Ten Contentions of Corporate Manslaughter Legislation:
Public Policy and the Legal Response to Workplace Accidents

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Abstract: Recent rail accidents in the UK have focussed public attention on the role that companies play in the causes of incidents and accidents. Partly in response, the Westminster parliament has published proposals to change the legislation on corporate manslaughter. Other accidents have had a similar impact in other countries. For example, the 2006 mining accident in Sago, West Virginia has prompted calls to recognise the responsibility that executive officers share in creating the conditions in which adverse events are likely to occur. There are strong parallels between this accident and the 1992 Westray mining disaster, which motivated significant changes in the Canadian jursidiction. Similarly, the Longford explosion in Victoria prompted further reviews in Austalia. The following pages provide an overview of the issues surrounding legislation for corporate manslaughter. The review focuses on existing legislation in Canada and Australia as well as recent proposals in England, Wales and Scotland. It forms part of a wider comparative analysis that is intended to help the formation of public policy over the reform of corporate manslaughter legislation.

Keywords: accidents, accident prevention, system safety, corporate manslaughter.

1. Introduction: Ten Contentions of Corporate Manslaughter Legislation

Corporate manslaughter legislation has proven to be controversial in many different counties. In Canada, the introduction of the C-45 Westray Bill split opinion between employers and the trades unions. The creation of a new offence by the Australian Capital Territories led to confrontation between State and Federal jurisdictions. Proposals for the introduction of new offences for Scotland and for England and Wales have done little to establish consensus. The following list identifies ten key area of conflict over the development of corporate manslaughter legislation. The list is not exhaustive nor is it prioritized. However, as we shall see, the elements help to characterise the debates surrounding recent proposals and legislative changes across several jurisdictions:

1. Supporting Accident Investigations and the Need for Accountability: Annex 13 of the International Civil Aviation Organization (ICAO) Convention sets out minimum standards for accident and incident reporting. It states that "the sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability". Many countries, therefore, provide legal protection for the individuals involved in investigations; such as US Federal Aviation Regulations (14 CFR 91.25). However, these regulations seldom provide protection from criminal prosecutions. For example, three Italian aviation officials and an air traffic controller were convicted of manslaughter and negligence following a fatal collision between a Cessna and an MD-87 at Milan's Linate Airport in October 2001. They were sentenced to prison terms ranging from 6 up to 8 years. Such prosecutions reveal a tension between the need to learn as much as possible about the causes of an accident and public pressure to ensure accountability. How can we ensure the cooperation of operators and managers in the investigation of an accident if the results of such enquiries may be used against them in litigation?

2. Equity in Operator versus Management Responsibility: Further tensions arise from the need to ensure equity in the blame associated with the causes of an accident (Pearce, 1987). There can be a perception that management escape the sanctions that are applied to individual operators. In the last 20 years, fewer than 40 criminal convictions have sent employers to jail for their involvement in the deaths of employees through health and safety related incidents in the United States (NYCOSH, 2004). Partly in consequence, many States have developed legislation that explicitly addresses managerial and executive involvement in adverse events. For example, Virginia's policy is to recommend criminal prosecution for manslaughter against any person whose flagrant violation of the State's Occupational Safety and Health laws results in the death of an employee. In Minnesota, the Occupational Safety and Health Act was amended during 2000 to increase the minimum penalty to $50,000 for cases where a violation contributes to the death of an employee. However, such sanctions have been criticized in the aftermath of high-profile mishaps such as the Sago mining accident. There have been calls to extend the provisions of the Sarbanes-Oxley Act from executive responsibility in financial mismanagement to include

significant criminal liability for the management of health and safety violations (Indiana House of Representatives, 2005). The link with Sarbanes-Oxley is significant because it signals a change of intent and not simply a change in detailed legislative provisions.

3. Third Party Liability and Unintended Consequences: The law governing liability in the aftermath of accidents is usually extremely complicated. In consequence, there are often unintended consequences of particular legislative changes. For example, the UK Management of Health and Safety at Work Regulations (MHSWR) 1999 were amended in 2003 partly in response to the European Directive on health and safety (89/391/EEC). The provisions were intended to enable employees to bring a civil action if they had suffered injury or illness as a result of the employer's breach of the MHSWR. The amendment also ensured a form of equity by allowing civil claims against employees for a breach of their duties under the regulations. The amendments also enabled third parties to make claims against employees over violations of the MHSWR. However, the amendments did not enable third parties to make claims against employers. The Health and Safety Executive recognised that their "underlying policy intention in placing a civil liability on employees for a breach of their duties under MHSWR was to promote employee responsibility and to ensure that liability was placed on the person who caused the breach. The intention was that the breach by the employee would be actionable by a fellow employee or their employer; it was not intended to give rise to actionable claims against employees by third parties". In consequence, recent amendments have been proposed to remove third-party liability from employees (UK Health and Safety Commission, 2005). This iterative process of reform illustrates the impact that detailed provisions can have upon confidence in key principles of the legal system.

4. Criminal versus Civil liability: Some authors maintain that civil rather than criminal liability is more effective against companies infringing health and safety legislation (Clarkson, 1996, Khanna, 1996, Fischel and Sykes 1996). The economic disincentives and loss of reputation that dissuades companies from violating rules and regulations can be the same under both civil and criminal legislation. However, civil systems are better tuned to assessing appropriate financial sanctions. This helps companies to extend conventional forms of cost-benefit analysis into any consideration of health and safety policy. In contrast, criminal systems often result in a form of 'over-deterrance' that dissuades companies from providing important services (Block, 1991). Executive officers fear personal criminal convictions. There are further arguments in favor of the civil system. Criminal law offers procedural mechanisms that increase the burden of proof in order to protect individual defendants. Companies have exploited these defences to avoid criminal sanctions in the aftermath of an adverse event (Tomasic, 1994). However, there are important counter arguments in favour of corporate criminal liability (Clarkson, 1996). There is a qualitative difference between civil and criminal convictions in many countries and the nature of any violation often justifies public pressure for criminal sanctions. There is also a strong deterrent effect stemming from the seriousness of criminal proceedings. Investigating agencies can also employ a range of additional procedures to support their work, including the ability to detain and question company officials.

5. Establishing Negligence and Intent: In order to be convicted of a crime, many legal systems require intent. Such provisions protect individuals with a mental disability if they commit an otherwise criminal act but do not understand or intend the consequences of the action. For those without such a disability, the prosecution must establish a guilty mind, 'mens rea', in order to achieve a conviction. However, it can be difficult to establish intent or a guilty mind for complex organizations that include hundreds or thousands of individuals. In practical terms, it is usually sufficient to establish intent on the part of an individual manager or executive officer in order to demonstrate intent across an organization. However, it can be very difficult to identify particular individuals with the necessary 'guilty state of mind' when an adverse event is the result of many different decisions taken over a long period of time. It is not always necessary in such cases to establish intent in order to achieve a conviction. For example, an individual's behavior can be construed as criminal conduct in cases of negligence. These cases often rest upon comparisons with the 'reasonable conduct' of similar parties. Negligence may be proven with respect to standard operating procedures and wider industry norms. At a corporate level, this raises problems when those norms may themselves be inadequate to protect public safety. Negligence may be the result of many lesser failures on the part of different managers within an organization. This can result in extremely complex legislation and case law based on many organizational structures. As we shall see, several countries have started to reform this aspect of their legal systems in the face of public concern over failures to convict corporations under this piecemeal approach.

6. Individual versus Corporate Liability: A number of arguments can be made in favor of corporate rather than individual liability for health and safety violations. Investigation agencies already recognize that adverse events can be caused by the collective effect of many minor violations, of inadequate engineering and poorly conceived policies. Responsibility is, therefore, distributed across many different levels of an organization (Ramraj, 2001). Individuals also often lack the resources necessary to make adequate reparation for the harm that they cause. For example, it can be difficult to assess individual responsibility for the harm caused by a large scale chemical release. In contrast, corporate bodies may have access to resources that can make adequate reparation. Companies may also exploit personal liability by offering increased salaries under the implicit assumption that members of staff would assume personal responsibility for health and safety violations. These individuals would then act as 'fall guys' for wider corporate failings. On the other hand, there are persuasive arguments in favor of personal liability. For instance, there may be little deterrent if managers and executives feel that they will not be held individually accountable for personal violations of health and safety legislation. The financial resources of a corporation may be sufficient to protect shareholders and hence executive officers from the adverse effects of any litigation if sanctions are not carefully applied. In other words, personal litigation offers a deterrent effect that goes well beyond any corporate litigation.

