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Sentencing those convicted of industrial manslaughter

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Introduction

In 1949, American sociologist Edwin Sutherland published a watershed monograph on the subject of white collar crime.² In doing so, he introduced the world to an idea that he had been pondering for a decade; that society should not ignore crimes committed by people enjoying an elevated social status.³

But for many years, criminologists did ignore these crimes. A common view prevailed that 'white collar' crimes should not be seen as *real* crimes, and the perpetrators should not be deemed *real* criminals because, it was said, there were no *real* victims. Inconsistency in enforcement, confusion in legal definition, and inter-agency rivalry in regulation led to conflicting messages being sent about the pervasiveness and seriousness of white collar crime generally. For decades, white collar criminals continued to escape the full processes of law. Academic research recorded the trends. Some years ago Michael Levi tracked the sentences given to social security and tax fraudsters in the UK (identified as being from the blue collar workforce) with the sentences meted out to entrepreneurs who had committed securities fraud. He found that the latter category of offender was more likely than the former category to be diverted from the criminal justice system into the regulatory system.⁴ Similar conclusions were reached in Australia by John Braithwaite and Toni Makkai, namely that the higher social status of white collar offenders not only permitted them greater opportunity to commit fraud, but also served to shelter them from more serious punishments.⁵

Sentencing patterns have changed dramatically since then. The most recent high profile reminder was the imprisonment in April 2005 of former HIH directors Ray Williams and Rodney Adler for convictions related to their part in the collapse of the insurance giant. Both received sentences of four and a half years, although Mr Williams' non-parole period (two years and nine months) was three months longer than Mr Adler's.

The principal 'white collar' regulator in Australia is the Australian Securities and Investments Commission (ASIC). Its lawyers can, and regularly do, ask the courts to consider lengthy terms of imprisonment for those who breach the corporate laws of this land. Its enforcement activities have been actively monitored by legal academic Michael Adams. Professor Adams takes an annual count of those convicted of corporate offences in Australia. He reports that, for the decade 1996 to 2005, on average 6.8 people per year were sentenced to between two and four years imprisonment, while an average of 4.8 people were sentenced to between four and eight years jail. On average, 0.9 people were sentenced to between eight and 10 years, and 0.4 were given sentences of more than 10 years. Thus a total of almost 130 Australian

corporate directors and managers (13 per year) served significant periods behind bars over the relevant decade.⁶ It is difficult to say how many of Australia's current 27,000 or so prisoners fall into this category, as the statistics that report "most serious offence" speak of "deception offences" of which white-collar fraud is but one. For the record, around seven per cent of prisoners are in prison for "deception" offences.⁷

Speaking generally, then, prison is no longer simply the home of the blue collar felon. Nowadays, those who are caught, prosecuted and convicted of white collar offences cannot assume with any confidence that their sentence will be served in a non-custodial environment.

With this background in mind, this paper looks not at deception offences but another type of white collar criminal activity: causing death in the workplace. Specifically it discusses the current debate surrounding the new 'industrial manslaughter' laws that now apply in the Australian Capital Territory. 'Industrial manslaughter' is a new offence that came into being in 2004 (as described below) to deal with deaths in the workplace at the hands of corporations that were not being captured either by the current corporate manslaughter provisions of the general criminal law nor by occupational health and safety laws. Under the industrial manslaughter laws, the potential for corporate executives to be sent to prison for the death of a worker, notwithstanding their lack of *direct* culpability, is now much greater in the ACT than in other jurisdictions. What needs to be proven in order for this to happen? Will it lead to more executives heading to jail? Will the potential for more terms of imprisonment being meted out to corporate managers make any difference to rates of workplace death? Is this a legal trend that should be commended?

Before answering these questions, it is important to review the law on death in the workplace as it stood in the ACT prior to 2004 and as it still stands in the rest of Australia. The standard response to a death is to charge the executives with 'corporate manslaughter.'

'Corporate manslaughter' as a means of responding to workplace death

Corporate manslaughter prosecutions may be brought when any person is killed in an activity carried out by a corporation. They have rarely met with any level of success.⁸ The most notable early case of a prosecution alleging corporate manslaughter in Australia was *R v Denbo Pty Ltd*.⁹ Denbo Pty Ltd was prosecuted when one of its drivers was killed when his truck's brakes failed. Upon examination, prosecutors found that the company's vehicle service record was appalling. The company (through its directors) pleaded guilty and was fined \$80,000. At the time of its conviction, however, Denbo Pty Ltd was in liquidation. The company was wound up six months before sentencing and never paid the fine. Later it was reborn as another company, and recommenced operations. The successor company did not pay the fine either.¹⁰

Internationally, the success rate (measured by a guilty verdict) in manslaughter prosecutions against corporations and individual officers is very poor indeed.¹¹ As Jim Gobert and Maurice Punch explain:

