

The Corporate Manslaughter and Corporate Homicide Act 2007 and Human Rights, Part I: has universal legal protection of the right to life been advanced?

ABSTRACT

Article 2 of the Human Rights Act 1998 not only provides for the state to protect life, but also requires the investigation of suspicious deaths and deaths in custody. In 2008, the creation of a statutory offence of corporate manslaughter by the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 was broadly welcomed as a long-overdue opportunity for Parliament to enable successful prosecution of corporate offenders. It was hoped that this new statutory regime might provide justice to families of victims lost in terrible incidents, or where a prisoner died in custody, as well as also protecting life by providing an effective deterrent. Ten years on, this paper considers to what extent the CMCHA has met expectations, and provided a tool for advancing human rights.

Introduction

Article 2 of the Human Rights Act (HRA) 1998 not only provides for the state to protect life, but also requires the investigation of suspicious deaths and deaths in custody. Similarly, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950 unequivocally declares that: “Everyone’s right to life shall be protected by law”.¹ The protections afforded under the latter comprise three main duties: a duty to refrain from unlawful killing; a duty to investigate suspicious deaths, and; in certain circumstances, a positive duty to prevent foreseeable loss of life.

Long before both the ECHR and HRA were created, the offences of murder and manslaughter were key features of criminal law both in the UK, and globally. The criminalisation of these acts has served to protect life both symbolically - by upholding the sanctity of human life – and practically, the threat of a conviction and punishment acting as a powerful deterrent. The question to be considered here is to what extent the law in the UK has provided universal legal protection for the right to life where organisations, as opposed to individuals, are responsible for the unlawful deaths.

In 2007, the Corporate Manslaughter and Corporate Homicide Act² (CMCHA) was passed creating a new statutory offence of corporate manslaughter³. A long time in the making, the Act was the product of public outcry after corporations escaped criminal liability for several deadly incidents involving employees, members of the public, and those held in detention and at its inception, the Act was embraced as ushering in a long overdue era of statutory corporate accountability.⁴

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, Article 2(1).

² The offence is called corporate manslaughter in England, Wales and North Ireland and corporate homicide in Scotland.

³ The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 1) Order 2008 (SI 2008 No. 401 (C. 15)).

⁴ J. Gobert, ‘The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but Was It Worth the Wait?’ (2008) 71 *M.L.R.* p.413 (explaining that a corporate homicide act was first recommended in a Law Commission report dating from the mid-1990s).

The CMCHA created a homicide offence specifically aimed at corporate entities, the primary purpose of which was to overcome the problems that had for decades plagued common law corporate manslaughter prosecutions. The Act was designed to complement the existent common law, and, by removing doctrinal barriers, significantly broaden corporate criminal liability. It was anticipated that this would increase the number of convictions for corporate manslaughter, in turn acting as an effective deterrent to lax health and safety practices, and thereby provide greater protection for workers as well as members of the public; justice would finally be served to families of victims lost in terrible incidents like the Grenfell fire, or where a prisoner hanged himself in his cell⁵, or a foreign national died while being deported⁶ such as Jimmy Mubenga,⁷ an Angolan deportee who died after being restrained by G4S guards on a British Airways plane scheduled to fly to Angola.

The CMCHA came into force on 6 April 2008⁸, with the exception of the provision relating to liability for death in custodial institutions which was brought into force over three years later, on 1 September 2011⁹. While broadly welcomed as a long-overdue opportunity for Parliament to capture corporate criminal liability, the Act was not without its critics. Indeed, many of those pro-regulatory organizations who had campaigned most vehemently for the law were highly critical of the form in which it was ultimately passed¹⁰. As the Bill passed through to enactment, for example, Families Against Corporate Killers - a group of families bereaved by work-related death - were scathing of its omission of directors' duties, its reference to senior management, and the limited range of penalties available on convictions¹¹.

Ten years on, this paper considers to what extent the CMCHA has enabled successful prosecution of corporate manslaughter cases and met expectations for increased universal legal protection of the right to life. Part I of the paper will consider the CMCHA has served as a vehicle for the government to comply with its duties under the Human Rights Act 1998 and the European Convention on Human Rights 1950, or whether the reservations expressed at the time have proved to be well founded. Part II will focus on the provisions relating to deaths in custody and assess to what extent the Act has acted as a means for protecting vulnerable detainees and inmates.

