force.

16 Extent and territorial application

- (1) This Act extends to England and Wales only.
- (2) Section 1 applies if the harm resulting in death is sustained in England and Wales or –
 - (a) within the seaward limits of the territorial sea adjacent to the United Kingdom;
 - (b) on a ship registered under Part 2 of the Merchant Shipping Act 1995 (c. 21);
 - (c) on a British-controlled aircraft as defined in section 92 of the Civil Aviation Act 1982 (c. 16);
 - (d) on a British-controlled hovercraft within the meaning of that section as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968 (c. 59);
 - (e) in any place to which an Order in Council under section 10(1) of the Petroleum Act 1998 (c. 17) applies (criminal jurisdiction in relation to offshore activities).
- (3) For the purposes of subsection (2)(b) to (d) harm sustained on a ship, aircraft or hovercraft includes harm sustained by a person who –
 - (a) is then no longer on board the ship, aircraft or hovercraft in consequence of the wrecking of it or of some other mishap affecting it or occurring on it, and
 - (b) sustains the harm in consequence of that event.

17 Short title

This Act may be cited as the Corporate Manslaughter Act 2005.

SCHEDULE

Section 1

LIST OF GOVERNMENT DEPARTMENTS ETC

Cabinet Office
Charity Commission
Crown Prosecution Service
Department for Constitutional Affairs
Department for Culture, Media and Sport
Department for Education and Skills
Department for Environment, Food and Rural Affairs
Department for International Development
Department for Transport
Department for Work and Pensions
Department of Health
Department of Trade and Industry
Export Credits Guarantee Department
Foreign and Commonwealth Office
Forestry Commission
Government Actuary's Department
Her Majesty's Customs and Excise
Her Majesty's Treasury
Home Office
Inland Revenue
Legal Secretariat to the Law Officers
Ministry of Defence
Northern Ireland Office
Office for Standards in Education
Office of Her Majesty's Chief Inspector of Education and Training in
Wales
Office of the Deputy Prime Minister
Office of the International Rail Regulator
Privy Council Office
Public Record Office
Scotland Office
Serious Fraud Office
Treasury Solicitor's Department
Wales Office

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the draft Corporate Manslaughter Bill set out in the preceding section. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the draft Bill.
2. The notes need to be read in conjunction with the draft Bill. They are not, and are not meant to be, a comprehensive description of the draft Bill.

OVERVIEW OF THE DRAFT BILL'S STRUCTURE

3. The draft Bill has 17 clauses and one Schedule:
 - **Clauses 1 to 5** set out the elements of the new offence. Clause 1 defines the offence and the sort of organisations to which it will apply. Clauses 2 to 4 provide supplementary information on specific aspects of the offence, including the level of management responsibility at which it will operate, how an organisation's culpability is to be assessed and the sort of activities and functions to which it will apply.
 - **Clause 6** makes provision for remedial orders to be made on conviction.
 - **Clauses 7 to 11** deal with the application of the offence to the Crown, including arrangements for liability where functions are transferred between Crown bodies and particular provision for the Armed Forces.
 - **Clauses 12 to 17** cover a number of general and supplemental matters, including the abolition of the current law, consequential amendments, and territorial application.
 - The **Schedule** lists government departments and other Crown bodies to which the offence applies.

TERRITORIAL EXTENT

4. The Bill extends to England and Wales only.

COMMENTARY ON THE CLAUSES

Clause 1 – The offence

5. **Clause 1(1)** defines the new offence of corporate manslaughter. At present, a corporate body can only be found guilty of the common law offence of gross negligence manslaughter if a “directing mind” of that body is also guilty of gross negligence manslaughter. This is known as the identification principle. A person is a “directing mind” if they are sufficiently senior to be considered the embodiment of the company when acting in their corporate capacity. To be guilty of gross negligence manslaughter, there must have been a gross breach of a duty of care owed to the victim.
6. The new offence builds on key aspects of this but makes corporations, and a range of Crown bodies, liable for the way in which the organisation’s activities are run by its senior managers, rather than making liability contingent on the guilt of a particular individual. In summary, the offence is committed where in particular circumstances an organisation owes a person a duty to take reasonable care for the person’s safety but the management of an activity at a senior level grossly fails to meet this duty and causes the person’s death.
7. The elements of the new offence are:
 - The organisation must owe a duty of care to the victim that is connected with certain things done by the organisation. The relevant duties of care are set out in clause 4.
 - The organisation must be in breach of that duty of care in the way its senior managers manage or organise a particular aspect of its activities. This introduces an element of “senior management failure” into the offence that is considered below.
 - This management failure must have caused the victim’s death. The usual principles of causation in the criminal law will apply to determine this question.
 - The breach of duty must have been gross. Clause 3 explains this further and sets out a number of factors that the jury must take into account when considering this issue.
8. The “senior management failure” aspect of the new offence attributes liability to a corporation in a different way from that used for corporate liability for gross negligence manslaughter and focuses on *the way in which an activity was managed or organised* by its

