

ARTICLE

No Soul to Damn? Revisiting the Case for Corporate Manslaughter in New Zealand

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Currently a corporation cannot be convicted of manslaughter in New Zealand. In light of legislation passed in cognate jurisdictions and several recent industrial disasters, the distinction demarcated between individuals and corporations has become increasingly out of touch. This article focusses on the *Report of the Independent Taskforce on Workplace Health and Safety* (2013). It is used to consider the above issues and concludes that the offence's alignment with fundamental criminal law principles makes a strong case for its introduction in New Zealand. Following a review of cognate jurisdictions and the findings of the Taskforce, the Report concludes that a more comprehensive set of recommendations, particularly consideration of the *corporate culture* model of liability developed abroad, was absent in the Taskforce's conclusions and necessary in any future discussions of reform.

I Introduction

Recent high-profile events have revealed an abject failure in the operation of New Zealand's legal regime for workplace health and safety. The well-publicised mining disaster at Pike River in 2010,¹ the collapse of the Christchurch Television building (CTV) during the February 2011 earthquake and a recurring spate of fatalities within the forestry industry, have brought the issue of deaths in industry and employment sharply into the public consciousness. Discourse has emerged calling for an increased focus on higher penalties for what is a perceived culture of negligence among numerous New Zealand corporations.

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1 See generally Rebecca Macfie *Tragedy at Pike River Mine: How and Why 29 Men Died* (Awa Press, Wellington 2013).

The introduction of an offence of corporate manslaughter, a charge that remains curiously absent from our law, has been central in much of the commentary around this issue. Organisations such as the New Zealand Council of Trade Unions have argued vehemently for the enactment of such a law, to more appropriately lay blame for deaths that occur in an industrial or corporate context.² This development would bring New Zealand to par with several other commonwealth jurisdictions that have embraced the concept of criminal liability for deaths at the hands of corporations. The most significant development to date was in the United Kingdom, where the Corporate Manslaughter and Corporate Homicide Act (CMCHA) was enacted in 2007.³

Against this background, the Independent Taskforce on Workplace Health and Safety was convened and published a report in 2013 assessing the efficacy and suitability of our current legal mechanisms in this area.⁴ During the widespread review it conducted regarding industrial health and safety, it sought to track the development of corporate manslaughter in other jurisdictions. It also assessed the feasibility of replicating these laws in New Zealand. The Taskforce's key recommendations were the strengthening of occupational health and safety laws and extending the existing law of manslaughter to include corporations.⁵ The first of these objectives is on the path to being addressed through the Health and Safety Reform Bill 2014,⁶ however recent remarks by the Prime Minister John Key appear to have put the issue of corporate manslaughter to rest once again.⁷

The aims of this article are twofold. Following a review in Part II of the current state of the law, Part III aims to consider afresh the case for corporate manslaughter in contemporary New Zealand. The author concludes that the offence's consistency with the principles of deterrence and denunciation in the criminal law and the persistence of industrial related harms warrants criminal sanction in the form of a manslaughter charge.

This article then examines the Taskforce's report, and sets forth the author's own view on the most appropriate aspects of any potential reform. In Part IV, the article analyses and critiques the recommendations advanced by the Taskforce, arguing principally that they fail to engage with the inherent complexity of holding corporations accountable through criminal law mechanisms. Part V discusses an emergent *corporate culture* approach to attribution of corporate liability, concluding that with sufficiently clear legislative indicia, this ostensibly nebulous concept may provide an effective method of attribution.

2 New Zealand Council of Trade Unions "Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at [S.93]. See also Sarah-Lee Stead and Nura Taefi "Should New Zealand Introduce Corporate Manslaughter?" in *Industrial Safety News Magazine* (New Zealand, July 2012) at 22.

3 Corporate Manslaughter and Corporate Homicide Act 2007 (UK).

4 Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (April 2013).

5 See Independent Taskforce on Workplace Health and Safety, above n 4.

6 Health and Safety Reform Bill 2014 (192-1).

7 Patrice Dougan "PM: Corporate manslaughter law 'unlikely'" *The New Zealand Herald* (online ed, Auckland, 3 December 2013).

II Corporate Criminal Liability

A *The identification doctrine*

Historically, the courts have been hesitant to recognise the notion of a corporate body having a conscience sufficiently autonomous to warrant criminal punishment. The traditional approach, which has been attributed to Baron Edward Thurlow, was that such bodies had “no soul to be damned, and no body to be kicked”.⁸ However, there now exists a rebuttable presumption that criminal offences apply directly, not vicariously, to corporate bodies, unless the language of the relevant offence suggests otherwise.⁹

The settled norm in the imputation of criminal liability to corporations is the *identification* doctrine. This requires that a single individual acting as a *directing mind and will*, as distinct from the *hands* of the company in the wider workforce, is identified as having performed the requisite elements of the offence.¹⁰ The House of Lords in *Tesco Supermarkets Ltd v Natrass*, the authoritative case on this issue, articulated the following central principle:¹¹

[T]he person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company.

This individual must have personally committed the crime in question for liability to be attributed to the company.¹²

It has long been considered that the identification process yields unsatisfactory results. Celia Wells commented that the model’s “[c]oncentration on the misdeeds of managerial officers ignores the reality of corporate decision making.”¹³ Indeed, in all but the smallest of companies, layers of authority serve to divorce the senior management from the day-to-day workings of the organisation, rendering the task of identifying such an individual virtually impossible. Arising out of these concerns, a model of *aggregation* has been suggested to remedy the shortfalls of this focus on the location of a culpable individual officer. Such a system would introduce liability where two or more officers perform acts or omissions that, if carried out by one of them, would ordinarily lead to the personal liability of that officer. The conduct of this totality of individuals is aggregated to attach to the corporate body itself. However, common law courts have given strong indication that they do not consider it appropriate to alter the basis of liability in this way, such as in *Attorney General’s Reference (No 2 of 1999)* where the identification doctrine was affirmed as the correct principle.¹⁴

8 Richard Card *Card Cross and Jones Criminal Law* (20th ed, Oxford University Press, Oxford, 2012) at [18]–[19].

9 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 220.

