

# **Reflection On Reforms: Developing Criminal Accountability For Industrial Deaths**

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[Referring to the proposed corporate manslaughter legislation in Victoria, Australia] That is not industrial relations; that is thuggery. It is not the criminal law; it is breach of every principle of the criminal law... I can just imagine the Japanese investor and his advisers<sup>1</sup>

## Section One

### Providing Context

The criminal law has numerous aims, often cited in introductory textbooks to include promoting 'justice,' providing norms to reduce unacceptable social behaviour, achieving deterrence or preventing crime, promoting rehabilitation for the law breaker, providing retribution against the law breaker, expressing moral concern at social harms (denunciation) and enabling appropriate levels of accountability (see for instance Ashworth, 1999: 16 and Haines and Hall, 2004). The criminal justice system is seen as a system providing meaning, achieving goals, and having a purpose rooted within the very foundations of all social and legal systems and ways of life.

This paper deals with the application of the criminal law to death as a result of industrial activity ('industrial deaths' are taken here to refer to traumatic and sudden workplace deaths and deaths in public disasters). It discusses organisational accountability for industrial deaths through examining reform processes in three countries: Australia, Canada and England and Wales.

It seems to us that 'traditional' criminal laws have always seemed to sit awkwardly with debates about the enforcement of occupational health and safety (OHS) statutes (Carson, 1970; Carson and Johnstone, 1990; Wells, 2001). What we shall call 'traditional' criminal law (including, for instance murder, manslaughter, assault, or theft) has a meaning and invokes a response that seems to be at odds with society's view of 'regulatory' criminal law (including, for instance, OHS, environmental pollution, or financial services regulation). This kind of regulatory criminal law is seen by some as quasi-criminal, falling within a nebulous 'public welfare' category (Carson, 1979/1980; Wells, 2001: 8), and for this reason seen as second in

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<sup>1</sup> *Vic Hansard* 14<sup>th</sup> May 2002, 1407, Dr Dean (Berwick)

force and power and distinct in meaning from traditional criminal law. There are some obvious reasons for this distinction between ‘traditional’ and ‘regulatory’ criminal law in the sphere of OHS, although as shall be argued throughout this paper, these are perhaps largely perceptual.

The Australian OHS statutes (in common with those of Canada, the United Kingdom and most of Europe) are built around ‘general duties’ and process, performance standards, and documentary requirements.<sup>2</sup> The general duties are imposed upon employers in relation to ‘employees’ and ‘others’; self-employed persons; persons in control of workplaces; designers, suppliers, importers, etc of plant and substances; and employees. They impose absolute (or strict) obligations in relation to OHS, qualified only by (‘reasonable’) practicability (see Johnstone 2004a: chapter four). In *Slivak v Lurgi (Australia) Pty Ltd*<sup>3</sup> Gaudron J (at pp 322-323) observed, in relation to the words ‘reasonably practicable’ that:

‘three general propositions are to be discerned from the decided cases:

- the phrase “reasonably practicable” means something narrower than “physically possible” or “feasible”;
- what is “reasonably practicable” is to be judged on the basis of what was known at the relevant time;
- to determine what is “reasonably practicable” it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.’

The courts have interpreted the ‘general duties’ broadly, and have specified that they require a ‘pro-active, not reactive, approach’, and that duty holders ‘should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare and which may exist or occur from time to time in the workplace.’<sup>4</sup>

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<sup>2</sup> See for instance Johnstone (2004a: chapters four to six); the *Health and Safety at Work Act 1974* (UK); and the *Canadian Labour Code Part II* (note however that health and safety falls under the Canadian provincial jurisdictions)

<sup>3</sup> (2001) 205 CLR 304

<sup>4</sup> *WorkCover Authority of NSW (Insp Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80 at 85

The general duties are underpinned by regulations and codes of practice (called ‘advisory standards’ in Queensland), which include process and performance standards, and documentation requirements. Instead of telling duty holders exactly how they are to achieve compliance, *performance standards* define the duty holder’s duty in terms of goals they must achieve, or problems they must solve, and leaves it to the initiative of the duty holder to work out the best and most efficient method for achieving the specified standard. *Process requirements* prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally. They are often used when the regulator has difficulty specifying a goal or outcome, but has confidence that the risk of illness or injury will be significantly reduced if the specified process is followed. Most regulations now require the duty holder to identify hazards and assess and control identified risks, and to do so in consultation with workers. Process-based standards have spawned greater reliance on *documentation requirements*. Increasingly OHS statutes are requiring duty holders to document measures they have taken to comply with process-based standards, performance standards and general duty standards.

The duties in OHS statutes are examples of what we might call ‘constitutive regulation’ (Hutter, 2001: chapter one), a form of regulatory law which attempts to use legal norms to constitute structures, procedures and routines which are required to be adopted and internalised by regulated organisations, so that these structures, procedures and routines become part of the normal operating activities of the organisation.

If breached, the OHS duties outlined above can be enforced ultimately by criminal prosecution. The OHS offences described above, however, differ from ‘typical’ crimes in that they are ‘inchoate’ offences, because they require no specific harm to be proven, but rather contemplate the possibility or risk of harm (Appleby, 2003<sup>5</sup>). An OHS prosecution, for example, need not be a response to an injury or fatality, but might be for a failure to provide a safe system of work, to conduct adequate hazard identification, risk assessment and control, or to guard a machine – even if no actual injury or fatality has resulted. This contrasts with traditional or typical criminal law that is more often concerned with outcomes

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<sup>5</sup> See also *R v Australian Char Pty Ltd* (1996) 64 IR 387 at 400 and *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149 at 158

(for instance, actual bodily harm or death) than with modes of behaviour. The courts have made it clear that the primary purpose of the prosecution of OHS offences is deterrence – both general and specific – and, in some instances, corporate rehabilitation<sup>6</sup>.

In contrast to the absolute or strict liability provisions in OHS statutes (discussed above), traditional criminal offences generally require *mens rea* or a ‘guilty mind’ in order to establish a criminal conviction. In order to be convicted of manslaughter for instance, it must be proven ‘beyond reasonable doubt’ not only that an individual both did a voluntary act or omitted to do something that caused the death of another, but also that they did so whilst possessing a guilty mind (Ashworth, 1999: 299-309). The guilty mind provides the measure of fault or moral culpability society has deemed proper for conviction of most traditional criminal offences.

Different kinds of traditional criminal offences require different levels of fault or *mens rea* before a conviction can result. These levels of fault can be graded from most serious to less serious; the most culpable is an intention to do an act that is deemed criminal, followed by recklessness in doing such an act, and finally negligence in doing that act (Smith, 1999: 52-96). The common law principles governing the level of culpability required for what is known as ‘involuntary manslaughter by gross negligence’ following an industrial death were explained by Hampel J in *R v AC Hatrick Chemicals Pty Ltd*, at pp 8-9:<sup>7</sup>

“The essence of manslaughter by criminal negligence is “a great falling short of the standard of care” which a reasonable person would have exercised, involving “such high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”<sup>8</sup>

As we discuss below, the application of *mens rea* to industrial actors for ‘traditional’ criminal offences is however somewhat problematic.

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<sup>6</sup> See for example *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Limited and another* (1999) 95 IR 383 per Walton J at p 427; *DPP v Ancon Travel Towers Pty Ltd*, unreported, County Court of Victoria (Judge Mullaly), 16 December, 1998; and *R v AC Hatrick Chemicals Pty Ltd*, unreported, Supreme Court of Victoria, Criminal Division (Hampel J), 8 December, 1995 at pp 5 and 6

<sup>7</sup> Unreported, Supreme Court of Victoria, 29 November 1995

<sup>8</sup> See also *Nydam v R* [1977] VR 430 at 445. The law of gross negligent manslaughter has been clarified in the United Kingdom by the case of *R v Adomako* [1995] 1 AC 171. This decision followed the decision of the Court of Appeal in *R v Prentice and others* [1994] 98 Cr App R 262

Involuntary manslaughter by gross negligence, therefore, is a crime quite different in nature from the OHS offences outlined above. Manslaughter is a response to a fatality – it is not an inchoate offence. The motivation for a manslaughter prosecution might be deterrence, but there are strong arguments that, unlike OHS prosecutions, manslaughter prosecutions might appropriately be motivated by retribution and/or denunciation (see Haines and Hall, 2004).

What is important here is that *mens rea* and high levels of moral culpability are not deemed necessary for offences under the OHS statutes, for which industrial actors are most often prosecuted following industrial deaths. These offences are absolute or strict liability offences requiring only a criminal act in failing to safeguard the health and safety of an employee or member of the public and not an intention or other culpable mental state of mind to kill or harm such a person.

### ***Effective Regulation - Deterrence vs. Compliance And Punish vs. Persuade***

The OHS regulatory literature suggests that the criminal law (which is both ‘traditional’ and ‘regulatory’ in nature) should be part of an OHS regulatory enforcement regime (see for instance Ayres and Braithwaite, 1992; Gunningham and Johnstone, 1999; Haines, 1997; Hopkins, 1995; Kagan and Scholz, 1984; Pearce and Tombs, 1990; Tombs and Whyte, 2003; and Johnstone, 2004b). Recent governmental policy initiatives also discuss increased use of criminal punishment in regulatory enforcement.<sup>9</sup> How threat of prosecution should fit into general regulatory regimes and to what extent criminal law should be utilised in regulatory strategies is highly contentious however, as the longstanding ‘punish-persuade’ debate illustrates.

On the one hand some argue that the primary focus of OHS enforcement should be on an ‘advise and persuade’ approach, focusing on *persuading* those regulated to comply with

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<sup>9</sup> In particular in the regulation of health and safety at work, see recent policy publications contemplating the increased use of punishment in regulatory policy in the United Kingdom and Australia, such as Department for the Environment, Transport and the Regions (DETR)(2000); Home Office (2000); Health and Safety Commission (HSC)(2002); National Occupational Health and Safety Commission (NOHSC)(2002); Victorian Workcover Authority (VWA)(2000); and VWA (2002)

regulations using methods like education and advice, autonomy of self-regulation, and ‘diplomatic’ regulatory inspectors.<sup>10</sup> When the regulated party defaults on obligations, the regulatory authorities should work with guilty parties to avoid recurrence but also to steer clear of too much blaming and shaming, so to keep avenues of co-operation open and effective. Proponents argue that this approach will best achieve desired effects of OHS regulation; that is prevention, through increasing OHS standards that should lead to a reduction in injuries and deaths to workers and members of the public. They also argue that such methods are not as resource intensive. The British Government has also argued that improvements in safety in turn will benefit the organisation economically (see for instance DETR, 1999).

On the other hand, some argue the most successful means of regulation is to *punish* those regulated when they do not comply (Pearce and Tombs, 1990; Slapper and Tombs, 1999). Punishment should utilise criminal law (both traditional criminal law and OHS prosecutions) through a variety of more contemporary criminal sanctions all tailored to modern organisational actors (Cahill and Cahill, 1999; Gobert, 1998). By using punishment, messages are sent to others regulated that contraventions must be prevented or strong punishment will result. This has both moral and various deterrent effects. This approach suggests that only by threatening those regulated with criminal punishment can regulatory goals be achieved.

More recently models have been developed to accommodate both ‘persuade’ and ‘punish’ strategies. The most well known of these is an escalating enforcement response using a regulatory enforcement pyramid (Ayres and Braithwaite, 1992; Gunningham and Johnstone, 1999; Haines, 1997; and Hopkins, 1995), where regulators start with a persuasion approach towards those regulated and escalate to punishment if they cannot be persuaded to comply. The type of organisational citizen the regulatory system is dealing with should have a large effect on responses to regulatory violations (Haines, 1997; and Gunningham and Johnstone, 1999: chapter four). A gradual or incremental approach to enforcement can balance the need to be tough with the need to presume those regulated are ethical. This means establishing cooperation amongst those whose cooperation is needed and whose behaviour allows such

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<sup>10</sup> The discussion of such approaches is common in any introductory regulatory literature, but in particular see Bardach and Kagan (1982) and Braithwaite (1985). See also Gunningham and Johnstone (1999: chapter four).

an approach, whilst making all aware, cooperation is only one of a variety of methods that regulators can utilise. In the background, overshadowing all regulatory work is the severity of criminal law, targeting both individuals and corporations. One of the main criminal offences to be discussed in this paper, industrial manslaughter, would exist at the top of OHS enforcement pyramids (see, for example, Gunningham and Johnstone, 1999: chapters four, six and seven).

### *Contemporary Issues Surrounding Accountability For Industrial Deaths*

The OHS regulatory debate canvassed in the previous section of this paper is not immune from perceptual and political changes within society and from unexpected and profound events and occurrences. The choice of regulatory strategy (whether to punish or persuade) is not insulated from public reaction to unexpected and profound events and occurrences (Hawkins, 2003). Since the 1980s in Australia, Canada and the United Kingdom there have been a series of tragic and in particular well-publicised disasters resulting in the deaths of members of the public and workers.<sup>11</sup> There have also been high profile workplace deaths, in particular of young workers killed on their first days at work.<sup>12</sup> Some of these fatalities have been subject to wide ranging investigations and inquiries, and coroners, judges and politicians have lamented at the unnecessary and wasteful destruction of innocent human life. Coroners and judges have also eluded to what they view as the avoidable consequences of industrial activity; deaths and injuries that have resulted from management failures, systems breakdowns, and the neglect by organisations, their senior officers and workers to take health and safety as seriously as they should.<sup>13</sup>

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<sup>11</sup> Amongst the most often cited are the Zeebrugge ferry disaster (Wells, 2001: 107); the Piper Alpha Explosion (Lord Cullen, 1990); the Westray mining disaster (Justice Richard, 1997); and the Southall Rail Crash (Wells, 2001: 112)

<sup>12</sup> In particular see the Simon Jones case in the United Kingdom (Brookes, 2002) and also see <http://www.simonjones.org>; the Anthony Carrick case in Victoria, Australia (see <http://www.vthc.org.au/anthonycarrick/index.html>); and the Joel Exner case in New South Wales, Australia ([http://www.news.com.au/common/story\\_page/0,4057,7682384%5E1702,00.html](http://www.news.com.au/common/story_page/0,4057,7682384%5E1702,00.html))

<sup>13</sup> See in particular Dawson and Brooks (1999); Fennell (1988); Hidden (1989); Lord Cullen (1990); Lord Cullen (2001); and Sheen Report (1987)

This sense of despair felt by relatives and friends of those killed through industrial activity, by politicians, the judiciary, coroners, unions and employer organisations, and most importantly by the general public at large, has been heightened by the perception that the criminal justice system has failed to achieve justice for the dead and injured; to condemn organisational and individual health and safety failures; and allocate adequate resources to OHS. Rarely has anyone been held to accountable for such ‘crimes’ as industrial manslaughter following industrial deaths in public disasters. The Zeebrugge sinking, Clapham rail crash, Southall rail crash, Westray Mining explosion, Westgate Bridge collapse, and Esso Longford explosion are all etched in our minds as examples of the perceived failure of the criminal justice system to satisfy demands for accountability and retribution. Manslaughter prosecutions have rarely been brought in response to industrial deaths in public disasters, and if they have, they have spectacularly failed.<sup>14</sup> What are often viewed as ‘petty fines’ are all that result from the conviction (often following guilty pleas) of organisations (usually corporations) and their senior personnel where prosecutions have been taken for contraventions of OHS statutes following such industrial deaths.

In addition to those killed in rare yet more widely publicised public disasters, regularly in excess of 200 people are fatally injured at work each year in the England and Wales (HSE, 2003),<sup>15</sup> perhaps over 400 per year in Australia (NOHSC, 2000),<sup>16</sup> and perhaps as many as 800 per year in Canada.<sup>17</sup> These figures do not even attempt to capture all those whose deaths are related in some other way to employment. The number of those who die of occupational diseases contracted within the workplace or those killed in road traffic accidents whilst working are not included within such statistics (Slapper and Tombs, 1999: 68-78). However there are just a handful of traditional criminal law convictions against organisations and their senior personnel each year following workplace deaths and very few have ever occurred. There also seems to be irregular use of OHS prosecutions following

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<sup>14</sup> The most publicised recent example of a failed corporate manslaughter prosecution was at the trial of Great Western Trains following the Southall rail crash (see Wells, 2001: 112). This followed the failed corporate manslaughter prosecution against P&O ferries following the Zeebrugge disaster in 1987 (see also Wells, 2001: 107-111)

<sup>15</sup> This is a record low figure, but note that this is around a third of the number of work related fatal injuries recorded in 1981

<sup>16</sup> Note however that this is an estimate based on a number of work related death studies

<sup>17</sup> See <http://www.clc-ctc.ca/health-safety/mourning.html>. This figure is based on data from workers compensation boards

workplace deaths (UNISON and CCA, 2002: 11-13; Perrone, 1995 and 2000; Johnstone, 2003).

The need to act tough or perhaps be *seen* to act tough on the causes of industrial death has spurred a desire to reform existing OHS enforcement (particularly prosecutions) and traditional criminal law in this context. Victims groups have been formed, with some demanding criminal law reform and greater use of ‘traditional’ as opposed to ‘regulatory’ criminal law;<sup>18</sup> advocacy centres now provide services to relatives of those killed through industrial deaths;<sup>19</sup> unions have utilised their power and voice to condemn acts of ‘corporate killing’ and demand that OHS is taken more seriously;<sup>20</sup> academics have condemned the inadequate response of the criminal justice system;<sup>21</sup> and lawyers and barristers have argued in court for a wider interpretation of established criminal doctrines so as to extend the use of criminal law following industrial deaths.<sup>22</sup> It seems fines are not enough, OHS prosecutions lack power and meaning (see Johnstone, 2003), and the traditional criminal law must be used more often and reformed in its response to industrial deaths.

### ***Which Existing Criminal Law Has Been Used Following Industrial Deaths?***

The discussion so far is not to suggest, however, that the traditional criminal law has never been prosecuted successfully against corporations and corporate personnel following industrial deaths.<sup>23</sup>

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<sup>18</sup> In particular in the United Kingdom: Disaster Action, the Herald Families Association, Safety on Trains Action Group, Marchioness Action and Marchioness Contact Groups, and the Simon Jones Memorial Campaign; and in Victoria, Australia: Industrial Death Support and Advocacy Group (IDSA) and the Uniting Church Partnership In Grieving Programme

<sup>19</sup> In particular the expanding Centre for Corporate Accountability in the United Kingdom

<sup>20</sup> In particular the Trades Union Congress, Transport and General Workers Union, and the Hazards Campaign in the United Kingdom (and in particular the Construction Safety Campaign of the 1980s) and the Australian Council of Trade Unions, the Construction, Forestry, Mining and Energy Union, and Victorian Trades Hall Congress in Australia

<sup>21</sup> In particular see Field and Jorg (1991), Fisse and Braithwaite (1993), Slapper (1999), and Wells (2001)

<sup>22</sup> See for instance Lissack QC (2000)

<sup>23</sup> It is important to stress here that the law up to the present time has generally only dealt with the criminal liability of the corporate entity, and hence the discussion in the first sections of this paper is very much focused on criminal liability of corporations for industrial deaths. However the proposals discussed in the later sections of this paper deal with ‘organisations’ or an ‘employer’ and hence the discussion about corporations should not be taken to apply exclusively just to corporations.

