Crimes (Industrial Manslaughter) Amendment Bill 2002

Report No 6

Standing Committee on Legal Affairs

September 2003

Legislative Assembly for the Australian Capital Territory

Committee membership

Mr Bill Stefaniak MLA (Chair)

Mr John Hargreaves MLA

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Secretary: Derek Abbott; Judith Henderson

Administration: Judy Moutia

Resolution of appointment

On 11 December 2001 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing committee, called the Standing Committee on Legal Affairs:

> to perform the duties of a scrutiny of bills and subordinate legislation committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory and regulatory services.

Terms of reference

Inquire into and report on the Crimes (Industrial Manslaughter) Bill 2002

Conduct of the inquiry

This Bill was referred to the Committee on 12 December 2002. The Committee received nine submissions and held three public hearings. A list of submissions received and witnesses who participated in the Committee's hearing are in appendices I and II respectively.

The Committee thanks all those who participated in its inquiry.

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Summary of recommendations

RECOMMENDATION 1

2.92. The Committee recommends that Section 49B (1) and (2) be amended to make it clear that their application is limited to relevant responsibilities and undertakings of the employer or senior officer in those capacities.

RECOMMENDATION 2

2.96. The Committee recommends that paragraphs 49C (c) (i) and (ii) and 49D (c) (i) and (ii) be reviewed to clarify the meaning of the phrase 'or any other worker of the employer'.

RECOMMENDATION 3

3.20. The Committee, by a majority, recommends that this Bill be proceeded with.

RECOMMENDATION 4

3.24. The Committee recommends that the ACT Government advise the Assembly as to why agencies, such as charities, voluntary associations and community groups have been included.

RECOMMENDATION 5

3.33. The Committee recommends that the ACT Government review section 49B(3) to ensure that it does not obstruct fully informed contracting agreements entered into in good faith which attribute responsibility for workplace safety to one party to the contract.

RECOMMENDATION 6

3.36. The Committee recommends the definition of 'agent' be reviewed to clarify that an employer, having satisfied him- or herself that a sub-contractor has the necessary skills, knowledge and experience, is entitled to rely on the contractual undertakings of a sub-contractor that a workplace will be conducted in full compliance with Occupational Health and Safety laws.

1. The Crimes (Industrial Manslaughter) Amendment Bill 2002

1.1. The crime of manslaughter already exists in common law and statute. It is defined in the *Crimes Act 1900* as '…an unlawful homicide that is not, by virtue of section 12, murder shall be taken to be manslaughter.'[1] Section 12 of the Act defines murder in terms of the deliberate intent to cause death or the reckless indifference to the causing of death.

1.2. Thus the crime of manslaughter occurs where a person causes the death of another through negligence or recklessness but without either the intent to cause death or the reckless indifference to the likelihood of causing death which would constitute the crime of murder. Manslaughter can be committed by a 'natural' person or a corporation.

1.3. The practical difficulty of prosecuting a corporation for manslaughter in the case of industrial accidents has given rise to an extensive debate and legislative effort in recent years to clarify the law as it applies to corporations.

1.4. Establishing the criminal liability of a corporation requires establishing the intent of the corporation (which cannot have a 'mind of its own') by attributing to it the actions, omissions or motives of a director or senior officer, being the guiding mind of the corporation. This has proven difficult in the past.

1.5. Prosecutions of corporations under the current law, even if successful, have been considered unsatisfactory because appropriate penalties are not available. Imprisonment is the only penalty for manslaughter. This is of no use where the offender is a corporation – a legal entity not a natural person.[2]

1.6. In a supplementary submission to the committee the Trades & Labour Council (TLC) of the ACT claimed that,

> … in the last 16 years there has been only one conviction at common law in respect of a death in the workplace. The company involved, after pleading guilty to the charge of manslaughter, was swiftly put into liquidation thereby successfully frustrating the imposition of financial penalties.[3]

1.7. Changing employment relationships have also made establishing responsibility in the workplace more difficult. With the spread of contract-based employment at the expense of more traditional wage and salary employment, defining the employer and attributing responsibility for safety in the workplace has become more complex.

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[1] *Crimes Act 1900*, section 15.
[2] Submission 5, ACT Government,p.3. Note that the Crimes Act 1900 provides for a penalty of imprisonment only. The Legislation Act 2001 (ACT) provides for the conversion of jail terms into fines where a corporation is convicted. At present the maximum fine for a corporation is $750 000.
[3] Submission 7, TLC, p.2.

1.8. In the view of the ACT Government, the changing nature of the employment relationship may weaken the focus on occupational health and safety (OH&S).

> We have seen the intensification of competitive pressures on subcontractors, particularly in the construction and transport industries, which has the potential to undermine safety controls at these workplaces. For this reason, it is essential that the new offences can apply to people who engage workers under contracting arrangements.[4]

1.9. The ACT Government's submission to this Committee quotes research indicating that these changing employment practices are challenging the commitment to OH&S:

> …economic and reward systems which encourage cost cutting and lack of attention to perceived 'frills' such as OHS; [and] more complicated and less obvious chains of responsibility and decision making, leading to no clear allocation of OHS responsibilities…[5]

1.10. In response to these considerations the ACT Government has introduced a bill entitled the Crimes (Industrial Manslaughter) Amendment Bill 2002 (the Bill).

What the Bill seeks to do

1.11. The Bill has three main purposes;

- to establish a new offence of industrial manslaughter;
- to clarify and define the range of employment relationships; and
- to provide for substantial penalties for the offences.[6]

The offence

1.12. The offence of industrial manslaughter occurs if,

> …[a] worker was killed (or suffered injuries that later led to the worker's death) in the course of his or her employment… An employer [or senior officer] will only commit the offence if the employer's [or senior officer's] conduct caused (substantially contributed to) the worker's death and the … conduct was either reckless or negligent.[7]

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[4] Simon Corbell MLA, Minister for Industrial Relations, ACT Legislative Assembly, Hansard, 12 December 2002, page. 4383.
[5] Shaw, A & Blewett, V, 'What's Happening in the Big Bad World? A Review of Health and Safety Issues in Other Industries and Countries', NSW Mining Industry OHS Conference, 2001. Quoted Submission 5, ACT Government, p.2.
[6] Crimes (Industrial Manslaughter) Bill 2002,, Explanatory Memorandum, p.2, Overview. This document will be referred to as 'Ex. Memo' in subsequent footnotes.
[7] Ibid. p.4

Who can commit the offence?

1.13. Industrial manslaughter can be committed either by an employer or a senior officer of an employer. Both these terms are defined in section 49A of the Bill. An employer is,

> a person who employs or engages a worker directly or through an agent. An employer can be an incorporated entity, a government entity or an unincorporated entity.[8]

1.14. The definition of a senior officer is complex. With regard to a government entity,

> 'senior officer' means a Minister, chief executive officer, or an executive who makes, or takes part in making, decisions affecting all or a substantial part of the functions of the [entity].[9]

1.15. For the purposes of this Bill the senior officer of a corporation is an officer of a corporation as defined by the Corporations Act.

> (a) a director or secretary of the corporation; or
> (b) a person:
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
> (c) a receiver, or receiver and manager, of the property of the corporation; or
> (d) an administrator of the corporation; or
> (e) an administrator of a deed of company arrangement executed by the corporation; or
> (f) a liquidator of the corporation; or
> (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.[10]

1.16. The senior officer of an unincorporated association is an executive,

> …who makes, or takes part in making, decisions affecting all or a substantial part, of the functions of the entity, or a person who would be an officer if the entity were a corporation.[11]

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[8] ibid., p.3
[9] ibid., p.3. The terms chief executive and executive are both defined in the *Public Sector Management Act 1994*(ACT), section 3.
[10] *Corporations Act 2001* (C'wealth)
[11] Ex memo, op cit, p. 3

1.17. The identification of a range of employment relationships is central to the Bill. It,

> … recognise[s] the changing nature of the employment relationship in Australian society. We have seen the increasing use of contracting arrangements as a means of avoiding the obligations of employers to their employees.[12]

1.18. Thus the main objective of the Bill is to 'catch' these contracting relationships and 'capture the chain of responsibility' in the work-place. The definition of an 'agent' was an important part of the legislation and the subject of considerable comment in submissions to the Committee. An agent is,

> … a person (the **second person**) engaged by the first person (whether an independent contractor or otherwise) to provide services to the first person in relation to matters over which the first person -
>
> (i) has control; or
>
> (ii) would have had control apart from an agreement between the first person and the second person.[13]

1.19. Similarly a 'worker' is broadly defined to include an employee, independent contractor and an outworker.

1.20. The Explanatory Memorandum to the Bill, in defining the employer offence, notes that, 'There may be cases where more than one person is capable of being the employer for the purposes of [section 49C]. This is particularly the case where the employment involves several levels of sub-contracting. '[P]rincipal contractors and other sub-contractors further up the chain of responsibility could be found responsible for the death…'.[14]

Penalties

1.21. The Bill provides for increased fines – a maximum of $1.25million for a corporation and a maximum prison term of twenty-five years for a natural person. In addition to prison sentences and substantial fines the Bill provides for the court to order corporations to undertake a range of activities including carrying out public interest projects and publicising the nature of their offence both generally and to specified individuals.[15] The total cost of the penalty imposed on a corporation, including fines, is limited to $5 million.

