

# Care Brief

## Spring 2010



## In this issue

The Corporate Manslaughter and Corporate Homicide Act 2007 – The Facts	2
Safeguarding Vulnerable Groups Act 2006	3
New Care Regime	5
Is a dismissal in the care sector any different from a normal dismissal?	6
Managing Risk in Supporting People Contracts	7

## Welcome

Care providers face the prospect of a new regulatory regime. The CQC has confirmed that regulations have recently been brought into force. They will replace the current system of care registration for adult special care and independent healthcare providers on 1st October 2010. In order to obtain registration, providers must show they are meeting new essential standards of quality and safety across all of the regulated activities that they provide. For more details see page 5.

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# The Corporate Manslaughter and Corporate Homicide Act 2007 – The Facts

Recently published sentencing guidelines, have suddenly pushed this Act to the top of senior management's "in tray". The Sentencing Guidelines Council has recently published sentencing guidelines and has said that the appropriate fine on conviction under this Act will "seldom be less than £500,000 and may be measured in millions of pounds".

## Background

By way of background, Act makes it easier to hold to account an organisation where the conduct of its senior management has caused a death in the work place.

This is achieved by codifying the common law offence of corporate manslaughter into statutory form and also removing the doctrine of identification. i.e. it is now no longer necessary for individual senior management to be guilty of corporate manslaughter for an organisation to be found liable under the Act.

## Key provisions

The Act focuses responsibility on working practices rather than questions of individual gross negligence

The court will also need to be satisfied that the organisation must have been in breach of that duty of care, and furthermore that there was a gross failure of senior management of the organisation that led to the death.

The new Act applies to corporations, partnerships, trade unions, associations and also to the prison service. They all owe a duty of care to their employees and, where applicable to, occupiers of premises owned or managed by them, or when supplying services to members of the public. A registered provider and an operator of care homes would be regarded as an organisation under this Act.

In order for an organisation to be found guilty of the new offence of corporate manslaughter, the breach of the duty of care owed must have amounted to a gross breach of that duty, and have also amounted to conduct which fell far below what could reasonably have been expected of the organisation in the circumstances.

*"When considering whether there was a gross breach of the duty of care, the court will also need to consider whether the organisation failed to comply with any relevant health and safety legislation, and if so, how serious that failure was."*

but also provides for senior management culpability where an employee has been killed in the workplace.

Key provisions of the Act include:

- A relevant duty of care must be owed by the organisation to the deceased individual;
- Senior Management of the organisation and the organisation itself can be prosecuted for the offence of corporate manslaughter under the Act;
- There must be a gross breach of a duty of care owed by the organisation to the deceased individual;
- An organisation guilty of the offence of corporate manslaughter is liable on conviction to an unlimited fine and/or a Remedial Order, and also be made the subject of a Publicity Order.

For an organisation to be convicted of the new offence of, a court will need to be satisfied it owed a relevant duty of care to the deceased.

A court will need to consider the conduct of other similar organisations in order to determine whether the conduct fell far below the standard expected. Industry specific expert evidence is likely to be produced. This is to assist the court at trial in understanding the nature of this test.

When considering whether there was a gross breach of the duty of care, the court will also need to consider whether the organisation failed to comply with any relevant health and safety legislation, and if so, how serious that failure was. In addition, the court will also need to consider evidence relating to attitudes, policies, systems or accepted practices likely to encourage such a failure.

An organisation guilty of the offence of corporate manslaughter is liable to an unlimited fine and / or a remedial order.

The Council also stated that the courts should usually impose a publicity order on an organisation

convicted of corporate manslaughter. Therefore, an organisation convicted of the new offence will not only be heavily fined but also be “named and shamed” as a consequence of any conviction.

#### How to avoid or defend a prosecution under the new act

- Thorough implementation of all applicable statutory and subordinate legislation relating to Health and Safety in the work place, together with good corporate governance and the adoption of all applicable Industry standards.
- Nominate a senior manager responsible for Health and Safety compliance.
- Conduct regular reviews of the organisation's Health and Safety policies to ensure that those policies fulfil all legal and regulatory obligations.
- If you have not done already, urgently review all job titles to ensure that they accurately reflect the seniority of the employees within the organisation.
- Have in place an Accident Management Protocol

so that there is a clear procedure in the event of a work place accident or death.

- Maintain regular contact with regulatory bodies including the Health & Safety Executive in order to keep pace with regulatory developments and market trends.

#### In the event of a loss of life, what steps should be taken?

##### For example

- Take all reasonable steps to liaise and negotiate with the Health & Safety Executive and prosecuting authorities to try and reduce the likelihood of the Crown Prosecution Service deciding to prosecute under the new Act;
- Seek legal advice;
- Prepare a report into the death for the attention of the police and / or the Health & Safety Executive;
- Consult employees about their risks at work and current safety measures.

