



UNIVERSITY OF
CHICHESTER

Corporate Manslaughter and Corporate Homicide Act 2007 –
An analysis of the Act considering whether the Health and
Safety Executive should be conferred prosecution powers.

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Law LLB (Hons) Dissertation

April 2024

University of Chichester

Academic Supervisor – Dr Amy Elkington

Word Count – 6909

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Acknowledgements

First of all, I would like to thank Dr Amy Elkington, Luke Browning and the rest of the Law Department at the University of Chichester for dedicating their time and resources in helping me write this dissertation. Secondly, I would also like to extend this to every member of the Law Department for continuously helping me achieve the best results I can throughout my time at the university. Finally, I would like to thank my immediate family and friends who have supported me throughout my degree.

This dissertation is dedicated to everyone who was a victim of the Grenfell Tower and the victims of Countess Chester Hospital NHS Foundation Trust in failing to recognise the death of multiple infants.

In addition, I would like to dedicate this dissertation to companies, the Health and Safety Executive, and Judges across the United Kingdom to consider the impact of the Corporate Manslaughter and Corporate Homicide Act 2007 in practice.

Abstract

This dissertation aims to analyse whether the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 is a suitable legal vehicle for convicting companies of manslaughter across the United Kingdom. The dissertation will demonstrate through the theoretical, socio-legal and doctrinal approach that the CMCHA 2007 is not a suitable vehicle for prosecuting companies. It achieves this by examining Ashworth's principles of criminal law including retroactivity, strict construction, liability and proportionality. Furthermore, case studies are considered to demonstrate the CMCHA 2007 is not suitable including; *R v P&O European Ferries (Dover)*¹ and *R v Kite (Peter Bayliss)*.² The importance of this dissertation is to highlight to the government that the CMCHA 2007 needs amendments including conferring prosecuting powers to the Health and Safety Executive.

Word Count – 6909 – excluding Acknowledgments, Abstract, Table of Contents, Titles, Sub-titles, Glossary, Bibliography and Appendix.

¹ (1991) 93 Cr App R. 72

² [1996] 2 WLUK

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Prosecution of Offences Act 1985

The European Convention on Human Rights 1950

Table of Abbreviations

Full Text	Abbreviation
Criminal Justice Act 2003	CJA 2003
Criminal Justice System	CJS
Corporate Manslaughter and Corporate Homicide Act 2007	CMCHA 2007
Duty of Care	DOC
Director of Public Prosecutions	DPP
Health and Safety Executive	HSE
Health and Safety at Work etc Act 1974	HSWA 1974
Prosecution of Offences Act 1985	POA 1985
United Kingdom	UK

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) defines corporate manslaughter as,

*An organisation is guilty of an offence if the way in which the 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.*³

As of 2022 there was an estimated 5.5 million business in the United Kingdoms (UK) private sector.⁴ The UK's large service based economy covers many specialisms, with multiple opportunities for the offence to arise thus making it vital for there to be an effective system to prosecute corporate manslaughter.⁵ The CMCHA 2007 has aimed to fulfil this role in prosecuting, regulating, and deterring companies from committing corporate manslaughter.⁶ However, there has been fewer than 30 convictions under the CMCHA 2007 since the Act was enacted. This is not proportionate compared to 135 workplace fatalities between 2022 and 2023 with similar quantities in previous years.⁷ This could indicate the CMCHA 2007 is not fit for purpose, or is proving to be an effective deterrent.⁸ With the growing number of companies and their influence in the UK it is essential that the CMCHA 2007 is examined to establish whether the Act needs abolishing or amending to facilitate further convictions.

³ Corporate Manslaughter and Corporate Homicide Act 2007, S.1(1)

⁴ Business population estimates for the UK and regions 2022: statistical release (HTML), (GOV.UK, 6th Oct 2022) accessed 24th Oct 2023 < <https://www.gov.uk/government/statistics/business-population-estimates-2022/business-population-estimates-for-the-uk-and-regions-2022-statistical-release-html> >

⁵ United Kingdom Market Overview, (International Trade Administration, 11th Sept 2022) accessed 24th Oct 2023 < <https://www.trade.gov/knowledge-product/united-kingdom-market-overview> >

⁶ Corporate Manslaughter, (CPS, 16th July 2018) accessed 24th Oct 2023 < <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter> >

⁷ Health and Safety Executive, 'Work-related fatal injuries in Great Britain' (Health and Safety Executive, n.d) accessed 25th March 2024 < <https://www.hse.gov.uk/statistics/fatals.htm> >

⁸ Freedom of Information Act 2000 Request, (CPS, 5th Mar 2020) accessed 24th Oct 2023 < <https://www.cps.gov.uk/sites/default/files/documents/publications/2020-foi-disclosure-13.pdf> >

There is a cross between multiple areas of law including but not limited to; criminal, tortious, and company law. These areas of law and their principles need to be balanced in order to achieve an effective criminal justice system (CJS). One of Ashworth's principles of criminal law is that, 'criminal and civil penalty rules are the fundamental rules that set obligations to either engage or disengage in a certain behaviour however, when a breach of that behaviour occurs so does guilt and a sanction such as a fine'.⁹ The law surrounding corporate manslaughter has an overlap between criminal and civil law because the principles of negligence are applied within corporate manslaughter.¹⁰ This demonstrates the two areas of law could exist conjointly or cause uncertainty affecting the use of the Act.¹¹ The dissertation will evaluate whether the Act is too complex in practice.

The dissertation will follow three types of methodology; the doctrinal, socio-legal and theoretical approach.¹² The doctrinal approach will be followed because the Statute will be analysed. This methodology allows the CMCHA 2007 to be analysed without taking into consideration other factors affecting the law such as morality and politics.¹³ This allows for a specific approach to be adopted to the dissertation emphasising the key issues within the Statute. The socio-legal approach will be applied to establish and understand how external factors affect the use of the Act.¹⁴ The CMCHA 2007 has a wide impact range, therefore a socio-legal approach is needed to critically analyse the impact of the Act outside of the legal context. Finally, a theoretical approach will be

⁹ Jeremy Horder, *'Ashworth's Principles of Criminal Law'*, (10th edn, Oxford University Press (OUP) 2022) p.63

¹⁰ Rosemary Craig, 'Thou shall do no murder: a discussion paper on the Corporate Manslaughter and Corporate Homicide Act 2007' (2009) *Company Lawyer*, vol.30(1), 19

¹¹ Matthew Dyson, *'Comparing tory and Crime'*, (Cambridge University Press, 2015) p.419

¹² Laura Lammasniemi, *'Law Dissertation, A step by step guide'* (2nd edn, Routledge, 2018) p.72

¹³ Mike McConville and Wing Hong Chui, *'Research Methods for Law'* (2nd edn, Edinburgh University Press, 2017) p.135

¹⁴ Laura Lammasniemi, (n.13) p.74

adopted as it provides greater insight into the disadvantages and anomalies of the Act. A comparative study would gain valuable insight into the reforms.¹⁵ However, this approach will not be followed because of the scope restriction of this project but, could be an area of future research.

The first three chapters consider the timeline of corporate manslaughter. Firstly, the common law offence¹⁶ of corporate manslaughter is discussed highlighting the issue of the corporate veil and identification doctrine. The second chapter considers the Law Commission's reform proposal by critically analysing the impact and structure of the new Statute.¹⁷ The third chapter examines the current law by analysing if there has been an improvement in the law. The fourth chapter argues that the Health and Safety Executive (HSE) should be granted prosecution powers under the CMCHA 2007. The dissertation concludes that the CMCHA 2007 should not be abolished but instead should be reformed to make it more applicable and efficient at prosecuting companies. To achieve this the HSE should be granted prosecution powers under the CMCHA 2007.