⁵ CMCHA 2007, Section 2 (1) (d) applies to all deaths in police custody suites, as well as prison cells, mental health detention facilities, young offenders institutions, immigration suites and Ministry of Defence institutions.

⁶ 'Persons held in detention or custody', includes being held or transported under immigration or prison escort arrangements CMCHA 2007, s.2 (2).

⁷ On 12 October 2010 Mr. Mubenga lost consciousness while the British Airways flight was on the runway at Heathrow. He was taken to hospital, where he was pronounced dead.

<http://www.guardian.co.uk/uk/2010/oct/14/security-guards-accused-jimmy-mubenga-death?INTCMP=ILCNETTXT3487> [Accessed 8.12.18].

⁸ The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 1) Order 2008 (SI 2008 No. 401 (C. 15)).

⁹ The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 3) Order 2011 (SI 2011 No. 1867 (C. 69)). Implementation of the clause covering custody deaths was delayed in order to give police forces and prisons time to inspect their custody facilities and make sure they were up to standard.

¹⁰ Liberty *Corporate Manslaughter and Corporate Homicide Bill: Liberty's briefing for Second Reading in the House of Lords*, Dec 2006. <https://www.libertyhumanrights.org.uk/.../corporate-manslaughter-bill-second-reading-commons-pt-1> [Accessed 15.01.19].

¹¹ Families Against Corporate Killers (2006) *News Release*, available at <http://www.hazardscampaign.org.uk/fack/news/corporatemanslaughterbill.htm> [Accessed 15.01.19].

Context

Work based fatalities are a significant cause of premature death in the United Kingdom, outflanking virtually all other recorded causes of premature death. According to the latest report by the Health and Safety Executive, a total of 144 workers were killed at work through a work place injury in Great Britain in 2017/18, and 100 members of the public as a result of a work-connected accident.¹² When premature deaths due to occupational disease are factored in, this figure jumps to a shocking 15,000¹³ - and by some estimates, may even be as high as 50,000¹⁴. By comparison there are ‘merely’ 500 murders and 2000 road traffic fatalities on average per year. These figures do not include deaths caused through non work-related incidents, such as the high profile cases discussed below, or the deadly Grenfell fire in 2017 that claimed 71 lives¹⁵.

Prior to 2007, securing a corporate manslaughter conviction under the common law was a challenging enterprise. Corporate culpability was almost invariably founded upon the offence of gross negligence manslaughter but this was beset with problems. Firstly, problems arose because of the inherent difficulties in imposing criminal liability on an artificial legal body: a corporation may be vicariously liable for the negligent acts and omissions of an employee during the course of his employment¹⁶ but the courts ruled that the principle of vicarious liability does not extend to manslaughter. Instead, the courts drew upon the ‘identification principle’¹⁷ - which operates on the basis that a body corporate is imputed with the physical being and will of its directing mind.¹⁸ In relation to the offence of involuntary manslaughter a corporation's guilt could only be established if it was possible to link the grossly negligent act of an employee through a chain of command, to the ‘controlling’ or ‘directing mind’;¹⁹ in other words, a company could only be found liable for manslaughter by gross negligence if the fault element of the offence was possessed by someone, such as a director or chief executive, who could be identified as the directing mind and will of the company itself. A ‘directing mind’ was said to be an individual in the company sufficiently senior to be ‘identified as the embodiment of the company itself’²⁰.

In practice however, identifying a ‘directing mind’ in all but the smallest of companies proved elusive. Complex management structures and the delegation of responsibilities in larger companies made it virtually impossible to identify an individual as embodying a company in his or her actions or decisions. This common law ‘identification’ doctrine was in

¹² Health and Safety Executive, *Workplace Fatal Injuries in Great Britain 2018* www.hse.gov.uk/statistics/ [Accessed 14.01.19].

¹³ Health and Safety Executive, *Health and Safety at Work: Summary Statistics for Great Britain 2018*, [Accessed 14.01.19]. www.hse.gov.uk/statistics/overall/hssh1718.pdf

¹⁴ S. Tombs and D. Whyte, ‘Worker Health and Safety’ in Oxford Research Encyclopaedia of Criminology and Criminal Justice (Oxford: OUP, 2017), available at <http://oxfordre.com/criminology> [Accessed 14.12.18].

