

The Corporate Manslaughter and Corporate Homicide Act 2007 –
Thirteen years in the making but was it worth the wait?

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Abstract: Despite a gestation period extending over thirteen years, the Corporate Manslaughter and Corporate Homicide Act 2007 is a disappointment. It is limited in its scope, restricted in its range of potential defendants and regressive to the extent that, like the discredited identification doctrine before it, it allows its focus to be deflected from systemic fault to individual fault. As a result the Act may not curb the type of short-sighted risk management decisions that can lead to the deaths of innocent workers, consumers and members of the public. Further, by requiring DPP consent to prosecute, the Act threatens to entangle corporate manslaughter prosecutions in the political process to an unacceptable degree. Despite these weaknesses, the symbolic significance of the Corporate Manslaughter and Corporate Homicide Act 2007 may ultimately transcend its methodological deficiencies.

The genesis of the Corporate Manslaughter and Corporate Homicide Act 2007 can be traced to a 1994 consultation paper of the Law Commission which reviewed the law of involuntary manslaughter.¹ Included in the report was a section which addressed the responsibility of corporations for causing deaths.² A recommendation for an offence of ‘corporate killing’³ followed in 1996 after the Commission had received and considered feedback from its earlier paper. The baton then passed to the Home Office. In 2000 it brought forth a consultation document⁴ inviting comment on specified aspects of its version of a corporate killing offence, which was modeled on that of the Commission.⁵ There then ensued another consultation period in which over 150 responses were received. A draft corporate manslaughter bill was finally

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¹ Law Commission, Consultation Paper No. 135, Criminal Law: Involuntary Manslaughter (1994).

² *Ibid*, Pts.IV, V(G).

³ Law Commission Report No. 237, Legislating the Criminal Code: Involuntary Manslaughter (1996), para. 8.3.5. (hereinafter Law Comm. Rpt. No. 237)

⁴ Home Office, Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000).

⁵ The primary modifications proposed by the Home Office were to extend the offence from corporations to all ‘undertakings’ (any trade or business providing employment) and to indicate its willingness to consider personal liability for directors who contributed or substantially contributed to their company’s offence.

published in 2005, followed by a bill in 2006 which ultimately became the Corporate Manslaughter and Corporate Homicide Act 2007.⁶ Despite the time available to study the proposed legislation and the breadth of input along the way, the 2007 Act is somewhat of a disappointment. It is limited in its vision and lacking in imagination. Further, it retains many of the evidentiary problems associated with the ‘identification doctrine,’ from which it had been the Commission’s aim to free the law.⁷

One does not have to look far to find the Act’s most glaring deficiency. It is revealed in its very title. Rather than tackling the generic problem of corporate criminality, the Act is restricted to one statistically minor (in terms of its incidence⁸ although clearly not in terms of the seriousness of the harm caused) dimension of a much more complex problem -- injuries and deaths caused by an organisation’s blatant disregard for the safety and welfare of employees, consumers and members of the public.⁹ The Act also is disappointing in its failure to provide for the criminal liability of directors, corporate executives and senior managers who significantly contribute to their organisation’s offence. To the contrary, these and other individuals are given immunity from accessorial liability. With its exclusive focus on *organisational* liability, Parliament appears to have lost sight of the fact that senior managers and directors are responsible for conceiving, formulating, approving and implementing corporate policies, including those which turn out to be criminogenic. Further, through its requirement that persons who play a significant role in the formulation and/or implementation of organisation policy be shown to have made a substantial contribution to the corporate offence, the Act threatens to perpetuate the same evidentiary stumbling blocks that frustrated prosecutions under the identification doctrine. Other provisions in the Act that are also likely to compromise its effectiveness include the need to show a pre-existing ‘duty’ to the victim, which was not an element of the Commission’s original recommendations or the 2000 Home Office consultation document and the requirement of DPP consent to prosecute, which was specifically rejected in

⁶ Hereinafter Act. The offence will be known as corporate homicide in Scotland, but corporate manslaughter elsewhere in the UK.

⁷ Law Comm. Rpt. No. 237, para. 8.1.

⁸ For 2006-07, there were 241 work-related deaths of employees, compared to 141,350 instances of injuries. Health and Safety Commission, Health and Safety Statistics 2006/07, p. 5.

<http://www.hse.gov.uk/statistics/overall/hssh0607.pdf> (last accessed 08/02/08).

⁹ See also C. Wells ‘The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity’ [1996] Crim LR 545.

both Reports in respect of private prosecutions and which threatens to embroil corporate manslaughter prosecutions in the political process. As a consequence, it is debatable whether the 2007 Act will be any more effective than was the identification doctrine in curbing the type of grossly ill-advised organisational risk-taking that can lead to fatalities.

This article begins with an overview of the key features of the Act. In the sections that follow the issues identified in the preceding paragraph will be probed in greater depth. In the conclusion I will suggest that the primary value of the Act may lie not in its test of corporate liability but in the very fact of its existence. The Act's symbolic value may ultimately transcend its methodological deficiencies. What impact it will have in practice, however, can only be a matter of conjecture, as much will depend on how vigorously the government enforces the Act and how expansively or restrictively the courts interpret it.

I. An overview of the Act

The main elements of the corporate manslaughter offence¹⁰ are set out in section 1 of the Act. In order to establish liability, the prosecution will have to prove that:

- (1) A qualifying organisation
- (2) which owed a relevant duty of care to the victim
- (3) caused the death of the victim; and
- (4) that this death was attributable to a 'gross breach' of a relevant duty,
- (5) 'gross breach' being defined as conduct falling 'far below what could reasonably have been expected of the organisation in the circumstances'; and
- (6) that the way in which the organisation's activities were managed or organised by its senior management constituted a substantial element in the gross breach.¹¹

There are several points worth noting about these elements. First is the fact that the Act applies to organisations,¹² a category that includes corporations, partnerships, police forces, trade

¹⁰ It might be observed that the reference to 'corporate' deaths in the title of the Act is misleading as the Act is not limited to corporations but applies to a wide range of organisations and even Crown bodies.

¹¹ Act, s. 1.