senior managers. This adopts the general approach recommended by the Law Commission in its 1996 report: that liability should lie in the system of work adopted by the organisation for conducting a particular activity. This looks at how in practice managers organised the performance of a particular activity, rather than focussing on questions of individual culpability, and enables management conduct to be considered collectively as well as individually. However, the draft Bill attributes liability to the organisation only for failures by an organisation's *senior managers*. This is intended to focus the offence on the overall way in which an activity was being managed or organised by an organisation and to exclude more localised or junior management failings as a basis for liability (although these might provide evidence of management failings at more senior levels).

9. To engage the offence, the senior management failure must amount to a (gross) breach of the duty of care owed by the organisation to the victim. This, and the framework for assessing an organisation's culpability set out in more detail in clause 3, build into the offence standards of reasonable conduct. There is therefore no question of liability where the management of an activity involves reasonable safeguards and a death nonetheless occurs.
10. **Clause 1(2)** sets out the sort of organisation to which the new offence applies. In the first place, this is corporations. Under **clause 5**, this is defined as any body corporate, whether incorporated in the UK or elsewhere. This includes companies incorporated under the Companies Acts, as well as bodies incorporated under statute (as is the case with many non-Departmental Public Bodies and other bodies in the public sector) or by Royal Charter. However, the definition specifically excludes corporations sole, which cover a number of individual offices.
11. The draft Bill also binds the Crown and will apply to a range of Crown bodies such as government departments. Crown bodies rarely have a separate legal personality. Where they do, the application of the offence to corporations (and provision binding the Crown – see clause 7(1) and clause 11) means that the offence will also apply to these bodies. Where they do not, a mechanism is required to identify which Crown bodies are covered by the offence and this is achieved by applying the offence to a list of government departments and other bodies set out in the **Schedule** to the Bill. This list is subject to further development. At present, it sets out a range of Ministerial and non-Ministerial Government Departments. The list can be amended by the Secretary of State by order (**clause 1(3)**), which would take the form of a statutory instrument subject to the negative resolution procedure (**clause 12(2)**). Clauses 7 to 11 deal with Crown application in more detail.

12. The new offence will be triable only in the Crown Court and the sanction is an unlimited fine (**clause 1(4)**). Proceedings for the offence will require the consent of the Director of Public Prosecutions (**clause 1(6)**).
13. The offence only applies to organisations and does not apply to individuals, be they directors, anyone else within an organisation, or otherwise. Clause 1(5) expressly excludes secondary liability for the new offence. However, the new offence does not affect an individual's potential liability for any other offences such as the existing common law offence of gross negligence manslaughter, or health and safety offences.

Clause 2 – Senior manager

14. **Clause 2** sets out what is meant by a senior manager. This relates to the requirement in clause 1(1) that the offence is concerned with the way in which the *senior managers* of an organisation manage or organise its activities. The definition of who is a senior manager therefore defines the level of management responsibility within an organisation at which the offence operates. This is intended to capture those managers who have responsibility for the overall way in which an organisation manages or organises any particular activity.
15. The definition identifies those whose management responsibilities relate to *the whole* of an organisation's activities or to a *substantial part* of them. What constitutes a substantial part of an organisation's activities will need to be considered in the context of individual organisations and will depend on their overall scale of activities. Activities that form a substantial part of a smaller organisation will differ from those representing a substantial part of a larger one. This links corporate liability to a particular level of management responsibility within the organisation, rather than to the management or organisation of a particular level of activity.
16. The definition identifies two strands to management responsibility - the taking of decisions about how activities are managed or organised and actually managing those activities. This ensures that managers who set and monitor workplace practices as well as those providing operational management are covered. In either respect, a person must play a significant role in the management responsibility.

