

No room for complacency

Corporate manslaughter legislation has been in place for nearly a year now. Just how much impact has it had on businesses? **By Sue Copeman**

The Corporate Manslaughter and Corporate Homicide Act was introduced on 6 April 2008 in the wake of high-profile incidents involving fatalities and the conclusion by the Health and Safety Executive (HSE) that 70–85 per cent of deaths at work were attributable to management failings. While the Act does not impose new responsibilities, it does increase the chances of a successful action.

“Before the Act was passed it was difficult to secure convictions against companies or their managers,” explains Mike Lea, Head of D&O and Joint Head of Financial and Professional Risk at Jardine Lloyd Thompson. “Previously, individual managers could only be pursued if it could be proved that they had a ‘controlling mind’ and that a gross breach in duty of care had resulted in death or injury.”

Management failures

“Under the old regime,” points out Francis Kean, a Partner at international law firm Barlow Lyde & Gilbert, “you had to find an individual criminally responsible for manslaughter on the basis that the ingredients of that manslaughter charge could equally well be held against the company. In large companies, while you may be able to demonstrate particular management failures by individuals, criminal law does not allow these to be aggregated.”

The new Act does not allow for individuals to be prosecuted but it does permit the aggregation of management failures as part of a prosecution against an organisation.

Additionally, the definition of senior management has now been widened to include everyone who plays a significant role in making decisions about how the organisation’s activities are managed.

Industry sectors such as life science, transportation and construction are likely to have a higher exposure to actions alleging breach of health and safety legislation than other sectors. Larger companies will normally have sufficiently robust risk management to avoid any potential prosecutions under this Act, points out David Lister, a Partner in the Global Risk Solutions Division at Jardine Lloyd Thompson. Even with strong risk management in place, however, there is still no room for complacency.

In any prosecution juries will look at corporate safety culture, says Kean. “They will examine how important the safety culture is, in both the industry concerned and the organisation being prosecuted.”

Maintaining good practice is clearly of crucial importance. Rachel Conran, Head of Financial Lines at Allianz Global Corporate and Specialty, believes that safety practices are of a higher standard in the UK than in most other parts of Europe. However, she warns that some European companies could be caught by the Act even if they do not have UK subsidiaries.

“The Act applies to all companies that operate in the UK,” she explains. “This would include, for example, a German bus company taking paying passengers into the UK. Such businesses need to get to grips with the legislation and realise they need good practice.”



Being tarred with the brush of irresponsibility could result in a steep fall in company profits

With the Act still in comparative infancy, no cases have yet been brought. Indeed, the Centre for Corporate Accountability says that it may take many years before the offence will actually apply to deaths – particularly in relation to deaths caused by the activities of large organisations. This is because the offence only applies when both the death and all the relevant evidence took place after 6 April 2008.

However, last year’s inquest into the death of Jean Charles de Menezes, who was shot dead by police who mistook him for a terrorist in July 2005, revealed circumstances which could have led to a successful prosecution under the Act. “There were different failings at different levels that lined

up to produce this tragedy. If this happened now there would be a good argument for aggregating these different failings under the Act,” says John Goodman, a Partner at Barlow Lyde & Gilbert.

Insurance implications

An action against an organisation would result in defence/investigation costs for both itself and its directors. As Lea says: “A company’s costs would usually be covered by its public, employers’ or motor liability policies, with directors reclaiming their own costs from the allocation of the costs attributable to the D&O policy.”

Since a major incident would require general liability insurers and D&O insurers to

MINIMISING RISK

- **Review existing health and safety** policies and procedures. Document these and ensure there are no gaps between what is written and what happens in practice.
- **Double check areas** like training, equipment and risk assessments.
- **Establish who ‘owns’** health and safety policies and how management is supervised.
- **Pay particular attention** if you or your subcontractors employ workers who may not understand signs and labels written in English.
- **Make sure people understand** what they are being told and test them on their comprehension.
- **Ask your broker to check** that liability policies provide adequate cover.

combine a defence strategy – because both are contributing – the wording of both policies should be compatible.

Cover may be provided by a specific endorsement or simply taken to be part of the overall insurance. Lea warns that some D&O underwriters impose relatively small sub-limits, often £100,000, for specific defence costs. In addition, the D&O policy will usually exclude injury, disease or death. “You need to be sure this exclusion is worded in such a way that it provides cover for costs,” he says.

Whether directors’ costs are met by their company or not depends on the latter’s indemnification policy. “If I was a director I would want separate insurance cover, although in some cases available cover is not as broad or generous as it might be,” says Kean.

In the event of a successful prosecution, the Act provides for publicity notices to be served. Again Kean warns, “This could result in significant issues concerning reputation. Being tarred with the brush of irresponsibility, which caused a fatality, could result in a fall in profits or even cause a company to go into insolvency. That could then trigger a civil claim by its shareholders – another area where directors would want the protection of their D&O policy.”

General liability policies include defence costs arising from a corporate manslaughter prosecution. In order to be covered, such costs must usually be incurred with the insurers’ prior consent. “The policies we have negotiated generally do not have sub-limits. We don’t consider this to be a major additional exposure for our larger clients and the prior consent clause gives insurers some control. Insurers may seek to impose limits for SMEs but the standard policy limits will apply for our bespoke placements for large clients,” Lister explains.

It is in insurers’ interests to defend a criminal prosecution which, if successful, would strengthen the case for subsequent civil action. Neither D&O nor general liability insurers charge additional premiums for such cover.

Deluge or subtle change?

“The jury is out as to whether we will see many prosecution cases in future,” says Lea. “However, as companies downsize to save costs, safety is an area that may be compromised,” he warns.

While actual prosecutions may not increase, it certainly seems likely that there will be more investigations. Goodman believes the authorities will choose their first target carefully. “They want absolute sure-fire certainty, so the first target will be an organisation that has genuinely cut corners in order to put profit before employees’ lives or safety.”

The government has suggested that there could be 10 to 15 cases a year under the Act. “It may get to that level, but not quickly,” says Goodman. He points out that the breach of duty of care has to be gross – with conduct falling far below what could reasonably be expected. “Words like ‘reckless’, ‘heinous’, ‘flagrant’ and ‘atrocious’ spring to mind,” he says.

The current recession means there is no political will to pursue a case at present. However, during a bad recession, organisations such as local authorities are not spending money on repair and maintenance. If an incident now results in a fatality, the law can and will act to make those responsible pay. **RS**

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