

CHARITIES SAFETY GROUP

Key Health & Safety risks for Charities – how to protect your organisations and its individuals

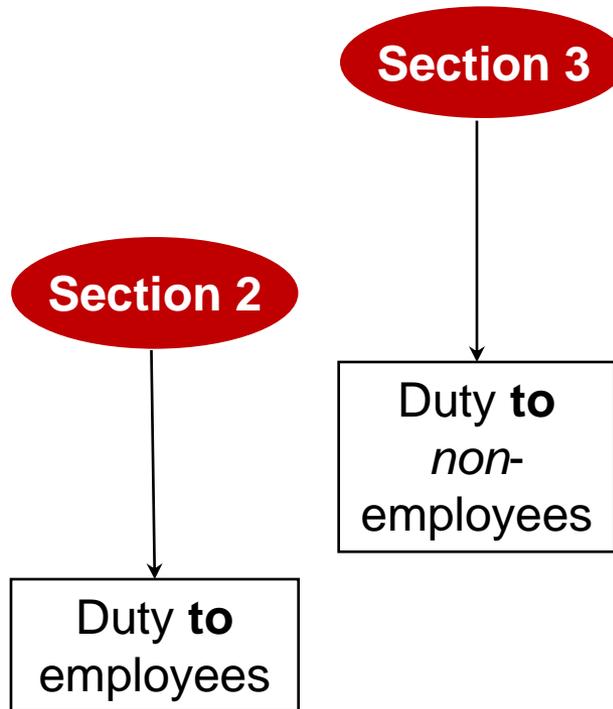
Kizzy Augustin, Russell Cooke LLP

21 January 2019

AGENDA

- Organisational vs Individual Responsibilities?
- The Health & Safety Sentencing Guidelines – impact on charitable and publicly funded organisations
- Relevant H&S Case Studies
- Corporate Manslaughter
- How does H&S fit in with serious incident reporting to the Charities Commission?
- Tips to limit liability

Corporate H&S Duties for Charitable Organisations

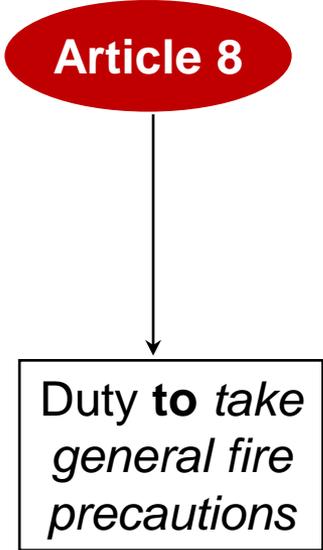


Duty to “*ensure*” the health safety and welfare of employees

Duty to “*ensure*” the health and safety of non-employees

“So far as is reasonably practicable”

Corporate Fire Safety Duties



Article 8

Duty to take general fire precautions

Duty **to** take
general fire
precautions

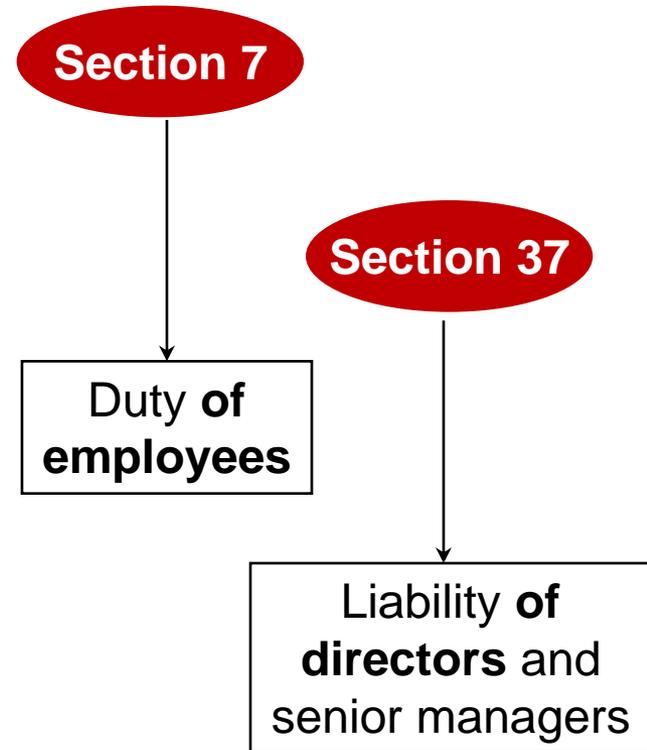
Duty to “take such general fire precautions as will ensure, **so far as is reasonably practicable**, the safety of any of his employees”