¹⁵ Laura Lammasniemi, (n.13) p.76

¹⁶ *R v Kite (Peter Bayliss)* [1996] 2 WLUK 121 [298]

¹⁷ Law Commission, '*Legislating the Criminal Code, Involuntary Manslaughter*' (Law Com No. 237, 1996)

Chapter 1: The Common Law Offence of Corporate Manslaughter

Within this chapter the common law offence of corporate manslaughter is explained and analysed. The chapter focuses on highlighting the issues with the common law offence by analysing the identification principle and the impact the principle had in practice. The chapter concludes that the identification principle was unfair leaving smaller companies at a disadvantage to larger companies.

The Identification Doctrine:

Historically, companies could be convicted for corporate manslaughter under common law.¹⁸ In order to achieve a successful conviction the prosecution had to identify someone within the company to convict of gross negligence manslaughter humanising companies.¹⁹ This conviction could then be transferred vicariously to the company if the death could be linked to the actions of the directing mind of the company.²⁰ This principle was known as the 'identification principle' and is defined in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.²¹ Lord Chief Justice Haldane defined the principle as,

*it's acting and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but is really the directing mind and will of the company.*²²

In practice this means those in charge of the company who make decisions affecting the company will be the directing mind and will. Friedman stated that one responsibility

¹⁸ (n.17) [298]

¹⁹ James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – thirteen years in the making but was it worth the wait?' (2008) *Modern Law Review*, vol.71(3) 414

²⁰ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] A.C. 705

²¹ [1915] A.C. 705

²² *Ibid* [715]

of a company is, “to use its resources and engage in activities designed to increase profits.”²³ However, the common law offence of corporate manslaughter is a regulatory offence limiting company’s actions ensuring they take safety measures contradicting Freidman’s outlook.²⁴

The identification principle has been successful at convicting companies of corporate manslaughter. It should be noted that the offence of gross negligence manslaughter had the same requirements as corporate manslaughter with the additional identification principle making the law consistent.²⁵ The successfulness of the common law offence was illustrated in *R v Kite (Peter Bayliss)*.²⁶ The company consisted of one individual who was the owner of a leisure business and took school trips out to sea in canoes.²⁷ On a sailing trip four pupils died due to the negligence of the company.²⁸ The courts easily identified the individual behind the company acting as the directing mind and will because the company was small.²⁹ A successful conviction was achieved because there was only one person within the company and no dispute as to who amounted to the directing mind and will.³⁰ Although, this suggests that the identification principle is not suitable in modern society. This is due to vast numbers of employees within modern companies making it difficult to establish an individual to convict of gross negligence manslaughter.³¹ This demonstrates that the identification principle is not universally applicable to all companies within the UK. This created a

²³ Alexandra Dobson, ‘Director’s liability for death or workplace injury’ (2013) *International Journal of Law and Management*, 55(5), 386

²⁴ Lee Roach, ‘*Company Law*’ (2nd edn, Oxford University Press (OUP), 2022) p.3

²⁵ Neil MacCormick, ‘*Legal Reasoning and Legal Theory*’, (1st edn, Clarendon Law Series, 1994) p.197

²⁶ [1996] 2 WLUK 121

²⁷ *R v Kite (Peter Bayliss)* [1996] 2 WLUK 121 [295]

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ *Ibid* [298]

³¹ Home Office, ‘*Corporate Manslaughter: The Governments Draft Bill for Reform*’ (Cmd. 6497, p.8)

discriminatory system in which larger companies were able to avoid liability, while small companies were crushed by the identification doctrine.³²

The issue with the identification principle became apparent within large companies.³³ Multiple levels of management and directing minds made it near impossible for the Crown Prosecution Service (CPS) to convict individuals which consequently meant companies were avoiding liability.³⁴ This was illustrated in the Southall Rail Disaster when a train collided with another due to the driver's failure to acknowledge warning signs consequently, killing seven individuals.³⁵ In this case the CPS failed to prosecute the executives of the company because no individual representing the company could be found of criminal offences leading to the accident.³⁶ This illustrates the disadvantage of the identification principle because it is not applicable to larger corporations. This became a major disadvantage of the common law offence because over seven thousand companies in the UK are large making the law not fit for purpose.³⁷

Another issue with the identification doctrine was established in *Tesco Supermarket Ltd v Nattress*³⁸ Lord Reid stated that, "*normally the board of directors, the managing director and perhaps other superior officers of the company carry out the functions of*

³² Law Commission, '*Corporate Criminal Liability: An options paper*' (Law Com, 2022) para 8.19

³³ *Ibid*

³⁴ *Ibid*

³⁵ Celia Wells, 'The Southall rail crash: testing the tracks of corporate manslaughter' (1999) *Archbold News*, vol.7, 3

³⁶ Sarah Hall, 'Outcry over train crash ruling' *The Guardian* (3rd July 1999) accessed 6th March 2024 < <https://www.theguardian.com/uk/1999/jul/03/sarahhall> >

³⁷ GOV.UK, 'Business population estimates for the UK and regions 2022: statistical release (HTML)' (GOV.UK, 6th Oct 2022) accessed 16th Nov 2023 < <https://www.gov.uk/government/statistics/business-population-estimates-2022/business-population-estimates-for-the-uk-and-regions-2022-statistical-release-html#:~:text=there%20were%2035%2C900%20medium%2D sized,of%20the%20total%20business%20population> >

³⁸ [1972] A.C. 153

*management and speak and act as the company.*³⁹ This demonstrates the identification doctrine has a narrow approach by excluding individuals within the company making prosecution complex.⁴⁰ Although, the high threshold is effective because it ensures the appropriate individuals within the company are held accountable.⁴¹ Lord Hoffmann stated the need for, “*a more sophisticated and flexible approach*” to the identification principle.⁴² The common law offence of corporate manslaughter was no longer fit for purpose with companies expanding in size with the ability to avoid liability. The identification principle therefore, led to the development of the CMCHA 2007.

The Corporate Veil Principle:

An established principle in company law is the corporate veil.⁴³ This concept states that individuals are able to ‘hide’ behind the company to avoid individual liability.⁴⁴ The case of *Hashem v Shayif*,⁴⁵ stated when the corporate veil can be pierced.⁴⁶ Justice Munby said, “*it is clear that there must be some impropriety before the corporate veil can be pierced.*”⁴⁷ Therefore, the court can look for the individuals behind the company when failure to observe standards of improper behaviour such as when corporate manslaughter arises.⁴⁸ This was further approved by the case of *R v P&O European Ferries (Dover) Ltd*⁴⁹ which states, “*a corporation itself is not indicatable, but the*

³⁹ *Tesco Supermarket Ltd v Natrass* [1972] A.C. 153 [171]

⁴⁰ (n.44) p.10

⁴¹ *Ibid* p.6

⁴² *Privy Council's advice in Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All E.R. 918, PC.

⁴³ (n.24)

⁴⁴ *Ibid*

⁴⁵ [2008] 9 WLUK 355

⁴⁶ *Ibid*

⁴⁷ *Ben Hashem v Ali Shayif* [2008] 9 WLUK 355 [161]

⁴⁸ *Ibid*

⁴⁹ [1990] 6 WLUK 21

*particular members of it are.*⁵⁰ Furthermore, Lord Justice Rose in *Attorney Generals Reference (No.2 of 1999)*⁵¹ provided insight as to why individuals of the company needed to be convicted of gross negligence manslaughter and not just the company. He stated that the identification principle was “*developed in order to avoid injustice.*”⁵²

This principle restores faith in the general public’s perception of the criminal justice system (CJS) by holding individuals accountable and punished.⁵³ However, capability of criminal liability for corporations is excluded because liability is attributed through moral agents.⁵⁴ Wolf states that corporations have the ability to be guided by moral agents directing the company to follow the law.⁵⁵ This was developed by Hart who states responsible agents have the power to exercise control and choose whether to conform to the law affecting the companies conscience.⁵⁶ This illustrates that companies are their own legal entity but are directed by moral agents which could damage the stigma and conscience of the company. On the other hand, it is also important to convict the company of corporate manslaughter to deter and raise awareness to other companies that could attract criminal liability.⁵⁷ Consequently, the courts need to hold an individual accountable and the company to uphold public confidence by piercing the corporate veil.

