

Corporate manslaughter

The new offence

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (**the Act**) was passed by Parliament on 26 July 2007. It will come into force on 6 April 2008, although some of its provisions will not take effect then.

The Act was created with the intention of remedying a defect in the common law offence of "gross negligence manslaughter", which meant that successful convictions were difficult to secure against larger organisations. The new offence takes account of this by creating collective culpability among senior management and eliminating the need to identify specific guilty individuals.

The New Offence

The Act creates the criminal offence of **corporate manslaughter** (for England and Wales) or **corporate homicide** (for Scotland) and puts the law of corporate manslaughter on a new and statutory footing. The offence must be tried in the Crown Court, by jury.

Under the Act, "an organisation [...] is guilty of an offence if the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."

An organisation can only be found guilty of the offence if "the way in which its activities are managed or organised by its senior management is a substantial element in the breach [...]."

Gross Negligence Manslaughter

The Act will not apply to any acts or omissions occurring before the Act comes into force. Until then, the common law offence will continue to apply, but it will be abolished in April 2008 in relation to those organisations covered by the Act. Gross negligence manslaughter will continue to exist from that time in relation to individuals and any organisation not covered by the Act.

An organisation can only be convicted of gross negligence manslaughter if it can be proved that an individual who was the "directing mind" of the organisation or who, essentially, controlled the organisation, is also personally liable. As decision-making is often spread amongst a number of directors and managers, it is difficult to prove that there is a directing mind to convict, although there have been a number of high-profile convictions of smaller organisations, with a small management team.

The Act does not replace the offences under the Health and Safety at Work Act 1974 (HSW) under which both organisations and individuals can be prosecuted for failing to ensure the health and safety of employees, non-employees and co-workers. This includes the situation where a death has arisen as a result of a breach of health and safety legislation. Indeed, the Act permits the joining of cases under HSW so that convictions under both Acts can be achieved at the same time.

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Corporate manslaughter

The new offence (continued)

Definitions used in the Act

The Act only applies to **organisations** which are:

- 1 corporations, which includes companies with more than one officer and limited liability partnerships. Parent companies are not liable for deaths caused by a subsidiary company
- 2 most public and Crown bodies, many of which lose Crown immunity, with certain exceptions relating to "emergency situations" such as military action and law enforcement
- 3 organisations incorporated by Royal Charter
- 4 the police force
- 5 charities and voluntary organisations
- 6 partnerships that have employees, which includes limited partnerships and partnerships formed under the Partnership Act 1890
- 7 trade unions or employers' associations.

The Act does not apply to individuals and individuals cannot be guilty under the Act of aiding, abetting, counselling or procuring the offence under the Act.

The Act can apply in relation to deaths resulting from the activities of foreign organisations operating in the UK. The Act can also apply in relation to UK or foreign organisations where the death occurs abroad, but the event resulting in the death occurred on UK soil. The Act does not apply to UK organisations if the death was caused abroad, even in the EU.

An organisation can only be guilty under the Act if there is a gross breach of its **relevant duty of care** to the deceased individual. This is defined as certain types of duty of care owed by an organisation under the general law of negligence.

These duties were drafted as those most likely to be relevant to a company's affairs. They include an employer's duty to safeguard the health and safety of its employees or a duty owed as occupier of premises. In each case, it will be for the judge to decide whether a duty of care is owed. There are certain exceptions for public authorities where no duty of care will be owed under the Act, for example in relation to public policy, military, policing, child-protection and other activities.

The Act applies where there has been a **gross breach** which is defined as being conduct which "falls far below what can reasonably be expected of the organisation in the circumstances". The Ministry of Justice guide to the Act (October 2007) confirms that the standard is intended to be "broadly equivalent to the sort of threshold applied under the common law". This would mean that the conduct would have to be so negligent as to warrant a criminal conviction, which is the test for common law manslaughter.

In deciding whether there was a gross breach, the jury must consider whether the organisation failed to comply with any applicable health and safety legislation or guidance and if so, how serious the failure was and how much of a risk of death the failure posed.

Notably, the jury may also take into account the general culture of the organisation. This right extends to "attitudes" and "accepted

Corporate manslaughter

The new offence (continued)

practices" which are likely to have encouraged the failure or to have produced tolerance of it. Inevitably, these subjective factors are expected to result in a greater number of successful prosecutions.

The Explanatory Notes to the Act make it clear that an organisation will not be guilty in relation to accidents as long as it has reasonable safeguards in place but a death occurs nonetheless.

An organisation will only be guilty if the way in which its **senior management** organises the activities of the organisation constitutes a substantial element in the gross breach of duty. The management failings must have been the cause or one of the causes of the death for a conviction to follow.

Senior management is defined in the Act as those people who play a significant role in the actual management or organisation or in the decision-making process relating to management or organisation of the activities of the organisation. The Act does not specify a level of management which would be considered "senior". The definition of a senior manager is drawn to capture those who play a role in the making of management decisions, or those actually managing the activities of the organisation as a whole or a substantial part of it. It is intended to cover management at a regional level within a national organisation, factories or operational sites. This ensures that managers who set and monitor work place practices, as well as those providing operational management are covered. Additionally, where organisations pursue a number of activities in roughly equal proportions, such as manufacturing, retail and distribution, those responsible for the overall management of each division fall within the definition.