[The] criminal law was not developed with companies in mind. Concepts such as *mens rea* and *actus reus*, which make perfectly good sense when applied to individuals, do not translate easily to an inanimate fictional entity such as a corporation. Trying to apply these concepts to companies is a bit like trying to squeeze a square peg into a round hole.¹²

In the case of corporate employers, with many individuals filling particular roles, it is rare indeed that a prosecutor will be able to establish a conjunction of the *actus reus* and *mens rea* of multiple individuals.¹³

That is not to say that manslaughter convictions are impossible. In July 2009, prosecutors successfully secured manslaughter by omission convictions that led to the sentencing of Australian boat-builder, Alex Cittadini, to a term of imprisonment. A fifteen metre racing vessel, *The Excalibur*, built by Mr Cittadini, had overturned off Port Stephens, New South Wales, in September 2002 after its keel snapped in high winds. Four of the six crew drowned. When the yacht was salvaged, it was discovered that the keel had been cut and insufficiently re-welded during a reconstruction. The cut had then been covered up by someone polishing across the weld line. It was alleged at trial that Mr Cittadini's company, Applied Alloy Yachts, had not employed high-level quality assurance checks, partly because it would have required more paperwork and added time and cost to the project.

In April 2009 Mr Cittadini was found to have been criminally negligent in allowing the delivery of the yacht with a major fault. Judge Stephen Norrish concluded that there was an 'element of inexperience' in Mr Cittadini's employees when it came to making yachts. Four manslaughter convictions were entered notwithstanding that the trial judge accepted evidence that Mr Cittadini was unaware of the cut, and that the secret had been kept from him. The trial judge concluded, nevertheless, that even if the accused had not known about the cutting of the keel, he should have known and had in place a reasonable system to detect and prevent any variation to the design. The judge sentenced Mr Cittadini to three years jail.¹⁴ On 18 December 2009, however, the NSW Court of Criminal Appeal quashed the convictions and directed verdicts of acquittal, determining that the lower court verdict was "unreasonable" and the Crown Prosecutor's final address had caused "a miscarriage of justice".¹⁵

Corporate manslaughter prosecutions, therefore, are difficult to prosecute, to the disappointment, often, of victims and their families. There is a consistent call for reform each time it appears that 'justice' has not been seen to be done. Indeed, in the aftermath of the Cittadini verdict, a survivor of the *Excalibur* incident, Mr Brian McDermott, expressed his disappointment that, ultimately, no one had been held accountable for the four deaths.¹⁶

The death of Lydia Carter provides another tragic example. In October 2006, Ms Carter died after crashing her go-kart into a barrier while at a work function at a go-kart track in Port Melbourne, Victoria.¹⁷ She was wearing a seatbelt that did not fit properly, and safety barriers on the track were incorrectly installed. Judge Duncan Allen convicted and fined the parent company AAA Auscarts Imports Pty Ltd a record \$1.4 million in May 2009, but the company had already gone into liquidation and will never pay the fine. Despite the finding that the company showed a gross disregard for the safety of its employees and the public, no person was ever held to account for the death of Ms Carter.¹⁸

Experimenting with 'industrial manslaughter'

Some commentators have been expressing their dissatisfaction with the lack of deterrent effect of the current law, and have been pushing further for the incorporation into legislation of an offence of 'industrial manslaughter'¹⁹ designed to punish corporations by making their higher level employees criminally responsible for outcomes regardless of the direct complicity of these employees.²⁰ This debate is not new, but it has recently acquired, in Australia and around the world, a greater level of academic and political attention.²¹

Underpinning the industrial manslaughter legislation in Australia is the idea that corporations are to be treated as if they were natural persons; that is, fault lies with, and is attributable to, the corporations themselves rather than with specific individuals who work for a corporation. Moreover, where the law applies,²² it allows for the joining of liability of any individuals who may have been part of a ‘web of decisions’ that led to the action that eventually caused the harm in question.²³ This is known as ‘aggregation’.

A theory of aggregation arguably better captures the nature of corporate fault than a theory which imputes to the company a crime of a particular individual. There are times when, as a result of employee negligence, victims are seriously injured. Negligence, however, is generally not deemed sufficient to warrant imposing criminal liability on an individual and therefore also insufficient ... to hold a company liable for the agent’s acts.²⁴

The naissance of the Australian developments are found in the *Criminal Code Act 1995 (Cth)*.²⁵ Part 2 of the Code expands the notion of corporate criminal liability²⁶ by allowing for the attribution of recklessness and negligence to a corporation. Indeed, by virtue of the Act, corporations may be found guilty of any offence that is punishable by imprisonment. Harm caused by employees acting within the scope of their employment is considered to be harm caused by the body corporate.²⁷ This allows for the *physical* element of manslaughter to be attributed to a body corporate where the actions involved were engaged in by more than one person, who may or may not have met the requirement of being the ‘guiding mind’ of the corporation.

