

Corporate Manslaughter: International Perspectives

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Abstract

This paper examines the way in which laws on corporate manslaughter¹ operate in the UK, Australia and Canada. It considers how each jurisdiction has grappled with the challenges of framing legislation to encompass corporate liability for the deaths of workers or members of the public. The three countries have a shared legal heritage and all experienced obstacles with the common law focus on identifying a directing mind within complex corporate structures. It was this failure of the common law to identify the directing mind within the company and to link that culpability to that of the organisation that led to the defeat of successive prosecutions. This led to a litany of failed prosecutions involving large organisations with complex management structures where decision-making was delegated along complex lines of management. This 'fault line' in the common law led to legislative reform in the three jurisdictions. Each country has developed statutory responses, which while similar, do contain important and distinctive characteristics. This paper provides a comparative analysis of the manner in which these countries have tackled what is sometimes referred to as 'corporate killing.'

Keywords: Corporate and Industrial Manslaughter, Corporate Culture, Regulatory law, Individual and Corporate culpability.

i. The impetus for reform

The first major impetus for reform was the problem of identifying the directing mind under the common law, when corporate bodies were prosecuted for gross negligence manslaughter. In order to find a corporate body guilty of gross negligence manslaughter, prosecutors had to identify a senior 'directing mind' at Board level within the company and causatively link his or her acts or omissions to the death of the victim. In other words, the directing mind had to embody the company—to be in effect the alter ego of the company. This proved almost impossible and the law only functioned effectively where the corporate body was small, with the simplest of management structures². In cases where the organisation was complex, with tiers of management cloaking the decision-making at the top of the company, successive prosecutions failed. Much has been written about this fault line³ and there was a litany of high profile cases⁴ in the UK that pointed to the need for reform.

In Australia and Canada too, (both of whom legal systems based on the common law), cases on corporate wrongdoing followed the same pattern as those in the UK.

¹ Corporate manslaughter here is used as an overarching term, although industrial or workplace manslaughter is more commonly used in Australia and Canada.

² See for instance the so called Lyme Bay case, *R v Kite and OLL Ltd*, Winchester Crown Court, 8 December 1994, unreported.

³ A useful example of the problem can be seen in *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

⁴ C.M.V. 'Kicking Corporate Bodies and Damning their Souls', (1996), *Modern Law Review* 557, 560

The decision in *Tesco Supermarkets Ltd v Natrass*⁵, the leading English authority on corporate liability and the directing mind was followed in the Australian courts in cases such as *Hamilton v Whitehead*⁶ and later in *R v A C Hatrick Chemicals Pty Ltd*.⁷ In *Hatrick*, a case occurring in Victoria, gum resin stored in a large container exploded with fatal results. The company was charged with manslaughter. Hempel J could not find a directing mind at a senior enough level and held [254] that although key employees, including the plant manager were negligent, they were not of sufficient status within company and their fault could not therefore be attributed to the company⁸.

In Canada, although also initially reliant on finding a directing mind as outlined in the *Tesco* case, the courts went on to steer something of a middle course. In the leading case of *Canadian Dredge and Dock Co. v. The Queen*⁹, there was an acknowledgment of the need to identify the 'alter ego' but the court also formulated a new, more pragmatic approach. The scope of the legal fiction of the directing mind was broadened to incorporate those with forms of delegated authority. By doing so the Court introduced a wider class of persons whose fault could be attributed to the corporate entity. Although this new formulation was of some assistance, it was thought by Canadian jurists to not go far enough and various proposals were put forward over the years to reform the law¹⁰. We will see in a later section of the paper how each jurisdiction has devised new laws in attempt to move away from the old common law position and consider whether the reforms are an improvement.

ii. The regulatory versus true crime debate.

A further issue that led to calls for reform was concern that the regulatory framework of health and safety law¹¹ provided only a limited form of redress against erring corporations. Commentators saw the reliance on health and safety law as a form of decriminalisation¹² and criticism of the regulatory framework was a common theme across all three jurisdictions. This form of law, variously described as regulatory or quasi crime, did not, it was argued, address the seriousness of the behaviour that led to the death¹³. It should be noted that all three countries have sophisticated regulatory regimes in place. In the UK, the Health and Safety at Work Act (1974) is the overarching legislation and the Health and Safety Executive leads on inspection and enforcement. In Australia, Safe Work Australia takes a lead on developing the law at a national level and the country has also developed, the Model Work, Health and Safety Laws (2011). These are intended to be adopted by all parts of the country, on a state/territory basis¹⁴. In Canada, across the 14 jurisdictions, each territory or state takes responsibility for occupational safety. Nevertheless, the argument has been that regulatory law is not perceived to be truly criminal and that while erring companies can be prosecuted for a range of regulatory offences, subsequent convictions do little to act as deterrents¹⁵. Regulatory law is defined by the Law Commission¹⁶ of England and Wales in the following terms:

⁵ *Tesco Supermarkets Ltd v Natrass* HL 31 Mar 1971

⁶ *Hamilton v Whitehead* (1988) 82 ALR 626.

⁷ *R v AC Hatrick Chemicals Pty Ltd* 140 IR 243

⁸ *Supra* at 254

⁹ *Canadian Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662

¹⁰ See for instance the discussion in the Law Reform Commission of Canada Report 31, Recodifying Criminal Law. Ottawa Law Reform Comm of Canada (1987) at pps.26-28 accessed at <http://www.lareau-law.ca/LRC31ONE.pdf>, March 2nd 2019

¹¹ Before the enactment of statutory manslaughter in the three jurisdictions, prosecutors had only health and safety law to fall back on when the common law gross negligence manslaughter failed.

¹² See for instance Johnstone, Richard, *Work health and safety and the criminal law in Australia. Policy and Practice in Health and Safety*, (2013), 11(2), pp. 25-44, available at

¹³ See also, Tombs, Steve and Whyte, David. *A crisis of enforcement: the decriminalisation of death and injury at work*, (2008). Centre for Crime and Justice Studies, King's College, London. available online <http://oro.open.ac.uk/36318/1/crisisenforcementweb.pdf> accessed 20th Jan 2019

¹⁴ The only parts of the country who have not adopted them are Victoria and Western Australia.

¹⁵ Paul Almond, 'Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of 'Populist Punitiveness'?' (2008), *British Journal of Criminology*, 48, 448-467, at 463.

“Very broadly, a regulatory context is one in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialised area of activity.”

The objective, of this form of law is to set goals for duty holders and by doing so encourage safety measures that help to avoid accidents, rather than being entirely focused on enforcement. Thus, the role of a regulatory regime is different from that of ‘traditional’ criminal law¹⁷ and is predicated on the prevention of risk, rather than the result of that risk.¹⁸ The role of health and safety as envisioned by Lord Robens¹⁹ in the UK was to prevent harm in the first place rather than to criminalise wrongdoing later. Regulatory law is often termed ‘quasi crime’ as breaches of the law do not attract the moral opprobrium of ‘true crime’²⁰. Judicial commentary is illuminating. In *R v Janway Davies*²¹, Tuckey L J at para 16, referred to dicta from the Canadian Supreme Court where Cory J. in *R v Wholesale Travel Group* expressed the rationale for the distinction as follows:²²

“It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability, than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.”

While many proponents of corporate manslaughter point to the failure of regulatory law, to properly censure erring companies²³ and observe that the law does not offer the requisite level of stigmatisation, it should be noted that there are additional factors that undermine the regulatory framework. For instance, there are resource and staffing issues that mean that the various inspection bodies overseeing health and safety law are unable to function effectively. Tombs and Whyte²⁴ note the political context that influences the debate. In the UK, successive governments have sought to minimise the regulatory burden on business and this say the authors has contributed to the ineffectiveness of health and safety law. Indeed this has become a subject of renewed debate following the devastating fire in the London Tower Block, Grenfell Tower, on the 14th June 2017, which caused the deaths of 72 residents. One of the issues that has come to the fore when the cause of the fire is debated, is the de-regulation of a web of protective measures in relation to housing and fire standards, and the consequent implications for safety.²⁵

¹⁶ Law Comm, Consultation Paper No 195, Criminal Liability in Regulatory Contexts, at para1.9. http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf, accessed 20th Nov 2018.