7. The Directing Mind (Identification) Principle: Many jurisdictions allow for the criminal prosecution of organizations and not just of individuals. However, this raises a host of practical and philosophical problems. For example, the responsibility for particular acts is usually associated with individuals. If groups are responsibility then courts often find it difficult to determine the degree of culpability within the members of the group (Jefferson, 2001). It can be difficult for courts to distinguish between claim and counter-claim as multiple defendants seek to repudiate their individual role in the causes of an accident (Simpson and Koper, 1992). It is for this reason that many legal systems rely upon the 'directing mind principle'. This assumes that it is only possible to find a corporation guilty of manslaughter if it is also possible to find one of its senior officers, or directing minds, personally liable for the crime. This principle has recently been attacked because it is extremely difficult to establish individual liability when complex engineering decisions may be devolved from the board level through many different layers of management. From 1992 to 2005 there were thirty-four prosecutions for work-related 'corporate manslaughter' in England and Wales but only six, small, organizations were convicted (UK Home Office, 2000a).

8. Corporations or Organisations? The term 'corporate manslaughter' is a misleading because the provisions of such legislation usually seek to go beyond narrow definitions of a corporation. Australian states have used the term 'industrial manslaughter' to avoid this limitation and leave the scope of the provisions deliberately wide ranging. Other jurisdictions have created legislation that refers to 'organizations' so that they address not simply commercial bodies but any agencies where the neglect of health and safety legislation may lead to death or injury. Under such terms it would be possible to prosecute terrorist organizations for the death of a member using a broad interpretation of these group-based manslaughter Acts. Existing legislation differs between jurisdictions as to whether or not government agencies might also be prosecuted for health and safety violations. Narrow definitions based on the concept of a corporation can often exclude State bodies from the provisions of their legislation.

9. Financial Penalties and Restorative Justice: Later sections will describe the considerable controversy that exists in several different countries about the potential penalties that might be associated with any conviction for 'corporate manslaughter'. Some jurisdictions have implemented laws that allow for unlimited fines. The precise amounts are, typically, determined by the profits of a commercial organization. However, this creates concerns that companies may be dissuaded from investing in jurisdiction that offer punitive sanctions for health and safety violations. 'Innocent' shareholders and employees may also be badly affected by these financial penalties. Fines for corporate manslaughter create further problems if Crown or government agencies are convicted. In such cases, fines end up being recycled between different departments of government. Increasingly, there have been calls for more innovative forms of restorative justice where companies and not-for-profit organizations are required to reform their safety policy and provide resources to improve the health and safety of the wider community (Braithwaite, 2002). These approaches have been criticized, in turn, for lacking the 'bite' of financial penalties, especially given that a conviction for corporate homicide may avoid some of the stigma that is associated with convictions for other forms of manslaughter.

10. Investigating Authorities? It can be difficult to identify appropriate agencies that might be used to investigate potential violations of new corporate manslaughter legislation. Problems arise because specialist expertise is often required to enforce health and safety regulations. Many jurisdictions, therefore, rely on cooperation between government regulatory agencies and police forces during investigations. Even with existing specialist skills, it is not clear that these agencies are well prepared to conduct the type of investigations that would be necessary to establish the aggregated 'management failures' or poor 'corporate culture' that have been advocated as key concepts within recently proposed legislation.

2. The Canadian C-45 (Westray) Bill

The introduction has sketched some of the key issues that arise when considering the introduction of legislation to cover corporate responsibility for health and safety violations. As will be seen, these general concerns come into particular focus when considering the particular offence of corporate manslaughter. Several governments have introduced legislation that provides for individual and collective liability for the causes of accidents and incidents. For example, the Canadian Parliament passed Bill C-45 in 2004.

C-45 stemmed from a 1992 mining accident in Westray Nova Scotia, which killed 26 miners. Although a provincial inquiry found managers, politicians and government regulators to have been negligent, the criminal charges against the managers could not be proven. At that time there was no law holding senior company executives criminally responsible for ignoring safety warnings. The Westray Bill was the result of sustained pressure from trade unionists, parliamentarians and, not least, the families and friends of the dead. Although the Bill did not directly deal with corporate manslaughter, it extended liability to both the corporation and anyone in a supervisory role within a corporation if they know about a crime committed by employees.

The Westray Bill forced the Canadian legislature to address many of the issues that were raised in the opening paragraphs. In particular, the bill was intended to address the problems of distinguishing between corporate and personal responsibility for involvement in adverse events. Under the existing criminal code, the Crown must establish that an individual possessed a guilty state of mind in committing an offence. Hence, someone suffering from a mental disorder or an individual who does not know about the criminal aspects of their actions cannot be found guilty. This guilty 'state of mind' differs between offences. For example, individuals may be guilty through knowing particular facts, such as that an item is stolen. They may also be guilty by intent if, for instance, they seek to knowingly mislead someone. They may also be guilty of intent to perform an act, for instance, planning to harm another person. There are also offences under Canadian law that carry a lower standard of proof. These are based on the concept of negligence where an objective test is applied to determine whether the person's conduct is itself sufficient evidence of 'criminal fault' (Canada Department of Justice, 2005). These might include situations in which an individual failed to provide their co-workers with the recommended protective equipment.

As mentioned, C-45 forced the Canadian legislature to consider both individual and corporate responsibility. The existing criminal code already extended the definition of "every one", "person" and "owner" to include "public bodies, bodies corporate, societies, companies". It is, however, more difficult to determine whether or not a corporation has the requisite mental state to be found guilty of an illegal act. It can also be difficult to draw a line between individual and group responsibility for particular actions. For example, it is usually possible to identify the companies involved in an accident. However, when we consider particular events we often focus on the actions of particular individuals. If an operator disables a safety system that goes undetected by the company, it is unclear whether the company is committing a crime. In the Canadian legal framework, successive case law was built up to elaborate the rules for when a corporation could be convicted of a crime. This established that a corporation is guilty of a crime if its "directing mind" committed the prohibited act and had the necessary state of mind. This "directing mind" referred to individuals who had the authority to set policy rather than simply manage existing directions. Case law referred to an "alter ego" or "soul". The directing mind must also have the intention to benefit the corporation by the crime. In the previous example, an executive officer might be considered the 'directing mind' of the company if they helped to establish a deficient safety management policy.

C-45 embodied ideas that were already being gradually introduced into other areas of Canadian Law. In particular, it refers to organizations rather than corporations. This covers political associations and terrorist groups within the

provisions of "a public body, a body corporate, a society, a company" and "a firm, a partnership, a trade union or an association of persons created for a common purpose". It also revised provisions over the notions of a 'directing mind' by referring to a 'senior officer'. The intention was to bring the legislation closer to the concepts and concerns of the general public. Senior officers were defined to include all individuals who have an important role in setting policy or managing significant aspects of the organization's activities. This definition focuses on the function of the officers rather than particular titles. It is clear that CEOs must be 'senior officers' whereas under previous legislation it might have been possible for senior officers to argue that they had no 'day to day' role in directing particular policies. The Bill draws together other ideas from the wider Criminal Code when it refers to organizations who are 'party to an offence'. This includes the person who actually commits the offence or aids or abets another person to commit it (section 21) and anyone who counsels another person to commit an offence (section 22). Hence organizations may be party to an offence if they were to advise someone to perform a criminal act. C-45 follows the wider Canadian distinction between cases of negligence and intent. In the past, it was sufficient to prove that an employee committed an illegal physical act for the organization to establish that the organization also committed that act. Under C-45 the term 'employee' is broadened to 'representative' meaning directors, partners, members, agents and contractors, as well as employees.

In cases of negligence, the Crown previously had to establish that employees committed the act and a senior officer should have taken reasonable steps to prevent them from doing so. Previous provisions lacked transparency. The complicated organizational structures, mentioned in the introduction, led to many different provisions that collectively were intended to cover the diverse ways in which different organizations might act. C-45 simplified matters considerably by making an organization responsible for the negligent acts and omissions of its representatives. These acts and omissions can be combined. There is no requirement that they be the responsibility of a single representative. This covers complex scenarios, typical of many accidents, where the effects of several different failures are compounded over time. The Canadian Department of Justice (2005) provides the following illustration:

> "…in a factory, an employee who turned off three separate safety systems would probably be prosecuted for causing death by criminal negligence if employees were killed as a result of an accident that the safety systems would have prevented. The employee acted negligently. On the other hand, if three employees each turned off one of the safety systems each thinking that it was not a problem because the other two systems would still be in place, they would probably not be subject to criminal prosecution because each one alone might not have shown reckless disregard for the lives of other employees. However, the fact that the individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted. After all, the organization, through its three employees, turned off the three systems".