## Safeguarding Vulnerable Groups Act 2006

Anybody involved in budgeting for services involving vulnerable adults will need to decide who pays the Independent Safeguarding Authority (ISA) liability. Others involved in reviewing SP contracts will now need to consider the impact of new language about ISA registration.

By way of background, the Safeguarding Vulnerable Groups Act 2006 received Royal Assent on 8 November 2006. However, its implementation is being carried out in phases. Under one phase, which came into force in January 2009 the new Independent Safeguarding Authority (ISA) was created. This is the new body responsible for maintaining the statutory lists barring individuals from working with vulnerable adults and children.

ISA has consolidated the former statutory barring lists (POVA, POCA, and List 99). As a result, employers no longer have to check three separate lists with 3 different government agencies in order to establish whether an individual is barred from

working with vulnerable groups. Equally, care providers are now required to report individuals who have harmed vulnerable adults or minors to ISA rather than the 3 agencies.

#### Registration

However, the biggest change to the vetting and barring scheme is due to come into force in November 2010. It will become mandatory for all new recruits or those switching roles into a care role be registered with ISA before they start working with vulnerable groups. After November 2010 any new employee that is recruited and is not registered with ISA, cannot work with vulnerable groups; if they do it will be a criminal offence. With existing employees who work in the care sector there will be a transitional period and they will be required to register with ISA by 31 July 2015.

Individuals are only required to register with ISA once at a cost of approximately £65. However, registration for volunteers will be free of charge

but they will be required to pay the fee if they, subsequently, obtain paid employment working with vulnerable groups.

The business issue for employers to consider is whether they will pay the cost of registration for employees or require the employees to pay for their own registration costs. It is likely that employers will adopt a pragmatic approach and arrange registration for all existing employees with ISA and pay the relevant fee. However, any individual who is recruited after November 2010, may be expected to be already registered with ISA. Employers must also adapt how they advertise for posts and draft offer letters. All advertisements should make it clear that the work is in relation to vulnerable groups and that offers of employment make ISA registration a condition of employment.

#### **Working whilst unregistered**

If an employer allows a new recruit to work with vulnerable groups after November 2010 who is

enhanced CRB checks.

#### **Automatic barring**

The new ISA list also includes a new automatic barring process. A person who has committed sexual offences against children or any other specified sexual or violent offences will be placed on the ISA barred list automatically. ISA also allow individuals to make applications for their status on the barred list to be reviewed once a minimum period has elapsed. The reviews will only be successful if the individual is able to demonstrate that their circumstances have changed.

#### **What do to if you are employing someone who is barred**

As with the previous vetting barring system, employers may register an interest against individuals on the ISA list. If ISA receives information about an individual from another source (e.g. a previous employer) that may make him/her unsuitable for working with vulnerable groups, it will inform the current employer. In these

4

*“After November 2010 any new employee that is recruited and is not registered with ISA, cannot work with vulnerable groups; if they do it will be a criminal offence.”*

not registered with ISA it will commit a criminal offence and be liable to a fine of up to £5,000. It is likely that this provision will lead to amendments to SP contracts. Individuals who are barred or not registered with ISA to work with vulnerable groups and do so, can also be liable to a fine of up to £5,000 or up to five years in prison.

#### **Do we still need CRB checks?**

At present it is envisaged that employers will still be required to carry out enhanced Criminal Records Bureau (CRB) checks as well as an ISA check. An ISA check will not disclose any details regarding past criminal convictions. An individual may not be on the ISA list barring them from working with vulnerable groups but the CRB check may disclose past offences that may make working with vulnerable groups inappropriate. Accordingly, it is essential that employers continue to make

circumstances employers should not immediately dismiss the individual. ISA will notify individuals that they are considering a referral and they will have an opportunity to make representations on the allegations prior to ISA making a final decision. Employers should either suspend the employee on full pay or redeploy the employee into a non-care position pending the decision from ISA. If ISA make a decision to bar the individual, employers may then consider permanent redeployment into a non care role or dismissal on the grounds of illegality i.e. it cannot continue to employ the individual in a care position due to his/her status on the ISA list.

With some 8 months until the new regime employers have some time to update internal procedures.

# New Care Regime

## Background

By way of background, all existing providers of care who provide what are known as “regulated activities” will need to register by 1 October and will need to issue a new declaration stating compliance with all of the essential standards of quality and safety. These new standards are discussed below.

The registration of providers currently registered under the Care Standards Act 2000 ends on 30 September 2010 and the plan is that the new registrations should take effect under the new regime from 1 October 2010. The new regime comes into force on 1 April 2010 for NHS Trusts.

