

CORPORATE MANSLAUGHTER: WHERE ARE WE NOW?

By Prashant Popat

“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.” (Charles Clarke, March 2005)

1. Reforming the laws on corporate manslaughter were Labour Party pledges in the manifestos of both 1997 and 2001. Shortly before last year’s election the Government published its draft Bill to do just that. It has now undergone scrutiny by the Home Affairs and Works and Pensions Select Committees. In March 2006, the Government published its response to the Committees’ recommendations, concluding:

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

2. In July of last year, the bill was finally laid before Parliament and is entering the final phases of enactment. This paper considers the proposed legislation, with particular regard to whether it will achieve the improvement of UK health and safety which must be its primary aim. The second half of this paper will consider how the draft Bill reflects a broader trend for more rigorous health and safety enforcement in recent years and identifies how companies should prepare for its implementation. The first step is to consider the existing law on involuntary manslaughter.

The current law on involuntary manslaughter

3. Corporations can be liable for involuntary manslaughter if an individual is identified as the embodiment of the company, its directing mind, and that individual himself is guilty of manslaughter. Where such an individual is convicted the company can be regarded as having acted recklessly or in a grossly negligent manner and to have caused the death. The requirement to identify such an individual is known as the doctrine of "identification".
4. The task of identifying an individual in a substantial corporation who can be described as a directing mind, who was grossly negligent and whose negligence actually caused the death in question can be very difficult, due in no small part to the skill of company secretaries in setting up complex corporate structures.
5. In such corporations the power and control usually rests with board directors or very senior managers. They are unlikely to have sufficient involvement in the day to day activities of the corporation to enable the prosecution to show they were responsible for the relevant management or system failure. The more diffuse the corporate structure, the wider the company's activities and the larger the organisation the harder it is to join the necessary links in the chain to mount a successful prosecution.
6. The consequence of these difficulties is that there have been few prosecutions for corporate manslaughter. Between 1992 and 2005 3,425 workers were killed. Yet over that period there have been only 34 prosecutions for work-related manslaughter. Of these, only 7 organisations were convicted of gross negligence manslaughter; all of them were small companies.¹
7. The number of higher profile disasters where there was either no prosecution for corporate manslaughter or no successful prosecution has led to much public

dissatisfaction. The Herald of Free Enterprise, the Kings Cross Fire, Clapham, Southall, Ladbroke Grove and, most recently, Hatfield are but some examples.

Demands for change

- **Law Commission to publish its Proposals in a report of 1996, no. 237 “*Legislating the code: involuntary manslaughter*”**
8. These difficulties led the Law Commission to publish its Proposals in a report of 1996, no. 237 “*Legislating the code: involuntary manslaughter*”. These proposals recommended a new offence of corporate killing with the focus sharpened on the corporate entity itself. Its basic premise was that if it could be said that the corporation was (grossly) negligent in the way it might be in a civil claim, the corporation could be liable for the offence of corporate killing. The essential requirement of the proposed offence was that there should have been a management failure which caused death.
 9. The Commission’s proposals received much publicity and appeared to have political support yet were not taken beyond the stage of being proposals.
- **Attempts to alter the test: Southall and Hatfield**
10. Following the Southall crash in 1997 the train operator, GWT, was prosecuted for corporate manslaughter. The prosecution sought to argue that the elements of the offence of corporate manslaughter had changed following a decision of the House of Lordsⁱⁱ in the prosecution of an individual for manslaughter. It was argued that there was no longer any need to identify a controlling mind who was also guilty of manslaughter. It was possible, the prosecution contended, to convict the company if there had been a serious breach of its personal duty to the deceased. This was an attempt to remove the problem caused by the identification doctrine – the prosecution essentially wanted to be able to bring criminal charges in the same way as a plaintiff could bring civil proceedings. The prosecution failed at first instance. The Court of Appeal affirmed the lower Court’s decision, preserving the

identification principle and the need to establish the guilt of a human individual before a non-human could be convicted.ⁱⁱⁱ