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[12] Simon Corbell MLA, Minister for Industrial Relations, ACT Legislative Assembly, Hansard, 12 December 2002, page. 4383
[13] The Bill, section 5, new part 2A, Definitions.
[14] Ex memo, op cit, p.4
[15] ibid., p.2

2. Comment on the Bill

Submissions

2.1. The Committee received nine submissions, from the ACT government, employer and industry groups and trade unions. Generally the employer/industry groups opposed the Bill while trade unions supported it.

The Criminal Code

2.2. The Bill must be read in the context of the model Criminal Code that applies in the ACT. Specifically Chapter 2 of the Code, which sets out ' the general principles of criminal responsibility (including corporate criminal responsibility, burdens of proof and general defences) and defines terms used for offences to which the Code applies (e.g. conduct, intention and recklessness)'.[16] This is a most significant development in criminal law in Australia. It is already law within the Territory and applies to any offence involving a corporation.

2.3. The effect of the model criminal code that now applies in the ACT also introduces the concept of 'corporate culture' into this law. In the past, to prosecute a corporation, the law needed to identify the guiding mind of the corporation - a real person of such seniority that he or she could be considered the mind of the corporation in terms of establishing the intent necessary for a criminal prosecution.

2.4. Under the Criminal Code, intent can be attributed to a corporate culture, which can be derived by the aggregation of various acts or omissions of officers of the corporation. None of these acts or omissions need constitute recklessness or negligence individually nor does any individual officer need to be considered the guiding mind of the corporation.

Exploring the implications of the Criminal Code

2.5. The major change to the principles of the established law in the ACT in recent years with regard to the legal responsibility of corporations is not, in fact, contained in this Bill but in the *Criminal Code* 2002 which is already law in the ACT.

2.6. As discussed in Chapter 1, the difficulty faced in prosecuting a corporation for a criminal offence lies in establishing the intent of the corporation. As a legal fiction a corporation does not have a 'mind' or 'will'.

2.7. The courts have overcome this problem in two ways. One method is that of creating vicarious liability – a corporation is vicariously liable for the acts of its employees. This Bill does not introduce vicarious liability.[17]

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[16] ibid., p.2

[17] Simon Corbell MLA, Minister for Industrial Relations, ACT Legislative Assembly, Hansard, 12 December 2002, page. 4384.

2.8. The second method is what the English Law Commission describes as 'identification'. '…under this doctrine those who *control* the corporation are treated, for the purpose of criminal liability as embodying the corporation: the acts and states of mind of those who control a company *are* in law those of the company itself.'[18]

2.9. The courts have generally interpreted 'identification' very narrowly. Natural persons who could be considered to 'embody' the company have been restricted to directors and the most senior executives. In the leading case on this matter in English law – Tesco Supermarkets Ltd v Natrass – regional and branch managers were not considered to embody the company. Other authorities have suggested that the Tesco definition was unreasonably narrow.[19]

2.10. This Bill applies equally to natural persons and corporations.[20] Read in conjunction with the Criminal Code it represents a significant change to the principle of identification.

2.11. Section 51 of the Criminal Code defines the '…ways in which authorisation or permission may be established' within a corporation. Sub-sections 2(a) and 2(b) refer to the actions of the board of directors and high managerial agents and are largely in line with the principle of identification.

2.12. Sub-sections 2(c) and (d) introduce the concept of a 'corporate culture' in establishing the intent of a corporation. For the purposes of establishing intent this is defined as,

> …an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in that part of the corporation where the relevant conduct happens.[21]

2.13. With regard to negligence, a corporate culture may be derived '… by aggregating the conduct of a number of its employees, agents or officers.'[22] As noted in Chapter 1 the acts or omissions of the officers need not, individually, constitute negligence or be sufficient grounds for prosecution of the natural person.

Is the Bill necessary?

2.14. Differing views were presented on the necessity of the Bill. In general, employer groups are opposed to the Bill, while unions and the Government support the Bill.

2.15. A number of submissions asserted that the Bill is simply unnecessary. There are two general arguments put in support of this view. It was argued that deaths in the workplace have been declining steadily in the ACT over the last decade. While no accidental or avoidable death is acceptable, there is no evidence to suggest that death

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[18] *Legislating the Criminal Code, Involuntary Manslaughter, Item 11 of the Sixth Program of Law Reform: the Criminal Law*, The Law Commission (London 1996), p.67.
[19] This matter is discussed in the Law Commission report, op cit., pp.77-79
[20] Transcript, p 2, Minister for Industrial Relations.
[21] Bill, section 51 (6)
[22] Bill, section 52 (2)

in the workplace resulting from the negligence or recklessness of employers is a growing problem. Thus, it is argued, there is no 'issue' that requires a specific response such as this legislation. Nor is there any evidence that the creation of a specific crime of industrial manslaughter will have the effect of reducing deaths in the workplace.

2.16. The Australian Institute of Company Directors (AICD), for example stated that,

> Before a major change in the law is actually brought about, the need for greater regulation … should clearly be made out and we consider that that is not the case in this instance. To put it in plain language it's not obvious to our membership why a new law to ensure workplace safety is necessary.[23]

2.17. The ACT government provided the Committee with figures for the number of workplace fatalities that resulted in claims for workers compensation. Between 1988-89 and 2001-02 there were 21 work related accidents resulting in compensated fatalities in public and private sector workplaces.[24] It should be noted that, as the ACT Government submission states, this 'does not suggest that all work-related fatalities are the result of criminally negligent or reckless conduct.'[25] The Australian Industry (AI) Group, while acknowledging some difficulties with the sources of information, suggested that there had been 3 or 5 workplace deaths in the ACT since 1996-97.[26]

2.18. The ACT government also noted that the figures may not be reliable,

> We know that a significant part of the workforce (in particular the self-employed) may not be insured in a way which appears in workers compensation statistics. We also know that claims are not always made, even when a worker is covered by workers' compensation insurance.[27]

2.19. It is also argued that manslaughter is one of the most serious crimes on the statute book and that particular groups within the community, in this case the owners and senior managers of businesses, should not be singled out and subject to a special range of provisions in addition to those applying to other citizens.

2.20. The existing law provides redress and penalties. Prosecutions are not easy but they are not impossible. The difficulty of gaining successful prosecutions should not be seen as evidence of the failure of the system but actually as demonstrating that onerous tests should apply to gaining a conviction for this most serious crime. The Australian Industry Group argued in its submission that,

> the reality is that failure of prosecutions on manslaughter in workplace situations has not occurred because of some inherent unfairness in the criminal system but as a result of … legal development and reasoning

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[23] Transcript, p 83.
[24] Submission 5, ACT Government, attachments 1 & 2. Note that these figures do not include work place fatalities involving of Commonwealth public servants.
[25] Submission 5, ACT Government, p.2.
[26] Submission, 6 Australian Industry Group, p.3.
[27] Submission 5, ACT Government, p.2.