10 *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) at 713.

11 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) at 170.

12 At 170.

13 Celia Wells *Corporations and Criminal Responsibility* (Oxford, Clarendon Press, 1993) at 132.

14 *Attorney-General’s Reference (No 2 of 1999)* [2000] 2 Cr App R 207 (CA) at 218 per Rose LJ.

Notably, the judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission*, put forward a substantially more *ad hoc* method of attribution. This was grounded in statutory interpretation as Lord Hoffmann was of the view that:¹⁵

[T]he Court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

While this approach found favour with the New Zealand Court of Appeal in *Linework Ltd v Department of Labour*,¹⁶ it is clear that the orthodox identification doctrine maintains a strong hold in spite of Lord Hoffmann's seemingly transformative ruling.¹⁷ Lord Hoffmann's test might appear to be at odds with identification principles, however, scholars are of the view that the *Meridian* approach does not purport to overturn the traditional doctrine. It supplements the orthodox view with a "principle of allegiance to the purpose of the statute" where the circumstances require.¹⁸ The default rules continue to be based on the location of a "directing mind and will".¹⁹

Andrew Ashworth seeks to provide a principled basis for attributing blame to the corporate body. He writes that the trend in the development of corporate liability rules "has been to attempt to fit corporate liability into the existing structure rather than to consider its implications afresh".²⁰ Although the criminal law was engineered overwhelmingly to ascertain the liability of individuals, a *de novo*, first principles approach to the implications of corporate liability has not taken place. It is this confused basis on which the principles of corporate liability lie that informs much of the debate as to its future.

B Corporate manslaughter: the current position

(1) United Kingdom

Prior to the introduction of its present statute, the common law of the United Kingdom had warmed to the idea of extending the application of the offence of manslaughter to corporate bodies. Although accounts differ as to the exact genesis of the principle, the unreported 1965 case of *R v Northern Strip Mining Construction Co Ltd* is often touted as the earliest indication of an assent to prosecuting corporate manslaughter at common law.²¹ In any event, by 1969 scholars accepted that "it now seems clear that corporations

15 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12–13.

16 *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [12] per Blanchard J.

17 *St Regis Paper Co Ltd v R* [2011] EWCA Crim 2527 at [12].

18 Simester and Brookbanks, above n 9, at 228.

19 At 228.

20 Andrew Ashworth and Jeremy Hodder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 147.

21 *R v Northern Strip Mining Construction Co Ltd The Times* (United Kingdom, 2, 4 and 5 February 1965) as cited in Gary Slapper "Corporate Manslaughter: An Examination of the Determinants of Prosecutorial Policy" (1993) 2 Social and Legal Studies 423 at 423–424.

may be liable for manslaughter”.²² However, conviction for the common law offence of manslaughter by gross negligence was still dependent on attributing liability under the identification doctrine, a hurdle that resulted in a very limited number of successful prosecutions.²³ The capsizing of the Herald of Free Enterprises ferry in 1987 is a salient example as it caused the death of nearly 200 passengers.²⁴ This resulted from the failure of members of three employees of mixed seniority to close and check the ship’s bow doors. A judicial inquiry into the disaster led the wreck commissioner, Sheen J, to reach the damning verdict that “[f]rom top to bottom the body corporate was infected with the disease of sloppiness.”²⁵ However, Turner J, reiterating the identification doctrine, ruled that manslaughter could not be proved.²⁶ The resulting legislation, the CMCHA, was intended as a corrective to the dire state of affairs in which instances such as the above went without punishment.

The CMCHA, a product of repeated calls for reform since 1996,²⁷ served to introduce an offence of manslaughter distinct from the existing common law offence, grounded primarily in the law of negligence. The new offence provides that an organisation will be guilty if it causes a person’s death in circumstances of a gross breach of a duty of care to which the defendant company owed to the victim.²⁸ The management of the company activities and the organisation of its senior management must form a *substantial element* of the breach.²⁹ Such has been termed a “managerial fault” model, the purpose of which being that “liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run”.³⁰ A finding of these elements creates prima facie liability under the Act to an unlimited fine, a remedial order and/or a publicity order, provided that the defendant cannot establish one of the Act’s many exceptions.³¹ This development was welcomed among legal academics, and the “managerial fault” approach to liability has been heralded as “[breaking] new conceptual ground”.³² The question of whether this legislation has truly been apt in prosecuting divergent behaviour will be considered later in this article.

22 LH Leigh *The Criminal Liability of Corporations in English Law* (Widenfield and Nicolson, London, 1969) at 59.

23 Andrea Oates *Tolley’s Corporate Manslaughter and Homicide: A guide to compliance* (LexisNexis, London, 2008) at 7.

24 Amanda Pinto and Martin Evans *Corporate Criminal Liability* (3rd ed, Sweet and Maxwell, London, 2013) at 220.

25 Justice Sheen *MV Herald of Free Enterprise report of Court no 8074 Formal Investigation* (Department of Transport (UK), London, 1987) at [14.1].

26 *R v P&O Ferries (Dover) Ltd* [1991] 93 Cr App R 72; [1991] Crim LR 695 (CA) at 84.

27 See generally Law Commission (UK) *Legislating the Criminal Code: Involuntary Manslaughter* (HM Stationary Office, March 1996).

28 Corporate Manslaughter and Corporate Homicide Act (UK), s 1.

29 Section 1(3).

30 Ministry of Justice *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007, Explanatory Notes* (2007) at [14].

31 Corporate Manslaughter and Corporate Homicide Act, ss 3(1)–7(1). Exceptions to the CMCHA include public policy decisions and instances in relation to military activities, the police and emergency services.

