

Take Responsibility!



Autumn/Winter 2003

TIME FOR REFORM

Only five companies have ever been convicted for manslaughter although every year between 300 and 400 workers and members of the public die in work-related incidents. Reform is required to both prevent these deaths and to ensure that grossly negligent companies can be held to account.

In 1996, the Law Commission proposed that a new offence of 'Corporate Killing' should be enacted that would make it easier to prosecute companies for a homicide offence and in the summer of 2000, the Labour Government published a consultation document that adopted this proposal. In its Manifesto for the May 2001 elections, the Labour Party stated that 'law reform is necessary to make provisions against corporate manslaughter.'

However, when will reform take place and what will be the exact substance of the proposed legislation?

In May 2003, David Blunkett the Home Secretary reconfirmed the Government's commitment to reform in this area and stated that the 'law needs to be clear and effective in order to secure public confidence and must bite properly on large corporations whose failure to set or maintain standards causes a death.' He also stated that a timetable for reform would be published 'in the autumn'. There was notably no commitment on when legislation would be introduced before parliament.

Since then it has also emerged that the Government will be undertaking a further round of consultation prior to introducing the Bill before parliament. This would be the third consultation that has taken place in relation to reforming the law of manslaughter.

As to the content of the proposals, it appears they are likely to be based around the Law Commission's proposed offence of 'corporate killing' – though there are indications from recent Government announcements, which no longer use the term 'corporate killing', that they may make some changes to the Law Commission's proposed offence. It is not yet clear what these changes will be.

When the legislation is introduced, another key issue of



contention will be the application of the offence and whether or not it will apply to organisations other than corporations, and particularly whether it will apply to 'crown bodies'. It appears that the Government's current position is that it should only apply to private and public companies and not to any other employing organisations and not to any crown bodies.

It is also the Government's view that companies can only be prosecuted for this offence if the death takes place in Britain. British companies that kill abroad would therefore be exempt from the proposals.

In its May 2003 announcement, the Government explicitly stated that the proposals will not result in criminal prosecution of company directors. This had been suggested in the Government's consultation document 3 years earlier which had stated that the Government were considering enacting a further offence that would allow directors to be prosecuted if there was evidence to show that directors had contributed to the offence of corporate killing.

WHY REFORM IS NECESSARY

Under current law, a corporation can only be prosecuted if there is sufficient evidence to prove that one of its directors or senior managers committed manslaughter, as an individual.

The prosecution of a company, therefore, has nothing to do with whether there is evidence of serious management

failures as such, but only whether a director/manager has caused death through gross negligence.

A company with a director who is grossly negligent may well be a company with serious management failures - but a company with serious management failures may well not have a director who can be shown to have acted with gross negligence.

Prosecuting large and medium sized corporate bodies is very difficult since it is difficult to

prove all the ingredients of the offence of manslaughter against a single director or senior manager of a large corporation.

Unlike directors of small firms who may have day-to-day responsibility and knowledge of what is happening on the company's 'shop floor', directors of large or medium sized corporate bodies will often delegate their safety responsibilities to others down the management chain. In addition, failures in large

companies will often be the result of actions or failures on the part of a number of different individuals, none of which individually amounts to a gross failure.

As a result, large and medium sized corporate bodies can escape prosecution for manslaughter because of the difficulty in identifying a single individual high enough up in the company who can be prosecuted for manslaughter, despite the most serious management failures.

SIGNIFICANT PROSECUTIONS

In July 2003, two companies and six senior managers were charged with the manslaughter of four people who died in October 2000 when a high speed GNER East Coast train derailed just south of Hatfield station in Hertfordshire. The immediate cause of the crash was a broken rail

This is a very significant prosecution as it is very rare for large companies to be prosecuted for manslaughter.

There have only ever been two large companies that have been prosecuted for manslaughter - both of which failed:

- P&O European Ferries over the Zeebrugge Disaster which killed 192 people in 1997. The trial collapsed at its early stages when the Judge ruled there was insufficient evidence against any director or senior manager
- Great Western Railways over the Southall Train Crash which killed 7 people in 1997. The CPS tried to prosecute the company without prosecuting any individual director or manager. The court ruled that the case could not go ahead on this basis.

The two companies being prosecuted are Network Rail, the successor to Railtrack, and the maintenance contractor, Balfour Beatty.

The trial is to take place at St Albans Crown Court in September 2004.

If found guilty, the individuals could face life imprisonment and the two companies could be ordered to pay unlimited fines.

A further six men face charges under the Health and Safety at Work Act only, including the former boss of Railtrack, Gerald Corbett, who is now chairman of Woolworth's.

Both the companies and their employees have said they would defend themselves against the charges.

In the two-and-a-half Year investigation, 1,500 witnesses have given evidence and Police have seized more than one million pages of documents.