In conclusion, the chapter has described the common law offence of corporate manslaughter. The chapter has highlighted the issues of the identification principle.

⁵⁰ *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 [74]

⁵¹ [2000] Q.B. 796

⁵² *Ibid* [797]

⁵³ *Attorney Generals Reference (No.2 of 1999)* [2000] Q.B. 796

⁵⁴ C.M.V. Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) *Modern Law Review*, vol.59, 562

⁵⁵ *Ibid*

⁵⁶ *Ibid*

⁵⁷ (n.24)

The chapter established the principle was unfair with the inability to convict larger companies making it harder to pierce the corporate veil. This principle led to the reform of corporate manslaughter, considered in the next chapter because of the discriminatory application the doctrine caused in practice.

Chapter 2: The Law Commission's Reform Proposals on Corporate Manslaughter

The consultation period to introduce a statutory offence of corporate manslaughter took the government ten years.⁵⁸ This was due to the conflicting views of the Home Office and Ministers on the inclusion of government bodies.⁵⁹ The time it took the government to implement the offence was criticised by the department of Home Affairs and Work and Pensions Committee as being '*lengthy*'.⁶⁰ There are multiple key papers commenting on the introduction of the statutory offence. Firstly, the Law Commission 1996 paper on legislating the criminal code of involuntary manslaughter.⁶¹ Secondly, the 2000 Home Office proposal paper on reforming the law on involuntary manslaughter.⁶² Finally, the 2005 paper by the Home Affairs and Work and Pension Committees on the Draft Bill on Corporate Manslaughter.⁶³ The major proposals will be discussed stating the relevant proposals and effects they did, or could have had on the CMCHA 2007. The chapter concludes the statutory offence of corporate manslaughter will be an improvement from common law because more companies are subjected to the offence.

Law Commission Report On Legislating The Criminal Code On Involuntary

Manslaughter 1996:

This report was the first attempt to legislate the offence of corporate manslaughter.⁶⁴

The report includes valuable insight into the Act as it stands today and what could

⁵⁸ Draft Corporate Manslaughter HC Bill (2005-2006) [87]

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ (n.18)

⁶² (n.44)

⁶³ (n.59)

⁶⁴ (n.18)

have been adopted to make the Act more effective. The Law Commission emphasised that this legislation was crucial to uphold the public's perception and confidence of the CJS after multiple events attaining no accountability.⁶⁵ An example is the inquiry into the Piper Alpha Disaster when 167 deaths occurred in the North Sea because of an operator's negligence, but escaped criminal liability due to the size of the company.⁶⁶ In order to rebut this issue the Law Commission suggested a new statutory offence of 'Corporate Killing.'⁶⁷ The offence firstly, required the corporation to be aware of the risk and or, serious injury. ⁶⁸ Secondly, the corporations conduct fell seriously and significantly below what could be reasonably been demanded of the company in dealing with the risk.⁶⁹

This proposed offence of corporate killing changed from the common law offence because the identification principle was removed.⁷⁰ Instead a new principle was adopted requiring the CPS to find a management failure within the structure of the company.⁷¹ This was highly supported by the Home Affairs and Work and Pensions Committee because the effect of this principle meant larger companies would now be liable of corporate killing thus creating a fair legal system for all companies.⁷² The Zeebrugge inquiry which was a formal investigation into the sinking of the Herald of Free Enterprise killing 188 people supported the implementation of the principle.⁷³ The

⁶⁵ (n.18) [7.12]

⁶⁶ Department of Energy, *'The Public Inquiry into the Piper Alpha Disaster'* (Cmd 1310, 1990)

⁶⁷ (n.18) [8.3]

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ HL Deb | 27th June 2023 | vol 831 | cols 616

⁷¹ Victoria Roper, 'Grenfell charge delays understandable, but where have all the corporate manslaughter prosecutions gone?' (2019) *Company Lawyer*, vol.40(8), 266

⁷² (n.20)

⁷³ Department of Transport, *'The Merchant Shipping Act 1894, Herald of Free Enterprise Formal Investigation'* (Report of Court No. 8074, 1987)

inquiry stated that responsibility of safety cannot be vested within one person, instead needs to be vested within a group of individuals.⁷⁴ However, the issue with the management failure requirement is it requires the CPS to identify senior managers playing a significant role within the decision making, or actual managing and organisation of activities.⁷⁵ This is problematic because there are various levels of management within large companies making it difficult to establish senior managers.⁷⁶ Although, it should be considered that S.14 of the Criminal Law Act 1827 states, 'in the absence of intention, the word person can be extended to corporations.'⁷⁷ This wide interpretation of the Criminal Law Act 1827 allows the court to convict companies of crimes when an individual cannot be proved to have the requisite *mens rea*.⁷⁸ This enables simple application of the law to attract corporate liability consequently, allowing justice to prevail.⁷⁹ Therefore, the removal of the identification principle was welcomed. While the new management failure requirement still requires the CPS to find individuals within the company it could lead to similar issues as the identification principle.

Home Office Proposal Paper On Reforming The Law On Involuntary Manslaughter
2000:

This consultation paper focused on what type of companies should be subjected to the offence and the involvement of enforcement agencies within investigations.⁸⁰ This paper suggested that the companies subjected to the new offence of corporate

⁷⁴ (n.18) (8.45)

⁷⁵ Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10 year review' (2018) *The Journal of Criminal law*, vol.82(1), 52

⁷⁶ *Ibid*

⁷⁷ Criminal Law Act 1827, s.14

⁷⁸ Explanatory Notes to the Criminal Justice Bill

⁷⁹ *Ibid*

⁸⁰ *Ibid* [20]

manslaughter should include a wider variety. Under the common law offence the only companies subjected to the offence were incorporated companies.⁸¹ Incorporated companies are defined as, 'a company so formed and registered under this Act.'⁸² This therefore, excludes unincorporated companies creating different burdens and inconsistency.⁸³ Although, it has been suggested that this requirement is necessary and would be inappropriate to decide otherwise due to the scope of the offence becoming too wide.⁸⁴ It was considered to include the word 'undertaking' into the offence encapsulating unincorporated companies.⁸⁵ However, this would have affected over three million companies within the UK making the application of the law unachievable because the CPS do not have the resources and funding to regulate this wide industry.⁸⁶

While this suggestion to only subject incorporated companies to the offence was accepted by the government, it could be argued that all companies need to be regulated similarly to create consistency.⁸⁷ Alternatively, UK business structures have been created to limit liability.⁸⁸ For example limited liability partnerships allow liability to be limited compared to sole traders who are responsible for all liability.⁸⁹ The UK's company structure would not align with the corporate manslaughter offence being

⁸¹ Home Office, 'Reforming The Law on Involuntary Manslaughter: The Governments Proposals' (Home Office, 2000) accessed 28th Nov 2023 <

<http://www.corporateaccountability.org.uk/dl/manslaughter/reform/archive/homeofficedraft2000.pdf> >

⁸² Companies Act 2006, s.1

⁸³ Michael Jefferson, 'Regulation, Businesses, and criminal liability' (2011) *The Journal of Criminal Law*, vol.75(1), 40

⁸⁴ (n.81)

⁸⁵ *R v Associated Octel Co Ltd* [1994] 4 All E.R. 1051 [1062]

⁸⁶ Select committee on Home Affairs and Work and Pensions, 'Back ground to the Draft Bill' (HC 2005-2006)

⁸⁷ Risk Assessment and Compliance, 'Corporate manslaughter and the implications for your business' (*Risk Assessment and Compliance*, n.d) accessed 28th Nov 2023 < <https://www.risk-compliance.co.uk/articles/corporate-manslaughter-corporate-homicide-and-their-implications-for-your-business/> >

⁸⁸ Lee Roach, (n.25) p.22

⁸⁹ *Ibid*

equally applied and would cause unfairness. Conclusively, there are many different types of business attaining varying levels of liability therefore, an Act applying to all types of companies would not be suitable.⁹⁰