> which has tightly protected people from being found guilty of crimes where the person neither committed the action which led to the death or had [that] intent…[28]

2.21. Other submissions viewed the Bill as necessary.

2.22. The Trades and Labour Council of the ACT (TLC) supports the Bill and believes that the legislation is long overdue. The TLC reported that unions involved in the building and construction industry have for some time been advocating the introduction of legislation to make employers personally culpable for deaths in the workplace which result from negligent or reckless work practices. [29]

2.23. The Transport Workers Union (TWU) also supports the Bill. In its submission the TWU noted the findings of the 'Report of inquiry into safety in the long haul trucking industry' prepared by Professor Michael Quinlan for the Motor Accidents Authority of New South Wales. This report showed that:

- long distance truck drivers face a significant risk of being killed in a single vehicle or multiple vehicle accident – driving a truck is one of the most dangerous occupations;

- current commercial arrangements between an array of parties to the transport of freight, such as the use of sub contractors and the subletting of many tasks, have a significant influence on safety.[30]

2.24. The TWU supports the Bill for the following reasons:

- the Bill provisions recognise the changing nature of the employment relationship in Australia;

- the intensification of competitive pressure on sub-contractors, particularly in the transport and construction industries has the potential to undermine safety controls at these workplaces;

- the Bill defines workers and employers in such a way as to capture the chain of responsibility where contracting arrangements are used.[31]

Compliance strategies

2.25. Those arguing against the Bill asserted that the proposed new offences of industrial and corporate manslaughter are unnecessary. They stated that if there is a genuine problem it is that, in the case of a corporation, the penalties available under the current legislation are not adequate. Where a corporation is successfully prosecuted, as was the case in the example given by the Australian Industry Group,

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[28] Submission 6, Australian Industry Group, p.7.
[29] Submission 7, Trades and Labour Council of the ACT.
[30] Submission 8, Transport Worker's Union, pp 2 3.
[31] Submission 8, Op cit, p 4.

above, it is also relatively easy for the corporation to avoid the penalty by going into liquidation.

2.26. It was argued that the appropriate response to these problems is to increase the penalties available in the Crimes Act under the existing law or to increase the penalties available under Occupational Health and Safety legislation so that breaches of that legislation which lead to a death can be punished.[32] Steps should also be taken to change the law to prevent companies from avoiding penalties imposed on them by the courts.

2.27. It is also argued, particularly by the Australian Industry Group (AI), that this Bill is the wrong approach to the problem of workplace safety for a second reason. The successful implementation of OH&S practices in the workplace requires a cooperative approach between employer, employee and regulator.

2.28. AI argues '… that employers are expected to undertake processes similar in nature and scope to full risk management in order to meet their legislative duties of care' and the key to that process is '… an open approach … The organisation must want to find hazards [author's emphasis], through workplace inspection, through examination of injury records, through consultation etc.'[33]

2.29. In AI's view the introduction of a crime of industrial manslaughter would shift the emphasis in OH&S from a cooperative approach as outlined above, to an adversarial approach, 'retribution rather than consultation',[34] where the employers focus was on protecting itself from prosecution.

2.30. The Australian Institute of Company Directors shared this apprehension.

> [The Bill is] not going to alter the conduct of cowboys or rogue operators against whom it's purportedly directed. We consider it's going to make workplaces a lot less open and a lot less trustful. In fact that works against the very thrust and design in legislation that's focussed on workplace safety.[35]

2.31. The ACT Government, in addressing this issue, sees no inherent contradiction in the two processes '… a credible enforcement strategy requires both extensive support for and promotion of voluntary compliance and a range of increasingly strong deterrent measures for serious offences.'[36]

2.32. In the Government's view the offences in the Bill provide a necessary deterrent for the most serious of workplace accidents – those that result in the death of a worker. The Government expects that the Bill will be an important catalyst in promoting awareness and understanding of employer duties to provide a safe workplace and to ensure employers take these duties seriously.[37]

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[32] Submission 9, ACT Chamber of Commerce, pages 1 and 2.
[33] Submission 6, AI, p.5.
[34] Submission 6, AI, p 1.
[35] Transcript, p.85.
[36] Submission 5, ACT Government, p.2
[37] ibid

2.33. The ACT OH&S Commissioner supported this view, favouring a balanced regime of education and good practice but with appropriate penalties.[38]

2.34. The Trades and Labour Council of the ACT argued that history has demonstrated that financial penalties alone are not a deterrent to unsafe practices that lead to death or injury in the workplace. Corporate responsibility can only be properly dealt with by making company officials accountable in the same way as they are held accountable for insolvent trading and the like. In their view:

> companies will continue to pay lip service to workplace safety unless specific legislation is in place which enables the corporate veil to be lifted and makes directors and office holders personally accountable for what goes on in the workplace.[39]

Other jurisdictions

2.35. In recent times other Australian jurisdictions have considered legislation enabling successful prosecution of employers for manslaughter in cases of negligent or reckless behaviour leading to a workplace death, and for the imposition of appropriately strong penalties.

2.36. The Victorian Government introduced corporate manslaughter legislation in 2001. This Bill was restricted in its application to corporations though it did extend the liability of officers. It also included provisions similar to the ACT legislation with regard to additional 'community service' and publicity obligations where a corporation was convicted. The Bill was defeated in the Victorian Legislative Council.

2.37. The Queensland Government produced a discussion paper in 2000 describing new offences of dangerous industrial conduct that would apply to both individuals and corporations.. The Queensland Government has not indicated if, or when, it will move from consultation to the introduction of legislation based on these proposals.

2.38. In Western Australia a major study into workplace safety, the Laing Report, was published in 2002. It focuses on changes to the *Occupational Health & Safety Act 1984* (WA) to increase the accountability of corporations and their officers for safety in the workplace.

2.39. The Commonwealth is also working through OH&S legislation to create new criminal offences where there are negligent or reckless breaches of duties under the legislation. In the Commonwealth, Victoria and Queensland proposed changes to the law – the definition of offences, principles of criminal responsibility and the recognition of 'corporate culture' – are consistent with the model Criminal Code.[40]

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[38] Transcript, pp.113-116.
[39] Submission 7A, ACT Trades and Labour Council.
[40] ACT Government Submission, attachment 2, pp.20-24

2.40. The United Kingdom Law Commission conducted a major inquiry into this matter in the mid-1990s.[41] Its report recommended the creation of an offence of corporate killing. Various proposals have been considered to give effect to this recommendation. Recent media reports suggest that the UK will legislate for an offence of corporate killing which will apply to corporations only – not to natural persons.[42]

2.41. Some submissions have claimed that because no other jurisdiction has as yet been successful in introducing industrial manslaughter legislation, that in pursuing this legislation, the ACT is out of step with developments in other jurisdictions. They have further asserted that it is inappropriate and unwise for the smallest, an in many ways least typical, Australian jurisdiction to take the lead in this matter.[43] However it is clear from evidence received by the Committee that the strengthening of the law in this area is an issue under consideration across the country.

2.42. Further while in Victoria the legislation was not passed, there are significant differences between what was proposed in Victoria and what is proposed in this Bill. Unlike the Victorian Bill, the ACT Bill does not establish vicarious liability for senior officers. Senior officers would only be held responsible for the death of a worker where their reckless or negligent conduct causes the death of a worker.[44]

2.43. The Bill recognises corporate responsibility and defines 'agent'.

Effect on established legal principles

2.44. A number of submissions and witnesses suggested that the Bill would weaken the established elements of the offence of manslaughter and the standards of proof required for a conviction.[45]

2.45. Individual responsibility and corporate responsibility raise different issues with regard to this question. As far as the natural person is concerned the majority of the Committee is satisfied that there is no weakening of standards of proof or watering down of the elements of the offence.

2.46. The person, whether a natural person or a corporation, will commit an offence only if they,

- cause the death of a worker;
- are reckless about causing serious harm to the worker; and/or
- are negligent about causing the death of a worker.[46]

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[41] *Legislating the Criminal Code, Involuntary Manslaughter, Item 11 of the Sixth Program of Law Reform: the Criminal Law*, The Law Commission (London 1996)
[42] *The Economist*, 24 May 2003, p.52. The *Economist* noted that 'Framing a law targeted at individual directors(which would have been unique in the world) was proving hard…'
[43] For example submissions 1, 2,.
[44]. Simon Corbell MLA, Minister for Industrial Relations, ACT Legislative Assembly, Hansard, 12 December 2002, page. 4384.
[45] For example, Submission 6, AI Group, p.7; Submission 2, AHA p.8.

2.47. Each of these matters must be proved by the prosecution to the criminal standard of proof, beyond reasonable doubt.

