



Personal Injury and Medical Law Teams Practice Note

The Corporate Manslaughter and Corporate Homicide Act 2007¹

The draft Corporate Manslaughter Bill was introduced in July 2005. Following considerable Parliamentary scrutiny, the Act came into force on 6th April 2008. This was the culmination of considerable pressure over the last 20 years to provide redress for victims of disasters resulting from corporate negligence: obvious examples include the sinking of the Herald of Free Enterprise and the Paddington Rail Crash. In all cases no successful manslaughter prosecution could be brought because of the requirement on the prosecution to establish that 'a directing mind' at the top of the company was personally liable.

Summary

A new offence has been created (corporate manslaughter in England and corporate homicide in Scotland) whereby an organisation is guilty of the offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management². Criminal conviction will result with sanctions.

The new offence allows an organisation's liability to be assessed on a wider basis, providing a more effective means of accountability for very serious management failings across the organisation. The new offence is intended to complement, not replace, other forms of accountability such as prosecutions under health and safety legislation and is specifically linked to existing health and safety requirements. The offence will support well managed organisations by targeting those which cut costs by taking unjustifiable risks with people's safety.

The jury will be able to consider the management of the fatal activity throughout the organisation as well as the company's safety systems and their implementation. The only requirement is that a substantial part of the failure must be at 'senior management level' and this is defined as those who make significant decisions about the organisation at an operational or managerial level.

¹ See too 2008 No. 401 (C. 15) Criminal LAW The Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No.1) Order 2008

² who is a member of 'senior management' will depend on the nature and scale of an organisation's activities. Apart from directors and similar senior management positions, roles likely to be under consideration include regional managers in national organisations and the managers of different operational divisions.

The focus is on organizational system failure and factors that might be considered include:

- the systems of work used by employees
- level of training and adequacy of equipment
- supervision of middle management
- arrangements for assessing and monitoring risk and auditing management
- health and safety.

This will become available as a coroner's verdict and will not only apply to 'corporations' but to other organisations including the NHS, as Crown immunity will no longer be a defence (section 11 CMCHA 2007). The duty of care owed in negligence is breached if the death is caused by the way in which activities are managed and organised or amount to a gross breach of a relevant duty of care

The Act applies to:

- companies incorporated under companies legislation or overseas
- other corporations including:
 - o public bodies incorporated by statute such as local authorities, NHS bodies and a wide range of non-departmental public bodies;
 - o organisations incorporated by Royal Charter;
 - o limited liability partnerships
- all other partnerships, and trade unions and employer's associations, if the organisation concerned is an employer
- Crown bodies such as Government departments
- police forces.

The Act applies across the UK and the new offence can be prosecuted if the harm resulting in death occurs:

- in the UK
- in the UK's territorial waters (for example, in an incident involving commercial shipping or leisure craft)
- on a British ship, aircraft or hovercraft
- on an oil rig or other offshore installation already covered by UK criminal law.

It does not extend to British Companies responsible for deaths abroad³

The offence is concerned with the corporate liability of the organisation itself and does not apply to individual directors, senior managers or other individuals. Nor is it possible to convict an individual of assisting or encouraging the offence (see section 18).

³ see guidance on page 17 of the Ministry of Justice Guide (infra)

However, individuals can already be prosecuted for gross negligence manslaughter/culpable homicide and for health and safety offences. The Act does not change this and prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so.

The Act sets out a number of exemptions covering deaths connected with certain public and government functions. The management of these functions involves wider questions of public policy and is already subject to other forms of accountability. Areas in which exemptions apply include military operations (section 4), policing, emergency response, child protection work and probation

A flow chart giving guidance to when the Act applies is set out on page 11 of a written Guide from the Ministry of Justice "A guide to the Corporate Manslaughter and Corporate Homicide Act 2007"⁴

Specific Provisions

- Section 1(1)(b)** **The Offence** - defines the offence as a *gross breach of a relevant duty of care owed by the organisation to the deceased*
- Section 1(2)** 'Organisation includes a corporation, those bodies listed in Schedule 1, a Police Force, a partnership, or a trade union or employers' association that is an employer
- Section 1(3)** The establishment of guilt requires the prosecution to show that manner in which the organisation's activities *are managed or organised by its senior management is a substantial element in the breach*
- Section 2** **Meaning of the 'relevant duty of care** –defines the duty of care and sets out the wide range of organisation to which this duty applies:
- S.2(3)** The duty owed is that which *would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.*
- S.2(4)b)** A breach by an organisation is a 'gross' breach if the conduct *alleged falls far below what can reasonably be expected of the organisation in the circumstances'*
- S.2(4)(c)** 'Senior Management' means (i) the 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 organised⁵ or (ii) the actual management or organisation of the whole or a substantial part of those activities

⁴ downloadable from the MoJ website: <http://www.justice.gov.uk/guidance/manslaughteractguidance.htm>

⁵ for example the organiser of the Lyme Bay canoe disaster in 1993 where in fact there was a successful prosecution of an individual for manslaughter and this was made possible because it was a small organisation which meant that individuals could not hide behind corporate obfuscation

S.2(5) Whether a duty of care is owed to a particular individual is a question of law upon which the judge must make any findings of fact necessary to decide that question.

