



Amicus Response to the Draft Corporate Manslaughter Bill

Main Issues

- Amicus welcomes the draft Corporate Manslaughter Bill
- The Bill's coverage is too narrow
- There should be an additional offence of "unlawful killing", that would open up the possibility of individual directors or senior managers being held responsible for failures in corporate responsibility. The penalties for such breaches should include imprisonment.
- Individual penalties should include fines, disqualification of Directors, training orders, and community health and safety orders.
- The Bill needs to apply to directors and senior managers, and must cover senior managers who play a major role in the whole, or significant parts, of the organisation.
- We expect to see an increase in corporate manslaughter cases being taken to court, with a significant improvement in the overall management of health and safety.
- It must be clear that the suggested tests in the Bill do not all have to be failed to justify guilt.
- The judgement of whether an organisation "profits" from health and safety failures must involve non-monetary considerations – we favour the use of the word "benefit".
- The Bill needs to address adequately deaths of contractors, sub-contractors and agency workers.
- The financial penalties for corporate manslaughter need to be considerably higher than current penalties for deaths at work that are taken by the Health and Safety Executive.
- Corporate sentences under the Bill should include Corporate Probation, Corporate Community Service and Negative Impact Orders.
- The Bill needs to make a clear link to the Directors Duties guidance, published by the Health and Safety Executive
- The current guidance on Directors Duties must be made into a clear legal requirement, and be applied to senior managers as well as directors.
- The Bill should be used as a vehicle to achieve the removal of Crown Immunity for all health and safety offences.
- The Bill should be used to increase all health and safety penalties.

Amicus is the UK's largest manufacturing, technical & skilled persons' union, with over 1.2m members in the private and public sectors. Amicus represents members in all parts of UK enterprise and industry. We welcome the opportunity to comment on the proposals for introducing new legislation covering Corporate Manslaughter.

In making these written comments, we would welcome the opportunity to make oral representations, in due course, to the Pre-legislative Scrutiny Committee.

Amicus is seriously concerned about the past failures of the Government to enact satisfactory legislation on Corporate Manslaughter and the failure of enforcement agencies to pursue prison sentences for company directors whose companies kill or seriously injure workers. We welcome, therefore, the publication of a draft Bill to reform Corporate Manslaughter legislation. However we are concerned that the current coverage is too narrow.

We are mindful of the views of the House of Commons Work and Pensions Committee in its report on "The Work of the Health and Safety Commission and Executive" (Fourth Report of Session 2003–04). The Committee called on the Government to resolve any outstanding issues concerning reforms of the law on corporate killing and recommended that by 1 December 2004, the Government published a Bill on corporate killing.

The Committee also recommended that the Government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.

Amicus strongly supports a new offence that targets very serious failings in the strategic management of a company's activities that have resulted in death. Like the Government, Amicus believes the Corporate Manslaughter law must focus on wider management failings within an organisation. However, we also believe that Corporate Manslaughter legislation must ensure that one or more directors and senior managers could be held individually responsible for workplace deaths if they are found to be responsible for those management failings. We are seeking therefore an additional offence of "unlawful killing", that would open up the possibility of individual responsibility arising from failures in corporate responsibility. The penalties for such breaches should include imprisonment.

Regulatory Impact

We have reviewed the Home Office Regulatory Impact Assessment. We accept that the problems inherent in the current Corporate Manslaughter laws have been highlighted by major disasters, such as the Herald of Free

Enterprise Ferry disaster in 1987 and the Southall rail disaster in 1997; where prosecutions failed in both cases. However, the reality of most deaths in the workplace, which we also expect these laws to deal with, is that they are isolated, yet tragic, events. The organisations involved are often smaller than those involved in the high profile deaths of members of the public, but nonetheless, have proved effectively immune from charges of manslaughter at an individual or corporate level.