It was established in the legal disputes following the Zeebrugge disaster that there was no doubt a ‘corporation’ could be prosecuted for manslaughter in England and Wales following an industrial death that carried some level of moral culpability by some high ranking official of the company.<sup>24</sup> The first conviction in the United Kingdom for the offence of corporate manslaughter followed in 1994 and a £65,000 fine was imposed; the death also resulted in the first custodial sentence (three years reduced to two on appeal) for a director of a company following an industrial death (Tombs, 1995: 351). So although manslaughter prosecutions have never resulted following public disasters, there has been limited success in prosecuting manslaughter in cases of workplace death in the United Kingdom. There have been five convictions for corporate manslaughter in England and Wales and one corporate homicide conviction in Scotland since 1994, and there have also been 12 convictions of company directors or business owners for manslaughter since 1989.<sup>25</sup>

The first corporate manslaughter conviction in Australia was also in 1994,<sup>26</sup> although the company went into liquidation and the \$120,000 fine was never paid (Coles, 1998). Since then there have been only a handful of prosecutions against corporations and corporate personnel, with Johnstone (1997: 424) reporting only two to have been successful. Victoria, the most proactive jurisdiction in Australia to prosecute for such offences, has had only three prosecutions.<sup>27</sup> Research by Tucker (1995: 113-4) revealed that between 1900 and 1995 there had been only eight criminal prosecutions of employers following workplace deaths in Canada and only one conviction for manslaughter which withstood appeal (for which the company was fined C\$5000).

There still seems however (despite legal developments) to be culpable conduct going unpunished. The litany of failed prosecutions referred to above provided evidence of management failures and organisational neglect which, although proving impossible to attribute to any individual, seems to point to some level of moral culpability on behalf of the

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<sup>24</sup> *R v P&O Ferries (Dover) Limited* (1991) 93 Cr App R 72. The first case of corporate manslaughter was brought in 1927 (*R v Cory Bros Ltd* [1927] 1 KB 810) but was dismissed by the court; the possibility of a conviction of a corporation for an act of violence was rejected.

<sup>25</sup> See [www.corporateaccountability.org/manslaughter.htm](http://www.corporateaccountability.org/manslaughter.htm), as updated on 10th January 2004

<sup>26</sup> *R v Denbo Pty Ltd.*, Victorian Supreme Court, 14th June 1994

<sup>27</sup> *DPP v Dynamic Demolitions*, Victorian Supreme Court, 8th December 1997; *R v Denbo Pty Ltd.*, Victorian Supreme Court, 14th June 1994 (resulting in conviction); and *R v AC Hatrick Chemicals Pty Ltd.*, Victorian Supreme Court, 29th November 1995

organisations involved following industrial deaths. Even when prosecutions have been successful against corporations and senior corporate personnel following an industrial death, such convictions concerned small companies with simple management structures where individual guilt was clearly visible and attributable to the company. Prosecutions against directors of larger corporations and the corporations themselves (or indeed other organisations including crown bodies) have never been successful in Australia, Canada or the United Kingdom.<sup>28</sup> This begs the question as to whether it is really only small companies that are morally culpable following industrial deaths and injuries or whether the existing law is unable to capture the moral culpability of larger organisations and their senior personnel.

Most of the well-known public disasters and industrial deaths in Australia, Canada and the United Kingdom that have not resulted in manslaughter convictions have not completely escaped criminal prosecution. Many large and small organisations and occasionally senior personnel have been convicted of OHS offences and fined.<sup>29</sup> It is important to remember (as discussed in section eight) that these regulatory offences are part of the criminal law, albeit perhaps perceived as lesser than traditional criminal law (Carson and Johnstone, 1990). Great Western Trains were fined £1.5 million in England for failing in its general duty under section 3(1) of the *Health and Safety at Work Act (HSWA) 1974* to ensure the safety of those not under its employment following the Southall rail disaster,<sup>30</sup> whilst the Thames Train prosecution following the Paddington rail disaster broke this previously record fine, resulting in a £2 million fine against the company for failing in its duties under the *HSWA 1974* to adequately train the train driver whom they employed and whose actions it was held contributed directly to the disaster.<sup>31</sup> Esso Australia Pty Ltd. were also fined Aus\$2 million in

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<sup>28</sup> Note however the ongoing cases relating to Network Rail and Balfour Beatty in relation to the Hatfield rail crash in October 2002 (Wells, 2003 and [http://www.guardian.co.uk/uk\\_news/story/0,3604,998033,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,998033,00.html)) and relating to Barrow Borough Council in relation to an outbreak of legionnaires disease (Ward, 2004)

<sup>29</sup> Imprisonment against corporate personnel is a measure available only for an extremely limited number of offences under health and safety law. For instance, s37 *Health and Safety at Work Act 1974* (UK) states ‘Where an offence under any of the relevant provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar office of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly. See also s52 *Occupational Health and Safety Act 1985* (Vic.) These clauses only results in imprisonment where an individual can be proved to have for instance breached a prohibition order imposed by health and safety inspectors, a somewhat rarer and more deliberate act. For a full list of the offences that can result in imprisonment, see s33 (4) *Health and Safety at Work Act 1974* (UK)

<sup>30</sup> *Attorney General’s Reference 2/99* [2000] 3 All ER 182.

<sup>31</sup> See [http://www.guardian.co.uk/uk\\_news/story/0,3604,1186592,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1186592,00.html)

July 2001 following the Longford plant explosions, the largest ever fine in Australia for breach of OHS laws.<sup>32</sup> However, the average level of fines for OHS prosecutions following industrial deaths, although increasing significantly in the England and Wales in recent years, remains low; also very few directors or senior managers of organisations are prosecuted and/or convicted under regulatory law (Unison and CCA, 2002; Johnstone, 2003). It seems that convictions under OHS law, however, may not satisfy society's demands for a suitable level of accountability under 'traditional' as apposed to 'regulatory' criminal law following a preventable industrial death.

### ***The Criminal Law And Its Reform In Response To Industrial Deaths***

Given the perceived deficiencies of existing criminal law (both traditional and regulatory) to provide suitable levels of organisational accountability following industrial deaths, reform has been proposed and pursued in the past decade. The rest of this paper highlights deficiencies in existing law that it has been argued contribute to a lack of criminal accountability both in the case of organisations in particular and of their senior personnel following industrial deaths. The reforms proposed both in Australia, Canada and England and Wales are then outlined and discussed, with attention paid to different legal doctrines battling for prominence in this area.

In sections two to five of this paper, two themes are highlighted that consider ways to increase accountability following industrial deaths. Firstly, it seems there is a need for traditional criminal law (for instance manslaughter) to develop from its individualistic approach to criminal liability (the need for individual human *mens rea* before conviction can result) to a more contemporary approach that reflects organisational structures and organisational criminality; and looks at management decisions, organisational culture, systems failures and how these can lead to industrial death, and incorporating these sorts of ideas into criminal legal doctrine. Government proposals suggest that the regulatory criminal law (that is, prosecutions for contraventions of the OHS statutes) is not perceived as adequate on its own in response to some industrial deaths and therefore suggest a need for

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<sup>32</sup> *DPP v Ezzo Australia Pty Ltd* (2001) 107 IR 285

traditional and more contemporary criminal offences to be prosecuted alongside OHS offences. Proposals have detailed the need for new rules in attributing criminal responsibility to organisational entities and new offences particularly drawn up to respond to industrial deaths.

Secondly, it seems there is also the need for more individual criminal liability of organisational directors and/or senior personnel both through traditional criminal law and OHS offences following industrial deaths in which such individuals can be seen to have a level of culpability or blameworthiness in contributing to the events which led to the death. Proposals both by Governments, unions, pressure groups and victims groups have stressed that the importance of OHS should be reflected in *duties* imposed upon individual directors as well as on the organisations (which already universally occurs under existing OHS regulation). Also it has been suggested there is a need for new criminal offences to deal with senior personnel existing alongside wider use of existing OHS prosecutions (both through increased fines, more readily available prison options, and wider use of disqualification following breach of health and safety law).

What most of the recent proposals discussed in this paper have suggested is the need for outcome-based prosecutions, i.e. offences that prosecute for the act of causing death or serious injury in the industrial context, as opposed to prosecutions for failing to act or breaching existing duties owed under OHS law. Although this approach, as we shall see, is not without its weaknesses (see section eight below), there seems to be a need to recognise organisational harm (in particular industrial deaths) as not just breach of a duty but as causing actual death. The proposals discussed in this paper suggest physical harm to workers and members of the public is serious and that OHS is about life and death. The proposals suggest OHS should perhaps not be the remit of only duty-based OHS law.

Section six and seven shall then explore the issue of sanctions accompanying law reform, as in the organisational context this area has in general been neglected. It shall be suggested that there is the need to have both developed criminal accountability through law existing alongside the need for some originality in discussion of developing the sanctions framework to reflect the particular offender - that is, the need to have sanctions specific to

organisations, such as corporation probation, publicity orders, and fines linked to profits (equity fines), and to have sanctions specific to senior organisational personnel. This, it is argued, will maximise the effectiveness of the criminal law (both traditional and regulatory) in achieving its purposes following prosecution; purposes which must surely include rehabilitation, deterrence, and the improvement of OHS standards, beyond that of retribution. Symbolism of criminal prosecutions is perhaps not enough and sanctions should also look to achieve at the same time more utilitarian goals. The proposals for reform of organisational sanctions regimes will then be outlined.

Section eight will address the issue of OHS reform as opposed to ‘traditional’ criminal law reform, and consider whether attention may have been wrongly shifted away from regulatory criminal law towards more traditional criminal law. It shall be suggested that such a shift could potentially deflect attention away from the importance and usefulness of existing OHS law that exists alongside traditional criminal law.

Section nine considers the perhaps less evident and less talked about issues of investigation and enforcement of existing law, and developments relating to investigations of industrial deaths and enforcement of existing law shall be considered briefly. It shall be suggested that the issues of investigation, enforcement and prosecutorial discretion in applying the law needs to be considered, and that actual legal reform is just one part of the equation in increasing accountability following industrial deaths. Finally, section ten concludes with some initial reflections on the need for law reform, proposed law reforms, and the way forward from here.

Legal reform seems to be required in the area of organisational criminal accountability for traditional criminal law offences, especially those involving industrial fatalities. As one barrister has suggested, ‘Whilst the law has developed significantly and in an enlightened fashion to enable corporations to be fixed with criminal liability in a whole range of other areas, the courts and Parliament [in the United Kingdom] have shown an astonishing unwillingness to ensure that the law keeps pace with increasingly sophisticated corporate structures when that corporation kills’ (Lissack QC, 2000).



## Section Two

### Organisational Criminal Accountability: The Issues

As the previous section has highlighted, there are perceived deficiencies in both traditional criminal law (in particular the law of manslaughter) and regulatory criminal law (OHS law) in achieving a suitable level of organisational criminal accountability following industrial deaths.

The first theme that will be dealt with here is the perceived deficiencies in the way criminal liability is attributed to organisations (or more particularly the legal personality of the ‘corporation’) following an industrial death; we shall look in particular at criminal liability for corporate manslaughter. The law of manslaughter that forms the basis of a prosecution for corporate manslaughter will be dealt with in section three on individual criminal liability, and here just the rules of attribution of criminal liability to corporations from the criminal liability of their personnel shall be explored. What difficulties arise in attributing criminal liability to a corporate personality?

Here one must go back to the basics of criminal liability under criminal law systems throughout the world. Criminal liability stems from having both the *actus reus* and *mens rea* of a crime occurring at the same point in time (Smith and Hogan, 1999: chapter four). We dealt with *mens rea* in the introductory section of this paper, and this was taken to mean that there must be a guilty mind that reflects a level of moral culpability. The *actus reus* of a crime meanwhile is the criminal act, that is, a voluntary act or omission that caused for instance death. Whilst the *actus reus* of a criminal offence arguably gives rise to fewer complications when applying criminal law to corporations, the *mens rea* is far more troublesome.

Criminal law has evolved around the central theme of individual liability, and so takes an individualistic approach to the elements of any crime (Wells, 2001: 1). For this reason the question that needs to be asked in relation to corporations is how to attribute blame, moral culpability, or *mens rea*, to the corporate personality in order to have both elements (the *actus reus* and *mens rea*) to convict it of a criminal offence. How can an organisation be immoral, and what is organisational blameworthiness? As has been stated in numerous appellate

judgements, one must bear in mind that ‘A corporation is an abstraction. It has no mind of its own any more than it has a body of its own.’<sup>33</sup> Though the problem of attributing criminal liability to the corporate personality has taken time to overcome, the law has found logical answers and the hurdle has by no means been insurmountable.

This paper shall consider a number of principles adopted by courts and legislatures in Australia, Canada and the United Kingdom to establish corporate criminal liability and to attribute criminal guilt (in particular the guilty mind or *mens rea*) to the corporate entity. These include the personal liability doctrine, the identification doctrine and the aggregation principle. The ‘corporate culture’ provisions in Australian Commonwealth law will be dealt with in section four of this paper.

This section will focus primarily on the second of these modes of attribution, the identification doctrine, which the courts have applied to issues of corporate *mens rea* in gross negligent manslaughter cases. However it is necessary to understand and evaluate all the routes to organisational criminal liability in order to assess the proposed reforms to existing law that this paper shall discuss in section four.

### ***The Personal Liability Doctrine***

We begin with a brief discussion of the personal liability doctrine. Here, criminal liability is placed upon the corporation personally following the commission of an offence. Although widely used in United States federal law (Wells, 2001: 85), in Australia, Canada and the United Kingdom use of this form of criminal liability usually arises only when the intention of the law clearly indicates that the offence in question is one that does not require *mens rea* or a guilty mind, with such not being the case for instance with the offence of manslaughter.

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<sup>33</sup> *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705

The personal liability doctrine is, however, used in OHS law. Specific duties are owed by organisations themselves,<sup>34</sup> and breach of one of these duties entails the automatic criminal liability of the organisation whether or not harm results. The duty is absolute, personal and non-delegable, and the effect is that the organisation is liable for any acts or omissions of those who are in a relationship to it (its workers, subcontractors etc.) that breach OHS statutory duties subject only to the defence that it did all that was ‘practicable’ or ‘reasonably practicable’ to prevent the commission of the offence.<sup>35</sup> So when the duties under the various OHS statutes are breached, whether or not this results in harm, there is no need to try and attribute to the organisation another’s guilty mind or *mens rea*. The identification doctrine does not apply to OHS statutes.<sup>36</sup> The offence is personal to the organisation and requires no measure of *mens rea* (Gobert and Punch, 2003: 55-59). In the words of Tipping J in the New Zealand Court of Appeal,<sup>37</sup> this

‘analysis does not depend on [the foreman’s] status within the employer company, nor upon concepts of agency or vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practicable step to ensure the employee’s safety, the employer is responsible for that failure.’

The upshot of these cases is that a corporation will not be absolved from liability simply because at a top management level the company had taken all reasonable steps to ensure safety, if at an operational level it was the court’s opinion based on the facts that such steps as were ‘reasonably practicable’ had not been taken to implement OHS policies and procedures. Wells (2001: 102) suggests that ‘the company ... falls to be judged not on its words but its actions, including the actions of its employees.’

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<sup>34</sup> For a discussion of the Australian duties, see Johnstone (2004; chapters four to six) The equivalent United Kingdom provisions are to be found in ss2-6 *Health and Safety at Work Act 1974* (UK)

<sup>35</sup> See for instance *Linework Limited v Department of Labour* [2001] 2 NZLR 639, *R v British Steel Plc* [1995] 1 WLR 1356, *R v Associated Octel Co Ltd* [1996] 4 All ER 846, *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78 in the United Kingdom. See also *WorkCover Authority of New South Wales (Inspector Lacey) v George Weston Foods Ltd*, unreported, Industrial Relations Commission of New South Wales in Court Session (Maidment J), 26 March, 1999; *WorkCover Authority of New South Wales (Inspector McKenzie) v Waste Recycling & Processing Services of New South Wales*, unreported, [2000] NSWIRComm 218; *WorkCover Authority of New South Wales (Inspector Carmody) v Byrne Civil Engineering Constructions Pty Ltd (No 1)* (2001) 103 IR 80; *WorkCover Authority of New South Wales v Siemens Pty Ltd (formerly Mannesman Dematic Colby Pty Ltd) No 2* [2003] NSWIRComm 45 at para 42; *WorkCover Authority of New South Wales (Inspector Yeung) v Thiess Pty Ltd* [2003] NSWIRComm 325 at para 37; and Thompson (2001: 27)

<sup>36</sup> See, in particular, *Linework Limited v Department of Labour* [2001] 2 NZLR 639, *R v British Steel Plc* [1995] 1 WLR 1356, *R v Associated Octel Co Ltd* [1996] 4 All ER 846 and *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78.

<sup>37</sup> *Linework Limited v Department of Labour* [2001] 2 NZLR 639 at para [45].

## *The Identification Doctrine*

In contrast to the personal liability approach which is used for offences (including OHS offences) which do not require *mens rea*, the narrower identification doctrine has been used in Australia, Canada and the England and Wales to attribute to the ‘corporation’ *mens rea* or the guilty mind when this was required for the commission of a criminal offence. Corporations are artificial legal personalities and can only act through their human employees and agents; yet they are also legal ‘fictions’ created by company law to be distinct from their directors, workers and shareholders.<sup>38</sup> Therefore in order for the *mens rea* that is the requisite for traditional criminal offences to be attributed to the corporation, the courts from the 1940s onwards<sup>39</sup> developed rules to use the individual knowledge, intention or actions of particular employees and to say that such knowledge is that of the corporation *itself*. Particular agents of the corporation *are* the corporation. The law therefore developed to attach criminal liability theoretically to the corporation through requiring evidence of *mens rea* usually against a senior officer of a corporation during their acting as a ‘directing mind and will’ of that corporation (Gobert and Punch, 2003: 59-69).

This ‘identification’ doctrine was authoritatively laid down in *Tesco v Nattras*<sup>40</sup> although Lord Denning’s judgement in *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Son Ltd*<sup>41</sup> outlines the principle most clearly:

‘A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. *The state of mind of these managers is the state of mind of the company and is treated by the law as such* [our emphasis]... in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.’<sup>42</sup>

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<sup>38</sup> See *Salomon v Salomon* [1897] A.C. 22

<sup>39</sup> It was the trio of cases decided in the 1940s that greatly developed the way *mens rea* was attributed to corporations (Wells, 2001: 93; and Slapper and Tombs, 1999: 28)

<sup>40</sup> [1972] 2 WLR 1166

<sup>41</sup> [1957] 1 QB 159

<sup>42</sup> Ibid. at pg. 172.

The identification doctrine has been the relevant legal test applied in deciding whether a corporation should be prosecuted for the crime of manslaughter. Was there evidence of manslaughter carried out by an individual who could be identified as the ‘directing mind and will’ of the corporation?<sup>43</sup>

The most obvious question to ask in relation to the identification doctrine is how far it extends? Exactly which company officers come within the definition of the ‘directing mind and will’ of a corporation to establish corporate criminal liability? Whose acts can be classified in law as those of the corporation? It is here that the limitations to the doctrine can be found (Forlin, 2004).

Courts in Australia and the England and Wales have generally taken a very narrow, and arguably unrealistic, approach in answering this question. They have laid down that it is generally only the board of directors, the managing director(s), senior and highly placed managers or anyone to whom a function of the board had been fully delegated that can be seen in law as the ‘directing mind and will’ of the corporation.<sup>44</sup> As Wells notes, ‘The relatively narrow doctrine (identification) ... had as its governing principle that only those who control or manage the affairs of a company are regarded as embodying the company itself’ (Wells, 2001: 101).

However, the Canadian courts have defined the ‘directing mind and will’ concept more broadly than their Australian and British counterparts (see in particular Ferguson, 1999). In *Canadian Dredge and Dock*,<sup>45</sup> Estey J outlined the principle as follows:

“The essence of the test [the directing mind and will test] is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager *within the sector of corporate operations assigned to him by the corporation* [our emphasis]. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. The requirement is better stated when it is said that the act in question must be

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<sup>43</sup> To this we shall return in section three below.