¹⁵ <https://www.theguardian.com/uk-news/2017/dec/11/grenfell-tower-police-investigating-corporate-manslaughter-offences> [Accessed 14.01.19].

¹⁶ *Coppen v Moore (No 2)* [1898] 2 QB 306 (DC).

¹⁷ *R v HM Coroner for East Kent ex p Spooner* (1989) 88 Cr App R 10 (DC).

¹⁸ This rule is criticised by Wells (1993) ‘Culture, Risk and Criminal Liability’ *Criminal Law Review* pp558-561 and 563.

¹⁹ Pinto A. & Evans M. (2008) *Corporate Criminal Liability*, London: Sweet & Maxwell 219

²⁰ Clarkson C.M.V. (2005) ‘Corporate Manslaughter: Yet More Government Proposals’ *Crim. L.R.* 677.

fact so restrictive in practice that under the old regime there were very few successful prosecutions.

Prosecutions of large companies believed to be responsible for large-scale disasters typically failed. Landmark examples where the 'identification' doctrine proved insurmountable include the prosecution of Great Western Trains for the Southall rail crash²¹, and the prosecution of Railtrack and Balfour Beatty for the Hatfield derailment²². The prosecution following the Herald of Free Enterprise tragedy²³ floundered due to similar doctrinal barriers. In the latter case, while Judge Turner clarified that, 'there is no conceptual difficulty in attributing a criminal state of mind to a corporation' this, he posited, required the identification of a human being who was liable for the crime²⁴; none was identifiable. Although the Health and Safety Executive was of the view that the majority of these deaths could have been prevented, the complex structure and hierarchy of modern corporations under which responsibility is delegated and diffused and thus likely to become untraceable were fatal to the doctrine; all defendants, including the company, were cleared of the charges.

Prosecutions of large companies for manslaughter was virtually impossible; instead, charges were more commonly brought under health and safety legislation - where they were brought at all²⁵. Nonetheless, 1994 did see the first successful prosecution of a company for homicide²⁶ together with that of its managing director; a corporate manslaughter conviction pre 2007 was indeed possible when the company was small, and the corporate offender in this case, OLL Ltd, was a 'one-man company' owned by Mr Kite. The company was thus easily 'identified' with Mr Kite, who was the 'directing mind' behind it²⁷. Such cases clearly do not 'provide the challenge that the large modern corporation brings to criminal law,'²⁸ nor were the impetus behind the new corporate homicide regime.

The new regime

Widespread scholarly criticism of failed corporate manslaughter prosecutions and of the failure to bring prosecutions²⁹ as well as public opprobrium in the face of the persistent failure of prosecutions of high-profile corporate killings forced the need to re-assess the capturing of criminal responsibility of corporations. In response to these criticisms and to address the deficiencies of the common law, the Corporate Manslaughter and Corporate

²¹ In September 1997, a high speed train from Swansea collided into a freight train at Southall. Seven people were killed and over 150 injured.

²² In October 2000, four people died and more than 100 passengers and staff were injured when a high speed GNER train travelling at 115mph from London to Leeds was derailed by a broken rail near Hatfield, Hertfordshire.

²³ R. Owen, 'Hundreds are Trapped after British Car Ferry Crashes into Pier: "No Hope" for The Missing', 7 March 1987, *The Times* (London), Issue 62710.

²⁴ P&O European Ferries (Dover) Ltd [1991] 93 Cr App at 74.

²⁵ C.M.V Clarkson, 'Corporate manslaughter: yet more Government proposals' (2005) *Criminal Law Review* 677 at 678.

²⁶ *Peter Bayliss Kite* [1996] 2 Cr App.

²⁷ Mr Kite was sent to prison, and the company was fined £60,000.

²⁸ C. Wells, *Corporations and Criminal Responsibility*, 2nd edn (Oxford University Press, 2001) at p107.

²⁹ P. Almond (2007) 'Regulation Crisis: Evaluating the Potential Legitimizing Effects of "Corporate Manslaughter" Cases', *Law & Policy* 29: 285; G. Slapper (1999) 'Corporate Homicide and Legal Chaos', *New Law Journal* 149:1031; S. Tombs and D. Whyte (2010). 'A deadly consensus: worker safety and regulatory degradation under New Labour' *British Journal of Criminology* 50(1), pp. 46-65.