THE OFFENCE OF MANSLAUGHTER

An individual commits the offence of manslaughter when he or she causes the death of another through his or her 'gross negligence'. It is necessary to prove that:

- the person accused had a 'duty of care' towards the person who died;
- the person was in 'breach' of that duty;
- the breach of the duty was 'gross';
- the breach was a 'significant cause' of the death.

The same test applies whether the individual being prosecuted is a director or worker.

In order for a 'company' to be prosecuted for manslaughter, the individual being prosecuted must be a director or senior manager of that company (i.e. a 'controlling mind' of the company). If such an individual is charged with manslaughter, the company can then also be prosecuted. The guilt or innocence of the company is then dependent on the guilt or innocence of the individual.

No organisation other than a company can be prosecuted for

manslaughter.

Even if the conduct of a company director appears to be seriously negligent, it can still be difficult to successfully prosecute a director of a large company for manslaughter:

- it is not always straightforward to show that director had a 'duty of care' towards the person who died.
- it can be difficult in large companies with a complex management hierarchy to show that the particular conduct of the director in question was 'a significant cause' of the death.

If one looks at previous cases, the factors that tend to increase the likelihood of prosecution of directors (and their successful conviction) appear to be:

- evidence that a director received advice from an HSE inspector, a worker or some other person that a particular practice - which was a cause of the death - was unsafe;
- other evidence that a director was aware that a



practice - which caused the death - was dangerous.

- evidence of previous injuries or near misses that should have alerted the director to safety problems.

A director can, however, be convicted even if there is no evidence that he actually knew that a particular practice was unsafe, as long as the jury considered that his conduct was grossly negligent.

MANSLAUGHTER REFORM CHRONOLOGY

1991: P&O European Ferries was acquitted for the manslaughter of the 192 people who died in the Zeebrugge disaster. The company escaped conviction because all the directors and senior company officers were acquitted of the offence of manslaughter.

1994: the Law Commission publishes a consultation document proposing reform to the law of manslaughter including how the offence would apply to companies.

1996: the Commission publishes its final report which proposes that a new offence - which it calls 'corporate killing' - should be enacted. This would allow a company to be prosecuted without the need to prosecute a director or senior manager as long as there was evidence to show that there was a serious management failure on the part of the company which was a cause of a death.

1997: in October, at the first Labour Party conference after its election in May, the Rt. Hon. Jack Straw MP, then Home Secretary, promised to enact this offence.

2000: in May, the Government published a Consultation Document in which it formally accepted the Law Commission's recommendation concerning the enactment of a new offence of corporate killing and proposed that the offence should apply not only to companies but all employing organisations. It however stated that

the offence should not apply to crown bodies and that it could be investigated and prosecuted by the Health and Safety Executive (rather than by the police and Crown Prosecution Service as is current practice). It also suggested that there could be scope to prosecute or disqualify company directors who contributed to their company committing the offence.

2001: In its manifesto for the May general elections, the Labour Party stated that 'Law Reform is necessary to make provisions against corporate manslaughter.'

2002: in August, the Home Office began conducting a regulatory impact assessment for a new offence of corporate killing. A questionnaire was sent out to those industries that could be affected by the new offence about the financial impact that such an offence would have upon them.

2003: in May, the Rt. Hon. David Blunkett MP, the Home Secretary, announced that the Home Office 'will publish a draft Bill on corporate manslaughter' and that 'a timetable for legislation and further details would be announced this autumn.' The press release indicated that the Home Office had dropped its plans to extend the application of the offence to organisations other than companies or to allow the prosecution or disqualification of company directors.

THE PROPOSED OFFENCE OF 'CORPORATE KILLING'

Ever since the Law Commission published its final report in 1996, the debate around reform to the law of manslaughter has centred on the Commission's proposed offence of 'corporate killing'.

What is this offence? According to the Law Commission's proposals (adopted in 2000 by the Government) a company would commit the offence of 'corporate killing' if it could be shown that:

- there was a 'management failure' on the part of the company;
- the management failure 'fell far below what could be reasonably expected';
- the management failure was 'a cause' of the death;

The Law Commission defined a management failure in the following manner: a company has a management failure, 'if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities.'

The offence of Corporate Killing is focused on the conduct of 'the company' – which in law is a separate entity from that of the directors (which manage the company), the shareholders (who own the company) or the employees (who work for the company). As a result it is 'the company' – and not the directors or managers – which is in the dock and which, if convicted, would be sentenced. The offence will therefore not increase the criminal accountability of company directors.

In its 2002 Consultation document, the

Government proposed that this offence should not only apply to companies but to all employing organisations except for Crown Bodies. It also stated that this offence should not apply to British companies that cause death abroad.

This offence has advantages and disadvantages.

