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IRM Risk Forum 2008
raising the game

Corporate Manslaughter Act - Implications for transport, logistics and supply chains

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Overview

- Learn how your organisation is particularly at risk from the new Act, in respect of the use of transport, logistics and supply chains to undertake organisational activities
- All organisations use these activities and this area of 'external' risk management is often ignored in the bigger picture of 'internal' risk exposures

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Context-1

- Transport and logistics is growing
- Outsourcing is become more common
- Move away from regulated vehicles is growing
- Pressure on performance is increasing
- Congestion is worsening
- Organisations are either:
 - Fleet and related operations users
 - Fleet and related operations providers
- Managing risks requires firm control of:
 - Internal operations
 - External operations
- New Act has potential implications for both

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Context-2

- Regulated vehicles/drivers historically monitored
- Work related driving risks 'in scope' since late 2003
- Limited awareness of 'duty of care'
- Limited application of risk management to 'fleets and related operations'
- Piecemeal 'silo' approach, with limited integration
- 'Fleets' considered an operational level activity and well under control
- Directors / senior management not aware of:
 - Current / Exposures
 - Extent of responsibilities
- New Act and Police activities changes the 'rules'

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New Act – overview

- Long time coming - 6th April 2008 (1996)
- New offence – gross failure results in death
- Focus on management systems & practices
- No 'new' regulatory standards
- 'Disregard for the safety of others'
- Gross breach of 'duty of care'
- Fatal activity managed or organised
- Substantial part = senior level
- Removes 'directing mind' & identification principle



New Act – understanding-1

- **The new offence**
 - Guilty if activities managed or organised causes a death & amounts to a gross breach of a duty of care to deceased
- **New test**
 - Juries consider how the fatal activity was managed or organised in the organisation, including systems & processes for managing safety AND actually operating in practice
 - Substantial part of failure at senior level – people who make significant decisions about the whole/part of organisation, whether HQ & operational level



New Act – understanding-2

- **Gross breach**
 - Conduct falls below reasonably expected
 - Juries take account of H&S breaches – serious & dangerous?
- **Duty of care**
 - Employees - systems of work, equipment, worksites
 - Other e.g. customers – premises, products, services
 - No new duties – civil law of negligence
- **Penalties**
 - Unlimited fine (£ millions)
 - Remedial order (Rare)
 - Publicity order (later)



New Act – understanding-3

- **Covered**
 - All companies & corporate bodies operating in UK (UK + foreign)
 - Private, public, partnerships, TU's/Employers bodies, government departments & Police, charities (no Crown Immunity)
 - Subsidiaries - 'stand alone'
 - Main contractor & sub-contractors – duty of care owed?
 - On 'British territory'
- **Exemptions**
 - Public & government re 'public policy'
 - Policing, emergency services, child protection – except employee responsibilities or premises
 - Currently, management of custody
- **DPP consent**
 - DPP consent before case is taken (includes 'private')



New Act – understanding-4

- **How to comply**
 - 'Continue' re H&S legislation compliance
 - Ensure H&S systems & processes are adequate, responsibilities structured, systems are implemented and maintained
- **Individual offence**
 - No – wide organisational & management failures
 - Yes – gross negligence manslaughter/culpable homicide and H&S offences
- **Delegation**
 - No - inappropriate delegation is covered
 - Take account of relevant advice



New Act – understanding-5

- **Action**
 - Employers have a legal duty to report certain incidents & work-related deaths
 - Police lead investigation if a criminal offence suspected
 - Partnership with HSE, local authority or other regulator
 - Prosecuted by CPS etc
 - Charges for H&S breach, plus individual case can be brought as well
 - No offence of 'assisting or encouraging'
 - Government – cases will be rare re 'worst instances' (not widely accepted – re current level of deaths)



Relevant Duty of Care

- **Employer and occupier duties**
- **Duties connected to:**
 - Supplying goods and services
 - Commercial activities
 - Construction and maintenance work
 - Using or keeping plant, vehicle or other things
- **Duties relating to holding a person in custody**
- **Duty of care re law of negligence**
- **Duty under H&S law is separate, as is statutory duties and common law duties**
- **Who will decide - Judge**



Exemptions

- **Comprehensive**
 - Public police decisions – strategic funding, but not management
 - Military combat operations, plus related support & preparation and hazardous training
 - Police operations dealing with terrorism etc, plus support, training
- **Partial – responsibility as employer only**
 - Policing & law enforcement
 - Emergency response
 - Statutory inspections
 - Exclusively public functions
 - Private companies = 'public work'

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Conviction

- Only very serious cases
- Managed or organised
- Substantial failure at senior management level
- How serious is breach and 'gross negligence'
- Failure to manage/organise = victim's death
- No need to establish failure re individual or manager
- Factors
 - Systems of work, level of training, adequacy of equipment, supervision / middle management
 - Strategic approach to H&S, including risk assessment, monitoring and auditing
 - Dual 'review' – formal systems + actual practice / attitude
 - Relevant guidance e.g. legislation + ACoP's

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Senior management

- People
 - Make significant decisions about organisation or substantial parts
 - Headquarters functions e.g. central finance or strategic roles or central responsibility (Risk or H&S)
 - Senior operational management roles
 - Nature & scale of organisation
 - Directors, similar senior management positions
 - Regional managers in national organisations
 - Managers of different operational divisions
- No specific failure, but no appropriate care = substantial part of failure
- No inappropriate delegation

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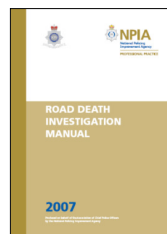
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Road Death Investigation Manual

Dealing with road death is core police work, and it is the view of ACPO that national criteria should exist to enable the whole police service to work to a consistent standard of professional investigation. 2004

The **ACPO (2007) Road Death Investigation Manual (RDIM)** is to be used to assist forces to develop policies and business processes to ensure that deaths on the road are investigated professionally



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Road Death Investigations Manual

'there are very few 'accidents' on our roads and that most are caused by human error' 2004.