S.2(6) On conviction the organisation is liable to a fine

S.2(7) A 'relevant duty of care' is defined as *a duty owed to its employees or to other persons working the organisation or performing services for it* and includes:

- a duty owed as occupier of premises; in connection with the supply of goods or services (whether for consideration or not);
- the carrying on of any construction or maintenance operations (as defined under s7(7));
- the carrying on of any other activity on a commercial basis or the use or keeping by the organisation of any plant, vehicle or other thing;
- a duty owed by reason of the organisation being responsible for the person's safety, defined in sub-section (7)(2) as a person detained in a custodial institution, custody area or similar holding facility and includes transportation of such persons in pursuance of prison escort arrangement or immigration escort arrangements; it also includes detained patients (precise definitions are given in subsection (7)(7))⁶

Section 3 **Public policy** – This section sets out the exceptions to the application of a duty of care where the death is the results of public policy decisions, exclusively public functions and statutory inspections.

Section 4 **Military activities** - The duty of care does not apply to defined military activities including peacekeeping operations and *operations dealing with terrorism, civil unrest or serious public disorder, in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance, and also the special forces*'.

Section 5 **Policy and Law Enforcement** - The duty of care does not extend to policing and law enforcement including training and defined duties including coming under direct threat or violent attack in the course of those duties. This does not however exempt from prosecution an organisation that is a servant or agent of the Crown (see **section 11**)

Section 6 **Emergencies** - Similar exemption is given in respect of the emergency services including fire and rescue, NHS ambulances (or organised by the NHS) and transportation of organs, blood, equipment or

⁶ Although the new offence will apply to the management of custody, this part of the Act will not come into force on 6 April 2008. The current intention is for this to commence this within 3 to 5 years. This is unlikely to find favour with pressure groups such as *Inquest* which has long campaigned for appropriate redress following death in custody

personnel, rescue services (including rescue at sea) and the armed forces

This exemption does not however extend to the way in which medical treatment is carried out or decisions about such treatment (save decisions about the order in which people are treated in an emergency) (s.6(4))

Section 7 **Child Protection and Probation Functions** - This relates to child-protection and probation functions to which the duty of care does not extend

Section 8 **Factors for the Jury** – once it is established (on the judge's ruling) that an organisation owed a relevant duty of care to a person, it falls to the jury to decide whether there was a 'gross breach' of that duty. There are 8 factors for the jury to consider:

S.8(2) The jury *must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation⁷ that relates to the alleged breach, and if so:*

- (a) how serious that failure was
- (b) how much of risk of death it posed

S.8(3) The jury may also consider the extent to which there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failures or to have produced tolerance of it, and to have regard to any health and safety guidance that relates to the alleged breach.

S.8(4) The jury's consideration is not fettered and despite the above guidance the jury may *regard to any other matters they consider relevant⁸*

Section 9 (1) **Powers** – This enables the court upon conviction and upon application by the prosecution specifying the terms of the proposed order (s.9(2)) to make a "*remedial order*" on such terms as it considers appropriate *having regard to any presentations made, and any evidence adduced* (by the prosecution or the defence) (s.9(2)) and upon consultation with the enforcement authority or authorities as it considers appropriate having regard to the nature of the relevant breach (s.9(3), requiring the organisation to take specified steps to remedy:

⁷ referred to in the definition sub-section 8(5) as '*health and safety guidance* (my emphasis) which extends beyond legislation to *any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.*

⁸ The Act does not require the prosecution to prove specific failings on the part of 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 this was a substantial part of the organisation's failure (page 14 MoJ Guide)

- (a) *the relevant breach*
- (b) any matter that appears to the court to have resulted from the relevant breach and been a cause of death
- (c) any deficiency, as regards health and safety matters, in the organisation's policies, systems or practices of which the relevant breach appears to the court to be an indication.

S.9(4)

In making a remedial order the court must specify a period within which the steps must be taken and may require the organisation to supply to a relevant specified enforcement authority evidence that those steps have been taken. Failure to comply with a remedial gives rise to a separate offence which on conviction on indictment renders the organisation liable to a fine.

Section 10

Power to publicise – this allows the court to make a publicity order setting out the conviction and the terms of any 'remedial order' to be publicised in a specific manner. Such order must set out the particulars of the offence, the amount of the fine and the period within which the terms of the remedial order must be complied with. The making of a publicity order is however subject to the view of the enforcement authority and any representations made by the prosecutor or the organisation. Failure to comply with a publicity order is an offence punishable by a fine (s.10(4))

Section 11

Crown Indemnity – The principle of immunity of Crown bodies (such as Government departments) does not apply to prosecutions under the Act⁹

Section 15

This section makes provision for a prosecution to be brought in the name of a partnership and not against individual members, and for any fine to be paid out of partnership funds. This reflects the approach taken under other legislation, such as the Companies Act 2006 and means that partnerships will be dealt with in a similar manner to companies and other incorporated defendants.

