



The manufacturers' organisation

EEF Response to Home Office Consultation on Draft Corporate Manslaughter Bill

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**Consultation
Response**

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ABOUT US

EEF, the manufacturers' organisation, has a membership of 6,000 manufacturing, engineering and technology-based businesses and represents the interests of manufacturing at all levels of government. Comprising 11 regional Associations, the Engineering Construction Industries Association (ECIA) and UK Steel, EEF is one of the UK's leading providers of business services in health, safety and environment, employment relations and employment law, manufacturing performance, education, training and skills.

EXECUTIVE SUMMARY

EEF welcome the draft Bill on Corporate Manslaughter as the culmination of a protracted period of work. We support the need to modify the law so that it is easier to hold organisations accountable where gross negligence results in a fatality. We also support the assertion that a prosecution under this Bill would only be appropriate in the most serious of cases, and that it is intended to supplement rather than replace actions under established health and safety legislation. Consequently the proposed legislation is likely only to give rise to a handful of cases each year.

The explicit exclusion of individual liability is a key strength of the draft Bill, focussing attention on the corporate nature of the offence and so allowing action only against the legal entity. This addresses a key weakness of existing legislation namely the so called *identification principle*. Additionally the commentary to the draft Bill suggests that corporate liability should not result where an individual has intervened in the chain of events in an extraordinary fashion. This provision should be formalised within text of the Bill.

EEF members do have a number of concerns associated with the detail of the draft Bill, namely:-

- The limitations of the definition of a Senior Manager
- The effectiveness of the statutory criteria for evaluation of the breach of a duty of care
- Reference to guidance published by the enforcing authority as a benchmark for acceptable performance
- Inclusion of provision for remedial orders

The application of the draft Bill to Crown Bodies is welcome, particularly as this will ensure a level playing field with private sector organisations engaged in PFI initiatives and the delivery of statutory services. However this application should extend to cover all crown bodies, including quangos.

Financial penalties are entirely appropriate for this offence, although the Bill should include some definition around the scale of these. Our members feel that it is appropriate for crown bodies and the private sector to be treated equally in terms of sentencing.

EEF members feel that it will be essential to ensure that a code of practice document is produced to provide an appropriate level of commentary and definition of this legislation for the business community.

INTRODUCTION

EEF have participated actively in this consultation process and welcome the publication of this Draft Bill as the culmination of previous efforts.

In our response to the previous consultation document we expressed our support for a change in the law which will make it easier to hold undertakings properly accountable for deaths in the workplace, which arise as a result of gross negligence. At the time we raised a number of concerns related to specific aspects of the government's proposals, and we are pleased to see that the new draft Bill has addressed some of these.

We welcome assurances in the commentary to the draft Bill that this offence is intended to cover only the most serious of cases. However, there is a fine line between implementing legislation which will make it easier to hold organisations to account and ensuring that the provisions of the legislation are such that it will apply in only the most serious of cases. If this finely balanced position is to be achieved, the definitions and the tests set out in the legislation must be specific and precise, and we do not feel that the draft Bill achieves this objective

CORPORATE LIABILITY

1. EEF members welcome the exclusion of individual liability from this draft Bill and the consequent application of the offence only to the corporate entity. This is a key development in the evolution of the legislation and a primary strength of the draft Bill. We acknowledge that this clause is not universally popular, but urge the government to remain firm in its position. The 'corporate' nature of this Legislation can only be maintained through the application of accountability to the legal entity of the organisation, without specific offences for individuals or officers. There are existing provisions for individuals to be held to account, where appropriate, through the wider offence of Gross Negligence Manslaughter.

MANAGEMENT FAILURE

2. The principle that the offence should be linked to the way in which an organisation's activities are managed or organised, is one which we support. EEF advocate good, proactive management of health and safety as an essential element of a successful business. This concept is widely accepted in the business community. It will, however, be essential to ensure that this test does not focus merely on the way in which processes are documented, but also on the custom and practice of the organisation. Investigations must take account of the whole reality of each situation beyond whatever might be recorded in systems or procedures. This will ensure that culpable organisations cannot hide behind their paperwork, but on the other hand will ensure that organisations are not deterred from producing written procedures by any perception of increased liability.
3. It will be necessary to ensure that cases can only be brought against an organisation where there has been a fundamental failure of the management system, and not where an individual manager 'on an excursion of their own' has operated outside of the established management system. The commentary to the draft Bill suggests that corporate liability should not result where an individual has intervened in the chain of events in an extraordinary fashion. This provision should be formalised within the Bill.

SENIOR MANAGEMENT

4. Responsibility for such a fundamental failure should lie at a senior level within a business. However the definition of a Senior Manager set out in the draft Bill focuses at a very high and strategic level of management, making decisions about how the whole or a substantial part of the organisations activities are managed or organised, or actually managing or organising the whole or a substantial part of those activities.
5. Modern corporate structures are typically flat so there are very few people operating at such a level. Beneath these strategic individuals in the structure there can be a large number of other managers with decisive responsibility for a smaller section of the business. In a situation like this, where targets are set at strategic level, but implementation systems are decided locally, the local management team could be in a position to commit an offence that ought to be covered by this legislation. However they would be unlikely to be covered by the definition as set out in the draft Bill. This definition should be reviewed to ensure that it encompasses all managers who have the freedom to act in a decisive manner within an organisation, however we are anxious to avoid devolution of accountability in highly systemised businesses where all aspects of operation are decided at a strategic level.

