

01/08

GUIDANCE NOTE TO
COLLEGE BOARDS OF MANAGEMENT
ON CORPORATE HOMICIDE

Introduction

The purpose of this Guidance Note is to provide guidance to Boards of Management of Colleges of Further Education, covering the offence of corporate homicide; proposed reform of the law; and implications for the college sector.

This guidance covers the following topics:-

- 1. An Introduction to the Offence of Corporate Homicide;**
- 2. Proposed Reform of the Law;**
- 3. The Corporate Manslaughter and Corporate Homicide Act 2007;**
- 4. Implications for Colleges of Further Education; and**
- 5. Status of Guidance Note.**

1. An Introduction to the Offence of Corporate Homicide

- 1.1 In Scotland, over the 9 years to March 2005, an average of 30 workers each year were killed at work. On average, a further 9 members of the public die each year as a result of work related activities. According to the Health & Safety Commission's statistics, there were 32 fatal injuries to workers in Scotland during 2005/06.
- 1.2 Organisations (including legal persons such as companies) can be convicted of a common law crime in Scotland. If the circumstances warrant it, an organisation may be prosecuted on a charge of culpable homicide. The crime of culpable homicide applies where the perpetrator might not have intended to kill the victim but nonetheless behaved so recklessly and with such complete disregard or indifference to the potential dangers and possible consequences that the law considers there is responsibility for the death.
- 1.3 There has only been one prosecution of a company in Scotland for the crime of culpable homicide. On 22 December 1999, a family of four in Larkhall were killed in their home by a gas explosion, due to the gross negligence of Transco Plc. For the first time in Scotland, the High Court of Criminal Appeal (Scotland's highest and final appeal court) held that, under the law of Scotland, a company could competently be charged with culpable homicide.¹
- 1.4 The "corporate veil", allowing corporate bodies a separate legal personality, makes it difficult to successfully convict large corporate bodies of this crime. Transco were eventually prosecuted for contraventions of the Health and Safety at Work Act 1974 and the Court imposed a fine of £15 million, the highest penalty ever imposed under these provisions.
- 1.5 To successfully convict a corporate body of culpable homicide, the prosecution must identify an individual (or group of individuals) who can be proved to be guilty of the crime and comprise the "controlling mind" of the company. The prosecution must also establish that the actions of that individual or individuals and their state of mind could be said to be that of the company. This is known as the "identification principle". Unfortunately in the Transco case, the prosecution could not identify such individuals due to the vast size of the company, which is why the culpable homicide action subsequently failed.

¹ Transco Plc -v- HMA 2004 SCCR1

- 1.6 The implication of the High Court judgment in the Transco case is that it would be extremely difficult in practice for complex organisations to be prosecuted for culpable homicide. It has been suggested that the outcome of the case against Transco on health and safety charges showed that health and safety legislation served as a strong and effective alternative to the common law crime of culpable homicide. However, it was considered by bodies such as the Scottish Executive that the eventual verdict and sentence in the Transco case did not avert the need to amend the law in this area.
- 1.7 The issue of complex organisations being prosecuted under health and safety charges occurred once again in August this year, when ICL Tech Ltd and ICL Plastic Ltd were convicted at the High Court in Glasgow of breaches of the Health and Safety at Work Act 1974 after a gas explosion at a Glasgow plastics factory killed nine of their employees². Lord Brodie fined each company £200,000.

2. Proposed Reform of the Law

- 2.1 Following similar consideration in England, a draft Bill was introduced in March 2005, applicable only to England and Wales. The main provision of the Bill was to introduce that an organisation would be guilty of corporate manslaughter if any of its senior managers caused a person's death through a gross breach of their duty of care. If found guilty, the maximum conviction is an unlimited fine for the company.
- 2.2 On 15 April 2005, Cathy Jamieson, then Minister for Justice, set up the Scottish Executive's Expert Group on corporate homicide. The Group's remit was to review the law in Scotland on corporate liability for culpable homicide and submit a report to the Minister for Justice by the summer of 2005.
- 2.3 In the subsequent Report, the Group concluded that a new statutory offence of corporate killing should be introduced for organisations guilty of recklessness which results in the death of employees or members of the public. The Expert Group considered that while there would be advantages in a uniform approach across the UK, it would be most important to get the law right in Scotland.
- 2.4 On 20 June 2006, Karen Gillon MSP, a member of the Expert Group on corporate homicide, published the "Culpable Homicide (Scotland) Bill Consultation Paper". This Bill proposed to introduce two new statutory kinds of culpable homicide into Scots law applicable to both individuals and corporations.
- 2.5 The Scottish Executive decided that corporate homicide should be dealt with by the UK Government. As such, the "Corporate Manslaughter and Corporate Homicide Bill" was introduced.

3. The Corporate Manslaughter and Corporate Homicide Act 2007

- 3.1 The Corporate Manslaughter and Corporate Homicide Bill was introduced in the House of Commons in July 2006, and received Royal Assent on 26 July 2007. The main provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") will come into force on 6 April 2008. The Act applies to the whole of the United Kingdom.
- 3.2 The Act makes provision for a new offence of corporate manslaughter in England, Wales and Northern Ireland (to be called corporate homicide in Scotland). The Act applies to companies together with other unincorporated bodies, Government departments and similar bodies, and police forces. The Act will also apply to Colleges of Further Education.