Regarding the attribution of a mental element to a body corporate, the Code provides several alternatives. The first is manslaughter by gross negligence. Tort lawyers know that it is difficult to attribute negligence to corporations at common law. Thus, the Code specifically extends negligence to corporations through aggregation.²⁸ Negligence may exist on the part of the body corporate, says the Code,²⁹ if the body corporate’s conduct is negligent when viewed as a whole, that is, by adding together the conduct of any number of its employees, agents or officers.

A requisite mental element other than negligence can be attributed to a body corporate if it expressly, tacitly or impliedly authorised or permitted the commission of the offence.³⁰ Two of the ways in which this authorisation or permission may be established are through the actual state of mind of either the board of directors or other “high managerial agents” within the body corporate,³¹ or by virtue of what is referred to specifically as the body corporate’s ‘corporate culture’. “Corporate culture” is defined as an “attitude, policy, rule, course of conduct or practice existing within the body corporate generally...”³² While this definition has not yet been judicially interpreted, there are have been some attempts to put flesh on its bones, so to speak. Jonathan Clough puts it as follows:

This ‘corporate personality’ or ‘corporate culture’ is seen both formally, in the company’s policies and procedures, but also informally. It is a dynamic process with the corporate culture affecting the actions of individuals, and the actions of individuals affecting the corporate personality. Corporate culture may exist independently of individual employees or officers and may continue to exist despite changes in personnel. ... For example, while a corporation may outwardly claim to be concerned with occupational health and safety, if the pressure on individual managers is to meet unrealistic financial or time pressures, then there may be a temptation for corners to be cut and worker safety compromised.³³

In other words, the body corporate could be deemed criminally liable for a workplace death or injury if it displayed a corporate culture that actively or passively allowed non-compliance with the law and this non-compliance led to the death of the worker.³⁴ This legislation was thus designed to catch situations where, despite the existence of documentation appearing to require compliance, the reality was that non-compliance was not unusual, or was tacitly authorised by the company as a whole.³⁵

In sum, then, the Code introduced a new basis for liability, one that is based upon attribution, aggregation and the inchoate concept of ‘corporate culture’. Under the Code, and indeed under the UK equivalent, the *Corporate Manslaughter and Corporate Homicide Act (UK) 2007*,³⁶ both the mental and physical elements of the offence can be attributed to corporations *as entities*. But then the Australian Code goes one step further. Corporate principals can be prosecuted and punished both individually and collectively by their association with the corporation if the culture over which they preside is one that encourages, tolerates or leads to non-compliance with the law.³⁷ A company with a poor ‘corporate culture’ may be considered as culpable for its intentional or reckless conduct as individual directors (or ‘high managerial agents’) might be under the existing common law. Importantly, prosecutors can aggregate the requisite carelessness or ‘risk denial’ potentially scape-goating ‘high managerial agents’ who may be imprisoned in the most egregious of cases.

Finally, corporations convicted of manslaughter under the Code can be subjected to heavier fines than apply under occupational health and safety laws.³⁸

Industrial manslaughter prosecutions, then, are thus markedly different from those pursued under the common law, or from those prosecuted under occupational health and safety legislation.³⁹

There is a major difficulty, however, for those wishing to use the *Criminal Code Act 1995* to prosecute such conduct in Australia. The Code only applies to Commonwealth offences, and manslaughter is not a Commonwealth offence.⁴⁰ Thus, in order to give effect to these particular provisions, States and Territories need to adopt similar sections in their criminal codes or, in the case of the common law States,⁴¹ other criminal legislation. To date, the Australian Capital Territory is the only jurisdiction to enact such a law. All of the other jurisdictions have considered industrial manslaughter and rejected it.⁴² There is nothing else, therefore, on the horizon, legislatively speaking, in Australia. It is to the Australian Capital Territory, then, that we now turn.

The Australian Capital Territory experiment with industrial manslaughter

The Australian Capital Territory (ACT), in 2004, became the first (and only) jurisdiction in Australia to introduce an offence of industrial manslaughter. This was done via the *Crimes (Industrial Manslaughter) Act 2003* which led to a new Part 2.5 (sections 49-55) being added to their Criminal Code. According to the companion *Crimes Act 1900 (ACT)*, “industrial manslaughter” is defined as causing the death of a worker while either being reckless about causing serious harm to that worker or any other worker, or being negligent about causing the death of that or any other worker.⁴³

Section 49C *Crimes Act*

“An employer commits an offence if—
(a) a worker of the employer—

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

Moreover, the ACT legislation now provides for both employer and “senior officer” liability⁴⁴ for industrial manslaughter, with maximum penalties being a combination of significant fines and terms of imprisonment.⁴⁵

Chapter 2 of the Criminal Code incorporates the Commonwealth Criminal Code Act notions of ‘corporate culture’. The key to the ACT Code is section 51:

51. (1) In deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, the fault element is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence.

(2) The ways in which authorisation or permission may be established include—

(a) proving that the corporation's board of directors intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the corporation intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law; or

(d) proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.