Furthermore, a proposal was to subject government bodies to the offence.⁹¹ The definition of government bodies is, 'a formally established organisation that is at least in part publicly funded to deliver a public or government service, though not as a ministerial department.'⁹² Under the common law offence government bodies were immune from criminal liability. Government bodies were excluded from criminal liability because they act on behalf of the Crown and undertake duties such as province of government which are not commercial but instead necessary to protect the realm.⁹³ Government bodies provide vital services across the UK and therefore, should also be held accountable in accordance with non-governmental bodies.⁹⁴ This proposal raised many policy considerations such as whether it is viable to convict and punish a government body that is publicly funded.⁹⁵ Removal of criminal immunity for government bodies was accepted by the government in order to uphold accountability and public perception creating a fair legal system protecting society.⁹⁶

⁹⁰ *Ibid* p.54

⁹¹ (n.18)

⁹² GOV.UK, 'Public Bodies' (GOV.UK, 2023) accessed 28th Nov 2023 < <https://www.gov.uk/guidance/public-bodies-reform> >

⁹³ (n.18) p.16

⁹⁴ Anne Dennett, '*Public Law Directions*' (2nd edn, OUP, 2021) p.281

⁹⁵ Samantha Ash, 'Charges of corporate manslaughter in the NHS' (2006) *BMJ*, vol.332, 1408

⁹⁶ Hilary Biehler, 'Upholding Standards In Public Decision-Making: Getting The Balance Right' (2017) *Irish Jurist*, Vol.57, 97

Home Affairs and Work and Pension Committees on the Draft Bill on Corporate Manslaughter 2005:

The government was passionate at modernising the CJS to be aligned with modern societal views and policy to achieve an effective CJS.⁹⁷ The draft Bill states, ‘an organisation would be prosecuted for corporate manslaughter if a gross failing by its senior managers to take reasonable care for the safety of their workers or members of the public caused a person’s death.’⁹⁸ The draft Bill facilitates a wider scope of application by applying to more companies including private and public but, also provides companies with clear direction for co-operation.⁹⁹ This is an improvement from the common law approach because the scope of the offence would be widened and consequently protect more individuals. The UK has a strong health and safety background that needs to be upheld to ensure individuals within the workplace and public are safe.¹⁰⁰ However, the statute is saved for the worst cases limiting the application of the law by including the word gross breach.¹⁰¹ Gross was defined in *R v Adomako*¹⁰² as, ‘*was the conduct of the defendant so bad in all the circumstances as to amount to a criminal act or omission.*’¹⁰³ This principle therefore, reserves the offence for the worst cases of corporate manslaughter by having a high threshold of breach. This limits the use of the Act potentially making it too restrictive.¹⁰⁴ On the

⁹⁷ (n.44) [1]

⁹⁸ *Ibid*

⁹⁹ *Ibid* [2]

¹⁰⁰ Department for Work and Pensions, ‘*Good Health and Safety, Good for Everyone*’ (*Department for Work and Pensions*, 2011) accessed 28th Nov 2023 < <https://assets.publishing.service.gov.uk/media/5a748a2eed915d0e8bf191e8/good-health-and-safety.pdf> >

¹⁰¹ (n.44) p.5

¹⁰² [1994] UKHL 6

¹⁰³ *R v Adomako* [1994] UKHL 6 [187]

¹⁰⁴ (n.76)

other hand the breach needs to be gross because the offence is of a criminal matter with harsher punishments compared to civil law.¹⁰⁵

It was estimated that the implementation of the Act would cost the industry a sum of around £14.5 million pounds to implement better safety precautions adhering to the proposed Act.¹⁰⁶ This may deter small companies from trading as the liability and cost is too high meaning smaller companies cannot compete with larger companies. Additionally, the punishment for a company convicted of corporate manslaughter is a fine.¹⁰⁷ The government have said the punishment of corporate manslaughter is narrow and needs a range of punishments to facilitate all types and sizes of companies.¹⁰⁸ The value of the fine is calculated on the company's turnover but creates unfairness.¹⁰⁹ While smaller companies pay a smaller fine, it might make the company insolvent and have dire consequences compared to larger companies who pay a larger fine and incur less financial impact.¹¹⁰

Therefore, the implementation of corporate manslaughter took the government a 'lengthy' period. The statutory offence of corporate manslaughter is drastically different to the common law offence. The key changes include the removal of the identification doctrine, the inclusion of government bodies and punishment of a fine. The scope of

¹⁰⁵ *R v Broughton (Coen)* [2021] 1 W.L.R. 543

¹⁰⁶ (n.44) [62]

¹⁰⁷ *Ibid* [52]

¹⁰⁸ (n.59) [47]

¹⁰⁹ Simon Parsons, 'The Corporate Manslaughter and Corporate Homicide Act 2007 ten years on: fit for purpose?' (2018) *Journal of Criminal Law*, vol.82(4), 308

¹¹⁰ Real Business Rescue, 'Fines for Health and Safety Breaches fine?' (*Real Business Rescue*, 2023) accessed 28th Nov 2023 < <https://www.realbusinessrescue.co.uk/cash-flow/my-company-cant-pay-health-and-safety-fines#:~:text=0800%20644%206080-What%20happens%20when%20I%20can%27t%20pay%20my%20health%20and,liability%20as%20a%20company%20director> >

the Act has been extended through the new senior management principle making more companies subjected to the Act. These major changes will make the statutory offence of corporate manslaughter more applicable and successful compared to the common law offence.

Chapter 3: The Corporate Manslaughter and Corporate Homicide Act 2007 currently

This chapter considers the statutory offence of corporate manslaughter by analysing the CMCHA 2007. The chapter focuses on different theories such as retributivism and proportionality to establish whether the CMCHA 2007 is an improvement from common law. The chapter establishes the CMCHA 2007 is an improvement but still has areas for improvement including; punishment and senior management principle.

In 2008 the CMCHA 2007 entered into force.¹¹¹ The Act enables the CPS to prosecute companies under legislation instead of the uncertain common law offence.¹¹² S.1(1) CMCHA 2007 it states, 'an organisation which this section applies is guilty of an offence in 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.'¹¹³ The Act clearly sets out the elements of corporate manslaughter creating consistency within the law.¹¹⁴ This allows companies to regulate and adapt their practices to be consistent with the legislation conforming to the principle of non-retroactivity.¹¹⁵ The non-retroactivity principle states legislation is there to guide those in conforming to the law.¹¹⁶ A regulatory impact assessment determined that the implementation of the Act would produce an additional ten convictions a year however, this number has not been achieved.¹¹⁷ Despite the Act

¹¹¹ (n.20)

¹¹² (n.3) s.15

¹¹³ Brenda Barrett, 'Liability for safety offences: is the law still fatally flawed?' (2008) *Industrial Law Journal*, 37(1), 111

¹¹⁴ (n.3) s.1

¹¹⁵ (n.10) p.70

¹¹⁶ *Ibid*

¹¹⁷ Home Office, *Corporate Manslaughter and Corporate Homicide: A regulatory Impact Assessment on the Government Bill (2006)* (Regulatory Impact Assessment) para 25

providing more clarity it has been heavily criticised because of the; duty of care (DOC), senior management criteria and punishment.