Clause 3 – Gross breach

17. **Clause 3** sets out the test for assessing whether the breach of duty involved in the senior management failure was gross. The test asks whether the conduct that constitutes this failure falls far below what could reasonably have been expected, which will inevitably mean the breach will have involved a risk of death or serious injury. This reflects the threshold under the current offence of gross negligence manslaughter.

18. Whether this threshold has been met will be an issue for the jury to determine. The existing common law offence of gross negligence manslaughter provides no particular guidance for determining this issue, but asks whether the conduct was so negligent as to be criminal. To provide a clearer framework for assessing an organisation's culpability, clause 3(2) requires that the jury have regard to certain matters. In particular, these put the organisation's conduct into the context of its obligations under health and safety legislation, and guidance on how those obligations should be discharged, as well as requiring the jury to consider what senior managers knew about the risks they were running and why they were prepared to run these. Specific factors for the jury to consider are:
- **The extent to which the organisation failed to comply with any relevant health and safety legislation or guidance.** This is defined in clause 3(3) to include not only the Health and Safety at Work etc Act 1974 but also all other legislation and guidance on health and safety.
 - **Awareness by the senior managers of the failure and the risk of death or serious harm that this posed.** This might be evidenced by warnings from health and safety enforcement authorities, prohibition or improvement notices or previous convictions for health and safety offences related to the activities causing death. **Not being aware of these matters in circumstances where senior managers ought to have been aware of a lack of compliance and consequent risks (which might amount to wilful blindness) is also covered.**
 - **The extent to which the organisation sought to profit from the failure to comply with health and safety requirements.** This considers the motive behind the breach. The extent to which the company actually profited would be a matter relevant for sentencing.
19. These factors are not exhaustive and **clause 3(4)** provides that the jury is also to have account of any other relevant matters.

Clause 4 – Duty of Care

20. The new offence only applies in circumstances where an organisation owed a duty of care to the victim. This reflects the current position under the offence of gross negligence manslaughter and, by defining the necessary relationship between the defendant organisation and victim, sets out the broad scope of the offence. Duties of care commonly owed by corporations include the duty owed by an employer to his employees to take reasonable care for their health and safety and by an occupier of buildings and land to people in or on, or potentially affected by, the property. Duties of care also arise out of the

activities that are conducted by corporations, such as the duty owed by transport companies to their passengers.

21. **Clause 4(1)** requires the duty of care to be one that is owed under the law of negligence. This will commonly be a duty owed at common law, although in certain circumstances these duties have been superseded by statutory provision. For example, in the case of the duty owed by an occupier, duties are now owed under the Occupiers' Liability Acts 1957 and 1984 and the Defective Premises Act 1972, although the common law continues to define by whom and to whom the duty is owed (see the definition of "the law of negligence" in subsection (4)).
22. Clause 4(1) also requires the duty of care to arise out of certain specific functions or activities performed by the organisation. The effect is that the offence will only apply where an organisation owes a duty:
- as **employer**. A key aspect of this will be an employer's duty to provide a safe system of work for its employees.
 - as **occupier** of land (which the Interpretation Act defines to include premises). This covers organisations' responsibilities, for example, to ensure that buildings they occupy are kept in a safe condition.
 - when the organisation is **supplying goods or services**. This will include duties owed in the law of negligence (rather than under specific statutory provision) for the safety of products, as well as the duties owed by service providers to their customers. The Bill makes it clear that it does not matter whether the goods or services are supplied for consideration (that is, under a contractual relationship, commonly where the goods or services are supplied in return for payment). Services that are provided to the public by public bodies, such as local authorities or NHS trusts, are therefore covered as well as those provided on a private basis.
 - when carrying out **other activities on a commercial basis**. This ensures that activities that are not the supply of goods and services but which are still performed by companies and others commercially, such as farming or mining, are covered by the offence.
23. The effect is to include within the offence the sort of activities pursued by companies and other corporate bodies, whether performed by commercial organisations or Crown or other public bodies. Functions that are peculiarly an aspect of government including, for example, decisions about regulatory standards or statutory inspection, are not covered by the offence.

Duties of care are unlikely to be owed in respect of such activities in any event, and they will remain subject to other forms of rigorous public accountability.