GROSS BREACH

6. In our response to the previous consultation, we expressed concern about the interpretation of the test *'conduct falling far below what can reasonably be expected'*. The draft Bill introduces a set of statutory criteria which, whilst not tests in themselves, set out areas which should be considered by the Jury in assessing an organisation's conduct. The criteria refer to health and safety legislation and guidance issued by the enforcing authorities as a measure of performance. We feel that this represents a significant change in status as most health and safety guidance documents currently have no legal standing, and employers are under no obligation to follow them. Consequently we feel that these criteria should refer only to compliance with health and safety legislation and Approved Codes of Practice.
7. The criteria will require juries to consider whether senior managers knew or ought to have known that the organisation was failing to comply with legislation, whether they knew or ought to have known that such a failure could result in death or serious injury, and whether they sought to cause the organisation to profit from that failure.
8. This seems to move away from consideration of 'negligence', which would imply a failure to effectively ensure health and safety, into the realms of a deliberate and calculated disregard for life in favour of material gain. We do not believe that this meets the intent of the draft Bill, and would therefore suggest that the Government consider adopting instead the defining criteria proposed by the Law Commission in earlier consultation, and direct the jury to consider:-
 - Likelihood and possible extent of harm
 - Cost and practicability of taking steps to eliminate or reduce the risk of harm

9. We believe that it would be more meaningful and effective to assess the 'reasonableness' of an organisation's conduct in this way, by considering the likelihood of harm in line with the principles of risk assessment, the practicability of addressing the risk in line with health and safety legislation, then benchmarking actions against compliance with legislation and established good practice.

DUTY OF CARE

10. We agree that part of the test should involve breach of an established duty of care owed by the organisation to the deceased and we feel that the circumstances of such a duty, as set out in the draft Bill are appropriate. We also support the requirement in the Bill for the Judge to define this relationship for the jury as it is defined in law.
11. The commentary to the draft Bill suggests that holding or parent companies may also be subject to proceedings under this legislation. However we feel that it may be difficult to establish duty of care in this situation and would welcome further information and guidance on this matter.

APPLICATION

12. We support the application of this legislation to all Corporations, however they are incorporated. We also welcome the position on the Crown, and agree that it is wholly appropriate for the Bill to apply to crown bodies as if they were incorporated as this creates a level playing field for public and private sector organisations.
13. We accept that certain public policy functions carried out by, or on behalf of, the Crown are effectively regulated under statute or Royal prerogative, and will therefore be outside the scope of the legislation. We do however have some concerns about the schedule to the regulations which lists a limited number of named crown bodies which would be subject to the legislation. The draft Bill should apply to all crown bodies, including quangos, and any list should be for indicative purposes only and not exhaustive, as there are regular reorganisations of such bodies and any exhaustive list would quickly become out of date. We see no reason why this should not be the case and urge the Government to demonstrate its commitment to the accountability of crown bodies by ensuring that the legislation is universally applicable.
14. We welcome the inclusion of a clause in the draft Bill which requires the consent of the Director of Public Prosecutions before the instigation of any proceedings under the draft Bill. We feel that this will ensure that the legislation cannot be used inappropriately when the defined tests are unlikely to be met. and that proceedings can only be brought when there is a real possibility of securing a conviction. Further to this point, we understand that in cases where three or more years have elapsed between the causative management failure and the death, proceedings could only be brought with the consent of the Attorney General and would be subject to a public interest test. We feel that this is a sensible control to impose on cases where there is a long latency period, such as those involving occupational ill health.

REMEDATION

15. In our response to the previous consultation we expressed our concern over the inclusion of a remediation clause with this legislation. We are concerned to see that these proposals are largely unmodified in the draft Bill.

16. It can take many months to bring complex proceedings against a corporate entity to court. In our opinion the situations which led to the breach that forms the basis of the case should be dealt with expediently as soon as they have been identified, in order to prevent any potential reoccurrence and ensure effective management of health and safety.
17. The draft Bill identifies that HSE will work with the Police on any investigation which might give rise to proceedings under this Legislation. HSE Inspectors have a range of enforcement powers open to them, such as improvement and prohibition notices, and we feel that these should be utilised to address non-compliant situations long before proceedings are brought to court.
18. If this is the case then the provisions for remediation within the draft Bill would represent needless duplication, and we therefore recommend that these be removed in line with the principles of better regulation. If however the provision is to remain in the Bill, then we would urge the Government to draw up guidance for sentencing. This should ensure that orders made under the provision are proportionate, relevant, practicable and in harmony with the other obligations and responsibilities placed on an organisation.

CONCLUSIONS

19. We feel that this draft Bill represents a welcome development in the process of legislation, however there are a number of issues which we feel should be addressed before this draft becomes law.
20. This is a complex area of law which is of concern to business organisations, and we feel that it would be essential to supplement legislation with a Code of Practice document that would set out the steps necessary to mitigate liability in a responsible manner. We feel that this would provide great reassurance to the majority of organisations which do operate their businesses in a responsible fashion and take all reasonable steps to ensure the health and safety of anyone likely to be affected by their undertaking. It would also limit any potential for unscrupulous exploitation of business concern for material gain by consultants or service providers.
21. EEF members accept that there is a need to change the law in order to effectively hold organisations to account where fatalities occur as a result of workplace activity, however they are keen to ensure that such legislation does not impose additional duties, burdens or concerns on responsible businesses. We feel that this draft Bill has gone a long way to addressing these points, but would urge the Government to give further consideration to the areas outlined above before enacting the Bill.