<sup>44</sup> See for instance *Tesco v Natrass* [1972] 2 WLR 1166, in particular the judgements of Lord Pearson at p 1196. See also *R v AC Hatrick Chemicals Pty Ltd.*, unreported, Supreme Court of Victoria, 29<sup>th</sup> November 1995 and *Hamilton v Whitehead* (1988) 82 ALR 626

<sup>45</sup> [1985] 1 SCR. 662

done by the directing force of the company when carrying out his assigned function in the corporation.<sup>46</sup>

Eskey J continues:

‘... the identification doctrine only operates where the crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.’<sup>47</sup>

This test was defined further in *The Rhone v The Peter A.B. Widener*,<sup>48</sup> where Iacobucci J stated that:

‘One must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such a policy... the court must consider who has been left with the decision-making power in a relevant sphere of corporate activity.’<sup>49</sup>

A recent Scottish case, while appearing to extend the *Tesco* identification doctrine, shows how narrow its application is in practice. In *Transco PLC v Her Majesty's Advocate*,<sup>50</sup> Scotland's Court of Criminal Appeal ruled for the first time that Scottish corporations can be prosecuted for the offence of ‘culpable homicide’ (similar, but not identical, to the Australian crime of manslaughter by gross negligence) after four members of the public were killed in a gas explosion. The court held that the *Tesco* identification doctrine applied in Scottish law. Lord Hamilton (with whom Lord MacLean agreed) was of the opinion that the ‘directing mind and will’ of the company could include both an individual to whom powers and responsibilities were delegated, and also a group of persons, such as a committee of directors, whose delegated powers are to be exercised on a collective basis. The court, however, rejected the argument that the prosecutor could rely on the ‘accumulated states of knowledge and awareness of all those hitherto having and exercising the directing mind and will.’ In other words, the requisite knowledge or intention had to be held by the group to

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<sup>46</sup> *Ibid.* at p 685

<sup>47</sup> *Ibid.* at pp 713-4

<sup>48</sup> [1993] 1 SCR. 497

<sup>49</sup> *Ibid.* at p 521

<sup>50</sup> Appeal No: XC392/03, 3 June 2003

[The judgement is online at http://www.corporateaccountability.org/dl/Cases/transcoapp.doc](http://www.corporateaccountability.org/dl/Cases/transcoapp.doc)

whom powers and responsibilities were delegated at the time the offence took place – and the court could not look to knowledge and intention of previous members of the group.

In legal disputes following industrial deaths, the problems that such narrow ‘identification’ tests gave rise to in terms of failing to achieve adequate corporate criminal accountability are obvious (see further Fisse, 1994). It may often be the case, especially in larger and more complex organisations such as corporations, that those seemingly more culpable when an industrial death takes place are those working on the front line; for instance, train drivers passing signals at speed or individuals working on the ground with dangerous equipment and in dangerous situations. Although these individuals can be liable in their own right for criminal offences, they cannot be described as the ‘directing mind and will’ of a corporation so as to establish corporate criminal liability. These individuals often do not work at a policy level or deal with implementing policy (in particular OHS policy), but simply do what they have been trained to do. It is therefore often very hard to link an industrial death to an individual who falls within the ‘directing mind and will test.’ The evidential requirements to prove that a particular policy at management or director level *caused* the death or injury of a worker can often be impossible to overcome (see for instance Appleby, 2003; Forlin and Appleby, 2004; and Forlin, 2004). For this reason it has often proved impossible to convict all but the smallest and structurally and organisationally simplest industrial actors for corporate manslaughter.

### ***The Aggregation Principle***

In accepting the identification doctrine, the courts have rejected what is known as the ‘aggregation’ principle for attributing criminal liability to corporations (Gobert and Punch, 2003: 82-86; Wells, 2001: 109). According to this principle, the fault of a number of different and perhaps unrelated individuals (workers, contractors or senior officers) can be aggregated to form the guilt of the corporation. As long as the corporation ‘as a whole’ is morally culpable for a criminal offence, the aggregation principle could be used to establish its criminal liability. The British Court of Appeal confirmed the rejection of this aggregation

principle in the case stemming from the Southall rail crash, with Rose LJ referring to the judgement of Bingham J in *R v HM Coroner for East Sussex ex. parte Roban* where he stated:

‘A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.’<sup>51</sup>

The aggregation principle has been seen by the judiciary as contrary to interests of justice; it supplies guilt on behalf of a corporation where in fact there was not guilt on behalf of an individual or individuals who could satisfy the ‘directing mind and will’ test of corporate criminal liability for offences such as corporate manslaughter.

### ***The Identification Doctrine Reconsidered?***

As we noted earlier, one must also distinguish the identification doctrine strictly applied from more recent decisions of the judiciary in cases concerned less with traditional criminal law offences and more with absolute or strict liability offences. One such case is *R v British Steel*<sup>52</sup> which, together with a series of other English cases, established that the *Tesco* identification principle does not apply to absolute liability OHS general duty offences. The liability of duty holders for contravention of the general duty provisions in the OHS statutes are personal and non-delegable. In effect, an organisation is liable for any of the acts or omissions of its workers or contractors which put others at risk.<sup>53</sup>

Also of importance is the case of *Meridian Global Funds Management Asia Ltd v Securities Commission*.<sup>54</sup> In addition to the decisions of the courts not to apply the identification

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<sup>51</sup> (1987) 88 Cr App R 10, at pgs. 16-17, cited from *Attorney General's Reference (no. 2 of 1999)* [2000] 3 All ER 182 at 190

<sup>52</sup> [1995] 1 WLR 1356

<sup>53</sup> *R v British Steel plc* [1995] 1 WLR 1356, *R v Associated Octel Co Ltd* [1996] 4 All ER 846 and *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78. The United Kingdom courts appear to have, however, left open the possibility that an employer which has otherwise exercised all proper precautions might not be liable for casual negligence on the part of low level employees or of contractors, where the company had adequately supervised the employees or contractors. This is not a new principle, but an application of the practicability qualification: see *R v Nelson Group Services Ltd (Maintenance)* [1998] 4 All ER 331. See also Johnstone (1999), Johnstone (2004: 229-242) and *Linework Limited v Department of Labour* [2001] 2 NZLR 639.

<sup>54</sup> [1995] 2 AC 500

doctrine to OHS offences, there have been successful judicial attempts to widen the identification doctrine so that it includes more individuals within a company, and more importantly, reflect the more modern organisational structure of corporations. This attempt has its roots in the speech of Lord Hoffmann in *Meridian*, which addressed the issue of whether the knowledge of two individual employees could be attributed to the company so as to attach liability to the company for the breach of the *Securities Amendment Act 1988*.

Lord Hoffmann relied on the purposive construction of the statute in question to make his decision, but in doing so, managed to distinguish the principle to be applied in this case from the stricter identification principle as applied in *Tesco* and also perhaps to expand on that principle. Lord Hoffmann suggested:

‘It is a necessary part of corporate personality that there should be rules by which acts are attributed to the company... these may be called “the rules of attribution”... The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association... These primary rules are obviously not enough to enable a company to go out into the world and do business... The company therefore builds upon the primary rules of attribution by using general rules of attribution that are equally available to natural persons, namely principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company’s primary rules of attribution, count as the acts of the company, and having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort... The company’s general rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations... In exceptional cases however, they will not provide an answer... This is generally true of rules of criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to the company?’<sup>55</sup>

Lord Hoffmann went on to say:

‘One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all [for example murder, which as it is defined only provides the possibility of imprisonment as a sanction, and so could not apply to the corporate personality]... Another possibility is that the court might interpret the law as meaning that it could apply to the company on the basis of its primary rules of attribution... *But* [our emphasis] *there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it [the law] excludes ordinary vicarious liability, insistence on the primary rules of attribution [as in *Tesco v Natrass*] would in practice defeat the intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation; given that it was intended to apply to the company,*

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<sup>55</sup> Ibid. at pp. 506 -507

*how should it apply? Whose acts (or knowledge, or state of mind) was “for this purpose” intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.’<sup>56</sup>*

Lord Hoffmann here takes the main issue to be ‘one of construction rather than metaphysics... It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or so the state of mind with which it should be done, should be attributable to the company...’<sup>57</sup> He is suggesting that rather than considering who it is that should be considered as the ‘directing mind’ of the company, it is more important to look at whose behaviour and actions Parliament intended to be attributable to the company. Whether or not this should have been the approach taken in *Tesco v Natrass*, it appears that Lord Hoffmann expresses no reservations that the decision in that case was correct as to the facts, but was in this case distinguishable.

*Meridian* allows liability to be attached to a company by extending the ambit of those whose acts the company can be attributable outside those ‘senior management’ members. As Wells (2001: 104) observes, ‘It seemed clear that *Meridian*, in acknowledging the need for a more sensitive test of corporate attribution, was stretching the identification model, rather than taking the offence into the vicarious liability category... In the age of flatter corporate hierarchies, “empowered” front-line employees and devolved decision-making, Lord Hoffmann’s decision has considerable resonance in the real commercial world.’ Wells reminds us, however, that this approach was firmly rejected in the *Great Western Trains* case following the Southall rail crash in England,<sup>58</sup> yet it is important to understand the *Meridian* principle as one competing on the legal stage in regard criminal corporate responsibility in Australia, Canada and England and Wales, and that cases discussed above which have determined that the identification doctrine does not apply to OHS offences are, in effect, an application of Lord Hoffmann’s thinking on *Meridian*.<sup>59</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid. at p 511

<sup>58</sup> See the argument of Lissack QC (2000)

<sup>59</sup> This is explained in *Linework Limited v Department of Labour* [2001] 2 NZLR 639.

## ***Conclusions***

The deficiencies in the identification doctrine, as applied to traditional criminal offences such as manslaughter, has inspired judges (see again Lord Hoffmann in the *Meridian* case) and legislative reformers (in Australia, Canada and the England and Wales) to develop new attribution principles in order to ensure that prosecutions can be brought more often and more successfully following industrial deaths. In order to understand how the identification doctrine has worked in practice however, the next section of the paper considers the requirements for individual guilt in the case of manslaughter and other traditional crimes. It has been this level of individual guilt that provided the moral culpability required for the identification doctrine, and it has been with the individual identifying mind that a corporate prosecution under traditional criminal laws such as corporate manslaughter falls to be judged.

## **Section Three**

### **Individual Criminal Accountability: The Issues**

In section two we outlined the common law rules for manslaughter by gross negligence, and explained that the issue of corporate criminal liability for traditional criminal offences relating to industrial death has always been dependent upon individual criminal liability. The basis of the identification doctrine has been individual criminal liability, and the only way in which a corporation could be found liable *itself* has been through actions of a select group of its senior personnel. Finding the individual liability of a directing mind, beyond that of identifying a directing mind in the first place, has caused many of the problems with the issue of corporate criminal accountability (Forlin, 2004).

Under the proposed reforms to the law relating to organisational criminal accountability, it seems that there would be vastly different approaches to the issues of organisational and individual accountability for traditional criminal law. Therefore in this section we lay out proposed manslaughter rules as they relate to individuals, and in section four we consider the proposals for manslaughter for organisations. It may be that the future sees a clear distinction between individual and organisational, whereas the past has relied on the two being linked together with organisational accountability dependent upon individual liability.

#### ***Prosecuting Gross Negligent Manslaughter***

Gross negligent manslaughter, which we discussed in section one above, is the form of manslaughter presently relied on when prosecuting corporate manslaughter following an industrial death. Gross negligent manslaughter bases criminal liability on a negligence standard, in contrast with the requirement that criminal intent (or perhaps recklessness) must be proven at trial for other homicide offences in Australia, Canada and the England and

Wales.<sup>60</sup> Gross negligent manslaughter is therefore a rare criminal offence in that liability is based on an objective culpability (that is, negligence) on behalf of a defendant as opposed to subjective culpability. This difference in the evidential standard is significant as negligence (as discussed above in section one) is the least demanding form of *mens rea* used in criminal law, in contrast to the requirement to prove the more serious intention or recklessness tests. Negligence allows a conviction based on what the defendant should have known or ought to have done in contrast to the requirement to prosecute for what they in fact knew or did.

An individual can be convicted of gross negligent manslaughter if they acted or *failed to act* in a grossly negligent manner. With industrial deaths, the cause of death has almost always been failure to act through failing to ensure safe workplace procedures and practices or failing to protect the public from harm. In order to be convicted of gross negligent manslaughter through a failure to act, a duty of care on behalf of the defendant to the deceased must be proven and breached. The breach of duty must be a substantial cause of death and a jury itself will have to decide whether ‘the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him ... *was such that it should be judged criminal.*’<sup>61</sup> This individual liability for manslaughter would then, if that individual was classified as a ‘directing mind and will’ of a corporation, feed into the offence of corporate manslaughter through application of the identification doctrine.

This duty of care requirement when prosecuting corporate manslaughter creates problems as it is *employers* (i.e. the organisation) *themselves* that owe the duty of care to protect the health and safety of the public and their workers. Breach of this duty entails liability under OHS legislation.<sup>62</sup> However, directors of corporations themselves generally owe duties to the company and to shareholders, and rarely owe a direct duty of care to workers or members of

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<sup>60</sup> See *R v Maloney* [1985] A.C. 905. For more detailed discussion, see Ashworth (1999: chapter seven) and Smith (1999: chapter twelve). Note however the law in Victoria which is slightly different in utilizing the concept of reckless murder and constructive murder, potentially making the offence easier to prove than an offence definition based solely on intention. See Rush (1997: chapter nine)

<sup>61</sup> This definition was based on Lord Hewart CJ’s judgement in *R v Bateman* [1925] All ER 79. I shall not expand here on how gross negligence is actually proven at trial for it is a subject of much debate and there are a number of conflicting viewpoints. The law’s application by the Crown Prosecution Services in the United Kingdom (where it has been tested more widely than any other jurisdiction) following industrial deaths has been disputed, successfully judicially reviewed, and subject to much academic discussion. See however Tombs and Whyte (2003: 2-3) for a brief discussion or for more technical discussion see Appleby (2003) and Lissack QC (2000)

<sup>62</sup> See the discussion of the general duty provisions in Johnstone (2004: chapters four and five).

the public to safeguard their lives and well-being.<sup>63</sup> As we noted above, it is only through the criminal acts of directors as the ‘directing mind’ of the corporation that criminal responsibility can be attributed to the corporation through the identification doctrine.

It will only be on rare occasions that a court will be able to find a duty of care owed by an individual which can form the basis of a gross negligent manslaughter prosecution following an industrial death, and might also result in the conviction of a company for corporate manslaughter. One example occurred in the Victorian case *R v Denbo Pty Ltd and Another*,<sup>64</sup> where the company entered a guilty plea to avoid the prosecution of individual personnel for manslaughter. A second example is where the ‘directing mind’ of the company owes a duty of care under OHS legislation as the company itself. This seems the case only in small companies with perhaps one or two directors who are both the ‘hands’ and ‘mind’ of the company. A third example arises in cases where a court accepts the ‘directing mind and will’ of a larger company satisfied the gross negligence test through having a duty of care to act towards the deceased, potentially through personally ‘procuring, directing, or authorising’ the company to commit the unlawful act that caused death, or if the ‘directing mind and will’ acted towards the deceased in a way that they assumed personal responsibility towards them to create a ‘special relationship’ (CCA, 2000: 3.27)<sup>65</sup>.

This kind of duty of care and such knowledge has never been proven against a ‘directing mind and will’ of a larger company in the Australia, Canada or the United Kingdom.<sup>66</sup>

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<sup>63</sup> For further discussion see Farrar and Hannigan (1998: chapter 24) and Malcome (1997)

<sup>64</sup> Supreme Court of Victoria, 14<sup>th</sup> June 1994. The Director of Public Prosecutions accepted a guilty plea to corporate manslaughter in exchange for dropping of charges of manslaughter against an individual director, who was instead prosecuted under the *Occupational Health and Safety Act 1985* (Vic). See Chesterman (1994)

<sup>65</sup> It was suggested by a solicitor in one of the author’s PhD interviews in July 2003 that it could be argued that a director owes the duty to adhere to the duty of care under health and safety legislation and to put systems in place to ensure compliance with the law under the *Health and Safety at Work Regulations 1999* (UK). See also Parker and Conolly (2002)

<sup>66</sup> Note however the ongoing cases relating to Network Rail and Balfour Beatty in relation to the Hatfield rail crash in October 2002 (Wells, 2003 and [http://www.guardian.co.uk/uk\\_news/story/0,3604,998033,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,998033,00.html)) and relating to Barrow borough council in relation to an outbreak of legionnaires disease (Ward, 2004)

## ***Success And Failure In Prosecuting Corporate Manslaughter Through Gross Negligent Manslaughter***

The first conviction for corporate manslaughter in England and Wales concerned a company with one director who became the first director to be given a custodial sentence when convicted of manslaughter.<sup>67</sup> Similar circumstances existed in more recent convictions in England and Wales and the first conviction of a company in Victoria, Australia.<sup>68</sup> However there have also been two high-profile failed attempts to prosecute larger companies in England and Wales for corporate manslaughter following public disasters. These were: the failed prosecution against P&O ferry company after the Zeebrugge tragedy, despite findings by an independent inquiry that ‘from top to bottom the body corporate was infected with the disease of sloppiness’ (Wells, 2001: 109); and the failed prosecution against Great Western Trains following the Southall rail crash, where a high-speed commuter train went through a red light in London and hit a goods unit, resulting in seven deaths and the injury of 151 (Wells, 2001: 109-111). Evidence disclosed at trial suggested the company encouraged drivers to depart on time even if train safety systems were not working.<sup>69</sup>

Both of these trials failed because no evidence of gross negligent manslaughter was presented at trial against individuals who could be identified as the ‘directing mind and will’ of the corporation. Due to public disquiet following the failed prosecution in the Southall train disaster, the Attorney General referred the question of corporate manslaughter to the Court of Appeal as an issue of public importance that required clarification. The court held the identification doctrine remained the only basis for attributing criminal liability for manslaughter to corporations under English law.<sup>70</sup> The court suggested reform of corporate manslaughter law was for the British Government, pointing out the Government was already

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<sup>67</sup> *R v Kite and others, Independent*, 9th December 1994. See Slapper and Tombs (1999: 33 – 34) for further discussion. The directors guilt however was very clear and the company very small, and so the director was *in fact* and *in law* the actual company

<sup>68</sup> In the United Kingdom see *R v Jackson Transport (Ossett) Ltd, Health and Safety at Work*, November 1996, the more recent *R v Teglgard Hardwood UK Ltd* and another, *Yorkshire Post*, 28<sup>th</sup> February 2003, and TUC (2003: Appendix). In Victoria see *R v Denbo Pty Ltd* and another, Victorian Supreme Court, 14<sup>th</sup> June 1994. For further discussion of the corporate manslaughter situation in Victoria, see Corns (1991). See also Johnstone (2004: 466 and 475).

<sup>69</sup> The commuter train had been fitted with a protection system that had been promised after earlier rail incidents but the driver had not been trained to use it. The safety system that the train had installed had not been working properly. Great Western Trains pleaded guilty to their general duty under s 3 (1) *Health and Safety at Work Act 1974* (UK) and were fined a record £1.5 million (Wells, 2001: 109-111)

<sup>70</sup> *Attorney General's Reference (no. 2 of 1999)* [2000] 3 All ER 182

considering proposals to reform the law.<sup>71</sup> The authoritative Court of Appeal judgement also rejected the argument that the company's duty of care could form the duty of care needed under gross negligent manslaughter (see also Lissack QC, 2000). It was held that the duty of care required under gross negligent manslaughter is that of an individual and not the company, with that individual then potentially being identified with the company through the identification doctrine.