¹⁷ See for instance the discussion in *R v Tangerine Confectionary Ltd* and *R v Veolia ES (UK) Ltd* [2011] on the issues of foreseeability and risk.

¹⁸ In commentary on the model Work, Health and Safety Law in Australia, the Australian Parliament under Chapter 5 at 5.3 note, “It is important to recognise that these two most serious offences seek to address the *risk* of exposure of a person to death or serious injury or illness, rather than the *outcome* (the death of a worker) which results from failure to address the risks.” Accessed Dec 5th 2018 at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Industrialdeath/sinAus/Report/Section?id=committees%2Freportsen%2F024170%2F26563.

¹⁹ Robens, *Report of the Committee on Health and Safety at Work 1970-1972*, HMSO, 1972.

²⁰ See the discussion by Johnstone of what he describes as the decriminalisation of health and safety law in Johnstone, Richard, *Work health and safety and the criminal law in Australia. Policy and Practice in Health and Safety*, (2008) 11(2), pp. 25-44.

²¹ *R v Janway Davies* [2002] EWCA Crim 2949

²² *R v Wholesale Travel Group* (1991) 3 SCR 154

²³ Haines, F and Hall, A. “The Law and Order Debate in OH&S”, (2004), *J Occup Health Safety, Aust NZ*, 20 (3) 263

²⁴ *Supra* at 11.

²⁵ See the House of Commons debate on Grenfell tower in June 2018,

<https://www.theyworkforyou.com/debates/?id=2018-05-16b.310.0> accessed 20th Oct 2018

Kensington and Chelsea Council (the Borough in which the Tower stands) and the Tenant Management Association for Grenfell Tower are both now being investigated for corporate manslaughter.²⁶

In a recent paper, ‘Still killing with impunity: corporate criminal law reform in the UK’, Tombs²⁷ points out that: “It has elsewhere been documented how the first decade of the new millennium saw a generalised decline in all forms of formal enforcement on the part of the HSE, with the reasons for this being largely due to an explicit policy shift towards more ‘business-friendly’ regulation and enforcement.”

Bergman²⁸ has pointed out that in the past, both Canada and Australia have based their safety law on the UK’s Health and Safety at Work Act 1974 (HSWA) and in a report written²⁹ for the HSE, notes the decline in safety inspections in both Australia and Canada. The quality of the investigations carried on behalf of regulatory agencies is also a matter of concern. A very recent report from the Australian parliament cites the level of unease of victim’s families in the aftermath of a death in relation to the poor quality of investigations carried out by regulators³⁰.

“Throughout the inquiry concerns were raised about the investigative abilities and attitudes of the various state and territory WHS regulators. The committee heard evidence that indicated that the quality of investigations was at times highly deficient, a situation which ultimately led to poor prosecution outcomes”

It is clear from the catalogue of disasters in all three jurisdictions that health and safety law has been unsuccessful, both in terms of enforcing standards and criminalising conduct. The Westray Mining disaster in Canada in 1992 is an example. Twenty six miners were killed after methane gas caused a devastating explosion. It was later found that prior to the accident, the mining company had some 50 violations of health and safety law³¹. For a full discussion see Bittle³² who considers the tragedy at length in his book³³ ‘Still Dying for a Living’ and notes that it was a spur for the enactment of statutory manslaughter law in Canada. In similar terms in Australia, and the UK, high profile disasters such as the Esso Longford tragedy in Victoria in 1998³⁴ and the Piper Alpha³⁵ disaster in the North Sea, exposed serious weaknesses in the way in which regulatory law operated.

Given the technical difficulties of overcoming the problem of the directing mind and the unease over the deficiencies of regulatory law, in all three countries there was momentum for reform.

²⁶ <https://www.bbc.co.uk/news/uk-40747241> accessed 12th Nov 2018 and see also the concerns of Dame Judith Hackitt <https://www.iosh.co.uk/News/Dame-Judith-Hackitt-IOSH-2018.aspx> accessed 19th Dec 2018.

²⁷ Steve Tombs, “Still killing with impunity: corporate criminal law reform in the UK”. *Policy and Practice in Health and Safety*, (2013), Vol 11(2) pp. 63–80

²⁸ David Bergman, Dr Courtney Davis and Bethan Rigby, International Comparison of Health and Safety Responsibilities of Company Directors, Centre for Corporate Accountability, (2007), RR535 Research Report, <http://www.hse.gov.uk/leadership/international.pdf>, accessed 20th Jan 2019

²⁹ Dr Gary Fooks, David Bergman, Bethan Day, International comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences, Centre for Corporate Accountability (2007), RR535 Research Report, <http://www.hse.gov.uk/research/rrpdf/rr607.pdf> accessed Dec 19th 2018

³⁰ They Never Came , Home at Chapter 4, Investigations, at para 4.4 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024170/toc_pdf/Theynevercamehomee94theframeworksurroundingtheprevention,investigationandprosecutionofindustrialdeathsinaustralia.pdf;file https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsinAus/Report accessed 19th Jan 2019.

³¹ Steven Bittle and Laureen Snider, “From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability, (2008), 28 JL & Social Policy 470 at 474.

³² Steven Bittle “*Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster*”, (Canada, Vancouver Press: UBC Press. 2012)

³³ Still Living for Dying Bittle

³⁴ Below at 48

³⁵ See the Public Inquiry into the Piper Alpha Disaster by Lord Cullen available at <http://www.hse.gov.uk/offshore/piper-alpha-public-inquiry-volume1.pdf> accessed 20th Nov 2018

As we consider each jurisdiction, however, and the approaches that were taken, there may be question marks over the efficacy of statutory manslaughter to fully counteract the deficiencies of the common law.

iii. Industrial manslaughter in Australia.

Australia was the first of the three jurisdictions to enact laws that attempt to deal with egregious organisational failings leading to industrial deaths. The legal position in Australia is that it is a Federal system, with the Constitution as the legal foundation. Below that there are a mix of states, operating different legal systems, some of which are wholly codified and some that rely on the common law. Each has its own Parliament and courts. There is no unified statutory manslaughter law prevailing across Australia, although most states have at one time or another contemplated putting in place statutory provisions. There is however at constitutional level, the overarching Commonwealth Criminal Code Act 1995³⁶, which contains provisions relevant to industrial manslaughter.³⁷ It is limited in its application however as it only applies if individual states and territories adopt it and the Australian Capital Territory (ACT) is the only state to have adopted the provisions to date.³⁸ These are discussed in detail below. It is worth noting at this point however that the CCA contains influential provisions that have been important in moving the law away from the focus on the directing mind to embrace broader concepts. The ideas contained within it have been persuasive for those framing statutory manslaughter in the UK and Canada. The most significant concept is contained in Part 2.5, Division 12 where there is an attempt to capture what must be proven to establish a failing corporate culture. It is summarised as follows:

'(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

'(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.'

The code has this explanation as to meaning of the term under s.12.3 (6)

*'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.'*³⁹

We will see that this approach has been replicated elsewhere and a number of writers have pointed to the significance of focusing on corporate culture⁴⁰. For instance see the discussion by Fisse and Braithwaite who urge a move away from a focus on individualism when considering the harm that corporations cause⁴¹. Belcher also welcomes this recognition of what she sees as a realist rather than a nominalist position that can; "explicitly recognise genuine corporate fault"⁴².

In commentating on the influential notions put forward in the Australian Criminal Code, a Canadian Briefing Paper put it thus:

*"The expansive definition of 'corporate culture' in the Act invites the court to delve deeply into corporate operations. The court can be expected to examine such factors as: management structure, policy directives, monitoring of compliance by employees regarding legal requirements, patterns of compensation and rewards for behaviour, etc."*⁴³

At the heart of the arguments about corporate criminal liability is an attempt to overcome the conceptual challenges of apportioning blame for the transgressions of an inanimate, artificial legal personality.