2.48. Both negligence and recklessness are defined in the *Criminal Code 2002* (ACT). The Industrial Manslaughter Bill does not vary those definitions. In addition both terms have been the subject of extensive legal debate before the courts.

2.49. Submissions suggested that, in the words of the Housing Industry Association (HIA) '…company officers may be criminally liable for acts of which they may not have been aware.'[47] The HIA's concern is that the breadth of the definition of an officer coupled to the generality of the definitions of acts and omissions by an officer combine to create an almost impossible obligation on employers and officers. Similar concerns were expressed by other witnesses.

2.50. In considering these concerns it is important to keep in mind that the successful prosecution of a natural person for the crime of industrial manslaughter – would require proof beyond reasonable doubt that the person had acted negligently or recklessly with regard to a matter and had, as a result, caused the death of a worker.[48] There is no vicarious liability in this - an officer cannot be liable for prosecution just because he or she occupies a particular position in an organisation.

2.51. As mentioned above, both recklessness and negligence are defined in the Criminal Code. Recklessness requires a person to be aware of a 'substantial risk', and, '… having regard to the circumstances known to the person, it is unjustifiable to take that risk.'[49] Thus, to be liable for prosecution a person requires knowledge of the substantial risk and their actions must be judged having regard to their knowledge of the circumstances.

2.52. Similarly negligence requires '… such a great falling short of the standard of care that a reasonable person would exercise in the circumstances.'[50] Thus the actual definition of the offence provides a number of requirements which must be met before criminal liability can be established.

2.53. In a related concern the Printing Industry Association suggested that '… it would appear that if a body corporate is found guilty of an offence of industrial manslaughter … a senior officer will also be guilty …'[51] if that officer falls into a class of relevant persons.

2.54. However it is important to reiterate that for a natural person to be convicted of industrial manslaughter they must be charged on the basis of their own actions or omissions and negligence or recklessness causing death must be proved beyond

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[46] Bill, s.49C and s.49D.
[47] Submission 1, HIA, p.4.
[48] The offence of industrial manslaughter is created by sections 49C and 49D of the Bill.
[49] *Criminal Code* 2002 (ACT), s.20
[50] ibid., s.21
[51] Submission 4, Printing Industries Association, p 3.

reasonable doubt. The conviction of a corporation would not, automatically, result in the guilt of any particular officer of the corporation.[52]

2.55. The Committee notes the comment by the AICD the definition of the word 'causes' in this Bill. The definition of 'causes death' is if conduct 'substantially contributes to the death'. The AICD is concerned that the qualifier 'substantially' introduces an element of uncertainty into the definition. The AICD does, however, acknowledge that 'substantially contributed' is the term used in attributing homicide to a person in the general criminal law.[53]

2.56. The majority of the Committee does not believe that the definition of 'causes' used in this Bill diverges from the existing law.

2.57. Concern was also expressed at the use in s.49C(a)(ii) and s.49D(a)(ii) of the expression 'and later dies' with regard to injury to a worker. It was felt that this is too imprecise and that the link between the injury and the death of the worker should be clearly established.[54]

2.58. In its submission the Government stated that in this case, the offence will only apply if the worker suffered injuries in the course of his or her employment that later led to the worker's death. In the case of workers who are not employees such as independent contractors or outworkers, the injuries that led to the death must occur in the course of the person's engagement as an independent contractor or outworker. An employer or senior officer will only commit the offence if the senior officer's or employer's conduct caused (substantially contributed to) the worker's death and the conduct of the employer or senior officer was reckless or negligent.[55]

2.59. Further, in specifically addressing the concerns of the Housing Industry Association, a representative of the Chief Minister's Department stated:

> There was a concern …raised by the HIA that deaths need not be related at all to the injury. That is not the case because of paragraph (b) of the description of the offence, which says that you have to establish that the employer's conduct or the senior officer's conduct caused the death. So it isn't the case that under the offences an unrelated death could be blamed on an employer.[56]

2.60. The majority of the Committee agrees with the Government. The wording of the relevant sections makes it clear that the death of an injured worker must have been caused by the employer or senior officer.[57] A causal link between the injury and the subsequent death is one of the matters that the prosecution would have to establish.

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[52] Submission 5, ACT Government, p6. Transcript, pp 120, 121 (ACT Government)
[53] Submission3. AICD, p.6, quoting *Howard's Criminal Law*, 5th edn., (Sydney 1990)
[54] Submission1, Housing Industry Association.
[55] Submission 5, ACT Government, p 8.
[56] Transcript, p 15.
[57] Bill, section 49C & D – a worker of the employer - …(a)(ii) is injured in the course of employment … and later dies; and (b) the employer's [or senior officer's] conduct causes the death …

Liabilities of employers

2.61. A key objective of this legislation is to 'catch' employers who use contracting or other indirect employment relationships.

2.62. Section 49B(3) of the Bill states that '… if apart from an agreement between a person and someone else, something would have been in that person's control, the agreement must be disregarded and the thing must be taken to be in the person's control.' The Explanatory Memorandum explains that the purpose of this section is to prevent '… the making of agreements to set aside a duty to avoid or prevent danger to the life, safety or health of a worker.'[58]

2.63. In presenting the Bill the Minister stated:

> We have seen the intensification of competitive pressures on sub contractors, particularly in the construction and transport industries, which have the potential to undermine safety controls at these workplaces.
>
> For this reason, it is essential that the new offences can apply to people who engage workers under contracting arrangements. This Bill defines workers and employers in such a way as to capture the chain of responsibility where contracting arrangements are used.
>
> A worker may be employed under contracting arrangements where there are several layers of contracting between the head contractor and the worker. If the worker is killed, any number of principals above the worker in the contracting chain could be charged with and found guilty of the offence if it can be proved that their conduct caused the death of the worker.[59]

2.64. In its submission to the inquiry the Government reported that current research indicates that the undermining of occupational health and safety responsibilities of employers as a result of current labour market changes has created significant risks in Australian workplaces. These risks are due to causes including 'economic and reward systems which encourage cost cutting and lack of attention to perceived 'frills' such as OHS [and] more complicated and less obvious chains of responsibility and decision-making, leading to no clear allocation of OHS responsibilities ….'[60]

2.65. Several participants in the inquiry expressed serious concerns about extending the employer responsibilities to sub contractors and other indirect employer relationships. While no witnesses suggested that deliberate avoidance of these obligations was acceptable, several pointed out that businesses that used contracted service providers could find themselves in impossible positions in trying to supervise those contractors.[61]

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[58] Ex memo, op cit., p.4

[59]. Simon Corbell MLA, Minister for Industrial Relations, ACT Legislative Assembly, Hansard, 12 December 2002, page. 4384.

[60] Shaw, Andrea and Blewett Verna, *What's happening in the Big BAD World? A Review of Health and Safety Issues in Other Industries and Countries, NSW Mining Industry Council OHS Conference , 2001.* As quoted in Submission 5, ACT Government, p 2.

[61] See, for example, Submission 1, p.4 and Submission 3, p.8.

2.66. This is a difficult issue. A common reason for using contracted employees or service providers is that the employer or lead contractor does not have the knowledge, skills or experience to carry out a particular activity. For example a property developer may be skilled in raising and managing finance but have little knowledge of the construction industry.[62]

2.67. Similarly, the contracted service provider may not have control over a workplace. For example, a recruitment company may place staff with an employer in good faith believing that the workplace to which they are sending staff is a safe workplace.