11. In a new attempt to alter the manslaughter test and in light of the rulings in the *Southall* case that it was still necessary to convict a directing mind, the prosecution following the *Hatfield* case sought to argue that the directing mind could be somebody in middle management as long as they had autonomy over their role and/or budget. In other words the directing mind could be directing one small part of the operations of the company. The prosecution argued that in the modern commercial world this was a necessary interpretation of the directing mind test where large organizations were often run by separate departments or units. The corporate manslaughter charge against Network Rail was dismissed and, half-way through the trial, the judge held that there was no case for Balfour Beatty to answer on corporate manslaughter. At the time, Mr Justice Mackay stated that the case “*continue[d] to underline the pressing need for the long-delayed reform of the law in this area of unlawful killing.*”

- **Increasing demands**

12. The failure of the Southall and Hatfield prosecutions has intensified demands from victims for a change in the law of corporate killing. It is believed by a vociferous amalgam of groups, aided and abetted by the press, that there is an urgent need to hold corporations criminally accountable for the consequences of “accidents” and some believe that the threat of such accountability will lead to improved safety.
13. The Government recognised the increasing agitation regarding the apparent inability to prosecute large corporations for their involvement in various high-profile disasters. This led to the 2000 proposals.

A history of the draft Bill

- **The 2000 Home Office proposals**

14. The 2000 Home Office proposals on involuntary homicide proposed new manslaughter offences and other associated offences. The proposals built upon the report of the Law Commission. They concerned the offences of involuntary manslaughter against the individual as well as corporations.

- **Proposed additional criminal offence so that officers of the undertaking who contributed substantially to the management failure resulting in death were to be liable to a penalty of imprisonment or a fine in separate criminal proceedings.**

15. Under the 2000 proposals it was proposed that, where an undertaking is guilty of corporate killing, there should be an additional criminal offence so that officers of the undertaking who contributed substantially to the management failure resulting in death were to be liable to a penalty of imprisonment or a fine in separate criminal proceedings. There was concern that the new proposals would lack force without the availability of a punitive sanction to be used against individuals.

- **Impact assessment in late 2002 by the Home Office Sentencing and Offences Unit**

16. In late 2002, the Home Office Sentencing and Offences Unit conducted an assessment of the potential effects of the proposed changes on the private sector by consulting with selected industries with a fatal and major injuries rate of over 250 per 100,000 employees over the last five years. During this assessment it was indicated that further consideration had been given to the area of enforcement against companies and their officers. Consequently there were two significant changes in the Government's policy proposals. First, the proposal that when an undertaking is found guilty of manslaughter, individual directors or other officers can be held individually liable was removed. Secondly, the proposal that officers of a corporation who contributed to the management failure could be disqualified from holding a management post anywhere in England was similarly abandoned.

- **The Select Committees of the Department of Work and Pensions and the Department of Home Affairs Corporate Manslaughter sub-committee.**

17. The Select Committees of the Department of Work and Pensions and the Department of Home Affairs set up a Corporate Manslaughter sub-committee and over 6 sessions took evidence from 29 organisations and individuals on the then draft Bill which had been produced. Those giving evidence included industry bodies trades unions, pressure groups, lawyers, academics and the CBI. They also received 163 written submissions.

18. The Committee published its 117 page final report in December 2005. Having welcomed the Government's proposal to reform the law of manslaughter, the Committee recommended a number of changes to the proposals contained in the draft Bill. In summary they concluded that:

- (a) The offence should also have wider application than in the current draft Bill, in particular consideration should be given to covering the operations of large unincorporated entities.
- (b) The proposed basis for liability in the draft Bill was more complex than it needed to be. The civil law concept of a duty of care in negligence should be removed from the Bill. It was surplus to requirements and adds unnecessary legal complication to the Bill.
- (c) The restriction of management failure to that by "senior managers" is also problematic and has in effect reintroduced some of the problems of the 'identification principle'.
- (d) Juries should be assisted in their task by being required to consider whether there has been a serious breach of health and safety legislation and related guidance or other relevant legislation and in assessing this they could consider whether a corporate culture existed in the organisation that encouraged, tolerated or led to that management failure.
- (e) A revised draft Bill should contain provision to prosecute an individual for contributing to the offence of corporate manslaughter.
- (f) There should be a wider package of corporate sanctions.