32 AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (4th ed, Hart Publishing, Oxford 2010) at 282.

(2) New Zealand

A corporation may not be convicted of manslaughter in New Zealand. A *person* is defined in the Crimes Act as both natural and legal persons.³³ However, the language of s 158 limits the ambit of a potential charge of homicide to the “killing of a [human being] by another”.³⁴ The verdict reached in *R v Murray Wright Ltd* unequivocally confirmed as a principle that the “human being” requirement prevents a company from being liable for homicide.³⁵ This element of s 158, at a minimum, would require amendment to the term *person* in order for a manslaughter charge to be brought against a corporation. However, this does not deny the ability of a corporate body to be liable as a secondary party to a homicide committed by an individual.³⁶ The relevant Crimes Act provision governing the ambit of secondary participation, s 66, does not contain the same language of a “human being”.³⁷

III The Case for Corporate Manslaughter

A Principles and policies of the criminal law

Many of the fundamental principles of the criminal law would arguably be well served by the introduction of a charge of corporate manslaughter. Principally, conviction for an offence of manslaughter, as opposed to a prosecution under health and safety legislation, would more adequately reflect community outrage. Such is evident in the burgeoning calls for stricter penalties for corporate offending. Widespread dissatisfaction with the outcome of attempts to hold companies and the individuals within them to account, including the decision not to prosecute Pike River manager Peter Whittall,³⁸ has only served to exacerbate this sense of disillusionment with the potency of our current legal armoury. This public concern provides cause for considering the “fair labelling” principle of the criminal law, which holds that offences should be “subdivided and labelled so as to represent fairly the nature and magnitude of law-breaking”.³⁹ This principle does not exist merely to satiate public outrage, but is based on the value that “where people reasonably regard two types of conduct as different, the law should try to reflect that difference”.⁴⁰

The criminal stature of a manslaughter charge arguably becomes more desirable in the context of our current regime for the correction of health and safety malfeasance, the Health and Safety in Employment Act 1992.⁴¹ Breaches of this legislation are considered *regulatory offences* which, although carrying penalty, fall victim to a perceived “‘real’ crime—‘quasi’ crime distinction”.⁴² Manslaughter, a real criminal offence of serious gravity, would provide a greater avenue for expressing public censure and condemnation. There is something to be said, whether the distinction is valid or not, for classifying

33 Crimes Act 1961, s 2.

34 Section 158 (emphasis added).

35 *R v Murray Wright Ltd* [1970] NZLR 476 (CA) at 481.

36 Simester and Brookbanks, above n 9, at 221.

37 Crimes Act 1961, s 66.

38 Ministry of Business, Innovation and Employment “Charges against Peter Whittall not proceeding” (press release, 12 December 2013). See also Macfie, above n 1, at 248.

39 Ashworth, above n 20, at 7.

40 At 77.

41 Health and Safety in Employment Act 1992, ss 49–56.

42 Wells, above n 13, at 8.

corporate behaviour causing death as manslaughter in order to more adequately reflect its seriousness, rather than falling under the *regulatory* sphere of the criminal law.

Intuitively, the *stigma* attaching to a manslaughter charge, in conjunction with higher penalties, would work to satisfy the deterrence aims of the criminal law. However, one compelling argument weighing against this appearance of harmony with fundamental principles, is a concern that a corporate manslaughter charge might merely create a semblance of stricter penalties whilst the bulk of deterrence is realised by the health and safety compliance regime. In effect, it would be tantamount to a hollow attempt at “penal populism”.⁴³ Should the Health and Safety Reform Bill currently before Parliament succeed in establishing a more effective compliance and penalty regime, the further introduction of a corporate manslaughter charge in New Zealand would likely face similar charges of futility.

It is the author’s view that the justification for corporate manslaughter remains despite this development. The new offences contained in the Bill before the House will not penalise deaths but merely exposure to the *risk* of death.⁴⁴ While there would undoubtedly be a degree of overlap between the behaviour examined under both categories of offences, the focus remains on different harms and outcomes. The justification for a corporate manslaughter indictment, if only for symbolic reasons, remains intact.

Submissions made during the legislative passage of the Health and Safety Bill also indicate a view in some quarters that the introduction of corporate manslaughter is still necessary. The Council of Trade Unions criticised the Bill for not going far enough in its punishment of negligent organisations.⁴⁵ The lack of sanction currently available to address the dangerous behaviour found in recent years reflects how patent the need for an offence of this nature is.

B *New Zealand: a commonwealth anomaly*

New Zealand’s lack of a corporate manslaughter offence puts it at odds with developments in many of the jurisdictions to which our legal system is attentive, particularly in light of the CMCHA. In addition, New Zealand remains firmly grounded in the common law doctrine of identification. In contrast, many other commonwealth jurisdictions have sought statutory reform of these rules whether pertaining to a specific manslaughter offence or rules of general application in the criminal law. Notably, Canada amended its corporate liability rules in 2003 and, although not equipped with a charge of corporate manslaughter, it has introduced an offence of causing death by criminal negligence in an attempt to make prosecutions against corporations easier.⁴⁶ Australia similarly sought to change the generic rules of corporate liability at a federal level, albeit in a different manner.⁴⁷ While the Australian Capital Territory (ACT) enacted an offence of

43 See generally John Pratt and Marie Clark “Penal Populism in New Zealand” (2005) 7 *Punishment and Society* 303.

44 Proposed offences under the Health and Safety Reform Bill include reckless conduct in respect of health and safety duty (cl 42), failing to comply with a health and safety duty that exposes and individual to the risk of death or serious injury or illness (cl 43) and failing to comply with a health and safety duty (cl 44).

45 New Zealand Council of Trade Unions, above n 2. See also Radio New Zealand “Safety Reforms don’t go Far Enough, MPs Told” (26 June 2014) Radio NZ <www.radionz.co.nz>.

