

Guidance Note

Corporate Manslaughter: Are you prepared to face a gaol term?

Corporate Manslaughter Legislation in the United Kingdom

Barrister Gerard Forlin, a workplace manslaughter specialist from the United Kingdom, spoke recently at an IFAP/Deacons seminar held in Perth, Western Australia.

Gerard discussed the introduction in April 2008 of revolutionary legislation in the UK that enables organisations to be prosecuted for management failures leading to death in the workplace.

The new offense of Corporate Manslaughter may be applied if the way in which any of the organisation's activities are managed by senior managers causes death and amounts to a gross breach of duty of care to the deceased. When considering whether to prosecute, management failure need not be the *sole* cause of death, it need only be a contributory cause.

The legislation does not target individuals but instead prosecutes on the basis of the liability of the organisation itself. *However, individuals still remain liable to prosecution in their own right.* Parent companies will be included in the prosecution and fines are unlimited.

Senior managers include those whose management responsibilities relate to the entirety of an organisation's activities, or to a substantial part of them. Management conduct can be considered collectively as well as individually. The implication of these new laws to senior managers is that the defendant will not just be "the organisation" but will include a line-up of managers from within the company, from safety advisors up to the CEO.

Demonstrating a Safety Culture

In defining what constitutes a gross breach, a jury must consider whether the organisation failed to comply with OSH legislation and if so, how serious that failure was and how much risk it posed. The jury may also consider health and safety guidance and the organisation's safety culture. Therefore, an organisation may have excellent policies and procedures but unless they are widely disseminated, easily accessible and part of the organisation's culture - including attitudes or accepted practices that although incorrect are tolerated (*ie* not enforcing the wearing of safety glasses, or lifting residents rather than using a hoist) - then it will be of very little use as a defence to a an alleged breach of safety. Evidence that employers have conducted training and provided education to cover their liability is not enough.

Gerard Forlin explained that human behaviour relies upon systems (safety or otherwise) that are created by management. Therefore, management has the ultimate responsibility for human behaviour. Although one may not totally agree with this, precedent on this point has been established - rightly or wrongly.

With the inevitable future introduction of corporate manslaughter laws into Australian jurisdictions, a particularly relevant situation that many Western Australian employers are facing at the moment is the presence of non-English speaking employees in the workforce. Not only

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do you have to ensure that these employees understand instructions (generally provided via written information in their own language or by an interpreter), but there should be confirmation that the interpreter understands and is imparting the correct information. For anyone dealing with this issue, the onus placed on senior management is staggering.

Implication of OSH Law Harmonisation in Australia

A key platform of the newly-elected Rudd Government is to harmonise OSH and workers' compensation legislation across Australia, and it is likely that the first stage of this process will be to gain agreement on OSH during Labor's first term in office. As NSW OSH legislation is currently the most stringent, it is anticipated that this will set the standard for national laws. The new UK laws have been somewhat based on NSW legislation, so the potential for harmonised laws here to incorporate Corporate Manslaughter provisions reflecting the UK model is high.

Maria Saraceni, a Partner in Deacons' Perth office, states that these laws will require employers to not only 'talk-the-talk', but 'walk-the-talk'. You need more than just documented evidence of your compliance; a safety culture must also be demonstrated.

Maria offers a number of questions to stimulate thinking about how to achieve this in your organisation:

1. To what extent do leaders at all levels actively model safety practices?
2. To what extent are employees held accountable? How is accountability enforced?
3. To what extent are safety risks assessed for work that is under your control?
4. To what extent do you rely on ongoing training and mentoring to provide everyone with skills to effectively lead and work safely?
5. To what extent is your organisation serious about maintaining safety standards and adhering to safety procedures?
6. To what extent does your organisation invest in time, resources, processes and tools to meet safety standards?
7. To what extent is safety a priority and not compromised?

Your ability to actively demonstrate that you go to great lengths to meet these requirements could save you from a gaol term in the future, in the unfortunate event of a workplace fatality.

Many safety practitioners will hyperventilate at the thought of having to not only develop systems, but change company culture as well. For the sake of staying out of gaol, senior managers would be well-advised to support these changes.

About Aurenda

Aurenda is a specialist, independent provider of worker injury risk management services. Our background includes a team of professionals with risk management, paramedical, workers' compensation and safety experience. Working in close partnership with some of Western Australia's foremost public and private sector organisations, Aurenda empowers clients to minimise the human and financial costs associated with workplace injury

For further information contact: Denise Sawkins, Senior Consultant, Aurenda
T 08 9336 2999 M 0422 623 607 E dsawkins@aurenda.com

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