## Registration

Providers, offering regulated activities, do not have to “de-register”. That said, registrations made under the Care Standards Act 2000 are not transferable to the new system because the legal status of the new essential standards of quality and safety is different. Providers will have to apply

## Why is there a change?

There are a number of reasons for the change. These include the fact that single set of standards will make it easier for one provider to be compared to another and for providers to work together. In addition, the new regime also marks a change from regulation primarily based on systems and processes to regulation primarily based on outcomes.

## Outcomes

The essential standards of quality and safety consist of 28 regulations. For each regulation, there is an associated outcome.

The CQC has indicated that when it starts to check compliance with the essential standards, it will concentrate on the 16 regulations (out of the 28) that directly relate to the quality and safety of care. Providers must have evidence that they can meet the outcomes. For example, “safety and suitability of premises” and “staffing”.

*“The introduction of the new regime will involve a great deal of leading and planning over the next few months. It could be a busy summer!”*

5

to be registered under the new system. While the CQC says that it wants to “make it as easy as possible for providers to register”, there will be no automatic “passport” through to the new system.

Regulated activities that require registration are described in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2009. They include, for example:

- personal care
- accommodation with nursing or personal care
- accommodation for persons who require treatment for substance misuse.

The regulations will replace:

- National Minimum Standards;
- Standards for Better Health.

The other 12 regulations relate more to the day to day, management of a service (for example ‘financial position’).

Demonstrating compliance with the new standards will mean a shift in care providers reporting regimes.

The introduction of the new regime will involve a great deal of reading and planning over the next few months. It could be a busy summer!

On the subject of preparation, while there was a great deal of preparation for the regulator’s “set piece” visits in the past, this will not be the case after 1 October. The site visits will be unannounced!

# Is a dismissal in the care sector any different from a normal dismissal?

Care providers should exercise caution before dismissing an employee because of a breakdown of trust, following a recent legal case. In this briefing we consider what a care provider should do in this situation.

## Background

With any dismissal there can be only be 5 fair reasons, capability, conduct, redundancy, retirement and some other substantial reason.

A breakdown in trust and confidence is a phrase usually reserved for employees claiming constructive unfair dismissal. However, a trend has emerged with employers citing this as a reason in disciplinary proceedings for dismissing employees. Is this a valid reason for dismissal? A breakdown in trust and confidence will fall into the 'some other substantial reason' category, whether it will be a valid reason to dismiss an employee will often depend on the circumstances of the employment relationship.

Calvert with immediate effect. The EAT held that the case was unusual due to the personal nature of the relationship between Mr Hutchinson and Ms Calvert. The employment relationship could only continue if there was trust and confidence between Mr Hutchinson and his carer. Accordingly, the EAT found that the reason for dismissal was a fair one.

Although the above case was in relation to a private individual and his carer, Registered Providers are now entering the domiciliary care sector where employees are carrying out personal care for clients such as feeding and bathing or home care which includes preparation of meals and shopping. In view of this the employees relationship is akin to that of a personal carer. Registered Providers could argue that the same principals in the case of Hutchinson applies equally to Registered Providers.

*"If there is a break down in trust and confidence between a client and employee, the Registered Provider should always look to redeploy the employee to another client or scheme in the first instance before taking any disciplinary action."*

6

## Trust and confidence in the care sector

In the care sector trust and confidence is often the cornerstone to any employment relationship. In particular, Registered Providers in the care sector provide support and accommodation to vulnerable adults and some of the support services provided are often personal services. Trust in the employee often goes to the core of the relationship.

Taking the above into account it can be argued that a break down in trust and confidence is a valid reason for dismissal in the care sector due to the interaction between the clients and the employees. This approach has been confirmed by a recent Employment Appeal Tribunal in the case of Hutchinson v Calvert. In this case Ms Calvert was a personal carer for Mr Hutchinson and their relationship had become strained which resulted in Mr Hutchinson dismissing Ms

## What should an employer do?

If there is a break down in trust and confidence between a client and employee, the Registered Provider should always look to redeploy the employee to another client or scheme in the first instance before taking any disciplinary action. It would be difficult for an employer to dismiss an employee purely because a service user announced that their relationship was becoming strained with a particular carer for no apparent reason.

Redeployment, would be facilitated by ensuring that an appropriate clause is included in an employee's contract allowing the employer the flexibility to move the employee to another place of work or to vary their job title and duties.