We are alarmed that the RIA only envisages 5 cases a year under the new Corporate Manslaughter provisions. We believe that if the new provisions are correctly framed to have the impact we desire, we could envisage more cases than this. We also believe that on the positive side of the equation, the effect of such provisions would be to drastically improve, at a senior level, the management of health and safety in many organisations, thereby leading to significant improvement in safety and a reduction in work-related ill-health.

We also believe that such changes will significantly improve the climate for the effective operation of trade union appointed safety representatives, key players in improving safety in the workplace.

Scope of the Offence

The proposed new legislation will make it possible to prosecute an organisation if there is a gross breach of their duty of care and that a senior manager of the organisation knew, or ought to have known, about this breach. Amicus supports the draft Bill on this point. To confine the awareness to actual directors would be too restrictive; however, we also think that to extend it to those below senior manager level would undermine the focus of the Bill, which is on corporate, senior management failings.

We are aware, for example, of many senior managers who should be within the scope of this law who are not directors. But they could be members of Senior Management Teams, or could be senior managers in roles involving major control of a company's activities, or major control of a production site, or other part of an organisation.

We are concerned that some organisations are not covered effectively by the Bill. Take, for example, an organisation employing 5,000 people on 10 sites. There is a Board of Directors, but each site has an operating manager, who is not a director but is responsible for everything on that site. We understand that the current definition for director or senior manager would not class the operating manager as a senior manager, as that person would only be responsible for 10% of the organisation.

We are aware that variations on the situation described above are very common throughout industry. Therefore, either operating managers of the type described must be classed as senior managers, or, it must be made clear in the Bill that senior managers do have responsibility for the actions of these managers and will be held liable for their failings. It needs to be stated explicitly in the definition that senior managers must take the necessary action to assume, and meet, this responsibility.

Clause 3(2)(b) of the Bill needs to make it clear that any one of the three tests needs to be met rather than all three. We are also concerned that the third test, which requires the prosecution to show that an organisation sought to profit from a failure, could lead to action being less likely against public and non-profit bodies. Instead we would wish to see the word "benefit" used instead of "profit".

Amicus believes that the new law should include additional considerations concerning the proper conduct of directors and senior managers in relation to health and safety.

Directors and senior managers should be compelled to show that, where they did not meet the requirement themselves:

- 1) they employed personnel properly qualified to analyse, direct and execute those activities in their business that give rise to risks, and
- 2) these personnel were properly used and consulted

Amicus welcomes the fact that the proposed offence will cover deaths to the public that result from the work process, as well as deaths in the workplace. However, clause 3(3) needs to make it clear that other health and safety legislation not made under the Health and Safety at Work etc Act, such as the Working Time Regulations, is also covered.

Duty of Care

The Corporate Manslaughter offence is based on the duty of care held by an employer, an occupier, a supplier of goods or services, or where there are relevant commercial activities. Amicus is concerned that the current definitions and framing of the Bill do not deal adequately with contractors, sub-contractors or agency workers.

The Bill must be absolutely clear where duties lie, and where is the target, or targets, of any corporate offence. For example, it is not clear from the Bill who might be liable in the event of the death of a sub-contractor on a multi contractor site. Nor does the Bill seem to address adequately the position of an agency worker killed at a workplace where the occupier is not the agency worker's employer.

Coverage

The draft Bill applies to “corporations” and government departments, not only as employers but also as suppliers. There is the question of whether it should apply to “un-incorporated” bodies such as partnerships. While recognising the difficulties, Amicus would like the offence to be as broad as possible.

The draft Bill has ruled out any jurisdiction over the operations of companies which are registered in the UK if a fatality occurs abroad. Amicus supports the view that there are some circumstances where the legislation should apply – in particular where a worker is killed overseas because of the failure of a UK based corporation to undertake a suitable risk assessment. We would also ask that consideration be given to extending the provisions to British Dependencies which are often used to register Merchant Shipping.

Amicus is also seeking positive confirmation that the Bill will apply to offshore workplaces, eg offshore oil platforms.