(3) Subsection (2) (b) does not apply if the corporation proves that it exercised appropriate diligence to prevent the conduct, or the authorisation or permission.

Significantly, like the provisions of the Commonwealth Code, negligence of a corporation can be attributed by aggregation,⁴⁶ and, similarly, the physical element of the offence (causing death either by an act or by omission) is not only attributable by the conduct of officers, but also by agents or employees of the corporation.⁴⁷

One needs to acknowledge a limitation, however. The Australian Capital Territory is home to only 1.5 per cent of the Australian population, and has no heavy industry. Most of its employers and employees are government departments and public servants respectively. Indeed, the Australian government moved quickly in response to the *Crimes (Industrial*

Manslaughter Act (ACT) 2003, and introduced (in 2004) a Commonwealth law that exempts Commonwealth of Australia employers and employees from its provisions. This political act (a snub for the legislators of the ACT by their more conservative national masters) grants exemptions in the case of approximately 80 per cent of employers in that jurisdiction).

Australian academics await a test case to determine the effectiveness (or, indeed, workability) of these new provisions. There have been no prosecutions to date under this law.

Discussion

Given the persistence of deaths and injuries in Australian workplaces notwithstanding an increasingly punitive occupational health and safety regime, there is good reason to believe that occupational health and safety law is, on its own, an inadequate deterrent against workplace harm. There is thus growing support for the view that deterrence could be bolstered if directors and managers of companies were to be personally (and criminally) liable in circumstances where the potential harm is great, the risk obvious and the precautionary work poor,⁴⁸ that is, where conduct “conspicuously fail[s] to observe the standards laid down by law.”⁴⁹ There are some who believe, in addition, that the deterrent factor would be enhanced if the penalties prescribed for the above conduct were to include terms of imprisonment for senior managers even in the absence of their *direct* culpability.⁵⁰

From a sentencing policy point of view, a key question quickly emerges. Is there any evidence to suggest that the placing of these presumably deterrent factors in legislation will make managers more likely to inculcate a culture of safety in their workplaces? One could safely assume that the inclusion of the ‘corporate culture’ provisions, such as those found in the ACT legislation, will make prosecutions more likely as it is probably easier to prove a poor culture than a manager’s (or string of managers’) direct culpability.⁵¹ And certainly the possibility of imprisonment of managers sends a strong message to the community that culpable conduct will not be tolerated, even if it means targeting individuals who may have been but one of a number of guilty parties.

But what evidence is there of the usefulness of the notion of corporate culture (indeed, an enhanced prosecution likelihood) as a tool of deterrence?

Helpful for our purposes is the study by Andrew Hopkins arising out of the Gretley mine disaster in November 1996. Four miners had drowned in a mining shaft 150 metres underground after they accidentally drilled into a flooded and disused shaft at Gretley, owned and operated by a Hunter Valley (NSW) colliery.⁵² Almost four years later, in August 2004, the Newcastle Wallsend Coal Company, its parent company Oakbridge, the mine’s surveyor and two managers were found guilty of breaching the *Occupational Health and Safety Act (NSW)*. Five other under-managers at the mine had charges against them dismissed.

Dr Hopkins concluded, on the basis of his interviews with relevant managers, that there are a number of direct effects (including deterrence) of prosecutorial threats over and above a general moral censuring.

- i) The threat of prosecution leads to thoughts of self-protection, namely it keeps a manager’s mind firmly on safety;
- ii) the threat of prosecution gives rise to an increased tendency for managers to write things down; and

- iii) the threat of prosecution leads managers to discipline employees who engage in violations of the rules.⁵³

His conclusions are corroborated by the work of Dorothy Thornton, Neil Gunningham and Robert Kagan. On the basis of their review of environmental law enforcement practices in eight jurisdictions in the USA, they concluded that the threat of strong sanctions does have a deterrent effect, manifested in both a reminder and reassurance function. The threat of prosecution reminds managers that they should review their compliance status regularly, while at the same time reassuring them that their competitors who cheat are unlikely to get away with it.⁵⁴

These conclusions, however, could relate to *any* prosecutions, not just those inspired by a poor 'corporate culture.' The logic of those who would praise the addition of the 'corporate culture' provisions is that the deterrent effect of the law is enhanced because these prosecutions are easier to mount and thus more likely to proceed and succeed. In the absence of direct evidence that this would be the case, however, we can only rely upon speculation.

More potent, perhaps, is the argument that the deterrent effect is bolstered if there is a likelihood of attracting a prison sentence in the event of a finding of guilt. Imprisonment, one assumes, is a far greater deterrent than non-imprisonment. This argument is only valid, of course, if we can rely upon two assumptions, firstly, that the presence of the 'corporate culture' provisions will make it more likely that a defendant will face a jail term and, secondly, that the threat of that happening will change potential offenders' attitudes away from law-breaking and towards compliance. Neither of these assumptions, however, is necessarily sound.