In order to establish intent, the court must determine whether the senior officers departed from the standard of care that might otherwise have been expected from such an organization. This involves comparisons between the practices of the accused and comparable organizations. For instance, it would be important to determine whether or not the senior officers should have implemented technical systems to prevent the three independent actions. An organization might also be found guilty if a safety director failed to ensure that one of the negligent employees had adequate training.

Looking beyond negligence where knowledge of an act is not necessary, C-45 identifies several ways in which organizations can commit crimes of intent. All of these situations focus on the role of a 'senior officer' who must act with the intention of producing benefits to the organization. For instance, the senior officer may themselves perform a criminal act to benefit their company. In such circumstance, they will be individually liable and the company will also be guilty of the act. Senior officer may also direct others to perform a criminal act. C-45 states that the organization is guilty if the senior officer has the intent and subordinates carry out the criminal act even if the employees themselves have no criminal intent. The senior officer and the organization could both be found guilty. Finally, an organization would be guilty if a senior officer knows employees are going to commit an offence but does not stop them. It would also have to be shown that the senior officer failed to act because they wanted to benefit the organization to benefit from the crime.

C-45, therefore, addresses many of the issues identified in the introduction that arise when considering provision for corporate manslaughter. It clarifies previous provisions under the Canadian Criminal Code covering

corporations, or more accurately ‘organizations’. The concept of a ‘directing mind’ is replaced with the more familiar notion of a senior officer. The legislation covers both intent and neglect, using the comparative approach mentioned in the opening paragraphs of this paper. The close parallels between the key issues in corporate manslaughter legislation and the provisions of C-45 should not be surprising given that C-45 stemmed from the Westray accident. However, as we have seen, the new legislation has wider concerns dealing with corporate responsibility and financial probity.

3. Australian Capital Territory’s Crimes (Industrial Manslaughter) Amendment Act

Canada is one of several countries that have recently reformed their legislation in response to public concern over corporate liability for health and safety related incidents. The Australian Federal Criminal Code Act, 1995 is similar to C-45; it also uses identification as a means of establishing organisational liability. Prosecutors can demonstrate corporate involvement in a criminal act by showing that a ‘high managerial agent’ carried out that act. The Federal Criminal Code covers both intention and negligence. However, it goes further than the principle of identification because ‘intention, knowledge or recklessness’ can be also attributed where a corporate culture. Organisations are also liable if they fail to create and maintain a corporate culture to ensure compliance. This is an important departure from C-45, which takes a more relativist approach by comparing behaviour to that of similar organisations. In contrast, the Australian Federal Code explicitly defines corporate culture to be ‘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’.

Public and political attitudes to this corporate manslaughter legislation were strongly affected by subsequent adverse events. The September 1998 explosion at ESSO's Longford gas plant in Victoria killed two employees. This accident amplified existing concerns over the number of workplace incidents and a number of states considered extending existing legislation. Australian Federal Government legislation only applies to Commonwealth employers. Each State or Territory regulates the safety of private sector employees and their employees. During November 2003, the Australian Capital Territory (ACT) became the first jurisdiction to pass legislation creating the offence of Industrial Manslaughter under part 2A of the Crimes Act 1900; Crimes (Industrial Manslaughter) Amendment Act. This provided for a maximum penalty of $1.25 million for companies. Individuals can be faced with fines of up to $250,000 or imprisonment for 25 years or both. Courts can also require that an organization undertakes community projects with a cost of $5 million.

The Industrial Manslaughter Amendment Act focuses on employers and ‘senior officers’. For corporations, these officers include individuals any executive who “makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity” (Australian Capital Territory, 2003). Senior officers also include people in entities who would have an executive role if the entity were a corporation. This role is defined to include people in government agencies. Senior officers in government entities are defined to include Ministers, those who perform the functions of Chief Executive Officer and “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”. Under the ACT legislation, an employer or a senior officer commits the criminal offence of industrial manslaughter if a worker dies or is injured in the course of employment and later dies and the employer or senior officer causes the death of the worker and the employer or senior officer is reckless about causing serious harm to the worker or negligent about causing the death of the worker. Although the Act is relatively wide ranging, it avoids any transitive liability. In other words, senior officers cannot be convicted for the negligent or reckless actions of others.

It can be argued that the title of the amendments is misleading. As mentioned above, the intention was to bring together legislation in this area so that it covered many different organizations and not simply corporations. It covers both industrial workplace fatalities but also those that occur in government entities. It was argued that the “Government wants to ensure all employers take their responsibilities to prevent workplace deaths very seriously, regardless of whether that employer is a union, a club, a community organization, a corporation or a natural person. And we are making sure that we will have to meet our own standards - Ministers and senior Government officials could also be prosecuted under the new laws” (Australian Capital Territories, 2003a).

The Act left a number of issues to the interpretation of the courts. In particular, it did not specify the types of conduct or omission that needed to be proven before an employer or senior officer could be deemed reckless or negligent under the amendment. Similarly, like many of the existing legislative provisions, it did not clarify the nature of the necessary causal relationship between their conduct and the death of the worker. This is significant given that it can be difficult to determine whether an employer or senior officer's role in establishing a corporate safety-culture might have directly led to a fatality. The Industrial Manslaughter Amendment Act was extremely controversial. Many argued that it was unnecessary, the provisions did little more than gather together existing clauses from other areas of the Territory's Health and Safety legislation. For example, Stuart Henry, a Member of the House of Representatives, criticized the Industrial Manslaughter Amendment Act when supporting Federal legislation in this area:

> "The ACT's industrial manslaughter law, frankly, is a piece of 'me too', union sponsored legislation imported from overseas that effectively kicks the guts out of Australia's focus on cooperation between employers and employees. That culture of cooperation needs to be protected and promoted, as it encourages collective responsibility with its emphasis on education and prevention rather than punishment. Surely this is an example where collective action in the workplace would work to the benefit of everybody" (Henry, 2005, p.28).

One of the important side effects of the Industrial Manslaughter Amendment Acts was that it created potential inconsistencies between different State, Territory and Federal jurisdictions. These were summarised in briefing papers prepared by employers' organisations in the aftermath of its introduction (Fitzgerald, 2005). In addition to the ACT and Commonwealth legislation, Victoria has implemented an Occupational Health and Safety Act 2004 (VIC) which contains a 'Duty not to recklessly endanger persons at the workplace'. Western Australia's Occupational Health and Safety Act 1984 includes provisions for industrial manslaughter under Section 21C. New South Wales' Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 inserts a new Part 2A 'Workplace Deaths – Offence'. There has been no industrial manslaughter legislation proposed for Queensland, Tasmania or the Northern Territory. South Australia has introduced the Occupational, Health Safety and Welfare (Industrial Manslaughter) Amendment Bill 2004 as a private members bill. Table 1 shows some of the differences between four of the State and Territory jurisdictions that have legislated in this area. The information for Southern Australia is based on the draft Bill. Similar inconsistencies exist in the terms of imprisonment that are associated with similar offences in each of the jurisdictions. Hence the critics of the ACT Industrial Manslaughter Amendment Act have argued that while it may introduce greater consistency within that State, it has encouraged a patch-work of legislation where similar offences might have radically different consequences in different parts of the same country.

	Australian Capital Territory	**New South Wales**	**Western Australia**	**Victoria**	**Southern Australia**	**Commonwealth**
Individual	$200k	$165k	$250k to $312,500k	$184k	$500k	$9k
Company	$1M	$1.65M	$500k to $625k	$920k	$500k	$495k

Table 1: Maximum Monetary Penalty for Industrial Manslaughter in Five Australian Jurisdictions (2005)

One month after the ACT Industrial Manslaughter laws took effect, the Federal Government introduced the Occupational Health and Safety (Commonwealth Employment) (Employee Involvement and Compliance) Bill 2004. This came into effect on 13th September 2004. It addresses some of the key provisions within the ACT legislation by seeking to exclude Commonwealth workplaces and employees from its provisions. This creates a situation where different employees within the same workplace are covered by entirely different legislation. It also reflected a clear division in public policy even though the Federal Government had powers to override the ACT legislation in this respect. The Federal amendment also created a framework for exempting Government employers and employees from similar legislation enacted by other States in the future. The Commonwealth objected to the ACT provisions on two key grounds. Firstly, there is a concern that the ACT legislation singles out the conduct of employers and senior officers. Secondly, the Industrial Manslaughter provisions duplicate existing offences available to deal with workplace deaths, such as the general offence of manslaughter in section 15 of the *Crimes*

Act 1900 (ACT) and the *Occupational Health and Safety Act 1989* (ACT). Consequently, the 2004 Commonwealth amendments did not seek to exempt Government officials from the existing legislation prior to the ACT provisions on Industrial Manslaughter.