Homicide Act was enacted in 2007³⁰ under which a new statutory offence of corporate manslaughter was created. The Herald of Free Enterprise tragedy's legacy, it has been argued, was in fact the enactment of this statute³¹.

Under the Act an organisation³² may be convicted of corporate manslaughter if the organisation owes a duty to take reasonable care for an individual's safety and 'the way in which its activities are managed or organised . . . causes a person's death, and . . . amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.'³³ The Act applies to all manner of business entities³⁴ as well as to government entities, including police forces, trade unions and partnerships.³⁵ The offence is only committed if the way in which the organisation's activities are managed or organised by its senior management constitutes a *substantial* element in the gross breach of a duty to take reasonable care.³⁶ By removing the requirement that liability must be determined exclusively by reference to the directing mind of a company, the common law identification principle is abolished.³⁷

A legal instrument to facilitate the prosecution of large, complex organizations, and one that for Almond, steers a path between government's symbolic need to do something about companies that kill whilst not unduly harming business interests³⁸, the Act's ambition was not only to achieve an increase in prosecutions for corporate manslaughter: it also sought to send a strong message about the value placed on preserving human life. Gobert, for example argued that its 'symbolic significance may ultimately transcend its methodological deficiencies'³⁹. It is however a moot point whether the Act has in fact served this purpose or merely paid lip service to the protection of rights under the HRA and the ECHR.

A consideration of the prosecutions brought under the new regime is a good starting point, and it is enlightening here to also consider how the CMCHA fares in comparison with the other route for prosecution where there has been a fatality at work: the Health and Safety at Work etc Act (HSWA) 1974. Of the approximately 50,000 occupational fatalities in the United Kingdom each year, and the hundreds of thousands of major and other injuries and infractions of safety law, there are typically about 500 prosecutions under the HSWA 1974

³⁰ The Act came into force on 6 April 2008. The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 1) Order 2008 (SI 2008 No. 401 (C. 15)).

³¹ 'The Herald's Legacy', a letter to The Guardian, Tuesday 6 March 2007, Available at: <http://www.theguardian.com/news/2007/mar/06/leadersandreply.mainsection4?INTCMP=SRCH> (accessed 05 May 2018).

³² CMCHA, s. 1(2) defines a relevant organisation as (a) a corporation; (b) a department or other body listed in CMCHA, Schedule 1; (c) a police force; and (d) a partnership, or trade union or employers' association, that is an employer.

³³ Section 1(1) CMCHA 2007.

³⁴ CMCHA 2007, s.1(2) defines a relevant organisation as: (a) a corporation; (b) a department or other body listed in CMCHA Sch.1; (c) a police force; and (d) a partnership, or trade union or employers' association that is an employer.

³⁵ CMCHA 2007 Schedule 1.

³⁶ CMCHA 2007 s.1 (3).

³⁷ S. Griffin and J. Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force: The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007' (2010) *Journal of Criminal Law*, 74, pp.358-381.

³⁸ P. Almond, *Corporate Manslaughter and Regulatory Reform*. (Basingstoke, U.K.: Palgrave Macmillan, 2013: 32).

³⁹ J. Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?' (2008) 71 *Modern Law Review* 413 at 414.

per annum with some 80–90 each year leading to successful prosecutions⁴⁰. On the other hand, in the decade since its inception, there have been fewer than 35 prosecutions under the CMCHA.

It is worth recalling at this point that in 2005, the government's position around the draft Bill to the CMCHA not only emphasised the lack of centrality of the new offence (indeed, it might be argued with hindsight, thereby condemning it to the margins), but also its implicit restrictions, the then Home Secretary stating, 'this offence must complement, not replace, other forms of redress such as prosecutions under health and safety legislation', and it 'must be reserved for the very worst cases of management failure'⁴¹. These comments, and, it is submitted, the prosecutions (or lack thereof) under the CMCHA highlight the first of two disparate issues here, namely, the reluctance to attach criminal liability to alleged white collar criminals, especially those in senior positions.