¹² Act, s. 1(1).

unions and employers' associations, as well as a number of specific government departments and bodies listed in a separate schedule.¹³ However, if earlier proposals to limit the Act to corporations could be criticized for being too narrow, the extension of the Act to so a diverse an array of organisations may be too broad. If, as proclaimed on trade union placards, one of the prime objectives of the legislation is to deter companies from putting profit ahead of safety, the category of organisations to which the Act applies is misconceived. It should have been restricted to for-profit organisations. What purpose is served, for example, by holding a hospital trust criminally liable for the death of a patient who fatally falls down a poorly lighted back stairway when the trust has chosen to invest its limited resources in patient care and reducing waiting times for clinical procedures? Similarly, the extension of the bill in the final days before its passage to deaths in custody means that prisons can be prosecuted when deaths occur as a result of inadequate staff to provide comprehensive supervision of an undeniably violent prisoner population, where the inability to hire more staff is due to budgetary constraints imposed by the government. These examples are not intended to suggest that hospitals or prisons should not be held accountable when their gross negligence causes death, or that all persons who are willfully exposed to organisational gross negligence are not deserving of protection regardless of the nature of the organisation. Criminal laws can and should be constructed to cover these types of situations. However, a law of *corporate manslaughter* arguably is aimed at a more specific and quite different problem – that of companies which allow their pursuit of profit to blind them to concerns of safety. The anticipated deterrent effect envisaged by supporters of the new Act is a significant re-ordering and re-weighting of the factors taken into account in corporate risk management decisions and the deterrence of choices that threaten to endanger innocent lives.

Secondly, the Act requires proof of a relevant duty of care to the victim.¹⁴ Among the relevant duties are those owed to employees and others who work or perform services for an organisation; those that arise from the organisation's status as an occupier of premises; those incurred in connection with the supply of goods and services, the carrying on of construction, maintenance operations or commercial activities, or the use of dangerous instrumentalities; and those owed to persons for whose safety the organisation is responsible (including detainees,

¹³ Act, s. 1(2).

¹⁴ Act, s.2.

patients and other persons held in custody or in custodial institutions).¹⁵ These duties have been imported from the civil law of negligence, and were given the status of an element of gross negligence manslaughter by the House of Lords in *Adomako*,¹⁶ a prosecution involving a natural person. The requirement of proof of a duty of care was retained by the government in the corporate manslaughter context both to preserve the link to the human offence and to limit the scope of the corporate offence. However, whether civil law duties have any legitimacy in a criminal law context has been questioned. In *Wacker*¹⁷ the Court of Appeal observed:

The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, liberty or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of law.¹⁸

Is the required proof of a relevant 'duty of care' in fact otiose? Neither the Law Commission's 1996 recommendations, nor its subsequent proposals on homicide generally,¹⁹ nor the 2000 Home Office consultation document contained this requirement. The Home Affairs and Work and Pensions Committees, which jointly reviewed the manslaughter bill while it was in draft form, also advised against inclusion of a duty of care requirement.²⁰ It is arguably unnecessary because organisations, as well as natural persons, are already under a duty not to kill innocent persons except in carefully delineated circumstances (self-defence, defence of others, time of war, etc.).²¹ It is submitted that when an organisation's conduct has fallen 'far below' what could reasonably have been expected of it in the circumstances and has caused a death, it

¹⁵ Act, s. 3.

¹⁶ [1995] 1 AC 171.

¹⁷ [2003] 1 Cr App R 329.

¹⁸ *Id* at 338. See also *Willoughby* [2004] EWCA Crim 3365.

¹⁹ See Law Commission Report No. 304, *Murder, Manslaughter and Infanticide* (2006)

²⁰ Home Affairs and Work and Pensions Committees 2005-06 HC540 para. 105. See <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/government-response.pdf?view=Binary> (last accessed 05/02/08).

²¹ Clarkson envisages that the type of argument raised in *Wacker* (no duty to illegal immigrants because of the civil doctrine of *ex turpi causa non oritur actio*) may resurface as a consequence of the Act's requirement of duty. C. Clarkson 'Corporate Manslaughter: Yet More Government Proposals' [2005] Crim LR 677, 683.

should be liable without more.²² To require proof of a duty of care simply provides defendants with another avenue for deflecting the trial from its main objective of determining the role of the organisation in the resulting death and detouring it on to a time-consuming and likely contentious dispute on an issue of dubious relevance. If deemed germane in a particular case, the lack of a duty of care to a victim could be considered as part of the relevant ‘circumstances’ referred to in the test of gross breach (see below).

The fault element in corporate manslaughter is a ‘gross breach’ of a relevant duty,²³ with ‘gross breach’ being defined as conduct which falls ‘far below what could reasonably have been expected of the organisation in the circumstances’.²⁴ This definition begs several important questions: (1) how to determine what is to be reasonably expected of organisations under different circumstances (if judged by what similarly situated organisations do, the test may turn out to be a recipe for an across-the-board lowering of industry standards); (2) exactly how far below reasonable expectations must an organisation’s breach fall before it can be characterised as ‘gross’ (Lord Mackay’s response in *Adomako* that the deviation had to be ‘so bad in all the circumstances ... that it should be judged criminal’ is obviously circular²⁵) and against what benchmarks can this be measured; and (3) what ‘circumstances’ are relevant when considering liability (presumably a company’s lack of profitability would not justify its ignoring basic safety requirements,²⁶ but the lack of clarity in the term ‘circumstances’ leaves open the possibility). These ambiguities were present in both the Law Commission’s original formulation of the ‘management failure’ test and the Home Office consultation document. To an extent they are addressed in s.8 of the 2007 Act, which directs juries to consider the link between a gross breach and an organisation’s non-compliance with health and safety legislation,²⁷ and suggests that in connection with the mandated consideration of health and safety violations they *may* also take

²² The criticism in the text is of course a more general criticism of *Adomako* and its inclusion of duty of care as an element of gross negligence manslaughter.

²³ Act, s.1(1)(b).

²⁴ Act, s.1(4)(b).

²⁵ In fairness, this deficiency was recognised by their Lordships in *Adomako*.

²⁶ See *R v F. Howe & Sons (Engineering) Ltd.* [1999] 2 All ER 249.

²⁷ Act, s. 8(2). For an even stronger attempt to link criminal liability to health and safety violations, see PR Glazebrook ‘A Better Way of Convicting Businesses of Avoidable Deaths and Injuries’ (2002) 61 CLJ 405.

into account whether ‘attitudes, policies, systems or accepted practices’ within the organisation were likely to have encouraged the breach or produced tolerance of it.²⁸

There is, however, a crucial difference between the Law Commission’s conception of a ‘management failure’ and that embodied in the 2007 Act. As envisaged by the Commission, a ‘management failure’ was a systemic failing, a serious defect in the way that a company organised or managed its affairs. The term was consciously not intended to refer to the failings of individuals who could be characterised as managers. The Commission’s exclusive focus on systemic failure is, in the Act, converted to one that also brings into consideration individual failings -- the prosecution will need to show that the errors, miscalculations or mistakes of a person or persons who play a significant role in the formulating and/or carrying out of organisation policy²⁹ have made a substantial contribution to the breach giving rise to liability.³⁰ While the reference to ‘senior management’ in s. 1(3) may have been intended to signify the government’s and Parliament’s conviction that organisations should not be held liable where the responsibility for a death rests with relatively junior staff, it is questionable whether culpability can be so neatly compartmentalised. A combination of miscalculations and errors at multiple levels of an organisation often precedes a fatal result, in the absence of any of which the death would have been avoided. Shortsighted policies of management may be compounded when implemented by staff who are inadequately screened, trained or supervised, and who act in a grossly negligent manner.