Advantages

- separates out the test which determines the guilt of the company from that of the individual;
- allows the jury to assess the adequacy of an organisation's management systems in determining its guilt;
- the conduct of the whole of the corporate body's management would come under scrutiny, rather than just the conduct of a single individual.
- makes it easier to prosecute an organisation for a homicide offence;
- would mean that large companies with very poor systems of safety will no longer escape prosecution simply because it is difficult to find a director who can be prosecuted.

Disadvantages

- it could act as a disincentive to the Police and the CPS to investigate and prosecute the conduct of individual directors since it would now be easier to prosecute just the company;
- the only sentence available would be a cash fine imposed upon the guilty organisation;
- the Government is proposing not to apply the new offence to 'crown bodies' or to British companies that commit the offence abroad.

BRITISH COMPANIES CAUSING DEATH ABROAD

At present, a British citizen whose conduct (within or outside Britain) caused a death abroad can be prosecuted for manslaughter in Britain; it is however unclear in law whether or not British companies can be prosecuted in a similar situation.

The enactment of a new homicide offence allows the Government to put British companies and British citizens on the same footing.

However, in its Consultation Document, the Government stated that only deaths that take place in England and Wales can result in a prosecution for corporate killing. The consequence of this would be to put British corporate bodies in a more favourable position than British citizens.

The government outlined a number of reasons why jurisdiction should be limited:

- it stated that there would be 'very considerable practicable difficulties' if English/Welsh courts were allowed to prosecute British corporate bodies that committed corporate killing abroad. Yet these practical difficulties are no different from those which the Government believes can be overcome in relation to individuals who commit homicide abroad, or indeed corporate bodies that commit corruption abroad.
- It is suggested that it would not be appropriate to extend jurisdiction, because the

Government would be 'accused of exporting our laws'. However, such an accusation could only be made if the Government was proposing to impose obligations on corporate bodies or citizens of another country. Allowing English/Welsh courts to prosecute British corporate bodies when the offence is committed abroad does not have that effect.

- The Government suggested that it is their policy to extend jurisdiction only in relation to criminal offences that involve conduct that 'constitutes an offence both here and under the laws of the country in which it happened'. This is known as the principle of 'dual criminality'. However, contrary to the Government's impression in the consultation document, many countries do have laws that criminalise negligent safety conduct, so extending jurisdiction should not in principle be a problem.

There are also a number of positive reasons for extending jurisdiction. Unless jurisdiction is extended, the new offence of corporate killing would have no deterrent value for corporate bodies with dangerous overseas operations, particularly when these operations take place in the developing world. It is important that there is an incentive for British corporate bodies to improve or maintain acceptable standards of health and safety in the activities that it conducts abroad.

THE GOVERNMENT'S MAY 2003 ANNOUNCEMENT

On 20 May 2003, the Home Office issued a press release concerning the Government's intentions to reform the law of manslaughter. The statement appears to have been in response to an amendment (tabled by Andrew Dismore M.P) to the Criminal Justice Bill – then being debated in parliament - which would have introduced a new offence of Corporate Killing into the Bill.

The press release quoted David Blunkett as stating: 'There is great public concern at the criminal law's lack of success in convicting companies of manslaughter where a death has occurred due to gross negligence by the organisation as a whole.'

'The law needs to be clear and effective in order to secure public confidence and must bite properly on large corporations whose failure to set or maintain standards causes a death. It is not targeted at conscientious companies that take their health and safety responsibilities seriously.'

The press release stated that 'it will publish a draft Bill on corporate manslaughter' and that 'a timetable for legislation and further details would be announced this autumn.'

It said that the legislation

- will be targeted at companies themselves, which is the area of weakness in the current law.
- will not impose any new burdens upon companies which already comply fully with Health and Safety legislation.
- will not target the criminal liability of individual directors.

The statement did not provide any clear time commitment about when new legislation will be actually be 'introduced' in parliament. It did not state whether the proposals would be part of the Queen's Speech later this year, which is crucial to when the offence will actually be on the statute books.

BENEFITS OF REFORM

There would be two key benefits of having an offence like 'Corporate Killing': accountability and prevention. As is stated in a recent report, written by Aberdeen University and published by the Health and Safety Executive, the proposed offence 'should act as a powerful deterrent to help prevent needless injuries and deaths whilst at the same time punishing the grossly negligent.'

Accountability: At present, the law allows grossly negligent companies to escape prosecution for a homicide offence. The new offence would ensure that these companies could be held to account for an offence that properly represents the nature of their criminal conduct & will ensure they suffer a sentence appropriate to the crime.

