

Litigation & Dispute Resolution



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Corporate manslaughter and corporate homicide bill – finally a reality

On 26 July 2007 the Corporate Manslaughter and Corporate Homicide Act 2007 finally received Royal Assent. This marked the conclusion of more than ten years of debate and false starts for this legislation, which first saw light of day in the Labour Party Manifesto in 1997. The law itself has, however, been 11 years in the making, since the Law Commission first recommended changes to the law in 1996.

Many thought the Bill was going to fall again at the last hurdle following a long-running game of parliamentary ping-pong between the Commons and the Lords over whether the Bill should include deaths in custody. Ministers have now agreed that the scope of the law is going to be extended in the future to cover such deaths.

At almost the same time as the Act was being passed the Health and Safety Executive released figures showing that the number of workplace deaths in the UK has significantly increased in the 2006/2007 period. In some regions of the country the number of deaths has more than doubled. This is a significant reversal of the trend of the last few years which had cumulated in the 2005/2006 year having the lowest number of workplace deaths ever recorded.

The HSE described the situation as unacceptable stating that they would be taking a robust line with regard to enforcement where such incidents occurred.

The introduction of the Act and the release of these statistics show why all deaths in the workplace will be under particular scrutiny from now on.

When will the Act start?

The Act will become fully operational in April 2008. This lead-in period will give the enforcing authorities, including the Health and Safety Executive and the Crown Prosecution Service, time to train their staff to ensure that they can properly investigate and assess whether a fatality should result in a Corporate Manslaughter prosecution.

The extent of the new legislation

The Act will apply to England, Wales, Scotland and Northern Ireland as well as the seaward limits of the territorial waters of the United Kingdom, United Kingdom registered merchant ships, British controlled aircraft and offshore installations covered by the Petroleum Act 1998. There is nowhere, therefore, in the United Kingdom that escapes the scope of this new legislation. The legislation not only applies to companies but to partnerships, trade unions and a whole host of government departments and ministries. In due course it will also apply to deaths in custody in the prison service and those controlling police cells. However, a date for this aspect of the Act has not yet been agreed.

Very few, if any, organisations in the United Kingdom will not be affected by the Act.

What is the new offence?

An organisation will be guilty of the offence if gross negligence in the way in which it is managed, or the way in which its activities are organised, causes a person's death. The key factors are that the gross breach has to occur at the senior management level and the standards of that management have to fall far below standards found in similar organisations.

The role of senior management

Senior management is defined under the Act as being persons (this can be either an individual or the senior management as a whole) who play significant roles in:-

1. The making of decisions about how the whole or a substantial part of an organisation's activities are to be managed or organised, or
2. The actual managing or organising of the whole or a substantial part of those activities.

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Should you have any queries on anything mentioned in this Briefing please get in touch with Deborah Williams, Suzie Savage or your usual contact at Reed Smith Richards Butler.

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The focus of any investigation following a fatality is going to be on the role management has played in the build up to that fatality and the manner in which management decisions were taken. Clearly, organisations that have a responsible approach to safety have nothing to fear from the Act. It will only affect those who have either been reckless in their decision making process or have knowingly taken decisions to proceed in a way that could result in a foreseeable death occurring.

Although the Act refers to the actions of senior management, the offence is one for which the organisation would be prosecuted; there is no scope for individuals to face charges under the Act.

The Duty of Care

The scope of those to whom the organisation owes a duty of care is very broad. It includes not just the organisation's own employees or other people working for that organisation or providing services to it, but also anybody to whom the organisation owes a duty of care because it is an occupier of premises, because it supplies goods or services, or because it is involved construction or maintenance operations or the carrying out of any other activity on a commercial basis or the keeping of any plant or vehicle. There is also a catch all provision that refers to the keeping of "other things" which will only become clear as and when the courts have ruled on what "other things" will include.

The range of individuals to whom a duty of care is owed will therefore depend upon the nature of the organisation's activities and could easily include large sections of the public, for example in the transport sector.

The extent of duties of care owed by public authorities is limited, with no duty arising in respect of decisions made as a matter of public policy, including decisions over the allocation of public resources and the exercise of statutory inspection. Public authorities, however, still owe duties of care as employers, occupiers of premises etc.

How will it be decided if a new offence has been committed?

The Act identifies various factors that a jury or judge will need to consider. In deciding whether there has been a gross breach of duty, the court **must** consider whether the organisation has failed to comply with any relevant health and safety legislation and if it did, the court must then consider how serious that failure was and how much of a risk of death that breach posed. The Act says the court **may** also consider whether the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to lead to safety failures. An assessment of a defendant's general corporate culture can therefore be legally relevant.

How will the new offence be punished?

The penalties include fines – with no maximum limit – and remedial orders. These orders allow the court to order the organisation convicted of corporate manslaughter to take steps to remedy the management failure leading to death.

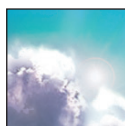
It is also possible for the court to impose a publicity order requiring the convicted organisation to publicise the details of its conviction and the amount of any fine.

What do you need to do to prepare for the new legislation?

In organisations where the issue of health and safety is taken very seriously and where they respond to advice received on safety improvements, there is probably little that needs to be done. The intention of the law is to capture those organisations who have such a poor management structure or are prepared to take such great risks that the inevitable result is someone being killed.

There has been concern that the new legislation may lead some organisations to attempt to delegate health and safety responsibilities to those at a much lower level in the organisation to protect the organisation from criminal liability. However, given that the entire basis of the Act is the positive actions of the senior management or their failure to act in a reasonable manner, such a step could in itself be seen as a gross breach of duty of care.

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Nevertheless, even in the most safety conscious organisation, the best advice has to be that now is the time to act and that the organisation should look to appoint someone at a senior level to be responsible for health and safety. Provided that the individual has sufficient powers to implement health and safety changes and acts reasonably on the advice received from those with particular expertise in any area of the organisation's operations where safety is a factor, then even if there is an unforeseen fatality, the organisation should not face a prosecution for manslaughter. The senior person who is appointed is not the fall guy for such matters, but is actually the reverse and shows that the organisation has taken its responsibilities very seriously.

Providing an organisation acts reasonably, it has nothing to fear from the new legislation. It is only in those organisations where perhaps profit is placed before safety, or where no regard at all to safety is taken, that there could be something to fear.

There is no doubt that come April 2008, the Health & Safety Executive will be monitoring closely the management structure and processes in any organisation where they are investigating a fatality, to determine whether there is sufficient evidence to refer the matter to the prosecution authorities to consider a prosecution for corporate manslaughter. With the number of workplace fatalities in the UK having increased, it is inevitable that at some point in the future a high profile prosecution will be brought with all incumbent publicity.

It would be a sensible precaution for any organisation that has hazardous operations to consider how it would respond to a corporate manslaughter investigation. In particular, organisations should consider how they would deal with issues such as legal representation of those who may be interviewed and expected to give evidence. This is because individuals may still be prosecuted under health and safety legislation in relation to the activities that led to a fatality and there is clearly a significant potential for a conflict between different members of an organisation's management when it comes to such interviews.

The organisation therefore should give early thought as to how it would arrange representation for different individuals who may be involved, and also how in itself it would wish to be represented. Early discussions with insurers and brokers would also be recommended to see the extent of the insurers' willingness to cover the cost of such separate representation. These are not the sort of questions you want to be asking when you have investigators at the door requesting to interview different members of your staff.

The short advice has to be to plan for the worst now, so that should it happen to your organisation, you are in a position to respond quickly and appropriately.

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