

# ICSA Guidance on Corporate Manslaughter and Homicide

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## 1. Overall purpose

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This guidance has been provided to help inform directors of public and private corporations, statutory authorities and charity trustees about the Corporate Manslaughter and Corporate Homicide Act 2007 and how it may affect the decisions they make in the boardroom. It is essential that directors, trustees, and others who play a significant role in the management of the whole or a substantial part of an organisation's activities (described in the Act as 'senior management,<sup>1</sup>') are aware of the very serious consequences of not complying with their duties of care.

The Corporate Manslaughter and Corporate Homicide Act 2007 (hereinafter referred to as 'the Act') applies to England, Wales and Northern Ireland where the term 'Corporate Manslaughter' is applicable, and Scotland (where the term 'Corporate Homicide' is applicable). The Act was given Royal Assent on 26 July 2007 and came into force across the UK on 6 April 2008.

## 2. Introduction

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Previously it was possible for a corporate body, such as a company, to be prosecuted for a wide range of criminal offences, including manslaughter, as a result of any harm coming to employees, visitors and customers. Crown bodies (those organisations that are legally a part of the Crown, such as government departments) could not be prosecuted for manslaughter under the doctrine of Crown immunity. Many Crown bodies, such as government departments, do not have a separate legal identity for the purposes of a prosecution, so legal action would never be taken against them.

To be guilty of the common law offence of gross negligence manslaughter, a company had to be in gross breach of a duty of care owed to the victim, and the offence as such was known as 'corporate manslaughter'. Before a company could be convicted of manslaughter, a 'directing mind' of the organisation (i.e. a senior individual who embodies the company in his actions and decisions) also had to be guilty of the offence. This was known as the 'identification principle'.

The Act eliminates the requirement for the identification principle, as it is no longer necessary, in order to secure a conviction, for a senior individual who could be said to embody the company in his actions and decisions having to be guilty of the offence. The organisation can now be charged in its own right for an action or inaction that gives rise to a death (as long as it has breached the duty imposed by the Act).

The new law sets out a clear definition of the offence and the duties required by an organisation in fulfilling its duty of care, and its elements.

Section 1 of the Act defines the situation giving rise to an offence:

**'An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised:**

- (a) causes a person's death; and**
- (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.'**

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<sup>1</sup> S.1(4)

The Act makes reference to 'organisations'; generally this means a body which is incorporated. It also includes other organisations such as Police forces (s.13), local authorities (s.2 (3) Local Government Act 1972) and NHS Trusts (s.5 (5) National Health Service and Community Care Act 1990) which have been designated for this purpose by statutory instrument.

Section 11 of the Act makes it clear that Crown bodies can also be charged with the offence. The section provides:

- (1) An organisation that is a servant or agent of the Crown is not immune from prosecution under this Act for that reason.
- (2) For the purposes of this Act:
  - (a) a department or other body listed in Schedule 1;<sup>2</sup> or
  - (b) a corporation that is a servant or agent of the Crown, is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown.

### 3. Duty of care and gross breach

The most important definitions to understand are that of 'relevant duty of care' and a 'gross breach.'

Section 2 of the Act defines the duties owed by the organisation under the common law of negligence (although it is for the judge to find whether a particular duty is owed to an individual by the organisation). The section provides that:

- a duty of care is owed by the organisation to its employees or to other persons working for the organisation;
- if the organisation is an occupier of premises then a duty of care is owed to ensure the premises are safe;
- a duty of care is owed when the organisation is supplying goods or services, when constructing or maintaining buildings, infrastructure or when using plant or vehicles, etc., or when carrying out other activities on a commercial basis.
- Finally, a duty of care is owed to someone who is being held in custody.

With regards to gross breach, section 1(4) (b) of the Act sets out the test for whether a particular breach is 'gross'. The test is one of reasonableness and asks the question: did the actions or omissions of the organisation fall far below that which could be reasonably expected of the organisation in the circumstances? It is a test that was previously used under the common law offence. The relevant duty of care is not a test which is actually linked to the acts of a certain level of management but looks at how the organisation *as a whole* acted or failed to act.

Any jury hearing a case under the Act must, under section 8, also take into account certain factors which are relevant to this issue. The sections provides as follows:

- (1) This section applies where:
  - (a) it is established that an organisation owed a relevant duty of care to a person; and
  - (b) it falls to the jury to decide whether there was a gross breach of that duty.

<sup>2</sup> Schedule 1 can be viewed at [www.opsi.gov.uk/acts/acts2007](http://www.opsi.gov.uk/acts/acts2007) and then viewing the Corporate Manslaughter Act 2007.

- (2) The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so:
  - (a) how serious that failure was;
  - (b) how much of a risk of death it posed.
- (3) The jury may also:
  - (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
  - (b) have regard to any health and safety guidance that relates to the alleged breach.
- (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
- (5) In this section 'health and safety guidance' means 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.

There must of course be a causal link between the actions taken, decisions or omissions made by the senior management and the resulting death. The Act itself fails to define the test of causation but common law causation rules for gross negligence manslaughter will generally apply. The established view taken by common law was defined thus by Lord Woolf in *R v HM Coroner for Inner London, ex parte Douglas-Williams (1999) 1 All ER 344*.

