

Corporate Manslaughter Act comes into force

The Corporate Manslaughter and Corporate Homicide Act 2007 comes into force on 6th April 2008. The Act creates a new statutory offence of corporate manslaughter (in Scotland corporate homicide) after years of debate on the subject.

The new offence will replace the current common law offence of gross negligence manslaughter as it applies to corporations and other organisations to which the new Act applies. The new offence is designed to fill a large gap in the law brought about by the impotence of prosecutions brought against companies for the common law offence.

Under the common law it proved extremely difficult to secure a conviction for gross negligence manslaughter against a company because the law required that before a company could be convicted of the offence it had to be established that an individual, senior enough to be deemed part of its 'controlling mind', had himself been charged and convicted of the offence. The company's guilt or innocence was entirely dependent upon that of the individual.

This created an anomalous situation in which a number of high profile cases over the years resulted in large companies being acquitted because it proved impossible to link an individual identified as the 'controlling mind' of the company with the negligent activity alleged. This was because multiple layers of management created a remoteness between the 'controlling mind' and the negligent activity [e.g. the Herald of Free Enterprise ferry disaster in 1987 and the Southall rail disaster in 1997].

By way of contrast a number of small companies have been convicted of the offence because they have been run by one or two 'hands on' directors working at the coalface of the company's business and thereby satisfying the above mentioned test.

Mindful of the difficulties in securing a conviction for the common law offence, prosecuting authorities invariably brought prosecutions against companies, when a death resulted, under Sections 2 and 3 of the Health and Safety at Work Act 1974. Section 2 provides that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his employees. Section 3 provides that it shall be the duty of every employer to conduct his business in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment are not thereby exposed to risks to their health or safety. Albeit effective, it was felt that these prosecutions against companies for acts/omissions resulting in death did not properly reflect the gravity of the situation when someone had been killed.

Against this background the new offence is 'designed to secure, in a wider range of situations than under existing law, a conviction for a criminal offence that properly reflects the seriousness of the worst instances of management failure causing death. It is designed to complement, rather than replace, existing health and safety offences, for which organisations may still be prosecuted as an alternative to, or in addition to, the new offence.'

The new offence provides that an organisation will be guilty of an offence of corporate manslaughter if the way in which 'senior management' managed or organised its activities both caused a person's death and was a gross breach of a relevant duty of care that the organisation owed to the deceased.

The offence applies to all corporations, police forces, partnerships, trade unions and employers associations. It also applies to most Crown bodies although it precludes 'a relevant duty of care' arising in many of their activities.

Individuals cannot be prosecuted under the 2007 Act, but they can still be prosecuted for gross negligence manslaughter and for offences under the Health and Safety at Work Act 1974.

A 'duty of care' means any of the following duties owed by an organisation under the law of negligence;

- to employees or persons working for the organisation or performing services for it
- as an occupier of premises
- in connection with the supply of goods or services
- arising from construction or maintenance operations
- arising from any other commercial activity
- A breach of a duty of care by an organisation is regarded as a 'gross breach' if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances.

'Senior management' means the persons who play significant roles in;

- the making of decisions about how the whole or a substantial part of its activities are managed or organised, or
- the actual managing or organising of the whole or a substantial part of those activities

It is anticipated that the issue of what constitutes 'senior management' will prove to be a vexed question for the courts, varying from case to case depending on the size and structure of the organisation involved.

Once it has been established that an organisation had a duty of care to a deceased person in deciding whether there was a 'gross breach' of that duty, a jury must have regard to the following factors set out in the Act;

- Was there a serious failure to comply with relevant health and safety legislation?
- How much of a risk of death did that failure pose?
- The extent to which attitudes, policies, systems or accepted practices may have encouraged the breach or produced tolerance of it.
- Any health and safety guidance that relates to the breach
- Any other matters that they consider relevant

The offence is punishable with an unlimited fine. It is anticipated that these fines will reflect the size of the organisation and seriousness of the offence and in given cases are expected to be severe in the extreme;

- In 2005 Transco was fined £15 million for health and safety offences arising out of a fatal explosion in Larkhill in 1999.

- In 2006 Network Rail was fined £3.5 million for health and safety breaches arising out of the fatal derailment of a train near Hatfield in 2000.

The Court, on conviction, also has power to impose a 'remedial order', requiring the organisation to take specified steps within a period of time to address the failures that resulted in the death and, to impose a 'publicity order', requiring the organisation to publicise details of the conviction, penalty and any remedial order imposed.

It has been suggested that in many cases the stigma attached to the offence and the consequential damage to an organisation's reputation could be the Act's most potent weapon. In some cases, particularly those involving prestigious companies, the consequences of the adverse publicity could put those companies at a distinct competitive disadvantage when tendering for new work.

In summary, the 2007 Act is a welcome and overdue piece of legislation which should go some considerable way to ensuring that organisations put health and safety at the forefront of their operational priorities. The new offence is clearly linked to existing health and safety requirements and as such does not impose any additional duties. Organisations already taking a conscientious approach to health and safety really have nothing to be concerned about. That said, the Act provides a timely reminder to organisations of the importance of reviewing health and safety policies, practices and procedures with a view to ensuring that they are legally compliant and eliminating, controlling or minimising those risks envisaged by the Act.

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