These failed corporate manslaughter prosecutions are examples of a litany of failures to prosecute successfully (and more importantly to even prosecute) using manslaughter law following industrial deaths, and have indicated to some that corporate actors are immune to or above criminal law. The issues of the inadequacy of present law stems from the identification doctrine and its practical application following industrial deaths. These failed convictions and the failure to prosecute are widely discussed in academic literature and form the basis of many calls for corporate manslaughter law reform. Without the duty of care on behalf of the directing mind of a corporation the prosecution of any individual for gross negligent manslaughter and for this reason also the company for corporate manslaughter collapses.

Showing that something done in the boardroom is a cause of death (a key element of gross negligent manslaughter prosecutions) is also not particularly easy either, even though the criminal law has clearly developed on the issue of causation. A related point is that it is also difficult to establish that acts of directing minds are a 'substantial' cause of death (Appleby, 2003). At present it seems the courts are willing to look beyond the immediate cause of death (perhaps a mistake by an employee) towards a more systems-based approach. Would the event which caused the industrial fatality have happened if there had been a system in place? If not, was the failure to put a system in place criminal? If so, then who is it that should put this system in place? These questions could potentially lead back to a director or directing mind of a company thus establishing the line of causation between a director and

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<sup>71</sup> *Ibid.* at p 192

the deceased. By failing to put a system in place to prevent the death, the senior office could be said to have caused the death.<sup>72</sup>

### *Conclusions*

This paper has so far identified the problems in prosecuting corporations and individual corporate personnel following industrial death, which in turn led back to both (i) the problem with using the identification doctrine to attribute criminal accountability to corporations and (ii) the actual make up of individual criminal offences and the difficulty of proving that senior personnel of corporations owed a duty of care to the deceased. Recent reform proposals (one of which has been implemented) seek to overcome these problems. In the next section we consider these proposals, and explain the varied approaches different jurisdictions have taken to the problem of the law's response to industrial death.

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<sup>72</sup> See for instance the related discussion in Parker and Conolly (2002)

## Section Four

### Reform In The Criminal Law's Response to Industrial Deaths: Organisations - Where Are We Now?

In recent years proposals have been put forward in Australia and Canada to reform *in general* the methods for attributing criminal liability to organisations. The proposals either do away with the identification doctrine for attributing criminal liability to organisations or extend the doctrines ambit to cover more individuals within an organisation who could then be classified as its 'directing mind and will' or as 'senior officers'. These proposals tend to adopt some form of the aggregation principle outlined in section two. Such reforms could potentially cover both prosecutions following industrial deaths and injuries and all other kinds of criminal organisational activities. The reforms provide evidence of a shift away from wholly individual notions of criminal liability to more collective notions; and seek to attribute organisational corporate criminal responsibility based on systems failures, organisational cultures, and management failures.

Proposals have also been put forward in Australia and England and Wales to deal *specifically* with the existing law of manslaughter as it applies to organisations, and develop a specific crime relating to industrial death. These proposals provide further evidence of this shift away from the individual notions of criminal liability for manslaughter to more collective notions for attribution of criminal liability to organisations. These proposals are obviously narrower in their approach than general rules for attributing criminal responsibility to organisations, dealing with just one offence and looking at the law's response only to industrial death.

First this section examines the more general attribution reforms by explaining aggregation principles as they have been proposed by various jurisdictions. It is important to distinguish the aggregation principle as it applies to the various *mens rea* requirements of intent, recklessness and negligence, because the aggregation principles tend to vary in their application to these measures of fault. The analysis will start with a consideration of the proposals already passed into law by the Australian Commonwealth jurisdiction (*Criminal Code Act 1995* (Cth)) and identically applied in the Australian Capital Territory (*ACT Criminal*

*Code 2002*). There shall then be a discussion of the recently updated organisational criminal responsibility provisions contained in *Canadian Criminal Code*.

### ***Criminal Code Act 1995 (Commonwealth of Australia) Provisions***

In Australia, the Criminal Law Officers Committee of the Standing Committee of Attorneys-General in 1992 put forward a radically different method for attributing criminal responsibility to the ‘corporate’ entity.<sup>73</sup> This approach hinges on the notion of ‘corporate culture’, or the policies and practices adopted by companies as their method of operation. The approach is argued to cast ‘a much more realistic net of responsibility over corporations than the unrealistically narrow’ *Tesco* principle<sup>74</sup>. The rationale for holding companies liable on this basis is that:

‘the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the organisation.’ (Field and Jorg, 1991: 111)<sup>75</sup>

The principles have been embodied in the *Criminal Code Act 1995 (Cth)*.<sup>76</sup> Section 12.3 establishes new methods for establishing the *mens rea* of ‘corporations’ where the fault element is other than negligence. It provides that:

‘1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

2) The means by which an authorisation or permission may be established include:

(i) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

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<sup>73</sup> For commentary on the provisions, see Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992: part five)

<sup>74</sup> *Ibid* at pg. 107

<sup>75</sup> As quoted in the Criminal Law Officers Committee (1992: 111)

<sup>76</sup> The provisions of the Code clearly owe much to the work of Fisse (1990: 605-608); but see his criticism of the Interim Report in Fisse (1991: 1) and Fisse (1991: 166). For a discussion of the *Criminal Code Act 1995*, see Woolf (1997: 257)

- (ii) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (iii) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (iv) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.’

The concept of a ‘corporate culture’ is defined in section 12.3(6) as:

‘... an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.’

In section 12.3(6) the board of directors of a corporation is defined as ‘the body exercising the corporation’s executive authority, whether or not the body is called the board of directors’ and high managerial agent as ‘an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation’s policy because of the level of responsibility of his or her duties.’

Offences such as manslaughter by gross negligence<sup>77</sup> that form the basis of a corporate manslaughter prosecution are dealt with by section 12.4 which provides that:

- ‘(2) If
  - (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of that body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be established by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying information to relevant persons in the body corporate.’

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<sup>77</sup> Section 5.5 outlines the ‘fault’ element for negligence, and provides that ‘A person is negligent with respect to a physical element of an offence if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.’

These Australian Commonwealth proposals partially reject both the *Tesco* identification and personal liability principles as a basis for criminal liability and look more to the corporation's policies and practices as a basis for determining criminal culpability. The proposals also allow aggregation of the acts of various individuals as a basis for the criminal liability of the corporation.

The *Criminal Code Act 1995* (Cth) came into effect in the Commonwealth jurisdiction on 15th March 2000. It was envisaged that the Criminal Code would be adopted by all Australian States and Territories and would in due course form the basis of all Australian criminal law. However, identical provisions to those in the Commonwealth Code have been incorporated only in the smallest Australian jurisdiction, the Australian Capital Territory, through the *Criminal Code 2002* (ACT) in sections 51 (fault elements other than negligence) and 52 (negligence).<sup>78</sup> As States lay down criminal law in Australia, the Commonwealth provisions therefore only apply to a very limited range of Commonwealth offences that do not for instance relate to traditional criminal offences (like manslaughter) or OHS offences until such time as States or territories (like the ACT) legislate otherwise.

### ***Canadian Criminal Code Provisions***

The Canadian Federal Parliament has also recently passed similar reforms for attributing criminal responsibility to organisations to those adopted by the Australian Commonwealth through inserting passages into the *Canadian Criminal Code*.<sup>79</sup> The main purpose of this legislation<sup>80</sup> was to expand the present common law and in particular the identification doctrine, which has been viewed throughout Canadian society as unable to cope with situations in which modern corporations in particular should be held criminally accountable following industrial death. Therefore the legislation codifies and develops existing law on the attribution of criminal responsibility to 'organisations' (including corporations).

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<sup>78</sup> Note that chapter two of the *Criminal Code Act 2002* (ACT), which contains these "General Principles of Criminal Responsibility" does not apply to 'a pre-2003 offence' (see s 7).

<sup>79</sup> Bill C-45 (Can) became part of the Canadian Criminal Code on 7th November, 2003. For more detailed commentary on the new law, see Archibald, Jull and Roach (2004)

<sup>80</sup> The Bill was dubbed the 'Westray Bill' following the failure to prosecute both companies and personnel after the Westray mining disaster (see Tucker, 1995).

The new laws rely on an expanded term of ‘organisation’ that has been included in section two of the *Canadian Criminal Code*. This term is more expansive than that of the ‘corporation’ used in the *Criminal Code Act 1995* (Cth) in Australia. In the *Canadian Criminal Code* an ‘organisation’ is defined as:

‘(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.’

Also of importance is an extended definition of the term ‘a senior officer,’ which is defined in section two as ‘a representative who plays an important role in the establishment of an organisation’s policies or is responsible for managing an important aspect of the organisation’s activities and, in the case of a body corporate, [automatically] includes a director, its chief executive, and its chief financial officer.’ The expanded definition of a ‘representative’ in respect of the organisation includes a ‘partner, employee, member, agent or contractor of the organisation.’

The new laws lay out the situations in which an organisation shall become a party to an offence committed by a representative of the organisation through two provisions: one related to negligence offences and another related to offences with fault other than negligence. First, section 22(1) of the *Criminal Code* now states that where the fault element of a crime is negligence:

‘an organisation is party to an offence committed if (a) acting within the scope of their authority (1) one of its representatives is a party to the offence, or (2) two or more representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and (b) the senior officer who is responsible for the aspect of the organisations activities that is relevant to the offence departs – or the senior officers collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent the representative of the organisation from being a party to the offence.’

Second, section 22(2) states that where the offence relates to a fault element other than negligence:

‘an organisation is a party to the offence if, with the intent in part to benefit the organisation, (a) one of its senior officers (acting within the scope of their authority) is a party to an offence; (b) having the mental element required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they do the act or make the omission specified in the offence; or (c) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.’

In conclusion, the Australian Commonwealth proposals (adopted in the Commonwealth and ACT) and the Canadian proposals look at changing the rules for attributing all kinds of criminal liability to organisations whilst utilising existing criminal offences such as murder and gross negligent manslaughter following for instance an industrial death. The new laws potentially allow criminal liability to be attached more easily to organisations following industrial deaths, although the provisions are as yet untested.

In addition to these general attribution developments, specific new offences have also been passed or proposed which apply only when individuals are killed at work and/or in public disasters. These new offences seek to overcome the deficiencies outlined in discussion on the identification doctrine as it applies to corporate manslaughter and vary according to the jurisdiction. These proposals can be distinguished according to jurisdiction by the different approaches to issues of attribution that they use and which kinds of industrial death would be covered by the particular proposals. These proposals go further to suggest that new criminal offences be created rather than rely on the common law rules for manslaughter by gross negligence outlined in section three above.

### ***Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) Provisions***

Following the debate surrounding the *Crimes (Industrial Manslaughter) Amendment Bill 2002* (ACT), the Australian Capital Territory became the first Australian jurisdiction to enact specific legislation related to industrial (or corporate) manslaughter on 27<sup>th</sup> November 2003. The *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) built upon the 2002 Bill and created specific criminal offences relating to *recklessly* or *negligently* caused industrial death. The 2003 Act also built upon the *Criminal Code 2002* (ACT) that introduced the Model Criminal Code provisions on corporate criminal liability into ACT law (as contained in the *Criminal Code Act 1995* (Cth)- see above). It is important to note however that the corporate

criminal liability provisions of the *Criminal Code 2002* (ACT) relate only to corporations, whereas the 2003 ACT Act covers ‘employers’, which would include ‘employers’ who are not corporations.

The impact of the new *Crimes (Industrial Manslaughter) Amendment Act 2003* provisions perhaps should not be overestimated given that the ACT is a very small Australian jurisdiction (and in April 2004 the Commonwealth introduced a Bill to make sure the Act did not apply to any Commonwealth government employers);<sup>81</sup> since self-government there have been 20 industrial fatalities and three recorded in 2002/03,<sup>82</sup> therefore having significantly lower industrial fatality rates than other jurisdictions covered in this paper. The *Crimes (Industrial Manslaughter) Amendment Act 2003* did not address the issue of attributing criminal liability to corporations – this issue had been addressed with the enactment of Part 2.5 of the *Criminal Code Act 2002* (ACT) (see above), although those provisions did not apply to ‘pre-2003’ offences, hence the need to re-enact manslaughter provisions in 2003. Given that the ACT Government expects the legislation to address only the most reckless and negligent organisations and their senior officers, it may be some time before the complex and legalistic provisions are tested in a prosecution and their effectiveness in overcoming common law deficiencies becomes assessable. However, as was stated by the ACT Government during the passage of this legislation, it is symbolic and a message is sent to citizens that even if the offence is never prosecuted in the ACT, an industrial death caused by recklessness or negligence is as morally blameworthy and should be as condemned as any other death.<sup>83</sup>

The *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) introduces Part 2A (containing sections 49A-49E) into the *Crimes Act 1900* (ACT). Section 49C creates the new offence of industrial manslaughter applicable only to ‘employers of workers’. An employer is defined specifically in section 49A as ‘(a) a person who engages the worker as a worker of the person; or (b) an agent of the person engages the worker as a worker of the agent.’ A worker is also defined specifically in the same section as:

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<sup>81</sup> *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004*

<sup>82</sup> ‘Industrial Manslaughter Fact Sheet’ accompanying the Media Release by Katy Gallagher MLA ‘Industrial Manslaughter Laws Passed,’ 27<sup>th</sup> November 2003.

<sup>83</sup> Ibid.

‘(a) an employee (defined as a person engaged under a contract of service); or (b) an independent contractor (defined as a person engaged under a contract for services); or (c) an outworker (defined as an individual engaged by a person (the principal) under a contract for services to treat or manufacture articles or materials, or to perform other services— (i) in the outworker’s own home; or (ii) on other premises not under the control or management of the principal; or (d) an apprentice or trainee; or (e) a volunteer (a person who provides services— (1) for, or in relation to, the trade or business of someone else; or (2) for an entity for, or in relation to, a religious, educational, charitable or benevolent purpose or otherwise in the public interest; and (ii) receives no payment for the provision of the services (other than reasonable out-of-pocket expenses).’

Section 49C states that an employer commits the offence of industrial manslaughter if:

‘(a) a worker of the employer – (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and (b) the employer’s conduct causes the death of the worker; and (c) the employer is (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.’

Section 49B provides that in terms of the ‘conduct’ that caused the industrial fatality, an employer or senior officer’s omission to act can be ‘conduct’ if:

‘it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from— (a) an act of the employer or senior officer; or (b) anything in the employer or senior officer’s possession or control; or (c) any undertaking of the employer or senior officer.’

The definition of the concepts of recklessness and negligence on which these provisions rely are contained in the *Criminal Code 2002* (ACT) that itself was modelled on the *Criminal Code Act 1995* (Cth) in relation to persons and corporations. This codified existing common law principles of criminal responsibility and introduces new corporate criminal accountability provisions (as discussed above). According to section 20(1) *Criminal Code 2002* a person (not including a corporation) would be *reckless* in their conduct that lead to an industrial fatality if ‘(a) they were aware of a substantial risk that serious harm would result to the worker; and (b) having regard to the circumstances known to them, it was unjustifiable to take that risk.’ The question whether taking a risk is unjustifiable would be a question of fact (section 20 (3)). According to section 21 of the *Criminal Code 2002* (ACT), a person would be *negligent* in relation to causing an industrial fatality if ‘the person’s conduct merits criminal punishment for the offence because it involves – (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that death

of a worker would result.’ If the person prosecuted was a corporation, then Part 2.5 *Criminal Code Act 2002* applies, which itself adopts the corporate responsibility provisions of the *Criminal Code Act 1995* (Cth) as outlined above.

### ***Queensland Government Proposals***

The Queensland Government Discussion Paper *Dangerous Industrial Conduct* essentially proposed that Queensland incorporate the *Criminal Code Act 1995* (Cth), applying to the ‘corporation’ as a body incorporated under the existing corporations law.<sup>84</sup> Under the new offence, it was proposed that:

‘a corporation and its management would be criminally responsible for intentional, reckless or negligent behaviour that results in death or injury to persons affected by the activities of the corporation [that is, employees and members of the public] where (1) the behaviour was dangerous, in that it was unlawful or otherwise fell far below what would reasonably be expected [within the current definition of criminal negligence, as discussed above in section three]; (2) the behaviour was that of an officer, agent or employee of the corporation acting within the actual or apparent scope of their employment or within their actual or apparent authority; and (3) where the behaviour was intentional or reckless, the behaviour is to be attributed to the corporation if it expressly, tacitly or impliedly authorised or permitted the behaviour.’

Section three of the proposals would then relate back to the fault provisions discussed above in the *Criminal Code Act 1995* (Cth). Where the behaviour was negligent, the conduct of any number of the corporation’s employees, agents or officers would also be aggregated. The Queensland Government however announced that it would not be implementing these new proposals for the time being.

### ***Victorian Government Proposals***

In Victoria, following the publication of the *Crimes (Industrial Manslaughter) Bill* and the consultation that preceded and followed it, a revised *Crimes (Workplace Deaths and Serious Injury) Bill*<sup>85</sup> was introduced into State Parliament in November 2001. This Bill passed

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<sup>84</sup> See Queensland Government, Department of Justice and Attorney General (2000)

<sup>85</sup> Crimes (Workplace Deaths and Serious Injuries) Bill – Introduction Print, viewed at

through the lower house of Parliament, the Legislative Assembly, but failed to get through the upper house, the Legislative Council, in May 2002 and was eventually withdrawn. The Bill sought to add additions to the *Crimes Act 1958* (Vic) in relation only to workplace deaths, and would not, if it had become law, have encompassed public disasters. The Victorian provisions only covered the death of ‘workers’, defined in section 11 to include ‘employees (including senior officers), persons deemed by legislation to be employees, persons (including independent contractors) engaged by the employer or by another person on behalf of the employer, outworkers, apprentices and trainees, and self-employed persons.’

The Bill proposed ‘to introduce new criminal offences of corporate manslaughter and negligently causing serious injury by a body corporate in certain circumstances; and to impose criminal liability on senior officers of a body corporate in certain circumstances.’<sup>86</sup> The revised proposals contained in the *Crimes (Workplace Deaths and Serious Injuries) Bill* stated in section 13:

‘that a body corporate which by negligence kills (a) an employee in the course of his or her employment by the body corporate; or (b) a worker in the course of providing services to, or relating to, the body corporate, was guilty of corporate manslaughter.’

For the purposes of this offence, conduct was ‘negligent’ if it involved ‘such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances and such a high risk of death or really serious injury that the conduct merits criminal punishment’ (sections 14B(1) and (2)). In determining whether a body corporate was negligent, ‘the relevant duty of care is that owed by a body corporate to the person killed...’ (section 14B(3)). Such a duty is as contained in the general duties under the *Occupational Health and Safety Act 1985* (Vic) in sections 21-25. The proposals also stated in section 14(B)(4) that in determining whether a body corporate was negligent, the conduct of the ‘body corporate as a whole’ must be considered. The proposals then state in sections 14(B)(5-6):

‘(5) For the purposes of sub-section (4)-  
(a) subject to paragraph (b), the conduct of any number of the employees, agents or senior officers of the body corporate (a) may be aggregated; (b) regard may be had

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[http://dms.dpc.vic.gov.au/archive/Autumn\\_2002/bills/B01048/B01048I.html](http://dms.dpc.vic.gov.au/archive/Autumn_2002/bills/B01048/B01048I.html)

<sup>86</sup> *Crimes (Workplace Deaths and Serious Injuries) Bill* – Introduction Print. Also see the speech of Attorney General Mr. Hulls to the Legislative Assembly on 22 November 2001, *Vic Hansard*, p 1921

to the negligence of any agent in the provision of services but that negligence must not be attributed to the body corporate.

(6) Without limiting this section, negligence of a body corporate may be evidenced by the failure of the body corporate--

- (a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or
- (b) to engage as an agent a person reasonably capable of providing the contracted services; or (c) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or
- (d) to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or
- (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.'

