

# THE NEW LAW ON CORPORATE MANSLAUGHTER

## A SHORT GUIDE TO THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

After years of contentious parliamentary debate, the Corporate Manslaughter and Corporate Homicide Act 2007 will come into force on 6 April 2008.

The Act creates a dedicated offence of corporate manslaughter. The intention behind the legislation is to set out more clearly the extent of the duty of care owed by organisations and to overcome some of the legal technicalities, which, in the past, have made it difficult to secure successful convictions of corporate defendants.

The key elements of the Act are as follows:

### The offence

A body can be charged with the offence of corporate manslaughter if the way in which its activities are managed or organised:

- Causes a person's death
- Amounts to a gross breach of the duty of care owed to that person by the organisation

A breach of duty will be gross if the conduct of the organisation falls far below what can reasonably be expected of the organisation in the circumstances. Ultimately that will be a matter of fact for a jury to decide. It will be interesting to see how the Courts approach this; will expert evidence be obtained, for example? The duty of care can arise in a number of ways. The following duties fall within the ambit of the Act:

- A duty owed to employees or others working for the organisation
- A duty owed as an occupier of premises
- A duty arising from the supply of goods or services (which includes healthcare services)
- A duty arising from the carrying out of construction or maintenance
- A duty arising from the use or keeping of any plant or vehicle

### Which organisations are affected?

The Act applies to corporations, police forces and partnerships, including GP partnerships for example. It also applies to the organisations listed in the Schedule to the Act, which includes all the major Government departments such as the Department of Health, the Crown Prosecution Service and HM Revenue and Customs.

The Act will also apply to all NHS bodies, as they are bodies corporate [by virtue of the NHS Act 2006 and NHS (Wales) Act 2006] and are therefore corporations within the meaning of section 1(2) of the Act.

As the Act applies to corporations, it will apply to any bodies corporate registered as operating a care home or any other care establishment or agency. It will also apply to partnerships operating such establishments or agencies, but only where the partnership is an employer.

### Extending the duty of care

The Act specifically extends the duties of care caught by the Act to include duties owed to persons whose safety is the responsibility of the organisation. This provision was introduced to bring deaths in custody within the ambit of the Act and comes into force in April 2011. Persons affected include:

- A person detained in a custodial institution or in a custody area at a court or police station
- A person detained at a removal centre or a short term holding facility
- A person being transported in a vehicle, or being held in the course of a prison escort or immigration escort
- A person living in secure accommodation
- A person who is a detained patient

From 2011, the Act will therefore impact heavily on NHS bodies providing healthcare to patients detained either under the Mental Health Act 1983 or within prisons, although this part of the Act is not expected to come into force until April 2011.

## Exclusively public functions and public policy decisions

The application of the Act is limited when an organisation is carrying out 'exclusively public functions'. It is arguable that certain functions undertaken by an NHS body could be construed as an 'exclusively public function'. Where an NHS body can be shown to be carrying out such functions, its activities will be caught by the Act only in specific circumstances, (for example, it is clearly arguable that the statutory functions of PCTs to regulate GPs under the Performers List Regulations 2004 is an 'exclusively public function').

Those circumstances are:

- Where the duty of care is owed to an employee or other person working for the organisation;
- Where the duty of care arises out of the NHS body's occupation of premises; or
- Where the duty of care is owed to a detained patient or a person living in secure accommodation.

Any duty of care, which an organisation might owe arising from deciding matters of public policy, will not be caught by the Act. This would exclude from the ambit of the Act, for example, decisions made by a public body (such as NICE) not to approve a new medicine, but specifically not resource allocation, for example, a decision by a PCT not to allocate healthcare resources in a particular way.

A public authority, such as the Commission for Social Care Inspection or the Healthcare Commission, will not be criminally liable under the Act in respect of inspections carried out in accordance with its statutory duties, except where there is a gross breach of the duty of care owed to its employees or of its duty of care as an occupier. Activities in the sphere of child protection are also exempt.