- (g) The removal of Crown immunity did not go far enough in that some of the exemptions in the Bill are too broad. In particular, the proposed exemption for deaths in police custody and prisons.
- (h) There should be no requirement to obtain the Director of Public Prosecution's consent before a private prosecution can be brought.

The terms of the Bill

19. After protracted deliberations and the circulation of several further drafts, the Government laid a Bill before Parliament on 19 July 2006, which contained a new offence to be called "Corporate Manslaughter" in England, Wales and Northern Ireland and "Corporate Homicide" in Scotland. It will, if and when enacted, have the effect, by virtue of clause 18, of abolishing the existing common law offence of manslaughter by gross negligence in its application to corporations, although it will continue to exist for individuals in the corporate sphere as much as anywhere else.

- **Clause 1 (1)**

20. Under Clause 1 (1) of the Bill it is provided that a corporation will be guilty of corporate manslaughter if:

"the way in which any of [its] 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."*

21. The test is therefore four-fold:

- (1) Is the defendant a relevant organisation?
- (2) If so, did the relevant organisation owe the victim a relevant duty of care?
- (3) If so, was the duty of care breached in a way that can be described as "gross"?
- (4) If so, did the way in which the organisation's activities were managed or organised by senior managers cause the victim's death?

(1) Organisation

- **Definition of “organisation” in clause 1(2).**

22. The definition of “organisation” in clause 1(2) includes “a corporation... wherever incorporated” (except a corporation sole), a Government department or a police force. Unincorporated bodies, such as partnerships are still specifically excluded.
23. This is a controversial exclusion. It would exclude, for example, large unincorporated bodies such as big partnerships of accounting and law firms.
24. In response the Government said that there did not appear to be many instances of major health and safety breaches by large unincorporated entities. As there were particular complications in seeking to apply the offence to such bodies, as they have no distinct legal personality, they questioned the need to extend the proposed offence to them. It was nonetheless agreed that there should be no readily avoidable gaps in the law and that further consideration will be given to see if there are any “straightforward ways” of extending the application of the offence to some types of unincorporated body.
25. It is hard to see an argument of principle against extending the scope of the offence to such entities – they are often much larger and more “corporate” in nature than many incorporated entities. Further, the legal complexities are unlikely to be impossible to overcome; the obvious example being existing health and safety legislation which applies to the activities of “undertakings”, whether corporations, partnerships or sole traders.
26. The House of Lords in its’ proposed amendments has suggested including such unincorporated associations insofar as they are “*a partnership, trade union or employers’ association, that is an employer.*” By their proposed amendments any fine is to be paid out of the funds of the partnership

- **Meaning of “senior manager”.**

27. Under clause 2 of the draft Bill (the Bill has undergone several redrafts since it was published and it is clause 1(4) of the latest draft as presented to the House of Lords), a person falls within the meaning of “senior manager” if he plays a “significant role” in either making decisions about how the whole or a substantial part of the organisation’s activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.
28. The addition of the senior manager requirement substantially altered the form of the legislation in relation to the definition first proposed by the Home Office in 2000. It restricted the potential liability of organisations in comparison to that which could have existed under the 2000 definition. The Committees raised a number of concerns about such a requirement: (a) the problems posed in identifying senior management; (b) the difficulties and inequity in the application of this test to small companies compared to large companies; (c) the possibility that this test will be interpreted as an extension of the identification principle.
29. The Government’s stated reason for imposing the senior management requirement is that, without it, there is the possibility that criminal liability will be established for management failures occurring solely at a relatively junior level, where it would not be fair to hold the corporation as a whole responsible for an offence of this nature. The Government considers that the management failure test in itself needs to be qualified in some way. In policy terms, the test should examine the way the organisation as a whole managed or organised a particular activity: *“By this we mean the prosecution should be based on not only the immediate events that led to the death but on the wider context in which those events were able to take place. The wider context could include concepts of corporate culture, if appropriate.”*
30. It could be argued that the *senior* manager qualification or any similar qualification is possibly unnecessary. A failure of an employee at a low level is unlikely to be a “management failure” as such and/or the conduct of the corporation as a whole is unlikely to be regarded as gross if death occurred by reason of the acts of low level employee(s) acting contrary to their instruction or training. It follows that a test