46 Criminal Code RSC 1985 c C-46, ss 22.1-22.2. See Part IV for a fuller discussion of Canada’s corporate liability rules.

47 Criminal Code Act 1995 (Cth), Part 2.5.

Industrial Manslaughter in 2003, where an employer or senior officer causes the death of a worker in the course of employment, other states have not yet followed this approach.⁴⁸

Notwithstanding the question of whether these offences are effective, New Zealand appears comparatively immobile in its treatment of industrial and workplace related fatalities.

IV The Report of the Independent Taskforce on Workplace Health and Safety

The Taskforce was established in June 2012, on the occasion of the 20-year anniversary of the Health and Safety in Employment Act 1982. It was established with a view to undertaking a “strategic review of whether the New Zealand workplace health and safety system remains fit for purpose”.⁴⁹ The report of the Royal Commission on the Pike River Coal Mine Tragedy was released that September. It had already taken the view that consideration should be given to the introduction of an offence of corporate manslaughter, a call which the Taskforce took heed.⁵⁰ The resultant report examined the current state of the law internationally regarding corporate manslaughter, as well as setting out their view of the approach New Zealand, should take. It provides perhaps the most holistic and comprehensive survey of issues pertaining to health and safety law in New Zealand. Accordingly, the recommendations made by the Taskforce would likely be salient to any concrete proposals for reform, should they arise in the future. Scrutiny of the Taskforce’s findings in respect of corporate manslaughter is thus valid and important.

The principal argument made within the report was that changes in the common law rules of the attribution of corporate criminal liability, applicable to all offences, was of primary importance for New Zealand. These changes would result in the extension of the general law of manslaughter to corporations to become feasible. Changes to the rules of attribution required the implementation of two key measures: (a) allowing the attribution of criminal liability to a corporation as a result of the acts and omissions of a greater range of officers and employees; and (b) the introduction of a system of aggregated criminal liability for the acts and omissions of two or more officers.⁵¹

This article argues that the above recommendations fail to give adequate consideration to the full extent of the models developed in cognate jurisdictions. This is particularly evident in the total lack of engagement with the concept of ‘corporate culture’ as an emergent basis for the attribution of liability to corporations that has developed abroad.⁵² As a result, the Taskforce’s proposal should be treated as a conservative statement of the reform options available. However, the author acknowledges that this perceived lack of depth may be due to time constraints, as the corporate manslaughter section formed only a small part of the Taskforce’s report, totalling only three to four pages.

48 Crimes Act 1900 (ACT), ss 49D–49E.

49 Independent Taskforce on Workplace Health and Safety *Terms of Reference for the Independent Taskforce undertaking the Strategic Review of the Workplace Health and Safety System* (August 2012).

50 *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (2012) vol 2 at 310.

51 Independent Taskforce on Workplace Health and Safety, above n 4, at [382].

52 Corporate culture will be examined in Part V of this article.

A Liability for the acts and omissions of a greater range of officers

The Taskforce directed strong criticism at the identification doctrine of attribution, particularly in its requirement that the offending individual be a “directing mind and will” of the corporate body. This was cited as the predominant reason why criminal prosecutions against corporations, in New Zealand and beyond, were unlikely to succeed. To remedy this shortcoming the Taskforce considered that, provided the individuals concerned were acting within the scope of their authority, corporate criminal liability should extend to the acts and omissions of a “greater range of officers”.⁵³

It is, of course, hard to determine what degree of extension was meant by the phrase “greater range of officers” as the Taskforce did not see it necessary to expand on their conclusions. However, the Taskforce did refer with apparent approval to the terminology adopted in the Canadian Criminal Code as one way to structure corporate liability rules to relax the stringent requirements of the identification doctrine.⁵⁴ Statutory reform took place in Canada through an amendment to the Code in 2003 as a result of their familiar dissatisfaction with the workings of the existing rules of attribution. The use of the term “senior officer” was apparent in such reforms. Such officers play a central role in the attribution of liability to corporations for offences of negligence and are defined within the Code as a:⁵⁵

... representative who plays an important role in the establishment of an organisation’s policies or is responsible for managing an important aspect of the organisation’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer ...

These officers would appear to refer to the similar narrow class of individuals considered a “directing mind and will” under the previous doctrine. However, explanations of the Bill by the Canadian Department of Justice maintain that the Code’s focus is “on the function of the individual, rather than on any particular title”.⁵⁶

Although the case law concerning these adaptations to the Code is limited, the recent judgment in *R v Metron Construction Corp* gives promising signals that the Courts have interpreted the concept of a “senior officer” as widening the basis of attributing liability beyond a small cache of upper-level management.⁵⁷ In that case, three employees of the defendant construction company fell to their deaths from a swing stage platform while working to restore a high-rise building. The platform was not properly constructed and collapsed under the weight of six men in gross excess of the platform’s weight capacity. The site supervisor, Mr Fazilov, permitted this overabundance of workers on the platform, with the additional knowledge that they were under the influence of drugs at the time. At trial, Bigelow J saw no reason why Fazilov could not be classed as a senior officer and expressed that “[t]hese changes in the criminal law ... clearly extends the attribution of ... corporate criminal liability to the actions of midlevel managers.”⁵⁸

53 Independent Taskforce on Workplace Health and Safety, above n 4, at [382].

54 At [381].

55 Criminal Code 1985 (Canada), s 2.

56 Department of Justice (Canada) “Criminal Liability of Organizations – A Plain Language Guide to Bill C-45” (2003) <www.justice.gc.ca> at 5.

57 *R v Metron Construction Corp* (2012) ONCJ 506.