³⁶ See Commonwealth Criminal Code, Part 2.5, Division 12.

³⁷ The term most frequently used in Australia.

³⁸ See ACT's Crimes (Industrial Manslaughter) Act 2003

³⁹ See CCA 12.3 (6)

⁴⁰ Alice Belcher, 'Imagining how a company thinks: what is corporate culture? (2006), Deakin Law Review. Vol 11, 2, p. 1-21 21 p

⁴¹ Brent Fisse and John Braithwaite, Corporations, Crime and Accountability, (Cambridge University Press, 1993) pp57-58

⁴² Supra at 32 see Part IV page 21.

⁴³ Corporate Criminal Liability - Discussion Paper, March 2002 accessed Nov 11th 2018 <https://www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/dp-dt/iss-ques.html>

Moving away from the directing mind to matters that go to the ethos and values of an organisation is one way in which the complexity of diffuse management structures may be captured. Looking at the culture of the organisation is one way of doing that. There is a caveat, however. In the small companies that are caught by laws designed to impose liability for death, there will be little difficulty in getting to the heart of the corporate personality. The actions of individuals (senior officers and employees) are transparent and procedures for decision making straightforward, at least in the sense that there will be few key personnel making them. Thus, corporate ethos is apparent. In larger organisations finding the true personality of the company and going behind statements and claims put out at Board level may significantly more challenging. Later in this discussion, when the ACT legislation on industrial manslaughter is considered we will see other important features of the Commonwealth Code that have been adopted at state level.

At this point, what is clear from recent developments is that there is a renewed impetus for laws at national level in Australia that seek to allocate culpability for workplace death, to erring organisations. In October 2018, the Senate Education and Employment References Committee of the Australian Parliament suggested a new countrywide law that would tackle the issue of industrial deaths across the country. See Recommendation 13⁴⁴, at 5.54 “The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to: introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.”

This revival of interest in an overarching law in Australia seems to have come about following the passing of industrial manslaughter laws in Queensland. In Australia, the nomenclature is different from that of the UK, as the term corporate manslaughter is generally not used. The Australian states actually adopting statutory manslaughter provisions thus far, have more often labelled them instead, as industrial or workplace manslaughter⁴⁵ and although there are parallels with the law in the UK, and Canada, there are also important distinctions. The reasoning behind the rejection of the term ‘corporate’ seems to be that use of ‘industrial’ allows a wider range of organisations to be caught by the law. Unfortunately, it also excludes important groups of victims, such as members of the public, who are not working within industry.

Regardless of the label that is adopted, it is clear that as well as being the first to legislate there is a continuing appetite for framing laws to confront serious safety failings such as those that led to multiple fatalities in Queensland at Eagle Farm⁴⁶ and Dream World⁴⁷ in 2016. Further, both embryonic laws and those actually reaching the statute books are designed to contain a mix of both individual and corporate liability. Such dual culpability is absent from UK legislation and has long been a source of contention⁴⁸.

Following early but limited recognition of corporate wrongdoing contained within the CCA 1995, individual states have wrestled with the difficulties of framing adequate laws to tackle corporate manslaughter.⁴⁹ The first to do so was Victoria where the proposed changes to the law came about in the aftermath of the Esso Longford tragedy⁵⁰ in 1998 when two workers were killed and another eight suffered injuries in a gas explosion.

⁴⁴ accessed Nov 30th 2018

⁴⁵ However an early but failed attempt to legislate under the Crimes (Workplace Deaths and Serious Injuries) Bill in Victoria did use the term see -

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/\\$FILE/541062ba1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/$FILE/541062ba1.pdf) accessed 15th Oct 2018.

⁴⁶ <https://www.worksafe.qld.gov.au/news/2018/company-fined-over-eagle-farm-double-fatality> accessed Oct 2nd 2018

⁴⁷ <https://www.theguardian.com/australia-news/2017/oct/21/dreamworld-deaths-police-say-no-park-staff-should-be-prosecuted> accessed Oct 2018

⁴⁸ Victoria Roper, The Corporate Manslaughter and Corporate Homicide Act 2007—A 10-Year Review (2018), *The Journal of Criminal Law*, 82 (1). pp. 48-75. ISSN 0022-0183

⁴⁹ In Victoria, corporate manslaughter was used to label the offence.

⁵⁰ <http://www.ema.gov.au/ema/emadisasters.nsf/0/116b7c8027a9ac16ca256d3300057fd2?OpenDocument>, accessed 13th Dec 2018 and see also Karen Wheelwright, (2002) “Corporate Liability for Workplace Deaths and

The incident also caused severe disruption to local gas supplies. Although Esso was found guilty of some eleven offences under Victoria's Occupational Health and Safety Act 1985, it was felt that the punishments were not severe enough and this added impetus to the need for reform. Under the Bill⁵¹ there was an attempt to impose liability encompassing a holistic appraisal of the organisations conduct.⁵² See s. 14A (2) which the Explanatory Memorandum explains in the following terms: "A court will therefore be able to consider the conduct of one, some or all of the body corporate's employees, agents (including employees and senior officers of the agent) and senior officers acting within the actual scope of their employment or within their actual authority."

The law drew on the Commonwealth Criminal Code Act 1995 and focused on the corporate body, with a whole systems approach that aggregated wrongdoing across tiers of decision making⁵³. The proposed offence was designed to be predicated on gross negligence and the common law case law was to be influential in deciding what was meant by gross⁵⁴. This approach is replicated in the Corporate Manslaughter and Corporate Homicide 2007 in the UK. Thus, in deciding if the corporate body had fallen below the requisite standard, it was the standard of reasonableness (based on the civil law) that was the benchmark. The burden of proof fell to the prosecution to the classic criminal standard of beyond reasonable doubt. From the perspective of causation, the gross negligence had to be linked to a high risk of death or serious injury. This differs from the UK position where statutory manslaughter legislation only applies in the event of death. The Victorian Bill however only applied to workers who died or were seriously injured in the course of their employment. The Bill also included provisions that could find senior officers, individually liable⁵⁵. Sanctions under the proposals included fines of \$5 million for death and up to \$2 million for serious injury. In what was to be a precursor for the UK's law, erring corporations could also be expected to publicise their own guilt⁵⁶.

In the event, the Bill did not make it onto the statute books. It failed, following strong opposition from employers. Although the argument from proponents of the Bill was that the full force of criminal law was required, in December 2004, following rejection of the Bill, the Government in Victoria opted to enhance sanctions under the Occupational Health and Safety Act 1985 and a new offence of 'conduct endangering persons at a workplace' was introduced.

Injuries – Reflecting on Victoria's Laws in Light of the Esso Longford Explosion" *Deakin Law Review*, vol. 7, no. 2.

⁵¹ See the explanatory memorandum to the Bill which states under Part 1, Clause 1, that the purposes of the Act are--to create 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; and to increase penalties in health and safety legislation; and to make other miscellaneous amendments to health and safety legislation

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/\\$FILE/541062ba1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/$FILE/541062ba1.pdf) accessed Nov 10th 2018

⁵² Although in Victoria corporate manslaughter was used.

⁵³ See Part 2.3 14B

⁵⁴ See for instance *R v Adomako* [1994] 3 WLR 288

⁵⁵ See Part 1, S.2 (a) to create new criminal offences of corporate manslaughter and negligently causing serious injury by a body corporate in certain circumstances; and 5 (b) to impose criminal liability on senior officers of a body corporate in certain circumstances.

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/\\$FILE/541062ba1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ebfbf49a3979e57dca2570d8001ba32d/$FILE/541062ba1.pdf) accessed Nov 19th 2018.