which imposes liability for grossly negligent management failure (evidenced by serious breach of the corporation's health and safety duties) could, in practice, meet the Government's objective of a test that is neither *"limited to failures at director level nor so wide as to capture management failures exclusively at a low level."* There are a number of weaknesses in the concept of "senior manager", not least the inability of anyone to define it in a way which satisfies: again amendments currently afoot are seeking to have another go.

- **Exclusion of offence by individuals of aiding, abetting, counselling or procuring the proposed offence by clause 1(5).**

31. No individual (including directors and managers) can be criminally liable under the Bill. Under clause 1(5) (now clause 16!!), individuals are expressly excluded from liability for aiding, abetting, counselling or procuring the proposed offence. However, directors would still be potentially liable individually for breaches of health & safety legislation and for gross negligence manslaughter.

- **Rejection of proposal for individual offence.**

32. The Committee recommended that there should be an offence for individuals in a company who have contributed to the offence of corporate manslaughter. The Government rejected this proposal on the basis that legislation designed to tackle corporate liability is not well equipped to review additional individual liabilities. Further, there are particular problems with seeking to address this issue through current tests for secondary liability. The Government recognises the importance of strengthening individual responsibility and accountability for health and safety management and have asked the HSE to review the effectiveness of the existing legislation against individuals.

33. It was, I suggest sensibly, argued that such an offence would have been unfair to those persons involved in entrepreneurial activity. There is little justification in principle for singling them out and exposing them to the risk of a conviction of a

criminal offence in respect of acts or omissions that will otherwise not warrant a criminal conviction. If their acts or omissions are sufficiently serious and causative of the death they will undoubtedly be liable for one of the individual manslaughter offences or an HSWA offence – as Adrian will explain; otherwise they should not be in a different position from every other member of society.

34. Any conviction of a corporation for the offence of corporate killing, particularly a large company, will lead to serious repercussions and consequences for that corporation and for the relevant managers in any event. The adverse publicity and the attachment of stigma cannot fail but to have a consequential effect on the value and financial performance of that organisation and the prospects of those managers.
35. The Government has also abandoned earlier plans to make parent companies liable for the failings of their subsidiaries. A company within a group can only be liable for a death where it owes a direct duty of care to the deceased and the death was caused by failures of its own senior management.

- **Removal of Crown Immunity by clause 11.**

36. Clause 11 removes Crown immunity in relation to a number of Government departments listed in a schedule to the Bill. This is again controversial and certainly the House of Lords believed it did not go far enough. They have insisted that, for example, deaths in custody are covered by the offence.

(2) Duty of Care

- **Duty of care and clauses 3 and 4.**

37. The Select Committees proposed that the concept of duty of care in negligence should be removed from the draft Bill. They recommended that the offence should not be limited by reference to any existing legal duties but that an organisation

should be liable for the offence whenever a management failure of the organisation kills a person.

38. The Government has not accepted this recommendation, on grounds of unpredictability and lack of clarity. Clause 3 (now clause 2) of the bill builds on, but does not purport to change existing duties under statutory health and safety provisions and, under occupiers', manufacturers' and suppliers' liability provisions:

“A “relevant duty of care”, in relation to an organisation, means any of the following duties owed by it under the law of negligence—

- (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;*
- (b) a duty owed as occupier of premises;*
- (c) a duty owed in connection with—*
 - (i) the supply by the organisation of goods or services (whether for consideration or not),*
 - (ii) the carrying on by the organisation of any construction or maintenance operations,*
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or*
 - (iv) the use or keeping by the organisation of any plant, vehicle or other thing.”*

39. Clause 3(3) (now 2(3)) specifically provides that whether or not there exists a duty of care is a question of law, on which it is the judge who must make any necessary findings of fact.