Duty of Care:

The CMCHA 2007 sets out the relevant DOC for organisations.¹¹⁸ These include; employees and or those performing services, occupier of premises, supply of goods and services, construction or maintenance operations, activities on a commercial basis and the use or keeping of any plant, vehicle or other thing.¹¹⁹ This section of the Act is restrictive and provides at first instance a contained list of duties although, these duties could be interpreted to include situations arising outside of the list.¹²⁰ Public authorities DOC are restricted through S.5(1) CMCHA 2007 which sets out the circumstances when public authorities do not owe a relevant DOC.¹²¹ This illustrates that the public authorities have a restrictive DOC under the CMCHA 2007 to the general public and employees potentially leaving individuals without protection because of policy.¹²² Furthermore, negligent deaths caused by Police forces are in the same position prior to the enactment of the CMCHA 2007.¹²³ Instead prosecution of an negligent death caused by a Police force will be prosecuted under the Health and Safety at Work etc Act 1974 (HSWA) demonstrating Parliament is keen to restrict public authorities liability.¹²⁴ This coincides with the judgment of *Michael v Chief*

¹¹⁸ (n.3) s.2

¹¹⁹ *Ibid*

¹²⁰ Michael Brooks Reid, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A critical analysis' (2021) *The Honourable Society of the Lincoln's Inn Student Law Journal*, vol.3, 8

¹²¹ Stephan Griffin & Jon 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(4), 377

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ Criminal Justice Bill HC (2023-24)

Constable of South Wales.¹²⁵ The court took a restrictive approach to Police's duties by stating the Police do not owe a DOC to a certain member of the public when they were aware, or ought to have been reasonably aware, of a threat to life or physical safety within the civil context.¹²⁶ Therefore, Parliaments intention is to restrict the relevant DOC under CMCHA 2007 towards public authorities mirroring the position within civil law creating consistency. But, creates an imbalance compared to private companies putting the law in the same position prior to the Act.¹²⁷

In addition the strict interpretation of the law allows the principle of strict construction to prevail.¹²⁸ The principle of strict construction states that if there is doubt within statutory provision then the court should rule in favour of the defendant to give fair warning further protecting public authorities.¹²⁹ Therefore, the duties under the Act are restrictive demonstrating a high threshold to protect companies from unnecessary burdens. The high threshold and restrictive DOC could contribute to the defectiveness of the regulatory impact and Act.¹³⁰

The Senior Management Principle:

The CMCHA 2007 has moved away from the historic identification doctrine and is replaced with the senior management requirement.¹³¹ The senior management principle is defined as, 'senior management, in relation to an organisation, means the persons who play significant roles in the making of decisions about how the whole or

¹²⁵ [2015] UKSC 2

¹²⁶ *Michael v Chief Constable of South Wales* [2015] UKSC 2 [164]

¹²⁷ Sarah Field & Lucy Jones, 'Is the Net of Corporate Criminal Liability under the Corporate Manslaughter and Corporate Homicide Act 2007 Expanding?' (2015) *Business Law Review*, 36, 218

¹²⁸ (n.10) p.86

¹²⁹ *Ibid*

¹³⁰ (n.69)

¹³¹ (n.7)

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.¹³² The CPS has to find evidence of a senior management failure linking to the gross breach of their DOC which led to the death.¹³³ This new requirement has allowed the Act to depart the former issues of finding the directing mind and will of the company. Although, in practice this can be complex making increased convictions less attainable.¹³⁴

This new requirement and S. 18 CMCHA 2007 exclude individual liability which allows the corporate veil to remain down thus protecting individuals within the company. Although, the senior management principle still has defects. For example, large companies have various levels of management making prosecution time consuming and complex.¹³⁵ This was apparent in *R v Cornish*¹³⁶ when the court failed to find the senior management within the National Health Service Trust. Justice Coulson stated, "*the successful prosecution of companies other than one man organisations, is therefore virtually impossible.*"¹³⁷ This demonstrates that the senior management principle could contribute to the failure of the Act and yield the issues of the identification principle. The requirement is too complex to apply in practice and no single individual is responsible which consequently leads to verdicts of no case to answer and injustice. Therefore, the senior management requirement allows the corporate veil to remain down but is complex in practice.

¹³² (n.3) s.1(4)(c)

¹³³ *Ibid*

¹³⁴ David Milman, 'Company directors: maintaining the balance between protecting managerial rights and regulating exposure to liability in UK law' (2016) Company Law Newsletter, 390, 3

¹³⁵ (n.76)

¹³⁶ [2015] EWHC 2967 (QB)

¹³⁷ *R v Cornish* [2015] EWHC 2967 (QB) [29]

Punishment:

The principle of proportionality stipulates punishment should be proportionate and reflect the severity of the crime.¹³⁸ The theory of retributivism is the concept that the offender should be punished and suffer for their actions.¹³⁹ The punishment for corporate manslaughter seems to contradict these theories. S.1(6) CMCHA 2007 states, an organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.¹⁴⁰ The cost of the fine is unlimited but, the court considers the organisation's annual turnover adjacent to aggravating and mitigating circumstances to reach an amount reflective to the crime.¹⁴¹ Aggravating circumstances include; previous convictions, cost cutting, poor health and safety record.¹⁴² Mitigating circumstances include: effective procedures in place; co-operation and good health and safety record. The Court and Sentencing Council take these into account to ensure the fine is proportionate to the circumstances.¹⁴³

The first recorded case that was convicted and punished under the Act was *R v Cotswold Geotechnical Holdings Ltd*,¹⁴⁴ who were fined £385,000. ¹⁴⁵ The Lord Chief of England and Wales stated, "*it may be particularly appropriate for an organisation of limited means which has committed a serious offence, and where it is undesirable that*

¹³⁸ (n.10) p.80

¹³⁹ Raymond Wacks, '*Understanding Jurisprudence*' (6th edn, OUP, 2020) p.336

¹⁴⁰ Nick Friedman, 'Corporations as moral agents: trade offs in criminal liability and human rights for corporations' (2020) *Modern Law Review*, 83(2), 258

¹⁴¹ (n.3) s.1(6)

¹⁴² Sentencing Council, 'Corporate Manslaughter' (*Sentencing Council*, n.d) accessed 12th December 2023 < <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> >

¹⁴³ *Ibid*

¹⁴⁴ [2011] EWCA Crim 1337

¹⁴⁵ *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337 [30]

the fine should cause it to be put out of business".¹⁴⁶ This illustrates the court are willing to inflict severe consequences on companies to convey the severity of the crime. The amount of the fine is a crucial indicator of the severity of the offence. Comparatively, in *R v Whirlpool UK Appliances Ltd*¹⁴⁷ the company's annual turnover was £700 million but, were fined £300,000.¹⁴⁸ The judge took into account mitigating circumstances and a guilty plea enabling a one-third reduction. The severity of the fine would have impacted the company less compared to *R v Cotswold Geotechnical Holdings Ltd*,¹⁴⁹ demonstrating that fines are not a certain, effective or, fair because they are based on financial circumstances of the company. This demonstrates a novel approach with the law still disadvantaging smaller companies.¹⁵⁰

On the other hand, varying cost allows the judge to take into account the circumstances and facts of each case tailoring the fine to be proportionate indicating a subjective approach.¹⁵¹ This was illustrated in *R v CMB Supply Ltd*¹⁵² when the company was fined £4.5 million because of previous convictions under HSWA 1974.¹⁵³ It could be suggested that fines abide to the theory of retributivism by inflicting a substantial financial impact having further consequences. However, companies will only be deterred from the offence if the fine exceeds the expected gains.¹⁵⁴ Furthermore, the company itself is not just affected from this punishment because the

¹⁴⁶ *Ibid* [32]

¹⁴⁷ [2017] EWCA Crim 2186

¹⁴⁸ *R v Whirlpool UK Appliances Ltd* [2017] EWCA Crim 2186 [33]

¹⁴⁹ (n.145)

¹⁵⁰ (n.144)

¹⁵¹ Dr Jay Gormley, 'Fines: A review of the sanction, its use and operation, and research evidence' (2022) Sentencing Academy, 7

¹⁵² [2022] 6 WLUK 664

¹⁵³ *R v CMB Supply Ltd* [2022] 6 WLUK 664

¹⁵⁴ C.M.V. Clarkson (n.55)

innocent shareholders who are ultimately the public also lose money from the stigma of the fine and incur financial impacts.¹⁵⁵ Fines do not reflect the principle of proportionality because fines are not an 'eye for eye' punishment.¹⁵⁶ In modern society a punishment cannot be the same as the crime and therefore, will not be achieved within criminal law. Therefore, while fines allow the circumstance of each case to be considered but the punishment does not reflect the crime committed and should be reconsidered by increasing the severity of the punishment to have greater impact on companies of all sizes.