24. Some intrinsically public functions might, however, amount to the supply of goods or services or be performed commercially (for example, custody functions within a privately managed prison). Clause 4(1)(c) therefore also makes *specific* provision to exclude such functions from the scope of the offence. It achieves this by excluding duties of care owed in the exercise of “exclusively public functions”. This test is not confined to Crown or other public bodies but also excludes any organisation (public or otherwise) performing that particular type of function. This does not affect questions of individual liability, and prosecutions for gross negligence manslaughter and other offences will remain possible against individuals performing these functions who are themselves culpable. And, as with types of activity that are not covered by the list, the strategic management of these functions will continue to fall to other forms of accountability such as independent investigations, public inquiries and the accountability of Ministers through Parliament.
25. “Exclusively public functions” are defined in **clause 4(4)**. The test covers both functions falling within the prerogative of the Crown (for example, where the Government provides services in a civil emergency) and *types* of activity that require a statutory or prerogative basis (in other words, that cannot be independently performed by private bodies). This looks at the nature of the activity involved and therefore would not cover an activity simply because it was one that required a licence or took place on a statutory basis. Rather, the nature of the activity involved must be one that requires a particular legal basis, for example functions related to the custody of prisoners (the function of lawfully detaining someone requiring a statutory basis).
26. **Clause 4(2)** deals with decisions of public policy taken by public authorities. (Public authorities are defined by reference to the Human Rights Act 1998 and include core public bodies such as Government departments and local government bodies, as well as any other body some of whose functions are of a public nature. Courts and tribunals, who are not covered by the new offence, are excluded.) At present, the law of negligence recognises that some decisions taken by public bodies are not justiciable, in other words, are not susceptible to review in the courts. This is because they involve decisions involving competing public priorities or other questions of public policy that it is not appropriate for the courts to seek to second guess. In these circumstances, no duty of care is owed in the law of negligence. Clause 4(2) makes it clear that no duty of care is owed for the purposes of this offence either. Deaths that are alleged to have been caused by such decisions will not therefore come within the scope of the offence, albeit many would not fall within any of the specified categories of duties within clause 4(1) in any event.

27. In criminal proceedings, questions of law are decided by the judge, whilst questions of fact, and the application of the law to the facts of the case, are generally for the jury, directed by the judge. **Clause 4(3)** confirms that the existence of a duty of care in a particular case is a matter of law for the judge to decide. This reflects the heavily legal nature of the tests relating to the existence of a duty of care in the law of negligence. Because the judge will be deciding whether the circumstances of the case give rise to a duty of care, he will need to make certain determinations of fact that are usually for the jury. For example, if considering whether a corporation owes a duty of care as employer, the judge will need to decide whether the victim was an employee of the corporation. The questions of fact that the judge will need to consider will generally be uncontroversial and in any event will only be decided by the judge for the purposes of the duty of care question. If they otherwise affect the case, they will be for the jury to decide.

Clause 5 – Corporation

28. Clause 5 defines which corporations are covered by the offence. See paragraph 10 above.

Clause 6 – Power to order breach etc to be remedied

29. Clause 1 provides that the sanction for the offence is an unlimited fine. **Clause 6** gives the courts a power to order an organisation convicted of the new offence to take steps to remedy the management failure leading to death. Clause 6 also enables a remedial order to specify that the state of affairs resulting from the management failure, and representing the more immediate cause of death, be addressed. (For example, where the management failure related to inadequate risk assessment and monitoring procedures, the consequence of this might be inadequate safety precautions, leading to a death. The court would be able to order that both failures be addressed.)
30. Failure to comply with a remedial order is an offence for which an unlimited fine is available in the Crown Court (and a fine of £20,000 in the Magistrates' Courts).

Clauses 7 to 11 – The Crown

31. The general presumption is that legislation does not apply to the Crown unless this is explicitly the case. **Clause 11** makes it explicit that the Bill binds the Crown.
32. **Clause 7(1)** provides that the immunity that generally prohibits the prosecution of a Crown body does not apply for the purposes of the Bill. Taken together, clause 11, this provision and clause 1 mean that Crown bodies that are either bodies corporate or are listed in the schedule to the Bill are subject to the new offence.