2.68. A further example was provided by the Housing Industry Association who are opposed to this provision in the Bill. In evidence Mr Pyers of the Housing Industry Association said:

> Perhaps I can illustrate that with an example, without naming names, of something that happened to a HIA member in this region in the last couple of years. This guy was a builder. He had been in business for 20 years or so and had engaged a subcontract painter, who he had known quite well over the years, to do some painting work for him. This happened on the other side of the border. He erected a scaffold in accordance with New South Wales regulatory requirements for the erection of scaffolds. The painter got there and moved the scaffold. The scaffold collapsed on the painter and the painter died.
>
> This guy was prosecuted extensively under New South Wales occupational health and safety law. I don't take issue with that because that's what the law says. The net effect of that prosecution, and the subsequent events surrounding the prosecution, is that the guy has gone out of business.
>
> The fact is that he erected the scaffold in accordance with the requirements and the painter came in. That's the nature of the building industry. If builders have five or 10 jobs going, they can't be on all of them at once.
>
> Given all of those circumstances, surely somebody in that situation has paid enough penalty by losing their business, being fined and having to live with the fact that somebody died at their workplace—rather than throwing at them the additional burden of possibly going to jail—given that they did everything they reasonably could to make sure the work environment was safe.[63]

2.69. In the above examples s. 49B(3) would appear to impose responsibility on a person or company that had no direct control over the workplace and, as in the first example perhaps, lacked the professional knowledge or skill to supervise a particular, specialised, activity. If that person was required to supervise the workplace in the detail required to ensure that all sub-contractors were following appropriate OH&S practice that would appear to negate one of the principle reasons for contracting out services. Notwithstanding that the contractual relationships may be complicated the standard of proof that is required in the Bill is the same standard of proof that applies

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[62] Transcript, p39.
[63] Transcript, p pp 39, 40.

to the crime of manslaughter under the ACT Crimes Act – that is, beyond reasonable doubt.[64]

2.70. There was some discussion before the Committee with regard to situations where the nature of the contracting relationship might preclude safe operation in the workplace. Two examples of industries where this might occur were the road transport industry and the use of out workers in the textile and clothing industry.[65]

2.71. In the case of the transport industry it was suggested that '… the atomistic and intensely competitive nature of the industry, encourage problematic tendering practices, unsustainable freight rates and dangerous work practices.'[66] A particular focus of the Quinlan Inquiry was the investigation of,

> …client and consignor requirements on tendering practices, contracts, methods of pricing, delivery times and lack of client responsibility for driver hours, performance and remuneration.[67]

2.72. Clearly where the structure of an industry creates an environment or culture where safety considerations are explicitly or tacitly ignored, then the head contractors should not be able to hide behind a contracting relationship to avoid responsibility. Turning a blind eye to commonly known, structural problems in an industry should not be acceptable.

2.73. A related concern was expressed with regard to the definition of the term 'agent'.[68] The AICD noted that its application had '… the potential to remove responsibility from the actual employer and move it elsewhere in the chain.'[69]

2.74. The significance of the term comes in the definition of an 'employer' – 'a person is an employer if …(b) an agent of the person engages the worker as a worker

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[64] Transcript, p 120-121.
[65] Submission 8, Transport Workers Union.
[66] Ibid., p.4; quoting from the *'Report of Inquiry into Safety in the Long Haul Trucking Industry* (the Quinlan report).
[67] Ibid., p.3
[68] Crimes (Industrial Manslaughter) Amendment Bill 2002
agent, of a person (the ***first person***), means—
(a) a person (the ***second person***) engaged by the first person (whether as independent contractor or otherwise) to provide services to the first person in relation to matters over which the first person—
(i) has control; or
(ii) would have had control apart from an agreement between the first person and second person; or
(b) a person engaged by another agent of the first person, or by an agent of an agent, (whether as independent contractor or otherwise) to provide services, in relation to the first person, to the other agent in relation to matters over which the other agent—
(i) has control; or
(ii) would have had control apart from an agreement between the agents.
[69] Submission 3, AICD, p.6

of the agent.'[70] The purpose of the use of the term 'agent' is to ensure that an employer cannot evade responsibility for the safety of his or her employees through the use of sub-contracting arrangements.

2.75. As stated by the Government a clear intention of the legislation is to identify responsibility at all levels in the chain. This is to clarify the relationships and responsibilities of employers, contractors and sub-contractors, and agents.[71]

Impact on business

2.76. It was put to the Committee that the legislation, if passed, would be particularly unfair on employers in industries, activities or occupations that were particularly high risk. Examples given to the Committee included firefighters, security guards, doctors, nurses and police.[72]

2.77. In an area where a high level of physical risk is part of the job it was argued that the employer would be at risk of prosecution for events that were inherent in the nature of the work.

2.78. Clearly, the responsibility of an employer to provide a safe working environment is beyond debate. However that does not mean that employers in inherently dangerous jobs should or would be judged against the criteria appropriate to employers in 'safe' areas. How that responsibility is discharged will vary depending on the nature of the work being done. A firefighter or a security guard will obviously be exposed to greater risk of physical harm than a white-collar worker.

2.79. As the Occupational Health and Safety Commissioner told the Committee the obligation on the employer is to ensure that that risk is managed in the appropriate way, that is, that a good occupational health and safety regime is in place such as appropriate training, to educate the individual, educate the teams and educate the workplace about the risks and how to deal with them.[73]

2.80. In relation to high-risk activities such as firefighting and emergency services work the Government in its submission advised the following:

> both the Government Solicitor's Office and the Department of Justice and Community Safety have advised that given the inherently dangerous nature of firefighting and other emergency service work, there would need to be very clear evidence of a high degree of negligence to support a prosecution. For the offence to be committed, it would also have to be established that:
>
> - having regard to the risk, it was unjustifiable to take the risk; or

[70] Bill, Part 2A, Definitions.
[71] Submission 5, ACT Government, p 5.
[72] Christopher Peters, ACT Chamber of Commerce, Transcript, p.96.
[73] Transcript, p 114.

- the conduct of the person was such a great falling short of the standard of care that a reasonable person would exercise in the circumstances.[74]

2.81. The Minister for Industrial Relations advised that all workplaces in the ACT [including so-called high-risk industries, activities or occupations] are subject to occupational health and safety laws and other laws of the Territory.[75] The Bill will apply to all employment categories.

2.82. The Australian Hotels Association and others raised the issue of the impact the new law might have on small business. It is argued that '… organisations that are vertically structured will be less exposed than those with a horizontal structure. This particularly exposes smaller employers…'.[76]

2.83. AI Group were concerned that it,

> is likely to lead to prosecutions having a greater chance of success in areas where there is a shorter chain of control or command. Inevitably small business owners and first line supervisors, those whose decisions can be most directly and easily linked to any accident in the workplace are the individuals most likely to be exposed to successful prosecution. [77]

2.84. This is possibly more true of the existing law rather than the proposed new offence. A criticism of the existing law is that senior officers and directors of corporations escape prosecution in relation to workplace injuries or deaths even though it may be the culture which they foster or the financial constraints or work practices they impose which are the underlying cause of an industrial accident.

2.85. Under either law it is possibly more likely that those directly responsible for a workplace will face prosecution than those higher up the managerial chain. However the proposed new law does, seek to open up the chain of command and attribute responsibility where it should properly lie.

2.86. A related concern is that lower level managers may find themselves being prosecuted in relation to accidents despite the fact that they may have tried to take remedial action prior to an incident but have been ignored by their superiors and have been left to make the best of an unsatisfactory situation over which, ultimately, they had little control.

2.87. This is clearly a concern. However a manager who behaved in the way outlined above would clearly have a very strong defence, being able to demonstrate that they had been neither reckless nor negligent with regard to their responsibilities.

2.88. As a Government witness testified:

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[74] Submission, 5, ACT Government, p 10
[75] Transcript, p 20.
[76] Submission 2, AHA, p.7.
[77] Submission 6, AI, p.8

> The only way that people in the chain of command could individually be held liable would be under the senior officer offence provisions in proposed section 49D. You would have to prove in relation to every individual that a worker died, that an individual's conduct caused the death of the worker and that a senior officer was reckless or negligent in causing such harm. So you would have to prove that against every individual. There is no piggybacking on the acts of others in relation to individual convictions.[78]

2.89. In a related argument witnesses suggested that the introduction of such a law would discourage investment in the ACT and 'frighten off' existing employers.[79] It was put to the Committee that even the remote risk of facing a criminal prosecution in relation to a workplace death could be the deciding factor for businesses considering operating in the ACT.

Drafting issues

2.90. The Committee has considered the use of language in the Bill above. There are concerns about other specific words and phrases.

2.91. Section 49B (1) and (2) state that an omission to act by an employer or senior officer can arise from 'anything in the employer's, [or senior officer's] possession or control' or from 'any undertaking of the employer [or senior officer]'. These paragraphs seem very generally expressed. It would be desirable to limit their application to the employer's or senior officer's responsibilities and undertakings as employers and senior officers.

Recommendation 1

2.92. The Committee recommends that Section 49B (1) and (2) be amended to make it clear that their application is limited to relevant responsibilities and undertakings of the employer or senior officer in those capacities.

