

THE CORPORATE MANSLAUGHTER & CORPORATE HOMICIDE BILL

THE 'SENIOR MANAGEMENT' TEST

OPINION

1. Despite the amendments introduced to the Bill in December 2006, there is still a serious risk that this Bill will fail to bring organisations with a culture of bad and dangerous work practices to account. This is because, despite Government claims to the contrary, the Bill continues to make failings by individuals a necessary condition for corporate liability.

2. Clause 1(1) of the Bill provides that liability for manslaughter (or homicide in Scotland) falls on a corporation:

*“...if the way in which any of its activities are managed or organised -
(a) causes the person’s death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”.*

3. Clause 1(3) limits the extent of the organisation’s liability by providing that

*“an organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a **substantial** element in the breach referred to in subsection (1) (emphasis added).*

4. Clause 1(4)(c) defines 'senior management' as

*"...in relation to an organisation...the persons who play significant roles in
(a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised or
(b) the actual managing of the whole or a substantial part of those activities".*

5. Corporate liability arises, then, only if the activities of the organisation's 'senior management', as defined, amount to a 'substantial element' in the 'gross breach' of the relevant duty of care. The threshold remains very high, as under the present law.

6. The pre-condition for liability appears to be acts or negligent failures by 'senior management' within the organisation. 'Senior management' is a term of art, defined in Clause 1(4)(c): it does not necessarily correspond with senior positions in the organisation's own hierarchy. What places a manager in the category of 'senior management' is whether his functions are as described by Clause 1(4)(c). The person or persons who have these functions may have a modest position in the organisation's hierarchy, and may not be 'senior' in any other sense.

7. The use of the word 'persons' in the plural should probably not be construed to mean that proof of failures by at least two people is required. The effect of that would be to exclude from liability any organisation in which only one person came within the 'senior management' definition. If Parliament meant to exclude such organisations it would surely make its intention plain. However, the drafting may allow an argument on these lines to be mounted.

8. The position in the hierarchy of a person whose functions define him as 'senior management' for the purposes of the Bill may vary from one company to another. It takes no great foresight to see that in a large organisation, such as a train operating company, senior managers in the company will plausibly deny they are 'senior management' for the purposes of Clause 2, as they do not have a 'significant role' in those areas of the company's business that directly concern safety and would engage liability.

9. If individuals cannot be found who come within the definition, the offence will not have been proved – even though a death has resulted from the company's bad practices. And if only a junior staff member can be found, then while the organisation may be liable, its more senior staff may avoid censure and responsibility. They can delegate the function relating to safety to a level of management which is not 'senior'.

10. Plainly, the bigger the organisation, the greater the distance between real senior management and those taking decisions that may turn out to cost lives. But it is these organisations – such as transport operators – that have the capacity to cause the deaths of larger numbers of people than smaller ones which have fewer layers of management and fewer places for the senior managers to hide. So the Bill appears to make life easier for those with the greatest responsibility to operate in a safe and secure manner, while placing a disproportionate burden on smaller organisations.

11. Clause 1(4)(c) appears to draw a distinction between strategic management in 1(4)(c)(i) and management of operations in 1(4)(c)(ii). The Explanatory Notes accompanying the Bill¹ state that the distinction ‘ensures that managers who set and monitor workplace practices as well as those providing operational management are covered’. But the setting and monitoring of work place practices in a large organisation may be delegated to relatively junior staff, or may even be handled by outsiders. These persons may be managers, but not ‘senior management’. This Bill makes the outsourcing of sensitive tasks such as these an attractive proposition, if it lifts the threat of criminal liability from the managers of the organisation – hardly an incentive for good corporate management. Therefore the distinction between ‘senior management’ and other management which is not ‘senior’ could well become a fertile ground for lawyers seeking to avoid corporate responsibility for manslaughter on behalf of their clients.²

12. The distinction that the Guidance Note draws – between ‘setting and monitoring’ and ‘operational management’ – may in any case be thought to be fairly narrow, and it does nothing to suggest that the Bill envisages an unbroken line of responsibility that runs from the top echelons of the organisation.