Duty to, “in relation to relevant persons who are not his employees, take such general fire precautions as may **reasonably** be required in the circumstances of the case to ensure that the premises are safe”

Individual H&S Duties

Duty to take reasonable care
of self and others affected
by work (**s.7**)

Where an offence... has been
committed with the **consent**,
connivance, or...attributable to
any **neglect** on the part of any director (*or trustee*),
manager... or a person who purports to
act in that capacity, he/she as well as the
company shall be guilty of that offence (**s.37**)



N.B. Similar fire safety duties under [Art 23](#) and [32\(8\)](#) of RRO 2005

Where are we with the Sentencing Guidelines 2016?

- Sentencing Council Definitive Guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences
- Implementation on 1 Feb 2016
- Where are we now?
- What has the impact been for charitable organisations?



Step 1 - Culpability

- **Level of culpability extremely important**

Very High

Deliberate breach or
flagrant disregard of the
law

High

Fell far short of the
appropriate standard

Medium

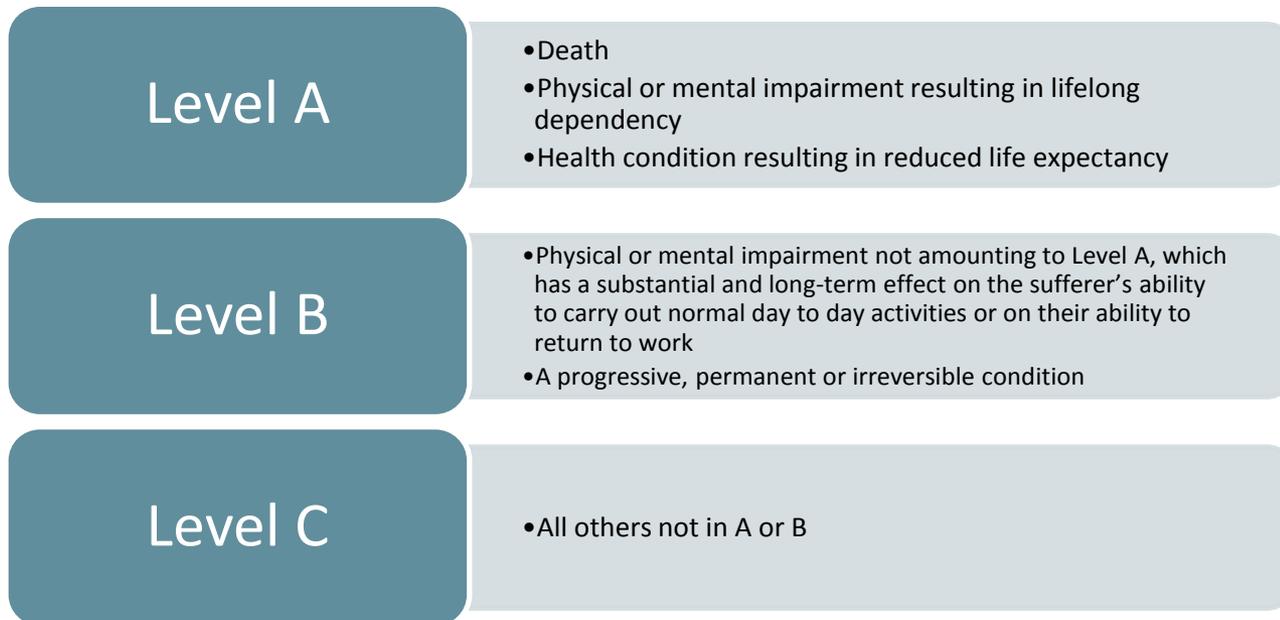
Fell short of standard in
a manner that falls
between descriptions in
high and low culpability

Low

Did not fall far short of
appropriate standard

Step 2 - Categories of harm

- Seriousness of harm risked + likelihood of harm = Harm Categories 1-4 (NB: Risk of harm – not actual harm)
- Seriousness of harm risked classified as:



Categories of harm

- Establish **Harm category** from Matrix

		Seriousness of harm risked		
		Level A <ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Health condition resulting in significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> All other cases not falling within Level A or Level B
Likelihood of harm	High	Harm category 1	Harm category 2	Harm category 3
	Medium	Harm category 2	Harm category 3	Harm category 4
	Remote	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Step 3 - Categories of organisation

- Establish **financial position of offender** based on turnover:
 - **Micro** – not more than £2m
 - **Small** – Between £2m and £10m
 - **Medium** – £10-£50m
 - **Large** – £50m and above
 - **Very large companies** – turnover “very greatly exceeds” £50m (but no guidance beyond that)

“it may be necessary to move outside the suggested range to achieve a proportionate sentence”

Sentencing Charitable Organisations

- Instead of turnover to determine size of organisation, use annual revenue budget
- Assessing level of fine:
 - *“Where the fine will fall on public or charitable bodies, the 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.”*

Starting Point / Range of Fines

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Starting Point / Range of Fines

Medium		
Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
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
High culpability		
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
Medium culpability		
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
Low culpability		
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

Top 5 Fines – so far!!