58 At [15].

Section 22.1 of the Code, which establishes the Canadian approach to liability for crimes of negligence, also differs critically from the identification doctrine in that the senior officers need not have personally committed the offence. Instead, they must exhibit a *marked* departure from the standard of care that, in the circumstances, could reasonably be expected to prevent any *representative* of the organisation from being a party to the offence.⁵⁹ In essence, senior officers owe a duty not to allow other representatives to commit the unlawful acts or omissions due to their own want of care. Colvin writes that the “focus on senior personnel has moved away from their own conduct and onto the quality of their supervision of other persons”.⁶⁰ Where the traditional identification doctrine would require the officer to be found personally guilty, the Code would allow liability where any representative or representatives⁶¹ commit the offence, provided they were unsupervised to a marked degree by a relevant senior officer.

It can be gleaned from the amendments made to the Code that the location of a senior officer was to be based on authority in real terms, rather than a limitation to a specific class of officers with titles of formal seniority.⁶² It could be that this facet of the Code imports some of the problems that were levelled in the approach taken by Lord Hoffmann in *Meridian*. This approach requires the judge to assess whether the offending actor was intended, due to the policy and language of the offence, as a relevant directing mind for attribution of liability to the company. Seemingly, this avoids a fixed determination that only a certain class of management is attributable to the company. Indeed, one of the pertinent considerations when assessing liability on the basis of the *Meridian* approach is whether the individual concerned had practical or effective authority.⁶³ Similarly, s 22.1 merely requires that the senior officer play a significant role in policy and/or management, rather than a fixed determination based on the title the offending individual holds.

Criticism of the approach taken by Lord Hoffmann has been forthcoming by academic writers. This is mostly for reasons of the apparent inconsistencies such an approach might result in, with the “greater uncertainty regarding who will be deemed the relevant person within the corporate hierarchy... likely to lead to difficulties”.⁶⁴ This is particularly true for corporations, which require clarity from judicial rulings to create policies that can provide a meaningful method to ensure compliance with the law.

By way of comparison, the CMCHA’s “senior management” test could be said to mirror the language of “senior officer” present in the Canadian Code.⁶⁵ In a similar vein to the interpretation of “senior officer” in the Code, the group deemed to be “senior management” is defined within the Act as the persons who play a significant role in:⁶⁶

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

59 Criminal Code 1985 (Canada), s 22.1. A *representative* is defined in s 2 of the Code as a “director, partner, employee, member, agent or contractor of the organization”.

60 Eric Colvin and Sanjeev Anand *Principles of Criminal Law* (3rd ed, Thomson Carswell, Toronto 2007) at 126.

61 The Code also allows for a system of aggregated liability. See ss 22.1(a)(ii).

62 Department of Justice (Canada), above n 56, at 5.

63 See *Linework Ltd v Department of Labour*, above n 16.

64 Meaghan Wilkinson “Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault” (2003) 9 *Canta LR* 142 at 151.

65 Corporate Manslaughter and Corporate Homicide Act, s 1(3).

66 Section 1(4)(c).

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

The inclusion of persons tasked with *actual* management or organisation might reflect the Canadian interpretation of persons wielding actual authority. Thus potentially giving scope for the courts to look below a director and executive level in interpreting “senior management”, to officers more aligned with the “hands” of the corporation. However, as I discuss later in this article, a body of case law has not developed in the United Kingdom concerning this offence to test this hypothesis.

The CMCHA could comparatively be said to suffer from a lack of clarity as to the conduct that will be required to bring a corporation’s senior management, however interpreted, within the purview of the Act. Section 22.1 of the Code establishes that, at a minimum, senior officers must have been grossly negligent in failing to prevent other representatives from committing the offence. By contrast, the CMCHA states only that the way in which these persons manage the organisation’s activities should play a substantial role in the breach of the duty owed.

Additionally, it is currently unclear what a *substantial* role might entail. Early perceptions of the legislation took the view that substantial means “more than trivial”, and in so doing meant that senior managers would not have to be solely responsible for the breach of duty.⁶⁷ It is submitted that, with respect, this is a strained interpretation of the provision, as any plain reading of the language of a *substantial* element would suggest that a high threshold of conduct is required.

The law appears to be at a loss for an effective way to capture corporate liability in terms of the true nature of the bodies’ activities. This is perhaps symptomatic of the lack of time in which coherent legal principles have been able to develop. The emphasis on officers at a senior level of management likely reflects the justified apprehension that, in fixing the threshold of officers too low, bottom-rung employees, who by and large do not perform meaningful work and are not influential enough to truly embody the company, will be treated as suitable to pin serious criminal liability to their employer. However, in so doing, these models may replicate the same focus on individuals that were the immediate cause of their reform.

B Aggregation

The Taskforce was of the view that changes in the general rules of corporate liability must provide for the ability to attribute where “two or more individuals of the required seniority... engaged in conduct that, if it had been the conduct of only one of them, would have made them personally liable”.⁶⁸ It is beyond doubt that this would require statutory enactment, as the courts have not felt able to so radically alter the basis of liability.⁶⁹ Changing the basis of corporate liability in this way would harmonise New Zealand practice with a vast swathe of academic commentary in support of aggregation. Celia Wells writes that it would be advantageous to move away from the “idea, implicit in both the vicarious and *alter ego* principles, that a corporation can only be liable through the unlawful activities of one particular officer or worker”.⁷⁰ Perhaps influenced by this academic appraisal, the concept of aggregation has also formed an integral role in cognate corporate

67 Oates, above n 23, at 142.

68 Independent Taskforce on Workplace Health and Safety, above n 4, at [382].

69 *Attorney-General’s Reference (No 2 of 1999)*, above n 14, at 218 per Rose LJ.

70 Wells, above n 13, at 132.

liability laws. Section 22.1 of the Canadian Code provides that an organisation is party to an offence of negligence if:

Two or more of its representatives engage in conduct... such that, if it had been the conduct of only one representative, that representative would have been a party to the offence.

