

**Health & Safety for Charities – what do I need to know to protect the charity and stay out of jail?**

**Legal Briefing for Charities Safety Group**

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# Speaker

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# Overview – Reducing Legal Exposure

- Comments on Health & Safety law
- Impact for senior executives and trustees – “Tone at the Top”
- New sentencing powers
- Legal preventive steps - practical tips
- Key risks for charities

# Comments on Health & safety Law

# Where do H&S liabilities come from?

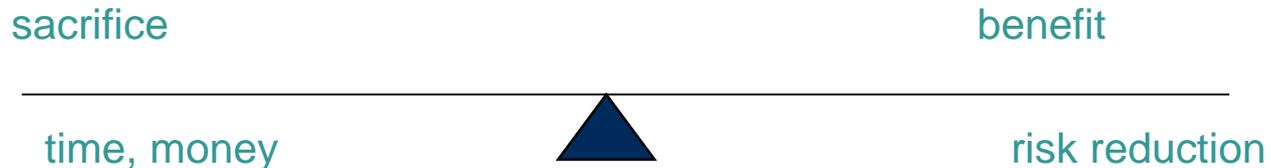
Civil Liabilities	Criminal Liabilities
Claim is brought by injured person, estate or dependents	Enforced by HSE, Local Authority, Fire Authority or Police
Monetary compensation	Fines and/or imprisonment
Need actual bodily or psychological injury	No need for actual injury
Charity/Trust liability	Charity/Trust & personal liability
Insurance	No insurance for fines
	Adverse PR

# Health & Safety at Work Act 1974

## Defence must prove conduct:

*“so far as is reasonably practicable”*

- OK to balance



- But you have the burden of proving with hindsight that you got the balance right!

# Corporate Manslaughter and Corporate Homicide Act 2007

Corporate manslaughter test:

- Death
- Caused by the way in which activities are managed or organised
- Gross breach
- **Senior management failing a substantial element**

**Usually accompanied by personal prosecution of the senior manager(s)**

# Factors To Be Taken Into Account By a Jury

## May consider:

- the extent of any **attitudes, policies, systems** or **accepted practices** likely to have encouraged such a failure or have produced tolerance of it
- any health & safety guidance relating to the alleged breach (Includes **IoD Guidance** for Directors, Governors, Trustees, Officers and equivalent)

# Impact for Senior Executives and Trustees - 'Tone at the Top'

# Impact for Senior Executives and Trustees – Tone at the Top

## Who is responsible?

- Charity/Trust?
- Subsidiary company?
- Directors/senior executives?
- Trustees/non-executive directors?
- Employees?
- Volunteers?

***Multiple defendants can each be 100% criminally liable***

# Individual Criminal Liabilities

## Gross Negligence Manslaughter (individuals)

- Breach of duty of care so grossly negligent it deserves criminal sanctions

## General Duties of employees (s7 HSWA)

- Take reasonable care for H&S of yourself and others affected by your “acts or omissions at work”

## Directors' & Officers' Duties (s37 HSWA)

# Directors' & Officers' Duties

## Section 37 HSWA

“where an offence ..... is proved to have been committed with the **consent** or **connivance** of, or ..... attributable to any **neglect** on the part of, any director, manager, secretary or **other similar officer** .... or a person .... purporting to act in that capacity, he as well as the body corporate shall be guilty of that offence”

**‘Officer’ includes trustees**

# Directors' & Officers' Duties

**Q: What do I have to do for H&S?**

A: Be as proactive as someone in your position ought to be and set the right 'tone at the top'.

**Q: What does that mean for relative responsibilities as between senior executives and trustees?**

A: Depends on the roles and responsibilities as set out in your health & safety policy, which should:

- address the issue
- get the right balance for you
- be understood and followed
- be reviewed by a specialist H&S lawyer

# New sentencing powers

# Sentencing organisations

## New sentencing guidelines

- New increased fines based on:
  - culpability factors
  - risk (more important than actual harm)
  - turnover
- For charities – *“fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of its services”*

# Sentencing organisations

## Small

Turnover or equivalent: between £2 million and £10 million

Starting point

Category range

### Very high culpability

Harm category 1	£450,000	£300,000 – £1,600,000
Harm category 2	£200,000	£100,000 – £800,000
Harm category 3	£100,000	£50,000 – £400,000
Harm category 4	£50,000	£20,000 – £190,000

### High culpability

Harm category 1	£250,000	£170,000 – £1,000,000
Harm category 2	£100,000	£50,000 – £450,000
Harm category 3	£54,000	£25,000 – £210,000
Harm category 4	£24,000	£12,000 – £100,000