Firstly, despite what Michael Adams says about the growing rate of corporate executives being given custodial sentences, it is still the case that corporate defendants are well-positioned to defend themselves and thus less likely to go to jail than non white-collar offenders who are convicted of offences that attract terms of imprisonment.

Large companies are able to hire the best lawyers, secure 'professional' expert witnesses, and engage in delaying tactics that will outlast the political pressure that prompted the government to initiate a prosecution in the first place ... The lesson seems to be that the criminal justice system, as presently constituted, is simply not a viable forum for tackling corporate wrongdoing.⁵⁵

Indeed, white collar offenders typically hold a number of cards that bode well for a non-custodial sentence. They rarely have previous convictions. Their standing in the community is usually very high. Their remorse is often well expressed. As their character witnesses will always attest, the professional shame that they have suffered could be seen as a punishment in itself. Their conduct has also dramatically reduced their ability to ever be able to work in their chosen profession again, and so forth.⁵⁶

Secondly, deterrence theory is notoriously unreliable. The best that can be said about the threat of imprisonment is that some people may be deterred from some conduct some of the time by the threat of more serious consequences. The evidence in deterrence theory points to the threat of being caught as a far greater deterrent than the consequences of being caught. Moreover, an over-reliance upon prison as a crime reduction strategy comes at a significant financial cost, and is applied inconsistently, primarily affecting those who cannot muster the resources, financial and personal, to aid in an acquittal or a plea in mitigation of penalty.

Putting to one side the ‘corporate culture’ issue for a moment, it should be noted that there are many critics of the whole thrust of industrial manslaughter laws who suggest that they are not the best response to cases involving corporate killing. For example, it has been pointed out that the imprisonment provisions do not apply to senior officers of non-corporations (such as partnerships and sole traders), transnational corporations and government-owned enterprises.⁵⁷ Furthermore, it may be too harsh to expect one or two persons to take full blame for the tragic consequences of a chain of errors, even in a work environment which is not properly safety-minded.⁵⁸

If the new provisions (attribution, aggregation, culture and the threat of imprisonment) have their short-comings as deterrents, are there other options for the punishment of companies that have engaged in unacceptable practices? Commentators have suggested that the deterrent power of divestment of company equity, adverse publicity, corporate probation (with remedial and rehabilitative conditions), disqualifications from certain commercial activities, receiverships (or ordering someone else to run the company), and the threat of the loss of limited liability are, arguably, equally potent deterrents, and have thus encouraged their deployment.⁵⁹

This discussion underlines the argument that industrial manslaughter laws cannot, by themselves, lower workplace death rates unless they directly affect corporate or individual employees’ perceptions of risk. Thus, there needs to be embedded within corporate entities a variety of control mechanisms, be they classified as ‘carrot’ or ‘stick’,⁶⁰ that is, non-prosecutorial options that reinforce the potential value of a multi-faceted approach to sentencing corporations in the event of grossly culpable behaviour.⁶¹ The trick is to determine how best to encourage such attitudes and behaviours with and without the threat of legal sanction.

Finally, is there not an argument for industrial manslaughter prosecutions on the basis of desert? What is the *symbolic* function of the law? Is there not an important interest to be served in seeing that ‘justice’ is done when serious harm has been caused? Paul Almond puts the issue as follows:

High-profile work-related fatality cases, whether or not they result in prosecution, communicate messages about the risks arising from corporate activity. It is this *communicative* function that accounts for the degree of public concern provoked by fatality cases, which cannot simply be dismissed as a form of moral panic over an emotive issue, because it reflects the cognitive evaluation of socially grounded phenomena.⁶²

Public perceptions are indeed important.⁶³ There is a perception amongst those who monitor ‘law and order’ politics that there is a latter-day preference for retributive sanctioning and a heightened intolerance of offending generally. There does appear to be a shift in public attitudes towards white collar offenders; a public that is now more likely to have a financial stake in corporate Australia and who see themselves – correctly – as indirect, if not direct, potential victims of others’ malfeasance. That being the case, we may be less inclined to have qualms about sending a former pillar of society to prison.

However, Dr Almond concludes that this does not necessarily translate into punitive attitudes to sentencing following corporate killings. In a survey based upon readers responding to a series of vignettes, he concluded that

although personal decisions about liability and punishment were made on essentially moral grounds, this did not translate into the ‘moral outrage’ and demands for vengeance that characterize accounts of populist punitiveness.⁶⁴

Indeed,

the respondents’ punishment preferences were rational and reasoned, and the emotive aspects of their attitudes were primarily regretful rather than vengeful ... there were signs that the desire to express condemnation and disapproval of offenders’ conduct was counterbalanced by recognition of the need for humane and just penal policies.⁶⁵

This conclusion is an important consideration in the debate over the adoption of industrial manslaughter legislation. If, as Almond points out, the demand by the public in the face of a work-related death is more focused on the control of underlying social risks rather than the vilification of an offender (representing a company) through his or her punishment, then the argument for industrial manslaughter legislation (and using the ‘corporate culture’ provisions to bolster it) is greatly diminished. If, however, the deterrent factor grows stronger by virtue of the threat of an industrial manslaughter prosecution, namely by its ability to motivate corporate executives to take active measures to control serious risks, then the legislation may have more value than its detractors may be prepared to admit.