33. **Clause 7(2) and (3)** addresses the fact that many of the activities and functions carried out by government departments and other Crown bodies are, legally, performed by the Crown rather than that body. For example, civil servants in government departments are employed by the Crown rather than the department for which they work. If provision were not made to deal with this, it would mean that Crown bodies might not technically be liable for senior management failings that occurred within them: the relevant conduct legally being attributable to the Crown rather than the body concerned. Similar difficulties might arise in respect of the duty of care owed as employer as technically this might be considered owed by the Crown rather than the relevant government department. Subsections 7(2) and (3) ensure that the activities and functions of government departments and others can properly be attributed to the relevant body.
34. The liability of the Crown in the law of negligence is governed by the Crown Proceedings Act 1947. This makes the Crown liable as employer, occupier and vicariously for the torts of its servants and agents. The new offence of corporate manslaughter is, however, predicated on an organisation owing a personal duty of care to the victim. To attribute the duties owed by the Crown as a whole to the relevant Crown body, **Clause 7(4)** makes it clear that Crown bodies are to be treated as owing for the purposes of the offence the duties of care that they would owe if they were bodies corporate that were not part of the Crown.
35. **Clause 8** deals with criminal procedure. Generally, provisions relating to criminal procedure relate to the prosecution of individuals. The different nature of legal persons has required some separate procedural provisions to be made. For example, section 33 of the Criminal Justice Act 1925 enables a corporation to plead through its representative as it cannot plead in person. Clause 8 applies these provisions to the bodies listed in the schedule for the purposes of proceedings for the new offence. It also enables any necessary modifications to be made by order. For example, a reference in the rules on criminal procedure to a director or the secretary of the corporation would need modification in order to apply to a government department.
36. **Clause 9** makes provision for cases where functions have been transferred between Crown bodies, or between a Crown body and another type of organisation. In summary, prosecutions will be commenced, or continued (if commenced before the transfer), against the Crown body that *currently* has responsibility for the relevant function. But if the function is now out of Crown hands entirely, proceedings will be against the Crown body by which the function was last carried out.

Clause 10 – Armed Forces

37. **Clause 10(1)** makes provision to exclude certain activities performed by the armed forces from the scope of the offence. These relate to military operations conducted by the naval, military or air forces and to their preparation, planning and direct support. This covers all war-like operations, including circumstances in which the armed forces are playing a peacekeeping role or are providing military support to the civil community in circumstances where they might face attack. The law of negligence already recognises that a duty of care will rarely be owed in such circumstances and this principle is made explicit on the face of the Bill.
38. The exemption also extends to training exercises that simulate these sorts of operations.
39. **Clause 10(2)** addresses the fact that technically members of the armed forces are not employed by the Ministry of Defence. Provision is required in the same way as described in paragraph 33 above to ensure that a duty of care as employer is owed to such personnel by the Ministry of Defence for the purposes of the offence.

Clause 11 – Crown application

40. **Clause 11** provides for the Bill to bind the Crown – see paragraph 31.

Clauses 12 to 14 – Orders, abolition of the common law and consequential amendments

41. Under **clause 12**, orders to amend the list of Crown bodies to which the offence applies (see clause 1(3)) will be contained in statutory instruments subject to the negative resolution procedure (that is, they will become law after being laid before Parliament for a certain period of time unless specifically annulled). This is also the case for orders under clause 8 amending provisions on criminal proceedings to adapt them for Crown bodies.
42. **Clause 13** abolishes the application of the existing offence of gross negligence manslaughter to corporate bodies. Prosecutions for corporate manslaughter would in future fall under this legislation. The abolition does not extend to corporations sole which, as individual offices, are not covered by the new offence.
43. **Clause 14** makes consequential amendments to the Police and Criminal Evidence Act 1984 and the Coroners Act 1988. The first is necessary to ensure that investigative powers related to serious arrestable offences continue to be available to the police for the investigation of the new offence (but see proposed amendments to the Police and Criminal Evidence Act in Part 3 of Schedule 7 to the Serious and Organised Crime and Police Bill). The second updates references to homicide offences in the Coroners Act to include the new offence.

Clauses 15 to 17 – Commencement, territorial application and short title

44. **Clause 15** deals with commencement and provides for the legislation to be brought into force by order - known as a commencement order - made by the Secretary of State. Clause 15(2) makes it clear that the legislation is not retrospective.

45. **Clause 16** deals with extent and territorial application. The Bill extends to England and Wales only. Clause 16(2) and (3) set out the circumstances in which the courts will have jurisdiction for the new offence. Under section 10 of the Offences Against the Person Act 1861, the courts have jurisdiction in a case of homicide if the injury causing death is inflicted in England and Wales, or in a place where the English courts have jurisdiction (such as on a British ship), even if the death does not. Clause 16(2) reflects that position providing jurisdiction if the harm causing death is sustained in England and Wales or other locations where English criminal jurisdiction currently extends. Clause 16(3) ensures that the offence still applies if death is sustained as a result of an incident occurring to a British ship (or aircraft or hovercraft), but not actually on board. For example, if a ship were wrecked and passengers killed by drowning.