40. This is likely to give rise to many difficult situations where the common law is not clear or there are no established cases in which a duty of care has been held to be owed in a comparable civil claim. In such cases it will be necessary to identify first whether there is a common law duty of care. The determination by the Judge as to the existence of a duty of care should take place in the absence of a jury.
41. Clause 4 (now clause 3) excludes the following duties from the ambit of 'a relevant duty of care', for the purpose of the offence:
- (a) Any duty of care owed by a public authority 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);
 - (b) Any duty of care owed in respect of things done in the exercise of an exclusively public function; and
 - (c) Any duty of care owed by a public authority in respect of inspections carried out in the exercise of a statutory function.

(3) "Gross" breach

- **Meaning of "gross" and clauses 1(3)(c) and 9(1)(b)**

42. The new offence states that the breach of the duty of care owed to the victim (which must be a duty of care owed in negligence) must be "gross." A breach of a duty of care by an organisation is a "gross" breach under clause 1(3)(c) (now 1(4)(b)), *"if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances."* Whether a breach of a duty of care is a "gross" breach falls for the jury to decide.
43. Clause 9 (now clause 8) requires a jury to consider whether there was evidence which showed that there had been breach of relevant health and safety legislation,

and if so: (a) how serious was the failure comply and (b) how much of a risk of death it posed.

44. A jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure to comply with relevant health and safety legislation, or to have produced tolerance of it. A jury may also have regard to any health and safety guidance that relates to the alleged breach or to any other matters they consider relevant.
45. An earlier draft of the Bill directed the jury to questions of senior managers' knowledge of the failure to comply with health and safety law or the risk of death. This was jettisoned, but does not prevent a defendant from raising the question.

(4) Causation

- **Causation**

46. When the Law Commission published its draft Bill on Involuntary Homicide in 1996, it included a specific clause dealing with causation. This stated that a management failure by a corporation *"may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual."* The Law Commission believed that such express provision was necessary in order to make it clear that the ordinary principles of causation for homicide were applicable to the corporate offence. Accordingly, a jury could find that a corporation's management failure was the cause of death despite an intervention by an individual, for example the deliberate failure of an unsupervised frontline operator. It was said that such a provision was necessary to ensure that the relevant management failure was not treated as "stage already set" and, therefore, not causally linked to the death.

47. The Government has not, however, made any provision addressing causation, because the common law has developed since 1996 sufficiently to hold, in appropriate cases, that conduct of this nature could be a cause of the consequences that flowed from it, even if these were more directly caused by another person (*Environmental Agency –v- Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22). It can be anticipated, therefore, that, notwithstanding any express provision in the legislation, cases where the management failure was a significant contributing cause of death could lead to conviction even if the act of an individual is the direct cause of death – unless that act was unforeseeable and unreasonable.
48. The new offence as set out in the draft Bill sought to detect and punish management failures which occur at a senior level within organisations. The aim was to focus on the working practices and ethos of a company rather than “*any immediate, operational negligence causing death, or...the unpredictable, maverick acts of [a company’s] employees.*”^{iv}

Sentencing

- **Sentencing Guidelines**

49. The Committees and the Government were united in welcoming the higher sentences given in recent cases by courts following convictions for high profile health and safety offences. The Government proposes that sentencing guidelines for corporate manslaughter will need to be produced by the Sentencing Guidelines Council to ensure sentences are set at the appropriate level. It is said that turnover may be relevant to sentencing but should not be an overriding factor.

- **Pre-sentencing Reports**

50. Further, it is agreed that Courts should have a pre-sentence report on companies before sentencing, which should include details of its financial status and past health and safety record.

51. The requirement to set out a company's financial status is different from health and safety cases, where, albeit there is no limit on the financial penalty imposed, the average fines have tended to be much lower and where a company's financial position is only usually taken into account if the company contends that it may be unable to meet a fine of a certain size. In other words the company has the choice of putting its financial status before the court – if it does not wish to, it does not have to.