Finally, the prosecution must prove that the management failure was the ‘cause’ of the victim’s death. The problem with this beguilingly simple reference to causation can be seen by comparing the language of the Act to that proposed by the Commission. The Commission would have required only that the management failure was either the cause *or one of the causes* of death.³¹ Corporate liability was not to be ruled out simply because the immediate cause of a death was the act or omission of an individual.³² The Commission’s formulation recognised that while the immediate cause of a death may be a (grossly) negligent act of an employee, seriously misguided management decisions may also have played a critical role in bringing about the death

²⁸ Act, s. 8(3)(a).

²⁹ Act, s. 1(4)(c).

³⁰ Act, s. 1(3).

³¹ Law Comm. Rpt. No. 237, draft bill, s.4 (1)(a)(1996)(emphasis added).

³² *Id.*, para. 8.39.

and thus be ‘one of its causes’. The Southall train crash illustrates the point. The primary cause of the crash and ensuing fatalities, as identified by a Health and Safety inquiry chaired by Professor Uff,³³ was the failure of the driver to pay sufficient attention to signals that would have warned him of the looming danger. But arguably of equal or greater importance was the failure of management to provide a functioning Automatic Warning System (AWS) that would have alerted the driver to the potential danger or, better yet, an Automatic Train Protection System (ATP) that would have brought the train to a halt without the need for driver intervention when a red signal had been passed. Both systems were installed on the train in question but neither was operative. The Southall case is not atypical in that the person whose negligent acts were most directly connected in time and space to the resulting deaths was an ordinary employee and not a senior officer of the company. In contrast, the senior managers who approved the policy of allowing company trains to operate without adequate technological safeguards (or even a back-up driver) may have been too far removed in time and space from the resulting harm to satisfy traditional tests of causation.³⁴ As was the case under the identification doctrine, such an approach to causation will work to the disadvantage of small companies and organisations, where the causal link between a death and a responsible official will be easier to establish than it will be for a large corporation or multi-national with a diffused command structure.

The 2007 Act rejects the Commission’s conception of causation in favour of the more conventional approaches used by the courts, which themselves have long been a source of controversy and confusion.³⁵ In the notes that accompanied the draft bill the Home Secretary argued that the Commission’s formulation was no longer needed because of recent developments in the criminal law. The Home Secretary, however, failed to specify what developments the government had in mind (although in its subsequent response to the Joint Report of the Home Affairs and Work and Pensions Committees³⁶ the government referred to the House of Lords decision in *Environmental Agency (formerly National Rivers Authority) v Empress Car Co*

³³ Health and Safety Commission, Southall Rail Accident Inquiry Report (2000)(Uff Report).

³⁴ Another instance where proof of causation may be problematic is in cases involving long-term fatal injuries, as from a worker’s exposure to hazardous substances where the worker’s life style may have contributed significantly to the death (eg. The deceased was a heavy smoker).

³⁵ See generally HLA Hart and T. Honore, *Causation in the Law* (2d ed. 1985).

³⁶ <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/government-response.pdf?view=Binary> (last accessed 05/02/08).

*(Abertillery) Ltd.*³⁷), how such developments would have elucidated the problem in respect of organisational fault in a case such as Southall, or what disadvantage there might have been in retaining the Commission's clearer and more embracing formula. Indeed, in light of the subsequent decision of the House of Lords in *R v. Kennedy (No. 2)*³⁸ indicating that free and voluntary acts of informed adults of sound mind will ordinarily break a chain of causation, the Law Commission's formulation may be needed more than ever if the Corporate Manslaughter Act is to have any bite.

II. A misdirected focus on homicide

Often the impetus for legislation lies in events.³⁹ These can provide a concrete focus for what might otherwise have been viewed as hypothetical dangers or draw legislative attention to risks that might not have previously been appreciated. The Dangerous Dogs Act 1991 followed well-publicised media accounts of attacks on children by certain aggressive breeds of dogs. The Protection from Harassment Act 1997 was attributable to the widespread belief, fomented by news accounts of particularly egregious cases, that stalking had reached epidemic proportions. And the genesis for the Corporate Manslaughter and Corporate Homicide Act 2007 can be found in the capsizing of the Herald of Free Enterprise in 1987 and the failed attempt to prosecute P&O for manslaughter.

There is obviously nothing inappropriate in a legislature addressing social problems that have been highlighted by events, and, indeed, Parliament would arguably be derelict in its duty if it failed to do so. The problem that can occur, however, is that legislation driven by events is often hastily conceived and rushed through the legislative process without sufficient consideration or study,⁴⁰ with the government's short-term goal being to achieve political capital by appearing responsive to public anxieties. This was not the problem with the 2007 Act, however, which was subject to critical scrutiny over a thirteen year period. As noted, the roots of the Act lay in the Law Commission's 1996 recommendations for an offence of corporate killing,

³⁷ [1999] 2 AC 22. This decision, never uncontroversial, may have subsequently been limited to its factual context by the House of Lords in *R. v. Kennedy (No. 2)*, [2007] UKHL 38 (below).

³⁸ [2007] UKHL 38.

³⁹ See B. Hutter and S. Lloyd-Bostock 'The Power of Accidents' (1990) 30 Brit. J. Crimin. 409.

⁴⁰ See S. Kadish 'The Crisis of Overcriminalization' (1958) 374 Annals 157.

which were informed by feedback received from the Commission's 1994 report. The Home Office 2000 consultation document was also followed by an extensive consultation period. The government's 2005 draft bill was jointly reviewed by the Home Affairs and Work and Pensions Committees,⁴¹ and during the bill's passage through Parliament, numerous amendments were introduced and debated in both Houses of Parliament.

The problem with the 2007 Act was thus not an adequate opportunity for reflection and review, but rather that it was too narrowly conceived from the outset. Instead of addressing the generic problem of corporate wrongdoing and how to hold organisations accountable for illegality whatever form it might take, the Act, as well as the Law Commission's recommendations and the Home Office consultation document which preceded it, is restricted to cases of homicide. None of these addressed, for example, corporate liability for causing grievous bodily harm, a statistically far more prevalent problem than corporate manslaughter.⁴² Indeed, it can be argued that a crime of corporate gbh would be likely to have a far greater impact on risk management decisions than a law of corporate manslaughter.⁴³ Few, if any, corporate executives or managers deliberately set out to kill or adopt policies that they can foresee will lead to widespread death. The threat of a prosecution of their company for corporate manslaughter is therefore unlikely to enter their thinking. On the other hand, it is axiomatic that these decision-makers will be aware that failing to pay sufficient attention to safety can lead to workplace injuries. Nonetheless, decisions not to install state-of-the-art but costly safety equipment may be rationalised on the basis that legal fines and damages resulting from claims by injured workers will be more than offset by the savings from foregoing installing the expensive equipment. This is the type of cynical reasoning that led the Ford Motor Company to decide not to recall Ford Pintos after it became aware that, due to their poor placement, petrol tanks of Pintos were subject to exploding when struck from the rear.⁴⁴

⁴¹ Home Affairs and Work and Pensions Committees 2005-06 HC540 para. 105. See <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/government-response.pdf?view=Binary> (last accessed 05/02/08).