Conclusion

The debate over the value or otherwise of industrial manslaughter laws will continue to feature strongly in corporate boardrooms, parliaments and criminal law circles. Discussion to date has been hampered by the multi-layered complexities and political tensions involved in drafting laws designed to bring responsible persons to account while remaining faithful to basic precepts of individual criminal responsibility, fairness and public sympathy.

In the absence of persuasive evidence that attributing human offences to corporate entities, aggregating negligent minds and actions, locating criminal liability in poor ‘corporate cultures’, and allowing for the possibility of imprisonment in some cases will reduce or eliminate deaths and injuries from the corporate workplace, changes to the *status quo* (outside of the Australian Capital Territory) are unlikely in Australia in the foreseeable future. Indeed, every other State has rejected the idea.⁶⁶ Jurisdictions appear reluctant to experiment with industrial manslaughter, regarding it as an ineffective and potentially counterproductive means of addressing corporate killing.

This is not to deny that ‘corporate culture’ prosecutions may nevertheless have a symbolic effect, setting risk management higher in the corporate management priority list, and showing the world that the law does take seriously the need for public rebuke in the most egregious of cases. Without this legislation, it is possible that more cases like those of Denbo⁶⁷ will continue to come before the courts yet simply exit them without further consequence. That possibility remains unacceptable to many victims and observers alike.

Endnotes

¹ Professor of Law and Criminal Justice, University of South Australia.

² Sutherland, E. (1949/1983) *White-Collar Crime: The Uncut Version*, New Haven: Yale University Press, 7. The term ‘white-collar crime’ was first used in Sutherland’s 1939 address to the American Sociological Society, published the following year as ‘White Collar Criminality’ (1940) *American Sociological Review*, 5, 1-12.

- ³ Refer to Sarre, R (2007) 'White Collar Crime and Prosecution for "Industrial Manslaughter" as a Means to Reduce Workplace Deaths' in Pontell, H and Geis, G (eds) *International Handbook on White Collar Crime*, New York, NY: Springer, 648-662
- ⁴ Levi, M. (1993) *The Investigation, Prosecution, and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No.14, London: HMSO.
- ⁵ Braithwaite, J. and Makkai, T (1994) 'Trust and Compliance', *Policing and Society*, 4, 1-12. Also see Makkai, T and Braithwaite, J (1994) 'The Dialectics of Corporate Deterrence', *Journal of Research in Crime and Delinquency*, 31, 347-373.
- ⁶ Adams, M (2005) 'Sentencing corporate offenders', Keynote address to the annual *ALTA Conference*, University of Waikato, Hamilton, New Zealand, July 2005.
- ⁷ Australian Bureau of Statistics (2008) 4512.0 *Corrective Services*, ABS Canberra.
- ⁸ See Wells, C (2001) 'Corporate Criminal Liability: Developments in Europe and Beyond' 39(7) *Law Society Journal* 62.
- ⁹ (1994) 6 VIR 157.
- ¹⁰ Chesterton, S (1994) 'The Corporate Veil, Crime and Punishment: The Queen v Denbo Pty Ltd and Timothy Ian Nadenbousch' 19 *Melbourne University Law Review* 1064.
- ¹¹ Sarre, R. 'White Collar Crime and Prosecution for "Industrial Manslaughter" as a Means to Reduce Workplace Deaths' in Pontell, H. and Geis, G. (eds) *International Handbook on White Collar Crime*, New York, NY: Springer, 2007, 648-662.
- ¹² Gobert, J. and Punch, M. (2003) *Rethinking Corporate Crime*, 10
- ¹³ Sarre, R. and Richards, J. (2005) 'Responding to Culpable Corporate Behaviour: Current developments in the industrial manslaughter debate', *Flinders Journal of Law Reform*, 8(1), 93-111.
- ¹⁴ 'Boatbuilder jailing may spark new case' *The Weekend Australian*, 11-12/7/2009, p 9.
- ¹⁵ 'Appeal win on boat deaths' *The Weekend Australian*, 18-19/12/2009, p 5.
- ¹⁶ 'Appeal win on boat deaths' *The Weekend Australian*, 18-19/12/2009, p 5.
- ¹⁷ Auscarats convicted over gokart death', by Daniel Fogarty, www.news.com.au AAP, 6 May 2009.
- ¹⁸ A go-kart centre called Auscarats Racing still operates at the same venue, owned now by Port Melbourne Go-Karts Pty Ltd.
- ¹⁹ Not to be confused with 'corporate manslaughter' or 'corporate homicide' which are applicable more generally to corporate killing. Industrial manslaughter must have occurred at work involving the death of a worker.
- ²⁰ Former SA independent MLC Mr Nick Xenophon (now Senator Xenophon) introduced in 2004 into the South Australian parliament an amendment to the *Occupational Health, Safety and Welfare Act 1986* (SA) that provided for a specific offence of industrial manslaughter. His Bill applied to a situation where an employer or a "senior officer" of the employer is either negligent about causing death or "recklessly indifferent about seriously endangering the health or safety of [an] employee or any other person at work." It also applied to omissions, deeming omitting to act an offence "if it is an omission to perform a duty to avoid or prevent danger to the life, safety or health of another." Under the Bill, the danger may arise from either the act or undertaking of that person or, significantly, "anything in the person's possession or control." The Bill later lapsed.
- ²¹ Writings in this area go back almost two decades; for example, Polk, K, Haines, F and Perrone, S (1993) "Homicide, Negligence and Work Death: The Need for Legal Change," in M. Quinlan (ed), *Work and Health: The Origins, Management and Regulation of Occupational Illness*. Melbourne: Macmillan.
- ²² As discussed below, it is only found in the Australian Capital Territory.
- ²³ Tomasic, R. (2005) 'From White-Collar to Corporate Crime and Beyond' in Duncan Chappell and Paul Wilson (eds) *Issues in Australian Crime and Criminal Justice*, Chatswood NSW: LexisNexis Butterworths, p 264.
- ²⁴ Gobert, J and Punch, M. (2003) *Rethinking Corporate Crime*, 84
- ²⁵ This Act applies to all Australians. Most Australian criminal law is the responsibility of the States or Territories and these laws are only applicable within the relevant jurisdiction.
- ²⁶ Part 2.5, Division 12. For a useful discussion of this Part, see Woolf, T (1997) 'The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability', 21(5) *Criminal Law Journal* 257. For a discussion of the English equivalent, see Almond, P. 'Regulation Crisis: Evaluating the Potential Legitimizing Effects of "Corporate Manslaughter" Cases,' *Law and Policy*, 29(3), 2007, 285-310 at 288.
- ²⁷ Section 12.1 and 12.2.
- ²⁸ Section 12.4(2).
- ²⁹ Section 12.4.2(b).
- ³⁰ Section 12.3(1).
- ³¹ Section 12.3(2) (a) and (b).
- ³² Section 12.3(6).