It is possible that failings at junior management level will go towards providing evidence of management failings at more senior levels. The Explanatory Notes make it clear that the Act is aimed at how the organisation as a whole manages itself. Ministry of Justice guidance to the Act makes it clear that the offence cannot be avoided by senior managers delegating responsibility for health and safety to more junior managers.

Penalties

The Act provides the Court with power to impose an unlimited fine on an organisation convicted of the new offence.

In addition, the Court has the right to make "remedial orders" requiring the organisation to remedy the breaches of duty. These would only be considered if requested by the prosecution and the Ministry of Justice has said that they expect remedial orders to be reserved for exceptional circumstances. In addition, the court can make "publicity" orders requiring the organisation to publicise the conviction and the particulars of the offence.

The provisions relating to publicity orders are unlikely to come into effect in April as the Sentencing Guidelines Council must first issue guidance on how publicity orders are to be used. A consultation was issued on 15 November 2007, with responses due by 7 February 2008. One matter under consideration is whether fines should be set as a percentage of annual turnover.

If the organisation does not comply with any orders made against it, this itself will be a criminal offence punishable by an unlimited fine.

Corporate manslaughter

The new offence (continued)

Limitations of the Act

Commentators have suggested various limitations to the Act:

- 1 individuals cannot be prosecuted under the Act. Although this is so, HSW and gross negligence manslaughter will continue to provide for the punishment of individuals. The number of successful prosecutions of individuals has increased notably in recent years, suggesting that new legislation aimed at individuals may not be required. The Government's stated aim is to make it easier to prosecute larger organisations, rather than to increase the number of prosecutions against individuals
- 2 the Act still provides immunity for certain Government departments. It has been noted in particular that the provisions relating to deaths in custody will not come into effect for at least another five years
- 3 it is a requirement of the Act that the Director of Public Prosecutions has to give consent to any prosecutions, confirming that this offence will be reserved for the very worst cases of corporate mismanagement leading to death
- 4 the Act does not apply to deaths caused by UK organisations on foreign soil
- 5 commentators have suggested that the definition of senior management is too narrow as this captures only those playing a significant role in relevant decision-making. It has been argued that this test is too close to the "controlling mind" test that has caused so much difficulty obtaining successful

prosecutions for gross negligence manslaughter

- 6 the process by which bereaved families can obtain compensation remains unchanged. They will still have to apply through the civil courts and are subject to existing restrictions on that process, such as applying through the Director of Public Prosecutions.

Steps to consider taking

A prosecution under the Act will involve investigations by the police and most likely, the Health and Safety Executive (HSE). Negative publicity is unwelcome but the situation will be worse if poorly managed. Guidance issued in relation to the Act by the Ministry of Justice states that "The offence does not require organisations to comply with new regulatory standards. But organisations should ensure that they are taking proper steps to meet current legal duties."

It is important for every organisation to ensure that it has put in place adequate health and safety policies and that they are implemented effectively by:

- 1 reviewing work place practices and procedures to ensure compliance with existing health and safety laws. For example, ensure risk assessments are carried out and that they are followed up with safe systems of work. The health and safety arrangements of contractors and key partners should also be assessed because an organisation will owe them a duty of care as well
- 2 reviewing health and safety policies to ensure that they are up to date - health and safety policies outline who is

Corporate manslaughter

The new offence (continued)

- responsible for health and safety matters, and will almost certainly be referred to by officers investigating allegations of corporate manslaughter
- 3 determining who could be considered as a 'senior manager' and assess their competency - provide health and safety training for senior management to ensure that they are aware of their obligations
 - 4 increasing board scrutiny for health and safety compliance - health and safety should regularly appear on the agenda of board meetings. Under the Act, it is important to be able to show that an organisation takes its health and safety obligations seriously
 - 5 checking the extent of your insurance cover - legal costs in defending HSE prosecutions can be substantial. For policy reasons an organisation cannot insure against a fine imposed under the Act or health and safety legislation in general. Some insurers do provide cover for the prosecution costs a defendant will be ordered to pay in the event of a conviction or guilty plea
 - 6 taking specialist legal advice from the outset in the event of a serious incident. Your solicitor can advise on privilege which can apply in certain circumstances to prevent documents from being disclosed to the prosecution. For example, an incident investigation report prepared in contemplation of a likely prosecution or for the purposes of obtaining legal advice could legitimately be withheld from disclosure during the course of investigations
 - 7 assisting individuals before they attend any police or HSE interviews, in conjunction with your solicitors.
- Please refer to your usual contact at Thomson Snell & Passmore for further information. Alternatively, please e-mail Douglas Skilton at douglas.skilton@ts-p.co.uk or call him on 01892 701352
- This information sheet summarises and comments on certain provisions in The Corporate Manslaughter and Corporate Homicide Act 2007. It is not intended to be comprehensive or to provide legal advice, which should be sought on particular matters.