### Medium culpability

Harm category 1	£160,000	£100,000 – £600,000
Harm category 2	£54,000	£25,000 – £230,000
Harm category 3	£24,000	£12,000 – £100,000
Harm category 4	£12,000	£4,000 – £50,000

### Low culpability

Harm category 1	£45,000	£25,000 – £130,000
Harm category 2	£9,000	£3,000 – £40,000
Harm category 3	£3,000	£700 – £14,000
Harm category 4	£700	£100 – £5,000

# Sentencing organisations

## Medium

Turnover or equivalent: between £10 million and £50 million

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
<b>High culpability</b>		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
<b>Medium culpability</b>		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
<b>Low culpability</b>		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

# Sentencing Individuals

## Culpability factor

### Very high

Where the offender intentionally breached, or flagrantly disregarded, the law

### High

Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

### Medium

Offence committed through act or omission which a person exercising reasonable care would not commit

### Low

Offence committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to health and safety
- failings were minor and occurred as an isolated incident

# Sentencing Individuals

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
<b>High culpability</b>		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
<b>Medium culpability</b>		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
<b>Low culpability</b>		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

# Legal preventive steps – practical tips

# Practical Legal Tips to Reduce Exposure to prosecution

## Before an incident occurs:

- Senior executive and trustee training to understand the importance of 'setting the right tone at the top'
- Health & Safety legal review of H&S policy statement and roles and responsibilities document
- Accident response protocol
- Avoid aggravating features

## After an incident:

- Obtain legal privilege over incident investigation report
- Support for EHO/HSE interviews

# Senior executive and trustee training to understand the importance of ‘setting the right tone at the top’

- Senior executive and trustee offence of **neglect** under s37 HSWA (*not as proactive as someone in their position ought to have been*)
- Corporate manslaughter offence requires **senior management** failing, particularly if poor “**attitudes, policies, systems or accepted practices**”
- Understanding relevance of **IOD Guidance** (Leading H&S at Work) - <http://www.hse.gov.uk/pubns/indg417.pdf>

# IoD Guidance (Leading H&S at Work)

- Strong and active leadership from the top
- Board members should be seen on site, following all H&S measures themselves and addressing any breaches immediately
- Appraisals of senior managers should include H&S
- Board must ensure adequate resources for H&S
- Celebrate good H&S performance

# H&S Legal Review of Documents

- **Policy Statement** – remove common hostages to fortune
- **Roles and responsibilities document** – remove common hostages to fortune and get right balance between senior executives, trustees and others
- **Accident response protocol** – procedure to obtain legal privilege over incident investigation reports and to support employee interviews

# Understand and Avoid Aggravating & Culpability Features:

- Failure to act upon previous warnings or advice from authorities
- Failure to heed relevant concerns of staff or volunteers
- Failure to respond appropriately to “near misses”
- Cost-cutting at the expense of safety
- Deliberate, repeated or long-standing breach
- Injury to vulnerable persons (e.g. children, elderly, etc)

# Incident management – legal privilege

- Special right to withhold documents/evidence
- Consult lawyers to seek privilege over the investigation/report
- **Dominant purpose** is to obtain legal advice in contemplation of legal proceedings

## Benefits if report is covered by privilege

- **Privileged** documents do not have to be disclosed to Police, EHO, HSE, Coroner or personal injury claimants
- Can choose if requested by EHO, HSE to disclose factual findings and keep conclusions privileged
- Reduces inhibition on casting the net widely to identify failings

# Support for EHO/HSE interviews

## Interviews without caution

- Compulsory (s 20)
- Voluntary
- Right to have a nominated representative present during the interview
- Training

## Interviews under caution – PACE

- Written representations instead?

# Key Risks for Charities

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- Volunteers?
- Events?
- Vulnerable persons?
- Falls/height?
- Fire?
- Stress at work?
- Driving?
- Catering and hygiene?

# Summary

# Summary of Key Points

- Criminal law – no insurance for fines/imprisonment
- Increased fines for organisations
- Lower threshold for imprisonment for individuals

## **Before an incident occurs:**

- Senior executive and trustee training to understand the importance of ‘setting the right tone at the top’
- Health & Safety legal review of H&S policy statement and roles and responsibilities document
- Accident response protocol
- Avoid aggravating features

# Summary of Key points (2)

## After an incident:

- Obtain legal privilege over incident investigation report
- Support for EHO/HSE interviews

# Questions?

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