⁵⁶ See for instance the influential work of writers such as Brent Fisse and John Braithwaite in their book, *The Impact of Publicity orders on Corporate Offenders*, State university of New York Press (Albany) 1983

As a postscript⁵⁷ in May 2018, the Government of Victoria under the leadership of Daniel Andrews, announced that a new law on workplace manslaughter would be included in the Occupational Health and Safety Act 2004. (OHSA) In November 2019⁵⁸, the Parliament of Victoria passed the Workplace Safety Legislation Amendment (Workplace Manslaughter and other matters) Bill 2019⁵⁹. The new law which amends the OHSA, should come into effect on July 1st 2020. Under s.39G it introduces two new offences under what is described as workplace manslaughter. The first in subsection (1) considers a wide range of organisations, including both incorporated and unincorporated bodies and the self-employed. The section can be used to target both natural and juristic legal persons. Penalties range from imprisonment for individuals to fines of \$16,522,000 for corporate bodies. Under subsection 2 the offence is targeted at what is described as officers of an ‘applicable entity’. Such entities again are widely drawn encompassing, both corporate and unincorporated bodies. At the time of writing the new law has not come into effect and it is too early to say how effective the new offences will be.

The Australian Capital Territory (ACT) passed the Crimes (Industrial Manslaughter) Amendment⁶⁰ Act in 2003. Again, the attempt to frame laws to prosecute corporate wrongdoing, signals a recognition that existing remedies were deficient.⁶¹ It added a new Part 2A, which was to be read in conjunction with Part 2.5 of the ACT Criminal Code and in doing so incorporated the CCA concept of corporate culture in Section 51. The amendment came into operation in March 2004. Prior to its enactment the ACT government made clear the intention behind the law in a memorandum.⁶² It had three main aims: “to establish a new offence of industrial manslaughter; to clarify and define the range of employment relationships; and to provide for substantial penalties for the offences.”

The offence is predicated on two mens rea elements as Sarre⁶³ notes: “Industrial manslaughter” is defined as causing the death of a worker while either being reckless in regard to causing serious harm to that worker or any other worker, or being negligent about causing the death of that or any other worker.”

The offence captures the wrongdoing of both individuals and corporates. Section 49 (A) of Part 2.A provides that a person (including a corporation) is an employer where engaging a worker. The scope of ‘worker’ is drawn widely, encompassing traditional concepts of those engaged under a contract of service but also including independent contractors and outworkers. Outworkers include those working in their own homes, and the legislation also embraces volunteers, trainees and apprentices. Thus while the scope is limited to workers and excludes members of the public, the emphasis on occupational safety is clear. Under Section 49(c) the conduct of the employer is placed under scrutiny.

“An employer commits an offence 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.”

While corporate wrongdoing is caught, so too are the acts or omissions of senior management under s.49 (D) replicating the content of s49(c). Senior officers hold executive positions⁶⁴, occupying important decision making roles. Campbell, notes that an executive position is drawn broadly, see Section 49(a).

⁵⁷ <https://www.premier.vic.gov.au/workplace-manslaughter-laws-to-protect-victorians/> accessed Sept 18th 2018.

⁵⁸ <https://www.premier.vic.gov.au/wp-content/uploads/2019/10/191029-Workplace-Manslaughter-To-Be-Enshrined-In-Law.pdf> accessed Dec 12th 2019

⁵⁹ <https://www.legislation.vic.gov.au/bills/workplace-safety-legislation-amendment-workplace-manslaughter-and-other-matters-bill-2019>

⁶⁰ It amended the *Crimes Act 1900*

⁶¹ Supra at 29

⁶² Standing Committee on Legal Affairs, Report No 6 Crimes (Industrial Manslaughter) Bill 2002 at p,2 para 1.1, https://www.parliament.act.gov.au/data/assets/pdf_file/0006/375756/1a06Crimes.pdf accessed 13th Nov 2018

⁶³ Rick Sarre, *White Collar Crime and Prosecution for “Industrial Manslaughter” as a means to reduce workplace death.*, (2006) Springer US (ED), Henry N Pontell, Gilbert Geis, Chapter Three at 652

⁶⁴ See, David Campbell. (Ed) *(Comparative Law Yearbook of International Business, Employment Law, Centre for International studies.* (Kluwer Law International 2016) at p39.

Thus, the concept of a senior officer can include those taking key roles such as a director but will also embrace any 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”

An omission to act on the part of an employer or senior officer can amount to conduct for the purposes of the offence and the causative requirements are satisfied if the person’s conduct significantly contributes to the death. The provisions here may have informed the UK legislation⁶⁵ but are currently untested by any case law in ACT. As well as the UK, Queensland was later to adopt a similar approach to the definition of senior officer.

Industrial manslaughter carries a maximum penalty of \$1.25 million for corporate wrongdoing, with individuals potentially facing imprisonment (up to 25 years) or fines of up to \$250,000 or both. As well as the severity of such punishments, the court may also order an organisation to publicise its own guilt⁶⁶ (as with the envisioned legislation in Victoria). The sanction is now also found in the CMCHA (2007)⁶⁷ and has been used in a number of cases. Prior to the passing of the UK legislation, it was said to be the most feared of the range of corporate punishments available. In addition to these penalties, the ACT legislation also allows the court to order an organisation to undertake community projects to a cost of up to \$5 million, a feature unfamiliar in the UK but one that is also present in Canada. The important concept of corporate culture is embraced in Section 51 (1) where the fault elements of intention, knowledge or recklessness are taken to exist where the corporation, ‘expressly, tacitly or impliedly authorises or permits the commission of the offence’⁶⁸. Again, this fault line in corporate culture can also come about via the acts or omissions of high managerial agents, in the same manner as that of the corporate body.

⁶⁵ See CMCHA (2007) Section 1(1)(c) “senior management”, in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

⁶⁶ See Section 5 (49(e) 2) In addition to or instead of any other penalty the court may impose on the corporation, the court may order the corporation to do 1 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 1 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.

⁶⁷ See Section 10 CMCHA

⁶⁸ Australian Capital Territory Criminal Code 2002 (ACT) s 51. (1) In deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, the fault element is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence. (2) The ways in which authorisation or permission may be established include— (a) proving that the corporation’s board of directors intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or (b) proving that a high managerial agent of the corporation intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or (c) proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law; or (d) proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.

Sadly, while the ACT legislation is both dynamic and potentially challenging for weak corporate structures, there is little to learn from it in practice as the demographics are such that workplace deaths are rare⁶⁹. Indeed, there have been no prosecutions at all under the legislation. Further, although it was hoped that all eight Australian jurisdictions would adopt the approach taken by ACT, others did not follow. While the ACT legislation was seen as a radical at the time, it has proved to be largely symbolic. As Sarre⁷⁰ points out:

“One needs to acknowledge a limitation, however. The Australian Capital Territory is home to only 1.5 per cent of the Australian population, and, while it has a healthy light industry quota, it has no heavy industry. Most of its employers and employees are government departments and public servants respectively. Indeed, the Australian government moved quickly in response to the Crimes (Industrial Manslaughter) Act (ACT) 2003, and introduced (in 2004) a Commonwealth law that exempts Commonwealth of Australia employers and employees from its provisions. This political act (a snub for the legislators of the ACT by their more conservative national masters) grants exemptions in the case of approximately 80 per cent of employers in that jurisdiction.”

Yet, the appetite for framing laws to confront serious safety failings continues and another state to enact recent laws has been Queensland. The stimulus may have been two high profile tragedies in the State⁷¹. In 2016, two workers were crushed to death by falling slabs of concrete, at the Eagle Farm racecourse. Construction supervisor, Claudio D'Alessandro was charged with manslaughter by gross negligence after the fatalities. However, other than liability for health and safety offences, under Section 32⁷² of the *Work Health and Safety Act 2011*⁷³ the construction company, Criscon, (with overall responsibility for the site) escaped further criminal liability. The second tragedy was in the Gold Coast area of the state. This is a much loved holiday destination and it was here at one of the areas, Theme Parks that a calamity occurred which again fuelled the debate on corporate failings leading to death. On October 25th 2016, four people were killed after riding on a water-based attraction. The ‘Thunder Rivers Rapids Ride,’ malfunctioned and riders on the mechanised rafts were flipped overboard following a collision, sustaining fatal injuries. Given the subsequent shape of the Queensland legislation, what is interesting is that the deaths were of tourists who are not covered by the new law as the legislation is focused on workers. A Coronial Inquest opened in June 2018 and is due to report formally in 2019⁷⁴ but the interim findings by the Coroner point to a catalogue of safety failings and minutes of a an engineering management meeting, appear to suggest that cost cutting may have been a factor.

