

No real convictions

One of the last acts of Labour's second term in government was to publish the very long awaited draft corporate killing bill. David Bergman, director of the Centre for Corporate Accountability, says the draft falls short in several crucial respects – not least the omission of new directors' safety duties carrying the real prospect of a jail term.

It has been so long in coming that it is difficult not to welcome its arrival – but the publication by the government of a draft corporate manslaughter bill has to be treated with a good deal of caution.

The bill does create a new homicide offence that should make it easier to prosecute companies: In contrast to the current situation, a company would under the new offence be liable to prosecution even where there is no evidence to prosecute a single director or senior manager. This should make it easier to prosecute at the very least medium-sized companies for a homicide offence.

And it would not just be companies that would be liable to prosecution for corporate manslaughter. The government's bill would for the first time allow action against Crown bodies – including departments of government.

However, there are a number of reasons why the bill needs to be considered with great care and also to recognise some inherent limitations of the proposed reforms.

The new offence does not just require very serious management failures – it requires

that these failures be the responsibility of *senior managers*. And the definition of a senior manager is restrictive – it says a person is only a "senior manager" if they have a "significant" role over at least a "substantial" part of the organisation's activities – making prosecution impossible in cases where one would expect it.

The larger the company, the harder it will be to prosecute – which is exactly the opposite of what was supposed to be the purpose of the offence and the bill. The bill's focus on senior management may also motivate large companies to delegate responsibilities down the management chain.

And whilst it will be possible to prosecute Crown bodies, there are some significant exemptions. Deaths resulting from "policy making decisions" of public bodies, for example, will not result in prosecutions, however grossly negligent the conduct of the senior managers involved may have been.

Gross injustice

Another concern is the evidence required to prove an organisation has acted with "gross negligence." The draft bill proposes that a jury, in assessing the conduct of the company, must consider

whether senior managers "sought to cause the organisation to profit from that failure" which could be very difficult to prove. Furthermore, a lack of care on the part of senior managers should, if serious enough, merit action regardless of a profit motive.

Nor does the proposed bill allow for the prosecution of directors; nor does it make it any easier to hold them to account. In 2000, the government suggested in its first consultation document on corporate killing there should be an additional offence which would allow a senior company officer to be prosecuted for "contributing" to the offence committed by the company.

The government has now done a u-turn. The new bill does not address at all the current lack of accountability of company directors. The reasons why the government

COULD THEY CARE LESS?

The average fine for a health and safety offence was £9,858 in 2003/04 (*Hazards* 89). But even the rare larger fines – only 16 so far have broken the £400,000 mark and only four have topped £1 million – hardly dent the profits of larger firms.

British Sugar was fined £400,000 in February 2005 for safety offences relating to the death of Lorraine Waspe. Its parent company, Associated British Foods, made an operating profit of £478 million in 2004. Co-defendant VM Plant Ltd was fined £250,000 but has gone into liquidation so it is unlikely the fine will be paid.

BAE Systems was fined £250,000 in November 2004 after its safety failings led to the death of contract welder Billy Farrell. BAE made a £453 million profit in 2003.

Balfour Beatty Rail Infrastructure Services Ltd (BBRIS) was fined £150,000 in October 2004 on charges relating to the death of casual labourer Michael Mungovan, who an inquest had earlier judged to be a victim of "unlawful killing". Parent company Balfour Beatty Group Ltd made pre-tax profits of £130 million in 2003.

Sunlight Services Group Ltd was fined £325,000 in July 2004 for offences related to the death of employee Paul Clegg. The company made a pre-tax profit in 2003 of £29.6 million.

RMD Kwikform Ltd was fined £100,000 in May 2004 for safety offences related to the death of Mark Warrallo. The company made an operating profit of £7.9 million in 2002. In November 2002 the company received a £240,000 fine for safety offences.

Construction company Wates was fined £150,000 in March 2004 for safety offences related to the death of sub-contractor employee Indergit Singh. The company made a pre-tax profit of £7.4 million in 2002.



Photo: Alan Dalton

CALL THEM TO ACCOUNT!

The draft bill has been published for comment. Responses should be sent by 17 June 2005 to: The Corporate Manslaughter Bill Team, Home Office, Fry Building, 2nd Floor, 2 Marsham Street, London SW1P 4DF. Email: corporatemanslaughterbill@homeoffice.gsi.gov.uk

once thought there should be increased accountability of directors have now been ignored. Only 11 directors have ever been prosecuted for manslaughter, all from small firms. Under the new proposals, directors of large companies will retain what amounts in practical terms to an immunity from prosecution except in the most exceptional cases (pages 8-9).

Possible penalties

Under the draft bill, the only real penalty the courts can impose on a guilty organisation is an unlimited cash fine. Large fines can be devastating for small firms – a cash crisis could impact on their staff too – but are unlikely to trouble major companies unduly unless they are fixed at a level previously unheard of in Britain.

The government has still

not given any consideration to equity fines, which require companies to issue shares that then go into a compensation fund and which do not hit the cash reserves of a company but do affect its value. Nor has it considered adverse publicity orders, which require companies to advertise their conviction, a measure which could seriously harm a firm's reputation. All these measures have been supported by the TUC (*Hazards* 87).

The issue of fines is also pertinent to the sentencing of Crown bodies. What is the point to fining Crown bodies – when the penalty simply returns into the pocket of the Treasury? On this point at least the government is open to suggestions of alternative forms of sentence.

And the bill only deals with grossly negligent con-

duct causing deaths but not serious injuries, leaving a serious accountability gap. The new offence will also have no impact on most deaths resulting from industrial diseases where the culpable conduct took place a long time ago and where the responsible company may no longer exist. The asbestos cancer mesothelioma alone, for example, kills 1,800 in the UK each year.

This is not the bill that campaigners wanted. There are indications it has been watered down to indulge business concerns. The Centre for Corporate Accountability will be seeking a greater consideration of the concerns of the victims of business negligence.

CCA website: www.corporateaccountability.org

TUC/CCA corporate manslaughter bill conference, 13 June – see page 29.

A QUESTION OF GUILT

The publication of a draft manslaughter bill comes after eight years of delays. The government's decision to target companies but not their directors has caused some consternation.

Commenting on the 23 March announcement by Home Secretary Charles Clarke, TUC general secretary Brendan Barber said: "The TUC recognises that the draft bill covers a number of complex areas and we are pleased that the government has agreed that the legislation should apply to Crown bodies, but are disappointed that the draft bill does not threaten individual directors with the ultimate sanction of a jail sentence."

Unions Amicus, TGWU and UCATT and campaign group the Centre for Corporate Accountability all called for new directors' duties (page 9) – no-one will face jail under the proposals, but companies could face an unlimited fine.

The bill has also been criticised for setting the bar too high, restricting corporate manslaughter to circumstances where someone has been killed because a company's senior management "grossly fails to take reasonable care for the safety of employees or others." A jury must also consider whether or not senior managers "sought to cause the organisation to profit from that failure".

A TUC briefing says it will be calling on the government to include directors' duties in the corporate manslaughter law or related measures, and says a range of innovative sentencing approaches should be considered to cut the death toll at work from its current unacceptable level of five a week. These include corporate probation and more innovative financial penalties (*Hazards* 87).

Safety officers' professional body IOSH said the draft bill "doesn't go far enough," adding "the test applied for establishing gross management failure should not be dependent on proving the organisation sought to profit from the failure to comply with health and safety requirements."

Draft corporate killing bill – TUC briefing, available on the TUC website: www.tuc.org.uk/h_and_s/