*'For gross negligence manslaughter so far as the facts we are considering are concerned there must be:*

- i. *negligence consisting of an act or failure to act;*
- ii. *that negligence must have caused the death in the sense that it more than minimally, negligibly or trivially contributed to the death; and*
- iii. *the degree of negligence has to be such that it can be characterised as gross in the sense that it was of an order that merits criminal sanctions rather than a duty merely to compensate the victim.'*

Under the Act, the organisation is only liable for the offence if its activities are managed, or organised, by its senior management in a way that is a substantial factor that leads to the breach. Under S.1 (3) 'Senior management' is defined as persons who play a significant role in the management of the whole or a substantial part of the organisation's activities. Under S.1 (4) (c) this covers both those in the direct chain of management as well as those in, for example, strategic or regulatory compliance roles. As a result it is clear that decisions made by directors or trustees will always influence this chain and so care needs to be always taken to ensure that safety at work is a priority.

#### 4. Penalties

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If an organisation is found guilty of the offence then the sanctions can be severe. Under section 1 of the Act the court has the power to impose an unlimited fine on the organisation. The court will almost certainly make a remedial order in which the company is ordered to remedy the deficiency that led to the death. For example, if the company had decided not to implement the recommendations arising from detailed risk assessments then the court would order their implementation, or if the organisation had little communication with staff on health and safety and training then it would be most likely ordered to remedy this. The order would specify a time limit for compliance.

The court also has the power under section 10 of the Act to order the organisation to publicise the conviction, stating the particulars of the offence, the amount of the fine imposed and any remedial order made. The organisation will be given a time limit in which to comply with this order and could be required to prove to regulators that it has indeed complied. Non-compliance is triable on indictment and punishable again with an unlimited fine. Consultation has taken place as to how Publicity Orders will work. Draft guidelines are expected later this year.

## 5. Preventing liability

The Act was essentially brought in to ensure that all organisations had effective health and safety measures in place and that they followed the mandatory health and safety guidelines.<sup>3</sup> It is important to remember that being a director or trustee of an organisation means you are ultimately responsible for ensuring that the employees are reasonably safeguarded from injury at work. It is also important to realise that it is not just employees that the organisation needs to ensure are safeguarded from injury, but also outside contracted workers, customers and volunteers.

There will often be occasions when a balance has to be found, for example a director has a duty to promote the success of the company<sup>4</sup> whilst having regard to the interests of the employees. If, therefore, a decision is made that would potentially increase the profits of a company but knowingly results in an unsafe work environment for the employees and ultimately (for purposes of this guidance) death of the employee, clearly the organisation is liable under the Act because of a decision made by the senior management which has grossly breached their relevant duty of care to the employee.

Steps that all organisations can take to minimise the risk of prosecution of corporate manslaughter:

- Ensure compulsory health and safety guidelines are in place and strictly adhered to by all employees, contractors and volunteers.
- Comply with the Health and Safety at Work, etc. Act 1974.
- Provide strong and effective leadership on health and safety at the top of the organisation, with a director being given responsibility to monitor this area of the organisation's activities and regularly report on it to the board.
- Develop a culture that flushes out information about mistakes that do not have adverse or serious consequences, so that lessons can be learned from them.
- Follow the joint guidance of Institute of Directors and Health and Safety Commission.<sup>5</sup>
- Ensure all members of the management team are aware of their roles with regard to health and safety and what is expected of them.
- Ensure all employees and outside contractors are aware of the safety measures and the guidelines that have been put in place.
- Constantly review the health and safety policy and ensure it is up to date, adhered to and reviewed regularly.
- Offer health and safety training and in some cases make it mandatory.
- When making decisions which may have implications for safety ensure that safety is a priority, and ensure when making policy decisions affecting the organisation that health and safety is always considered.

<sup>3</sup> Health and Safety at Work Act 1974. It should be noted that to be convicted under the Corporate Manslaughter Act does not necessarily mean that the organisation and even a particular individual will not also face prosecution under the Health and Safety at Work Act 1974 as well. The decision whether to bring a prosecution (under the 1974 Act as well as the 2007 Act) will be based on a test of public interest.

<sup>4</sup> Companies Act 2006, S.172

<sup>5</sup> Visit [www.hse.gov.uk/leadership](http://www.hse.gov.uk/leadership) for details on the guidance. For detailed further reading: M. Bateman, *Managing Health and Safety*, (ICSA Publishing 2005).

- Organise meetings with health and safety experts to ensure that the organisation is ensuring employees are safe and safety in the work environment is given a very high priority.

In companies the company secretary should ensure that the Health and Safety code is an item annually reviewed by the Board and by operational management at more frequent intervals. It would also be prudent to ensure that whenever there is a proposal for policy change within the company the health and safety implications are received and recorded.

Employees also have duties concerning their own safety at work which include taking reasonable care for their own health and safety and that of others who may be affected by what the individual does or does not do; co-operating with the employer on health and safety; correctly using work items provided by the employer, including personal protective equipment, in accordance with training or instructions; and not interfering with or misusing anything provided for health, safety or welfare.<sup>6</sup> All employees should be regularly reminded of their obligations.

*October 2008*

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<sup>6</sup> Source: [www.hse.gov.uk/pubns/law.pdf](http://www.hse.gov.uk/pubns/law.pdf)

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