

Adviser

Corporate manslaughter and Corporate Homicide Act 2007

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Over the past 20 years and following a number of serious accidents, there have been unsuccessful attempts to prosecute large corporations under the common law offence of gross negligence manslaughter. Prosecutions largely failed due to the difficulty in proving the identified 'controlling mind' of the corporation responsible for creating the circumstances that caused the death(s). As a result, the Government has been under pressure to introduce legislation to rectify what was seen by some as miscarriages of justice. Despite many technical difficulties and following years of debate, the Corporate Manslaughter and Corporate Homicide Act 2007 received Royal Assent 26 July 2007.

This Adviser provides a brief overview of the legislation, the health and safety implications and the implications on insurance coverage.

- The Corporate Manslaughter and Corporate Homicide Act 2007 received Royal Assent on 26 July 2007 and applies to organisations based throughout the United Kingdom.
- Organisations can be prosecuted as a corporate body should a gross breach of the duty of care to a person cause that person's death
- Organisations include corporate bodies, associations and partnerships. There is no Crown Immunity and, with prescribed exceptions, many government departments, including defence, police/emergency services, prison, childcare and health services are liable for prosecution
- The duty of care includes the duty to employees and third parties arising from all operations including occupier of premises, construction/maintenance work, supply of goods or services, use of vehicles and plant, and all commercial activities.
- Manslaughter charges are likely to be brought in conjunction with charges for breach of health and safety regulations
- There is no upper limit on the fines, remedial or improvement notices that can be imposed and the convicted organisation can be ordered to publicise the details of the offence.
- Failure of an organisation to demonstrate an effective health and safety system and culture within the workplace will be key factor in any decision to prosecute. Likewise, a strong health and safety culture could be instrumental in a successful defence of a prosecution – all organisations subject to the new legislation should review their safety and loss control procedures and seek professional advice if needed
- Liability insurances should be checked to ensure that there is adequate cover in place to defend prosecutions brought under health and safety legislation and the new manslaughter legislation.

The legislation

The Corporate Manslaughter and Corporate Homicide Act 2007 will be in addition to and will not replace the existing Scottish offence of Culpable Homicide and the existing Common Law manslaughter offence under which individuals and directors/owners of small businesses have previously been successfully prosecuted for manslaughter offences. The previous Common Law offence of manslaughter by gross negligence as applicable to corporations under which successful prosecutions proved difficult is abolished.

The legislation will apply to corporate bodies, certain associations that have employees and partnerships (special rules will apply for partnerships) and will also apply to many government ministries and departments, including defence, police/emergency services, prison, childcare and health services. There will be no Crown Immunity although there will be some specified exemptions for certain public policy decisions and in other prescribed circumstances. While individuals cannot be prosecuted under this legislation it is still possible to do so under existing manslaughter common law offences as well as under health and safety legislation.

This Act specifically allows an organisation to face charges brought under this manslaughter legislation and for breaches of health and safety legislation, with the jury invited to return a verdict on each charge.

The offence

An organisation will be guilty of an offence if, in the way that its activities are managed or organised by senior management, it causes a person's death due to a 'gross breach of a relevant duty of care owed by the organisation to the deceased'.

A 'duty of care' means a duty under the laws of negligence in respect of a duty owed:

- to Employees or others working for or performing services for the organisation
- as an occupier of premises
- arising from construction or maintenance operations
- arising from the supply of goods or services
- arising from any other commercial activity
- arising from the use or keeping of plant or vehicles.

The legislation also describes the duty of care in respect of police, detention, healthcare and child protection services and other specialist government and quasi-governmental operations and activities.

Senior management is described as persons who play significant roles in making decisions about how the whole or a substantial part, or an organisation's activities are managed, or the actual managing of the whole or a substantial part of the activities.

When considering a verdict, the jury must decide if the organisation had a duty of care to the deceased and if there was a 'gross breach' of that duty. The proposed legislation provides guidance on the factors to be considered by the jury. The jury must also consider:

- Was there a serious failure to comply with Health and Safety legislation?
- Did that failure pose a risk of death?
- How have the attitudes, policies, systems and accepted practices within the organisation potentially contributed to the death?
- Is there any health and safety guidance that may or should be provided that relates to the 'gross breach'?
- Is there anything else that may be relevant?