This is further evidenced by the fact that the overwhelming majority of corporate manslaughter prosecutions under the CMCHA have in fact concerned small to medium sized enterprises that would in any event have been caught by the pre-2007 provisions,⁴² and have tended to relate to single instances of death as opposed to national disaster type incidents with multiple deaths. Only three prosecutions have in fact involved multiple counts, the highest number of fatalities prosecuted being against MNS Mining (four fatalities), and this resulted in an acquittal⁴³. Also noteworthy in this regard is the fact that the vast majority of charges to date have concerned the deaths of employees - and all have related to one-off fatal incidents (as opposed to fatality arising from industrial diseases); only four of the prosecutions to date have involved non-workplace deaths. And all the organisations charged have been companies except for one failed prosecution of an NHS Trust⁴⁴.

The Act appears to be overly conservative and ineffective in capturing corporate liability. On the one hand, the senior management requirement does appear to represent a modest improvement on the identification doctrine in that the number of prosecutions overall has increased since 2008. But these figures have been very low: and as Slapper has noted, the small number of prosecutions is unlikely to be due to a lack of sufficiently reprehensible

⁴⁰ S. Tombs and D. Whyte, 'Worker Health and Safety' in Oxford Research Encyclopaedia of Criminology and Criminal Justice (Oxford: OUP, 2017), available at <http://oxfordre.com/criminology> accessed 14.12.18.

⁴⁰ <https://www.theguardian.com/uk-news/2017/dec/11/grenfell-tower-police-investigating-corporate-manslaughter-offences> [Accessed 13.01.19].

⁴¹ See the comments by The Home Secretary, the Rt Hon Charles Clarke MP in the Foreword to *The Corporate Manslaughter: The Government's Draft Bill for Reform* (Cm 6497, 2005). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251080/6497.pdf [Accessed 07.01.19].

⁴² One exception of note is the case of CAV Aerospace Ltd., convicted in 2015 of corporate manslaughter as well as of breaches of sections 3(1) and 33(1)(a) of the HSWA 1974. This was the first conviction of a medium to large corporate defendant (over 500 employees) with a complex corporate structure: CAV Aerospace was in fact the parent company of CAV Cambridge, the subsidiary where the fatality occurred. The victim died after a stack of metal sheets collapsed on top of him in a warehouse in Cambridge, trapping and crushing him. <http://www.cambridge-news.co.uk/Cambridge-aerospace-company-guilty-corporate/story-27477431-detail/story.html#ixzz3o3WhxUkg> [Accessed 12.12.18].

⁴³ MNS Mining Limited, 19 June 2014, Swansea Crown Court.

⁴⁴ *Health and Safety Executive v Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 2967 (QB).

cases⁴⁵. On the other however, and of greater concern, the inclusion of a senior management element appears to have all but wholly deterred prosecution of more complex cases.

It is hard to see how a statute that has been invoked so rarely and with such a limited remit could have any impact in terms of protecting life; even as a deterrent. In the wake of the deadly fire at Grenfell Tower it has been mooted that this might be about to change;⁴⁶ MP David Lammy has labelled the incident as ‘corporate manslaughter’ and called for arrests to be made.⁴⁷ But the track record of prosecutorial decisions does not lend support for this. In 2017 Southwark Council was convicted of four breaches of fire safety regulations after another deadly tower block fire,⁴⁸ and although there were fatalities, corporate manslaughter charges were not pursued.⁴⁹

The reluctance to attach criminal liability to senior corporate individuals is further reflected in the exclusion of individual liability under the Act. As early as 2008, Ormerod and Taylor queried whether ‘in practical terms the Act may lead to a focus on organisational failures while allowing individuals to escape censure’⁵⁰. While individual liability remains available through the common law offence of gross negligence manslaughter and directors and managers can therefore be charged with that offence, convictions are rare and often difficult⁵¹. To date individual gross manslaughter charges have been brought in less than half the cases and convictions secured in only two cases (Sherwood Rise⁵² and Bilston Skips⁵³) i.e. there is a less than one in ten chance of a director being convicted of manslaughter if the company is found guilty. Furthermore, only five of the convictions have led to Director disqualification; another indication that the Act lacks real bite and that neither organisations, nor individuals in those organisations are being held to account.

At the draft stage of the Bill, it was notable that organisations representing workers and victims argued forcefully in favour of the inclusion of individual liability under the Act, while employers’ organisations were opposed.⁵⁴ Leading scholars like Celia Wells had also advocated in the years preceding the Act that enforcement against companies is most

⁴⁵ G Slapper, ‘Justice is mocked if an important law is unenforced’ (2013) 77 *Journal of Criminal Law* 91: 93.

