

Corporate Manslaughter and Corporate Homicide Act 2007 – Guidance note Sheena Sood, January 2008

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (“the Act”) creates a new offence called corporate manslaughter in England and Wales and Northern Ireland, and corporate homicide in Scotland.

An organisation will be guilty of the new offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a duty of care to the deceased. A substantial part of the breach must have been in the way the activities were organised or managed by senior management.

The Act was given Royal Assent on 26 July 2007 and the majority of it will come into force on 6 April 2008.

Background

Historically there have only been a handful of convictions against organisations for gross negligence manslaughter because the law requires proof that a “directing mind” (that is an individual senior enough to be said to embody its decisions or actions) is guilty of the offence. It has therefore been very difficult to secure convictions in large companies where no one individual director can be said to be the directing mind that committed the offence.

The new offence remedies this shortcoming by enabling prosecutions to be brought in the name of the organisation as opposed to an individual director, thus ensuring proper accountability for serious management failings across an organisation.

The new offence

Organisations covered by the Act include corporations, limited liability partnerships and all other partnerships and trade unions that are an employer, and further organisations referred to in Schedule 1 of the Act.

They will be guilty of the new offence if the way in which their senior management organises or manages their activities causes a person’s death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

Relevant duty of care

The Act requires the duty of care to be one that is owed by the organisation under the law of negligence. This will often be a duty owed at common law, although these duties may have been superseded by statutory provision. The Act requires the judge to decide if a duty of care is owed, not the jury.

The duty of care must arise out of certain specific functions or activities performed by the organisation. These are set out in section 2 of the Act and include:

- a duty owed to employees or to others working for the organisation or performing services for it;
- a duty owed as an occupier of premises;

- duty owed in connection with the:
 - o supply of goods or services (whether for consideration or not);
 - o carrying on by the organisation of any construction or maintenance operations. The Act provides that the 'construction or maintenance operations' includes operations of any of the following descriptions: construction, installation, alteration, extension, improvement, repair, maintenance, decoration, cleaning, demolition or dismantling of any building structure;
 - o carrying on by the organisation of any other activity on a commercial basis; or
 - o use or keeping by the organisation of any plant, vehicle or other thing.

The organisation must be in breach of that duty of care as a result of the way in which the activities of the organisation were managed or organised.

Section 1(3) provides that an organisation cannot be convicted unless a substantial element of the breach lies in the way the senior management of the organisation managed or organised its activities. The Act does not, however, require the prosecution to prove specific failings on the part of the individual senior managers.

It will be sufficient for a jury to consider that the senior management of the organisation collectively were not taking adequate care, and that this was a substantial part of the organisation's failure. The way in which the organisation's activities were managed or organised must have caused the victim's death.

Gross breach of duty of care

There must be a 'gross breach' of the duty of care by the organisation.

Section 1 (4) (b) provides that there will be a 'gross breach' if the conduct alleged to amount to a breach falls far below what can be reasonably expected of the organisation in the circumstances. As the offence is concerned with the way in which an organisation's activities were managed or organised, the jury will have to consider whether an adequate standard of care was applied to the fatal activity.

The jury should therefore consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the breach, and if so, how serious that failure was and how much of a risk of death it posed. The jury may also consider how an activity was managed or organised by the organisation as a whole. This will include for example, consideration of the extent to which evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to encourage any failure.

An organisation cannot therefore protect itself by delegating health and safety responsibility to more junior members of staff because this is a management decision.

Senior management

Section 1 (4) (c) of the Act defines 'senior management' as those persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised (the decision makers), or the actual managing or organising of the whole or a substantial part of these activities (the do-ers).

Penalties

In the event of conviction, an organisation can receive:

- An unlimited fine. The Sentencing Advisory Panel expects to publish guidelines in the autumn of 2008. However early indications are that the level of fine expected will be between 2.5% and 10% of the average turnover taken from the preceding three years. For a Health and Safety offence involving a fatality the starting point will be between 1.5% and 7.5% of the average turnover taken from the preceding three years.
- A remedial order requiring the organisation to remedy breaches of duty. The prosecution must apply for this stating the proposed terms of the order. Prior to making an application the prosecution must consult the appropriate regulatory authority, for example, the HSE.
- A publicity order requiring the organisation to publicise the conviction and the particulars of the offence. The Sentencing Advisory Panel expects to publish guidelines in the autumn of 2008.