⁴² For the incidence of workplace injuries compared to workplace deaths, see statistics cited *supra* note 8.

⁴³ I am grateful to David Bergman for his input in helping me to develop this theme.

⁴⁴ See M. Punch, *Dirty Business* 23-24 (1996). In the Pinto case there was a calculated decision to balance the cost and associated negative publicity of a recall against damages from wrongful death claims.

Although by law companies can be convicted of offences that can be committed by an individual,⁴⁵ the challenge lies in adapting elements of offences which were conceived and developed with natural persons in mind to fictional, artificial and inanimate entities such as companies or organisations.⁴⁶ That said, legislation from other jurisdictions offers models for a more holistic approach to corporate criminal liability. The Australian Federal Criminal Code Act (1995), for example, provides that ‘if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence that can be committed by a company, that fault element may be attributed to a body corporate that ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence.’⁴⁷ In Europe too one can find examples of a less piecemeal approach to corporate criminal liability. An Austrian statute that came into force in 2006 holds companies criminally liable when either a decision-maker within the company has committed a crime or, more radically, an employee has committed an offence but in circumstances where the company has failed to take the precautions necessary to prevent the offence from occurring.⁴⁸ The Austrian statute mirrors a 2001 Italian statute under which a company can be convicted of a crime either committed by a principal officer of the company, or in circumstances where the company can be shown to have been negligent in not considering the possibility of the offence which occurred and in not establishing mechanisms to prevent its commission.⁴⁹ The above statutes recognise the general duty of companies to prevent wrongdoing and their obligation to put in place systems that will achieve this goal

III. A focus on corporate liability to the exclusion of individual liability

⁴⁵ Eg, Interpretation Act 1978 Schedule 1(words and expressions defined).

⁴⁶ See J. Gobert, ‘Corporate criminality: four models of fault’ (1994) 14 *Legal Studies* 393; C. Wells ‘Corporate Manslaughter: Why does Reform Matter?’ (2006) 123 *South African LJ* 648.

⁴⁷ Criminal Code Act (1995)(Cth) s. 12.3 (1). Although, as a *federal* law, this provision has limited applicability, its test of liability was subsequently adopted by the Australian Capital Territories for its statute on industrial deaths. Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT), ss. 51 (2).

⁴⁸ Bundesgesetz uber die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG), Bundesgesetzblatt I 2005/151 discussed in K. Schmoller ‘Criminal Responsibility of Corporations. A New Regulation in Austria’ (Collection of papers, Scientific Conference, Serbia, 18 May 2006).

⁴⁹ DLgs (Legislative Decree) of June 8, 2001 discussed in J. Gobert and E. Mugnai ‘Coping with Corporate Criminality – some Lessons from Italy’ [2002] *Crim LR* 619.

In a reversal of the position taken by the Law Commission, the Home Office in its 2000 consultation document indicated its willingness to consider holding directors and officers of undertakings criminally responsible for contributing to the then proposed corporate killing offence.⁵⁰ Two tiers of potential liability were envisaged: one, for contributing to (or, in the words of the document, for having had ‘some influence on, or responsibility for’⁵¹) the corporate offence, would have led to disqualification from acting in a management capacity in any future undertaking; and a more serious offence, for *substantially* contributing to the corporate offence,⁵² which would have carried the potential for a sentence of imprisonment.

Not surprisingly, these proposals for personal liability were strongly resisted by those in the business community, who were troubled by the potential damage to their personal reputation which could result merely from the bringing of a prosecution – even if it subsequently failed -- and by the possible prospect of jail if it were to succeed. The latter concern was compounded by the uncertainty of how judges would interpret the requirement of substantiality in the ‘substantially contributing’ offence. Furthermore, there was the fear that prosecutors might yield to pressures from unions and/or relatives of a deceased to bring charges against corporate executives rather than their companies and that juries composed of ordinary citizens would be more likely to empathise with the victims than with the ‘fat cat’ directors in the dock and convict.⁵³ In short, business executives were afraid that they would be made the scapegoat for not unreasonable business decisions that had gone seriously awry. The spectre of personal liability was also seen as a disincentive for rising junior staff from accepting senior managerial posts entailing responsibility for safety (or, as John Braithwaite has referred to the holders of these posts, ‘Vice Presidents responsible for going to jail’⁵⁴).

⁵⁰ Home Office consultation document, paras. 3.4.7-3.4.12. The Law Commission’s rejection of liability for complicity in the corporate offence was set out in Law Comm. Rpt. No. 237, para. 8.58. It was in attributable to other proposals the Commission advanced in respect of categories of manslaughter committed by natural persons, which arguably made secondary liability for the corporate offence less necessary.

⁵¹ Home Office consultation document, para. 3.4.9.

⁵² *Id.*, para. 3.4.13.

⁵³ See S. Tombs and D. Whyte ‘Two steps forward, one step backwards: towards accountability for workplace deaths’ (2003) *Policy and Practice in Health and Safety* 9.

⁵⁴ J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* 308 (1984).

The lobbying efforts of the business community against personal liability bore fruit in that the 2007 Act specifically provides that no individual can be prosecuted for aiding, abetting, counselling or procuring the commission of corporate manslaughter or corporate homicide.⁵⁵ While criminal complicity is a highly contentious area⁵⁶ and well beyond the scope of this article, one might observe that liability under section 8 of the Accessories and Abettors Act 1861 is generally the norm and immunity from liability the exception. The government's rationale for eschewing accessorial liability in the corporate manslaughter context -- its professed desire to focus on the liability of organisations -- is hardly a convincing reason for ignoring the culpability of corporate executives, senior managers and directors. Nor is immunity from accessorial liability easy to reconcile with the government's general efforts to link the 2007 Act's provisions to health and safety law. The immunity provision clashes jarringly with Section 37 of the Health and Safety Act:

Where an offence...by a body corporate is proved to have been committed with the consent and connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate ..., he as well as the body corporate shall be guilty of that offence....⁵⁷

Although the government made the point that culpable corporate officers and managers could still be prosecuted for gross negligence manslaughter, there is a vast gulf between those who can be charged with this offence, given the evidentiary demands of *Adomako*⁵⁸ and the fact that so serious a charge will not be brought lightly, and those who have been knowingly

⁵⁵ Act, s. 18.

⁵⁶ See generally Law Commission, Report No. 305, Participating in Crime (2007).