The Bill was strongly supported by the Victorian Labor Party (who presently and at that time formed the Government of Victoria) and also many Australian Trade Unions organisations,<sup>87</sup> but faced strong opposition from the Australian Liberal Party and the National Party (who blocked the legislation in the Legislative Council) and also from employers and employer associations.<sup>88</sup> At present, it is unclear what is to come of the planned reforms as the Labor Government has stated they will not reintroduce legislation into Parliament (Skully, 2002). This has appeared surprising especially to those within the Victoria Trade Union movement as since the December 2002 election, Labor now hold a considerable majority of seats in both the Legislative Assembly and a majority in the Legislative Council. It was (according to the Labor Party) because of this failure to have a majority in the Legislative Council that the Bill failed to become law.

However, the Labor Party has stated that the *Occupational Health and Safety Act* 1985 will be updated to 'ensure Victoria has a coordinated and proactive approach to improve the health of Victorian workers'<sup>89</sup> and the *Occupational Health and Safety Act* 1985 (Vic) was reviewed (see section six below). It may be the *Occupational Health and Safety Act* will be updated to include provisions similar to those proposed on corporate manslaughter,<sup>90</sup> or it may be the Victoria

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<sup>87</sup> Most importantly, the Victorian Trades Hall Congress (VTHC), see media release of VTHC (2002)

<sup>88</sup> Eight employer associations launched a vigorous public campaign to prevent the Bill becoming law, taking out full-page newspaper advertisements with the title 'Minister Hulls, the solution to workplace deaths will not be found in bad law!' *The Herald Sun* (2002)

<sup>89</sup> Victorian Labor Party (2002), in particular Chapter ten on 'Fairness and Safety at Work,'

<sup>90</sup> In a recent response to a letter from Deanne and Jack May of the Industrial Deaths Support & Advocacy Inc. (IDSA) to Attorney General Rob Hulls, the Attorney General stated 'The Government remains committed to implementing its promise for all Victorians to enjoy a safe workplace. While the Government does not currently

Government are keeping a keen eye on developments in other jurisdictions, including England and Wales.

### ***British Government Proposals***

The English Law Commission in a Consultation Paper in 1994 looked at the issues raised by involuntary manslaughter. It proposed a new test of killing by gross carelessness to replace 'gross negligence' manslaughter (as discussed above in section three). The test posited in 1994 would be three pronged: (a) did the defendant's conduct cause the death?; (b) ought the defendant reasonably to have been aware of a significant risk that her or his conduct could result in death or serious injury?; and (c) did the defendant's conduct fall seriously and significantly below what could reasonably have been demanded of her or him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm? (Law Commission, 1994)

More important, for our purposes, the Commission proposed that there be a special regime applying to corporate liability for manslaughter, but emphasised that it was concerned to work out ways in which the 'general law of manslaughter may be applied in the particular circumstances of the corporation, and not whether standards and requirements should apply to corporations which are different from those which apply generally' (Law Commission, 1994: 127). The Commission argued that the real difficulties with attributing criminal liability to corporations lay in trying to attach liability for crimes of *conscious* wrong doing (that is, those requiring *mens rea* as discussed above in section two). The crime of manslaughter proposed by the Commission was not, it argued, a crime of *conscious* wrong doing, but one of neglect or omission, occurring in the context of serious objective culpability. For these reasons they simply proposed that in relation to corporations, 'the direct question would be whether the corporation fell within the criteria for liability of that offence' as described above (Law Commission, 1994: 129). In affect the Commission retained the traditional

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propose to re-introduce the previous Bill, other ways to toughen occupational health and safety laws are being considered.' Response dated 20<sup>th</sup> February 2003

identification attribution principle discussed in section two, although it seemed to have broadened the range of individuals whose knowledge could be attributed to the corporation.

As to the question of whether the corporation should have been aware of the risk, the Commission emphasised that a corporation chooses the types of business activities it conducted, and the question was simply whether the persons responsible for taking the business decisions of the organisation were, or should have been, 'aware of a significant risk that those organisations, either at their commencement or during their continued pursuit, could result in death or serious injury' (Law Commission, 1994: 130). This might involve having to examine the nature of the company's operations or the degree of hazard in some detail.

As to the third issue, the company's conduct in dealing with the risk, the inquiry was whether the company arranged its affairs in a reasonable way given the presence of the risk. In other words, how did the company operate to prevent injury or death? The steps taken by the company to discharge the duty of safety, and the systems it has created to run its business, would be directly relevant (Law Commission, 1994: 131-132).

Following consultation, the Law Commission radically altered its position in a report published in March 1996 (Law Commission, 1996). It rejected the possibility of making corporations personally liable in the sense now accepted in relation to the general duties in the OHS statutes (see sections one and two above), on the grounds that 'it would virtually make the corporation strictly liable for the acts and omissions of any employee which resulted in death' (Law Commission, 1996: 7.26/7.27). Instead the Commission proposed to apply the elements of the individual offence of killing by gross carelessness, outlined above, but 'in a form adapted to the corporate context and, in particular, in a form that does not involve the principle of identification' (Law Commission, 1996: 7.36).

In particular, the Law Commission removed the issue of whether the corporation was aware of the risk of death or serious injury, or whether a reasonable person in the position of the corporation would have been aware of the risk, because it accepted that it is impossible to place a corporation in the same position as a human being. In effect this change removed

the need to impute *mens rea* to a company through identifying a natural person who had the required knowledge or intention, but retained the other two elements of the Commission's proposed test for manslaughter. The first element, causation, was adapted slightly in relation to corporations in the 1996 proposal. For individuals, it must be shown that she or he acted in a particular way, and that this conduct caused the death. For a corporation, the question focuses not on individual conduct, but on 'management failure' (Law Commission, 1996: 8.19), and requires an examination of things done in the management and organisation of the company, rather than on a purely operational level. This does suggest that the chain of causation might be broken if the actual cause of the fatality was the actions of someone outside management (Ridley and Dunford, 1997: 110).

A corporation would be guilty of corporate killing if '(a) a management failure by the corporation is the cause or one of the causes of a person's death; and (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.' For the purposes of this definition, there was said to be a management failure on behalf of the corporation if '(a) the way in which its activities are managed or organized fails to ensure the health and safety of persons employed in or effected by those activities; and (b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.'

In short, the Commission's revised proposal is that a corporation would be guilty of corporate killing if at least one of the causes of a person's death could be attributed to management failure, and that failure constituted conduct falling far below what could reasonably be expected of a corporation in the circumstances. Management failure would occur if 'the way in which an organisation's activities were managed or organised failed to ensure the health and safety of persons affected by those activities.'<sup>91</sup>

Since 1996 British Governments have had before them the report by the Law Commission relating to a new offence of corporate manslaughter. In May 2000, some years following the Law Commission's report, and after a crucial New Labour election pledge in 1997 to

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<sup>91</sup> Law Commission (1996) and HSE (1996: 2). For comment on the proposals, see Wells (1996) and Ridley and Dunford (1997)

introduce new laws relating to corporate manslaughter, the public was consulted about what was considered the appropriate form for legislation to take<sup>92</sup> (Home Office, 2000). The new offence of corporate manslaughter proposed by the Law Commission and accepted in the Government's consultation document seemed to be primarily addressing the present problems relating to the attribution of criminal responsibility towards corporate bodies for both public disasters and workplace deaths.<sup>93</sup>

As discussed above, the Law Commission recommended in its report utilising a concept of 'management failure' as the basis for attributing liability to corporations for corporate manslaughter. The Government's consultation document stated "The Government considers that while there may prove to be difficulties in proving a "management failure" there is a need to restore public confidence that companies responsible for loss of life can properly be held accountable in law..." (Home Office, 2000: 15). And so despite noting that there may be difficulty in applying the concept of management failure,<sup>94</sup> and despite very little discussion of what the term actually meant in practice, the Government generally supported the findings of the Law Commission and proposed to adopt these findings subject to the suggestion that the offence potentially apply not just to body corporates but to a wider category of 'undertakings.'<sup>95</sup>

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<sup>92</sup> For a critical discussion of the whole process of regulatory reform and consultation relating to corporate manslaughter legislation in the United Kingdom, see Tombs and Whyte (2003)

<sup>93</sup> The government outlined in its consultation document that "There have been a number of disasters in recent years, which have evoked demands for the use of the law of manslaughter, and failures to successfully prosecute have led to an apparent perception among the public that the law dealing with corporate manslaughter is inadequate. This perception has been heightened because the disasters have been followed by inquiries which have found corporate bodies at fault and meriting very serious criticism and in some instances there have been successful prosecutions for offences under the *Health and Safety at Work Act 1974*... The Law Commission also considered that there were many cases of deaths in factories and building sites where death could and should have been avoided...(The HSE commented) In the majority of such cases the disaster is caused as a result of a failure of systems controlling the risk with the carelessness of individuals being a contributing factor.' See Home Office (2000: 13-14)

<sup>94</sup> See also Wells' somewhat critical commentary of the Law Commission's proposals, where she suggests that 'It will undoubtedly be easier in many cases to address corporate culpability through "management failure" than through the directing mind notion. But it is not enough to speak of "management" or "the way its activities are managed or organized" without resurrecting the same old problems: which employees and which systems can be said to be those of the company? If there is one lesson from the P&O and other corporate killing sagas, it is that corporate defendants are highly motivated and well placed to exploit the metaphysical gap between "the company" and its members' (2001, 125-126). See also Sutton and Haines (2003: 154), where the authors suggest larger companies have the resources to dispute the law and to exploit its ambiguities and can avoid prosecution for this reason

<sup>95</sup> An 'undertaking' was defined as 'any trade or business or other activity providing employment' (Home Office, 2000: 15-16)

Despite a vast response to the consultation document and numerous calls for legislation from interested parties, the issue of what form corporate manslaughter legislation would take was subject to a 'brief regulatory assessment (RIA)<sup>96</sup> two years later. The official line from the Home Office during the past few years has been that 'The Government is committed to extending criminal liability for involuntary manslaughter to corporations ... and will do so when Parliamentary time allows...'<sup>97</sup>

On 21<sup>st</sup> May 2003, conscious of the manifesto pledge shadowing the Government, in the face of noisier campaigning, and in an apparent plan to protect the passage of the new Criminal Justice Bill through Parliament, announcements were made that the government 'intended' to legislate on corporate manslaughter.<sup>98</sup> Nothing has since been published. It is therefore unclear what form any proposed legislation may take and whether it will build on the proposals as contained in the consultation document of May 2000. The issue of crown immunity for any proposed offence and the breadth of application of the developed offence (as to who it shall apply to) seem to be requiring further thought. Reports suggested that when proposals were released in Autumn 2003 (although this date has now passed) they will be subject to further consultation (Mathiason, 2003), leading many to ask whether there will ever be a new law. One is left wondering whether the promises contained in both the 1997 and 2001 election manifestos will ever be fulfilled?

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<sup>96</sup> In response to the one of the authors' emails to the Home Office, this reply was received on 11<sup>th</sup> December. 'An RIA is a routine part of policy making in areas which the Government intends to legislate. It is necessary in order that policy aims are proportionate to the costs that may be incurred by businesses and other organizations concerned. The RIA will inform the process of deciding what the legislation will look like finally...The Government has yet to make final decisions on these proposals...'

<sup>97</sup> *Ibid.* Andrew Dismore MP has been a vocal critic of the governments lack of progress in the area of corporate manslaughter and has recently filed an early day motion in Parliament, 'Corporate Manslaughter Early Day Motion 793,' viewed on the web at <http://edm.ais.co.uk/webblink/html/motion.html/ref=793>. It states 'That this House regrets that since 1997, over 2000 workers and members of the public have died in work-related incidents, as well as the Southall, Paddington, Hatfield and Potters Bar disasters; notes that during the same period only four companies and two directors have been convicted of the offence of manslaughter and that these were all small firms; recalls that the Law Commission recommended a new offence of corporate manslaughter in 1996 to hold large as well as small undertakings to account for causing death through grossly negligent failures of management; believes that such an offence would increase the accountability of directors and their equivalents, and encourage better safety standards in undertakings; and calls on the Government to put before Parliament measures to enact a new offence of corporate manslaughter as soon as possible.' The early day motion however has very little political force and no legal force

<sup>98</sup> The Home Office stated 'A timetable for legislation and further details will be announced this autumn,' viewed at [http://www.ukonline.gov.uk/News/NewsArticle/fs/en?CONTENT\\_ID=4006654&chk=Em8TfT](http://www.ukonline.gov.uk/News/NewsArticle/fs/en?CONTENT_ID=4006654&chk=Em8TfT)

Despite the British Government announcing that the existing law of corporate manslaughter is unworkable, particularly when applied to industrial deaths occurring within larger corporations, the Crown Prosecution Service (CPS) has suggested that there is a realistic prospect<sup>99</sup> of conviction of companies for corporate manslaughter and individual directors/senior personnel for gross negligent manslaughter in the case of both the Hatfield rail disaster and Barrow Borough Council's role in a legionnaires outbreak. The CPS has decided it is in the public interest to go ahead with these prosecutions. If these prosecutions resulted in conviction, one could be left with the situation where the existing law (and the application of the identification doctrine) is seen to be workable if in fact there is evidence of gross negligence on behalf of the senior personnel of larger companies and if the case is investigated and prosecuted properly (see section nine below). And if this was the case, would a new law in fact be necessary? It could just be that the Government might leave such decisions to the judiciary and wait and see.

### ***Conclusions***

Some of these new offences discussed in this section cover not only manslaughter-type crimes but also crimes for causing serious injury to workers or members of the public. However this subject is beyond the scope of this paper. For example, the proposed Victorian reforms created the offences of corporate manslaughter for workplace fatalities (section 13) but also the offence of negligently causing serious injury (section 14). The Queensland reform proposals covered deaths and 'grievous bodily harm.'

This section outlines various attempts to address existing deficiencies in the law in order to conduct manslaughter prosecutions more effectively and therefore also to increase the number of prosecutions against organisations (including but not exclusively so the corporation) following industrial deaths. The proposals are seeking to reform the identification doctrine as the principle applied to issues of organisational accountability using existing traditional criminal law either by reforming the general law of attributing criminal

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<sup>99</sup> This is the test that the CPS must apply alongside a public interest test when prosecuting under the criminal law (CPS 2000)

liability to organisations to enable the mens rea of a number of individuals to be aggregated, or by bringing in specific new offences relating to industrial death. None of the laws implemented have yet been tested by prosecutors and so the effectiveness of the legally complex provisions is still in question. However, it cannot be denied that the attempt to utilise an aggregation style approach to the issue of organisational criminal responsibility, looking holistically at an organisations' actions and its systems of management, is a brave and contemporary step forward for criminal legal doctrine as it is applied in an organisational context.

## Section Five

### Reforms In The Criminal Law's Response To Industrial Deaths: Individuals within the Organisation – Where Are We Now?

As briefly discussed above, individual actors within organisations (whether directors, managers or front line workers) can already be prosecuted under existing OHS statutes and traditional criminal law if their conduct is deemed morally culpable and they satisfy the tests of criminal liability. The traditional criminal law provisions, and some of the provisions under the OHS statutes (see for example, section 52 of the *Occupational Health and Safety Act 1985* (Vic), but contrast section 26 of the *Occupational Health and Safety Act 2000* (NSW)) require the presence of some kind of *mens rea*.

For instance, an individual whose acts or omissions satisfy the gross negligent manslaughter test (as laid down in section three) can be prosecuted and convicted as a worker, manager or director of an organisation just as if they were an individual citizen and had been grossly negligent in events that led to another's death. All of the OHS statutes provide for individual liability of workers and (apart from the Commonwealth and the ACT) senior organisational personnel that, in certain circumstances, can be prosecuted alongside the organisational liability prosecutions. Some of the provisions require some form of *mens rea* to be proven. For example, section 52(1) of the *Occupational Health and Safety Act 1985* (Vic) provides that where an offence against the Act committed by a body corporate is proved to have been committed with the 'consent or connivance of, or to have been attributable to any wilful neglect on the part of, an officer of the body corporate that officer is also guilty of that offence.' Section 52(3) provides that an 'officer' means 'a director, secretary, executive officer, any person in accordance with whose directions the directors are accustomed to act, or a person involved in the management of the body corporate.' Similar provisions can be found in Western Australia and the Northern Territory (see further Johnstone, 2004a: 431-436).

These provisions can be contrasted with similar individual liability provisions in for instance New South Wales or Queensland States in Australia where there is a reverse burden of proof

and no *mens rea* requirement in particular individual prosecutions under the OHS statutes. Section 26(1) *Occupational Health and Safety Act 2000* (NSW) provides that if a corporation contravenes any provisions of this Act or its regulations, ‘each director of the company, and each person concerned in the management of the corporation’ is taken to have contravened the same provision unless the director or person satisfies the court that ‘he or she was not in a position to influence the conduct of the corporation or he or she, being in such a position, used all due diligence to prevent contravention by the corporation’ (see also Johnstone, 2004a: 432-433).

As we have discussed above, however, rarely are individuals prosecuted and convicted in response to industrial deaths either for traditional or OHS offences (HSE 2002/2003; Unison and CCA 2003). This in part has been the result of both the ambiguous wording used in OHS statutes and the tests applied by traditional criminal law (i.e. difficulty of proving that an individual owed a duty of care to the deceased in a prosecution for gross negligent manslaughter). Therefore in the past decade numerous proposals have aimed to add additional criminal offences in relation to corporate officers to the existing OHS statutes, as well as suggesting new offences that would fall under the ambit of traditional criminal law.

Some of these proposals have also sought to overcome the difficulties in proving that a duty of care was owed by senior management to a deceased worker, by creating an *explicit* duty of care on behalf of all involved in management of organisational activities towards workers. This explicit duty could take the form of a general obligation on senior organisational personnel to protect workers’ health and safety or to do everything ‘reasonable’ to implement a safe system of work. Such a duty of care would build upon or perhaps replace those few exceptions at present to the rule that no duty of care is owed to workers by senior organisational personnel. It would also reduce the difficulties in establishing that a duty has been breached, that the failure to act as amounted to gross, criminal, negligence, and that the gross negligence had caused the death. This reform would enable the existing offence of gross negligent manslaughter to be more widely used against senior organisational personnel and therefore also against the organisations themselves (as corporate manslaughter) through the ‘directing mind and will’ identification test outlined in section two above.

The additional offences that have been proposed to apply to individual organisational personnel often also piggy back onto organisational offences by individuals ‘contributing to’ any new organisational offence. Some proposals have even, at various stages of their development, suggested automatic liability of directors if their organisation had been found liable under an organisational OHS or traditional criminal law offence. Such measures could be interpreted to be in blatant disregard for human rights and presumptions of innocence, and have usually been rejected early on in the legislative drafting process. Some proposals have introduced the complex issue of objective culpability based on what it is suggested a reasonable director or senior officer should have known or done, as opposed to their actual fault and actual moral culpability in what they thought or did. Such issue leads to a discussion as to why senior officer of organisations should be treated in this way, and general criminals not.

### ***Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) Provisions***

As noted above in section four, the *Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT)* creates two new offences of industrial manslaughter by recklessness and by negligence which are also applicable to senior officers. Section 49D creates the new offence of industrial manslaughter applicable to senior officers of the employer that employs the killed worker. A senior officer is defined extensively in section 49A as meaning:

- ‘(a) for an employer that is a government, or an entity so far as it is a government entity—any of the following: (i) a Minister in relation to the government or government entity; (ii) a person occupying a chief executive officer position (however described) in relation to the government or government entity; (iii) a person occupying an executive position (however described) in relation to the government or government entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entity; or
- (b) for an employer that is another corporation (including a corporation so far as it is not a government entity)—an officer of the corporation; or
- (c) for an employer that is another entity—any of the following: (i) a person occupying an executive position (however described) in relation to the entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity; (ii) a person who would be an officer of the entity if the entity were a corporation.’