- **High bar**

52. I have no doubt that the recent spate of high profile, high fine HSWA cases (Transco £15m, Hatfield £10m (reduced to £7.5m on appeal) and £3.5m, Ladbroke Grove £4m and £2m) are the tip of the iceberg. In HSWA cases the fines can be very high but can also be very low because those cases can be tried in Magistrates' Courts. So fatal health and safety incidents can lead to fines of a few thousand pounds. I think that is unlikely to happen in cases of corporate manslaughter, which will always be tried in the High Court. The bar will be set high and the fines will almost certainly be higher than those regularly imposed in HSWA cases.

- **Compensation orders**

53. The Government has also said that it should be possible for compensation orders to be made in appropriate circumstances under the existing law.

- **Remedial orders**

54. In addition to an unlimited fine, the Government proposed, in Clause 10 (now clause 9), that a court may make remedial orders against the corporate defendant. Such orders would be akin to enforcement and prohibition notices served by HSE under the existing health and safety legislation. Breach of any such remedial order would in itself be an offence and be punishable by an unlimited fine following conviction on indictment.

55. The remedial order clause of the Bill gives rise to concern. In relation to most accidents there is a need to ensure that any remedial orders are consistent with the strategy for improving safety across the industry. There would be a danger that a criminal court considering one aspect of the management of safety by one undertaking in that particular industry would be unaware of the impact of any remedial order on the activities of other industry operators and/or would be unaware of any advances in safety being made elsewhere.
56. By way of hypothetical example, assume that a drug manufactured by a respectable pharmaceutical company caused the death of an individual. Assume further that the manufacture of the particular batch that contained the offending drug was grossly negligent. It is not fanciful then to assume that a criminal court that has convicted that pharmaceutical company of corporate killing might make a remedial order regarding the manufacture of the drug.
57. Such a remedial order may in fact lead to a restriction or reduction in the production of the drug and that may cause harm to a large number of people. The merits of a remedial order in such circumstances would necessitate a complicated risk/benefit analysis which a criminal court may be ill-equipped to conduct.
58. Further if the court trying the criminal proceedings were to be made aware of the "*wider picture*" in all cases where a remedial order was proposed, there is a potential for serious delays to the conclusion of those proceedings and an escalation (and possibly a duplication) of costs.
59. Further, it is seriously doubted whether any judge would be truly competent to make such an order in a case involving complex industrial processes, or inter-relationships between a number of different dutyholders. The operation of the railways is an obvious example.

60. It is to be hoped that, as with the little-used power to make remedial orders under s. 42 HASWA 1974, the proposed sanction of remedial order under the draft Bill will be seldom deployed by the court.

- **Disqualification orders**

61. The Government has, however, shelved plans for the power to make disqualification orders as a result of a conviction for corporate manslaughter. Similarly, the original May 2000 reform proposals relating to disqualification orders for individuals with some influence on or responsibility for the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death was also jettisoned from the Bill.

62. Insofar as it is necessary to protect the public against subsequent acts of individuals whose activities are covered by the provisions of the Companies Acts, the courts already have a power to make an appropriate disqualification order. Under the Company Directors Disqualification Act 1986, the court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management or liquidation of a company.^v Such liability would attach to an individual convicted even under existing legislation, such as section 37 of HASWA 1974.

- **BRE proposals**

63. Further, it has been confirmed that the review of existing penalty systems for regulatory offences to be carried out by the Better Regulation Executive will be broadened to consider the wider application of innovative sanctions. Adrian will consider these proposals further.

64. An example of an innovative punishment, can perhaps be seen in the House of Lords proposed amendments, which include power to make order requiring the convicted defendant itself to publicise the convictions and sentence – what they have called a “publicity order”.

