

Stakeholder Engagement 23

Crown Prosecution Service

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Background

The Crown Prosecution Service (CPS) was set up in 1986 to prosecute criminal cases investigated by the police in England and Wales. The Director of Public Prosecutions (DPP) is the head of the CPS and operates independently, under the superintendence of the Attorney General. On the 6 April 2008, the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) came into force throughout the UK and the provisions in the Act which relate to deaths which occur in custody were brought into force on 1 September 2011.

John Edwards (JE) is a Senior Legal and Policy Advisor working at the Crown Prosecution Service and agreed to speak to the Panel to present and discuss the policy guidance relating to corporate manslaughter.

CORPORATE MANSLAUGHTER

The panel wanted to explore the position regarding a possible investigation of corporate manslaughter into the bodies (or corporations) with which the Review is concerned.

JE explained the processes and considerations that the CPS would have to take into account to allow for a charge and prosecution for corporate manslaughter following a self-inflicted death in a prison. JE explained that in addition to there being no case law under the CMCHA covering this specific issue, his explanation had to be considered in the context of any possible future prosecutions and that therefore his responses to any questions on this issue are hypothetical. The CPS approach to any death in custody is informed by the Butler Report, 1999, and the Report of the Attorney General, Lord Goldsmith, in 2003. The CPS does not investigate any criminal offences, including those involving deaths. The CPS provides advice to the police and other investigators, reviews cases, makes charging decisions, and conducts prosecutions. The CPS will advise the police on lines of investigation and will sometimes work jointly with the Health and Safety Executive (H&SE), although it is independent.

All cases of a death in custody which are referred to the CPS are dealt with by accredited prosecutors in the Special Crime Unit. Cases are reviewed by the accredited lawyer, the Unit Head and the Head or Deputy Head of Division,

before being referred to the Director for Public Prosecution (DPP) for final approval.

To make a charging decision, the CPS will apply the Code for Crown Prosecutors:

- Stage 1 – the Evidential and Stage – and Stage 2 – the Public Interest stage – both have to be satisfied before a prosecution can be brought. At the Evidential Stage, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, which means a jury is more likely than not to convict the defendant of the charge alleged.

At the Public Interest Stage, prosecutors should consider the questions set out in the Code to determine the relevant public interest factors. These questions relate to:

- Seriousness
- Culpability
- Harm caused to the victim
- Whether the suspect was under 18 at the time of the offence
- The impact on the community
- Whether a prosecution is a proportionate response
- Whether sources require protecting.

If the CPS were to consider a charge of corporate manslaughter, following any self-inflicted death in NOMS custody (the statutory offence is only applicable after 1/9/2011), the five elements of the offence would need to be considered:

- **Is there a qualifying organisation?** A defendant must be a qualifying organisation under the Act. These are listed in Schedule 1 of the Act. Neither the prison service nor NOMS are listed organisations in schedule 1. The MoJ is a Government Department listed in Schedule 1, so may be the defendant if the prison is public prison. If the prison is a private prison, it may be a corporation under s1(2) of the Act.
- **Is there a relevant duty of care owed to the deceased by the Organisation?** This is a point of law decided by the Judge and so may be considered as a preliminary point to be decided. There is no case law on this in relation to the offence under the CMCHA but query whether the case law on the common law offence of Gross Negligence Manslaughter may apply here?
- **Was there a Gross Breach of the duty?** This would be a question of **fact** for the jury to decide. The jury would consider if the conduct amounting to the breach falls **far** below what can be reasonably expected of the organisation in the circumstances. To do so, they must consider any failure to comply with H&S Legislation that relates to the alleged breach (for example, the H&S at Work Act); and how serious the failure to comply was; and how much of a risk of death it posed.

The jury **may** also consider the systems, attitudes, policies and practice that were likely to have encouraged such a failure or produced a tolerance of it and any H&S guidance that related to the breach (the main guidance is the HSE Approved Codes of Practice. Any regulator guidance could also be considered (possibly HMCIP). Under s8(4) of the Act the jury may have regard to any other matters they consider relevant. Any reports that point to a systemic failure or recommend improvements in H&S matters in a prison could arguably be relevant under s8(4), if relevant to an issue in the case. For instance, this could include a previous report by a Coroner or prison probation ombudsman.

- **Was the way in which the organisation’s activities were managed by its senior management a substantial element of the breach?**
Section 1(4) of the Act defines senior managers as people who play a significant role in the management of the whole, or a substantial part of, the organisation’s activities. If the relevant organisation were the MoJ, the breach must be within the MoJ. Query whether, if the breach is within a prison or NOMS, someone within a prison or NOMS can be said to be part of “senior MoJ management”?
- **Did the way in which the organisation’s activities were managed cause the person’s death?**
The Act does not define causation. We look to the common law for a definition of causation. The breach must be a more than **minimal** contribution to death. For example, where the breach is a failure to notify someone of a risk, it must be proved that the death would not have occurred if the notification had been made.

There must be sufficient evidence in relation to each of the above five elements of the offence for a prosecution to go ahead.

The CPS will also consider other appropriate charges, such as manslaughter by gross negligence and HSWA offences. Although there is no Crown immunity for the CMCHA offences, the Crown cannot be prosecuted for HSWA offences. Rather, crown bodies may be censured for such offences.

Where the CPS made a decision not to charge but there is subsequently a narrative verdict at the inquest or a verdict of unlawful killing, the CPS will review the evidence and consider whether there is anything that would change its decision. To inform the CPS decision, the police/IPCC will be asked for a report highlighting the areas where the evidence previously reviewed by the CPS in reaching its earlier decision has changed.