An officer of a corporation is also defined extensively in section 49A as meaning the definition of officer in the *Corporations Act 2001* (Cth), section nine, where officer is:

- ‘(a) a director or secretary of the corporation; or
- (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation's financial standing; or (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.’

Section 49D states that the senior officer commits the offence of industrial manslaughter if:

- ‘(a) a worker of the employer – (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the senior officer's conduct causes the death of the worker ; and
- (c) the senior officer is (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.’

As was noted above in section four, section 49B provides that in terms of the conduct that caused the industrial fatality, an employer or senior officer's omission to act can be conduct if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from ‘(a) an act of the employer or senior officer; or (b) anything in the employer or senior officer's possession or control; or (c) any undertaking of the employer or senior officer.’ The terms *negligence* and *recklessness* were also defined in the previous section in relation to their application to the organisational offences under the *Criminal Code Act 2002*.

### ***The Victorian Government Proposals***

The Victorian revised *Crimes (Workplace Deaths and Serious Injury) Bill* attempted to build the liability of ‘senior officers’ onto the corporate offences outlined above in section four.

‘Senior officer’ has the same meaning as ‘officer’ has in relation to a corporation in the *Corporations Act 1990* (Vic), namely:

- ‘(a) a director or secretary of the corporation; or
- (b) a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation’s financial standing; or (iii) in accordance with whose instructions and wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors of the corporation) ...’

Sub-section 14C(1) provided that if it was proven the body corporate had committed (although not necessarily was convicted of) the crime of corporate manslaughter (see previous section), a senior officer of that body corporate could also be found liable for an indictable offence. Senior officers acting without any fee, gain or reward could not be liable for these offences. This senior-officer crime would have committed the offence if:

- ‘(a) a senior officer of the body corporate:
  - (i) was organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate; and
  - (ii) in performing or failing to perform his or her organisational responsibilities, contributed materially to the commission of the offence by the body corporate; and
  - (iii) knew that, as a consequence of his or her conduct, there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or really serious injury to a person; and
- (b) having regard to the circumstances known to the senior officer, it was unjustifiable to allow the substantial risk referred to in paragraph (a)(iii) to exist.’

The Bill then went on in section 14C(3) to state that:

- ‘For the purposes of sub-sections (1)(a)(i), without limiting the matters that may be considered in determining whether a senior officer of a body corporate is organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate, consideration may be given to-
- (a) the extent to which the senior officer was in a position to make, or influence the making of, a decision concerning the manner in which the conduct, or that part of the conduct, was performed; and
  - (b) the participation of the senior officer in a decision of the board of directors of the body corporate concerning the manner in which the conduct, or that part of the conduct, was performed; and
  - (c) the degree of participation of the senior officer in the management of the body corporate.’

The recent Laing Report in Western Australia discussed at length the existing liability of senior officers under the *Western Australian Criminal Code* and *Occupational Safety and Health Act 1984* (WA) (Laing Report, 2002: 122-132). It recommended (recommendation 34) that the *Occupational Safety and Health Act* be amended to make senior officers liable for the death or serious injury of workers if the deceased or injured was owed a duty of care by the corporation, the senior officer breached this duty and the breach was one of gross negligence. This recommendation would lapse in ‘the event that investigation procedures under the Criminal Code and/or amendment of the Criminal Code provide an effective alternative process.’ These recommendations have not yet been acted upon.

### ***Queensland Government Proposals***

The Queensland Discussion Paper also recommended a new offence for individuals of ‘dangerous industrial conduct’ where they ‘behave dangerously in a workplace (that is, in a way that was unlawful or fell far below what would reasonably be accepted)’ and the behaviour results ‘in death or grievous bodily harm.’ This offence was discussed in the previous section and the Discussion Paper provides no further elaboration of the individual liability provisions. While this recommendation would appear to overcome the ‘duty’ issue discussed earlier in this paper, it might still not address the ‘omissions’ issue.

### ***British Government Proposals***

Again, as noted in section four, the Home Office proposed two new crimes of reckless killing and killing by gross negligence, and these crimes would be applicable to senior officers of corporations or undertakings. The proposals also suggested that company directors be able to be disqualified if it was found that their conduct has ‘contributed’ to the corporation committing the offence of ‘corporate killing.’ Although as was noted above it is unclear what the present status of the Home Office proposals are, what is clear is that individual offences attaching to senior management and directors have been dropped from the proposals.

### ***The Duty Of Care Issue***

The other issue that proposals have discussed addressing is the issue of the duty of care owed by senior management or the directors of an organisation to a person killed through industrial activity. If a specific duty of care was created between senior management and the deceased, in the form of a duty of care on behalf of senior management to ensure the health and safety of their workers is maintained, this duty could then form the basis of prosecution of individuals under existing gross negligent manslaughter law. Following on from this, a new explicit duty could therefore facilitate successful corporate manslaughter prosecutions through the identification doctrine as it presently exists.

### ***Canadian Criminal Code Provisions***

The Canadian legislation discussed above has introduced a specific duty along these lines into the Criminal Code (section 217.1). Section 217.1 provides that ‘everyone who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.’ The Government stated that they see this clause as a codification of the similar duty in existence under common law.

### ***British Government Proposals***

Similar proposals have been put forward in relation to a duty on company directors in the England and Wales. In *Revitalising Health and Safety: Strategy Statement June 2000* (DETR, 2000) the British Government first proposed to legislate in this area in June 2000. Action Point 11 of this document stated that:

‘The Health and Safety Commission will develop a code of practice on Directors’ responsibilities for health and safety, in conjunction with stakeholders. It is intended that the code of practice will, in particular, stipulate that organisations should appoint an individual

Director for health and safety, or responsible person of similar status... The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities' (DETR, 2000: 26).

The Health and Safety Executive went on to publish guidance to directors on such issues in July 2001 by setting out best practice in five action points. The guidance was to apply to all types of organisations in both the private and public sectors. The guidance was, however, voluntary and did not place any legal obligations on companies. The five action points were as follows:

- (1) The board needs to accept formally and publicly its collective role in providing health and safety leadership in its organisation
- (2) Each member of the board needs to accept their individual role in providing health and safety leadership for their organisation
- (3) The board needs to ensure that all board decisions reflect its health and safety intentions, as articulated in the health and safety policy statement
- (4) The board needs to recognise its role in engaging the active participation of workers in improving health and safety; and
- (5) The board needs to ensure that it is kept informed of, and alert to, relevant health and safety risk management issues. The Health and Safety Commission recommends that boards appoint one of their number to be the health and safety director' (HSE, 2001<sup>100</sup>)

As no Parliamentary action was undertaken to legislate in the area of directors' duties, the *Company Directors' (Health and Safety) Bill* was introduced by Ross Cranston MP under the Ten Minute Rule on 25<sup>th</sup> March 2003. The bill proposed to insert into the *Companies Act* 1985 provisions on directors' duties regarding OHS, and in section 309A stated:

- (1) It is the duty of the directors of a company to exercise their powers to discharge their duties in the interests of the health and safety of its employees and others affected by its operations.
- (2) It is the duty of the directors of the company to take effective steps to ensure that the company acts in accordance with the obligations imposed on it by any applicable law relating to health and safety.
- (3) The directors of a company are to be taken to meet the requirements of subsection (2) if they (a) act reasonably and in good faith; (b) inform themselves about the company's health and safety obligations in the particular circumstances of its operation; and (c) consider any report of a health and safety director appointed under section 282 (4) of the Act.'

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For research on the implementation of this guidance, see HSE (2003a)

The Bill (through inserting section 282 (4) into the *Companies Act* 1985) then placed an obligation on public companies to appoint a health and safety director among its directors (as required under the HSC guidance) and to publish clearly in company's annual reports the name of their health and safety directors. The Bill also inserted section 309B into the *Companies Act*, relating to the duties of the company health and safety director. It states:

'(1) It shall be the duty of the health and safety director appointed under section 284 (2) of this Act (a) to monitor on a regular basis the health and safety performance of the company; (b) to ensure the health and safety statement of the company reflects current board priorities on the matter; (c) to ensure that the company's management systems provide for effective monitoring and reporting of its health and safety performance; (d) to report to other directors immediately on any significant health and safety failure in the company and on recommendations for changes; and (e) to report to the board on health and safety implications of decisions....'

The Bill did not progress beyond its second reading and was not taken up by the Government. Evidence suggests that the HSE have now decided not to recommend that legal duties be imposed upon company directors.<sup>101</sup>

### ***Conclusions***

This paper has now laid out new laws and proposals both for developed organisational and individual criminal responsibility following industrial deaths. This section has explored ways in which senior organisational personnel can be brought under existing OHS and traditional criminal law so as to facilitate prosecutions of corporate officers with particular responsibility for industrial deaths. These proposals create express requirements on senior personnel in relation to OHS which would facilitate prosecution by creating express criminal offences for actions or omissions that would not under existing law be criminal. It is important to note also however that the Canadian law originally in its draft stages proposed individual offences attached to the organisational liability reforms but these were dropped. It seems also that this has been the case with the British proposals. The issue of individual liability relating to industrial deaths seems to be much more contentious issue than organisational liability.

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<sup>101</sup> See <http://www.corporateaccountability.org/directors/govt.htm>

In the next section of the paper we review the organisational sanctions debate and look at the contemporary sanctions attached to the laws and proposals outlined above. The proposals have not only considered or brought into law contemporary means of attributing criminal responsibility to corporations and their personnel through introducing new laws and new attribution methods, but have also reconsidered the need to impose upon organisational actors effective and innovative sanctions suited to their particular context and the crimes that have been committed.

## Section Six

### The Forgotten Sanctions Debate: Providing Context

The developments in the law on criminal responsibility for industrial deaths have not been accompanied by fundamental reform of sanctions that can be attached to organisations and their personnel following criminal conviction for both OHS and traditional criminal law offences (Gunningham and Johnstone, 1999: 256). This is in contrast to the ever-growing sanctioning options for non-organisational offenders.

The fine is still the most widely used sanction against organisations and their personnel following an industrial death, despite numerous discussions drawing attention to the availability of innovative and alternative organisational sanctions (Cahill and Cahill, 1999; Fisse, 1983; Gobert, 1998; Gunningham and Johnstone, 1999; Heine, 1999; Wells, 2001). Indeed, the use of fines against organisations has been subject to much academic criticism (see in particular the discussions in Gunningham and Johnstone (1999: 257-259) and Wells (2001: 32-37)). Criticisms have focused on the effectiveness and equity of using fines to punish organisational offenders. These grounds include: the low level of the maximum fines available, and of the actual penalties imposed. Offenders can simply pay the fine and not remedy the hazard, review its OHS systems, or discipline the managers responsible for the offence — suggesting to offenders that offences are ‘purchasable commodities’ (Fisse, 1994: 103); the impact of fines can be passed on to ‘innocent parties’, such as consumers, workers and others, who can do little to remedy the OHS systems failure; and fines affect the financial values of the company, and not non-financial motivations (for example, reputation and pride) which might shape attitudes to OHS (see further Gunningham and Johnstone, 1999: 256-258).

Given that organisational offences and offenders vary, there seems to be a strong case for variety in the sanctions available in an organisational sanctions regime. However, it seems that the criminal justice and regulatory systems in most of Australia, Canada and the United Kingdom have merely modelled organisational sanctions on the use of the fine and imprisonment. Sanctions have merely been taken from an individual human offender

context and inserted into an organisational offender context (Stone, 1978: 357-8). Also in contrast to the sanctioning frameworks applied to non-organisational offenders, in the organisational context there appears to be little regard for making the sanction fit the particular offender and offence, by investigating the background of an organisational offender, its assets, and how these two factors could be relevant in the level of sanction that should be imposed in response to a particular criminal conviction in order to have a beneficial effect on future organisational conduct (Wells, 2001: 32). There seems to have been a lack of thought in how organisational sanctions regimes could achieve more effective and utilitarian outcomes.

The innovative and contemporary approaches in attributing criminal liability to organisations following industrial deaths (see above in sections four and five) presents the opportunity for a wide ranging discussion of innovative organisational sanctions and the need for a contemporary look at what is available and useful in this context. If the reforms to the law itself are to be effective in altering organisational behaviour with the hope of reducing the number of deaths related to industrial activity, then the issue of sanctions appears paramount in bringing about utilitarian benefits beyond simply the law's symbolic power in condemning wrong doing. To these reforms we shall return in section seven. In this section, we discuss the general sanctioning options available to a judge or jury following criminal conviction of an organisation and its personnel and we shall briefly highlight the non-court ordered actions which a regulator can undertake following breach of OHS statutes.

### ***Financial Penalties – Where are we now?***

Following an industrial death the financial penalty is the most widely used sanction available to a court once there has been a criminal conviction against an organisation or its personnel. Yet the level of fines imposed on organisations and their personnel following industrial deaths have been historically low and at times described by the courts as 'derisory' (Wells, 2001: 33). Commentators have also drawn attention to the minimal impact that even the largest fines awarded can have on larger corporations (Gobert, 1994: 394; Wells, 2001: 32)

In Australia from the late 1980s, the courts (particularly in New South Wales and Victoria) began to develop sentencing principles for offenders contravening the OHS statutes. The courts have emphasised that deterrence is the rationale behind sentencing (although some influential cases have adverted to corporate ‘rehabilitation’). In determining the level of fine, the courts must reflect the gravity of the offence – the nature of the breach rather than the consequences (for a discussion of the relevant cases, see Johnstone, 2003: 246-258; Johnstone, 2004a: 450-455; and Thompson, 2000: 53-64). The levels of fines for OHS offences in Australia have generally been relatively low (see Johnstone, 2004a: 456-457) although in recent years there have been some substantial fines.

A turning point in England and Wales was the Court of Appeal’s judgement in *R v Howe and Son (Engineers) Ltd.*<sup>102</sup> The court stated that fines imposed for OHS offences were too low to act as a suitable deterrent in achieving the instrumental aim of OHS law to decrease the amount of industry related injury and death. Specific sentencing guidelines were also laid down in this case (HSE, 2002: 6; Wells, 2001: 33). The sharp increase in fine levels during the past century is reflected in recent statistics that show that the average fine imposed on companies in particular following death of a ‘worker’ in England and Wales was £28,908 in 1996/7, £42,813 in 1997/8, and increasing to £66,911 in 1998/99 (CCA and Unison 2002, 15).

The past few years have also seen record fines for large corporations following public disasters and workplace deaths both in Australia and the United Kingdom. We mentioned in section one the fine of £1.5m awarded against Great Western Trains following the Southall rail crash; the £2m awarded against Thames Trains following the Paddington rail crash; and the Aus\$2m fine awarded against Esso following the Longford gas explosion.<sup>103</sup> However one must also consider the British Health and Safety Executive (HSE) statistics for the years 2002/03 that report the average fine in cases following a death (that is work-related) as being only £29,564 compared to £38,055 the previous year which was a drop of 22%. The HSE

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<sup>102</sup> [1999] 2 All ER 249

<sup>103</sup> Wells (2001: 34) also refers to the £1.7m fine against Balfour Beatty following the collapse of a tunnel they were building for the Heathrow Airport express link in 1999

expressed disappointment to see the overall level of fine following a work-related death fall given the expectation that fine levels would continue to rise (HSE, 2003: 7).

Commentators have stressed that if the financial penalty is to be used so widely against corporations and their personnel in relation to OHS and in particular following industrial deaths, then it should be developed to reflect the corporate offender as opposed to the general individual within society (Cahill and Cahill, 1999; Gobert, 1998: 2-6; Gobert and Punch, 2003: 221-233; Gunningham and Johnstone, 1999: 261). This would mean in some way linking the level of fine to the ability of the corporate offender to pay. It would also be necessary to reflect the reality of the large profits that are made and returned to shareholders and senior executives in large and in particular multinational corporations, at times at the expense of health and safety of workers and members of the public (Corns, 1991: 354; Wells, 2001: 33-34). Examples of attempts at such an approach include the Australian *Crimes Act 1914* (Cth) that introduces pecuniary sanctions for corporations up to five times the level of those applied to individuals for similar offences, and the European Union's antitrust laws (*EEC Council Regulation Art. 15(2)*) which provides provisions allowing fines of up to the percent of an offending companies previous year's global turnover.<sup>104</sup> Gunningham and Johnstone (1999: 275) draw attention to the possibility of imposing equity fines upon offending organisations, which they describe as a stock or share dilution measure (see also Fisse, 1983: 1233-7 and Gobert and Punch, 2003: 232). An equity fine could be used instead of imposing a large cash fine on an organisation, and would be a fine imposed against the security of the corporation. Gunningham and Johnstone see the benefit of such a measure in affecting management's interests by 'reducing the value of their share options and holdings' in the organisation (at 275).

### ***Corporate Sanctions other than Fines – Where are we now?***

Although the fine is often the only court ordered sanction that is used against organisations and their personnel following conviction in relation to an industrial death in Australia,

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<sup>104</sup> Cited from Wells (2001: 34) where she also cites Fisse (1990: 228). For further discussion also see the Federal Sentencing Guidelines in United States, as explored by Coffee (1999)

Canada and the United Kingdom, there are other existing possibilities (Australian Law Reform Commission, 1987; Cahill and Cahill, 1999; Fisse, 1985; Gobert and Punch, 2003: chapter seven; Gunningham and Johnstone, 1999: chapter seven; New South Wales Law Reform Commission, 2001). There are the existing options of imprisonment and disqualification for corporate personnel, although rarely used, and also the remedial order requiring the offender to remedy the breach of the OHS statute or traditional criminal law that caused or could have caused a risk to the health and safety of workers and members of the public. Many of the more contemporary sanctioning options for organisations and their personnel are generally only explored in academic work and rarely been discussed or implemented generally into the criminal justice framework and in particular in the OHS statutes. But before we discuss court ordered sanctions however, it is worth mentioning briefly enforcement action that OHS regulatory authorities as opposed to the courts can take against organisations and their personnel following an industrial death.

Regulatory authorities in particular are able to utilise panoply of enforcement measures once there is evidence of a breach of regulatory standards. As we have discussed in section one, damage need not have occurred from the breach as OHS law is concerned more with processes and duties than outcomes. Usually, however, when an industrial death has occurred, such an aggravating circumstance means enforcement would consist of the regulatory agency bringing formal prosecutions through the courts system and not through the measures highlighted below.

OHS regulatory authorities in most jurisdictions are, in addition to more informal measures, able to issue improvement notices and prohibition notices (see in particular Johnstone, 2004a: 403-419 for commentary on Australia). An improvement notice requires a statutory contravention to be remedied within a specified time, and a prohibition notice prohibits an activity that poses an immediate threat to the health and safety of any person. The courts can enforce these notices in the event that they are not acted upon, or indeed are breached.<sup>105</sup> In some Australian jurisdictions OHS regulators can also impose infringement notices ('on-the-spot fines') or accept 'enforceable undertakings' from organisations that have breached their obligations under the OHS statute (see further Johnstone, 2004a: 419-420 and 422-426).

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<sup>105</sup> See for instance s 33(4) *Health and Safety at Work Act 1974* (UK)

### (a) Imprisonment

Once a conviction has resulted for breach of an OHS statute, the courts are able to use the imprisonment option against individuals (an organisational legal personality such as a corporation could not practically be imprisoned). Although imprisonment is only available in very limited circumstances and very rarely utilised as an option in sentencing corporate misconduct, its use has at least been recognised since the mid 1990s.