The Commonwealth representatives argued that "(our) occupational health and safety policy is focused on prevention of workplace deaths and injuries. State and Territory laws which purport to impose criminal liability in respect of a person's death that occurs during, or in relation to, the person's employment or provision of services to another person are inconsistent with this policy" (Commonwealth of Australia, 2004). The proponents of the Federal amendments also pointed to the practicalities associated with obtaining a conviction for Industrial Manslaughter. It seems likely that if the standards of proof for a criminal conviction could be obtained under the ACT amendment then it could also have been obtained under the existing criminal code. If this is the case then it can be argued that creating separate provision for Industrial Manslaughter will be counterproductive. Killing someone at work might be seen as less serious than killing some on the street. A conviction for Industrial Manslaughter might lose some of opprobrium associated with a criminal conviction for remaining forms of manslaughter (Braithwaite And Makkai, 1994).

The divisions over Industrial Homicide reflect strong political differences between the Howard government and some of the labour organizations. For instance, the Australian Trades Union Congress (2004) has strongly criticised the Federal intervention:

> "The ACTU supports the ACT Government's industrial manslaughter law because it provides strong penalties for employers convicted of causing the death of an employee through negligent or reckless behaviour. Industrial manslaughter laws provide a strong deterrent to employers and send a big signal that they must provide a safe working environment..."

Employers representatives have countered by arguing that Industrial Homicide legislation should focus on individual responsibility for health and safety rather than placing additional sanctions on corporations. The Australian Chamber of Commerce and Industry (2001) have argued that:

> "There is a growing and disturbing trend in Australia towards the increased use of enforcement of Occupational Health & Safety (OHS) regulations based on the ill founded premise that increased fines and penalties levied by the jurisdictions will in themselves result in improved OHS performance. The fines and penalties are increasing to such an extent that the dollar value would bankrupt most small to medium sized companies and the proposed introduction of the new charge of corporate manslaughter will lead to increased legal disputation and a reluctance by OHS professionals and managers to take on higher levels of corporate responsibility. In an era of improved communications and consultative processes there are more effective options than enforcement through legal processes to achieve better OHS performance".

4. The English and Welsh Draft Bill on Corporate Manslaughter

There are some similarities between the Australian State and Territory jurisdictions and the legal framework covering the United Kingdom. The partition of the Irish Free State in 1922 left four countries with three distinct legal systems; England and Wales, Scotland and Northern Ireland. Initially each of these jurisdictions implemented the statutes enacted at the Westminster parliament. This situation was complicated by devolution during the late 1990s. The Scottish Parliament and Welsh assemblies have responsibility for key areas of the administration of those countries. The Northern Ireland Assembly is currently suspended. Criminal law in Northern Ireland remains the responsibility of the Secretary of State for Northern Ireland. There is a requirement on all three national systems to incorporate European legislation following the UK entry into the European Economic Community in 1973. This preamble explains why the following sections distinguish between proposals for Corporate Manslaughter in both the English and the Scots legal systems.

The need for reform can be illustrated by the complexity of current provision. In England and Wales, murder and manslaughter are common law offences. There is, therefore, no complete definition of either concept. There are differences in the degree of culpability, for instance through provocation or intent. For example, involuntary manslaughter occurs if someone kills without intending to cause death or injury, but was blameworthy in some other way. However, a recent Law Commission report argued that such distinctions were a "mess", lacking "clarity

and coherence" and were "seriously flawed" [cite]. Within the English and Welsh concept of manslaughter, there is the notion of gross negligence. This supposes that there was a duty of care owed by the accused to the deceased. And that the death of the deceased was caused by the breach of this duty of care. And that the breach was so great as to represent a criminal form of gross negligence.

It is possible for companies to be found guilty of manslaughter under existing legislation. However, as with previous Australian and Canadian provisions, it is necessary to identify a 'controlling mind' who is also personally guilty of the crime of manslaughter. As mentioned in the introduction, this is referred to as the 'directing mind' principle in English and Welsh law. The only successful prosecutions for corporate manslaughter in the UK have been brought in England. These involved relatively small companies where it is relatievly easier to identify a single, directing mind. For example, OLL Ltd was the first company to be convicted of manslaughter. This case also resulted in the first company director being given a custodial sentence for their role in the offence. The case involved the death of four students in a canoeing accident in Lyme Regis. There were only two directors of the company. The jailed director had the primary responsibility for "devising, instituting, enforcing and maintaining the safety policy" (Leckia and Anwar, 2005).

A further example is provided by a case involving the director of an English waste paper recycling business was given a 12 month jail sentence following the death of an employee in December 2003 (Raines, 2005). The accused pleaded guilty to manslaughter and other health and safety charges. His company was also fined £30,000 with costs of £55,000. The employee climbed into a paper-shredding machine to clear blockages. The machine contained a series of hammers that revolved at high speed. The subsequent investigation into the accident found that there was no means of securely isolating the machine while blockages were being cleared and the control system was contaminated with dust. In this case, the individual director was found guilty of manslaughter as the 'directing mind'. Both he and his company pleaded guilty to offences under section 2(1) and 37(1) of the Health and Safety at Work etc Act 1974 (HSWA). Section 2(1) of HSWA states "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees." Section 37(1) states "Where an offence under any of the relevant statutory 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 officer of the body corporate or a person who was purporting to act in any capacity, he as well as 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."

The prosecution of both the company and the individual illustrates the way in which English and Welsh Health and Safety Legislation build on the 'identification principle'. However, this approach is difficult to apply in criminal prosecutions for corporate manslaughter. As we have seen, many companies delegate policy decisions on safety management issues to relatively junior staff. Other organizations hire-in expertise from specialist consultancies. It is not possible under the present law to add up the negligence of several individuals to show the company as grossly negligent. In consequence, a number of high-profile prosecutions have failed to achieve convictions for corporate manslaughter under existing legislation. Following the 1987 loss of the Herald of Free Enterprise, two directors and P&O European Ferries were acquitted of manslaughter. The judge ruled that the identification principle could not be satisfied because there was insufficient evidence against any individual director or senior manager. The 1997 Southall rail crash led to the prosecution of Great Western Trains. The Crown Prosecution Service did not link the corporate case to the prosecution of any individual director or manager. This prosecution might, therefore, have established new case law breaking the identification principle. However, the court ruled that the trial could not proceed on this basis. The company subsequently admitted violations of Health and Safety legislation and was fined £1.5 million.

Arguably the most significant recent case in English Corporate Manslaughter stemmed from the Hatfield train crash in October 2000. This accident led to the deaths of four people and more than 100 were injured. Five executives were prosecuted for manslaughter. Three were employed by the track owner, Railtrack. Two were employed by Balfour Beatty; the company responsible for maintaining the track. Their company was also charged with manslaughter under the Health and Safety at Work Act, 1974, which as we have seen, provides for a conviction of corporate manslaughter if a senior individual or 'directing mind' is guilty of "gross negligence

manslaughter". The judge directed that all manslaughter charges should be dropped. The conduct of the individuals was "at its highest, a bad error of judgment" and nowhere near gross negligence. With no individuals accused of manslaughter, the company could not be guilty of manslaughter. He, therefore, concluded that the case illustrated "the pressing need for the long-delayed reform of the law in this area of unlawful killing". Similarly, manslaughter charges were thrown out against Barrow Borough Council following the deaths of seven members of the public from legionnaire's disease in 2002. The judge ruled that there was no case to answer. The jury failed to reach a verdict on seven counts of manslaughter against an individual design services manager. Partly as a result of previous acquittals, the UK Crown Prosecution Service (2005) decided there was no prospect of convicting any individual or company for manslaughter by gross negligence following the 2002, Potters Bar rail crash.

Several different groups, including both the UK Trades Union Congress and the Institute of Directors, subsequently argued for changes in the English and Welsh laws on corporate manslaughter. In 2000, the UK Home Office published proposals to revise the law on involuntary Manslaughter in England and Wales. The reforms related to those who kill when they do not intend to cause death or serious injury but where they have (i) been extremely careless or negligent, or (ii) reckless as to whether death or serious injury occurred. Extreme carelessness or negligence does not require proof that a person was aware of a risk of death or injury resulting from his or her conduct, whilst recklessness does. The Home Office (2000) proposals distinguished between individuals and organizations. For individuals they envisaged a distinction between reckless killing and manslaughter through gross negligence. Neither of these offences would require any 'duty of care' to be established. As might be expected, the proposals also sought to address the identification principle in English and Welsh law. The Home Office suggested retaining the former route of prosecution through a 'directing mind' but also proposed the creation of a new offence of 'corporate killing'. Crown bodies would be exempt from prosecution under this legislation. However, cases could be brought even if it was not possible to establish a criminal conviction for manslaughter against a senior officer of an organization. The proposals drew upon previous ideas from the Law Commission that suggested 'management failure' as a litmus test in proving the offence of 'corporate killing'. This failure would have to be a cause of the death. It would also have to fall 'far below' what might reasonably be expected. Like the Canadian C-45 Westray Act, any case would be likely to involve comparisons between similar organizations to establish reasonable expectations rather than the Australian Federal Code approach where direct references are made to appropriate behavior.