# Managing Risk in Supporting People Contracts

## Introduction

As funding becomes tighter, the prospect of income from a supporting people contract becomes more enticing. Regrettably, these agreements are getting longer and more repetitive! That said, the main object of these agreements remains the same, to ensure that the buyer of the service, typically the authority, gets the scope and standard of service for which it is paying. Meanwhile, for the provider apart from ensuring it has the necessary expertise and resources to provide the services, it is essential to know what costs and risks it is accepting before signing up!

## Importance of service description

In any negotiation, service description (including service levels) will be a key area for debate - both internally and externally.

With greater service user "choice" in 2010, concentrating on the detail of the actual services to be provided will become more important. Often parties can be distracted by the drafting of basic

- to provide an incentive to the provider. In arm's length transactions, clear service levels coupled with financial penalties and, possibly, incentives provides a performance incentive to the care provider providing a service.

The drafting of service levels requires adherence to a number of practical rules, such as:

- As with the service description one should concentrate on specific outputs rather than tasks.
- The service levels must be capable of objective measurement.
- Keeping the system simple – over complex service levels can create monitoring problems and can involve the care provider in extra costs (see below).

For a more detailed discussion on service levels, please see our briefing "***Providing Care Services - Negotiating Service Levels and Incentives to Perform***" on our website.

*"In addition, all service providers are required to demonstrate that their procedures comply with a range of local authority policies."*

7

contractual provisions in the 'front end' of the agreement, which set out the framework of the relationship. Regrettably, the provisions set out 'up front', are of limited assistance, without an adequate service description.

The service description with accompanying service levels are often found in a schedule. It is critical that these should be checked by those familiar with the day to day operations to ensure that they are reasonable and ascertainable.

Adequate detail is essential, for example:

- so that both parties know what they have to do;
- to fix the costs for the services. A service provider cannot price the service if it does not know what it has to provide. The inclusion of additional services (or the imposition of a higher standard) after signing the contract can result in a 'cost creep';

However, it is also important for the provider's finance group to ensure that the timing of payments of fees will not lead to cash flow problems.

## Identifying costs and liabilities

Recent forms of supporting people contracts from a number of local authorities now permit local authorities to terminate all or some services on as little as 6 or even 3 months notice. Alternatively, the economic risk of a reduction of ODPM funding is now being laid off on the care provider. Thought needs to be given, for example, as to how to deal with the termination on short notice for services entailing high "tooling up" costs.

In addition, care needs to be taken to measure additional compliance costs where pricing the services. The ISA registration fees coming in later this year are just one example. With some local authorities now requiring the service provider to

monitor its own performance, and provide records to the local authority, compliance costs are another liability to be considered.

In addition, all service providers are required to demonstrate that their procedures comply with a range of local authority policies. This may also entail the care provider reviewing and, in some cases, renegotiating their sub-contracts. Accordingly, these sub-contracts also need to be considered when fixing the price.

If in doubt amend the offending clauses and see if, and how, the authority reacts.

### Liabilities

While some contracts contain limits on each parties liability, increasingly, certain liabilities (for example, in relation to employees – see below) may be uncapped. Furthermore, some authorities may try and shift the risk of liabilities, over which the provider may have no control, onto the provider. Care

### Termination

There is a reluctance to spend too much time considering termination provisions. From the service provider's position, it is sensible to ensure that there are intermediate steps to permit disputes to be resolved, without triggering termination. Where certain classes of service use are involved, such as vulnerable adults, special provisions regarding the hand over on termination may need to be added.

### Assistance from the Office of Government Commerce

For those involved in negotiating supporting people or similar contracts with local authorities, the OGC Good Practice Guidance ([www.ogc.gov.uk](http://www.ogc.gov.uk)) offers helpful guidance if negotiating with an intransigent local authority officer.

Although officials at authorities pay little attention to such guidelines, they are, nevertheless, worth reading before 'locking horns' with them. That said,

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8

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providers should avoid accepting risks over which they have no control.

It is essential to check, with the care provider's own insurers, that it can comply with the contractual obligations imposed by the local authority in relation to insurance (for example the level of cover). If it has to take out additional cover, consideration needs to be given as to whether the contract remains economic. Apart from establishing that the contract is commercially viable, the care provider's board will want to know the extent of the uninsured liability it has to bear – and how such risk can be mitigated.

Employees and pensions liabilities can, potentially, be substantial, particularly where the authority fails to provide the provider with complete details of transferring employees. Care providers may want to negotiate indemnities from the authority to cover employee liabilities or to reimburse unforeseen costs which the authority has failed to disclose.

a provider will be able to negotiate, with much more leverage if they can 'gang up' with other local providers to negotiate terms and conditions.

### Success?

For a successful relationship, consider whether there are sensible mechanisms, for example, for service improvement and flexibility. However, for many, a successful relationship is when the signed agreement remains, undisturbed, in the filing cabinet, until the contract comes up for renewal.