Section five outlined the offences that can be committed by corporate officers under the Australian OHS statutes. Imprisonment is only available as a sanction in some of the Australian OHS statutes, in particular those of the Commonwealth, Victoria, Queensland, South Australia and the Northern Territory,<sup>106</sup> and generally imprisonment is not a sanction for a breach of the corporate officer provisions alone. Imprisonment usually is only available for offences like contravening a prohibition notice, assaulting an inspector, or repeat offences. Corporate personnel can also be imprisoned following conviction for any of the traditional criminal law offences such as homicide (including gross negligent manslaughter). We have already highlighted such cases where this has occurred

The position is similar in the England and Wales. Section 37 *Health and Safety at Work Act 1974* (UK) states ‘Where an offence under any of the relevant provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar office of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.’ This clause would only result in imprisonment where, for instance, an individual themselves could be proved to have breached a prohibition notice imposed by a health and safety inspector, a somewhat rare and

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<sup>106</sup> For a discussion of the possible sanctions under the current Australian OHS statutes, see Johnstone (2004: 440-450).

more deliberate act.<sup>107</sup> To date, only five people have been sent to prison for breach of OHS law in England and Wales, and none have been imprisoned in the last three years (HSE, 2003: 11).

Once individual senior personnel of organisations are convicted of an OHS offence, disqualification is also an option, through for instance the *Company Director's Disqualification Act 1986* (UK). However, there have only ever been eight directors disqualified for health and safety offences in England and Wales, and none in the last two years (HSE, 2003: 11).

#### (b) Remedial orders

In a few jurisdictions, the courts are also able, in addition or instead of any penalty, to issue a remedial order following a breach of an OHS statute. The court may order within a certain period of time that a person (corporate or individual) take 'such steps as are specified' for remedying the particular situation that led to breach of OHS law (see sections 113 and 117 of the *Occupational Health and Safety Act 2000* (NSW) and section 42 *Health and Safety at Work Act 1974* (UK)). Failure to adhere to the court order could put the person charged with implementing the remedial order in contempt of court.

#### (c) Winding up the organisation as a sanction

In her review of non-financial organisational penalties, Wells (2001: 37-39) discusses a variety of more original organisational sanctions presently utilised in Canada and the United States of America. She notes that the equivalent of corporate imprisonment, corporate dissolution or compulsory winding up, has been used in some jurisdictions of the United States in cases of corporations formed for an illegal purpose.<sup>108</sup> Gunningham and Johnstone liken this sanction to the organisational equivalent of capital punishment, although unlike capital punishment, they point out such a measure need not be permanent (1999: 274). They suggest that in the most extreme circumstances when an organisation is a danger either to

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<sup>107</sup> See also s 52 *Occupational Health and Safety Act 1985* (Vic) and more generally Johnstone (2004a: 433-435). For a full list of the offences that can result in imprisonment of corporate personnel in relation to health and safety at work, see in particular s33 (4) *Health and Safety at Work Act 1974* (UK) and Johnstone (2004a: 432-435).

<sup>108</sup> Referring to Heine (1999: 246)

the public or its workers then ‘the blunt instrument’ may well be justified. Wells (2001: 37) also notes that since 1988 United States federal courts have been able to restrain a convicted corporation from acting in specific ways,<sup>109</sup> and Box (1983: chapter two) suggests that nationalisation for a limited time should also be an option once an organisation has been convicted of a particularly grave criminal offence. However such severe sanctions as these do not apply in OHS regulatory frameworks in Australia, Canada and the United Kingdom although we argue that policy makers might consider their introduction for extreme cases.

(d) Adverse publicity orders

Commentators also note the potential benefit of utilising adverse publicity orders following organisational conviction against image weary corporations as part of general regulatory enforcement strategies (Cahill and Cahill, 1999; Gobert and Punch, 2003: 236-239; Gunningham and Johnstone, 1999: 263-6; and Wells, 2001: 37-38). This sanction is available for OHS offences in New South Wales (see *Occupational Health and Safety Act 2000*(NSW) section 115), in the Australian Capital Territory where a manslaughter conviction has been recorded under the new manslaughter provisions (see *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) section 49E(2) – see below), under the United States *Sentencing Guidelines of Organisations* (United States Sentencing Commission, 1991; and Gunningham and Johnstone, 1999: 263-266) and in the Canadian province of Nova Scotia through the *Occupational Health and Safety Act 1996* (Nova Scotia) (see section 75). The regulatory OHS authorities in England and Wales, Victoria and Queensland in particular have started to compile a list of OHS convictions and/or prosecutions on their websites, in a less formal strategy of using adverse publicity.<sup>110</sup>

(e) Corporation probation

Another important sanction, yet to be introduced into Australian OHS statutes, is corporate probation, which enables a company to be placed under probational surveillance and or

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<sup>109</sup> Referring to *US v Allegheny Bottling Co.* (1988) 695 FSupp 856

<sup>110</sup> See <http://www.hse-databases.co.uk/prosecutions/>  
and <http://www.workcover.vic.gov.au/vwa/home.nsf/pages/prosecutions>

organisational processes and procedures reformed following criminal conviction. Already used in Canada and the United States, Wells (2001: 38) suggests that this ‘judicially mandated restructuring of internal corporate processes’ paid for by the offending organisation could be at least as effective as the financial penalty and could be modified to contain elements both punitive and rehabilitative.<sup>111</sup> Gunningham and Johnstone (1999: 266) argue that the supervisory order or corporate probation is a way of overcoming many of the deficiencies which the fine brings to the organisational context, and suggest that such orders would enable the courts to require an OHS offender to develop and implement an appropriate form of systematic OHS management (see also Parker and Connolly, 2002). The authors highlight three different forms of supervision that could be part of an organisational sanctions framework, with the one chosen depending on the severity of the breach of regulatory law and the situation of the offender. These (see also Bergman, 1992: 1313) are:

- (i) internal discipline orders (a court order that the organisation investigate the offence it has committed and provide a report to the court about the disciplinary proceedings it has conducted);
  - (ii) organisational reform orders (which involve a limited period of judicial monitoring of the activities of the convicted company, through recognised reporting, record keeping and auditing controls designed to increase internal accountability and to improve OHS systems); and
  - (iii) punitive injunctions (which insist on the development of innovative OHS management systems).
- (f) Community service orders

Another option highlighted by Gunningham and Johnstone (1999: 272-274) and Gobert and Punch (2003: 233-236) is the corporate community service order. Widely used in the non-organisational context, rarely has this sanction been used in an organisational context. Gunningham and Johnstone (1999: 277) argue that community service could be easily be modified for application to the organisational offender and could allow the organisation to ‘carry out research or socially useful projects which utilise the resources and the special skills

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<sup>111</sup> Referring to Note, Yale (1979: 365), Prefontaine (1999: 280), and the *Sentencing Reform Act 1984*(US) 18 USC paragraph 3551

of the corporation', in some way related to the organisations original criminal offence. Again, the corporate community service order is available as a possible sanction in New South Wales (*Occupational Health and Safety Act 2000* (NSW) section 116, in the Australian Capital Territory after a manslaughter conviction (see *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) section 49E(2) – see below) and under Nova Scotia's occupational health and safety regime in Canada (*Occupational Health and Safety Act 1996* (Nova Scotia), section 75).

### ***Conclusions***

We argue that these wide-ranging, innovative and contemporary organisational sanctions can increase the deterrent effect of OHS and traditional criminal law prosecutions, and could also require OHS offenders to take steps to improve their systematic management of OHS, which would prevent further workplace injuries and death. In section seven we highlight the use of some of these sanctions in the recent reforms discussed earlier in sections four and five. Although by no means making wide use of these new sanctions, the new and proposed laws at least attempt to take into account the potential for more contemporary sanctions to be as effective and perhaps more appropriate than the financial penalty and are a starting point for a developed and contemporary organisational sanctions regime.

## Section Seven

### The Forgotten Sanction Debate: Contemporary Reforms

This section reviews the new legislative enactments and proposals (discussed in sections four and five) that have included sanctions as part of their reconstruction of organisational criminal accountability.

#### *Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) Provisions*

The *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) provides for an enhanced sanctions framework for employers and senior officers prosecuted under the Act that builds on existing OHS laws and more traditional criminal law. The maximum penalties for both employer and senior officer offences under the Act are \$200,000, imprisonment for 20 years, or both. Such punishment levels were far more punitive than existing OHS and traditional criminal law in this jurisdiction.

Under section 49E(2), if a court finds an employer guilty of the section 49C offence of industrial manslaughter outlined above in section four, in addition to or instead of any other penalty the court may impose, the court may order the employer to do one or more of the following:

‘(a) take any action stated by the court to publicise — (i) the offence; and (ii) the deaths or serious injuries or other consequences resulting from or related to the conduct from which the offence arose; and (iii) any penalties imposed, or other orders made, because of the offence; (b) take any action stated by the court to notify one or more stated people of the matters mentioned in paragraph (a); (c) do stated things or establish or carry out a stated project for the public benefit even if the project is unrelated to the offence.’

Here the legislation is adopting the adverse publicity and community service sanction options that were discussed in section six above. According to section 49E(3), when making such orders, the court ‘may state a period within which the action must be taken, the thing must be done or the project must be established or carried out, and may also impose any

other requirement that it considers necessary or desirable for enforcement of the order or to make the order effective.’

Section 49E(4) states that the total cost to the employer of compliance with an order or orders under subsection (2) in relation to a single offence must not be more than \$5,000,000 (including any fine imposed for the offence). Section 49E(5) states also that if the court decides to make an order under subsection (2), ‘it must, in deciding the kind of order, take into account, as far as practicable, the financial circumstances of the corporation and the nature of the burden that compliance with the order will impose.’ Section 49E(7) provides that ‘if a corporation fails, without reasonable excuse, to comply with an order under subsection (2)(a) or (b) within the stated period the court may, on application by the commissioner for occupational health and safety, by order authorise the commissioner— (a) to do anything that is necessary or convenient to carry out any action that remains to be done under the order and that it is still practicable to do; and (b) to publicise the failure of the corporation to comply with the order.’

### ***Canadian Criminal Code Provisions***

In sentencing organisations convicted of a criminal offence under the *Canadian Criminal Code*, the newly inserted section 718.21 of the Code provides that the court should now consider the following when imposing sentence on an organisation convicted of any criminal offence:

‘the advantage realised by the organisation as a result of the offence; the degree of planning involved in carrying out the offence and the duration and complexity of the offence; whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution; the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees; the cost to public authorities of the investigation and prosecution of the offence; any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence; whether the organization was - or any of its representatives who were involved in the commission of the offence were - convicted of a similar offence or sanctioned by a regulatory body for similar conduct; any penalty imposed by the organization on a representative for their role in the commission of the offence; any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.’

Section 732.1 (3) (3.1) of the *Canadian Criminal Code* deals with probation orders. These can already be served upon corporations following conviction of a criminal offence in some jurisdictions of Canada. The new law lists additional conditions of such probations order, and these include:

‘...that the offender: make restitution to a person for any loss or damage that they suffered as a result of the offence; establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence; communicate those policies, standards and procedures to its representatives; and report to the court on the implementation of those policies, standards and procedures; identify the senior officer who is responsible for compliance with those policies, standards and procedures; provide, in the manner specified by the court, the following information to the public, namely, (i) the offence of which the organization was convicted, (ii) the sentence imposed by the court, and (iii) any measures that the organization is taking - including any policies, standards and procedures established under paragraph (b) - to reduce the likelihood of it committing a subsequent offence; and comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.’

Here again we see the use of the adverse publicity sanction against a convicted organisation through use of additional conditions attached to a probation order. Under the new law however, the court should bear in mind that (section 732.1 (3) (3.2)) ‘before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.’ One might question whether the court is the appropriate body to undertake such a supervisory function.

Although the maximum level of a fine is already unlimited for indictable offences under Canadian federal law, there is a limit on the level of a fine for a summary offence committed by organisations. This is updated so that section 735(1)b which sets the limit of a fine for summary offences at C\$100,000.

### ***The Victorian Proposals***

Following conviction of the offences of corporate manslaughter and negligently causing serious injury by a body corporate as proposed by the Victorian Government in the *Crimes*

*(Workplace Deaths and Serious Injuries) Bill 2001*, the proposals dealt specifically with an innovative sanctions regime that would apply. Under section 14(D)(2) of the Bill:

- ‘The court must impose on a body corporate a fine proportional to the size of the body corporate, taking into account--
- (a) the number of employees of the body corporate and the entities, within the meaning of the Corporations Act, it controls; and
  - (b) the number of persons, including independent contractors and outworkers, providing services to, or relating to, the body corporate and the entities it controls; and
  - (c) if appropriate, the consolidated gross operating revenue for the last preceding financial year of the body corporate and the entities it controls; and
  - (d) if appropriate, the value of the consolidated gross assets at the end of the last preceding financial year of the body corporate and the entities it controls.’

Under section 14(D)(4), in addition to or instead of any other penalty the court might impose on the body corporate, the court could order the body corporate to do one or more of the following:

- ‘(a) to take any action specified by the court to publicise (for example, to advertise on television or in daily newspapers)-
- (i) the offence; and
  - (ii) any deaths or serious injuries or other consequences arising or resulting from the offence; and
  - (iii) any penalties imposed, or other orders made, as a result of the commission of the offence;
- (b) to take any action specified by the court to notify one or more specified persons or classes of persons of the matters referred to in paragraph (a) (for example, to publish a notice in an annual report or to distribute a notice to shareholders of the body corporate);
- (c) to perform specified acts or establish or carry out a specified project for the public benefit (for example, to develop and operate a community service) even if the project is unrelated to the offence.’

Here again we see proposals utilising the possibility of introducing the adverse publicity and community service sanction options into the organisational framework.

In making an order under section 14(D)(4) of the Bill, ‘the court may specify a period within which the action must be taken, the act must be performed or the project must be established or carried out and may also impose any other requirement that it considers necessary or expedient for enforcement of the order or to make the order effective.’ Under section 14(D)(6) the total cost to the body corporate of compliance with an order or orders under sub-section (4) must not exceed- ‘(a) in the case of a body corporate found guilty of corporate manslaughter, Aus\$5,000,000; and (b) in the case of a body corporate found guilty

of negligently causing serious injury, \$2,000,000.’ Under section 14(D)(7) if the court decides to make an order under sub-section (4), it must, in determining the type of order, take into account, as far as practicable, ‘the financial circumstances of the body corporate and the nature of the burden that compliance with the order will impose.’ Finally, under section 14(D)(9), ‘if a body corporate fails, without reasonable excuse, to comply with an order under sub-section (4)(a) or (b) within the specified period, if any, the court may, on application by the Victorian Workcover Authority, by order authorise that Authority- (a) to do anything that is necessary or expedient to carry out any action that remains to be done under the order and that it is still practicable to do; and (b) to publicise the failure of the body corporate to comply with the order.’ Nothing in sub-section (9) prevents contempt of court proceedings from being started or continued against a body corporate that has failed to comply with an order.

### ***The British Proposals***

The British Government’s year 2000 consultation document on corporate killing is the least innovative in relation to organisational sanctions. All that the document suggests is that the Law Commission’s recommendation that the court (in addition to existing powers given to regulatory agencies) should have power to make remedial orders should be accepted, with the responsibility for drawing up the order resting with whichever agency is prosecuting (Home Office, 2000: 21). Under section 5 (1) of the Law Commission’s *Draft Involuntary Manslaughter Bill* (Law Commission, 1996a), it is stated:

‘(1) A court before which a corporation is convicted of corporate killing may ... order the corporation to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death... (5) A corporation which fails to comply with an order under this section is guilty of an offence and liable – (a) on conviction on indictment to a fine; or (b) on summary conviction, to a fine not exceeding £20,000.’

The enforcement authority would also, it is suggested, be given the task of checking compliance with such an order and reporting back to the courts where it was necessary.

## *Conclusions*

As this section has demonstrated, the recent involuntary manslaughter reforms have begun to utilise new sanctioning options to increase corporate criminal accountability. However, it is generally only the adverse publicity order, the community service order, the probation order, and the remedial order that have been used in the organisational context, in addition to the fine and imprisonment options (the latter rarely being used). The wide-ranging additional sanctioning options, including the contemporary fining methods and more interventionist forms of organisational sanctions have not been explored. Most commentators in this area would agree that this reluctance to use the full range of possible sanctions is limiting the preventive potential (through deterrence and corporate rehabilitation) of OHS and traditional criminal law prosecutions.

## Section Eight

### Reforms To Existing Occupational Health And Safety Statutes As A Forgotten Possibility

OHS reforms have not been confined to the development of manslaughter provisions. In both Australia and the English OHS regulatory reviews and strategies have attempted to revitalise existing OHS law, instead of developing new traditional criminal law offences both for organisations and individuals. These proposals and reviews are premised on perceiving the systems of both traditional criminal law and OHS law as complementary rather than mutually exclusive. Indeed, some commentators who see the focus on developing traditional criminal law rather than on strengthening sanctions under existing OHS statutes as a worrying trend, perhaps to the detriment of worker safety (Appleby, 2003; Carson and Johnstone, 1990; Gunningham and Johnstone, 1999). These commentators argue that the sanctioning framework for OHS contraventions should be strengthened, by ratcheting up penalties for breach of existing duties by corporation and individuals, including a wider use of imprisonment as a sanctioning option against organisational personnel and increased fine levels for organisations.

Appleby (2003) suggests in England and Wales it would be better to ‘rehabilitate the status of the *Health and Safety at Work Act 1974*’ for many industrial deaths by emphasising its breach is truly ‘criminal’ (OHS law *is* criminal law) through wider use of imprisonment, increased fines, and more effective prosecution against companies and individuals. Carson and Johnstone (1990) suggest to rely on individual offences such as manslaughter only where death occurs is to devalue and differentiate OHS laws from other criminal law when they should be perceived as equally criminal. They argue that OHS policy makers should try to arrest the tendency for OHS offences to be seen as ‘quasi-criminal’, and should reassert that OHS law is truly criminal and the harm caused by breaching and derogating from OHS standards is as serious as that caused by breaching traditional criminal law. OHS law also has the strength that it can focus attention on proactive as opposed to reactive measures, punishing risk whether or not harm has occurred. Harm that has not occurred but could

occur is as culpable as harm that has occurred, and OHS law allows such risk as apposed to outcome to be prosecuted.

As a means to achieve this increased criminalisation of OHS law, Glazebrook (2002) suggests creating imprisonable offences under existing OHS statutes by extending directors duties through an offence of causing death or serious injury by breaching OHS regulations, and Carson and Johnstone (1990) suggest the inclusion into the *Occupational Health and Safety Act 1985* (Vic) of an offence of causing death through violation of the Act itself or of its attendant regulations, or alternatively, an offence of industrial manslaughter could be incorporated into the Act. Another possibility is that the OHS offences be enacted in traditional criminal statutes like the Crimes Acts or Criminal Codes.

Wells (2001) and Tombs and Whyte (2003) accept the functional role of OHS legislation in addressing some corporate harm, although they suggest it is inappropriate for prosecuting companies that cause death through dangerous conduct precisely because OHS offences within the current framework devalue harm caused. They support calls for more punitive OHS legislation and its more effective investigation and enforcement but only in addition to increased use of 'traditional' criminal law, which has its own special value to them (Wells 2001: 21-31; Tombs and Whyte, 2003: 17-18).

With many of the new traditional criminal law offences that were outlined in section four and five, it could be argued such offences are merely existing regulatory OHS offences under a different name and based on outcome as apposed to risk created, with similar levels of sanctions. The distinction between new corporate killing law and existing OHS law in England and Wales 'could be purely a semantic one...' (Christian 2001) as no additional sanctions following conviction for the new British corporate killing offence have been proposed. If fines are not set higher than existing fines in the OHS statute, no sanction difference would be evident between OHS and traditional criminal laws. The *Health and Safety at Work Act 1974*, in particular, provides already for unlimited fines when cases are tried in the Crown Court, and courts have insisted (as discussed above) that fines under the

*Health and Safety at Work Act 1974* should increase. There is evidence they have substantially increased.<sup>112</sup>

But the main focus of OHS reviews has been on increasing levels of fines, more innovative sanctions, increased use of imprisonment for individual breaches, and possible reform of the provisions dealing with individual criminal liability. Perhaps the individual liability rules contained in existing OHS law are archaic and new duties upon both directors and senior personnel in addition to, rather than dependent upon, existing duties on organisations need to be developed? Another alternative is to perhaps introduce new discrete offences into OHS law, as apposed to separate manslaughter offences that fall within a separate traditional criminal law system, thereby creating two complementary criminal law systems.