Additionally, the CMCHA would appear to provide for aggregation in that the ‘senior management’, who must play a substantial role in the breach, refers to the *persons* who play significant managerial roles, rather than the location of a singular officer.⁷¹

The pronouncements made by the Taskforce, although in support of the principle of aggregation, contain key differences to the approaches taken internationally. While the Taskforce’s reasoning would aggregate liability where two officers *of the required seniority* commit the required acts, s 22.1 of the Canadian Code stipulates that two or more *representatives* (rather than the analogous “senior officers”) can be aggregated to constitute a liable organisation. The Taskforce’s reasoning thus appears to still be grounded in concerns with a limited upper class of management, rather than taking an expansive view of corporate culpability as capable of stemming from a variety of levels of the corporate structure. Arguably, it is the “hands” of the corporation that are most likely to commit the acts catalysing a homicide.

In spite of the growing attention given to models of aggregation, the theoretical underpinnings of the concept are not unanimously championed among academics. Some consider it “not possible to artificially construct the *mens rea* in this way”, being of the view that “two semi innocent states of mind cannot be added together to produce a guilty state of mind”.⁷² A common justification for a system of aggregation is that the model captures instances of a “widespread pattern of negligence by its individual representatives [that] may amount to a more serious breach of its own duty of care”.⁷³ However, the author is of the view that it would be wrong to presuppose that an aggregated system will deal wholly with *widespread* patterns among a large number of employees. The model, by its very description, would draw liability from the conduct of as few as two employees. While aggregation would adequately catch cases of widespread malfeasance where it can be said that all layers of the organisation played a role in the offences committed. It may also impose liability in the situation where two wayward employees, subject to a lack of supervision, commit the relevant offence. It is doubtful whether this is conduct that we would instinctively liken to an organisation plagued by the “disease of sloppiness”.⁷⁴

For these reasons, aggregation should not provide the fulcrum of any method of attributing criminal liability to a corporation. While a useful tool, it should be coupled with an assessment of the corporate body as a whole, so as to mitigate the risk of apportioning blame at companies when only a small number of representatives are privy to the offence.

C No separate offence of corporate manslaughter

Going against the grain of the reforms enacted in the United Kingdom and other commonwealth jurisdictions, the view of the Taskforce was that reform should come via

71 Corporate Manslaughter and Corporate Homicide Act, s 1(3).

72 David Ormerod *Smith and Hogan’s Criminal Law* (13th ed, Oxford University Press, New York, 2011) at [10.1.2.5].

73 Colvin and Anand, above n 60, at 127.

74 Justice Sheen, above n 25, at [14.1].

the extension of the general law of manslaughter to corporations. Thus, while they were enthusiastic about a charge of this nature becoming part of our law, the Taskforce did not support the recent trend of the introduction of a separate statutory offence of corporate manslaughter. This was justified primarily on the basis of the Taskforce's characterisation of the comparative offences in the United Kingdom and Canada as being of limited efficacy. The Taskforce concluded that the low rate of successful prosecutions of corporations for manslaughter was indicative of the hold of existing corporate liability rules which, "make it very difficult to convict a corporation for core Crimes Act offences".⁷⁵

Further justification against an isolated change to the law of manslaughter is evident in the potential legal anomaly that would arise where the particular offence of corporate manslaughter would be adrift from the orthodox principles informing the general criminal liability of corporations. If recourse was made to a separate offence, framed to relieve the difficulties of establishing liability using the identification doctrine, the Taskforce rightly indicates that "it would end up making it easier to convict a corporation of manslaughter than of some other offence against a person".⁷⁶ In principle, the means of attributing corporate liability should apply consistently to any offence that a corporation could conceivably commit. The specific harm of killing does not of itself warrant a distinct lower threshold of liability, and offences such as "injuring by unlawful act" should also be relieved from the strictness of the identification doctrine.⁷⁷ The Taskforce's view was that changes at a general level to the rules of attribution were preferable for the coherent development of the law.

(1) Is the CMCHA 2007 an effective means of attributing liability?

The Taskforce placed strong emphasis on what it considered to be a failure in the operation of the 2007 legislation. Indicative of this failure was in the Taskforce's view, a low rate of successful prosecutions brought under the Act, all of which were "against small companies".⁷⁸ As a result, they were of the opinion that a model such as that developed in the United Kingdom should not be followed.⁷⁹ The emergent case law surrounding the offence, or lack thereof, supports this conclusion to some extent.

The first successful indictment brought under the s 1 offence, *R v Cotswold Geotechnical Holdings Ltd*, concerned the death of a geologist resulting from the collapse of an unsupported pit. The defendant was a small company in which the sole director, Mr Eaton, was easily classifiable as senior management.⁸⁰ There was, as a result, no question that Eaton had played a substantial role in the company's breach of duty and it seems likely that the director would have been identified as a directing mind. Further charges were instigated against JMW Farm Ltd and Lion Steel Ltd, the latter of which was a company of larger size. However, both pleaded guilty, thus avoiding the need to proceed to trial.⁸¹ The Taskforce's analysis of these cases as few and far between served to mischaracterise the operation of the Act as a failure, whereas it is merely the case that a body of law

75 Independent Taskforce on Workplace Health and Safety, above n 4, at [379].

76 At [380].

77 Crimes Act 1961, s 190.

78 Independent Taskforce on Workplace Health and Safety, above n 4, at [374].

79 At [376].

80 *R v Cotswold Geotechnical Holdings Ltd* (2011) EWCA Crim 1337, [2012] 1 Cr App R (S) 26 at [3].

81 Jonathon Grimes "Corporate Manslaughter" (29 August 2012) The Law Society Gazette <www.lawgazette.co.uk>.

surrounding the offence has not yet flourished.⁸² This does not necessarily mean that the offence is ineffective.

Of critical importance to, and currently absent from, any analysis of the CMCHA is an exposition of how the mechanics of the offence will work in the courts. Issues such as how the judge will summarise a *gross* breach in the context of corporate, rather than individual offending, as well as how the senior management test will unfold, are the characteristics that make the offence unique. They will also provide the salient points in any discussion of whether it should be adopted.