⁴⁶ <https://www.theguardian.com/uk-news/2017/dec/11/grenfell-tower-police-investigating-corporate-manslaughter-offences> [Accessed 12.12.18].

⁴⁷ <https://www.independent.co.uk/news/uk/politics/grenfell-tower-fire-corporate-manslaughter-arrests-david-lammy-mp-labour-london-kensington-a7790911.html> [Accessed 20 Jan 2019].

⁴⁸ <https://www.theguardian.com/uk-news/2017/feb/28/southwark-council-fined-570000-over-fatal-tower-block-fire> [Accessed 1 March 2017].

⁴⁹ <https://www.theguardian.com/uk-news/commentisfree/2017/jun/19/grenfell-tower-lakanal-house-inquest-fire-safety> [Accessed 19 June 2017].

⁵⁰ D. Ormerod and R. Taylor, ‘The Corporate Manslaughter and Corporate Homicide Act 2007’ (2008) *Criminal Law Review* 4.

⁵¹ D. Whyte, ‘The fatal flaws in the English Corporate Manslaughter Bill’ (2005) *Employment Law Bulletin* 4. According to Whyte the rate is only around 3 or 4 a year.

⁵² *R v Sherwood Rise Ltd* (unreported, 3 December 2015): A care home company pleaded guilty to the offence of corporate manslaughter and was fined £30,000 following the death of an 86 year old resident at a residential home. The care home has since closed down.

⁵³ *R v Bilston Skips Ltd* (unreported), 16 August 2016: The company was fined £600,000 following the death of an employee who fell into a skip. The company is now in liquidation.

⁵⁴ D. Whyte, ‘The fatal flaws in the English Corporate Manslaughter Bill’ (2005) *Employment Law Bulletin* 4.

effective when complemented by enforcement against senior managers⁵⁵. This view was also shared by Clarkson who argued that failing to provide punitive sanctions on company officers would not provide a meaningful level of deterrent, since ‘people are more amenable to deterrence than corporations’⁵⁶. By failing to include any element of individual liability the Act has restricted its reach and undermined its potential to deter and protect.

The second issue that has weakened the potency of the Act is the multitude of charges that can be brought in relation to the same death. The case of SR and RJ Brown⁵⁷, which involved charges arising from the death of a worker who fell whilst working on a roof, is a good illustration: collectively, the defendants, both corporate and individual, pleaded guilty to 14 offences⁵⁸. As Wells has noted⁵⁹, this plethora of potential charges that can arise from the same death lends itself to plea-bargaining and thus has inadvertently facilitated corporate defendants to *escape* individual liability. Individual charges were dropped for example in the prosecutions of Lion Steel⁶⁰ and Monovan Construction⁶¹ following guilty pleas to the charges under the CMCHA. The dropping of individual charges (as well as a reduction in the fine imposed) may well account for the fact that guilty pleas have been entered in the majority (over two thirds) of the cases where corporate manslaughter convictions have been secured. It has long been argued that plea bargaining comes at a cost of undermining core principles of the English legal system,⁶² and within the context of corporate manslaughter, the emerging pattern does little to advance the view that the offence furthers the protection of the right to life, either through the punishment of offenders, or as an effective deterrent.

Another criticism of the current regime has centred on the sentencing of corporate offenders, and on the appropriateness of the available sanctions. Currently, the main penalty is an unlimited fine. The Sentencing Council recommends a starting point of £500,000, although fines can be lower or higher depending on the organisation’s size and culpability⁶³. The sentencing regime is notable for its harsh, punitive language: the “appropriate fine” could measure “in the millions of pounds”; rarely would it be “less than £500,000”, the minimum threshold. The purpose of such a sizeable penalties was to mark the severity of the offence and to act as a powerful deterrent against poor health and safety practices. An important point to note is that the cost of fines cannot be met by insurance, as such risks are deemed to be uninsurable at law. Moreover, the Sentencing Council recognised that if a fine imposed on

⁵⁵ C. Wells, ‘Corporations: Culture, Risk and Criminal Liability’ [1993] *Criminal Law Review* 551 at 565 and C. Wells, ‘The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity’ [1996] *Criminal Law Review* 545: 553.

⁵⁶ C.M.V Clarkson, ‘Corporate manslaughter: yet more Government proposals’ (2005) *Criminal Law Review* 677: 687.