⁷³<https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics> accessed 28th Feb 2019.

⁷⁰Rick Sarre, (2010) "Sentencing those convicted of industrial manslaughter" ALRS 1, ALTA Law Research Series, <http://classic.austlii.edu.au/au/journals/ALRS/2010/1.html> accessed Sept 6th 2018.

⁷¹ Supra at 59

⁷² Section 32, Failure to comply with health and safety duty—category 2

A person commits a *category 2 offence* if—

- (a) the person has a health and safety duty; and
- (b) the person fails to comply with that duty; and
- (c) the failure exposes an individual to a risk of death or serious injury or illness

⁷³<https://www.worksafe.qld.gov.au/news/2018/company-fined-over-eagle-farm-double-fatality> accessed 13th Nov 2018.

⁷⁴ The Inquest will consider the following issues: ‘The findings required by s.45 (2) of the Coroners Act 2003; namely the identity of the deceased person, when, where and how they died and what caused the death. • The circumstances and cause of the fatal incident on the Thunder River Rapids Ride at the Dreamworld Theme Park, which occurred on 25th October 2016. • Examination of the Thunder River Rapids Ride at the Dreamworld Theme Park, including but not limited to, the construction, maintenance, safety measures, staffing, history and modifications. • Examination of the sufficiency of the training provided to staff in operating the Thunder River Rapids Ride. • Consideration of the regulatory environment and applicable standards by which Amusement Park rides operate in Queensland and Australia, and whether changes need to be made to ensure a similar incident does not happen in the future. • What further actions and safety measures could be introduced to prevent a similar future incident from occurring?’

https://www.courts.qld.gov.au/data/assets/pdf_file/0010/92872/OngoingInquestsMonthlyReport.pdf accessed Jan 5th 2019.

We await the full findings of the Inquest but following the results of an independent, Best Practice Review of Work Health and Safety in Queensland⁷⁵, the jurisdiction became only the second to introduce offences of industrial manslaughter after ACT.

At the Second Reading of the Work Health and Safety and Other Legislation Amendment Bill⁷⁶, the Minister for Employment and Industrial Relations, Grace Grace said: “We owe it to the victims of these tragedies and their loved ones to ensure that Queensland has strong industrial manslaughter laws to protect people on the job backed by strong penalties for employers proven to be negligent. This is once again nation-leading legislation. One of the great virtues of this bill is that it sends a clear message”

Following the progress of the Bill onto the statute books, industrial manslaughter was introduced as an offence in Queensland under the Work Health and Safety and Other Legislation Amendment Act 2017 (Queensland Amendment Act),⁷⁷ and came into effect on 23 October 2017. The law in Queensland covers both a Person Conducting a Business (PCBU) and or a senior officer. A PCBU includes a sole trader, a partnership, a company, an unincorporated association or government department. Liability can arise where a worker dies, or is injured and dies later and the cause of the death arose from the acts or omissions of the PCBU or senior officer⁷⁸ The definition of senior officer is broad and a non- exhaustive list of those who might fall into this category include; those who occupy executive positions, or take strategic or financial decisions or have responsibility for major aspects of the company’s operations. This encompasses an extensive range of personnel and is not limited by title but arises via management responsibilities. In similar terms to the ACT legislation ‘conduct’ means an act or omission that significantly contributes to the death. Under Section 34(D)⁷⁹ where a senior officer causes death this can come about through negligence. Unlike the law on health and safety under the Work Health and Safety Act 2011, the new laws only apply in the event of a fatality.

The rationale underpinning the Queensland legislation followed familiar lines to those of the ACT.⁸⁰ During the passage of the Bill it was noted that:

“.....with the changing industrial landscape and the emergence of increasingly elaborate corporate structures, it is exceedingly difficult to prosecute an employer for manslaughter given the difficulty of attaching criminal liability to the employer. Our intent is clear: if a work related fatality occurs and that fatality can be attributed to the negligence of a person conducting a business or undertaking or their senior officers, then the PCBU or senior officer should be able to be punished to the full extent of the law”

The same arguments were replicated in the Queensland Parliament as had occurred in the UK during the passage of the CMCHA (2007). Those who doubted the efficacy of the new law raised questions over the need for legislative reform in the first place.

⁷⁵ <https://www.worksafe.qld.gov.au/laws-and-compliance/best-practice-review-of-workplace-health-and-safety-queensland> accessed sept 6th 2018.

⁷⁶ 11 Oct 2017, Work Health and Safety and Other Legislation Amendment Bill at 3025

⁷⁷ <https://www.legislation.qld.gov.au/view/html/asmade/act-2017-038/lh> accessed June 12th 2018

⁷⁸ Under Part 2A (34)(A) of the Work Health and Safety Act 2011 where industrial manslaughter is defined there are the following definitions:

34A (1)

(2) For this part, a person’s conduct *causes* death if it substantially contributes to the death.

(3) For this part, a reference to a worker carrying out work for a business or undertaking includes a reference to a worker who is at a workplace to carry out work for the business or undertaking, including during a work break

⁷⁹ 34D(1) A senior officer of a person who carries out a business or undertaking commits an offence if—(a) a worker—(i) dies in the course of carrying out work for the business or undertaking; or

(ii) is injured in the course of carrying out work for the business or undertaking and later dies; and (b) the senior officer’s conduct causes the death of the worker; and

(c) the senior officer is negligent about causing the death of the worker by the conduct.

Maximum penalty—20 years imprisonment

⁸⁰ 11 Oct 2017, Work Health and Safety and Other Legislation Amendment Bill at 3025, accessed https://www.parliament.qld.gov.au/documents/hansard/2017/2017_10_11_WEEKLY.pdf, Nov 4th 2018

Unlike the ACT legislation however there is already one conviction in Queensland. In *R v Brisbane Auto Recycling Pty Ltd & Ors*⁸¹ [2020] QDC 113, a company was successfully prosecuted after an employee driving a forklift truck at a wrecking yard was killed. Brisbane Auto Recycling Pty Ltd was charged with industrial manslaughter contrary to s 34C *Work Health and Safety Act 2011* and two senior officers of the company were charged with lesser offences of reckless conduct. Both the company and the individuals pleaded guilty – the company was fined \$3 million and the individuals given suspended sentences of 10 months imprisonment. At this point all that can be said about the conviction is that the company seems to have gone into liquidation prior to the judgement.⁸² This is a now familiar pattern seen in many cases under the Corporate Manslaughter and Corporate Homicide Act 2007 in the UK. It is also the case that this company appears to have been a small and medium sized enterprise, again another feature of prosecutions in the UK.

For now, the positive aspects of the law in Queensland are that it is broadly drafted, allowing for both individual and corporate liability, with 10m dollar fines for corporates and imprisonment for up to 20 years for individuals; by contrast it seems only to provide protection for workers, with the caveat that important sections of the workforce remain outside of the scope of the law. For legislation labelled ‘industrial manslaughter’ the absence of the inclusion of the mining industry⁸³ was striking. In Queensland, mining makes a significant contribution to the economy and there are many fatalities.⁸⁴ Although there have been industry specific additions to health and safety law⁸⁵ it seemed at the time when the law was first drafted that the mining industry fell outside of the scope of the legislation. However very recent amendments have closed this gap, following lobby from unions representing those working in the resources industry. In May 2020, the Queensland government introduced *the Mineral and Energy Resources and Other Legislation Amendment Act 2020*⁸⁶. This Act amends various pieces of law and allows the new industrial manslaughter offence to apply to the mining industry

The next section considers the Canadian approach.

iv. The Canadian Approach

In Canada, federal legislation came into effect in 2004 which amended the Canadian Criminal Code (Bill C-45)⁸⁷. It had taken 10 years from the tragedy of Westray for the law to be reformed (although in the interim, a gradual widening of the scope of case law had taken place)⁸⁸, attempting to move away from the issues of the directing mind under the common law. However, this was not sufficient to overcome the barriers to apportioning corporate guilt and legislators were keen to overcome the conceptual hurdles of finding senior officers who could be said to be the alter ego of the company. The first issue to note is that the Bill was weakened by strong opposition from sectors representing commerce. In all three countries, there have been fairly polarised views with those representing business generally arguing against reform, and trade unionists and victim’s families arguing for tougher laws.