In the author's view, the Taskforce was premature in reaching its conclusion that the statutory approach of the United Kingdom is wholly inappropriate as a method of reform. New Zealand has the benefit of time, with no proposals for corporate manslaughter at any substantive stage in the legislative process. This means we would do well to assess the continuing prosecutions under the Act as they come to light.

V Alternative Reform Options

A *Prosecuting errant corporate culture*

Rather than conclude that the CMCHA 2007 is ineffective as a method of structuring a charge of corporate manslaughter, this article will argue that elements of the United Kingdom's offence have merit and warrant adoption, or, at the very least, consideration, should New Zealand ever resolve to legislate for corporate manslaughter. Its scope to evaluate "the way the organisation's activities were managed or carried out" is of particular note.⁸³ This element of the offence speaks to a concern with prosecuting a *corporate culture* where, rather than assessing a corporation in terms of the acts of individuals, the focus would turn to the corporation aggregate. This invites an assessment of the internal policies and processes of the company, as well as internal views about the importance of such structures. The virtues, or otherwise, of this model of liability were not canvassed in the Taskforce's report.

Support for attributing liability on this basis abounds in academic literature. A leading voice on this matter, Celia Wells, argues that responsibility can "be found in the corporations structures themselves".⁸⁴ In a similar fashion, LH Leigh was of the view that the imputation of corporate liability should "depend not upon the status of the actor performing it, but on whether the crime represents a policy decision on the part of those in control of the corporation".⁸⁵ This concentration of matters of policy and process has led some to conclude that a culture-based approach to attribution might provide one method by which we can calibrate a corporate body's *intent*. They submit that these components of culture would give "evidence of corporate aims, intentions and knowledge"; and such would be authoritative "because they have emerged from a decision-making process recognised as authoritative within the corporation".⁸⁶

A first principles assessment has led the author to the view that Sheen J struck at the heart of the harms that a corporate manslaughter charge should address when he

82 There have been 16 convictions for corporate manslaughter, as of September 2016.

83 Corporate Manslaughter and Corporate Homicide Act, s 1(3).

84 Wells, above n 13, at 130.

85 Leigh, above n 22, at 126.

86 Stewart Field and Nico Jorg "Corporate Manslaughter and Liability: should we be going Dutch?" (1991) Crim LR 156 at 159.

lambasted the P&O Ferries Corporation for their affliction with the “disease of sloppiness”.⁸⁷ Arguably, a culture-based model of liability is best placed to identify a truly blameworthy corporation in line with this fundamental notion.

This argument speaks to a wider discord articulated by Colvin between “nominalist” and “realist” theories of the corporate body. Nominalist theories “view organizations as nothing more than collectivities of individuals” whereas realist theories “assert that organizations have an existence that is, to some extent, independent of the existences of their members”.⁸⁸ The Taskforce’s recommendations, particularly aggregation, in truth fall prey to a *nominalist* conception of organisational personality that do not differ in any practical respect from the current identification doctrine. The extension of liability to a greater range of officers, while aimed to capture the entirety of activity within the corporation, would only give a realistic picture in the circumstance of officers from a range of levels within the corporation being at fault. Short of an affirmation of a corporate culture model, this would not prevent the same focus on the acts of individuals.

Parallel jurisdictions have embraced corporate culture as a doctrine of attribution. The Australian Criminal Code, in providing for corporate culture as a means of proving fault, defines the term as an “attitude, policy, rule, course of conduct or practice existing within the body corporate”.⁸⁹ However, as the major criminal offences lie within the legislative territory of states, the potential benefits of such an amendment have not borne fruit. The Australian Capital Territory (ACT) was compelled to adopt this more holistic approach to corporate liability, although other states have not followed suit. ACT adopted a corporate manslaughter offence, termed “Industrial Manslaughter”, to be found in s 49A–49E of the Crimes Act 1900 (ACT).⁹⁰ This is the only example of an offence of this nature within Australia. It provides that an employer or senior officer of an employer (this may be an individual or a company), is guilty of an offence where its reckless or negligent to conduct results in the death of an employee. More significantly, the general principles of corporate liability in the Territory’s Criminal Code 2002 allow for the attribution of fault if the corporation is found to have *authorised or permitted* the commission of the offence. Such can be established by:⁹¹

- (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.

However, ACT’s small size and largely bureaucratic workforce means that judicial application of this *corporate culture* model is extremely unlikely.⁹² The potential reach of the territory’s model remains unclear and untested due to a lack of substantial business and industry sectors. Furthermore, the evidential difficulties of pinpointing a corporation’s culture has been a point of criticism and debate among scholars as is the question of

87 Justice Sheen, above n 25, at [14.1].

88 Colvin and Anand, above n 60, at 123.

89 Criminal Code Act 1995 (Cth), s 12.3(6).

90 Crimes Act (ACT), ss 49A–E; note that the ACT offence relates only to deaths that occur within the workplace.

91 Criminal Code 2002 (ACT), s 51(2)(c)–(d).

92 Des Taylor and Geraldine McKenzie “Staying Focused on the Big Picture: Should Australia Legislate for Corporate Manslaughter Based on the United Kingdom Model?” (2013) 37 CLJ 99 at 111.

whether the corporation aggregate, or merely one offending section of the company, must have an errant culture to warrant criminal sanction.⁹³

The term *corporate culture* might appear malleable and prone to ambiguity. However, it is submitted that this is not a foregone conclusion and that a workable legislative design of a corporate culture provision is possible. First, as evidenced under the commonwealth code, the traditional links to the upper levels of a corporation's management persist. Questions of whether "authority" to perform the proscribed acts had been given, or was believed on reasonable grounds to have been given, by a senior manager are "relevant considerations" in determining if such a culture exists.⁹⁴