2.93. In s.49C (c) (i) and 49D (c)(i) the phrase '…an employer is … reckless about causing serious harm to the worker [who has died or been injured] or **any other worker of the employer** [emphasis added] … .'[80]

2.94. The purpose of this paragraph is clearly to deal with a situation where the person directly affected by the recklessness of the employer is not the actual victim but where the death is clearly a result of the recklessness. However as it is currently written it could be interpreted to mean that recklessness not related to the actual death could be taken as evidence of culpability.

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[78] Transcript, p 122.
[79] Submission 2, Australian Hotels Association, p.7 and p 10; Submission 1, Housing Industry Association, p.3
[80] Submission 3, AICD, p.8.

2.95. The Committee shares the concern of submitters. An employer's recklessness or negligence should relate specifically to the employee who has died and the circumstances of that death. The employer's negligence or recklessness towards other employees, in circumstances unrelated to the death, while it may be evidence of a pattern of behaviour, should not be taken as evidence of the employer's commission of a specific offence.

Recommendation 2

2.96. The Committee recommends that paragraphs 49C (c) (i) and (ii) and 49D (c) (i) and (ii) be reviewed to clarify the meaning of the phrase 'or any other worker of the employer'.

Other penalties

2.97. In the event of a corporation being found guilty of industrial manslaughter, section 49E of the Bill empowers the courts to impose penalties additional to or instead of a fine. The court may order the corporation to undertake a range of other activities including publicising the offence and the circumstances that gave rise to it and to undertake a project for the public benefit. The total cost of the fines and alternative penalties which may be imposed for one offence is $5 million.

2.98. These alternative penalties can be seen as analogous to a community service order imposed on a natural person. The AICD took the view that these alternative penalties were inappropriate, '… introducing the concept of denunciation and ongoing sanction into the criminal law.'[81] It recommended that, if the Bill were to proceed, section 49E be deleted and the maximum fine for industrial manslaughter be increased to $5 million.

2.99. In performing its role as a Scrutiny of Bills and Subordinate Legislation Committee, the Committee made the following comments on section 49E.

> Proposed new s 49E does however propose a significant variation. There are issues of policy here in relation to which the Committee does not propose to comment, other than to say that there have been suggestions, in relation to corporations convicted of crime, that the conventional penalties of imprisonment and fine are not sufficient; (see B Fisse, *Howard's Criminal Law* (5th ed, 1990, chapter 7).
>
> There is however a point where the magnitude of a penalty brings rights into focus. Looking only at proposed new sections 49C and 49D, the upper amount of the fine is 2500 penalty units, which the Committee understands translates to $1,250,000. On the other hand, the upper limit of cost to a corporation that may result from a court order made under proposed new s 49E is $5,000,000.

[81] Submission 3, AICD, p.9.

The Committee considers that there should be some explanation as to why there should be such large difference. In practice, two employers, both being equally culpable, could end up paying very different sums of money.

There is a separation of powers issue here too. A sentencing court making an order under proposed new section 49E, noting in particular paragraph 49E(2)(c), would be engaged in what appears to be very close to a legislative act. The court would, in effect, devise a new form of punishment. The power in proposed new subsection 49E(3) seems to take the court close to being involved in the administration of the project that is the punishment.

The Committee draws these matters to the attention of the Assembly.[82]

[82] Standing Committee on Legal Affairs (Performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) *Scrutiny Report No. 25*, p 14.

3. The Committee's findings

3.1. The Committee is divided on whether the Bill is necessary. All members of the Committee take the view that any death in the workplace is a serious matter and that appropriate penalties should be available where a worker is killed as a result of the negligence or recklessness of an employer.

3.2. Ms Tucker and Mr Hargreaves, a majority of the Committee, support the introduction of legislation which addresses the specific circumstances of employment related fatalities. They believe that the changing nature of employment relationships with the growth of contract-based employment and 'long-chain' sub-contracting is a significant change to which the law must adapt.

3.3. While recognising that the number of cases which may arise out of this legislation is likely to be small, the majority of the Committee do not believe that that is a reason not to have the legislation. They believe that the implementation of OH&S policies involves a continuum of enforcement options and this offence should be seen in that light rather than viewing it as a departure from an existing 'cooperative' approach to OH&S.

3.4. For the most serious of workplace failures, causing death through negligence or recklessness, the majority of Committee members believe that a specific criminal offence, reflecting the circumstances of the workplace and the employer's duties towards his or her employees is appropriate.

3.5. The difficulty of prosecuting corporations with the narrow definition of the guiding mind of the corporation and the inadequacy of penalties for corporations is also significant in convincing those Committee members of the need for this Bill. This difficulty has been exacerbated by the growth of a range of contractual employment relationships which have blurred, and in some cases totally obscured, the lines of responsibility for safety in the workplace.

3.6. The Committee is also divided over the question of whether it would be preferable simply to increase penalties available under Occupational Health and Safety legislation. A majority of the Committee sees the purpose of the Bill as broader than simply increasing penalties and do not believe that that broader purpose should be abandoned.

3.7. A number of submissions have suggested that the passage of this Bill will change the climate of cooperation between employers and employees in OH&S as employers seek to protect themselves against possible manslaughter prosecutions. A majority of the Committee members believed this to be an exaggeration. They feel that the likelihood of a manslaughter prosecution will be miniscule compared with the on-going responsibility for OH&S and it is difficult to imagine an employer changing his or her approach to the latter because of some remote fear of a criminal prosecution.

3.8. The majority of the Committee was not convinced by the suggestion that the adoption of this law would have an adverse effect on investment in the ACT. The number of workplace deaths in the ACT which could, conceivably, give rise to

prosecution is very small. The probability of prosecution is likewise small. It is difficult to accept that a positive business case for investing in the ACT could be set aside because of the distant and miniscule risk that, at some unspecified time in the future, a corporation might face a prosecution for manslaughter.

3.9. Investment in the ACT is also largely specific to this area. Property developers, construction companies or large retail investors cannot simply transfer their interests to other regions because the demand for their products and services is here in the ACT. Similarly government and its related services, which remains the ACT's largest employer, are not able to move from here.

3.10. Mr Stefaniak does not believe that the current law is inadequate in dealing with workplace fatalities. The law relating to the prosecution of corporations is well established and has been developed over more than a century to balance the rights of the victim and of the accused plus we have the new Criminal Code provisions.

3.11. In his view, the limited number of successful prosecutions for manslaughter of employers, senior officers or corporations does not reflect a failure or inadequacy within the law. It is, instead, a reflection of the high levels of proof the law quite properly requires when a person is being tried for one of the most serious offences in the statute book.

3.12. In Mr Stefaniak's view the case has not been made to justify the creation of a specific criminal offence applying only to employers and their senior officers. The trend in workplace deaths and injuries in the ACT is downwards and the number of deaths which might give rise to prosecutions under this legislation is small. Thus there is no problem or exceptional set of circumstances that this legislation is required to address.

3.13. In addition, Mr Stefaniak supports the view put to the Committee that the ACT should not be in the vanguard of Australian jurisdictions in introducing this type of offence. As a small jurisdiction, wholly surrounded by New South Wales, the ACT should avoid adopting laws relating to business which are at variance with those of New South Wales.

3.14. Mr Stefaniak would prefer to see increased penalties being implemented through existing Occupational Health and Safety laws or by amendments to the Crimes Act. He is also concerned that the Bill introduces an anomaly into the law of the ACT.

3.15. The proposed legislation has the effect of providing two penalties for the same offence depending on the status of the victim. An employer who causes the death of a worker and is convicted of manslaughter could be imprisoned for twenty-five years or, if a corporation, fined a total of $5 million. If exactly the same set of circumstances resulted in the death of somebody who was not an employee, for example a client visiting a construction site, the employer, if convicted would face the penalty under the Crimes Act – imprisonment for twenty years.

3.16. This raises a general issue which has been of concern in other jurisdictions – 'that the duplication of offences across different legislation may lead to inconsistency in treatment of persons charged.'[83] However the Committee understands that this anomaly in sentences will be dealt with in the next round of amendments to the Criminal Code.

3.17. Mr Stefaniak feels that if this legislation were to proceed the Crimes Act needs to be amended at the same time to ensure consistency of penalties.

3.18. The majority of the Committee (Mr Hargreaves and Ms Tucker) support the Bill. Mr Stefaniak does not believe the Bill should be proceeded with.