⁸¹ *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113,

⁸² <https://insolvencynotices.asic.gov.au/browsesearch-notices/notice-details/Brisbane-Auto-Recyclers-Pty-Ltd-126397233/99c8bc77-b14e-494c-824d-381c9c5a1319> accessed June 2020.

⁸³ See Mineral Councils of Australia: ‘The MCA believes that the industrial manslaughter offences applicable in the Australian Capital Territory and Queensland (excluding the Queensland mining industry) are inconsistent with accepted principles of criminal law and should not be supported. Submission on the *inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*

⁸⁴ <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics#figure-2-worker-fatalities-proportion> accessed Dec 31st 2018

⁸⁵ *Mines Legislation (Resources Safety) Amendment Bill 2018*

⁸⁶ <https://www.legislation.qld.gov.au/view/html/asmade/act-2020-014> accessed 12 June 2020.

⁸⁷ <http://www.ccohs.ca/oshanswers/legisl/billc45.html> Parliamentary Committee on Occupational Health

⁸⁸ *Supra* at 9

Although Bill C-45 reached the statute books, it did not entirely fulfil the ambitions of reformers and as Bittle points out did not introduce fundamental change⁸⁹ Under the Bill, new duties were imposed for workplace health and safety and following the amendments, the original offence of criminal negligence which had been reliant on the identification principle was extended to encompass how work activities are organised. Section 219 of the amended Code is an overarching provision providing a definition of criminal negligence.

S. 219(1) explains that:

“Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.”

Under s.217.1, those directing the work of another person are under a duty to take reasonable steps to prevent bodily harm.⁹⁰ Within s.22.1 the organisation⁹¹ and its representatives are captured where there is negligence leading to death. Here an objective standpoint is adopted. The use of the terminology ‘organisation’ is the same as that employed in the UK legislation⁹² but appears to be broader in scope, going so far as to cover ‘an association of persons’ formed for a common purpose⁹³.

The Canadian position adopts a mixed approach, as while there is some focus on corporate culture, introducing accountability for a potentially extensive group of representatives of the organisation, it seems that there must be fault on the part senior officers, in order to activate the offence. What is meant by ‘representative’ is also widely drawn, in order to encompass a broader grouping than simply employees. However in order to incur liability, they must be acting within the scope of their employment at the time of the offence. They are described as comprising the following; ‘director, partner, employee, member, agent or contractor.’⁹⁴

The offence is more comprehensive than that of the UK, as under S.21, it provides that a ‘party to an offence’ is liable where actually committing the offence or aiding or another to commit it. Under s.22 counselling another to commit the offence is also captured. The Canadian Department of Justice⁹⁵ explain it in these terms:

“In general, for an organization to be found guilty of committing a crime of negligence, the Crown will have to show that employees of the organization committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so. However, the complicated structure of organizations requires that this relatively straightforward idea be expressed in legal language that covers the many different ways that an organization acts.”

⁸⁹ Stephen Bittle, “Cracking down on corporate crime? The disappearance of corporate criminal liability legislation in Canada, (2013),” Policy and Practice in Health and Safety 11(2).

See Paul Macklin, Liberal MP in the Canadian Parliament, Hansard 27 October 2003. www.hansard.ca accessed 19th Nov 2018.

⁹⁰ These new provisions that define an “organization” will also apply to other groups that have an operational structure and make themselves known to the public. This will ensure the law does not apply to an informal group that gets together regularly, for example, to discuss politics or to play bridge. <https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/p02.html> accessed Nov 16th 2018

⁹¹ The term organisation is used rather than corporation thus; 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

⁹² <https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/p02.html>

⁹³ These new provisions that define an “organization” will also apply to other groups that have an operational structure and make themselves known to the public. This will ensure the law does not apply to an informal group that gets together regularly, for example, to discuss politics or to play bridge. <https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/p02.html> accessed Nov 16th 2018

⁹⁴ Criminal Code Section 2.

⁹⁵ <https://www.justice.gc.ca/eng/rp-pr/other-autre/c45/p02.html>, accessed Jan 15th 2019

Senior managers, in a similar way to the CMCHA (2007) and in both ACT and Queensland statutory manslaughter laws, are responsible for managing important parts of the organisations activities or for policy decisions. Where there is a corporate body, a senior officer could be a director, a chief executive officer or a chief financial officer. They must, either individually or collectively, depart ‘markedly’ from the standard of care for the offence to be activated. This means the organisation can be culpable where a representative is acting within the scope of their authority and the senior officer who has responsibility for the sphere in which the offence occurs, departs from that standard. To date there is limited jurisprudence on the working of the law, given the paucity of cases.

In 2008 in *R. c. Transpavé Inc*⁹⁶ a corporate manufacturer of concrete slabs pleaded guilty under Section 219, after an employee who had received inadequate training, and who was working with faulty equipment, died. The company was a relatively small family owned business with around 100 employees. It had a good track record of health and safety compliance and had spent \$750,000 on remedial work to rectify the safety issues. A fine of \$100,000 was agreed by the Court and this allowed the company to continue in order to protect the jobs of employees.

Later In 2013, in the construction fatality case of *R v Metron Construction Corp.*⁹⁷ four workers fell to their deaths after climbing onto a defectively designed ‘swing stage,’ to carry out their work. Although the guilty plea on the part of the company effectively foreclosed full examination of the amended sections, the Court of Appeal in Ontario was able to provide some analysis, when considering whether the sentence was adequate.⁹⁸In the event the Appeal Court found that the fine was too low and ordered it to be raised to C\$750,000. The limited discussion of the offence found one of the deceased ‘Fazilov’ to be both a senior officer and a representative of the company. He was the foreman and it was he who had failed to take reasonable steps to prevent bodily harm. In terms of sentencing the Court reflected at para 80 that:

“The seriousness of the offence of criminal negligence causing death is reflected in the maximum punishment for such an offence – life imprisonment for an individual: s. 220(b). If an offender is an organization, the quantum of the fine is unlimited: s. 735(1) (a).”

In coming to their decision the Court also took the opportunity to highlight the difference between occupational safety law and criminal negligence, reiterating that the latter signified moral opprobrium for the grave nature of the negligence. Importantly, it also noted that the trial judge in the lower court had erred in coming to the conclusion that the company’s ability to pay an increased fine was a factor.

The Court of Appeal signalled that although s.718.21 (d) of the Code requires consideration of ‘the economic viability’ of the organisation and the employment prospects of workers in the event of a fine, it was only one of a number of factors that should be taken into account. This decision makes it clear that even where a company might no longer be able to trade (following a significant financial penalty), the Court will not recoil from awarding a significant fine.

In a separate but related case⁹⁹ the site supervisor for Metron was found guilty of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm, under Section 217.1 of the Criminal Code. Vadim Kazenelson, the supervisor was sentenced to three and a half years in prison. The case against Metron provides a clear indication that the amendments to the Criminal Code have moved the law away from the obstacle of the identification of a directing mind. Prior to the reform of the law in 2004, the acts or omissions of the foreman or of the site supervisor would not have been at a sufficiently high level within the organization to have incurred liability on the part of the company.

However, while these cases reveal that the amendments to the Code do provide a mechanism for imputing guilt for corporate offenders, the reality is that the law is little used.

⁹⁶ *R v Transpave* (2008) J.Q. No. 1857 (Cour du Québec)

⁹⁷ *R v Metron Construction Corp* 2013 ONCA 541, [2013] OJ No 3900

⁹⁸ *Supra* at 99, Para 80, ‘The respondent pleaded guilty to one count of criminal negligence causing death and was sentenced to a fine of \$200,000. The Crown seeks leave to appeal this sentence on the grounds that it is manifestly unfit.