The Home Office proposals from 2000 contained several points that have not been mentioned in connection with the Canadian or Australian legislation. For instance, the proposed that parent companies might also be prosecuted for corporate killing cases. However, UK companies could not be prosecutes for acts that occurred overseas. Not only might fines be levied against companies that were convicted of management failure but those individuals who contributed to the failure might also be disqualified from acting in a similar capacity in the future. This innovative proposal sought to maintain a balance between an organizational conviction and personal responsibility for a fatality. In March of 2005, the UK government published a draft bill for consultation having promised legislation in this area as part of two previous election manifestoes. This left almost no time for parliamentary consideration before the election in May 2005. However, the Labour Party repeated the commitment in their re-election manifesto and 'corporate manslaughter' reform played a prominent part in the Queens Speech that traditionally opens a new parliament. The draft Bill built on the consultation that had taken place since the Home Office (2000) consultation paper and the UK Law Commission (1996) report. The key objective was to balance the need for more effective legislation and avoiding unnecessary burdens on industry.

The draft Bill shows considerable differences from these earlier proposals. In particular, the Law Commission promoted a new offence based on a failure to ensure the health and safety of employees or members of the public. This created potential confusion between any proposed manslaughter reforms based on a failure to care and the existing 'duty of care' embodied in other areas of UK Health and Safety legislation. The draft Bill, therefore, builds on this concept of 'duty of care', which exists for instance from employers to employees, transport companies to passengers, manufacturers to the users of products etc. The scope of the proposed 'corporate manslaughter' offence was, therefore, narrowly based on the existing provisions for gross negligence manslaughter. As in previous Home Office proposals, specific exemptions were made for Crown and other government bodies. These exemptions can be justified in pragmatic terms and do not reveal the deeper conflicts illustrated by the ACT and Federal legislation in Australian. The UK Home Office (2005) argues that "an offence of corporate

manslaughter is not an appropriate way of holding the Government or public bodies to account for matters of public policy or uniquely public functions". Government activities that would be exempt from the legislation include the provision of services during civil emergencies. They would also include actions taken to ensure the custody of prisoners. The Government exemptions would protect the National Health Service from claims following the death of a patient during routine care. Although organizational liability would not be allowed for Government agencies performing these services, personal criminal liability would continue.

As with previous consultation documents, the draft Bill replaces the identification principle with an offence of corporate manslaughter that is defined in terms of a failure in senior management. This is justified by the distributed decision making that characterizes many complex organizations and is described in previous sections. The focus is on the normal working practices of the organization and the proposed offence would not cover deaths that occurred from any immediate, operational negligence causing death for example by an operator. Similarly, the proposed offence does not address unpredictable, maverick acts by employees. It does, however, consider wider how activities were managed at a senior level within the organization.

The focus on senior management is intended to ensure that attention is paid to strategic direction and not simply the operational management of the organization. Senior managers play a 'significant role' in making or implementing decisions that govern the activities across all or 'a substantial part' of an organization. The Home Office recognize the difficulty in defining what these terms mean and that the interpretation of the Bill would be critical in determining the level of management responsibility engaging the new offence. Some uncertainty also stems from way in which the proposals exploit a Law Commission proposal to define corporate manslaughter in terms of conduct that falls far below what can reasonably be expected in the circumstances. It can be difficult to determine conduct that 'falls far below' expectations. The draft Bill therefore provides a non-exclusive range of criteria for assessing an organization's culpability. It is also clear in the most recent proposals that the management failure must have caused the death. This is interpreted to mean that their failure must have made more than a minimal contribution to the death and that an intervening act did not break the chain of events linking the management failure to death (UK Home Office, 2005).

Previous sections have described how the Canadian C-45 'Westray' Act focuses on organizations rather than corporations. The 1996, Law Commission report focused more narrowly on the English definition of corporate bodies. They avoided proposals that might cover unincorporated bodies that have no legal 'personality'. The 2000 Home Office proposals considered extending the provisions to all 'undertakings', such as businesses and trades, whether or not they were formally incorporated. As we have seen, the 2000 proposals also brought in some Crown activities. The draft Bill followed the 2000 model but did not extend Corporate Manslaughter proposal to unincorporated bodies and hence has a more focused scope that the C-45 legislation.

The proposals provide for an unlimited fine to be imposed on those organizations that are found guilty of corporate manslaughter. This creates potential problems for Crown bodies where a fine would be paid from one government agency to another. Further consultations are required to determine appropriate remedies in this case. As mentioned in the previous discussion of the 2000 proposals, the more recent draft bill would also enable courts to impose remedial orders on offending organizations. The Home Office also coordinated research to estimate the financial impact of its proposals. Although it is difficult to be precise, they argued that the measures might cost £14.5 million to organizations with notably bad Health and Safety practices. These costs might be offset against an associated reduction in workplace injuries and death.

The proposed bill underwent a period of consultation and review by The Home Affairs and Work and Pensions sub-committees. The Committees broadly supported the Home Office 2005 proposals and urged that an amended Bill should be introduced within the current parliamentary session. However, they strongly criticized the 'senior manager' concept in the draft Bill (UK Home Affairs Committee, 2005). The potential ambiguities in this test created numerous opportunities for organizations to avoid the sanctions that had been intended when the proposals were developed. Instead, the Committees recommended the Law Commissions earlier proposals based on the general concept of a 'management failure' Juries would then be free to consider whether or not there had been a serious breech of health and safety legislation when assessing whether management failure had occurred. This is an interesting counter-proposal because it places the onus on regulators to develop the guidance material that would

be necessary to establish whether a violation had occurred. The Committees also suggest that juries could "consider whether a corporate culture existed in the organization that encouraged, tolerated or led to that management failure" (UK Home Affairs Committee, 2005). These comments have strong similarities with the Australian Federal Criminal Code, mentioned in previous paragraphs. However, the Committees did not use arguments about a flawed safety culture to excuse the conduct of individual managers. In contrast, they argued strongly against the proposals that individual managers within an organization that is guilty of corporate manslaughter should only be liable for breeches of health and safety legislation. In contrast, they argued for secondary liability for managers of organizations that were convicted under the proposed legislation. The Committees went on to argue against some of the more specific Crown exemptions.

The wider consultation that took place following the publication of the draft Bill raised a number of further points. Balanced against the committees' caveats were the arguments in favor of legislative reform. Many of these have been rehearsed in previous paragraphs. In addition, media and public comment focused on the need not simply to address the leniency shown in response to workplace fatalities. There was also a concern to make the English and Welsh legal system recognize the changing nature of corporate life in the new millennium. By making companies face the consequences of accidents, they will be more likely to invest in health and safety improvements. In contrast, opponents of the legislation pointed to the relatively good safety record across the UK. They also suggested that other issues deserved greater consideration, for instance more investment in rehabilitation or in regulatory intervention before accidents occur. The time and energy wasted in pursuing a small number of organisations might be better employed in raising awareness of health and safety issues across the nation's industries. It was also argued that large organisations would pass on the costs associated with any additional legislation. This might be done by insurance and the costs for individual policies might then be passed to consumers. However, even a relatively small number of claims might lead to very large premiums so that hazardous businesses became uninsurable. Companies that could not pass the costs of these premiums on to their customers might then cease to trade in these markets. One commentator summarised responses to the draft legislation by arguing that even though corporate manslaughter remained a government priority "at this point in time there seems to be too little real consensus between industry, the unions and interested pressure groups about how the proposed legislation should look, or indeed, whether it should be introduced at all" (BBC, 2005).