⁵⁷ Health and Safety Executive v SR and RJ Brown (unreported), Manchester Crown Court, 16 March 2017.

⁵⁸ Corporate manslaughter, various health and safety offences and perverting the course of justice.

⁵⁹ C. Wells ‘Corporate criminal liability: a ten year review’ (2014) *Criminal Law Review* 849.

⁶⁰ R. v Lion Steel Equipment Limited (unreported), Manchester Crown Court, 20 July 2012.

See Sentencing Remarks of HHJ Gilbart (QC)

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/hhj-gilbartqc-sentence-remarks-r-v-lion-steel.pdf> [Accessed 16.01.19].

⁶¹ R v Monovan Construction Ltd (unreported), 27 June 2016).

⁶² See for example, P. Darbyshire, ‘The Mischief of Plea Bargaining and Sentencing Reward’ (2000) *CLR* 4.

⁶³ Sentencing Council (2015) *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline*. <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf> [Accessed 19.02.19].

company were very substantial, the - acceptable - result may be the demise of the organisation⁶⁴.

However in practice, the courts have proven to be conservative in this regard: concerns about substantial penalties putting convicted corporations out of business have generated lower than anticipated fines; an analysis of the decided cases in fact reveals a worrying nexus between the corporate defendant's ability to pay and the level of fine imposed.⁶⁵ Moreover, should a public body find itself in the dock on a corporate manslaughter charge, another disparate set of issues emerges, which give rise to valid questions concerning the justice of the corporate homicide regime, in addition to its effectiveness: Firstly, special treatment. Because the imposition of a substantial fine could impact on a body's ability to perform its statutory functions, 'special considerations' come into play, namely the Sentencing Guidelines provide for a reduction in the penalty if it would have a 'significant impact' on a body's services⁶⁶. While from a practical standpoint this may seem understandable, it does question the merit of imposing a financial sanction on this type of corporate offender. Secondly, and possibly of greater concern, a hefty fine on a public body could in reality precipitate an injustice in that the financial burden would be passed on to others, for example, through an increase in council tax should a local authority be convicted – this would in effect amount to an exercise in apportioning punishment to innocent members of the public. Financial penalties on a convicted public body would seem to be wholly inappropriate since they are neither effective, nor equitable.

The second penalty currently available to the courts is a remedial order (s9), under which - in addition to a fine - an organization can be ordered to take steps to remedy the management failure that led to the death. Remedial orders are available in cases where corporate failings have not been remedied by the time of the trial, and where such failings are 'sufficiently specific to be enforceable'.⁶⁷ However, these powers have rarely, if ever, been exercised; there is a clear reticence on the part of the courts to do so.

Finally, section 10 permits a court to impose a publicity order in addition to a fine.⁶⁸ This in effect is a 'naming and shaming' of convicted corporations – requiring the organization to publicize its conviction, with specific details of the offence. It was anticipated that the publicity order could potentially be more damaging to a convicted corporation than a fine because of its reputational implications – and hence would act as a hefty deterrent; indeed Ormerod and Taylor contended that large organisations might be more concerned about adverse publicity than a fine⁶⁹. As in the case of remedial orders, however, the exercise of this power by the courts has been scant,⁷⁰ (in less than a third of the cases). The infrequent

⁶⁴ Sentencing Guidelines Council (2010) *Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline*.

⁶⁵ See for example the comments of the Recorder in *R v JMW Farms Ltd* [2012] NICC 17 para 10.

⁶⁶ Sentencing Council, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* (2016) para 26.

⁶⁷ Sentencing Guidelines Council. *Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline* (2010) para 35.

<https://www.sentencingcouncil.org.uk/publications/item/corporate-manslaughter-health-and-safety-offences-causing-death-definitive-guideline/> [Accessed 5 May 2017].

⁶⁸ CMCHA 2007, s10.

⁶⁹ D. Ormerod and R. Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' (2008) *Criminal Law Review* 589 at 610.