⁹⁹ *R v Kazenelson*, 2015 ONSC 3639

There may be a number of reasons for this; the amendments attempt to bring together conceptually, (via a form of vicarious liability and elements of identification), disparate mechanisms for attributing liability. There may also be a reluctance, or a lack of understanding on the part of investigators and prosecutors when identifying the important differences between failures in health and safety and those that would prompt criminal negligence charges.

v. The UK Approach

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) had a long gestation period and on finally reaching the statute books, it was clear that there remained a number of question marks over its efficacy. The bulk¹⁰⁰ of the Act came into operation on April 6th 2008 and the law applies to the whole of the UK, although the offence is known as corporate homicide in Scotland.¹⁰¹ The difficult and controversial passage to the statute books was presaged by many years of academic and political debate. A number of high profile tragedies led to a succession of unsuccessful prosecutions and the public enquiries that followed had reinforced the need for reform of the common law. The offence¹⁰² is predicated on a form of aggregation bringing together the acts or omissions of senior management. The breach of a relevant duty of care must be gross and in coming to decisions on what this means, case law on common law gross negligence manslaughter is influential¹⁰³. While this has been criticised for its inherent circularity¹⁰⁴ it nevertheless requires behaviour that is 'wicked' or 'so bad' that it is characterised as gross negligence. The requirement that senior management play a substantial role in tracing the lines of accountability to find corporate fault provides a challenge for prosecutors. Under s.1 (3), a substantial element of the breach must be in the way that senior managers managed or organised activities. In other words there must be causation shown (by the way activities are managed or organised), to have caused the death, subject to the seriousness of the breach and predicated on the failure of senior managers.

As Tombs points out¹⁰⁵ *“For a conviction under the CMCHA, the responsible organization must have owed a ‘duty of care’ towards the person(s) who died. Its central test of guilt is that there must be a failure in the way in which the organization was managed or organized which amounted to a gross breach of the duty of care. This requires evidence that the failure fell ‘far below what can reasonably be expected’ (s. 4(b)).”*

The word 'substantial' in relation to the activities of senior managers, has been argued as potentially confusing to the jury. Under s.1 (3);

“An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1)”

¹⁰⁰ The parts that were not currently in force when the Act became operative were s.2 (1) (d) duty owed to a person in custody. This section was implemented in 2011. In relation to those detained under Mental Health legislation the National Health Service and the Department of Health agreed to earlier implementation. Corporate Manslaughter and Corporate Homicide Act 2007: Progress Toward Implementation of Custody Provisions: Ministry of Justice at http://www.legislation.gov.uk/ukdsi/2011/9780111511466/pdfs/ukdsiem_9780111511466_en.pdf accessed June 10th 2018

¹⁰¹ Scotland's legal system is not based on the common law but takes its roots from Roman law.

¹⁰² Under Section 1(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

¹⁰³ *R v Adomako* (1994) 3 All ER 79

¹⁰⁴ See amongst others Clarkson, C.M.V, *Understanding Criminal law*, Thomson, Sweet & Maxwell at p221.

¹⁰⁵ Steve Tombs, (2018). The UK's corporate killing law: Un/fit for purpose? *Criminology and Criminal Justice*, 18(4) pp. 488–507.

Following the passing of the legislation onto the statute book, Professor David Ormerod and Professor Richard Taylor, in an article in the *Criminal Law Review*¹⁰⁶ pointed to the difficulties of encapsulating management responsibility in such terms and it is this connection between senior management, and their substantial contribution to the gross breach that may cause difficulties¹⁰⁷ during the trial.

Section 8 of the CMCHA 2007 requires both a consideration of how serious the breach was (s.8 (2) (a)) and how much of a risk of death it posed (s.8 (2) (b)). In s.8(3) what might be described as the 'safety culture' of the organisation is taken into account but, as Gobert¹⁰⁸ notes, this subsection does not become operative until breaches of health and safety have been established. Thus, the establishing of a health and safety offence in a trial where a large organisation is under scrutiny is vital before consideration of more endemic problems can begin. Unlike Australia and Canada there is no individual liability (either primary or secondary) under the Act¹⁰⁹. The consent of the Director of Public (England, Wales and Scotland)¹¹⁰ is required before proceedings are initiated under Section 17.

To date the bulk of the prosecutions have involved guilty pleas and they have with the exception of three cases, involved small and medium sized enterprises (SMEs). Indeed many of those SMEs have been tiny companies with either a sole director or a handful of directors. Most of the cases could have been pursued under the common law but this has now been abolished where it pertains to corporate bodies under Section 20.

They are *CAV Aerospace Ltd*¹¹¹ and *R Cornish and Maidstone and Tunbridge NHS Trust*¹¹². The first, *CAV Aerospace* is the only case where a parent company has been indicted for the death of a worker at a subsidiary. While prima facie this case might have provided some interesting insights, it was in the end unexceptional as the relationship between parent and subsidiary was straightforward, with the parent exercising a clear degree of control over the subsidiary. The company was prosecuted for statutory corporate manslaughter and health and safety offences. At the time it had 600 employees. The accident was caused when heavy metal Airbus parts, stacked dangerously, fell and crushed the victim, employee Paul Bowers. A statement from Detective Constable Simon Albrow of Bedfordshire, Cambridgeshire and Hertfordshire Major Crime Unit provides the rationale for the prosecution:

"Following a joint investigation which was launched between ourselves and the Health and Safety Executive in March 2013, we came to the conclusion that no single person was to blame for Paul's death. As parent company to CAV Cambridge, CAV Aerospace failed to act on safety risks which were brought to their attention at the Cambridge site. We therefore sought to prosecute the company for corporate manslaughter due to the collective failings in the management and control of CAV Cambridge which ultimately led to this tragic loss of life."

He went on to point out that the parent company ignored repeated warnings about safety including specific mention of the storage of Airbus material that led to the victim's death. The company was prosecuted under the CMCHA and under Sections 3(1) and 33(1) (a) of HSWA 1974¹¹³.

¹⁰⁶ D. Ormerod, R. Taylor, *The Corporate Manslaughter and Corporate Homicide Act 2007*. (2008) *Crim Law Rev* (8) 589-611.

¹⁰⁷ See Alexandra Dobson, *The Corporate Manslaughter and Corporate Homicide Act: A Symbolic Response*, (2009), *Asia Pacific Law Review*, Vol 17, No 2, at pp 188-199 and see also Alexandra Dobson, *Shifting Sands: Multiple Counts in Prosecutions for Corporate Manslaughter* (2012) (3) at pp 200-10

¹⁰⁸ James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?' (2008) 71 *Modern Law Review* 413–433

¹⁰⁹ See s.18, 'an individual cannot be found guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter'.

¹¹⁰ If the case is one in Northern Ireland, then the Director of Public Prosecutions there must give consent.

¹¹¹ *CAV Aerospace Ltd* (2015) Central Criminal Court unreported.

¹¹² *R v Cornish and Maidstone and Tunbridge Wells NHS Trust* 2016. Judge Toulson ruled that there was no case to answer and the ruling is available at <http://www.mtw.nhs.uk/wp-content/uploads/2016/01/R-v.-Cornish-and-Maidstone-Tunbridge-Wells-Ruling-2016.pdf>, accessed Jan 19th 2019.

¹¹³ Health and Safety at Work Act 1974

The fine in this case was substantial, some £600, and 00 with £125,000 costs and came just before the definitive guidelines on sentencing for health and safety offences and corporate manslaughter were published¹¹⁴. The fine, although large, might have been greater were it not for the fact that the court had noted that the company was not making significant profits¹¹⁵. Nevertheless, it may have foreshadowed a more stringent approach in light of new guidelines. Sentencing remarks from Judge Gordon are not available but have been reported in the media. The extract below sheds some additional light on the relationship between parent and subsidiary

Sentencing, Judge Gordon¹¹⁶ was reported as saying that the most senior manager at CAV Cambridge Ltd reported to the company's sole director, Owen McFarlane, who was also the senior director of CAV Aerospace Ltd'. Judge Gordon said:

“There was’, however, ‘no clear and realistic thought given to the relationship between’ Cambridge and its parent company. This was particularly the case at the level of CAV Aerospace Ltd.’s senior management and above, which appeared, ‘to regard Cambridge as a separate company, almost as a supplier’. In practice, added the judge, the Cambridge site did not have a financial department and the purchase and finance was carried out at group level with the documentation produced in the name of Cambridge.”

