Worth the wait?

Ten years of wrangling have failed to settle the corporate manslaughter debate, says **Gerard Forlin**

After more than a decade of wrangling, bartering, debate and delay, the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007) finally received Royal Assent on 26 July 2007. It will be brought into force by secondary legislation on 6 April 2008.

It has not previously been possible to pierce the corporate veil and successfully "convict" a large- or medium-sized organisation. With the advent of CMCHA 2007, it is highly likely that such organisations will now be realistically in the telescopic sights of the prosecution agencies after April 2008. In theory, CMCHA 2007 will not change the law regarding the prosecution of individuals (who are increasingly being imprisoned following conviction for manslaughter). The reality is, however, that as police investigations increase, more individuals will be caught up in the process, resulting in more arrests and more convictions.

CMCHA 2007 permits the jury to review the corporate culture inside an organisation and its general attitude to safety enforcement and control for the first time. This new ability for the jury to assess and review the internal practices in an organisation will inevitably facilitate successful prosecutions.

Once convicted, an organisation will face unlimited fines. Fines in excess of £50m can not be far away and when compared to the £120m imposed recently on British Airways for anti-competitive conduct, such level of fines may soon be imposed in the health and safety sphere.

Under CMCHA 2007, ss 9 and 10 convicted organisations can be given a remedial order, whereby they must remedy the breaches of which the organisation has been convicted within a period of time. Convicted organisations can also be given a publicity order, which requires them to publicise their conviction, particulars of the offence, amount of the fine and the terms of the remedial orders imposed. This will result in greater damage to the reputation of the organisation, causing lower share prices, higher insurance premiums and a greater difficulty when tendering for future work.

Additionally, where an organisation is subsequently prosecuted, the defence will find it much harder to prevent that organisation's previous convictions going before the jury, thereby making acquittals harder to achieve in the future.

DOES CMCHA 2007 GO FAR ENOUGH?

Many think that after such a long wait, the government has missed a golden opportunity to rectify properly this legal lacuna. Detractors have and will continue to cite the fact that CMCHA 2007 provides immunity for many government departments—importantly, the provisions relating to deaths in custody will not come into effect for at least another five years. They are also unhappy that the director of public prosecutions has to give consent to any prosecutions, that the legislation lacks extra-territorial bite, and that the test of senior management failure is too restricted—namely that "only those persons who play a significant role in decisions or in the actual managing or organising of the whole or a substantial part of those activities" can be the catalyst for the offence. They feel that the bar is set too high and clever organisations will cascade their decision-making procedures to personnel below this bar height.

In reality, only increased opprobrium will distinguish this offence from general health and safety offences as both have unlimited fines. Further, it will also lead to many more contested trials, thereby increasing the suffering of the loved ones left behind.

To others, CMCHA 2007 goes too far and will cause an exodus from British management—and schools and hospitals—and affect British competitiveness with the rest of the world. To a certain extent, this has already happened both in the UK and other jurisdictions which are taking a firm stand on health and safety—and corporate governance generally.

It is likely there will be a gradual extension to CMCHA 2007, especially in Scotland, but for the time being we will have to wait and seen how many new prosecutions—with all the prosecution funding difficulties involved—arise out of CMCHA 2007. Interesting times lay ahead and British organisations need to be more on their guard than ever before.

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LETTER TO THE EDITOR

Dear editor,

The concept that a judge might receive evidence of what happened at a mediation is startling and concerning (see "Inside mediation" *NLJ*, 3 August 2007, p 1105). Surely the only matter that the judge in *Brown v Patel and Rice* needed to decide was whether or not there was a settlement agreement in writing signed by all the parties? He found that there was not, and this finding should have pre-empted any need to explore whether there was in theory an agreement which could have been evidenced in writing.

The implication behind his doing so is that parties might be able to reach binding agreements at mediations even though they are not written down and signed. This is an even more worrying thought. Fortunately the district judge's apparent attempt to require the mediator to give evidence fell aside, albeit only by inter-party concession.

As mediator, I tell the parties that mediations do not generate evidence and that unintended binding agreements cannot be reached during the mediation unless written down and signed. This surprising decision casts doubt as to whether I can continue to say such things to parties.

Yours faithfully,

Tony Allen

Director at the Centre for Effective Dispute Resolution