In conclusion, this chapter has considered the current law. The chapter critically analysed the issues under the Act including; DOC, punishment and the senior management principle. While the CMCHA 2007 is an improvement from the common law offence there are still areas under the Act which could be reformed to make the law more effective such as; a wider range of harsher punishments and simplicity. Areas for reform are considered in the next chapter exploring the idea of conferring prosecuting powers to enforcement agencies.

¹⁵⁵ *Ibid*

¹⁵⁶ Morris Fish, 'An eye for an eye: Proportionality as a Moral Principle of Punishment' (2008) *Oxford Journal of Legal Studies*, 28(1)

Chapter 4: Should the Health and Safety Executive be given Prosecution Powers?

Currently the HSE has no prosecution powers of corporate manslaughter under the CMCHA 2007.¹⁵⁷ This chapter examines the concept of conferring prosecution powers to the HSE, through analysis of the potential social and legal impacts. It draws the conclusion that the HSE should be granted prosecution powers under CMCHA 2007.

Concept of Private Prosecutions:

The CPS defines private prosecutions as, “*a prosecution started by a private individual, or entity who/which is not acting on behalf of the police or other prosecuting authority.*”¹⁵⁸ The aim of private prosecutions is to allow more individuals and organisations to access the CJS.¹⁵⁹ Private prosecutions are a historic element within the UK constitution conferring the right for individuals to act when the State fails to.¹⁶⁰ Public authorities and other organisations besides the CPS can bring private prosecutions.¹⁶¹ A public authority is defined as, ‘any other authority or body whose members are appointed by His Majesty or by any Minister of the Crown or government department or whose revenues consist wholly or mainly of money provided by Parliament.’¹⁶²

¹⁵⁷ (n.76)

¹⁵⁸ Crown Prosecution Service, ‘*Annual Report and Accounts 2019-20*’ HC 558

¹⁵⁹ CPS, ‘Private Prosecutions’ (CPS, October 2019) accessed 16th Feb 2024 < <https://www.cps.gov.uk/legal-guidance/private-prosecutions> >

¹⁶⁰ HC Deb, 2nd October 2022, vol 1, col. 1

¹⁶¹ Prosecution of Offences Act 1985, s.6(2)

¹⁶² *Ibid*, s.17(5)(d)

The status of the HSE has been questioned under the ‘Public Bodies review of the HSE.’¹⁶³ This report questioned whether HSE constituted as an arm’s length body of the government. An arm’s length body is defined as an organisation working at national level but, working more independently and less subject to ministerial control.¹⁶⁴ Arm length bodies must perform a technical task, have impartiality or, act independently.¹⁶⁵ The HSE was created under the HSWA 1974 and amounts to a non-executive departmental public body.¹⁶⁶ The HSE is part funded by the Department of Work and Pensions and therefore, amounts to a public authority under the Prosecution of Offences Act (POA) 1985 and obtains the right to bring private prosecutions.¹⁶⁷

Private Prosecutions Analysis:

Private prosecutions have risen in popularity over the past decade as noted by Lord Thomas in *R v Zinga*.¹⁶⁸ He stated, “*there is an increase in private prosecutions at a time of retrenchment of State activity in many areas where the State had previously provided sufficient funds to enable State bodies to conduct such prosecutions.*”¹⁶⁹ This demonstrates that the State is not distributing funding adequately as individuals and organisations are having to bring their own prosecutions.¹⁷⁰ This may account for the

¹⁶³ GOV.UK, ‘Public Bodies Review of the Health and Safety Executive (HSE)’ (*GOV.UK*, 2023) accessed 28th Nov 2023 < <https://www.gov.uk/government/publications/health-and-safety-executive-public-bodies-review/public-bodies-review-of-the-health-and-safety-executive-hse> >

¹⁶⁴ GOV.UK, ‘Public Bodies’ (*GOV.UK*, 2023) accessed 28th Nov 2023 < <https://www.gov.uk/guidance/public-bodies-reform> >

¹⁶⁵ (n.95) p.281

¹⁶⁶ Department for Work and Pensions, ‘A review of the Health and Safety Executive as a Non-departmental government public body’ (*Department for Work and Pensions*, §4th June 2013) accessed 25th March 2024 < <https://assets.publishing.service.gov.uk/media/5a7ca129e5274a38e5755c10/hse-triennial-review-cfe.pdf> >

¹⁶⁷ GOV.UK, ‘Health and Safety Executive’ (*GOV.UK*, n.d) accessed 13th March 2024 < <https://www.gov.uk/government/organisations/health-and-safety-executive#:~:text=The%20Health%20and%20Safety%20Executive,Department%20for%20Work%20and%20Pensions.>>

¹⁶⁸ [2014] EWCA Crim 52

¹⁶⁹ *R v Zinga* [2014] EWCA Crim 52 [10]

¹⁷⁰ The Crown Prosecution Service, ‘Our financial summary’ (*CPS*, n.d) accessed 13th March 2024 < <https://www.cps.gov.uk/node/17775> >

lack of corporate manslaughter cases under the CMCHA 2007 because the CPS lacks the funding to invest in complex prosecution of cases.¹⁷¹ The cost to prosecute a corporate manslaughter case is around £200,000 which the CPS do not have the funding for in general.¹⁷² It is therefore, common for other prosecuting authorities other than the CPS to bring private prosecutions when there are direct interests in pursuing certain prosecutions.¹⁷³ One example is the Royal Society for the Prevention of Cruelty to Animals who privately prosecute individuals who abuse or neglect animals illustrating it is common for agencies to prosecute offences within their expertise.¹⁷⁴ This is because the CPS focus on a realistic prospect of conviction and only pursue the most certain cases due to restrictive funding.¹⁷⁵ Public authorities such as the HSE may afford to bring private prosecutions against companies under the CMCHA 2007 who are less restricted by funding.¹⁷⁶

Recently, private prosecutions have had a lot of media coverage for their controversy.¹⁷⁷ The recent publicity surrounded *Hamilton v Post Office Ltd*,¹⁷⁸ and the

¹⁷¹ Vikram Dodd, 'CPS 'cherry-picking' cases to prosecute, say senior police chiefs' *The Guardian* (18th May 2023) accessed 13th March 2024 < <https://www.theguardian.com/law/2023/may/18/cps-cherry-picking-cases-to-prosecute-say-senior-police-chiefs> >

¹⁷² (n.76)

¹⁷³ Justice Committee, 'Private Prosecutions: Safeguards, 9th Report of Session' (HC 2019-21 – 497) para.29.

¹⁷⁴ RSCPA, 'Prosecution Policy' (RSCPA, June 2017) accessed 27th March 2024 < https://www.rspca.org.uk/documents/1494939/7712578/RSPCA_Prosecution_Policy_2017.pdf/d1066a3c-996c-2c91-e30b-8dc78555d32d?t=1555596081582#:~:text=The%20RSPCA%20will%20consider%20the,prosecution%20will%20also%20be%20considered. >

¹⁷⁵ Dr Stephen Colman, 'Evaluating private prosecutions: reform or abolition?' (2023) *Criminal Law Review*, 11, 698

¹⁷⁶ Paul Peachey, 'Two-tier justice: Private Prosecution Revolution' *Independent* (16th August 2014) accessed 13th March 2024 < <https://www.independent.co.uk/news/uk/crime/twotier-justice-private-prosecution-revolution-9672543.html> >

¹⁷⁷ Harriet Sherwood, 'Top lawyer urges MP to review Private Prosecution after Post Office Scandal' *The Guardian* (12th Jan 2024) accessed 13th March 2024 < <https://www.theguardian.com/uk-news/2024/jan/12/top-lawyer-urges-mps-to-review-private-prosecutions-after-post-office-scandal> >