3.19. Mr Stefaniak's detailed comments can be found at Appendix 3.

Recommendation 3

3.20. The Committee, by a majority, recommends that this Bill be proceeded with.

3.21. However there are a number of issues of detail within the Bill which the Committee believes should be addressed before it becomes law.

Not for profit organisations

3.22. The Bill is not limited to business corporations and government. It applies to a wide range of entities – incorporated and unincorporated. Voluntary organisations, charities religious groups and a wide range of community organisations will be subject to it.

3.23. The Committee notes that when similar legislation was being considered in Victoria not for profit organisations were excluded. This Committee received very little evidence on this issue.

Recommendation 4

3.24. The Committee recommends that the ACT Government advise the Assembly as to why agencies, such as charities, voluntary associations and community groups have been included.

Other penalties

3.25. The courts ability to impose penalties on a corporation in addition to a fine was described at paragraph 2.97. The Committee is not opposed to the idea of

[83] *Review Workers compensation and Occupational Health, Safety and Welfare Systems in South Australia*,,(2002) Report, vol 3, p.110.

additional penalties. Finding appropriate penalties for corporations is one of the key purposes of the Bill. Significant fines may be appropriate in some, but not all, circumstances.

3.26. The good name or reputation of a company may be among its most valuable assets. By requiring the corporation to publicise its conviction and its failings to its shareholders and the public, the courts may be able to have a more significant impact on corporate behaviour than a simple financial penalty would have.

3.27. The establishment of a project for the public benefit may also be an appropriate form of restitution where the corporation's offence has had a significant impact on a particular community.

3.28. The Committee does not accept that these supplementary penalties introduce 'ongoing sanctions' into the law. Community service orders already require natural persons to undertake projects over a period of time. The total cost of the additional penalty will be known at the time of sentencing and clearly cannot be varied thereafter.

Contractual relationships

3.29. A principal purpose of this Bill is to allow the law to look behind contracting relationships which may have the effect of obscuring responsibility for safety in the workplace or even the true nature of an employment relationship. The Committee generally supports this approach.

3.30. However as discussed in paragraphs 2.64 to 2.75 above there are some legitimate concerns with the application of this approach. It has been put to the Committee that the result of section 49B(3) may be to expose a principal to a legal obligation which should rest with a subcontractor.[84]

3.31. On balance the Committee believes that this section needs to be tightened up. Where a contract specifies, in good faith, that one party is responsible for ensuring that all the legal obligations and responsibilities with regard to OH&S are met and where nothing in the terms of the contract precludes the responsible person from meeting those obligations then it does seem unreasonable to place legal liability further up the contracting chain.

3.32. In entering into the contract the parties should at the very least be required to assure themselves that the contract price, performance targets and method of providing the services do not preclude proper regard for OH&S requirements.

[84] 49B(3) – …if, apart from an agreement between a person and someone else, something would have been in the person's control, the agreement must be disregarded and the thing must be taken to be in the person's control.

Recommendation 5

3.33. The Committee recommends that the ACT Government review section 49B(3) to ensure that it does not obstruct fully informed contracting agreements entered into in good faith which attribute responsibility for workplace safety to one party to the contract.

3.34. The Committee notes the concern that the definitions of 'agent' and 'employer' could make an employer legally liable for the consequences of the recklessness or negligence of a sub-contractor, even if the employer had entered into a contract in good faith in which the other party to the contract accepted responsibility for ensuring that the workplace was conducted safely.

3.35. The Committee is concerned that as currently worded, these definitions place a liability on employers in situations where a sub-contractor has accepted responsibility for workplace safety and, on reasonable grounds, the employer understands that they have the skills, knowledge and experience to operate a safe workplace.

Recommendation 6

3.36. The Committee recommends the definition of 'agent' be reviewed to clarify that an employer, having satisfied him- or herself that a sub-contractor has the necessary skills, knowledge and experience, is entitled to rely on the contractual undertakings of a sub-contractor that a workplace will be conducted in full compliance with Occupational Health and Safety laws.

3.37. The changes recommended in this section would not preclude the prosecution of a principal where the contract was not entered into in good faith or where the terms of the contract, the conditions of the employment relationship or the structure of the industry made it clear that one purpose of the contractual relationship was to avoid responsibility for workplace safety.

Effect on established legal principles

3.38. A number of submissions to the Committee (see paragraphs 2.44 to 2.60) expressed concern that the Bill seemed to be altering the established elements of the offence of manslaughter and weakening the standards of proof that would be required to gain a conviction of a natural person.

3.39. As discussed above, the majority of the Committee does not believe that there are grounds for this concern. The Bill does not impose a vicarious liability on any natural person. To gain a conviction of a natural person under this legislation the prosecution will be required to demonstrate beyond reasonable doubt that that person had caused the death of an employee (as defined in the legislation) as a result of their recklessness or negligence. The terms recklessness and negligence are defined in the Criminal Code and those definitions are well established in the criminal law.

3.40. Thus a majority of the Committee members does not share the concerns put to it that the offence of manslaughter will be 'watered down' by this legislation. The Committee does not feel that convictions will be obtained on a standard of proof lower than that applying to all criminal convictions.

3.41. With regard to the prosecution of corporations, the introduction in the Criminal Code of the concept of a corporate culture on which the courts may rely when seeking to ascertain the 'intent' of a corporation is an innovation. It is consistent with the objectives of this Bill but as noted above is not a part of it.

3.42. While some members of the Committee have reservations about it, it is already part of the established law of the ACT.

Bill Stefaniak MLA
Chair
16 September 2003

Appendix 1 - Submissions

1. Housing Industry Association (HIA)

~~1.~~2. Australian Hotels Association

~~1.~~3. Australian Institute of Company Directors

4. Printing Industries Association

~~4.~~5. ACT Government

~~4.~~6. Australian Industry (AI) Group

~~4.~~7. ACT Trades & Labour Council

7A ACT Trades and Labour Council

8. Transport and General Workers Union, Canberra

~~8.~~9. ACT and Region Chamber of Commerce and Industry

Appendix 2 – Witnesses at public hearings

FRIDAY 4 APRIL 2003

Ms K Gallagher MLA. Minister for Industrial Relations,

Penny Shakespeare, Director of Work Safety and Labour Policy, CMD,

Shelley Schreiner, Senior Manager A/g, Work Safety Policy, CMD.

TUESDAY 29 APRIL 2003

Housing Industry Association – Michael Pyers & Kate Wilson

Australian Hotels Association – Nick Proud & Jane Bergmann-Hanna

Australian Industry Group – Mark Goodsell

ACT Trades & Labour Council – Peter Malone, Sarah Schoonwater & Andrew Whale

TUESDAY 3 JUNE 2003

Australian Institute of Company Directors – Gabrielle Upton, Tony Hulett

ACT Chamber of Commerce – Chris Peters

ACT Workcover – Jocelyn Plovits

ACT Chief Minister's Department & Department of Justice and Community Safety

Penny Shakespeare – CMD

Elizabeth Kelly – JACS

Claude Monzo - JACS

Appendix 3 – Dissenting report and additional comments

I believe there is no justification for this Bill. No other Australian jurisdiction has seen fit to introduce and pass legislation of this type. Other jurisdictions are going about the issue in a very different way to the ACT and I have real concerns that the ACT will be the odd jurisdiction out.

I am also concerned that apart from the unions, the ACT Government and its department responsible for this particular legislation, (who has to follow instructions from the Government of the day), no one else has called for this type of legislation. All other witnesses before the inquiry were against the legislation. The vast majority of these witnesses, of course, were employer organisations and other persons who had an interest in businesses.

I am also concerned that no evidence was put before the Committee to indicate that such a law was actually necessary. There are very few deaths attributable to negligence in the work place in the ACT. The evidence failed to indicate whether any of those particular deaths would have sustained a charge of industrial manslaughter being brought. As these deaths related to a period going back into the 1980's there seems to me to be no justification that would indicate introducing a separate offence of industrial manslaughter into the ACT.

If anything, the indications were that considerable efforts had been made in recent years to improve Occupational Health and Safety in the ACT and these efforts were ongoing and work place accidents are actually less common now than they were in the past. The ACT also is somewhat unique in that it does not have a significant manufacturing industry base in the Territory, nor does it have a particularly large primary industry base. It seems to me that there would be even less call for legislation such as this than in states where there is a much greater industrial base, where accidents are more likely to happen than in a jurisdiction such as the ACT.