⁵⁷ Health and Safety at Work etc. Act s.37 (1974). The potential for using this section to fill the gap left by the 2007 Act is explored in F. Wright, 'Criminal Liability of Directors and Senior Managers for Deaths at Work' [2007] Crim. LR 949.

⁵⁸ In particular, proving (1) a duty of care to the victim -- while directors may owe a fiduciary duty to their company and its shareholders, they are not generally held to owe a personal duty to the company's employees or users of its premises or products; (2) gross negligence -- the mere fact that a director or senior manager may have approved or failed to question an ill-conceived policy may not constitute sufficiently gross behaviour to satisfy this requirement; (3) *mens rea* -- while not technically relevant under *Adomako*, *mens rea* may be of evidentiary significance, see *A-G's Ref. (No. 2 of 1999)* [2000] 2 Cr. App. 207, and showing that a director or senior manager was aware of a risk of death associated with a given policy may be problematic; and (4) causation -- an intervening act by a grossly negligent employee may be found by a court to have broken the chain of causation from boardroom to crime scene, although this is now less likely after *Kennedy (No. 2)* [2007] UKHL 38), discussed *supra* note 38 and accompanying text.

complicit in their organisation's manslaughter offence. Corporate executives, senior managers and directors who occupy this no-man's land will escape all criminal liability under the configuration of the law now in place. Interestingly, as noted previously, the Act requires a showing that the way in which an organisation's activities were managed or organised by its senior managers was a 'substantial element' in the gross breach of the relevant duty. But if fault of senior managers constituted a substantial element in the organisation's offence, it would seem hard to argue that these managers were not accessories to that offence.

When might it be found that persons who play a significant role in the making and/or carrying out of organisation policy have contributed to a death that was not directly caused by their actions to an extent meriting accessorial liability? An organisational offence can be premised on policies that fall 'far below what can reasonably have been expected of the organisation in the circumstances.' It would be the rare case, however, where the flawed policy was not conceived, formulated, drafted or at the very least approved at senior management level or higher. For the relevant senior personnel to claim unfamiliarity with the policy in question smacks of willful neglect, and to claim a lack of understanding of the dangers inherent in the policy ignores their ability to seek out the advice of consultants who have the necessary expertise. However one looks at it, senior managers and corporate executives who knowingly ignore criminogenic risks inherent in organisational policies, or willfully blind themselves to such risks, or deliberately fail to take feasible counter-measures to prevent their occurrence are complicit in any resulting offence. These policy makers are engaged in such sufficiently poor risk management that the law should at least allow their liability as accessories to be considered when a grossly flawed policy for which they bear responsibility leads to a death and conviction of their organisation.

But the case for personal liability does not end there. Senior staff usually have responsibility for hiring and training new employees. If, for instance, a death occurs as a result of the grossly inept operation of a forklift, those who failed to provide appropriate training for the forklift operator or who hired a completely unsuitable person to do the job may be as culpable as the operator. Senior personnel may also be responsible for providing the means by which an offence has been committed as, for example, if the forklift operator had been assigned a forklift known for its tendencies to malfunction. Further, the responsibility for devising and implementing systems for supervising employees will usually rest with senior managers. They

can, for example, install CCTV cameras in construction areas where negligent practices are known to be commonplace and there is a high risk of death. Finally, if an employee is found to have violated a corporate policy aimed at preventing serious injury or death, a senior official within the organisation will likely be responsible for disciplining the employee. Imposing a relatively minor penalty will convey to the workforce that the violation is not taken seriously by management while dismissal or a lengthy suspension without pay will clearly send the opposite message.

In some instances promotion, salary and bonus structures can encourage illegality. For example, when lorry drivers are paid by the number of the deliveries they make, it is not difficult to foresee that drivers will break speed limits or drive while overtired in order to maximise the number of their deliveries. It is in such circumstances that fatal road ‘accidents’ are most likely to occur. Similarly, when a company-paid all-expenses vacation is on offer to the employee who sells the most health insurance policies, would it be shocking to find sales personnel failing to inform customers that the policies in question provide grossly inadequate coverage in respect of certain potentially fatal diseases? The preceding examples are not to suggest that salary and bonus schemes that reward exceptional performance are to be eschewed but rather that there also needs to be put in place independent review mechanisms that will protect against shortcuts that have the effect of endangering lives. Those responsible for instituting reward structures that significantly increase the foreseeable risk of death bear a commensurate responsibility for preventing fatalities.

Unions frequently claim that deaths at work are attributable to callous corporate decisions to place profits ahead of safety. Obviously a delicate balance between the two must be struck, but frequently that balance is struck too much in favour of profitability. It is typically senior managers who decide what funds to allocate to research and development (R&D). However, the R&D budget is often the first to be slashed in times of fiscal exigency. Yet by not taking R&D sufficiently seriously, an organisation may wind up exposing users of its services or products to an inordinate risk of death. The link between a death and an underfunded R&D department may be difficult to appreciate in practice, as the latter consists of an omission rather than an act of commission, and there are no guidelines to indicate how much an organisation should be spending on R&D. However, a couple of real-life examples may shed light on the relationship. Well before the capsizing of the Herald, the dangers of roll on, roll off ferries were known to those

in the industry.⁵⁹ Yet not even the Sheen Report⁶⁰ contained much discussion of the R&D efforts made by P&O to explore safer ways of loading and unloading vehicles on to its ferries. On the other hand, one of the more irresponsible incidents revealed in the Sheen Report was the ridicule heaped by directors on a not unreasonable request from Ships Masters to install warning lights on the bridge that would signal when the bow doors were not closed.⁶¹ This proposal was summarily rejected without even a cursory investigation of its feasibility, the reason given being that bridge lights were an unnecessary expense where an employee was already being paid to close the bow doors. Yet as the Law Commission recognised:

‘If a company chooses to organise its operations as if all its employees were paragons of efficiency and prudence, and they are not, the company is at fault; if an employee then displays human fallibility, and death results, the company cannot be permitted to deny responsibility for the death on the ground that the employee was to blame.’⁶²

Similarly, the Southall rail crash occurred when the driver of the train allowed his concentration to lapse and he failed to observe signals warning him of the potential danger of a crash. However, the train in question was equipped with ATP, a system that would automatically have brought the train to a halt after it had passed a red signal, but the ATP system had been switched off. In his testimony before the Health and Safety inquiry that examined the causes of the crash, the managing director of Great Western Railways explained that the company had been unable to get ATP to function properly. The effort expended by the company in making the system work was not probed in depth even though European train companies had for years been using ATP without experiencing major difficulties. Parenthetically, after the Southall crash, Great Western managed to install a working ATP system on all of its trains; and after the capsizing of the *Herald*, P&O had no difficulty in fitting the bridge with warning lights.