Discussion

- **Will proposals help?**

65. The question of corporate accountability has been the subject of much publicity and debate in relation to accidental fatalities and this is understandable. The new Bill contains much that is to be welcomed, particularly with regard to the absence of the identification principle.
66. There is, however, arguably, rather too much in the draft Bill which focuses the mind on the consequence of a failure. This could lead to activity designed to give the impression of good safety management by the creation of audit trails for the prime purpose of exculpation. It was to have been hoped that the primary focus of the proposals for change to the law of manslaughter would have been to improve safety. The principles of retribution and deterrence are secondary. With that in mind, the refusal to create offences relating to individual directors or managers in relation to the new offence is to be commended.
67. The danger of over-emphasising the criminal consequences of mistakes was considered in a report published by the department of health entitled “*An organisation with a memory*”. The purpose of this report was to learn lessons from adverse events in the NHS. The authors of that report correctly identified the need to move away from a blame culture if appropriate lessons are to be learned and if safety is to become paramount. The following passage comes from the executive summary to that report under the heading of “*Evidence and Experience*”

“7. When things go wrong, whether in health care or in another environment, the response has often been an attempt to identify an individual or individuals who must carry the blame. The focus of incident analysis has tended to be on the events immediately surrounding an

adverse event, and in particular on the human acts or omissions preceding the event itself.

It is of course right, in health care as in any other field, that individuals must sometimes be held to account for their actions - in particular if there is evidence of gross negligence or recklessness or of criminal behaviour. ...

Activity to learn from and prevent failure therefore needs to address their wider causes. ...

It is possible to identify a number of barriers that can prevent active learning from taking place, but there are two areas in particular where the NHS can draw valuable lessons from the experience of other sectors.

Organisational culture is central to every stage of the learning process - from ensuring that incidents are identified and reported through to embedding the necessary changes deeply into practice. There is evidence that “safety cultures”, where open reporting and balanced analysis are encouraged in principle and by example, can have a positive and quantifiable impact on the performance of organisations. “Blame cultures” on the other hand can encourage people to cover up areas for fear of retribution and act against the identification of the true causes of failure, because they focus heavily on individual actions and largely ignore the role of underlying systems. ...

Reporting systems are vital in providing a core of sound, representative information on which to base analysis and recommendations. Experience in other sectors demonstrates the value of systematic approaches to recording and reporting adverse events and the merits of quarrying information on “near misses” as well as events which actually result in harm...”

- **Progress**

68. The Government has repeatedly promised that this Bill will be enacted. To date those promises have been empty. Having now got through the Lords and concessions having been made it is more likely than ever that some form of legislation introducing a new offence of corporate manslaughter will be on the statute books within the next 12 months.

What to do?

- **Steps to take.**

69. The following steps are recommended for industry players in preparing for implementation of the legislation:

- (a) Seek advice on duties / regulations;
- (b) Determine who might qualify as a senior manager and determine their competency;
- (c) Review Job titles to reflect the seniority of the role;
- (d) Review H&S polices for SMART objectives;
- (e) Enhance / increase H&S training for managers;
- (f) Enhance / increase Board scrutiny of H&S compliance;
- (g) Implement an accident management protocol (if not already implemented), with an H&S specialist lawyer to advise on all matters arising from incident from day one.

Further Information

- **HSE:** www.hse.gov.uk

- **Centre for Corporate Accountability:** www.corporateaccountability.org

- **Institution of Occupational Safety and Health:** www.iosh.co.uk

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ⁱ The companies prosecuted were Nationwide Heating Services Ltd. in July 2004, Telgarrd Hardwoon (UK) Ltd. in February 2003, Dennis Clothier and Sons in October 2002, English Brothers Ltd. in August 2001, Jackson Transport (Ossett) Ltd. in September 1996 and OLL Ltd. in November 1994. These figures are taken from the Government's regulatory impact assessment of the new draft Bill, March 2005.

ⁱⁱ R v Adomako [1994] 3 All ER 79

ⁱⁱⁱ Attorney General's Reference (No.2 of 1999) [2000] QB 796

^{iv} Para 26, Introduction to the draft Bill, March 2005

^v Section 2 (1)