46. **Clause 17** sets out the short title for the legislation.

Schedule

47. The Schedule sets out the Government departments and other similar bodies to whom the offence applies (other than bodies corporate) and is considered more fully in paragraph 11 above.

SUMMARY

- There should be a new offence of corporate manslaughter. (A comparison with the current law is set out in a table below).
- An organisation would be guilty of the new offence if the way in which its senior managers managed or organised its activities caused a person's death and was a gross breach of a duty of care the organisation owed them as:
 - their employer or the occupier of a building or
 - in supplying goods or services or performing a commercial activity
- The organisation's conduct would be assessed against a number of statutory criteria, including the extent to which it had breached relevant health and safety legislation, whether senior managers were aware of the risk the company was running and whether they had sought to profit from the breach.
- The offence would apply to all corporate bodies. There would be no general Crown immunity and the offence would apply to a wide range of government departments and other Crown bodies, as well as other parts of the public sector.
- The new offence would not, however, allow the courts to assess public policy decisions nor look at the management of core public functions, which are more appropriately the subject of democratic accountability.
- The new offence would target the liability of organisations themselves and would not apply to individual directors or others. Individuals would remain liable to prosecution for existing offences where personally to blame.
- The offence would be tried in the Crown Court and the penalty would be an unlimited fine. Courts would also have the power to make remedial orders. Private prosecutions would require the consent of the Director of Public Prosecutions.
- The offence would apply in England and Wales and would not carry extra-territorial jurisdiction. There will be separate consultation in Scotland and Northern Ireland.
- Responses should be sent by 17 June 2005 to:

The Corporate Manslaughter Bill Team
Home Office
Fry Building, 2nd Floor
2 Marsham Street
London SW1P 4DF
corporatemanslaughterbill@homeoffice.gsi.gov.uk

	Gross negligence manslaughter	Draft Bill
APPLICATION	<ul style="list-style-type: none"> • Individuals • Corporate bodies (<i>including commercial companies and public sector bodies that have been incorporated such as local authorities (including fire and rescue authorities) and NHS trusts</i>) • Crown bodies not liable to prosecution. 	<ul style="list-style-type: none"> • Corporate bodies • Wide range of Crown bodies (<i>Government Departments etc</i>)
SCOPE	<p>Common law duty of care.</p> <ul style="list-style-type: none"> • <i>Applies in a range of established categories eg:</i> <ul style="list-style-type: none"> — <i>employer</i> — <i>occupier</i> • <i>Also arises when supplying goods & services or performing activities e.g. duty of care to rail passengers.</i> • <i>Duty of care rarely owed for strategic public policy decisions.</i> 	<p>Common law duty of care owed:</p> <ul style="list-style-type: none"> — <i>as employer or occupier</i> — <i>when supplying goods or services or performing a commercial activity.</i> • <i>Offence does not apply to core public functions that are performed by the Government under the prerogative or those that are a type of activity (whether performed by a private or public sector body) that requires a statutory or prerogative basis.</i> • <i>Exemption for strategic public policy decisions on the face of the Bill.</i>
BASIS OF LIABILITY	<p>Identification principle: an individual senior enough to embody the company must also be guilty of gross negligence manslaughter.</p>	<p>A failing in the way senior managers organised or managed the organisation's activities.</p>
THRESHOLD	<p>Conduct or failure in question must have been gross negligence.</p>	<p>Management failure must have been gross breach of duty of care – defined as conduct falling far below what could reasonably be expected.</p> <ul style="list-style-type: none"> • <i>Framework in draft Bill for assessing culpability, linked to health and safety standards.</i>
INDIVIDUAL LIABILITY	<p>Individual only liable if personally guilty of manslaughter.</p> <ul style="list-style-type: none"> • <i>Corporate liability contingent on this.</i> 	<p>Individually only liable if personally guilty of manslaughter</p> <ul style="list-style-type: none"> • <i>Corporate liability not contingent on this.</i> • <i>No individual liability for new offence.</i>
PENALTY	Unlimited fine	
JURISDICTION	Not extra-territorial	



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