The Scottish Expert Group on Corporate Homicide

The Health and Safety at Work Act (HSWA) has been used extensively within the existing Scottish legal framework to levy considerable fines on companies. For example, BP were fined a total of £750,000 following the deaths of three men in two separate incidents at the Grangemouth refinery in March 1987. The same company was fined a further £1m at Falkirk Sheriff Court in 2002 for a steam rupture and fire at this refinery. Similarly, Shell Expro was fined £900,000 at Aberdeen Sheriff Court in 2005 following the deaths of two workers on the Brent Bravo platform in the North Sea. In spite of these successful legal actions, Scottish public opinion has been affected by many of the acquittals mentioned in the previous paragraphs on English law. As mentioned previously, there are three distinct legal systems within the United Kingdom. In consequence, the publication of the draft Bill in England has also encouraged the Scots parliament to consider reform of existing laws in this area. Moves to reconsider legislation on corporate homicide were given fresh impetus by the case of Her Majesty's Advocate (HMA) v Transco in 2002. This was the first in which a corporation was prosecuted for 'culpable homicide' in Scotland. A family of four died following an explosion in their home. It was argued that the utility company had failing to maintain an iron gas main which ran through the family's garden. The company's maintenance and repair records were criticized and seemed to incorrectly indicate that the 250mm medium-pressure gas main was made from a form of plastic. Transco were charged under the Health and Safety at Work Act 1974 (HSWA). The Crown alleged that the company had shown a complete disregard for public safety citing the actions of its engineering and management committees. The innovative aspect of the prosecution was that by charging the company without first prosecuting an individual 'directing mind', the Crown would have extended Scots common law and established a principle of guilt by aggregation. The organization would have been guilty by the cumulative actions of its employees rather than the actions of a single individual. There are, therefore, strong links between HMA v Transco and the Crown Prosecution Service's handling of the case against Great Western Trains within the English systems following the 1997 Southall rail crash. In both cases, the Crown did not link the corporate case to the prosecution of any individual director or manager. As with the English case, the Advocate General for Scotland also failed to establish common law as a means of breaking the identification principle. Transco argued that the charge was irrelevant because it did not identify the 'directing mind'. In June 2003, the appeal court ruled in flavor

of Transco. The court reiterated that there were no differences in this respect between the common law of England and Scotland (Leckie and Anwar, 2005). Both embodied the identification principle, the court also stated that: "If, however, Parliament considers that a corporate body, in circumstances such as the present, should be subjected, not only to potentially unlimited financial penalties, but also to the opprobrium attaching to a conviction for culpable homicide, then it must legislate."

Even though the charge of 'culpable homicide' was dismissed, the prosecution pressed for convictions over breeches of Sections 3 and 33 of the HSWA between 1986 and 1999. It was argued that the company had exposed the public to unnecessary risk having encountered problems with ductile iron piping on several previous occasions, the most recent was in Runcorn only months before the Edinburgh explosion. The Crown case was intended to establish that Transco were aware of these possible failings and yet did not device an adequate strategy to address the problem. After a six month trial, Transco were convicted on all of the alleged breeches of the HSWA. The company received the highest even fine for any violation of health and safety legislation in the UK at £15 million. In his closing remarks the Judge indicated that he had difficulty in identifying which of the managers were most to blame. He also attacked the "corporate mindset" of the company which had tried to argue that the explosion was caused by a leak inside the house rather than at the mains. The judge argued that this defence showed the lack of remorse that characterised the company's attitude to the accident. Shortly before the judgment, Transco sold its interest in Scotland's gas supply network.

The Member of the Scottish Parliament for the Larkhall constituency did little more than repeat the judge's words when she called for changes to be made to the law on corporate homicide. Her actions combined with the general public anxiety over the Transco rulings helped to persuade the Scots Justice Minister to set up an expert review. Her announcement was also prompted by the publication of the draft bill for England and Wales. Rather than introducing a similar offence to that proposed South of the border, the expert group was asked to consider appropriate reforms within the context of the Scottish legal system. The group reported back to the Justice Minister in November 2005, rejecting the option of adopting the English proposals and instead provided alternate suggestions in the hope that they would "provide a useful basis for amending the law in all UK jurisdictions"! Several members of the group argued for the benefits of a common system so that, for instance, companies would operate under the same obligations both North and South of the border. However, the majority in the group stressed the need to identify a suitable system for Scotland before consistency with the English and Welsh systems, especially given the existing differences in the treatment of homicide. To summarize, the Westminster draft Bill would provide a statutory basis for the common law offence of manslaughter and would clarify its application to organizations. An organisation would be guilty of the new offence if its 'senior managers' caused a person's death and there was a gross breach of a 'duty of care'. The offence would be reserved for a management failure that fell far below what could be reasonably expected. The Scots experts rejected the English and Welsh model because the 'duty of care', which forms the basis of manslaughter by gross negligence South of the border, does not figure in the Scots common law offence of culpable homicide. Any application of the proposed bill would have consequences on diverse areas of the Scottish legal system, which the experts felt would not be 'straightforward'. The experts also voiced the criticism made in previous paragraphs that the focus on 'senior managers' would perpetuate the problems created by the identification principle. Health and safety decisions might also be delegated to so low a level within an organizational hierarchy that the individuals concerned would fall below the indicative thresholds for 'senior' management. Further objections related to the way in which the proposed Bill assumed that senior managers should be seeking to help an organization profit from a failure. They argued that the offence should stand irrespective of whether or not this was the case and 'intention to profit' should only be relevant for sentencing. Some in the expert group argued that there should also be a secondary offence covering individual directors and managers. They opposed Crown immunity, which as we have seen was a prominent concern of the proposed Bill. The decision to reject the suggested reforms in England and Wales led to considerable differences between the two proposed models. One of the clear differences between these proposals and their English counterparts was that the Scots expert group suggested the new law might cover deaths that involved organizations based in Scotland but which took place overseas (Scottish Executive, 2005). The expert group reviewed the legislation of several other countries and found none that could easily be transferred to the Scots legal system. Although elements of the Canadian and Australian system were of 'interest', there was only limited experience in operating the Acts that have been reviewed in the previous sections of this document.

The Scots Expert group began by summarizing the current legal situation. As mentioned previously, an organization can be convicted of a common law crime. For instance, culpable homicide 'applies where the perpetrator might not have intended to kill the victim but nonetheless behaved so recklessly and with such complete disregard or indifference to the potential dangers and possible consequences that the law considers there is responsibility for the death'. The only example of an organization being prosecuted for this offence was the Transco case, mentioned above. The expert group argued that this case illustrated the practical difficulties that arise when trying to prosecute an organization in this way. In particular, the problems created by the identification principle and the need to establish a guilty mind (*mens rea*) that have been considered in the opening sections of this paper. The court of appeal that considered the Transco case also expressly stated that the law of Scotland does not allow for aggregation where the actions of a number of people over a period of time cumulatively provide the necessary evidence of a 'guilty mind' even when there is no individual who might exhibit this degree of culpability. The expert group argued that this should be addressed so that an organization might be prosecuted for deaths arising from their activities. In other words, they rejected the argument that the financial penalties for Transco were sufficient to obviate the need for reform. Lord Osborne, in his Opinion on the Transco Appeal stressed the opprobrium associated with a culpable homicide conviction which was not associated with a conviction under the Health and Safety at Work Act. However, the expert group recognized the strengths provided by the Health and Safety at Work Act that provided for the prosecution of organizations without any assumption of *mens rea.*

The group identified 3 routes for changing the existing law. Firstly, it would be possible to extend the existing common law offence of culpable homicide to allow it to be attributed to organizations as well as individuals. For example, the aggregation of individual acts and knowledge over time might be attributed to an organization. Although this would tackle specific issues in the Transco case, it would not address particular concerns about the management of safety within organizations. Secondly, a new offence could be introduced for corporate liability causing death or serious injury. Thirdly, it would be possible to extend existing Health and Safety legisilation. However, this option would avoid the opprobrium associated with an organizational conviction for corporate homicide. It might, therefore, not address the public concern over the treatment of major accidents and incidents.

The expert group outlined a hybrid approach by considering situations where there has been the death of an employee or of a member of the public and that death has been caused by recklessness on the part of a person or persons within the organization. They argued that it should be possible to aggregate the acts of the individuals "in order to establish the physical elements of the offence" (Scottish Executive, 2005). Organizations would be vicariously liability for the reckless acts or omissions of its employees. However, the expert group also argued that it should be necessary to establish an element of 'corporate fault' before any conviction. Clearly, the success or failure of the expert group's proposals rests on the identification of corporate fault. They argued that this could be based on evidence of failures in management systems or a corporate culture that led to the death. Individuals and managers should also be liable to individual prosecution if they have 'direct responsibility' for the death. As can be seen, none of these proposals rest on the identification principle embodied in the existing UK legal systems.