Indeed, in 1995 the Australian Industry Commission (1995: Vol I, 116 and 118, recommendation 16) recommended that, on the basis that the ‘maximum penalties (including fines, imprisonment and licence revocation) should provide the courts with the ability to impose a penalty which is sufficient to act as a credible deterrent to others, after allowing for the probabilities of detection and conviction’, and assuming that ‘[h]igher maxima are likely to lead to higher penalties ... all jurisdictions consider an immediate increase in the maximum penalties in their OHS legislation to the levels in Commonwealth Seafarer OHS legislation [\$100,000 for individuals and \$500,000 for corporations]. Governments should also consider further increases in their maximum penalties over time.’ Consequently, in the past few years the maximum penalties for serious OHS contraventions have been considerably increased in New South Wales and Queensland States.

The *Occupational Health and Safety Act 2000* (NSW) provides for maximum penalties of \$825,000 for corporations and \$82,500 for individuals who, being previous offenders, contravene the general duty provisions in sections eight to eleven of the Act, and maximum penalties of \$550,000 for corporations and \$55,000 for individuals who contravene those general duties but who have not previously offended. Maximum penalties for contraventions of the general duty provisions in the *Workplace Health and Safety Act 1995* (Qld) were

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<sup>112</sup> See HSE (2002). This is not of course to say that the increases in fine levels are adequate (see also Wells, 2001: 17-18)

increased in 2003, so that now, where a breach causes multiple deaths, the maximum fine is \$150,000 for individuals; if the breach causes death or grievous bodily harm, \$75,000; if the breach causes bodily harm, \$56,250; and otherwise, \$37,500. The maximum penalties for contraventions by corporations are five times these maxima for individuals (see *Penalties and Sentences Act 1992* (Qld), section 181B).

We also note that in April 2004 the *Occupational Safety and Health Legislation Amendment and Repeal Bill 2004* was introduced in the Western Australian Legislative Assembly, and aimed to bring the maximum penalties in the *Occupational Safety and Health Act 1984* (WA) into line with those available on the east coast of Australia. The Bill increased the maximum fine for a corporation committing a serious offence which was a first offence to \$500,000, with subsequent offences incurring a maximum penalty of \$625,000.

This paper will deal briefly with two other jurisdictions who have announced proposals in the area of OHS penalties.<sup>113</sup>

### ***The British Proposals***

Under the *Revitalising Health and Safety* strategy (DETR, 2000), the British Government said it would 'seek an early legislative opportunity, as Parliamentary time allows, to provide the Courts with greater sanctioning powers for health and safety crimes. The key measures envisaged are to extend the £20,000 maximum fine in the lower courts to a much wider range of offences which currently attract a maximum penalty of £5,000 and the provide the courts with the power to imprison for most health and safety offences... The Health and Safety Commission will advise ministers on the feasibility of consultees' proposals for more innovative penalties' (2000: 24). Despite the more punitive rhetoric, no Government legislation resulted.

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<sup>113</sup> Note also developments in this area within Canada and other Australian states such as Queensland and Western Australia which are not covered in this paper

The Government's intentions were taken up by Lawrie Quinn MP in a private members bill, although given lack of government support, the Bill did not become law. The *Health and Safety At Work (Offences) Bill 2003*, as introduced into the House of Commons on 7<sup>th</sup> January 2003, included proposals under a new schedule (6A) to be inserted into the *Health and Safety at Work Act 1974*. The schedule would have brought in a wider use of the crown court in trying and sentencing health and safety offenders therefore increasing the maximum sentences applicable to a wide range of offences. Financial penalty levels would be raised for some offences from the existing £5,000 if tried summarily to £20,000 with the additional option of six months imprisonment for senior officers implicated in the offences through section 37 of the Act (as highlighted in section five above). Those offences which already carry a £20,000 fine when tried summarily (including the general duty provisions under the *Health and Safety at Work Act*) would remain at this level but the option of imprisonment for six months would also be included. Where offences tried on indictment already have an existing unlimited fine option, this would stay the same, but now also include the option of imprisonment for up to two years. As discussed in section five above, the option of imprisonment for OHS offences at present is very narrow, and this Bill intended to increase attention to the seriousness of existing OHS law.

The *Health and Safety at Work (Offences) Bill 2004* was once again introduced as a Private Members Bill into the House of Commons by Andy Love MP on 10<sup>th</sup> February 2004.

### ***Victorian Government Review***

The *Crimes (Workplace Deaths and Serious Injuries) Bill 2002* (Vic) proposed to increase maximum penalties under the *Occupational Health and Safety Act 1985* (Vic) for body corporates from \$250,000 to \$600,000 or \$750,000. Senior officer offences would also be increased from \$50,000 to a maximum of \$120,000 or \$150,000 and 12 months imprisonment. Following the defeat and then withdrawal of the proposals for industrial manslaughter and increased health and safety penalties contained in this Bill, the Victorian Government announced a review of the *Occupational Health and Safety Act 1985* (Vic). The review reported early in April 2004 (see Maxwell, 2004) and emphasised the fundamental

difference between inchoate and strict liability criminal offences under the *Occupational Health and Safety Act* and breaches of ‘the general criminal law’ (Maxwell, 2004: 13-14). It concluded (Maxwell, 2004: 14) that manslaughter ‘properly remains within the province of the general criminal law’, but recognised that the ‘community in general – and employers and unions in particular – regard a culpable failure to provide a safe working environment as a matter of the utmost seriousness.’ It noted that the penalties for OHS contraventions in Victoria were still well below the levels recommended by the Industry Commission (1995), and considerably lower than the available penalties in New South Wales and Queensland, and recommended (Maxwell, 2004: 14 and chapter 35) that the Victorian Act be amended to provide for ‘substantial increase in the maximum monetary penalties for breach’, and that should be ‘available for first offenders where the breach of duty involves high-level culpability.’ It also recommended that alternative sanctions, particularly enforceable undertakings, adverse publicity orders and community service orders, be made available.

### ***Conclusions***

As can be seen from these two jurisdictions, existing alongside the proposals in relation to the development of existing traditional criminal law to deal with corporate criminal accountability are attempts to reform OHS statutes and the available penalties under those statutes. It may be that any approach considering how to increase corporate criminal accountability for industrial deaths should also focus on the existing OHS regulatory system and to enhancing the appeal and punitiveness of OHS law. Any attempts to utilise only traditional criminal law in the event of industrial death could otherwise lead to the downgrading of the status of OHS law when in fact reform should focus on ensuring that OHS law is truly criminal and should be seen as such. Indeed, as stressed by Appleby (2003) and Carson and Johnstone (1990), the failure to see OHS law as real criminal law can only lead to a less serious approach taken to OHS in general and its deterrence potential.

## Section Nine

### Investigation- A Crucial Part of the Puzzle

In the final section of this paper we focus briefly on problems with investigation and evidence gathering as they relate to the prosecution of organisations and senior personnel following industrial deaths. Some commentators have suggested that the reason many of the investigations following industrial deaths fail to identify the directing mind and moral culpability required by the identification doctrine under existing common law (see section two and three above) is not due to an inherent defect in the existing law, but because of the fact that investigations are not conducted properly due to inadequacies in police training and the resources of regulatory bodies (Appleby, 2002; Simpson, 2002; Slapper, 1999; Tombs and Whyte, 2003). Wells argues these factors have been perpetuated by the mistaken categorisation of industrial deaths as ‘accidents’ and not ‘crimes’ (Wells, 2001: 11-12).

Wells is resistant to conclude legal technicalities corporations exploit will be resolved in favour of strict enforcement of any developed organisational criminal accountability laws, suggesting history shows corporate defendants ‘highly motivated and well placed to exploit the metaphysical gap between “the company” and its members’ (Wells, 2001: 124-126 and see also Gobert and Punch, 2003). Sutton and Haines (2003: 152) suggest larger corporations can avoid prosecution because they have more resources to direct towards compliance efforts, and can appear more virtuous so that when doing the right things is not in a larger corporation’s best interests, it can afford better legal advice and devise schemes to remain within the letter of law whilst defying its spirit. They suggest larger companies have resources to dispute law and exploit its ambiguities to avoid prosecution (see also Gobert and Punch, 2003).

Perhaps existing law is not investigated and enforced effectively because political will to enforce the law is absent, and for this reason legal reform will be ineffective without strengthening the power base necessary to make laws effective (Slapper, 1999; Tombs and Whyte, 2003; Wells, 2001; Snider, 1991)?

The issue of the adequacy of investigation of industrial deaths has come to the forefront through newly implemented processes and reviews of existing processes in Australia and England and Wales. This paper shall briefly highlight one such development in England and Wales, although it is important to note also that reviews are under way in the Victorian Police Force and the recent *Protocol for the Investigation and Provision of Advice in Relation to Workplace Deaths and Incidents of Serious Injury and Prosecutions Arising Therefrom* has been published in New South Wales in January 2004. We shall not discuss here the related problems of misapplication of existing law and regulatory enforcement budgets, which in themselves could contribute greatly to the failure to enforce existing law effectively.

### ***The British Protocol***

The *Work Related Deaths: Protocol for Liaison* (HSE, 2003b) was a joint venture originally between the Police, the Crown Prosecution Service and the Health and Safety Executive in England and Wales, but has now expanded to take in other regulatory enforcement agencies. The Protocol was put together in recognition of the fact that the investigation of industrial death was not properly coordinated and there was a need to emphasise the importance of working together to ‘investigate thoroughly, and to prosecute appropriately, those responsible for work-related deaths in England and Wales’ (HSE, 2003b: 1).

The stated aims and underlying principles of the Protocol are that (HSE, 2003b: 4):

‘an appropriate decision concerning prosecution will be made based on a sound investigation of the circumstances surrounding work-related deaths; the police will conduct an investigation where there is an indication of the commission of a serious criminal offence (other than a health and safety offence), and HSE, the local authority or other enforcing authority will investigate health and safety offences. There will usually be a joint investigation, but on the rare occasions where this would not be appropriate, there will still be liaison and co-operation between the investigating parties; the decision to prosecute will be co-ordinated, and made without undue delay; the bereaved and witnesses will be kept suitably informed; and the parties to the protocol will maintain effective mechanisms for liaison’

The Protocol however does not deal with the more pressing issues of both the resources of the OHS regulatory authority to effectively investigate an industrial death and the ability of the police to adequately investigate deaths that, being organisational in scope, differ

markedly from general criminal investigations. This has worried some commentators in the United Kingdom who are concerned that, whilst the Protocol is significant, ‘the issue of training and the provision of investigation manuals for the police and the HSE needs to be addressed’ (Appleby, 2003).

### ***Conclusions***

It is crucial to look carefully at the existing adequacy of investigations of industrial deaths, for commentators stress the need to consider this alongside changes to the law. It is not enough to change the law itself without also considering that there may be inherent faults in the enforcement of law as written. Although this issue has not been fully explored here, it is crucial to consider the adequacy of legal decisions taken within crown prosecution departments and the ability of regulators and police to investigate OHS breaches due to budget constraints and lack of specialisation in this organisational context. Crucially the effectiveness of police investigations in an organisational context must also be considered. We mention this all in this final section of the paper as it is another important consideration that has not been extensively dealt with or considered in many of the jurisdictions covered in the paper. Yet policy makers should bear in mind these issues if the intention of reforms is to increase accountability of organisations following industrial deaths.

## **Section Ten**

### **Conclusions**

Looking back on the past decade, it is hard not to see at least the potential for rapid change in the way developed Commonwealth legal systems deal with organisational criminal responsibility for industrial deaths. Although the issue of how the law deals with organisational harm has been something the Australian, Canadian and British legal systems have struggled to deal with since the early 1900s, the past decade has seen change in the context of industrial death in certain jurisdictions on a level not seen since the 1940s. During the past decade Australian, British and Canadian law reformers have begun to address organisational criminal responsibility for industrial deaths.

The Australian Commonwealth and Australian Capital Territory and the Canadian Federal jurisdictions have introduced into their legal systems significant new laws for attributing criminal responsibility to organisations. These reforms move away from the identification doctrine which over the years has been utilised by the courts when attributing criminal responsibility to organisations for the vast majority of traditional criminal law offences (see section two above), towards attribution rules with a more holistic, and arguably realistic, way of understanding exactly how organisations think and act, and how they should be held to account. These reforms (discussed in section four above) have the potential to enable prosecution of organisations with inadequate management systems and organisational cultures, which fail to address themselves as a ‘whole’ to the question of the OHS of workers and, in some jurisdictions, members of the public affected by their particular industrial activity. They also present regulators with the possibility of prosecuting a new kind of organisational fault under traditional criminal law, in addition to prosecutions under OHS statutes.

The Australian Capital Territory has also introduced specific industrial manslaughter crimes (see sections four and five above), the first such offences in the jurisdictions we have examined in this paper. Rather than utilising the existing common law of homicide (murder and manslaughter), the ACT jurisdiction has opted for specific new criminal offences that

recognise the unique character of organisational inadequacies that result in death of workers, although the new provisions do not cover deaths of members of the public.

Reform of corporate manslaughter law has also been proposed in Queensland, England and Wales and Victoria. Victoria's proposed organisational criminal accountability legislation (discussed in sections four, five and seven above) was defeated in a hail of angry accusations that the law had failed to prosecute corporate cowboys, and that politicians had 'let them off the hook.' The Victorian Government now seems strangely quiet on corporate manslaughter legislation that in 2001 it said was so necessary and which would have been passed if not for an opposition party using their numbers in the Upper House (the Legislative Council) to defeat the proposed legislation.

The British Government seems to be forever in a process of consultation and redrafting of a corporate killing law that was first discussed some ten years ago. The new proposals are due out any day now, but many with an interest in this area of law are hesitant to conclude it is the intention of the Government ever to see such a law on the statute books. Queensland Government's proposals are not to be implemented for the time being, and the Government has not expressed a clear reason for abandoning the proposals.

Nevertheless, the overview this paper has provided of issues in the development of organisational criminal responsibility following industrial deaths suggests that the debate is likely to preoccupy Governments for some time to come.

What is unclear at this stage is how the legislation that has already been passed will be enforced and prosecuted, and section nine dealt briefly with some of the concerns policy makers must consider if new laws are to have a chance of success. The new legal provisions are legalistic and highly complex and there will no doubt be a series of high profile legal disputes in the courts when an organisation or its personnel are finally prosecuted for one of the new offences. Corporate lawyers will doubtless seek to exploit loopholes in the law and question its meaning and the judiciary will then be called upon to interpret the legislation. Here again there is space for the legislative purposes to be undermined by the traditional

judicial attitude towards organisational criminal responsibility, as outlined in section two above.

A further question is whether politicians and the public should be resisting the calls for traditional criminal law reform and instead should be focusing on strengthening existing OHS law. We suggest that the sidelining of OHS law is a troubling prospect, and that although it is agreed that the traditional criminal law (manslaughter and new industrial manslaughter offences) may well be appropriate in certain circumstances, such offences are only a *reaction* to industrial death that has already occurred. It is crucially important that attention is focused on prevention, and here more punitive use of the criminal law in OHS prosecutions could potentially provide the improvements in OHS that perhaps the traditional criminal law cannot.

We also suggest that alongside the introduction of new traditional criminal laws and the increased punitiveness of existing OHS law, policy makers should also focus on improving investigation in the enforcement of existing criminal law in the organisational context. A need for well informed and competent investigations into organisational harm is crucial if laws implemented are to be effectively enforced, and recent development in developing procedures for investigation of industrial deaths canvassed in section nine above is timely and necessary. Such an approach needs to be backed up by adequate training of investigators, inspectors and prosecutors. Our paper does not extensively touch on the perennial question of adequate resources of OHS regulatory agencies. The effectiveness of any strengthening of laws to allow more effective prosecution of organisational criminality is contingent on regulatory enforcement agencies being able to investigate and enforce the laws alongside the police and the state prosecution apparatus.

We discussed the organisational sanctions debate at length in sections six and seven, and the ACT and Canadian reforms outlined in section seven provide examples of sanctions that might more effectively punish organisational criminality once it has been prosecuted successfully. However, it is by no means clear whether or how the judiciary will use these new sanctions once charges under the new provisions are proved. Further, the new laws utilise only a small number of the organisational sanctions options that have been discussed

in the academic literature, leaving many innovative and perhaps effective sanctions as only theoretical possibilities.

It is important to remember what this whole debate is about and why the question of organisational criminal responsibility has become so important. What must be our crucial aim in all this talk of law reform? The aim of reforming this area of law must always be to improve OHS in industry. It must be to reduce industrial death and injury arising from organisational failure to develop and implement adequate OHS measures to ensure injuries and fatalities do not occur in the first place. This leads to the question of what will best achieve this aim in the long term. Having said this, we also acknowledge the importance of other criminal law rationales in bringing manslaughter prosecutions, most importantly symbolic motivations such as denunciation and retribution (see Haines and Hall, 2004).

Will the bad publicity associated with increased use of reformed traditional criminal law in tandem with OHS prosecutions, and the threat of imprisonment and hefty sanctions, increase the levels of attention paid to OHS policies, procedures and practices and therefore reduce industrial deaths/injuries? Will a well-coordinated approach to responsive enforcement (see Johnstone, 2004b), including manslaughter prosecutions for egregious cases resulting in workplace fatalities and large and varied sanctions for non-compliance with OHS statutory provisions, increase voluntary compliance (Gunningham and Johnstone, 1999) with OHS law and lead to positive gains. Another question that must be asked is whether changes in the law may just increase the willingness of business to close up their systems to inspection and evade effective prosecution of new laws (CBI, 2001; Haines, 1997)?

What is clear is that new laws passed and laws proposed must look to contextualise, rather than decontextualise, the harm caused by industrial activity. Historically, OHS prosecutions have been criticised on the grounds that organisational offenders simply pleading guilty to OHS offences and that the prosecution process decontextualises and trivialises non-compliance with OHS standards (see Johnstone, 2000/2003). If the reforms described in this paper enable traditional criminal laws such as murder and manslaughter to be more

widely and effectively utilised, then perhaps at least the harm caused by industrial activity will be ranked alongside the harm caused by gun violence or drink driving for instance.

But perhaps we should put aside the politics of law and order when it comes to OHS, and not follow the general trends in addressing ‘street crime.’ Perhaps we should focus on doing the best to prevent in advance the carnage caused by lack of interest, incompetent OHS management, and the economic pressure of doing business that puts profits ahead of effective systematic OHS management. We acknowledge that unbridled attention to traditional criminal law could deflect attention away from proactive models to reduce industrial deaths and injuries and away from the important contribution the existing OHS statutes make to preventing workplace injury, disease and death. Properly enforced and sanctioned, OHS laws can be both proactive and punitive, whereas manslaughter and traditional criminal law is generally only reactive. We suggest that it is worth considering the option of bringing manslaughter and outcome based offences within the existing OHS regulatory regimes alongside a ratcheting up of punishment for breach of OHS standards. This would reduce the divide between OHS regulatory regimes and the ‘traditional criminal law.’

A crucial issue not explored in this paper is the issue of ‘justice’ for those whose lives have been destroyed or severely affected by organisational harm and those left behind to mourn the preventable loss of their partners, relatives and colleagues. The questions relating to the issue of preventing industrial death, responding to industrial death, and achieving justice for all those involved in this debate are being sought more widely than in the past. This is a welcome development that recognises organisational harm for what it is. And it must be hoped for that innovative thinking and careful reform may bring some urgently needed answers, to the benefit of OHS.

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