Company	Fine	Fatal/Non- fatal
Merlin Attractions	£5million	Non-fatal but significant injuries
Tesco Stores Ltd	£5million	Non-fatal and no injuries
Network Rail	£4million	Fatal
ConocoPhillips	£3 million	Non- fatal – no injuries
Cristal Pigment UK Limited	£3 million	Fatal
(*Pre Guidelines) Network Rail, Hatfield and Ladbroke Grove disasters	All c. £3 million	Multiple fatalities, “very high culpability”

Merlin Attractions (Sept 2016)

Facts

- In June 2015, passenger train on Smiler rollercoaster collided with empty train
- Operatives overrode system's safety mechanisms to allow train to proceed
- 16 passengers suffered physical and psychological injuries
- **Turnover:** £385m (2015)

Fine

- £5m



Travis Perkins Trading Company Limited (May 2016)

Facts

- A customer was loading planks of wood onto the roof of his car when he fell backwards onto the yard service
- The customer was run over by a company vehicle operating in the yard and died from crushing injuries
- **Turnover:** £2.198bn
- **Profit before tax:** £125m

Fine

- £2 million



J G Hale Construction Ltd (Aug 2016)

- HSE's unannounced inspection found that measures to prevent a fire starting and getting out of control had not been properly taken. 54 houses were under construction at broadly the same stage with little fire protection, a lack of site management control, insufficient means to detect a fire and raise the alarm, poor control of ignition sources and a general lack of emergency planning.
- Workers were also at risk of being struck or crushed by construction vehicles on site.
- Improvement Notices were served regarding fire and vehicle safety issues and these were complied with after two further inspection visits.
- **Turnover:** £15.7m
- **Profit before tax:** £1.7m
- **Fine:** £100,000



Nottinghamshire County Council (April 2017)

- Disabled member of the public struck by a vehicle used for collecting branches
- 71 year old man suffered serious bruising and injuries to arms, legs and head
- HSE found:
 - failure to implement a safe system of work for - failed to segregate vehicle movements from the public
 - Failure to train workers or supervise or plan the work
- **G plea** – revenue budget of £480m
- Fine = £1 million

Shrewsbury & Telford NHS Trust (Nov 2017)

- HSE prosecution
- Breach of health and safety duty towards 5 patients who suffered fatal injuries following falls between June 2011 and November 2012
- Judge's comments:
 - *“All organisations, public or private, are accountable under the criminal law.... public bodies are to be held equally accountable under the criminal law for acts and omissions in breach of Health and Safety legislation and punished accordingly”*
 - if they been a private company the fine would have been at least **£1 million**
 - reduced the fine by 50% (for being a public body and its financial circumstances)
- **G plea** - £333,333 fine plus prosecution costs of £130k

Southern Health NHS Foundation Trust (2018)

- Trust pleaded G to section 3 HSWA following the death of Teresa Colvin at a mental health hospital in 2012
- Failure to protect her from self-harm
- 3rd prosecution in recent months (death of patient who drowned in bath at care unit / patient fell from rooftop)
- *“Although I have accepted both that the Trust operates under financial constraints, and that it has no apparent surplus funds available, and that the imposition of any fine will reduce the sums available for clinical services pro rata, the Trust’s evidence does not demonstrate that particular services will or will not be affected by a given level of fine.”*
- No reduction given - **£2 million fine**

Individual Culpability

- Determine the offence category:
 - Culpability
 - **Very High** - Intentionally breached or flagrant disregard for the law
 - **High** – actual foresight of or wilful blindness to risk, and risk taken
 - **Medium** - an act or omission that a person exercising reasonable care would not do
 - **Low** – little fault i.e. minor error of judgment

Individuals – where is the custody threshold?