Given that there is not, in my mind, any conclusive proof that this legislation is necessary in the ACT, I have some sympathy for the view put before the Committee by several employer groups that this legislation, if passed, would have the potential to scare off investment in the ACT. If it were a good thing to introduce legislation such as this that would not concern me, however, for a number of reasons I consider this to be bad legislation and I think that point is also a valid one in that not only would we be introducing unnecessary legislation but there is some possibility in that it could scare off some potential investors who had to decide whether they invested in New South Wales, or the ACT. Queanbeyan may well be a beneficiary of this legislation in that regard.

I am also totally unconvinced as to the need for this legislation, as we already have had for many years the crime of manslaughter in the Crimes Act. This has been further enhanced with the Criminal Code and with the introduction of corporate responsibility in the Criminal Code. This, in itself, takes away one of the main arguments put in terms of the need for this particular piece of legislation. It was put strongly to the Committee that bad corporate culture needs to be attacked that strong

legislation, such as this, was necessary to do this. There may have been some validity in that comment except bad corporate culture can now be attacked through the corporate responsibility parts of the Criminal Code.

There have been successful prosecutions for manslaughter arising out of industrial incidents in Australia. Manslaughter is a very hard offence to actually prove, and rightly so, as it is one of the most serious offences in the Crimes Act. Nevertheless, there has been a fairly recent successful prosecution brought in the state of Victoria. I also think it is not good law to have a separate manslaughter offence when we have a perfectly good one that has stood the test of time in the Crimes Act. If we have industrial manslaughter why don't we have sporting manslaughter arising from incidents on the sporting fields, or motor vehicle manslaughter arising from accidents on the road, or manslaughter for under 18 year olds? I do not think there is anything so horrendously specific that would justify manslaughter in the industrial field, as opposed to any other field where a charge of manslaughter is justified. Manslaughter is manslaughter.

Also, the fact that very few prosecutions have been brought for manslaughter in the industrial area, raises the question of just how often this legislation would be used, if at all. It could well be, given the nature of the ACT and its industry that we would never see this particular offence used. If there is no real difference between the standards and elements needed to prove manslaughter and industrial manslaughter, why on earth do we need this particular Bill? The argument was put that this particular type of manslaughter was no lesser an offence in terms of criminal proofs and the elements necessary to prove an offence than the current law of manslaughter and if that is truly the case I think that is effectively an argument against this particular Bill. There is simply no need for it and industrial manslaughter can be equally brought under the existing law of manslaughter.

If, however, the fears of some witnesses before this Committee are justified and this manslaughter offence is somewhat different from the ordinary offence of manslaughter in the Crimes Act then some lesser standard is required, not so much in the burden of proof (i.e. beyond reasonable doubt) but more in terms of the elements of what has to be proved by the Crown. If the elements to be proved are somewhat less onerous in terms of this particular offence of manslaughter as opposed to the manslaughter in the Crimes Act then again we have a serious deviation from normal legal principles. This is especially true given the very significant penalties that would be imposed if this Bill were to become law. The fines are far greater than can possibly be brought under the current Crimes Act. The other penalties are significantly different as well in terms of what can happen to a corporation and the maximum term of imprisonment for an individual is 5 years higher i.e. 25 years as opposed to 20 years for normal manslaughter in the Crimes Act.

Now I don't as a rule have problems with strong penalties and I have no problems with the serious penalties proposed in this particular legislation. I merely query the need for this legislation as such. (In fact, big fines and having organisations do certain acts as a penance is something I'd like to see extended to individual criminals and used in relation to other crimes elsewhere in the Crimes Act). I merely query the need for such legislation and I do not believe it should be passed.

I am very concerned that two very similar Acts would lead to a charge of manslaughter under this Bill being sustained and a charge under normal manslaughter provisions in the Crimes Act not being sustained. An example that was suggested to me illustrates this point. An employer has a faulty electrical plug and socket, which is behind the counter of a shop front. The employer knows that plug is faulty and has taken no steps to repair it. An employee drops a $2 coin, which rolls behind the counter. The employee attempts to retrieve the coin, somehow gets stuck behind the counter and electrocutes himself /herself. The employer would be liable under this Bill. Consider the situation of an ordinary citizen who comes into the shop front and drops a $2 coin which rolls behind the counter, goes to retrieve it, gets stuck and electrocutes himself /herself. I submit it would be very difficult for the prosecution to sustain a charge of manslaughter against the owner/manager of the particular premises. In fact, I defy anyone to get up on a charge of manslaughter in the ACT Courts in terms of the latter case.

If there is a lesser standard for the prosecution to sustain a manslaughter charge under this legislation than there is under normal legislation then, in my view, this legislation is bad law. If there isn't, there should be no need for this law as the current manslaughter provisions adequately cover it.

I have some further comments in relation to suggestions as to how significant negligence in the workplace can be counted later on in my comments. I was impressed to hear Government officials, the Minister and indeed the Union representative speak of the need for deterrence and strong penalties to deter criminal acts. I hope these views actually extend beyond this particular Bill, and if so, I look forward to Government support for my Sentencing Bill. I wonder, however, whether these comments merely relate to the need for deterrence in this area, rather than deterring ordinary, every day criminals in relation to other offences in our current Crimes Act.

In summary, I do not see any need for this legislation. The existing law of manslaughter is sufficient and indeed this particular legislation smacks of a "politically incorrect" crime and the Government proceeding to honour an election commitment made to a certain section of its support base. I do not think on balance this legislation benefits our society and certainly is unnecessary because existing laws cover the worse situation that this law is intended to cover.

Another reason I have given for opposing this legislation is that no other state or territory has gone down this path. Victoria came close, the Bill was defeated – it has taken it no further. New South Wales has adopted a very different strategy as indeed have other states. I travelled to Brisbane to talk with Occupational Health and Safety officials, plus their Attorney General's department.

Queensland has gone about increasing penalties in its Occupational Health and Safety Act. I think the maximum penalty for offences under that Act has been increased to 3 years imprisonment plus fairly substantial fines. New South Wales also has very substantial fines in its Occupational Health and Safety Act

Because I regard this particular ACT Bill as a (perhaps unwitting) bastardisation of the law, I would suggest to the Government it might consider another way around the

problem. I do not particularly think employer groups would necessary like this suggestion, but I offer it as a better alternative to the road the Government is going down. In Queensland there is consideration being given for an offence of negligent act causing death that would carry a maximum gaol sentence of 7 years together with considerable fines and other penalties for corporations. This is effectively an industrial equivalent to culpable driving. I feel that something like this is far tidier than industrial manslaughter.

Culpable driving is a negligent act causing death as a result of driving and I think there is a much greater affinity between that type of offence than there is in terms of bastardising the laws that have been with us for many years in relation to manslaughter. Obviously, manslaughter under the Crimes Act would still be applicable for industrial incidents as it has been in the past and as it has been successfully, albeit rarely, applied, just as manslaughter has been used (also rarely but successfully) in relation to deaths resulting from the use of a motor vehicle. Negligent act causing death in the workplace would be an appropriate charge for incidents that weren't quite up to the standard required to prove a manslaughter offence.

I think this would be a far better legal way around the perceived problems the Government sees, rather than enacting this legislation. Again, given the history of accidents in the ACT workplace it would be an offence which may hardly ever be used either, but at least I feel it would be much better in terms of application of proper legal criminal principles.

I would also recommend a toughening up of Occupational Health and Safety laws in other areas. I think the Queensland model is a reasonable one and also I would suggest the Government should look at what is occurring in New South Wales.

Negligence in the workplace, especially deliberate or reckless indifference to work place safety is something none of us can tolerate. Thankfully it does not happen all that often in Australia and the ACT does have a very good record for a number of reasons, but especially because of the nature of our industry. I think there are better ways of approaching a problem rather than going down the path of this Bill and for the reasons above I reject it.

Given that a majority of this Committee recommends the Bill be proceeded with I put on record that I have no problems with the other recommendations i.e. recommendations 1 and 2 and 4, 5 and 6. If this unnecessary legislation is going to be passed I feel these recommendations may at least improve it. Again, I reiterate my opposition to this legislation and urge the Government to reconsider its position.

Bill Stefaniak MLA

16 September 2003