



Corporate Manslaughter and Corporate Homicide Act 2007

Sentencing guidelines

Overview

The Corporate Manslaughter and Corporate Homicide Act 2007 (CM Act) comes into force on 6 April 2008. It was drafted in response to the difficulty of prosecuting organisations under the 'identification principle' by basing the offence on 'senior management failure'. An organisation may still be prosecuted under health and safety legislation alternatively, or in addition to, the CM Act, but the common law offence of manslaughter by gross negligence will now be restricted to individuals.

The CM Act will apply to companies, partnerships, LLPs, trade unions, and specified crown and governmental bodies. Such organisations can be found guilty of an offence under the CM Act if the way in which any of their activities is managed or organised by their senior managers causes death due to a gross breach of a relevant duty of care. The offending party will then be subject to an unlimited fine and the possibility of a publicity and/or remedial order.

The text of the CM Act can be found at <http://www.opsi.gov.uk>.

The CM Act's convoluted development has been charted in previous briefings. **If you would like a copy of any of these please contact Alyson Tanner 0117 902 2759.**

Although the key aspects of the Act are now firmly in place, the Sentencing Advisory Panel has yet to finalise its sentencing guidelines. This briefing is in response to the "Consultation Paper on Sentencing for Corporate Manslaughter" which can be found at <http://www.sentencing-guidelines.gov.uk>. The guidelines will not apply to Scotland.

The deadline for responses to the paper is 7 February 2008.

Scope

This consultation also includes sentences for breach of health and safety laws that result in death as well as corporate manslaughter. Confirmation of this approach will almost certainly lead to a significant increase in fines companies receive for a breach of health and safety law where a death has occurred.

Areas for consultation

The level of fine or other sanction must reflect the seriousness of the offence and take into account the financial circumstances of the offender. The way in which these two

factors are taken into account forms the basis of the consultation.

Seriousness

It is proposed that the seriousness will be assessed on the culpability of the offender (e.g. how far the conduct fell below the appropriate standard, the degree of risk and whether there were repeated breaches of duty) and the extent that the harm posed by the breach was foreseeable. The seriousness may be **aggravated** by factors such as:

- as multiple deaths and serious injuries;
- a failure to act upon prior cautions or concerns; financial motives;
- financial motives;
- corporate culture producing tolerance of breach; or **mitigated** by
- co-operation with investigating authorities; and
- to a limited extent, an employee failing.

Interestingly, the consultation considers a good safety record (a mitigating factor recognised in health and safety sentencing) as not likely to be relevant to a corporate manslaughter sentence because there will be few, if any, cases where an organisation in gross breach of its duty of care could make that claim.

The Aims of Sentencing

The consultation considers that the main aims of sentencing are to administer a punishment which reflects the gravity of the most serious instances of management failure resulting in death, and to act as a deterrent against unsafe working practices. It is suggested that an unlimited fine will act as both punishment and deterrent (in line with the overall objective of sentencing), while the remedial order will be used to eliminate any financial advantage the offending organisation has gained through commission of the offence. It suggested that a publicity order should be imposed following every conviction under the CM Act, and that this should not offset the level of the fine. In contrast, the Panel suggests that the fine should be increased if publication is not ordered.

Calculation of the Fine

The Panel favours a fine expressed as a percentage of turnover. It believes that such an approach will have an equal economic impact on organisations of different sizes. In

Burges Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400

Chancery Exchange, 10 Furnival Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

www.burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

addition a minimum fine is proposed in order to reflect the serious nature of the sentence regardless of how small the offending organisation may be.

An organisation's ability to pay is obviously essential to the level of any fine, and the Panel has suggested that a 'pre-sentence report' detailing such information is desirable.

The Panel also highlights various negative factors in relation to the proposed fining mechanism, such as a high level fine preventing an organisation from investing in improved health and safety practices, the potential detrimental effect on its employees and customers, and whether treatment of an organisation should differ based on whether it is a private or public body.

For a corporate manslaughter offence the starting point for a first time offender pleading not guilty is a fine amounting to 5% of the offender's average annual turnover during the three years prior to sentencing. Taking into account any aggravating or mitigating factors the Panel expect that the fine will fall within a range of 2.5 to 10% of average annual turnover. For health and safety offences resulting in a death the starting point will be 2.5% with the fine falling within a range of 1 to 7.5% of average annual turnover.

Points for discussion

The proposal for the fine to be based on a **percentage of an organisation's turnover** appears to be overly general in nature. It may in the end mean that the fine is driven by the perception of the seriousness of the outcome rather than the degree of culpability, particularly if there is a presumption that mitigation factors will have low relevance in corporate manslaughter sentences.

Issues such as **profitability and liquidity** are only considered in the consultation paper in response to dissatisfaction with a fine, rather than as part of the overall mechanism for calculating it. This may be problematic due to the differing nature of organisations in particular industries. For example, an IT firm may have limited turnover but achieve a high level of profitability due to the technical nature of the industry, while a construction firm may have a large turnover on its goods, but actually profit very little.

The setting of a **minimum fine** may also have a disproportionate effect on small companies. In light of such discrepancies, reliance on turnover alone could run at odds with the policy of equal economic impact that the Panel desires.

The presumption in favour of a **publicity order** is also worth considering. It is not immediately apparent why this will be needed when most corporate manslaughter cases will be highly publicised in the media. The Panel however notes that the use of **remedial orders** is likely to be restricted to organisations which have not responded to other interventions.

The impact of bringing **death related health and safety offences** within these guidelines may lead to a significant increase in fines with what appears to be a further slide towards outcome based sentencing rather than a focus on culpability - it is not clear if this was the intention and whether in fact there is any justification for further increases in health and safety fines. It is also not clear what the position will be if a company has previous health and safety convictions (as many large companies will have) - presumably this will lead to an increase in the range of possible fine.

Also of interest is the continuing ambiguity surrounding **group liability** under the CM Act. The proposals make no specific mention of parent companies and it is unclear to what extent a parent company is liable following the death of person injured by the activities of one of its subsidiaries. The CM Act talks about a relevant duty of care but does not give any hints at whether that could go beyond a subsidiary.

It seems likely that whether a duty of care is owed will depend on the manner in which a particular group is organised and managed. Aspects of the Health and Safety at Work Act 1974 regime strongly encourage parent companies to adopt a leadership role and undertake responsibility for the safety procedures in their groups. Some organisations will adopt this approach while others may retain a more traditional subsidiary structure. It is a potential paradox that the conscientious organisation that strives to involve itself actively in the health and safety activities of its group is more likely to face an argument that it owes a direct duty of care and subsequently be more liable to the sanctions of the CM Act.

Conclusion

There remains a level of uncertainty surrounding the CM Act's impact and, as the scope of the offence has been significantly widened on its passage through the Lords, it is advisable to take advantage of the opportunity to comment on the proposed sentencing provisions.

January 2008

For further information, please contact:



Chris Jackson
Partner

Tel: +44(0)117 939 2238

Email: chris.jackson@burges-salmon.com



Ann Metherall
Associate

Tel: +44(0)117 902 6629

Email: ann.metherall@burges-salmon.com

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2008. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.