Safety is one dimension, albeit a very important one, of a larger issue relating to a company’s ethos and culture. Where lies an organisation’s values and priorities? What message does it convey to its workforce about the need to comply with the law? Does it indicate that it takes compliance seriously or does it give the impression that lip service is grudgingly being paid

⁵⁹ See G.R. Sullivan ‘The Attribution of Liability to Limited Companies’ (1996) 56 CLJ 515, 542.

⁶⁰ Dept of Transport, The Merchant Shipping Act. *mv Herald of Free Enterprise*: Report of Court No. 8074 (1987).

⁶¹ *Ibid.*, para 18.5.

⁶² Law Comm. Rpt. No. 237 para 8.37.

to ‘legal technicalities’? Are employees encouraged to report violations, and, if they do, are they rewarded, humoured or indirectly punished (e.g., by subsequently being passed over for promotion)? Are reported violations rectified or ignored? These are important questions but ones which may be difficult to answer in a given case.⁶³ Indeed, can a company’s culture even provide the basis for a criminal prosecution; and, if so, what is the relationship between a company’s culture and its directors and senior officers?

Again, the Australian Federal Criminal Code Act (1995)⁶⁴ points the way forwards. Under this law, one way that corporate fault can be established is by proof that ‘a corporate culture existed ... that directed, encouraged, tolerated or led to non-compliance with the relevant law’ or that ‘a body corporate failed to create and maintain a corporate culture that required compliance with the relevant law.’⁶⁵ The fact that a criminogenic culture had been in existence for many years or even from the company’s founding, and in no way attributable to the company’s current management, will not be a defence under the Australian statute as those in a position to change the culture have an affirmative obligation to do so.⁶⁶ Although the concept of ‘corporate culture’ may be criticised for its vagueness and while proving a company’s culture may be problematic, the Australian legislation can be judged a success if it causes directors and corporate executives to periodically review their company’s culture. It is these individuals who bear the responsibility for their company’s culture, ethos and values. Much as they might like to do so, ordinary workers lack the authority to order change.⁶⁷

The 2007 Act also makes reference to an organisation’s culture. Among the factors that a jury may consider in determining whether a gross breach of a duty has occurred is ‘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 [the gross breach] ... or to have

⁶³ See P.Bucy ‘Corporate Ethos: A Standard for Imposing Corporate Criminal Liability’ (1991) 75 Minnesota L Rev 1095.

⁶⁴ See *supra* note 47 and accompanying text.

⁶⁵ Criminal Code Act (1995)(Cth) ss. (2)(c) and (d).

⁶⁶ See also G.R. Sullivan ‘The Attribution of Liability to Limited Companies’ (1996) 56 CLJ 515, 536.

⁶⁷ Corporate executives should be encouraged to seek the opinions of ordinary workers as to their understanding of the company’s culture and their first-hand experiences with it, perhaps through an anonymous suggestion box.

produced tolerance of it.’⁶⁸ It should be noted, however, that this provision applies only after a violation of health and safety legislation has already been established. Also, a company’s culture is only evidence that a jury *may* consider, as compared to a violation of health and safety laws, which the jury *must* consider.⁶⁹

Permitting the prosecution of directors, corporate executives and senior managers for complicity in their organisation’s offence would have several advantages, not the least of which would be the placing of blame where in many cases it properly belongs. Being subject to prosecution as an accessory would also prevent individuals responsible for the organisation’s offence from hiding behind the cloak of organisational liability. Especially if imprisonment is a sentencing option, the prospect of personal liability as an accessory to any resulting organisational offence can be expected to encourage those in positions of power to take more seriously their obligation to promote safety and a law-compliant culture. In addition, individual liability will help to combat the ‘Phoenix’ phenomenon whereby a company may effectively evade monetary sanctions for corporate manslaughter by going into liquidation. Accessorial liability would ensure that those at fault in their company’s wrongdoing will remain subject to criminal sanction even if their organisations do not. In the absence of personal liability, directors in a bankrupted company may be able to simply regroup and start up a new company under a different name and a modified charter.

IV. A failure to achieve a more realistic test of corporate liability

Prior to passage of the 2007 Act (and still with respect to other common law and statutory offences) the prevailing test of corporate criminal liability was to be found in the ‘identification doctrine’.⁷⁰ To convict a company of a crime, the prosecution had to show that a person who represented the ‘directing mind and will of the company’ had committed the offence with which the company was charged. If this could be proved, the offence could then be imputed to the company.

⁶⁸ Act, s. 8(3)(a).

⁶⁹ Act, s. 8(2).

⁷⁰ The leading modern authority is *Tesco Supermarkets Ltd v Natrass*, [1972] AC 153.

The deficiencies of the identification doctrine have been well documented elsewhere,⁷¹ and it was to overcome these shortcomings that the Law Commission recommended a test of corporate liability that was not linked to personal fault. Under the Commission's proposals, systemic fault, embodied in the concept of 'management failure', was to be the basis of corporate liability.⁷² This methodological approach constituted a recognition that often deaths in a corporate context are due to the combined effect of flawed policies and the actions and inactions of more than one individual. Although a theory of aggregated fault intended to capture the latter dimension of corporate fault was advanced by the prosecution in the Herald case, it was rejected by the trial court.⁷³ The 2007 Act appears to accept the concept of aggregation in limited form by its reference to 'senior management' in s. 1(3) and the linkage in s. 1(4) of senior management to persons (note the use of the plural) who play significant roles in the making or carrying out of corporate decisions. While the acts of the persons referred to in s. 1(4) only would need to be shown to be a *substantial* element in the breach, and not its sole cause, it nonetheless remains

⁷¹ See, e.g., D. Bergman *The Case for Corporate Responsibility* (2002); B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (1993); J. Gobert and M. Punch, *Rethinking Corporate Crime* (2003); G. Slapper and S. Tombs, *Corporate Crime* (1999); C. Wells, *Corporations and Criminal Responsibility* (2nd ed. 2001).

⁷² Law Comm. Rpt. No. 237, draft bill, s.4 (1)(a)(1996). The Commission's 'management failure' test was endorsed both in the Home Office consultation document and in the Joint Report of the Home Affairs and Work and Pensions Committees, see *supra* note 20 at para. 169.

⁷³ *R v Stanley and others* 19 October 1990 (CCC No 900160). The judge quoted Bingham, J. (as he then was) in *R. v. H.M. Coroner for East Kent, ex parte Spooner* [1989] 88 Cr. App. R. 10 (another of the cases arising from the capsizing of the Herald) at 16-17:

Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.

The above quotation appears to be premised on a misconception of the purpose of the doctrine of aggregation in the corporate context. That purpose is not to allow one person's (or a company's) fault to be based on the fault of somebody else (or some other company). Rather, the purpose of aggregating individual fault in the corporate context is to provide a means of capturing corporate fault. Arguably, even if no individual's improper act rises above the level of negligence (with gross negligence being required for criminal liability), a company's willingness to tolerate endemic negligence by its workforce constitutes *gross* negligence on its part.

unclear whether wrongful acts of employees can be added to the wrongful acts of these individuals in determining whether a ‘management failure’ has occurred.