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- ³³ Clough, J (2005) 'Will the punishment fit the crime? Corporate manslaughter and the problem of sanctions', *Flinders Journal of Law Reform*, 8(1), 113-131 at 119.
- ³⁴ Sections 12.3(2) (c) and (d).
- ³⁵ Section 12.3(2) (d).
- ³⁶ See generally Gobert, J (2005) 'The Politics of Corporate Manslaughter – the British Experience,' *Flinders Journal of Law Reform*, 8(1), 1-38.
- ³⁷ The UK Act refers to the notion of corporate culture but does so only as an evidentiary factor, not as a basis for liability.
- ³⁸ This is not to say that the OH&S penalties are trifling; see Catanzariti, J (2004) 'Higher and novel penalties for serious safety breaches,' *Law Society Journal*, 48 (August).
- ³⁹ There is a philosophical issue alive here as well. Health and safety law may be regarded as a lesser form of proscription, as liability under OH&S attaches to a breach of duty (a guard rail was left open), rather than the outcome (a person died because the guard rail was open). The criminal law is thus more 'ends-driven' and less 'regulatory,' and thus possesses greater legitimacy power than OH&S prosecutions which may be regarded as simply the end result of a routine enforcement activity. See Almond, P 'Regulation Crisis: Evaluating the Potential Legitimizing Effects of "Corporate Manslaughter" Cases,' *Law and Policy*, 29(3), 2007, 285-310 at 290 and 300.
- ⁴⁰ In August of 2004, Greens Senator Kerry Nettle introduced into the Australian parliament the Criminal Code Amendment (Workplace Death and Serious Injury) Bill 2004, which was designed specifically to incorporate industrial manslaughter offences into the Commonwealth Criminal Code. The Bill has stalled.
- ⁴¹ There are, confusingly, different approaches taken to criminal laws amongst the States and Territories. Three States (Queensland, Western Australia and Tasmania, plus the Northern Territory and the Australian Capital Territory) have codified their criminal laws. South Australia, New South Wales and Victoria still use the common law.
- ⁴² Sarre, R. and Richards, J. 'Criminal manslaughter in the workplace: what options for legislators?' *Law Institute Journal*, 78, (1-2), 58-61, 2004.
- ⁴³ Crimes Act 1900 (ACT) ss 49C, 49D. Confusingly the offence of manslaughter is proscribed in this Act while the requisites of criminal responsibility are found in the Criminal Code (2002). The two pieces of legislation, therefore, need to be read together. The Crimes Act 1900 (ACT) s 7A does this specifically by linking the specific provisions.
- ⁴⁴ Section 49D mirrors section 49C.
- ⁴⁵ Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.
- ⁴⁶ Criminal Code 2002 (ACT) s 52.
- ⁴⁷ Criminal Code 2002 (ACT) s 50.
- ⁴⁸ Gobert, J. and Punch, M. *Rethinking Corporate Crime* (2003), 96, referring to Ashworth, A. *Principles of Criminal Law*, (3rd ed, 1999) 199.
- ⁴⁹ Per Cummins J, *DPP v Esso (Australia) Pty Ltd* [2001] VSC 296 (Unreported, Supreme Court of Victoria, Justice Cummins, 30 May 2001) [para 4]. For an insight into that prosecution, see Wheelwright, K (2002) "Corporate Liability for Workplace Deaths and Injuries – Reflecting on Victoria's Laws in the Light of the Esso Longford Explosion," 7(2) *Deakin Law Review* 323.
- ⁵⁰ Anecdotally, it has been said that the sight of executives in handcuffs being led out of the building of failed US giant corporation Enron probably did more towards restoring public confidence in the justice system in the wake of that corporate malfeasance than anything else.
- ⁵¹ We will be better able to make that judgement once there have been some judicial interpretations of the rather vague terms found in the legislation such as "culture", "attitude" and "maintain".
- ⁵² See also Phillips, K. (2006) *The Politics of a Tragedy: The Gretley Mine Disaster and the dangerous state of work safety laws in New South Wales*, Institute of Public Affairs, Work Reform Unit.
- ⁵³ Andrew Hopkins, *Lessons from Gretley*, 2007, at page 134
- ⁵⁴ Thornton, D., Gunningham, N. and Kagan, R. 'General Deterrence and Corporate Environmental Behavior' (2005) 27(2) *Law and Policy* 262-288.
- ⁵⁵ Gobert, J and Punch, M (2003) *Rethinking Corporate Crime*, London: LexisNexis Butterworths, 9.
- ⁵⁶ Sarre, R. (2001) 'Risk Management and Regulatory Weakness' in Ian Ramsay (ed) *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia*, Sydney, CCH, 291-323.
- ⁵⁷ Discussed in Sarre, R. 'White Collar Crime and Prosecution for "Industrial Manslaughter" as a Means to Reduce Workplace Deaths' in Pontell, H. and Geis, G. (eds) *International Handbook on White Collar Crime*, New York, NY: Springer, 2007, 648-662.
- ⁵⁸ Moreover, there is the possibility that the mere mention of 'industrial manslaughter,' 'aggregation,' or 'corporate culture' prosecutions will raise the likelihood that collaboration between employers and employees will break down, and that would be to the detriment of health and safety in the workplace generally. See former