Fines

We believe that all current fines coming out of health and safety cases are too low. Recent cases taken by health and safety inspectors, under existing health and safety law, have seen fines in the region of only £100,000, where workers have been killed. No individual manslaughter or Corporate Manslaughter charges have been brought in these cases. This puts a very low value on loss of life, and many fines have been much lower than this.

These cases and fines vary according to the circumstances, but they can hardly be seen as adequate when a worker has died. So, we take the view that Corporate Manslaughter fines must be much, much higher. We need to be talking millions of pounds, rather than tens of thousands of pounds. Even a million pound fine may be a relatively small amount to a large organisation. It is worth looking to the financial sector to see what could be expected. The Financial Services Authority can impose fines of up to 10% of the gross turnover of a company. This might be closer to the appropriate level of fines for corporate manslaughter offences.

Another option that should be explored is Equity Fines. These are aimed at Public Limited Companies (PLCs), requiring the company to create shares up to a particular value in a victims compensation fund. An advantage is that this hits shareholders, something a Board of Directors will not be keen to do.

We do recognise a problem in fining public companies. What is the point in Government money being paid back to the Government? It is a tricky issue and needs more thought, but it also points to the need for other forms of sentencing.

So, all of this shows us that fines against corporate bodies, companies or organisations are not enough. Corporate fines do not penalise the senior managers who are often responsible for the organisation's failings.

Individual Directors and Senior Managers

The draft Bill, as currently presented, will simply allow for an organisation to be fined, although remedial orders will also be able to be imposed. Because a company or public body cannot be sent to prison, the government is suggesting there are no other alternatives to this. We fundamentally disagree with this point.

The absence of statutory directors' and senior managers' duties on health and safety hinders the prevention of accidents, injuries and fatalities and makes it more difficult to secure justice for the victims of health and safety breaches. Only the introduction of statutory health and safety duties on company directors and senior managers, and effective penalties, will ensure that the most senior members of an organisation can be held responsible for health and safety negligence.

We disagree with the view that it would not be appropriate for an offence of Corporate Manslaughter to look at individuals such as company directors. Amicus believes that without punitive sanctions against directors and senior managers there would be insufficient deterrent force to any new proposals.

The Corporate Manslaughter Bill should open up the possibility of action, and sanctions, against individual directors and senior managers, where it can be shown that their actions or inactions contributed directly to the gross failings of the organisation on health and safety. Those legal sanctions must include the possibility of directors or senior managers being sent to prison where their gross failures lead to the death of someone at work.

Amicus believes there should also be a range of potential non-custodial sentences against individuals.

A number of options should be considered, including personal fines, suspension or disqualification of directors, retraining or remedial training orders, and community health and safety service orders against directors or senior managers.

Directors Duties

Furthermore Amicus believes that the Government must also look, as a matter of urgency, at the responsibilities of directors and senior managers with a view to tighter regulation. Criminal liability for management applies not only to the corporate body or undertaking concerned, but also to owners, directors, and very senior personnel who are ultimately responsible for the management failure. The existing guidance on Director's Duties on health and safety needs to be reframed as a legal duty, with the clear indication that it applies to directors and senior managers, so that its coverage is in line with that of the Corporate Manslaughter Bill.

Sentencing Organisations

As far as corporate penalties and sentencing are concerned, we think there needs to be more than just large fines. Amicus would like to see the Courts exploring more imaginative, additional penalties. We see these as additional, not as alternatives, to fines.

Unfortunately the Government has given no serious consideration to the best way of sentencing companies and other organisations. The Home Office, for its part, has displayed a total lack of imagination in this area. It might also be recalled that the Government's "Revitalising Health and Safety" report, published in 2000, committed itself to looking at alternative forms of sentences. As far as we are aware, no work has been done on this.

The only measure identified in the draft Bill is Remedial Orders. Courts already have the power to issue these in relation to health and safety offences, but, as far as we are aware, they have never been used. In practice, we expect health and safety failings to be put right long before companies end up in Court. The Health and Safety Executive generally imposes health and safety improvements through their investigations and interventions under existing health and safety law. So, we are not against remedial orders, but we have some doubts about their practical value.

