

Corporate Manslaughter and Corporate Homicide Act 2007

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007¹ received Royal Assent on 26 July 2007. The Act, which underwent extensive scrutiny during its passage through Parliament, is the culmination of several years of campaigning by unions and pressure groups. It will come into force on 6 April 2008 and will create a new statutory offence of corporate manslaughter (or "corporate homicide" in Scotland), replacing the common law offence of manslaughter by gross negligence.

Background

The Act has its origins in the series of disasters in the late 80's (Herald of Free Enterprise, Piper Alpha, and the Kings Cross fire). No person or organisation was successfully prosecuted in any of these cases despite serious criticism being levelled at each of the organisations involved. The subsequent failure of the prosecutions in the Southall and Hatfield rail crashes consolidated public opinion in favour of a new statutory offence of corporate manslaughter, and led to a Law Commission enquiry into the deficiencies in the current law. For a company to be successfully prosecuted under the existing regime, it is necessary to identify a senior manager who is the "directing mind" of the company, for whose shortcomings the company can be held liable, and for that person individually to be guilty of manslaughter. In most large organisations, the various management functions are devolved, making it virtually impossible to satisfy the "directing mind" test. The handful of successful prosecutions for corporate manslaughter were all brought against small organisations with a simple management structure.

Scope of the new offence

The elements of the new corporate manslaughter offence are as follows:

- the company (or other organisation) must owe a duty of care to the victim, whether as employer, occupier of land, supplier of goods or services or in carrying on construction or maintenance activities or indeed any other activity on a commercial basis;
- the victim may be an employee (including an agency worker or contractor), a customer or a member of the public;
- the company must be in breach of that duty of care by virtue of the way in which any of the company's activities are managed or organised by its senior management and that management failure must constitute a "substantial element" of the breach;
- this senior management failure must have caused the victim's death; and
- the breach of duty of care must be a "gross" breach, i.e. conduct falling far below what can reasonably be expected of the company or organisation in the circumstances.

¹ http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en.pdf

Who can be liable?

The offence of corporate manslaughter is committed by the company itself. Whilst the conduct of the company's directors or senior management will be relevant to establishing liability on the part of the company, those individuals cannot be held personally liable under the Act. The Government dropped its original, controversial suggestion that directors should also be liable to prosecution under the new regime. However, directors should bear in mind that a successful prosecution of a company for corporate manslaughter is likely to result in criticism of management. Directors could also be prosecuted separately under existing health and safety legislation or for manslaughter where it can be shown that their personal conduct amounts to an offence. Disqualification proceedings under existing legislation are also possible in certain circumstances.

The offence can also be committed by public bodies, including various Government departments, and the police force. Partnerships are also covered by the Act.

Can a parent company be liable for its subsidiaries?

There are no specific provisions in the Act dealing with the liability of a parent company for the operations of its subsidiaries. Generally, companies within a group will owe separate and individual responsibilities, regardless of ownership, and it will be no defence for the directors to argue that they were acting on the instructions of their parent company. In limited circumstances, the parent company could be liable to prosecution if a duty of care can be established and it can be shown that it was the gross failure of senior management of the parent which was responsible for the death of the victim, e.g. an employee of a subsidiary.

What about overseas operations?

The offence must be committed in Great Britain. So, it can apply to the British operations of foreign companies, but cannot apply to activities carried on overseas by British companies or their foreign subsidiaries (subject to specific exceptions for British aircraft and ships).

What constitutes senior management failure?

The definition of "senior management" includes only those who play a significant role in making management decisions about, or actually managing or organising, the activities of the company as a whole or a substantial part of its activities. This will be a question of fact and will vary from company to company. There are several hurdles in this definition. The term "significant" is intended to capture only those whose role is decisive or influential. The reference to the company "as a whole or a substantial part of it" means that divisional, regional or sectoral managers will only be caught if the operations for which they are responsible represent a substantial part of the company's operations as a whole. Clearly, the larger the organisation, the less likely it is that individual managers will be deemed to be responsible for a "substantial" part of the activities of the organisation.

What does "gross" breach of duty mean?

This is defined in terms of conduct which "falls far below what can reasonably be expected of the organisation in the circumstances". By way of guidance on how this concept is to be interpreted, the Act states that it will be relevant to consider evidence that the company failed to comply with relevant health and safety legislation or guidance, the seriousness of the breach and the extent to which attitudes, policies or practices within the organisation contributed to the breach.

What sort of activities are likely to be covered?

The Act states that a company may be liable in its capacity as employer, occupier of land, supplier of goods or services or in carrying on construction or maintenance activities or any other commercial activity, which catches most commercial organisations in some shape or form. Prosecutions are thought to be most likely in the case of:

- companies responsible for the design or construction of buildings or other structures, in the event of collapse;
- owners or occupiers of buildings who ignore fire safety regulations;
- product manufacturers and retailers who fail to comply with relevant standards in respect of defective products;
- employers who are in breach of their health and safety obligations towards their employees and other workers; and
- companies involved in public transport systems.

What is the penalty?

Companies convicted of corporate manslaughter face an unlimited fine and the court may also order the company to take specified steps to remedy the management failure within a specified timescale. As well as the financial penalties, it is expected that the adverse publicity involved in a prosecution will be a significant deterrent. The court also has the power to order a company, upon conviction, to publicise the fact that it has been convicted of the offence and specified details of the offence.

What should we do to minimise the company's exposure?

There are various practical steps companies can take to minimise the risk of prosecution, including:

- ensuring the company complies with the Health and Safety at Work etc Act 1974 and other health and safety regulations and related guidance in respect of its employees, agency workers, contractors, customers, visitors to its premises and other members of the public;
- ensuring the company also complies with any industry or sector-specific safety or other regulations;
- ensuring that where responsibility for health and safety is delegated, everyone in the management chain is fully aware of the scope and extent of their responsibilities and there are no loopholes;
- appointing a "health and safety director" and/or a committee responsible for health and safety at board level (the Health and Safety Commission recommends the appointment of a health and safety director in a guidance booklet for directors entitled Directors' Responsibilities for Health and Safety which was published in 2001 and is still current (as at August 2007) and is available from the HSC's website²); and
- ensuring that adequate records of compliance with health and safety obligations are kept, properly monitored and reported up the management chain.

Relevant corporate governance obligations for listed companies

In establishing and maintaining a management structure for the company's health and safety obligations, listed company directors should have regard to:

- Principle C2 of the Combined Code³, which provides that the board should maintain a sound system of internal control to safeguard the shareholders' investment and the company's assets, and the requirement under paragraph 9.8.6 of the Listing Rules to report on the application of Principle C2 along with the other Code Principles;
- Provision C.2.1 of the Combined Code, which states that the board should, at least annually, conduct a review of the effectiveness of the group's system of internal controls and should report to shareholders that they have done so. The review should cover all material controls, including financial, operational and compliance controls and risk management systems; and
- the Turnbull Guidance on internal controls⁴, which is to be followed by listed companies in assessing how they have applied Code Principle C.2, and which places responsibility for internal controls firmly on the directors.

Having established policies and procedures which ensure compliance with health and safety legislation and the Combined Code, the board may delegate the task of implementing those policies and procedures to other individuals within the company, but under the Turnbull principles, the board should receive and review regular reports on internal health and safety controls from those charged with responsibility for health and safety management on a day-to-day basis.

For more information on the Act, please contact your usual contact at the firm.

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³ <http://www.frc.org.uk/corporate/combinedcode.cfm>

⁴ <http://www.frc.org.uk/images/uploaded/documents/Revised%20Turnbull%20Guidance%20October%202005.pdf>