The Royal Academy of Engineering

RESPONSE TO THE HOME OFFICE

CORPORATE MANSLAUGHTER: THE GOVERNMENT'S DRAFT BILL FOR REFORM

Memorandum submitted by
The Royal Academy of Engineering

June 2005

Introduction

The Royal Academy of Engineering is pleased to respond to the Government's draft Corporate Manslaughter Bill. Within the draft Bill are several areas of particular relevance to Fellows of The Academy which have been highlighted. The Academy's response is given below.

On the whole, the draft Bill was well received by The Academy. The majority of those who responded felt that the draft Bill was an improvement on existing legislation and that any corporation which already takes health and safety matters seriously should have little to fear from it. Some strong opinions were expressed that corporate manslaughter cases should be brought against the body corporate and not individuals, as should any penalties.

There were however some individuals who were unsure as to the need for such legislation. The objections raised covered two main points:

Firstly, there is already extensive legislation governing health and safety in British industry and it was suggested that this draft Bill is simply an attempt to pander to public sentiment. Any attempt to change the law in this area should involve a more wholesale review of all health and safety legislation with a greater emphasis on education and personal responsibility rather than the allocation of blame.

Secondly, this draft Bill will have little or no effect as any situation where it might apply will already be covered by existing health and safety legislation. However, this may not be the case if the fines imposed were significantly higher than those imposed due to a breach of the Health and Safety at Work Act. For this reason it was felt that it would useful if the Government were to produce draft sentencing guidelines for the draft Bill.

The need to include the second sentence of section 4.3 was questioned as it is a fundamental tenet of the English criminal justice system that underlying facts should always be a question for the jury and not for the judge. For a judge to rule on underlying facts relating to the duty of care when they inevitably consist wholly or partly on the facts of the case before the court could potentially deny the defendant some of the basic human rights.

Comments on specific questions

Sections 25 – 31: Management Failure by Senior Managers
The heart of the new offence lies in the requirement for a management failure on the part of its senior managers … 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 … The definition then requires the person to play a "significant" role … 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 … 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 … 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 organisation's activities and playing a significant role in such management responsibilities, as illustrated above, strike the right balance.

The aim of such a Bill should be to embrace both those who define the company's policy and those who have to ensure that it is followed i.e. those playing a "significant role". The definition of a senior manager in the draft Bill does, on the whole, strike the right balance. There is however some concern that difficulties could arise in certain situations. For example, in the case that a single, maverick senior manager is at fault it is unclear as to whether it would then be the individual or the organisation that would be liable.

It is possible that an individual may have a directing role within a company but not be formally recognised as such. Hence, the seniority of the individual in the organisation was raised in questioning the concept of a "significant role" in the management of the organisation. It was argued that the correct test should be aligned to the concept of directorship and of de facto or "shadow director", being an individual with whose instructions or directions the directors of a company are accustomed to act, as laid out in the Companies Act 1985 S741(2).

Overall the Draft Bill rightly seeks to lay the blame with senior management but when the failure occurs at a relatively junior level it may be difficult to prove this in a criminal court.

Sections 32 and 33 – Gross Breach and Statutory Criteria

The new offence is targeted at the most serious management failings that warrant 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.*

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*** *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.*

The terms 'gross failure' and 'falls far below what can reasonably be expected' are both considered to be sufficiently adequate. Although they are somewhat subjective, the consensus of opinion is that they are already well understood and that any remaining uncertainty will be clarified by case law.

The range of statutory criteria is also felt to be adequate and that any attempt to write exhaustive criteria would not be comprehensive and may lead to technical acquittals, although some definition of best practice, by sector, could prove useful. It was also thought important that there should be a focus on demonstrating that appropriate processes are in place to manage Health and Safety issues.

Section 37 – Corporations

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 proposal to make a parent company liable to prosecution is, on the whole, acceptable. If the parent company ignores the behaviour of a subsidiary, or even pressurises it to cut corners, the parent company is as much the cause as if it had been the senior manager. There are, however, two main concerns as regards this section of the draft Bill.