Prosecution of the parent company seems to have been the most appropriate course here not only because of the failings at senior level noted above but also as it circumvented another emerging characteristic, where small companies cease trading before sentencing and sometimes before the trial itself. The subsidiary CAV Cambridge closed operations in June 2014 with the result that any fine levied against them would not have been paid.

The other notable case was the first where an NHS Trust¹¹⁷ was indicted¹¹⁸. Two doctors, employed by the Trust were also to be prosecuted for common law gross negligence manslaughter. In the event, the case against the doctors collapsed after the judge, Mr Justice Coulson ruled there was no case to answer. This then led to the case against the Trust being abandoned. Although in some ways a full blown examination of the essential elements of the offence was not undertaken, Toulson, J, did provide some examination of both causation and the way in which senior management, might be identified. At Para 37 of his ruling he rejected arguments that senior management should be precisely defined, following written submissions that the particulars supplied by the Crown were insufficient. He suggested that what was required was that the Trust should identify ‘the tier of management that it considers to be the lowest level of the senior management team within the Trust that is culpable of this offence.’

While this is helpful, in that it begins to explore some of the issues, and seems to suggest that the concept of senior management could be explained on a case by case basis, with regard to the particularities of the culpable organisation, it did not fully clarify, what is meant by senior management. As such we await further judicial elaboration in the future.

As noted earlier, many of the cases thus far could have been prosecuted using the old common law on gross negligence manslaughter, as they involve small companies, often with a single director, where culpability could easily be traced along causative lines. Indeed this was the case with the first successful prosecution¹¹⁹. Some two thirds of the cases have involved guilty pleas and this has effectively stymied full examination of the issues. While it could be said that the law in the UK has been more successful, in the sense that there have been now been some 25 cases, with only three acquittals, this presents a false picture of the law. Sadly, the law has never fulfilled the expectations of its proponents. The lack of cases where the organisations have complex structures, is striking. The law was designed to capture large multi-faceted organisations but it has thus far been tested in any meaningful manner.

¹¹⁴ <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf> accessed 14th Dec 2018

¹¹⁵ According to a report in the Health and Safety Bulletin from Weightmans <http://www.weightmans.com/media/3461945/health-safety-environmental-newsletter-december-2015.pdf> accessed Jan 10th 2019

¹¹⁶ <https://www.bbc.co.uk/news/uk-england-cambridgeshire-33652146> accessed on Jan 12th 2019.

¹¹⁷ Supra at 115

¹¹⁸ An NHS trust is a corporate body.

¹¹⁹ Supra at 53.

Although common law gross negligence manslaughter in relation to corporate entities is abolished under s.20 of the Act, there is of course the potential to use common law gross negligence manslaughter against individuals outside of the scope of the legislation, and this has happened in a small percentage of the cases. Importantly, health and safety offences occur commonly on the indictment, alongside corporate manslaughter and in some cases common law gross negligence manslaughter. See commentary on the first prosecution¹²⁰ for an account of the way the law works where there are multiple counts on an indictment in cases of corporate manslaughter.

vi. Conclusion

This paper has attempted to chart the way in which the law in Australia, Canada and the UK, works in relation to corporate/industrial manslaughter. While it is impossible to say how the law in the various jurisdictions in Australia will function given the lack of case law, there appear to be overlapping issues in Canada and the UK which have implications for all three countries.

It is beyond the scope of this paper to consider all of the potential barriers to effective working of the legislation but there are some emerging themes. As noted in an earlier section of the paper, there is a distinction between regulatory offences and 'true crime'. This distinction whilst recognised in case law and in academic comment, obfuscates the close relationship between the two, in practical terms. In reality, however described, the intricacies of the offences in all three jurisdictions, require a breach of a duty of care. The statutory manslaughter offence can only be established via negligence and the breach will be closely aligned to health and safety responsibilities. While they are different¹²¹, health and safety offences are predicated on risk and manslaughter on outcome, in virtually all of the UK corporate manslaughter prosecutions, regulatory offences appear on the indictment¹²². In doing so, they pave the way toward establishing the gross breach. Ironically, while that is the case, the perception that safety offences and statutory manslaughter are entirely different may impede prosecution.

This because there is the concern that at the investigation stage, there may be an inability arising from inexperience on the investigators to understand fully what might constitute a statutory manslaughter offence. This is not an issue for the UK alone. Clearly the police in all three countries are more used to dealing with obvious criminal offences, rather than what might be referred to as 'white collar' crime. While inspection bodies such as the Health and Safety Executive (HSE), in the UK, will advise at the investigative stage, it is ultimately the police who lead an investigation. Further there are resource issues in all three jurisdictions that may act as an obstacle to the carrying out of effective investigations. These apply both to the police and also relevant inspection bodies.

The tragedy of Grenfell Tower in London, is also instructive. The Metropolitan Police have disclosed to former residents of the Tower that they are sifting through huge volumes of material, in terms of witness statements and technical data in relation to the cause of the fire¹²³. There are conjoined issues here, investigators lacking resources and in the case of the police, inexperience to identify statutory manslaughter and at the same time, as a result of the perceptions attached to both 'true crime' and 'quasi crime,' perhaps unable to recognise the distinction between offences when they occur¹²⁴. Now three years on from the tragedy at Grenfell the police continue their investigation¹²⁵ and we await news of potential prosecutions.

A further and striking issue is the drafting of the various pieces of statutory manslaughter legislation. All three countries have attempted to bring about changes to the law, in order to move away from the problems associated with the common law's reliance on finding the directing mind within an organisation. Innovative approaches, particularly in Australia have been taken. The attempt to capture failing cultures which in turn lead to deficient safety is useful and moves statutory manslaughter away from a focus on individuals to a more realistic appraisal of an organisations responsibility for the deaths of victims. It has not yet been tested and it remains to be seen, if in practice, this approach will assist.

¹²¹ Supra at 116

¹²² There has been only one case where this was not so. *R v Malcolm Fyfield and MNS Mining Ltd*, Swansea Crown Court (2014) unreported

¹²³ <https://www.bbc.co.uk/news/uk-40747241> accessed 14th Jan 2019

¹²⁴ <https://www.healthandsafetyatwork.com/news-and-prosecution/jonathan-grimes-laura-thomas-martinisation-ozdil-ten-years>, accessed Jan 20th 2019

¹²⁵ <http://news.met.police.uk/news/third-anniversary-of-the-grenfell-tower-fire-404359> accessed June 30th 2020.

In Australia, the federations in ACT and Queensland have attempted via their laws to encapsulate both individual liability and organisation fault. Canada too, includes both individual and organisational fault in the legislation.

By contrast the UK's law has been criticised as it lacks any individual liability and the uncomfortable blend of ameliorated identification of senior management, combined with less than whole hearted attempts to capture the culture of the organisation, appears to have come about as the legislation made its difficult journey through Parliament. Again, although there have been a number of cases, thus far, the CMCHA has not been tested in a meaningful way.

Likewise the provisions in Bill C-45 in Canada, where there are echoes of both vicarious liability and also a strong emphasis on corporate culture, remain untested by the sort of major cases that was envisaged following the Westray disaster. In the UK and Canada, the law is either little used, or used in cases that are far from encompassing the sorts of tragedies that had instigated calls for reform of the law.

Perhaps in all three jurisdictions it is the symbolic effect of the law that is as important as the law itself. Unfortunately symbolism is difficult to quantify and in the absence of meaningful case law, it may be many years before any of the examples of statutory manslaughter can be properly assessed.

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