

Corporate Manslaughter



► **Inside**

The offence of corporate manslaughter

Penalties

Individual liability

Other health and safety obligations

Practical steps



Introduction

Under the Corporate Manslaughter and Corporate Homicide Act 2007 (the Act), an organisation is guilty of an offence if the way in which its activities are managed or organised by senior management causes a death and this amounts to a gross breach of duty of care owed by the organisation to the deceased.

This Inbrief provides a general summary of the legislation and the steps an organisation can take to comply with its obligations.

The offence of corporate manslaughter

The Act provides for a statutory offence of corporate manslaughter in England, Wales and Northern Ireland, and corporate homicide in Scotland. It applies to companies and other corporate bodies (in the public and private sector), partnerships that are employers, and bodies such as Government departments and police forces.

The offence makes a company liable for corporate manslaughter if:

- the way in which its activities are managed or organised
- by senior management
- causes death
- is a gross breach of a duty of care owed by the company to the individual concerned

The way in which activities are managed or organised must be a substantial element of the breach of the duty of care.

The elements of the offence are looked at below.

Relevant duty of care

The organisation must owe the deceased a duty of care connected with the organisation's activities. Factors to be taken into account when deciding whether there is a duty of care include:

- any duties owed by the organisation under the law of negligence
- a duty owed to the organisation's employees or to other persons working for the organisation or performing services for it
- a duty owed by the organisation as an occupier of premises
- a duty owed in connection with:
 - supply by the organisation of goods and services
 - the carrying on by the organisation of any construction or maintenance operations
 - the carrying on by the organisation of any other activity on a commercial basis
 - keeping or using plant and equipment

Most organisations will owe duties of care to

employees and others in connection with their activities, so in the employment context establishing a duty of care should not be difficult.

Senior management

The failure must be at senior management level. A 'senior manager' is someone who plays a significant role in making decisions about how the whole or a substantial part of its activities should be managed or organised, or who is actually responsible for managing those activities. This will be a question of fact in each case, but is clearly capable of including executive and non-executive directors. It is the breach of a duty by 'senior management' that gives rise to liability with the focus being on the collective management of the organisation, not the activities of a single individual.

Gross breach of the duty of care

To constitute a 'gross' breach of the duty of care, the conduct alleged must fall "far below what can reasonably be expected of the organisation in the circumstances".

In deciding this, the jury must consider whether the organisation failed to comply with health and safety legislation and if so:

- how serious that failure was
- how much of a risk it posed

The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any failure or to have produced tolerance of it. This means that the organisation's safety culture will be very important. For example, evidence that employees were regularly required to work without adequate protective equipment could be taken into account when determining whether there has been a 'gross' failure.

It will not be a defence for the organisation in question to show that its safety record was no better or worse than other companies in the same industry, particular if that industry/sector has a poor or sub-standard safety record.

Health and safety guidance can be taken into account in deciding whether there has been a 'gross' breach. This includes codes, guidance,

manuals or similar publications concerned with health and safety matters issued by an authority responsible for the enforcement of any health and safety legislation, such as the HSE.

Penalties

There are three possible sanctions for a breach of the Act: an unlimited fine and/or a 'remedial order' and/or a 'publicity order'. Failure to comply with a remedial or publicity order is a criminal offence punishable by an unlimited fine.

A remedial order requires the organisation to take steps to remedy the management failure, including any deficiencies in health and safety policies, systems or practices.

A publicity order requires the organisation to publicise the conviction and may require publication in a specified manner of the fact of conviction, specified particulars of the offence, the amount of any fine and the terms of any remedial order.

Guidance as to how courts should use the possible sanctions was issued by the Sentencing Guidelines Council in February 2010 in its definitive guideline "Corporate manslaughter and health and safety offences causing death" (available at http://www.sentencing-guidelines.gov.uk/docs/guideline_on_corporate_manslaughter.pdf).

This guideline sets out key principles relevant to assessing the seriousness of the offence and the appropriate financial penalty and looks at the additional powers available to a court imposing sentence.

The guidelines are clear that fines must be punitive and significant. The appropriate fine for an offence of corporate manslaughter will seldom be less than £500,000 and may be measured in millions of pounds. Where other health and safety offences cause death, the appropriate fine is unlikely to be less than £100,000 and may be up to hundreds and thousands of pounds.

Individual liability

The Act does not impose secondary liability for aiding, abetting or procuring the commission of the offence of corporate manslaughter. In other words, individual senior managers cannot be

liable for the offence of corporate manslaughter. However, the Act does not preclude individuals being prosecuted in their own right for primary liability offences including gross negligence manslaughter under the common law (which is unaffected by the Act in relation to individuals) and/or breaches of other health and safety legislation.

Other Health and Safety obligations

- The Health and Safety at Work Act 1974 (HSWA) requires employers to conduct their business so as to ensure the health and safety of their employees, non-employees and members of the public, as far as it is reasonably practicable to do so
- A breach of these duties is a criminal offence that can be prosecuted by the Health and Safety Executive (HSE). If convicted, a company can face unlimited fines
- In addition, individual directors can be prosecuted if the company's breach was due to their negligent acts. If convicted, the HSE can apply to have the individual director disqualified under the Company Directors Disqualification Act 1986. Individuals within the company can also be prosecuted for manslaughter

Practical steps

The legislation is there to punish system failures. The more robust the systems in place, the less likely an organisation will be held liable for their failure. Once a policy is established, it will be critical to ensure that it is actually followed.

Policy - create a policy which is both robust but at the same time simple to understand. It is important to ensure the policy meets the business's needs but at the same time ensures compliance with its obligations.

Organisation - ensure there is in place an organisational structure that is responsive to safety needs. It is important to ensure that those individuals involved in health and safety matters have sufficient training and are 'competent' to undertake the tasks assigned to them by the business. Remember the business has a non-delegable duty of care to its employees and visitors.

Forward planning - before undertaking any change in working practices ensure that there is a period of planning and testing before final implementation. It is important that feedback is obtained and recorded in relation to any proposed change, and, if necessary, additional risk assessments carried out.

Measure performance - set bench marks for accident rates and measure against those standards. Constantly review the standards and look for accident trends/patterns. Test and measure response time and provide feedback to employees. Ensure that additional risk assessments are undertaken if any accidents occur or accident patterns emerge. Review performance and if necessary undertake additional assessments.

Audit - it is important for businesses to have an audit trail which shows that the policy is a living document and the organisation takes its duties very seriously.

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