Firstly, that the parent company only be held liable when they are 'directly' to blame for a cause of death. This distinction is already in the Bill but must be emphasised. It is important that the management of any subsidiary company are aware that they themselves have a duty of care to their employees and clients and hence may be liable to prosecution.

Secondly, that this clause should not be used merely to access the funds of the parent company or allow 'double recovery'.

Sections 38 – 40: The Crown

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 … it is 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.

The question of whether the Armed Services should be subject to the draft Bill received a variety of responses. Generally it was felt that the draft Bill should not interfere with the Armed Forces' ability to carry out their functions effectively. However, in training situations they should not be allowed to let their health and safety standards fall below what would be reasonably expected of any other body.

For this reason the majority of Fellows considered it appropriate for the Armed Services not to be excluded from the draft Bill when carrying out training exercises as they owed a duty of care to the public in these situations.

A small number of respondents thought that there is already enough legislation in place without further restricting the Armed forces while others felt that specifically excluding the Armed services was unnecessary and that each case could be dealt with on its own merits.

The definition of "exclusively public function" in section 4.4 of the draft Bill seems ambiguous and uncertain. It is thought illogical to argue that these public functions are subject to other legal regimes; the companies who are liable under the draft Bill are also subject to the Health and Safety at Work Act and the common law. Applying the draft Bill to either the Armed Services or public functions such as prisons would not conflict with democratic accountability. The decision to allow activities to be managed in a way that falls far below a reasonable standard and which results in death should be judiciable.

Sections 45 - 46 – Punitive Sanctions

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.

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.

The proposal that the Bill should not pursue new sanctions against individuals is generally supported. The intention begins to duplicate that which already exists under existing law relating to a director failing any aspect of statutory duty. Also, it is felt that if this was the case it may lead to corporations being overly risk averse and encourage management to conceal the facts.

The Bill is designed to deal with corporate failings and as such should encourage organisations as a whole to put in place the proper procedures and resources to ensure the health and safety of its employees and clients. The Bill should also be primarily concerned with finding out what went wrong in the case of a fatality and preventing future similar failings. Any singling out of an individual within a corporation may simply provide a scapegoat and prevent either of these objectives being fulfilled.

It is however of some concern that the Bill may indirectly lead to individual prosecutions. In the case where a Corporate Manslaughter charge is upheld, this will clearly provide strong evidence for action against the individual senior managers under Section 7 of the Health and Safety at Work Act.

Section 57 – Investigation and Prosecution
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.

As regards investigation and prosecution there is some conflict of opinion. The majority of Fellows believe, some strongly, that the HSE and police should be responsible for investigation and that prosecution of any offences should be handled by the CPS. This will leave the HSE free to concentrate on improving health and safety standards within industry and public life rather than getting involved in individual prosecutions. Others believe that, given the potentially complex nature of the offence, the HSE enforcing agencies should have authority as they have more expertise in this area that the CPS or the police.

Although there is some discrepancy in the views of Fellows on this question it is clear that the final Bill should be clear and consistent on this matter in order to remove any conflict of interest between the relevant bodies.

Section 62 – Costs

… 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 (regulatory impact assessment) in the light of comments on the draft Bill and would welcome further information from respondents on potential costs.

The question of costs was deemed relatively unimportant by most respondents. On the whole it was felt that any reasonably competent company should already have sufficient health and safety measures in place and hence not incur any further costs.

If further regulation is deemed necessary then efforts should be made to mitigate the effect by simplifying and removing unnecessary regulation.

Submitted by:

Mr P Greenish CBE
Chief Executive
The Royal Academy of Engineering
29 Great Peter St
Westminster
London
SW1P 3LW
Tel: 020 7227 0501

Prepared by:

Dr Alan Walker
Policy Advisor
17/06/05