In dispensing with the need to identify a specific individual within the organisation who has committed manslaughter, the 2007 Act represents a major improvement over the identification doctrine. Also, the category of senior management is doubtless more encompassing and realistic than the identification doctrine’s restriction to persons who comprise the ‘directing mind and will’ of a company. Nevertheless, the 2007 Act’s linkage of senior management to persons who play a significant role in the formulation and/or implementation of organisation policy appears, at least indirectly, to continue the identification doctrine’s preoccupation with individual rather than systemic fault. In so doing, it may perpetuate many of the evidentiary problems associated with the identification doctrine, while adding new problems of its own. Under the identification doctrine, arguments over whether an individual was part of a company’s ‘directing mind and will’ were commonplace. Under the Act, similar arguments can be anticipated in respect of which individuals play a ‘significant’ role in the making or carrying out of organisational policy. Added to this sticking point can be expected new disputes raised by the wording of the Act: how much of a role must an individual play in decision-making or managing before the role can be deemed to be ‘significant’?; with how large a part of an organisation’s activities must an individual be involved to satisfy the Act’s requirement that the individual be involved in a ‘substantial part’ of the activities in question? In respect of the requirement that the way that ‘senior management’ managed or organised the relevant activities be shown to have constituted a ‘substantial element’ in the breach,⁷⁴ it would seem inevitable that whether senior management’s contributions to a breach were substantial or something less weighty will prove a point of contention. The wrangling can be expected to be particularly acute where there are failings at multiple levels, some managerial and some not, of a large company. In such a case the question that will arise is whether the contributions of senior management need to be viewed in isolation to see whether, standing on their own, they played a ‘substantial’ role in the death or whether the failings of other employees can be factored into the assessment of whether the senior management failure was a substantial element in the breach. It is submitted that in answering this question courts should be able to take into account oversight responsibilities. What would have

⁷⁴ Act, s. 1(3).

been helpful is inclusion in the Act of a concept akin to that of ‘command responsibility’ in the International Criminal Court Act 2001:

...

(2) A military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where—

(a) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences, and

(b) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is responsible for offences committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates where—

(a) he either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offences,

(b) the offences concerned activities that were within his effective responsibility and control, and

(c) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(4) A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.⁷⁵

A doctrine of this sort would have clarified the resolution of cases where a combination of managerial and employee fault combined to bring about a death but the employees were acting under the control of a senior manager. Note that, under s.4 of the International Criminal Court Act, the effect of proving ‘command responsibility’ is to render the defendant liable as an accessory, the precise position rejected in the Corporate Manslaughter Act 2007 in respect of individuals. In the absence of such a provision, organisations will be able, as they were under the identification doctrine, to render themselves virtually manslaughter-proof by placing a junior member of staff in charge of potentially lethal dimensions of a company’s business or safety

⁷⁵ International Criminal Court Act 2001, s. 65.

generally. If a death were then to occur, corporate liability would only lie if senior management's decision to delegate the responsibility for safety matters to the junior staff member was itself a 'substantial element' in the breach. The question may devolve into one of whether senior managers were 'significantly' involved in safety decisions or simply with the appointment process of staff, as can be expected to be argued by the corporate defendant.

V. The requirement of DPP consent

Both the Law Commission in its 1996 Report and the Home Office in its 2000 consultation document took the position that there should be no requirement of consent to the beginning of a private prosecution for corporate killing.⁷⁶ In stark contrast, the 2007 Act requires consent by the Director of Public Prosecutions (DPP) not only for private prosecutions, but for all corporate manslaughter prosecutions.⁷⁷

A CPS publication describes the role of the DPP as one of making decisions about 'the most complex and sensitive cases'.⁷⁸ However, s. 1(7) of the Prosecution of Offences Act 1985 allows DPP consent to be given by a Crown Prosecutor.⁷⁹ How are these two provisions to be squared with the 2007 Act's stipulation of the need for DPP consent to institute a prosecution for corporate manslaughter? A not unreasonable interpretation would be that prosecutions for corporate manslaughter do not fall within the category of cases to which s. 1(7)'s delegated authority applies. Rather, such prosecutions come within the 'complex and sensitive cases' for which the DPP's personal consent is envisaged. The relatively small number of anticipated prosecutions – the government projected only five per year – would mean that the DPP would not be overly taxed by the obligation of review, even assuming that more than five cases were referred to the DPP over the course of a year. If the requirement of DPP consent were to be challenged, a court may well give a literal interpretation to the requirement. After all, not every statute specifically refers to the need for DPP consent and corporate manslaughter prosecutions may well be regarded as especially complex and sensitive cases.

⁷⁶ Law Comm Rpt. No. 237, para. 8.6.6; Home Office Consultation document, para. 3.7.6.

⁷⁷ Act, s. 17. See also *R v Liverpool Crown Court ex part Bray* [1987] Crim LR 51.

⁷⁸ The Crown Prosecution Service, Director of Public Prosecutions, <http://www.cps.gov.uk/about/dpp.html> ((last accessed 08/02/08).

⁷⁹ Prosecution of Offences Act 1985, s 1(7).

An alternative interpretation of the 2007 Act's requirement of DPP consent is that it pertains only to *private* prosecutions, the context in which the issue arose before the Law Commission and in the 2000 Home Office consultation document. The major impediment to such an interpretation is the language of the 2007 Act, which does not differentiate between prosecutions initiated by the Crown and by a private party. Consent of the DPP seems to be envisaged for both. As the drafters of the Act were presumably familiar with the 2000 Home Office consultation document, the change in position cannot be considered as inadvertent or unintentional. The more probable explanation is that the issue was reconsidered by the government in the interim between the 2000 consultation document and the 2005 draft bill. The reason for such reconsideration may be surmised. At the time of the publication of the consultation document, the Home Secretary had opined that few, if any, private parties would have both the will and the financial wherewithal to pursue a private prosecution. This view failed to take into account the possibility that a trade union with deep coffers might decide to bring a test case. It also failed to take account of the power of the internet in raising money to finance a private prosecution, as indeed occurred in the Simon Jones case.⁸⁰

Among the DPP's duties is that of 'reporting to the Attorney General, the Government Minister who answers for the CPS in Parliament.'⁸¹ This chain between the DPP, the Attorney General and Parliament highlights the political implications of a decision to bring a prosecution for corporate manslaughter. Although the government has indicated that the same general criteria applied by the CPS to decisions to prosecute generally -- -- whether there is sufficient evidence for there to be a reasonable prospect of a conviction and whether bringing the proceedings would be in the public interest⁸² -- would govern the DPP's decision to allow a corporate manslaughter prosecution,⁸³ how 'public interest' is conceptualized may be modified when immersed in the political cauldron. If DPP consent to prosecute were to be withheld, those opposed to the decision may suspect that the DPP had been influenced by MPs who in turn had been influenced

⁸⁰ See <http://www.simonjones.org.uk/> (last accessed 08/02/08)

⁸¹ See *op. cit.*, note 78.