⁷⁰ See for example, *Mobile Sweepers Reading Ltd*; *Peter Mawson Ltd*; *Linley Developments Ltd*.

imposition of these penalties may derive from the view that the efficacy of publicity orders on small firms (and, as noted above, to date the corporate offenders have been predominantly small firms) is negligible since in relation to small companies there is little or no significant reputation to be lost through stigmatic punishment.⁷¹

These concerns do not justify blanket exemptions from liability, nor do they justify the reluctance of the courts to impose harsher penalties; however, what they do prompt is an urgent re-think in terms of sentencing options. If the CMCHA is to have any real impact in terms of advancing protections, then its enforcement clearly needs to be both appropriate and effective: At present, the corporate homicide regime fails on both counts.

Conclusion

The statutory corporate manslaughter offence was introduced as a means of affording a superior basis of protection to its common law offence predecessor against egregious corporate conduct.

While it is true that since its inception, there have been more prosecutions and higher average fines than under the common law, the Act's reach has encompassed little more than micro/small companies despite the wide spectrum of entities capable of committing the offence, and these have invariably been companies that in any case would have been successfully prosecuted for involuntary manslaughter under the common law identification doctrine with its 'controlling officers' test. No case to date has concerned long-term fatal damage to health, and no firms of a comparable size to P&O have ever been charged with the new statutory offence. The cases concluded to date do not indicate any notable impact of the Act in respect of the protection of life and it remains doubtful whether the Act could be used to prosecute an organisation which has caused a multi-fatality disaster of the type the Act was intended to address. Moreover, there have been far fewer prosecutions than predicted – on average a mere three such prosecutions per year. This has meant continued lack of corporate accountability. If the Act is to realise its full potential in capturing and preventing unlawful health and safety practices and advancing the protection of life, there needs to be a holistic reconceptualisation of 'corporate offender' beyond small companies to the wide range of organisations which already fall within the Act's remit.

Moreover, the inclusion of the concept of "senior management" in the Act needs reconsideration. Clarification of what is meant by this term remains frustratingly elusive. While the test of 'senior management' is defined in section 1(4) as the persons who 'play significant roles in either the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities', the meaning of 'significant [role]' is undefined. The term 'senior management' is said to be 'wider' than the 'controlling mind' which was required at common law.⁷² However, it is nonetheless clearly indicative of a certain level of authority emanating directly or indirectly, via a delegation of authority from

⁷¹ V.S. Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) *Harvard Law Review* 109, pp.1477-1534.

⁷² http://www.cps.gov/legal/a_to_c/corporate_manslaughter/, [Accessed 10/12/18.]

the organisation's controlling mind,⁷³ and as such represents only a modest improvement on the common law doctrine – in effect it remains one of the key obstacles in the path of an optimal corporate homicide scheme. Corporate failings can be systemic and widespread without senior managers having direct and personal knowledge of them, and it is submitted, without this stringent requirement, the Act would have far greater reach and would catch in its net a much broader range of offenders.

Furthermore, the legislators elected not to include individual liability in the Act, even though it is typically impossible to entirely separate the issue of individual culpability from corporate liability, while the prosecuting authorities have often been willing to drop individual involuntary manslaughter charges against directors and managers in order to secure corporate manslaughter convictions. We therefore have a position where, more often than not, directors and managers are not held personally accountable. Individuals, as well as organisations, responsible for the wrongful killing of their employees or members of the public are currently able to escape liability, or at most sustain a conviction under health and safety legislation.

When the CMCHA was created, it was anticipated that indictment and conviction for corporate manslaughter would carry greater deterrent and punitive weight than liability for violating health and safety regulations. However, the evidence of the last ten years suggests that an unworkable common law offence has been replaced by an equally ineffective statutory one, and that the CMCHA is less effective as a means of bringing corporate offenders to justice than prosecutions under the HSWA. If this is indeed the case, then the corporate manslaughter regime may have become redundant. Indeed, the Act's track record - the reluctance to bring prosecutions, the difficulties encountered in securing convictions and the overly conservative sentencing regime - appear to indicate that instrumentally at least, the CMCHA has been rendered somewhat obsolete.⁷⁴

Looking at workplace health and safety through the prism of human rights, one sees a sphere of activity which produces significant harm but where the current regime does little to advance the protection of employees or members of the public. As things stand, with an Act that is under- or un-enforced there is some merit in thinking that the right to life has not been advanced in any meaningful way.

⁷³ Griffin S. (2007) 'Corporate Manslaughter: A Radical Reform?' *Journal of Criminal Law*, 71: 151.

⁷⁴ <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> [Accessed 15 February 2018].