Investigation and prosecution

Investigations relating to corporate manslaughter and corporate homicide will be led by the police. In England and Wales and Northern Ireland, the consent of the relevant Director of Public Prosecutions is needed before a case of corporate manslaughter can be taken to court.

Is the reform retrospective?

The reform is not retrospective. The offence will only apply to fatalities caused by gross management failings that occur after the new law comes into force on 6 April 2008.

It will no longer be possible to bring common law proceedings for gross negligence manslaughter against an organisation to which the new offence applies. For a case that occurs wholly or partly before the new offence applies (before 6 April 2008), it will still be possible to bring proceedings on the basis of the common law.

Jurisdiction

An organisation can be prosecuted for the new offence if the harm resulting in death occurred in the UK, in the UK's territorial waters, on a British ship, aircraft or hovercraft, on an oil rig or other offshore installation already covered by UK criminal law.

Convictions under this Act and under health and safety legislation

Section 19 provides that a conviction for corporate manslaughter does not preclude an organisation being convicted for a health and safety offence on the same facts if this were in the interests of justice.

What do organisations need to do to comply with the law?

The offence does not require organisations to comply with new regulatory standards.

In light of the new offence it would be sensible for organisations to satisfy themselves that their systems and processes for managing health and safety are adequate.

The Health and Safety Commission and the Institute of Directors published new guidance entitled 'Leading Health and Safety at Work: Leadership Actions for Board Members' in October 2007. The guidance does not add new requirements, it is intended to explain in a practical language what board members need to do.

Recommended steps: The 4 point agenda

- Planning
- Delivering
- Monitoring
- Reviewing

Planning

- Have an awareness of the significant risks faced in your line of work.
- Audit and keep under review your health and safety policy.
- Put health and safety on agenda the agenda at Board meetings.
- Appoint a Board member as health and safety director.
- Board to take responsibility and "own" health and safety.
- Plan and implement a health and safety management system that identifies and manages the risks.
- Promote health and safety throughout the company.

Delivering Health and Safety

- Ensure health and safety arrangements are adequately resourced.
- Consult competent health and safety advisers.
- Ensure health and safety is a factor when deciding senior management appointments.
- Ensure appropriate risk assessments are carried out.
- Ensure employees or their representatives are involved in decisions that affect their health and safety.

Monitoring Health and Safety

- Implement regular audits of the effectiveness of management structures and risk controls for health and safety are carried out.
- Gather information about the preventative work being done and incidents.

- Report changes and impacts to Board.
- Ensure there are procedures to implement new legal requirements.

Reviewing Health and Safety

- Review at least once a year.
- Examine whether the health and safety policy reflects organisation's current plans.
- Examine whether there has been effective reporting to the Board.
- Decide actions to address any weaknesses in the system and a system to monitor implementation.
- Celebrate good performance.

Preparing for an incident

Implement (or review) your accident management protocol – does it provide for dealing with the authorities in the event of an investigation for corporate manslaughter?

Do you have staff trained in how to deal with investigating authorities?

Take specialist legal advice immediately in the event of a serious accident so that individuals receive advice before any police or HSE interviews and before internal steps are taken?

Check your insurance cover.

The construction industry

Contracting chain

The new offence applies to all organisations, including those in a contracting chain. The Health and Safety Commission and the Institute of Directors guidance recommends that the health and safety arrangements of partners, key suppliers and contractors should be assessed as their performance could adversely affect yours.

Senior Management

It may be difficult to determine who will be considered a senior manager. For example, will the construction site manager be considered to be involved in the managing of a substantial part of the organisation's activities? It would be sensible for organisations to review job titles to ensure they accurately reflect the seniority of the role.

Construction Design and Management Regulations 2007

Ensure compliance with the CDM Regulations.

Going forward

- Review your accident management protocol, does it provide a protocol for dealing with the authorities in the event of an investigation for corporate manslaughter/ homicide?
- Do you have a team of staff who are trained in how to deal with investigating authorities?
- Take specialist legal advice from the outset in the event of a serious accident. It is important to that your incident investigation report and individuals receive the right advice before any police or HSE interviews.

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