NSW Industrial Relations Minister John Della Bosca as cited by, and reported in, 'NSW: Govt to introduce tougher laws for negligent employers' (AAP, 27 October 2004).

⁵⁹ See Sarre, R. 'Responding to Corporate Collapses: is there a role for corporate social responsibility?' *Deakin Law Review*, 7(1), 1-19, 2002.

⁶⁰ Fisse, B (1990) "Sentencing Options Against Corporations," 1(2) *Criminal Law Forum* 211.

⁶¹ Tomasic, R (2005) "From White-Collar to Corporate Crime and Beyond" in Duncan Chappell and Paul Wilson (eds) *Issues in Australian Crime and Criminal Justice*, Chatswood NSW: LexisNexis Butterworths, at 267.

⁶² Almond, P. 'Regulation Crisis: Evaluating the Potential Legitimizing Effects of "Corporate Manslaughter" Cases,' *Law and Policy*, 29(3), 2007, 285-310 at 293. (Emphasis in the original.)

⁶³ Monterosso, S. 'Punitive Criminal Justice and Policy in Contemporary Society' *QUT Law and Justice Journal*, 9(1), 13-25, 2009.

⁶⁴ Almond, P, 'Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of 'Populist Punitiveness''? *British Journal of Criminology*, 48, 448-467, 2008 at 463.

⁶⁵ Almond, P, 'Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of 'Populist Punitiveness''? *British Journal of Criminology*, 48, 448-467, 2008 at 464.

⁶⁶ The list is contained in Sarre, R. and Richards, J. (2005) 'Responding to Culpable Corporate Behaviour: Current developments in the industrial manslaughter debate', *Flinders Journal of Law Reform*, 8(1), 93-111.

⁶⁷ The Cittadini and AAA Auscart cases did not involve employees being killed, rather members of the public, hence the industrial manslaughter laws would not apply even if they had been adopted in NSW (Cittadini) and Victoria (AAA Auscart). But should those States adopt the provisions of the Commonwealth Criminal Code Act, then there would be a heightened chance of a conviction and sentence of imprisonment in each of these cases.