There are other alternatives that we think might be more effective:

- For organisations we should be considering Corporate Probation. The Court should have the power to place conditions on an organisation. These could include setting periods of time during which the organisation must deliver identified, good health and safety practices. The Court could require companies to employ additional safety advice, or train managers and so on.

- Organisations could also be subject to Corporate Community Service Orders, requiring them to provide health and safety services to workers or to the local community. This would mean putting something back into a community, or to families, or to workers, that have been affected by a workplace death or deaths.
- Another type of order is a Negative Impact Order. This would require a company to pay for prominent advertising informing people that they have been convicted. This is naming, shaming, publicising and then charging! It could be very effective.

General health and safety penalties

Amicus recognises that the issue of penalties relates to all corporate offences, not just Corporate Manslaughter, and would hope that the Government will look at this issue generally. In noting that the Government has committed itself to increasing penalties for health and safety offences, Amicus supports the TUC in asking the Government to consider whether this Bill could be an instrument to achieve that.

Crown Immunity

It is also important that the new laws apply to everyone, including all public bodies. Amicus welcomes the fact where a government department or agency is responsible for a death at work it is prosecuted. Crown bodies must not be exempt from prosecution where they have caused a death and so we welcome the removal of Crown Immunity.

We hope that this Bill could be used as a vehicle to achieve the removal of Crown Immunity for all health and safety offences.

Specific Amicus points on the Draft Bill

1 The Offence

1(5)

We oppose this clause which explicitly removes the possibility of individuals being held liable under the Bill. We think it is entirely appropriate that where there is clear evidence that an individual senior manager, or managers, has aided, abetted, counselled or procured the offence of corporate manslaughter, there should be the possibility of action against them.

This should include imprisonment, but also such things as disqualification from holding directorships, training orders and community health and safety orders.

2 Senior Manager

This definition needs to be extended to fully cover the meanings given to it in the explanatory notes to the Bill.

It must not be possible to scapegoat less senior managers through denials of responsibility at a higher level. The Bill needs to cover divisional or site managers for example, who have substantial decision making, managing and organising responsibilities. Additionally, or alternatively, it must be made clear that Senior Managers do have responsibility for the actions of these managers and will be held liable for their failings. It should therefore be stated explicitly in the definition that Senior Managers must take the necessary action to assume, and meet, this responsibility.

3 Gross Breach

3(2)(b) (i) (ii) and (iii)

In clause 3(2)(b) the sub clauses (i) to (iii) need to have the word "or" added at the end of each of them. This is necessary to show that senior managers do not have to fail all of these tests to show failure to comply.

3(2)(b)(iii)

After profit add the words "or benefit in other ways". This is to address the fact that organisations could benefit in ways that are not purely monetary.

Add an additional new clause 3(2)(c) stating:

“Whether or not senior managers:

(i) employed personnel properly qualified to analyse, direct and execute those activities in their business that give rise to risks, and

(ii) these personnel were properly used and consulted.”

3(2) and 3(3)(b)

Amicus strongly supports the inclusion in these clauses of reference to “guidance” (3(2)) and “any code, guidance, manual or similar publication” (3(3)(b)). This is essential in any judgement of an organisation’s compliance with its health and safety duties, since so much of this is detailed in supporting material to the legislation.

New clause 3(2)(d)

Amicus is seeking an additional clause that makes specific reference to compliance with HSE material on Directors Duties. (At present this is published as guidance, but it should be noted that Amicus is seeking a legal requirement on Directors and Senior Managers, based on the current guidance.)

3(3)

We need to be certain that this clause is worded so that it is clear that other health and safety legislation, such as the Working Time Regulations is covered by this definition.

6 Power to order breach etc to be remedied

Amicus welcomes the provision that a court can make remedial orders to remedy breaches and any other matters.

We are keen to see additional corporate penalties including corporate probation, corporate community service orders and negative impact orders.

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