² HMA -v- ICL Plastics Ltd and ICL Tech Ltd, August 28 2007, High Court, Glasgow
<http://www.crownoffice.gov.uk/News/Releases/2007/08/28121737>

3.3 The elements of the new offence of corporate homicide are as follows:-

- The organisation must owe a duty of care to the victim;
- The organisation must be in breach of this duty of care as a result of senior management failure;
- The management failure must have caused the victim's death; and
- The breach of duty must have been a "gross" breach of duty as set out in Section 1(4)(b) of the Act.

The Offence

3.4 Under Section 1 (1) of the Act, an organisation in Scotland will be guilty of the new offence of corporate homicide if the way in which any of its activities are managed or organised:-

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

3.5 The test for a "gross" breach of duty is whether the conduct that constitutes the failure falls far below what could reasonably have been expected, although various other factors are also considered.

"Senior Management"

3.7 Under Section 1(4)(c) of the Act, "senior management", in relation to an organisation, means the persons who play significant roles in:-

the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

the actual managing or organising of the whole or a substantial part of those activities.

3.8 College Board Members play a significant role in the making of decisions about how College activities are to be managed or organised, and are therefore likely to be considered to be "senior management" for the purpose of the Act. The definition will also apply to senior managers of the College involved in the actual managing or organising of College activities.

"Relevant Duty of Care"

3.9 To be guilty of the offence of corporate homicide, an organisation must owe the "relevant duty of care" to the person whose death has been caused by the organisation.

3.10 Every College of Further Education owes a common law duty of care to its students, staff, visitors and any other persons it regularly comes into contact with to prevent reasonably foreseeable harm. However, the Act goes on to outline the duties of care owed by organisations that will be considered as relevant to the offence of corporate homicide in particular.

3.11 Under Section 2 (1) of the Act, a College's "relevant duty of care" shall mean any of the following duties owed by it under the law of negligence, including the duties owed:-

- to its employees or to other persons working for the College or performing services for it;
- as occupier of College premises;
- in connection with the supply by the College of goods and services (whether for consideration or not);
- in connection with the carrying on by the College of any construction or maintenance operations;
- in connection with the carrying on by the College of any other activity on a commercial basis; or
- in connection with the use or keeping by the College of any plant, vehicle or other thing.

continued on page 4

“Gross Breach” *continued from page 3*

- 3.12 Under Section 8 of the Act, in the event that it were established in Court that a College owed a relevant duty of care to a deceased person, and it falls to a jury to decide whether there was a “gross breach” of that duty, the jury may consider the following matters in deciding:-
- Whether the evidence shows that the College failed to comply with health and safety legislation and, if so, how serious that failure was and how much of a risk of death it posed.
 - The extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the College that were likely to have encouraged any such failure, or to have produced a tolerance of it.
 - Any health and safety guidance that relates to the alleged breach.
 - Any other matters they consider relevant.
- 3.13 Any court action raised in respect of the offence of corporate homicide can only be heard in the High Court (in respect of Scottish jurisdiction). If a College is convicted it will be liable to an unlimited fine.

4. Implications for the College Sector

- 4.1 Despite the proposed penalty for corporate homicide being the same as the penalty under existing health and safety legislation, the stigma of being convicted of corporate homicide (and any associated fine) may be far more damaging to the reputation of an organisation. This will be particularly damaging to Colleges, which rely on student enrolment for sustainability.
- 4.2 In light of the current common law, and subsequent statutory reform, Colleges should undertake extensive precautions to ensure the health, safety and welfare of everyone affected by its activities and to avoid potential prosecution.
- 4.3 Colleges would benefit from undertaking a comprehensive review of present health and safety policies, with particular reference to those areas where there may potentially be greater exposure to risk. Colleges should also consider (if they have not already done so) appointing a Health and Safety Adviser to ensure that office holders and employees of the College are complying with relevant health and safety legislation, regulations and guidance. While the College’s Board of Management and its senior management shall retain ultimate responsibility for ensuring the College’s overall compliance with health and safety requirements, the Health and Safety Adviser should be given sufficient authority from the College’s senior management to enforce any necessary health and safety procedures within the College.
- 4.4 Colleges should ensure that regular risk assessments of buildings and procedures are undertaken. This may include consulting with their insurers in order to find out exactly what will be covered when the new corporate homicide legislation is in force.
- 4.5 Individual College Board Members and senior managers cannot be convicted of an offence under the Act as individuals. However, such persons may still have individual liability in respect of the common law and other health and safety legislation.

5. Status of Guidance Note

- 5.1 This Guidance Note is intended to give general advice only. It should not be treated, or relied upon as specific legal advice. Professional advice should be sought before acting on the material contained in this Guidance Note as it may not be appropriate for your circumstances.
- 5.2 This Guidance Note relates only to the specific obligations applicable to Colleges of Further Education in relation to the offence of corporate homicide and the provisions of the Corporate Manslaughter and Corporate Homicide Act 2007, and does not cover other legal obligations which may apply to colleges under any other legislation referred to in this Guidance Note or otherwise.

Thorntons Law LLP on behalf of ASC March 2008