13. The Bill strikingly excludes anything comparable to the doctrine of ‘command responsibility’ that characterises international war crimes law, and is enacted

¹ The Guidance Notes accompanied the original version of the Bill, in which the unchanged wording of these sub-sub-sub clauses appeared as Clause 2.

² Those seeking to make a distinction between ‘senior management’ and other management might look to Paragraph 2, Schedule 2, of the **Control of Major Accident Hazards Regulations** 1999 (SI 1999/743) in which the role of ‘senior management’ is limited to updating the safety management system.

in English law in Section 56 of the **International Criminal Court Act 2001**³. Just as it is no defence to plead 'I was only obeying orders', top military commanders cannot insulate themselves from crimes committed by their subordinates. The policy of the law is plainly to deter military commanders from turning a blind eye to lawless subordinates, because each can be held to account for war crimes. There is an incentive for the generals to keep all the ranks under tight control, lest they are held vicariously liable for the crimes of others.

14. The Bill, by contrast, is modest in its ambitions: it identifies 'senior management' purely by the functions they fulfil, not by the positions they hold within the organisation. Only if such a person can be found, and can be shown

³ (1) This section applies in relation to -

(a) offences under this part, and

(b) offences ancillary to such offences.

(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.

(5) In interpreting and applying the provisions of this section (which corresponds to article 28) the court shall take into account any relevant judgment or decision of the ICC.

Account may also be taken of any other relevant international jurisprudence...

to have acted in a way that amounts to a 'substantial element' in a breach of a duty of care, will the organisation be liable.

15. However, not all badly run companies are run by negligent managers at any level. An organisation may suffer from deep-seated, historic problems, while all its managerial are acting responsibly and properly within their remits. Difficulties are often systemic, in the fibre of the organisation, not the product of readily identifiable failures by individuals. The Bill has nothing to say about that. It may be thought that the focus on individuals whose duties make them 'senior management' means that it is not really about corporate responsibility at all, but the failures of individuals. The Bill does not appear to consider whether the company as an entity was at fault, over and above the gross failings of individuals within it.

16. The absence of any type of 'command responsibility' doctrine means that those who could potentially change the culture of a bad organisation – the board of directors – will not be presumed to be accountable, because they will be able to show that the chain of command was broken well below their level.

17. The need to find some one to fit the 'senior management' definition may also lead to scapegoating: a relatively junior manager who fits the definition may find himself bearing the burden for widespread systemic bad practice.

18. The defence of a low or middle ranking manager who has been saddled with a system that he cannot change is predictable. He can justifiably say that he is

not responsible: he has inherited something that he has no power to change. If the jury accepted that, and there was no one else who came within the 'senior management' definition, the right outcome would be an acquittal. It would be right because the Bill shifts responsibility from the organisation as an entity to the people who can be identified as senior managers. In the practical world of the Court room, it will be the individual from 'senior management' who will appear to be on trial, and who will be required to answer the difficult questions. By putting him or her in the liability spotlight, the Bill makes it very difficult for questions to be asked about the overall culture and structural failings of the organisation, over which no one individual may have sufficient control or responsibility.

19. It is hard to see how 'senior management' test in the Bill represents an advance over the existing 'directing mind' test – by which a senior individual (in the normal sense) must be found who embodies the organisation in his actions and decisions. If anything, it fixes responsibility on people who may work at a lower level within the organisation than those with 'directing minds'.

20. When the 'senior management' test is looked at together with the high threshold for liability set by Clause 1(1)(b) – 'a gross breach of a relevant duty of care', of which the acts or omissions by 'senior management' are a 'substantial element', it is worth asking whether this law will have teeth at all, or whether it makes corporate criminal liability for deaths as easy to escape as it is at present.

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