	Starting point	Category range
Very high culpability		
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
High culpability		
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
Medium culpability		
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
Low culpability		
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

- **UNLIMITED FINES** – Magistrates / Crown Court

Fine Band	Starting point <i>(applicable to all offenders)</i>	Category range <i>(applicable to all offenders)</i>
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income
Band D	250% of relevant weekly income	200–300% of relevant weekly income
Band E	400% of relevant weekly income	300–500% of relevant weekly income
Band F	600% of relevant weekly income	500–700% of relevant weekly income

David Steed (Mar 2017)

- Company director pleaded guilty to breach of section 37 HSWA 1974 and section 4 RIDDOR 2013
- Young worker received burns on arms and legs after being instructed to stand on a skip and pour a drum of flammable thinners onto burning waste.
- Resulted in a fireball which blew employee off the skip
- Director failed to ensure the waste material was burned safely, did not provide first aid to employee and failed to report incident to HSE
- **G plea** – 8 months imprisonment and disqualified from being company director for 7 years

Terrance Murray (Feb 2018)

- Manchester scaffolder photographed by a member of the public
- Working on top of a scaffold at a height of 13 - 18 metres without edge protection or a harness connected to the scaffold or building
- HSE: employers had taken reasonable steps to avoid working unsafely at height....'frolic of his own'
- **G plea** – 26 weeks' imprisonment, suspended for one year, and 100 hours of community service; plus costs of £500 and a victim surcharge of £115 (*section 7 HSWA*)

Corporate Manslaughter and Corporate Homicide Act 2007

Prosecution must prove the way in which activities were managed or organised:

- Caused a person's death;
 - Amounts to a **gross breach** of a relevant duty of care owed to the deceased; and
 - **Senior management's** role in the breach was a substantial element in the breach
- The jury may also
- *consider the extent to which the evidence shows that there were **attitudes, policies, systems or accepted practices** within the organisation that were likely to have encouraged any such failure ... or to have produced tolerance of it.*

Corporate Manslaughter

Large organisation Turnover more than £50 million		
Offence category	Starting point	Category range
A	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium organisation Turnover £10 million to £50 million		
Offence category	Starting point	Category range
A	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small organisation Turnover £2 million to £10 million		
Offence category	Starting point	Category range
A	£800,000	£540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro organisation Turnover up to £2 million		
Offence category	Starting point	Category range
A	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

Martinisation (London) Limited (July 2017)

- Both company and MD denied corporate manslaughter and H&S charges respectively in relation to the deaths of two employees:
 - Workmen moving heavy sofa onto balcony using ropes with Victorian railings for safety
 - Sofa fell after railings on the balcony gave way – employees fell to their deaths
- Company - **guilty** of Corporate Manslaughter - £2.4m fine for both deaths and £650k for H&S breach
- Martin Gutaj – **guilty** of health and safety breach - 14 month imprisonment for each death (concurrently) - and barred from being a company director for 4 years

Serious Incident Reporting

- Adverse event, whether actual or alleged, which results in or risks significant:
 - Harm to the charity's beneficiaries, staff, volunteers or others who come into contact with the charity through its work
 - Damage to the charity's property
 - Harm to the charity's work or reputation
 - Loss of money or assets

Reportable incidents: includes issues regarding protecting people and safeguarding incidents / risk of harm to trustees, staff and volunteers / breaches of policies or procedures / criminal activity

Likely impact of changes in H&S?

- Significant increase in fines / Very large companies fall outside the ranges in the Guidelines and “*all bets are off*” / ‘focus on ‘sector’ or ‘industry’
- More **individuals** are likely to receive **custodial sentences**
- More focus on fire safety in light of Grenfell and other similar incidents
- Not enough to say “we are funded by the public” but.....charitable / public organisation fine reduction

Likely impact of changes in H&S cont...

- Focus on key sectors – not many prosecutions against charities but see trends:
 - NHS trusts
 - Independent schools
 - See Royal Opera House “noise” claim
- Not just the charitable organisation as dutyholder – could include service providers such as FM / Property Managers / Procurement Officers etc

Top tips to limit liability

- **What's important?** *Preventative, proactive action.....*
 - Culture & Leadership from the top – “*Leading H&S at work*” (INDG 417)
 - Incident Response Protocol – post incident “legal” protective measures
 - Understanding powers of the Enforcing Authorities
 - RIDDOR reporting – evidence?
 - Review of policies and practices / key roles
 - Investigating incidents / accidents – how?
 - Insurance – what is covered?
 - Safety management systems in place, robust and properly invested in
 - Role played by senior management and directors (**pre and post-incident**)

Questions?



Kizzy Augustin, Partner

T: +44 (0) 20 3826 7302

kizzy.augustin@russell-cooke.co.uk