The author suggests that such considerations, whether optional or mandatory, could be extended to a set of statutory indicators of a malfeasant corporate culture. These indicia could include the internal policies and processes of the firm, or lack thereof, as well as evidence of previous health and safety incidents or investigations conducted by WorkSafe New Zealand.⁹⁵

Lessons from the industrial disasters in New Zealand, the catalysts for this debate, seem to suggest that the health and safety culture of the companies in question was highly relevant to the eventual tragedies. Inquiries into the Pike River disaster identified that the *organisational culture* of the company put production before safety. Criticism levelled at the senior management of the organisation was that they "pressed ahead when health and safety systems and risk assessment processes were inadequate".⁹⁶ This was characterised as a systemic shortfall and a *cultural influence* of management, which permeated the organisation as a whole.⁹⁷ This would seem to confirm that there is a valid need to amend the organisational culture of companies so as to improve our health and safety record. Also supporting the case that it is the acts of the overarching entity, rather than one or a combination of individuals within it, that should principally be at issue in the context of a corporate manslaughter offence.

B *Collateral individual liability*

Section 1 of the CMCHA makes clear that only an *organisation*⁹⁸ can be liable for corporate manslaughter.⁹⁹ An individual cannot be liable for the offence, nor can they be tried as a secondary party.¹⁰⁰ Academics have voiced concern around this measure, arguing that, if they are sufficiently culpable, individual directors should also be made accountable on a separate basis for the outcome of the corporation's failings.¹⁰¹ This is pertinent if reforms move the basis of corporate manslaughter away from the identification doctrine, where the locus of liability will no longer be an individually culpable "directing mind". Advice to

93 Allens Arthur Robinson "Corporate Culture' as a basis for the Criminal Liability of Corporations" (prepared for the United Nations Representative of the Secretary-General on Human and Business, February 2008) at 17.

94 Criminal Code (ACT), s 51(4).

95 The Crown Entity charged with the monitoring and enforcement of Health and Safety Legislation. See generally, Worksafe <www.business.govt.nz>.

96 *Report of the Royal Commission on the Pike River Coal Mine Tragedy*, above n 50, at 56.

97 At 175.

98 Organisations for the purposes of the CMCHA include Corporations (s 1(2)(a)), Government departments or other public bodies (s 1(2)(b)), a Police Force (s 1(2)(c)) and a partnership, trade union or employers' association that is an employer (s 1(2)(d)).

99 Corporate Manslaughter and Corporate Homicide Act, s 1.

100 Section 18.

101 Taylor and McKenzie, above n 92, at 113.

the Taskforce regarding reform of our health and safety laws indicates that this issue would not arise. The creation of positive directors duties to mitigate Health and Safety risks in the current Bill were mooted in as “not mutually exclusive” to a corporate manslaughter enactment, and able to be enforced in conjunction with one another.¹⁰² This parallel prosecution would ensure that all culpable parties are punished, while reflecting that these two notions of liability are, and should be, grounded on categorically distinct principles.

C Constructive liability

One of the options under consideration by the Law Commission report on corporate manslaughter in the United Kingdom was a form of constructive liability, whereby guilt for manslaughter would arise wherever a death occurred as a result of a breach of a health and safety offence. Such an approach was rejected, although committing a health and safety offence was imported as a relevant jury consideration regarding whether a “gross breach” of the duty under the Act occurred.¹⁰³ This model is closely analogous to the conventional ‘unlawful act’ permutation of the general law of manslaughter in New Zealand.¹⁰⁴

There is an arguable case for this approach to liability. The Health and Safety in Employment Act imposes wider duties on employers “to ensure that no action or inaction of any employee while at work harms any other person”.¹⁰⁵ Thus, making the scope of the duties owed under it applicable to any eventuation of a homicide at the hands of a corporation. The UK’s hesitance to accommodate constructive manslaughter perhaps stems from the Law Commission’s publication of disapproval with this type of liability throughout the general criminal law.¹⁰⁶ The same concerns do not appear to be present in New Zealand, so in the absence of any apparent advantages to one variation over another, consideration might also be lent to an enactment of this kind.

VI Conclusion

It is clear that, aside from the continued prevalence of great harms at the hands of corporations in our society, the development of criminal sanctions on the part of many of our most comparable foreign jurisdictions warrants serious consideration of a corporate manslaughter offence. Given that the Taskforce additionally recognised the offence as desirable for New Zealand, this divergence from the commonwealth norm cannot be maintained in the long term.

The final recommendations reached by the Taskforce, namely that widespread general change to the common law rules of attribution was required, concurs with the weight of commonwealth thinking both in academic and legislative circles and was undoubtedly the correct conclusion. However, because the law in this area internationally is still in a state of infancy, it would be premature to take the Taskforce’s recommendations as an

102 Ministry of Business, Innovation and Employment “Supporting Material for MBIE’s presentation to the Independent Taskforce on Workplace Health and Safety” (27 November 2012) at 22 (Obtained under an Official Information Act 1982 request to the Minister of Labour).

103 Ormerod, above n 72, at [15.4.2.2].

104 Crimes Act 1961, s 160(2)(a).

105 Health and Safety of Employment Act 1992, s 15.

106 Law Commission (UK), above n 27, at [5.14].

exhaustive statement of the options available in New Zealand. Indeed, their report was not intended to be so.

The author is of the view that if our elected representatives deem it appropriate for corporate manslaughter to be introduced into our legal system, consideration should be given to a fuller range of options for law reform. Any eventual reforms should not take a patchwork quilt approach, but consider afresh the underlying principles of corporate criminal liability. This will only come as a result of a longer conversation, not by enacting a stand-alone law of corporate manslaughter while leaving the bulk of our criminal law subject to its historical underpinnings of individual liability. Reform of corporate criminal liability principles should only come from the acceptance of a realist view that an organisation can have an existence, indeed *soul*, independent of the individuals within it.