¹⁷⁸ [2021] EWCA Crim 577

arbitrary power of the Post Office during private prosecutions of sub-postmasters.¹⁷⁹ The media coverage has put private prosecutions in the spotlight with many academics criticising the process while others defend. Private prosecutions are referred to the Director of Public Prosecutions (DPP) for consent to prosecute.¹⁸⁰ This allows the DPP to ensure case meet the full code test and are being brought before the Court for legitimate reasons.¹⁸¹ Consequently, the Courts time is not wasted and the defendant is protected from potential miscarriage of justice.¹⁸² However, miscarriages of justice have happened demonstrated by *Bates v Post Office Ltd*.¹⁸³

Furthermore, the Court has terminated private prosecutions under S.58 CJA 2003 illustrated in *Asif v Ditta*.¹⁸⁴ In the case the judge ruled that the continuation of the case would amount to an abuse of process and needed to protect the integrity of the CJS.¹⁸⁵ This illustrates that private prosecutions may be brought under wrong motives but demonstrates the Court and CPS are ready to intercept abuses of power to ensure convictions are fair, just and reasonable.¹⁸⁶ Additionally, the CPS can take over private prosecutions when the evidential sufficiency and the public interest of the Full Code Test are met and there is particular need for the CPS to take over the case.¹⁸⁷ Although, CPS have discontinued more than half of their private prosecution cases in 2019.¹⁸⁸ In a freedom of information request in 2019 it was discovered that the CPS

¹⁷⁹ *Ibid*

¹⁸⁰ (n.161), s.1(7)

¹⁸¹ CPS, 'The Code for Crown Prosecutors' (*CPS*, 26th October 2018) accessed 14th March 2024 < <https://www.cps.gov.uk/publication/code-crown-prosecutors> >

¹⁸² HL Deb | 14th June 2023 | vol 830 | col 1990

¹⁸³ [2019] EWCA 606 (QB)

¹⁸⁴ [2021] EWCA Crim 1091

¹⁸⁵ *Ibid* [71]

¹⁸⁶ Aidan Tevlin, 'Motives for prosecution' (1993) *Journal of Criminal Law*, 57(3), 290

¹⁸⁷ (n.161) s.6(2)

¹⁸⁸ Catherine Baksi, 'CPS drops more than half of its private prosecutions' (*The Law Gazette*, 29th March 2021) accessed 14th March 2024 < <https://www.lawgazette.co.uk/practice/cps-drops-more-than-half-of-its-private->

took over 32 private prosecutions and discontinued 29.¹⁸⁹ This could be because the CPS lacked the necessary funding to carry out the prosecutions.¹⁹⁰ This can be demonstrated through *Scopelight Ltd v Chief Constable of Northumbria*.¹⁹¹ The CPS decided not to commence prosecution due to a similar case already being heard.¹⁹² This illustrates that the CPS will not use their resources and funding on certain cases because their budget restricts which cases to peruse leaving no prosecutions.¹⁹³

The rules and procedures of private prosecutions have been increased to protect those involved in prosecution. The Phillips Commission reporting on the Criminal Procedure reformed the law surrounding private prosecutions.¹⁹⁴ This was recently considered in the Supreme Court in *R (on the application of Gujra) v Crown Prosecution Service*.¹⁹⁵ This case concerned the Director of Public Prosecutions (DPP) ability to take over private prosecutions and discontinue them under S.6(2) POA 1985.¹⁹⁶ The Supreme Court held it is legal for the DPP to take over and discontinue private prosecution cases depending on the likelihood of conviction.¹⁹⁷ This likelihood of conviction test acts as another measure ensuring the right cases are being heard

[prosecutions/5107989.article#:~:text=A%20freedom%20of%20information%20request,over%2032%20and%20discontinued%2029.>](#)

¹⁸⁹ *Ibid*

¹⁹⁰ HC Deb | 11th January 2017 | vol 619 | col 147WH

¹⁹¹ [2009] EWCA Civ 1156

¹⁹² Mike Clancy, 'A perfect storm: why funding cuts are affecting HSE's ability to regulate' (*British Safety Council*, 11th July 2023) accessed 14th March 2024 < <https://www.britsafe.org/safety-management/2023/a-perfect-storm-why-funding-cuts-are-affecting-hse-s-ability-to-regulate#:~:text=Funding%2C%20pay%20and%20staffing&text=Since%202010%2C%20HSE%20has%20experienced,still%20significantly%20lower%20than%202010> >

¹⁹³ Owen Bowcott, 'CPS severely hampered by lack of resources, says report' (*The Guardian*, 10th July 2023) accessed 14th March 2024 < <https://www.theguardian.com/law/2013/jul/10/cps-lack-resources-funding-cutbacks> >

¹⁹⁴ Private Prosecution Association, 'Code for Private Prosecutors' (*Private Prosecution Association*, July 2019) accessed 14th March 2024 < <https://r1sfa4.n3cdn1.secureserver.net/wp-content/uploads/PPA-Code-for-Private-Prosecutors.pdf> >

¹⁹⁵ [2012] UKSC 52

¹⁹⁶ *R (on the application of Gujra) v Crown Prosecution Service* [2012] UKSC 52 [21]

¹⁹⁷ *Ibid* [129]

before the court.¹⁹⁸ Therefore, prosecuting agencies like the HSE need to ensure the cases they peruse have a likelihood of conviction and acts as a deterrence to prosecute inappropriate cases.¹⁹⁹ It is also worth mentioning there are other bodies in place to ensure cases are fair including; Criminal Case Review Commission and Private Prosecutors Association.²⁰⁰ Therefore, private prosecutions are heavily regulated and allow the CPS to divert resources elsewhere. The CPS funding could be contributing to the lack of convictions under the CMCHA 2007.

Conferring HSE Prosecutions Powers:

The HSE currently prosecute cases under the HSWA 1974.²⁰¹ Between 2022 and 2023 the HSE prosecuted 216 criminal cases compared to the CPS prosecuting 47,361 cases.²⁰² This demonstrates that the CPS have a large workload which could create an ineffective CJS. It could indicate the HSE do not have capacity to take on more cases.²⁰³ Distressingly, workplace deaths are often reported in the media as 'accidents' attaining little media presence or chance for reform because the public do not see workplace deaths as intentional corporate violence making the offence of corporate manslaughter infrequent.²⁰⁴ The HSE investigate workplace deaths with displacement of police conferred to the HSE.²⁰⁵ This gives the perception that

¹⁹⁸ *Ibid*

¹⁹⁹ Morgan Reynolds, 'Using The Private Sector To Deter Crime' (1994) *The Journal of Social, Political, and Economic Studies*, vol 19, issue 2, 207

²⁰⁰ Criminal Case Review, 'About Us' (*Criminal Case Review*, n.d) accessed 14th March 2024 < <https://ccrc.gov.uk/what-we-do/> >

²⁰¹ Health and Safety at Work etc Act 1974, s.38

²⁰² Health and Safety Executive, 'Annual Report and Accounts 2022/2023' (HC 1599) p.7

²⁰³ CPS, 'CPS data summary Quarter 4, 2022-2023' (*CPS*, 20th July 2023) accessed 14th March 2024 < [https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2022-2023#:~:text=The%20proportion%20charged%20in%202022,8.0%25%20from%202021%2D22.&text=The%20volume%20of%20completed%20prosecutions,22%2F23%20\(12%2C576\).](https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2022-2023#:~:text=The%20proportion%20charged%20in%202022,8.0%25%20from%202021%2D22.&text=The%20volume%20of%20completed%20prosecutions,22%2F23%20(12%2C576).>) >

²⁰⁴ House of Commons Justice Committee, 'Private prosecutions safeguards' (HC 497, 2nd October 2020) p.13

²⁰⁵ C.M.V. Clarkson (n.55)

corporate violence has not occurred further damaging the public interest in corporate manslaughter. However, this illustrates that the HSE have mass control in the investigations of corporate manslaughter and would be logical to confer the final element of prosecution to the HSE to 'control' corporate manslaughter.²⁰⁶ Consequently, this will allow the crime control model to prevail.²⁰⁷ The crime control model states countries need an efficient legal system controlling crime to ensure that society is safe. Therefore, by conferring prosecution powers to the HSE it means the HSE can effectively control health and safety offences including corporate manslaughter ensuring society is safe.²⁰⁸

S.17 CMCHA 2007 states, 'proceedings for corporate manslaughter may not be instituted within England and Wales without the consent of the DPP.'²⁰⁹ This demonstrates that the CPS also need the consent of the DPP to prosecute corporate manslaughter.²¹⁰ It would therefore, be logical to allow the HSE to prosecute offences of corporate manslaughter which does not change the process of prosecution.²¹¹ This allows the due process model to prevail by creating a fair CJS with minimal obstacles to justice demonstrating an uninterrupted CJS made more effective.²¹² Therefore, the HSE have a proven ability to prosecute criminal offences and therefore should also prosecute corporate manslaughter.