⁸² See Crown Prosecution Service, Code for Crown Prosecutors, No. 5. <http://www.cps.gov.uk/publications/docs/code2004english.pdf> (last accessed 08/02/08).

⁸³ See Government Response to the Joint Report of the Home Affairs and Work and Pensions Committees 2005-06 HC540 p. 31. <http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/government-response.pdf?view=Binary> (last accessed 05/02/08).

by corporate lobbyists. Whether or not this was in fact true, a shadow will have been cast over the integrity of the process. Virtually invisible behind the scenes corporate lobbying is likely to be assumed even if it cannot be proved. Although of course a decision by the DPP to withhold consent to prosecute would be subject to judicial review, this procedural avenue would simply add another layer of time, expense and anxiety in the search for justice, and with relatively modest chances of success.

VI. The bigger picture: the symbolic and practical effects of the Act

There is no gainsaying the importance of simply having a corporate manslaughter statute on the books. The symbolic effects of the 2007 Act may in the long run overshadow the deficiencies discussed in this article. Most importantly, the Act signifies that companies and other organisations (as well as Crown bodies) are not above the law and are capable of committing crimes as grave as manslaughter. The Act further signifies that causing a workplace death is a ‘real’ crime and not just a ‘regulatory’ offence.⁸⁴ Health and Safety laws, despite the penal sanctions attached to their violation (and the same maximum penalty -- an unlimited fine – as attached to a corporate manslaughter conviction) are viewed quite differently by both those in industry and the general public. All would regard manslaughter as a serious offence; in contrast, health and safety violations are often viewed as involving technical breaches of overly protective rules laid down by a nanny state. To some extent the latter attitude may be attributable to the fact that health and safety violations do not require proof of a death or even any injury.

In the not so distant past, deaths at work were commonly dismissed as unfortunate ‘accidents’. This characterisation was by and large accepted, even by the families of victims. However, public inquiries and media investigations into the circumstances surrounding several of the tragic ‘accidents’ of the 1980’s and 1990’s revealed that many of these were preventable and, moreover, that corporate fault may have played a role in the deaths. The Act takes this train of thought to the next level in its recognition that at least some of these deaths may involve homicide. Moreover, the implication that organisations, companies and even Crown bodies may be potential criminals cannot help but alter society’s image of these entities and its views as to

⁸⁴ See D. Bergman *The Case for Corporate Responsibility* (2002).

what is acceptable and what is unacceptable organisational conduct. The dialectic process or reshaping societal attitudes towards corporations and other powerful organisations which arguably began with the enactment of the Factory Acts⁸⁵ should gain pace as a result of the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007.⁸⁶

The 2007 Act may have more immediate and practical effects as well. Hopefully it will spur directors and senior managers to satisfy themselves that their organisation's systems for managing health and safety are fit for their purpose. The Act should also lead to greater attention being paid to the calculus of risk management decisions, with higher priority likely being given to health and safety considerations. Although admittedly a more elusive concept, the Act may cause organisations to take a fresh look at their culture and ethos. The reasons for the above predicted effects are not difficult to appreciate. Few organisations, and few corporate conglomerates in particular, will want the unwelcome publicity that attends a criminal prosecution for manslaughter. The 'naming and shaming' of a company by virtue of an indictment can itself be extremely damaging to its reputation and sales, regardless of the outcome of the trial. If convicted, the 'adverse publicity order' authorised under the Act,⁸⁷ with its potential to precipitate a crippling boycott of the offender's products or services, may be more damaging still.

The Act provides not only a new way of thinking about corporate crime but also a test of corporate criminal liability which could serve as a model for other areas of corporate wrongdoing. While instances of workplace deaths may be relatively few (and even after the Act, likely to be dealt with under health and safety law in all but the most egregious cases), workplace injuries are far more common.⁸⁸ If there were to be enacted an offence of corporate gbh with the same test of organisational fault as under the 2007 Act, the potential liability of organisations would expand exponentially. Many in the business community in fact see the Act as the thin end of a very ominous wedge.

⁸⁵ See L. Snider 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1987) 9 Law and Policy 37.

⁸⁶ See J. Gobert 'The Politics of Corporate Manslaughter—The British Experience', (2005) 8 Flinders Journal of Law Reform 1; C. Wells 'Corporate Manslaughter: Why does Reform Matter?' (2006) 123 South African LJ 648.

⁸⁷ Act, s. 10.

⁸⁸ See *supra*, note 8.

For its part, the government has tried to downplay these fears. Both the Home Office notes which accompanied introduction of the original draft bill and the Ministry of Justice guidance published after passage of the Act⁸⁹ seek to reassure organisations that they have nothing to fear from the Act if they are in compliance with health and safety laws. The government is obviously worried that a law of corporate manslaughter may discourage companies which are in the process of choosing where to locate their corporate headquarters from selecting the UK because of the fear of prosecutions under the new law. Companies already located in the UK may similarly decide to move their headquarters to a state perceived to have a less legalistic and hostile business environment. Even if a company does not relocate its headquarters, it may decide to shift dangerous dimensions of its business to foreign subsidiaries, with resulting displaced injuries and deaths to workers in the state of the subsidiary.⁹⁰ All such decisions may lead to job losses and unemployment for UK workers, reduced personal and corporate taxes for the UK government, an increase in crime (from out-of-work employees) and a general demoralisation within society, but especially within the labour and business communities. In addition, a rigorously enforced law of corporate manslaughter may give rise to a risk-averse corporate culture. Rather than experimenting, companies may decide to choose ‘safe’ options. If so, British businesses may find themselves falling behind more entrepreneurial competitors operating in less prescriptive states, to their disadvantage and to the disadvantage of the reputation of British industry generally.

Which of the above described effects of the 2007 Act will come to pass is at present an open question. The answer will depend on how vigorously the government chooses to enforce the new Act and how expansively or restrictively the courts interpret its provisions. The Act came into force in April 2008, and its long-term efficacy remains to be determined.

⁸⁹ Ministry of Justice, Understanding the Corporate Manslaughter and Corporate Homicide Act 2007, http://www.nio.gov.uk/corp_mans_leaflet_web_revised.pdf_9_oct_07-3.pdf (last accessed 05/02/08).

⁹⁰ Whether a UK parent company would be liable for a death at a foreign subsidiary is in theory a complex issue, even though the Act purports not to apply to deaths that do not occur in the UK or fall within other well-established exceptions. Act, s. 28(3). See generally J. Gobert, *Corporate Killings at Home and Abroad — Reflections on the Government's Proposals*, (2002) 118 LQR 72.