Currently, the most that will

happen to such a company is to be prosecuted for a health and safety offence. Health and safety offences serve a very important function - but their application is inappropriate for the prosecution of organisations that cause death through dangerous or grossly negligent conduct. Health and safety offences are, at the very most, crimes of straightforward negligence, which do not require proof that the body corporate caused a death, and where the burden of proof is reversed so that, unlike most offences, it is for the body corporate to prove that it did not commit the offence. As a result, courts do not impose fines that are particularly large (in relation to the organisation's profits or turnover).

On the other hand, the offence of corporate killing requires both proof of 'grossly negligent' management failings and evidence that these were a cause of the death. Therefore the level of fines that the court will impose will almost certainly be significantly higher.

Prosecuting grossly negligent

corporate bodies for health and safety offences - as happens now - is like prosecuting an alleged rapist for assault - an inadequate and inappropriate response.

Prevention: The criminal justice system has an important role in encouraging those who control and manage companies to put in place systems of management that will ensure that their organisations comply with health and safety law. The threat that their companies will be prosecuted and suffer a financial penalty and the potential loss of reputation, can induce directors and managers to take the necessary steps to ensure that deaths and injuries will not happen or, if they do, that they are not the result of management failures.

The threat of prosecution for health and safety offences is, however, not an adequate deterrent, particularly in relation to those companies that routinely place the safety and lives of workers and the public at unreasonable risk. The fact that these offences are not considered 'real crimes', are unrelated to causing death and

they receive low level of fines has meant that for some companies, prosecution is simply the acceptable price of doing business.

In contrast, a conviction for corporate killing would likely result in very high fines and severe consequences to the corporate body's reputation. As a result, large and medium sized corporate bodies will be aware that they must comply with health and safety law to avoid the possibility of prosecution. Such an offence would therefore act as a much more successful deterrent. As the Health and Safety Commission itself has stated, 'no company will want to be convicted of such a serious offence and the Commission believes that a key value of changing the law in this way will be its deterrent effect.'

Equity: There is another benefit to introducing the offence of corporate killing - equity. It would bring to an end the unfair advantage that large corporate bodies have over smaller ones in being able to escape a homicide charge.

CROWN BODIES AND MANSLAUGHTER PROSECUTION

At present, government departments (and certain other organisation under the control of a government department) cannot be prosecuted for any criminal offence, including the offence of manslaughter. This is because they are known as 'Crown bodies' and are in constitutional terms seen as 'servants or agents of the crown' which have immunity from prosecution.

The Royal Mint, for example, could not have been prosecuted for the manslaughter of 50 year old John Wynne who was killed when a six-tonne furnace fell on him at the Mint's premises in Llantrisant, South Wales, in June 2001 - even had there been sufficient evidence against one of its director or senior managers, as it is a Crown body.

Individual Ministers and civil servants, however, do not have Crown immunity and can be prosecuted as individuals for criminal offences (including manslaughter) even when they commit offences in the course of their work.

Should the proposed offence of

Corporate Killing apply to crown bodies?

There is no overriding constitutional principle which says that a Crown body cannot be prosecuted and the Government, if it so wished, could easily allow Crown bodies to be prosecuted. All that the Government would need to do would be to put a provision in the Bill stating that 'this offence applied to Crown bodies'.

There are a number of reasons why crown bodies should be able to be prosecuted for any new homicide offence that the government enacts:

- homicide offences are the most serious crimes in the criminal law. No organisation should be able to escape prosecution if they commit such a serious offence;
- crown bodies are no less likely to create risks and cause deaths than any other organisation;
- crown immunity for such a serious offence sends out the wrong signal - suggesting that

Government is above its own laws;

- whether or not a particular organisation has or does not have Crown status is often an arbitrary one, dependent on whether or not it was written into the originating statute. So whilst the Civil Aviation Authority would be able to be prosecuted for any new offence (since it is not a crown body) the Department of Transport could not (as it is a crown body). This makes no sense;
- it is difficult to understand why local government bodies - which do not have Crown status - would be able to be prosecuted for a homicide, but central government bodies would not;
- individual ministers and civil servants do not have immunity from prosecution for homicide offences, so why should their organisation; and
- a House of Lords case has indicated that technically there is no legal obstacle to the prosecution of

government departments for criminal offences, and that such prosecutions are required to 'vindicate the requirements of justice.'

In its consultation document, however, the Government stated that Crown bodies would not be able to be prosecuted for the offence, it gave no reasons for this.

The Government proposed an alternative to removing crown immunity. It suggested that where there was evidence that Crown bodies had 'committed' the offence of corporate killing, they should be brought before the High Court, which could make a 'declaration of non-compliance with statutory requirement'. This would require the Crown body to take immediate action to 'rectify the shortcoming identified'. This would be a civil law declaration and no fine or other penalty would be imposed.

However, there is no reason why a Crown body should not be prosecuted, like any other organisation, if there is sufficient evidence to do so. This is also the view of the Health and Safety Commission, which considers that Crown bodies should be able to be prosecuted.