²⁰⁶ *Ibid*

²⁰⁷ Denis S. Kennedy, 'Has Packer's "Crime Control Model" become the dominant force in Irish criminal justice?' (2013) *Irish Criminal Law Journal*, 23(3), 80

²⁰⁸ *Ibid*

²⁰⁹ (n.112)

²¹⁰ *Ibid*

²¹¹ CPS, 'Relations with other prosecuting agencies and the Prosecutors Convention' (CPS, 24th February 2024) accessed 14th March 2024 < <https://www.cps.gov.uk/legal-guidance/relations-other-prosecuting-agencies-and-prosecutors-convention> >

²¹² Richard Wilmot-Smith, 'Due process and issues which prey on the minds of arbitrators and client alike' (2021) *Civil Justice Quarterly*, 40(2), 100

The original contribution that this dissertation brings is to add a new section into the CMCHA 2007 conferring the right for the HSE to prosecute corporate manslaughter. This new section should mimic S.39(1) HSWA 1974 which states, 'an inspector, if authorised in that behalf by the enforcing authority which appointed him, may, although not of counsel or a solicitor, prosecute before a magistrates' court proceedings for an offence under any of the relevant statutory provisions.'²¹³ The proposed new section in the CMCHA 2007 should extend the HSE powers further to prosecute cases within the Crown Court to allow the capability of convicting manslaughter.²¹⁴

Alternatively, under S.5 POA 1985 the DPP can appoint a person who is not a Crown Prosecutor but who has general qualification under S.71 Courts and Legal Services Act 1990 to institute or take over criminal proceedings.²¹⁵ Therefore, providing the HSE prosecutor has the relevant qualification the CPS could confer the power to a HSE prosecutor to prosecute.²¹⁶ Furthermore, prosecutors are governed by the Criminal Investigation and Procedure Act 1996 which places many duties upon prosecutors to ensure investigation and prosecutions are carried out fairly.²¹⁷ Therefore, fairness and certainty is created by holding all prosecutors to the same standard ensuring all cases whether a CPS or HSE prosecutor are equal.²¹⁸ Consequently, a new section should be inserted into the CMCHA 2007 to give the power for the HSE to prosecute offences of corporate manslaughter and raise conviction rates.

²¹³ (n.202) s.38

²¹⁴ (n.144)

²¹⁵ (n.161) s.5

²¹⁶ Courts and Legal Services Act 1990, s.71

²¹⁷ Criminal Investigation and Procedure Act 1996

²¹⁸ The European Convention on Human Rights 1950, Article 6

The HSE ability to prosecute cases have been challenged within the Environmental, Transport and Regional Affairs Committee Report 2000.²¹⁹ It stated there was an urgent need for the HSE to increase prosecutions.²²⁰ However, the HSE state that their resources were far stretched and was the reason for a lack of prosecutions.²²¹ Although, the Centre for Corporate Accountability stated the HSE can seek costs incurred after conviction.²²² Therefore, by conferring the power to prosecute corporate manslaughter, it will increase the number of convictions and will not financially impact the HSE. Furthermore, convictions of corporate manslaughter are often combined with offences under the HSWA 1974.²²³ Currently, work is split between two authorities requiring more communication, resources, money and time.²²⁴ By enabling the HSE to prosecute under both Statutes it will increase time, resources and money of the CPS demonstrating that conferring HSE prosecution powers is a desirable notion.

In conclusion, private prosecutions are an element of the UK's constitution and have strong history within the CJS. Private prosecutions allow agencies and private individuals to access the CJS when the State fails to provide adequate funding. The chapter has analysed private prosecutions and established that while controversial, private prosecutions provide access to justice, divert CPS resources and are heavily controlled enabling the crime control and due process models to prevail. The analysis concluded that a new section should be created under the CMCHA 2007 to confer

²¹⁹ Select Committee, 'The Environmental, Transport and Regional Affairs Committee Report 2000' (HC 1999-2000)

²²⁰ *Ibid*

²²¹ *Ibid*

²²² *Ibid*

²²³ (n.7)

²²⁴ (n.211)

prosecuting powers to the HSE to further diver CPS resources and increase convictions of corporate manslaughter.

Conclusion

This dissertation has sought to establish why there is a lack of convictions under the CMCHA 2007. The dissertation has critically analysed the history of the corporate manslaughter offence to establish whether the current law is more effective than the common law. The common law was no longer fit for purpose within the UK. The identification doctrine and corporate veil principles made application of the law complex and unfair towards smaller companies. The government recognised the unfairness of the common law offence after multiple disasters attaining no corporate liability. The reforms proposed by multiple organisations aimed to widen the scope of the law by subjecting private and public companies to the offence to create fairness. The proposed statutory offence aimed to create consistency by setting clear guidance for companies across the UK to adhere to. The regulatory impact assessment proposed an increase of prosecutions.

Despite major reform the CMCHA 2007 has not been as successful. While the statutory offence is an improvement from common law, the Act still requires the CPS to find individuals within the company taking a novel approach. Public authorities are protected by having restricted DOC and being prosecuted under the HSWA 1974 taking another historic approach. Therefore, this dissertation has highlighted the issues with the offence and the reasoning behind the lack of convictions. The original approach this dissertation has brought is to confer prosecution powers to the HSE. This is to be done through amending the current Statute to introduce a new section. The HSE have the capacity to prosecute corporate manslaughter and could increase the number of convictions due to their expertise in health and safety. Therefore, this

dissertation recommends further reforms simplifying the Statute and conferring prosecution powers to the HSE to increase convictions

Glossary

Term	Definition
Corporate Veil	The doctrine of English law which enabled the courts in very limited circumstances to pierce the corporate veil was to only be invoked where a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or whose enforcement he deliberately frustrated by interposing a company under his control
Identification Doctrine	It's acting and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but is really the directing mind and will of the company
Scope	In the House of Commons, the scope of a bill is the extent of its permissible content, as determined by its existing content
Senior Management Principle	"senior management", in relation to an organisation, means the persons who play significant roles in– (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities.
Punishment	The imposition of some pain or penalty, warranted by law, on a person by a court in response to disobeying the law
Retributivism	Concept that the offender should be punished and attain suffering from their actions
Deterrence	Deterring or preventing by fear
Crime Control Model	A need for an efficient legal system controlling crime to ensure society is safe
Due Process Model	A legal system with minimal obstacles to achieve justice
Proportionality	Containing its own concept of procedural fairness, is concerned with defining that "fair balance",
Aggravating Circumstances	Something that makes a crime more serious
Mitigating Circumstances	Something that may reduce your sentence
Retroactivity	Legislation is there to guide those in conforming to the law
Strict Construction	If there is doubt within statutory provision then the court should rule in favour of the defendant to give fair warning

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Appendix

Term	Definition
Full Code Test	A two-stage test, under the Code for Crown Prosecutions, applied by a prosecutor when determining whether an offender is to be charged with an offence. ²²⁵

²²⁵ (n.181)