In contrast to the draft Bill in England and Wales, the Scot's expert group rejected the notion of negligence as a basis for their proposals. The Transco judgment argued that 'gross negligence' and 'recklessness' are interchangeable and that both can be seen as criminal indifference to consequences. The expert group, therefore, presented 'recklessness' as a basis for criminal liability. This concept would cover situations where individuals are or ought to be aware of a serious risk that acting will bring about an adverse event and where no reasonable person would act in a similar manner. Recklessness embraces both the deliberate risk-taker and the person who is not aware of the risks but who ought to be aware of those risks. The court does not, therefore, need to establish willful recklessness or negligence but only that an individual should have realized their conduct would create serious risks.

The expert group argued that strict liability provides means of avoiding the limitations associated with the identification principle. They drew the parallel with the offence of dangerous driving within road safety legislation. It is sufficient to establish that someone died or was injured as a result of a driver's actions to establish that an offence had been committed. This avoids the need to establish a guilty mind (mens rea) for particular individuals or by aggregation. Problems arise when determining who to charge with any offence when dealing with a complex organization. It can be relatively straightforward to identify the driver following a road traffic accident, as we have seen it can be far more difficult to identify the many different individuals who contribute to particular health and

safety violations in large companies. The expert group advocated vicarious liability for wrongful acts of omission and commission by any agent of an organization, including senior officers and directors but also more junior employees acting within the scope of their usual employment. This highlights further differences with the proposals for England and Wales as well as the Canadian C-45 and Australian legislation.

Rather than focus on English and Welsh arguments around a breech in the duty of care, the expert group focused on management failure. In their view, organizations should have appropriate management systems in place to support the health and safety of both their workforce and the general public. They argue that 'this approach seeks to move away from the notion of liability arising from the intent of individual senior managers - or any group of individuals - towards an approach which focuses on the organization's effectiveness in managing its activities and operations' (Scottish Executive, 2005). They also identified the importance of corporate culture in preventing behavior that is likely to result in workplace fatalities. They cite a definition of 'corporate culture' from the Australian Criminal Code Act 1995, mentioned in previous paragraphs, 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". The existence of written policies and procedures would not, therefore, be sufficient to demonstrate an appropriate culture within these proposals. An organization would be liable if it tolerated a culture that directly encouraged or led to the practices that resulted in death.

Although the group felt that it should be possible to prosecute any individual who is involved in a workplace fatality irrespective of their role in the organization, they were divided over whether or not there ought to be individual liability to mirror the organizational liability for 'recklessness'. The majority felt it was desirable to create a new offence where an individual's behavior might fall short of culpable homicide. Others dissented arguing that it would create a dual standard for prosecution depending on whether or not the death occurred in a work-related context. Further concerns focused on whether directors and senior managers could be convicted on an 'art and part' basis. In Scots law, the term 'art and part' can be interpreted as aiding or abetting in the perpetration of a crime, or being an accessory before or during a crime. Most of the group argued for the retention of this liability. The majority also argued for the creation of a specific secondary offence for directors/senior managers whose actions or omissions directly contributed to a death. This was supported by arguments in favour of 'focusing the minds' of senior personnel on health and safety issues. However, others on the group argued that such a specific offence might dissuade companies from investing in Scotland if key officers were liable to more stringent laws than those in the rest of the UK.

The expert group considered whether any new offences should be extended to unincorporated bodies. Recall that the Canadian C-45 refers to organizations rather than corporations. The Australian Capital Territories legislation was also intended to cover fatalities involving a union, club, community organization, corporation or individual. In Scotland, unincorporated bodies would include business partnerships, schools and clubs. These partnerships are particularly important given their role in sub-contracting within industries such as building that often have a relatively high accident rate. The group recognized that practical difficulties with extending an offence to groups that lack 'legal personality' in Scots law. However, it was concluded that the liability of incorporated and unincorporated bodies should be the same. They followed this general line of argument in rejecting many of the areas for Crown immunity that were identified in the English and Welsh proposals. Public authorities should have the same vicarious liability as other organizations if there was management failure leading to a fatality. The Scots' expert group closed their report by considering the range of penalties that might be associated with any new offences. They supported the use of unlimited fines but also advocated the the use of more creative approaches to 'restorative justice'. These included community service and corporate probation orders as possible sanctions (Bergman, 1992, Wray, 1992). Such approaches were particularly important for public sector or not-for-profit organizations (Croall, 2005). As we have seen, fines levied on public bodies may simply consume finite administrative resources by recycling funds through different government agencies.

The Scottish Justice Minister commissioned the expert report, rather than directly adopting the proposals for England and Wales, in order to open up a national debate about potential law reforms. As might be expected, there has been a significant response in the six months since the publication of the group report. Many questions the justification for creating a separate offence which stemmed from acts that would already be covered by existing health and safety legislation and where the proposed penalties would not be significantly different from the

unlimited fines and six months imprisonment available via the HSWA. These criticisms follow the broad pattern established by opposition to the Canadian and Australian amendments as well as the English and Welsh proposals. These criticisms were tempered by the recognition that the proposals included novel penalties such as corporate probation and the appointment of health and safety administrators. Other new deterrents were less widely welcomed. For example, the suggestions that organizations might be disqualified from particular activities was felt to be unfair on employees, shareholders and customers who may not have had nay direct involvement in the offence. In particular, some authors have criticized the proposed 'equity fines' where companies would have to dilute their value by issuing additional shares (Leckie and Anwar, 2005). The adverse effect that such mechanisms could have on innocent parties dissuaded the New South Wales Law Reform Commission from considering them in their recent review of corporate manslaughter. Others expressed more supportive opinions, arguing that shareholder pressure was an important agent for corporate change in health and safety management practices.

Further contention focused on the proposal for individual vicarious liability through a secondary offence that would exist in Scotland but not in England and Wales. In making these criticisms, respondents pointed to the Health and Safety Executive's emphasis on the operational need for a consistent approach across the UK. They also stressed that only two of the eleven group members had business backgrounds. It can, therefore, be argued that in extending personal liability, in proposing an offence for acts involving Scots organizations overseas and in stressing management failure, the group had created heavy disincentives for companies to locate in Scotland. It is also possible to criticize the proposed secondary offences for individuals, including directors and senior managers. The majority of the expert panel felt that the proposals would make it easier to achieve convictions in cases that fell short of culpable homicide. However, it seems likely that the proposals would still leave most members of the board in a position where they could deny responsibility by delegating authority to a Health and Safety officer. In large organizations, this would expose a small number of individuals to possible prosecution. In smaller companies which often lack the necessary training and other resources to implement formal safety management systems all directors could face imprisonment, as is the case at the moment.

Further inconsistencies arise from the relationship between any proposed new laws developed in Scotland and the majority of UK health and safety legislation, which is reserved for the Westminster parliament. The Law Society for Scotland argues that this would create a situation in which a company that through its recklessness kills one person would be prosecuted under the new provisions developed in Scotland. However, if the same reckless acts maimed its victims then the organization would be prosecuted under legislation which the Scottish Parliament has no authority to amend.

Conclusions

Several high-profile acquittals of companies and their senior officers have focused public attention the legislation that applies to workplace fatalities and corporate manslaughter. For example, the 2006 mining accident in Sago, West Virginia prompted calls to make executive officers more accountable for creating the conditions in which an incident is likely to occur. Similarly, the Longford explosion in Victoria and the Westray mining disaster in Nova Scotia prompted significant changes in the Canadian and Australian legal systems. This paper has summarised many of the issues surrounding corporate manslaughter legislation. In particular, we have identified ten area of conflict over the development of corporate manslaughter legislation. The list is not exhaustive nor is it prioritized. However, it does characterise the debates surrounding recent proposals and legislative changes across several jurisdictions:

> *1. Supporting Accident Investigations and the Need for Accountability:* There is a tension between the need to learn as much as possible about the causes of an accident and public pressure to ensure accountability. A fear of litigation following an accident or incident can act as an important barrier to learning the lessons from previous adverse events.
>
> *2. Equity in Operator versus Management Responsibility:* Further tensions arise from the need to ensure equity in any prosecutions following the causes of an accident. Any laws in this area should recognize the particular contributions that 'shop floor' workers, managers and board members make towards the causes of a fatality. Similarly, it is important to avoid bias where for example the senior officers of large

companies are likely to escape sanction while most successful prosecutions target the directors of small companies.

3. Third Party Liability and Unintended Consequences: Legislative changes must consider the criminal prosecution of individuals and organisations for their involvement in corporate manslaughter. However, employees can have a case against their employers. Employers may hold employees liable for dangerous acts. Members of the public can bring third party cases against either the employer or the employee. The legislative changes in this paper focus on criminal convictions without considering wider actions.