Section 18

It is not possible to convict an individual of assisting or encouraging the offence which discourages 'scape-goating'

Comment: The offence only applies in cases of gross negligence. The new offence makes it clear that the standard is whether the organisation's conduct fell far below what could reasonably have been expected. This is intended to be broadly equivalent to the sort of threshold applied under the common law.

This Act coincides with the Coroner Bill and the Minister of Defence's recent unsuccessful attempt to fetter the language of narrative verdicts in Inquests relating to death in military service. Observations regarding the 'unlawful', 'unforgiveable' and 'inexcusable' and *failure to provide basic equipment*¹⁰ that might otherwise give rise to a 'relevant breach' and finding of 'gross breach' of that duty, will not lead to prosecutions under the Act as

⁹ Schedule 1 sets out a list of Government departments etc to which the offence applies.

such military duties are specifically excluded under section 4. Nonetheless, in the other areas of corporate activity and responsibility, the new statutory offence remedies a lacuna in the law. Wide-ranging and precise definition of the organisations and activities that will come within the ambit of the Act is given under section 2(7) and in the Ministry of Justice Guide. This Act is also the subject of detailed guidance and audit procedures from a number of bodies including the HSE (www.corporatemanslaughter.net and www.hse.gov.uk/corpmanslaughter)¹⁰

This Act is far-reaching for a number of reasons:

- the obligations imposed upon organisations are significant and cannot be avoided by concealment of by whom and at what level decisions are taken concerning management of safety systems and their implementation. Examples range from responsibility for company cars to parallel responsibilities by charities and voluntary organisations¹¹
- these obligations are absolute and non-delegable and indeed delegation may of itself provide the necessary evidence of breach of the duty imposed under the Act¹²
- the creation of a civil definition of a criminal offence in respect of which the judge has to be satisfied as a matter of law before leaving the factual determination to the jury.
- At present the organisations that are covered are strictly defined but there is provision in section 21 to extend the range of organisations to which the Act applies by secondary legislation and thus the potential powers are significant

The Act is therefore of significant importance to both criminal and PI practitioners as it creates a criminal offence dependent upon a civil standard and definition of the duty imposed. It is only after the judge has made a ruling on the facts as to whether a duty of care arises that the matter falls to the jury to determine whether there has been 'gross negligence' based upon specific criteria as set out in section 8 of the Act.

The remedial powers are significant in terms of an organisation's continuing existence – not only is there the possibility of swingeing fines far in excess of those currently imposed following HSE prosecutions¹³ but there is the power to make 'publicity orders' and

¹⁰ See too the Office of Public Source Information - http://www.opsi.gov.uk/si/si2008/ukxi_20080401_en_1

¹¹ see page 6 of the Ministry of Justice 'Guide'

¹² see second bullet point on page 14 of the MoJ Guide

¹³ which will continue in respect of lesser instances of breach of the Health and Safety law that have not resulted in death. On occasions such charges will probably be made in conjunction with the Act. Examples of the type of fine that it is anticipated will be imposed are given at pages 15 and 16 of the MoJ Guide and include reference to the £1.5m resulting from the 1997 Southall train crash; £2m imposed on Thames Trains in 2003; £4 imposed on Network Rail following the fatal train crash at Ladbroke Grove; £15m on Transco for the explosion in Larkhall in 1999 and in 2005 £3.5m against Network Rail and £7.5m against Balfour Beatty in respect of the Hatfield fatal train derailment. It is stated that "In appropriate cases, fines on this scale, and even higher, are of the sort that we would expect to see for corporate manslaughter".

The Sentencing Advisory Panel is expected to publish a consultation paper in November. A final guideline is expected to be in place by the autumn of 2008.

publicise the conviction and penalty under section 10¹⁴. Although the expectation of the Ministry of Justice is that the courts will only impose a remedial order "in relatively rare circumstances since the relevant regulator will have been involved in the case from the outset and will have been able to use their existing enforcement powers to address any dangerous practices long before a case comes to court", this power enables the judge to impose an order if it still appears necessary. This is potentially very damaging. It is interesting to note that it is mandatory for the court to specify the time within which the organisation must comply with the terms of the remedial order (s.10(3)(a)) whereas the requirement that the organisation provide evidence that the remedial order has been complied with, is discretionary (s.10(3)(b))

It may be – at least in the early days of implementation – that criminal practitioners should look for guidance from their civil practice colleagues on whether a particular course of conduct or control and management structure within an organisation give rises to a prima facie breach of duty such that a successful prosecution may be mounted.

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Please note that this Practice Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

¹⁴ Provisions relating to publicity orders will be commenced when supporting sentencing guidelines in England and Wales are available. The Sentencing Advisory Panel expects to publish a consultation paper on publicity orders (and the assessment of financial penalties) in November. A final guideline is expected to be ready by the autumn of 2008, paving the way for publicity orders to be brought into force at that point. The application of the offence to the management of custody will also commence at a later stage. The Government is working to implement that aspect of the legislation within 3 years of the offence itself, but has indicated that a period of up to 5 years might be necessary. (taken from the Ministry of Justice Guidance)