Conviction will result in (unlimited) fines and the potential for remedial orders. The Court has the power to order a guilty organisation to publicise details of the offence and the punishment including the remedial action ordered by the court.

The guilty organisation must provide an appropriate enforcement authority with the evidence that the required remedial action has been taken within the timeframe ordered by the Court. Failure to comply will be a further offence, again, with no upper limit imposed by the legislation as to the level of fine.

Health and Safety Systems and Culture

Even in the most effectively run organisations, accidents can happen. In the event of a prosecution, a jury must consider the organisation's health and safety systems and procedures when deciding on its verdict. It follows that demonstrably sound health and safety systems and procedures that comply with legislation within the accused organisation can be used as part of the defence. A safety culture within the workforce, seen to be vigorously encouraged by management ensuring the implementation and enforcement of robust health and safety procedures compliant with, and working to, minimum recognised standards such as HSG65 or OHSAS18001, will not only reduce the potential for serious accidents but may also reduce, although will not eliminate, the potential for prosecution in the unfortunate event of a fatality.

It should be noted that manslaughter charges can also arise from fatalities caused by the supply of alleged defective products. Manufacturers and suppliers of goods should be able to demonstrate that systems are in place for safety and quality checks on all supplied parts and ingredients as well as the finished product, with procedures in place to recall products that are potentially faulty.

The legislation and rules governing health and safety requirements are many, complex and often evolving. Some guidance and self-auditing tools, both for large and small organisations, are available on-line through the Health and Safety Executive.

<http://www.chaspi.info-exchange.com/default.asp>
(for businesses with more than 250 employees)

<http://www.hsapi.info-exchange.com>
(for small businesses)

The successful completion of these questionnaires is not likely to exempt an organisation from potential manslaughter or health and safety prosecutions. Companies should seek professional advice on how the Act implicates their organisation's – and their – liability.

Marsh would advise all clients to review the adequacy of both their safety management systems and overall claims management processes, to ensure that they are able to defend claims successfully, through identifying and addressing gaps in management systems and highlighting areas that might give rise to an unnecessarily high number of indefensible claims.

Insurance Implications

This legislation has been introduced as a result of failed high-profile attempts to successfully prosecute large corporations following a disaster. Failed attempts at prosecuting under the Common Law manslaughter offence where larger corporations have been involved in the fatalities, together with successful prosecutions of individuals including directors/owners of small businesses who were directly involved in the events leading to the accident, mean that the exposure to substantial legal defence costs following manslaughter prosecution is not new.

Most liability insurers provide defence costs following prosecution arising from an alleged breach of health and safety legislation. As the prosecutions for corporate manslaughter or homicide will invariably arise from a breach of health and safety legislation, it follows that prosecution defence costs provided by liability insurers should also apply manslaughter charges.

Few liability policies will have manslaughter etc defence costs included automatically and the extension must be requested.

Organisations should check their Employers' and Public/Products Liability policies (or, if purchased separately, the legal fees insurance policy) to ensure that defence and appeal costs are included following any manslaughter, culpable homicide, corporate manslaughter, corporate homicide or similar offence allegations or charges with such defence costs provided for individuals as well as for the organisation.

Should the insurer provide the cover but impose an inner limit for these costs, it should be negotiated to a level as high as is available. Defending these cases through the courts and possible appeals will be very expensive.

Any declination by an insurer to provide this legal expenses cover, or impose a low inner limit, will be a competitive consideration with insurers that are prepared to offer adequate insurance.

Conclusion

Fines for conviction under this proposed legislation are, like convictions for breach of health and safety legislation, up to an unlimited amount. However, convictions for corporate manslaughter (corporate homicide in Scotland) will carry a greater stigma than a conviction for a health and safety breach. The fines could be higher and there will certainly be greater and more adverse publicity.

Senior managers clearly need to take note of this legislation as it could significantly increase the liability of their organisation and possibly themselves in the event of death of an employee or member of the public.

Marsh would advise all organisations to review the adequacy of both their safety management systems and overall claims management processes. Defences will be helped if the business can demonstrate a good health and safety culture that is actively encouraged by management. Marsh can assist with this process and please do not hesitate to speak to your usual Marsh contact should you want any further information.

The Corporate Manslaughter and Corporate Homicide Act 2007 is available to view on line at:-

http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en.pdf

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