4. Criminal versus Civil liability: It can be difficult to distinguish between those situations where it is appropriate to pursue civil or criminal sanctions. Civil systems offer considerable advantages when assessing the financial sanctions to be levied against organizations. However, the criminal law can act as a greater deterrent, especially if executive officers fear personal convictions.

5. Establishing Negligence and Intent: In order to be convicted of a crime, many legal systems require intent. Such tests cannot so readily be applied to corporate behavior where decisions are devolved over time through different organizational structures. Most legal systems also provide a lesser burden of proof for crimes of negligence, which need not involve intent. However, it can be difficult to make the comparisons that are necessary to show a company failed to meet the standards that might reasonable be expected of their peers.

6. Individual versus Corporate Liability: Investigation agencies already recognize that adverse events can be caused by the collective effect of many minor violations across an organization. On the other hand, there may be little deterrent in prosecuting a company, if individual managers and executives feel they are not accountable for personal violations of health and safety legislation.

7. The Directing Mind (Identification) Principle: Many jurisdictions rely upon the 'directing mind' or 'identification' principle. A corporation can only be found guilty of manslaughter if it is also possible to find one of its senior officers, or directing minds, personally liable for the crime. However, it is extremely difficult to establish individual liability when complex engineering decisions may be devolved from the board level through many different layers of management.

8. Corporations or Organisations? Several jurisdictions have gone beyond the concept of 'corporate manslaughter' to ensure that not-for-profit and governmental organizations also come within the scope of amended legislation.

9. Financial Penalties and Restorative Justice: Some jurisdictions allow for unlimited fines following workplace accidents. Companies may be dissuaded from investing in jurisdiction that offer punitive sanctions for health and safety violations. 'Innocent' shareholders and employees may also be badly affected by these financial penalties. Financial sanctions cannot easily be applied to Crown or government agencies, where fines are recycled between government departments. Techniques from restorative justice can be used to address particular health and safety problems. However, these approaches can lack the 'bite' of financial penalties.

10. Investigating Authorities? Many jurisdictions rely on cooperation between regulatory and police agencies to investigate workplace accidents. Even with existing specialist skills, it is not clear that these agencies are well prepared to conduct the type of investigations that would be necessary to determine whether aggregated 'management failures' or poor 'corporate culture' led to a fatality.

We have provided examples of these ten issues by examining the amendments that have been integrated into Canadian and Australian jurisdictions. This paper has also considered proposals to change the laws on corporate manslaughter as they apply to the different systems in Scotland and in England and Wales. These examples were chosen because they are well documented. Both the proposed systems and implemented reforms have been the subject of considerable public debate in each of these countries. However, there are similarities between these

legal systems and further work must extend the scope of the analysis to other jurisdictions. The long term aim is to encourage both legislators and the public to consider the many different possible approaches that exist to corporate manslaughter. Above all, the intention is to motivate a further comparative study of these jurisdictions to monitor and assess the impact of these different approaches. At present, there is little empirical evidence that might be used to support any comparative analysis or to direct public policy. In consequence, we can only make approximate judgments about whether any of these approaches will have a long-term impact on health and safety.

Acknowledgements and Caveats
This paper reviews a relatively complex area of the law in several different jurisdictions. There may be factual errors and errors of interpretation in the proposals, Bills and Acts that are referenced. The author views this as a living document and every effort will be made to correct the on-line version if he is notified by email to the corresponding address at the start of this paper.

References

Australian Capital Territory, Crimes (Industrial Manslaughter) Amendment Act 2003, A2003-55, Canberra, Australia, 2003.

Australian Capital Territory, 2003a. Industrial Manslaughter Laws Passed, Statement Issues by Katy Gallagher MLA, ACT Minister for Industrial Relations, MR29IR, 27 November 2003a,

Australian Chamber of Commerce and Industry, Industrial Manslaughter And Workplace Safety, ACCI Review, Canberra, Australia, May 2001.

Australian Council of Trades Unions, Government Seeks Immoral Exemption From Industrial Manslaughter Law, Press Release, Melbourne, Victoria, 2nd April 2004.

Bergman, D, Corporate Sanctions and Corporate Probation, New Law Journal, 142:1312, 1992.

Block, M, "Optimal Penalties, Criminal Law and the Control of Corporate Behavior" (1991) 71 *Boston University Law Review* 395

Braithwaite, J, Restorative Justice and Responsive Regulation, Oxford University Press, Oxford, U.K., 2002.

Braithwaite, J., and Makkai, T., The Dialectics of Corporate Deterrence, Journal of Research in Crime Delinquency, 31:360, 1994.

BBC Online, Corporate Manslaughter: the Issues, 16th May 2005.
http://news.bbc.co.uk/1/hi/business/4537053.stm, last accessed 23rd February, 2006.

Canada Department of Justice, Criminal Liability of Organizations: Bill C-45 - Amendments to the Criminal Code Affecting the Criminal Liability of Organizations, Ottawa, Canada, 2005.

Clarkson, C.M.V., Kicking Corporate Bodies and Damning Their Souls, Modern Law Review 59:557, 1996.

Commonwealth of Australia, The Parliament Of The Commonwealth Of Australia, House Of Representatives, Occupational Health And Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005, Explanatory Memorandum, Canberra Australia, 2004.

Croall, H., Penalties for Corporate Homicide, Report Prepared for the Scottish Executive Expert Group on Corporate Homicide, Scottish Executive, Edinburgh, U.K., August 2005.

Fischel, D.R. and Sykes, A.O., Corporate Crime, Journal of Legal Studies, 25: 319, 1996.

Fitzgerald, B., Criminal Liability of Organizations, Technical Report, Australian Mines and Metals Association/ Tasmanian Law Reform Institute, Hobart, Tasmania, August 2005.

Henry, S., Address to the Australian House of Representatives on the Occupational Health And Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005, Commonwealth of Australia, Parliamentary Debates, House of Representatives Official Hansard, No. 21, 8th December 2005.

Indiana House of Representatives, Sen. Rep. Dan Stevenson to Seek Greater Workplace Safety Protections in 2006, News Release R11_12162005, Indianapolis, Indiana, 2005.

Jefferson, M., Corporate Criminal Liability: The Problem of Sanctions, Journal of Criminal Law, 65(3)235, 2001.

Khanna, V.S., Corporate Criminal Liability: What Purpose Does it Serve, Harvard Law Review, 109:1477, 1996.

Leckie, D. and Anwar, A., Bad Company, Journal of the Law Society of Scotland, May 2005, page 18, 2005.

New York Committee for Occupational Health and Safety, Campaign to Stop Corporate Killing, NYCOSH Safety Report, Vol. XIV, No. 2, June 2004.

Pearce, F., Corporate Crime, Critical Social Policy, 7:116, 1987.

Raines, K, Prison after Manslaughter Appeal, Norfolk Constabulary Press Release, Norwich, Norfolk, UK, 15th September 2005. Available on http://www.norfolk.police.uk/article.cfm?artID=6197&catID=638, accessed 23rd Feb, 2006.

Ramraj, V., Disentangling Corporate Criminal Liability and Individual Rights, Criminal Law Quarterly, 45:29, 2001.

Scottish Executive, Corporate Homicide: Expert Group Report, Blackwells, Edinburgh, November 2005.

Simpson, S. and Koper, C., Deterring Corporate Crime, Criminology, 30:201, 1992.

Tomasic, R, Corporate Crime in a Civil Law Culture, Current Issues in Criminal Justice, 5:246, 1994.

UK Crown Prosecution Service, CPS Decision in Ladbroke Grove Collision, Press Release CPS 166/05, London, December 2005.

UK Health and Safety Commission, Proposals For New Regulations Amending The Management Of Health And Safety At Work Regulations 1999 And The Health And Safety (Consultation With Employees) Regulations 1996, UK Health and Safety Executive, London, February 2005.

UK Home Affairs and Work and Pensions Committees, Draft Corporate Manslaughter Bill, First Joint Report of Session 2005–06, Volume I: Report, HC 540-I, House of Commons, The Stationery Office, London, December 2005.

UK Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals, London, UK, May 2000.

UK Home Office, Corporate Manslaughter: A Summary Of Responses To The Home Office's Consultation In 2000, London, UK, 2000a.

UK Home Office, Corporate Manslaughter: The Government's Draft Bill for Reform, Cm6497, The Stationery Office London, UK, March 2005.

UK Law Commission, Legislating the Criminal Code; Involuntary Manslaughter: Item 11 of the Sixth Programme of Law Reform: Criminal Law (Law Com No 237). The Stationery Office, London, HC171 March 1996.

Wray, C. A., Corporate Probation Under the New Organizational Sentencing Guidelines, Yale Law Journal, 101:2017, 1992.