## The duty of care and emergencies – the exemption

Any duty of care owed by an NHS body in respect of the way in which it responds to emergency circumstances will not fall within the Act, except where the duty is owed to employees or as an occupier of premises. Organisations with emergency responsibilities are listed in the Act and include the providers of the transportation of organs and blood, NHS Trusts and ambulance services.

Emergency is defined within the Act as circumstances that are present and imminent and cause or are likely to cause serious harm or worsening of harm. Harm includes serious injury, serious illness, mental illness, harm to plants or animals and harm to property. Clearly this will apply to many of the functions of NHS bodies in the provision of healthcare!

It is important to note, however, that the Act specifically states that the carrying out of medical treatment in an emergency does give rise to a relevant duty caught by the Act, but decisions as to the order in which persons are to be treated do not. This ties in with the obligations to plan for 'emergencies' under the Civil Contingencies Act 2004.

## The emphasis on senior management responsibility

In order to convict an organisation for corporate manslaughter it will no longer be necessary for an offence to be proved against an individual within that organisation (the so-called 'controlling mind'). However, the Act makes it clear that an organisation can be convicted for corporate manslaughter only if the way in which its activities are managed or organised by senior managers is a substantial element in the breach of the duty of care. Senior management means persons who play a significant role in:

- The making of decisions about how the whole or a substantial part of the organisation's activities are to be managed;
- The actual managing of the whole or a substantial part of those activities.

It will be interesting to see how the concept of senior management is applied; for example, if there was a gross failure to organise sufficient staffing levels on a ward, thereby leading to the death of a patient, could a ward manager be deemed 'senior'?

## The importance of a health and safety culture

A trial jury considering an offence of corporate manslaughter may be invited by the judge to consider the extent to which evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged a failure of the health and safety system or to have produced a tolerance of it.

## Penalties

An organisation convicted of corporate manslaughter will face an unlimited fine. No individual can be prosecuted under the Act and so the Court cannot impose a custodial sentence. However, individuals who commit a serious breach of a duty of care leading to a person's death may still face prosecution and possible imprisonment for the common law offence of gross negligence manslaughter or under existing health and safety legislation. The common law offence has been abolished in relation to companies. Public bodies are traditionally given lesser fines; Southampton University Hospitals NHS Trust was fined £40,000 in 2006, whereas in the same year, Network Rail was fined £3.5million.

Of perhaps more concern to NHS Trusts, the Act also permits the Courts to make a Publicity Order (from Autumn 2008) requiring an organisation to publicise details of its conviction and fines (worrying for NHS organisations with the advent of payment by results and practice-based commissioning), and a Remedial Order, requiring an organisation to take steps to address the failure behind the death in consultation with the appropriate regulatory authorities.

## WHAT PRACTICAL STEPS CAN NHS BODIES TAKE TO PROTECT THEMSELVES?

Evidence will be vital as the Trust's health and safety culture will be robustly and meticulously scrutinised:

- Organisational charts: how is responsibility allocated?
- Identify who might be a senior manager. Do they know they are a senior manager and that the Act might apply to them? Do they understand their responsibilities under the Act?
- Who has Board responsibility for risk? Is the delegation of tasks by the Board appropriate?
- Risk management policies: are risk assessments completed? Identify areas of risk, for example, estates. Allocate grades of risk and consider how high risk areas can be improved.
- Policies: are they workable and effective?
- Are the implementation of policies audited? Are the results of audits retained, and actioned?
- How are staff notified of changes to Trust policy and for example, NPSA Alerts or the issuing of new guidance by NICE?
- What is the system for reviewing near misses / trends in incident reports?
- How are recommendations arising from internal investigations, SUIs and external inquiries implemented throughout the Trust?
- Avoid blind eyes to breaches.
- Consider the content of Trust Board, H&S and other committee minutes. Are issues followed through?
- Communication within Trust: consider the content of emails, memos, and correspondence.
- Staff training records: there must be robust communication and training about the content of policies to staff and records kept.
- Recruitment and training: how does the Trust manage the effectiveness of members of staff, undertake appraisals, and manage problems for example, underperformance?
- How are staff supervised?

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