Investigate all incidents as 'UNLAWFUL KILLINGS' until the contrary is proved. 2007

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Road Death Investigation Manual
p.120

HSE involvement

- failures in safety management by the employer have, significantly contributed to the incident and/or
- there is a serious continuing risk

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Implications for transport-1

- **Extent of 'duty of care'**
 - Employees
 - Sub-contractors
 - 'Customers'
- **Extent of 'direct & indirect' operations**
- **Review**
 - Organisational factors – business 'drivers'
 - System & processes – match business needs
 - Identify actual practices – expose reality
 - Actual direct & indirect costs
 - Identify and assess risks, including reputation risks
 - Changes required + integration
 - New structure + delegation + training

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Implications for transport-2

- **Examples - 'Own' fleet + direct operations**
 - Recruitment & selection
 - Competency & training
 - Systems, processes, SSW's
 - Vehicles & equipment specifications
 - Repair, maintenance & inspection
 - 'Hazard control' & monitoring
 - Work/travel patterns, 'working time', incentives (sleep)
 - External support & compliance (mobile 'phones)
 - Accident 'management' (causation)
 - 'Dual' message to employees, drivers?

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Implications for transport-3

- **Examples – 'Other's' fleet & sub-contracted**
 - Manage as if your own
 - Due diligence, pre-assessments/selection
 - Accident/incident management, ongoing monitoring
 - Agency SLA's
 - Pre-competency assessments, insurance cover/licences,
 - Incentives & performance
 - General SLA's – type of vehicles/equipment, work/travel patterns, customer inter-face

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Implications for transport-4

- **General**
 - Records & monitoring
 - Adapt practices and maintain them
 - Readily available records
 - Police investigation
 - PACE interview
 - Remove potential 'evidence'



Implications – Directors / Senior Managers

- Most businesses do not consciously 'ignore' H&S at the expense of 'profit'
- Heavy 'business' focus often leads to de-focus on risk, H&S and other internal controls
- 'Directors' need to understand what 'button' will be pushed when people have a choice
- Doing the minimum & focusing on legal compliance may not be sufficient
- Changes may be required to your:
 - Business and operational processes
 - Risk management strategy
 - People management arrangements
 - Health & Safety and fleet risk management systems
 - Corporate governance



Key Questions?

1. Do you and your senior managers know, or ought to know if the organisation is failing?
2. Are you aware, or ought to be aware, of the risk of death or serious harm?
3. Do you seek to cause the organisation to 'profit' from the failure?
4. Do you know what you can do to reduce the possibility of 'management failures'?
5. Do you know how health & safety can be a strategic, organisational, business and commercially relevant process?
6. Do you know how to integrate fleet and health & safety risk management into your organisation to add value and gain 'competitive' advantage?



Balanced approach

Risk averse
Doing the minimum

Not integrated into business

Eliminating 'all' risks

Regulatory compliance focus



Risk management
Balancing upside & downside risks

Maximising opportunities

Minimising risks

Make sensible decisions using facts



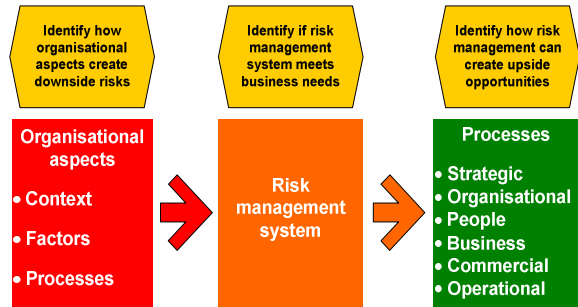
What do directors need to know?

- Need to understand what is actually going on in their business – not what they think is going on
- Need to understand how their organisation is creating risks
- Need to understand their most significant potential 'management failures'
- Need to understand at a strategic, management & operational level what they can do to manage their significant risks and potential 'failures'
- Need to understand the 'journey', time scales, resources and commitment levels

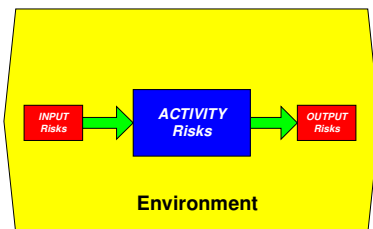


RiskFrisk[®] Model

Corporate risk assessment



Holistic approach



Consider total 'business process' using a holistic, not a 'silo', legal compliance approach



Future – enhanced business information

- Show you understand your risks and are 'in control'
- Strategic enterprise-wide risk profiling & assessment
 - Vehicles, Drivers
 - Load, Site
 - Journey, delivery
 - Environment
 - Management support, organisational aspects
- Link to performance management & risk management systems
- Use outputs to generate focused action plan linked to risk appetite
- Access internal & external benchmarking

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Any questions?

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