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Corporate Manslaughter – does it have a place in NZ law?

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There can be no more fundamental work right than the right not to be killed at work.

Sadly, this right is denied to many New Zealand workers with persistent regularity. Most dramatically in recent years was the explosion of the Pike River mine on 19 November 2010, which resulted in the deaths of 29 workers.

The Royal Commission on the Pike River coal mine tragedy[1] concluded that

> even though the company was operating in a known high-hazard industry, the board of directors did not ensure that health and safety was being properly managed and the executive managers did not properly assess the health and safety risks that the workers were facing. In the drive towards coal production the directors and executive managers paid insufficient attention to health and safety and exposed the company's workers to unacceptable risks.[2]

As a result, 29 workers lost their lives.

The commission called for "legislative, structural and attitudinal changes".[3]

This paper addresses one aspect of that challenge – how do we hold companies and their senior managers responsible for workplace deaths? Are we sending the right message to those responsible for workers deaths? Do our laws reflect this? Or is there a need for change?

In approaching these issues, I will review the current legislative framework, including those changes on the horizon in Bill form. Secondly, I will look at the approach taken to corporate manslaughter in the United Kingdom and Australia. Thirdly, I will consider what we can and should do, now, to respond appropriately to instances where companies cause workers to be killed.

The Current Legislative Framework

Health and Safety in Employment Act 1992

The Commission on the Pike River Tragedy considered the Health and Safety in Employment Act and noted that there is a need to pay legislative attention to company directors whose responsibility for health and safety is not currently recognised in legislation.

The object of the Health and Safety in Employment Act 1992 is:[4]

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[1] Graham Panckhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy Te Komihana a te Karauna mot e Parekura Ano Waro o te Awa o Pike* (October 2012).
[2] Volume 1, at 12.
[3] Volume 1, at 35.
[4] Health and Safety Act 1992, s 5.

> to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by –
> a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and
> b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions; and
> c) imposing various duties on persons who are responsible for work and those who do the work; and
> d) setting requirements that –
> i) relate to taking all practicable steps to ensure health and safety; and
> ii) are flexible to cover different circumstances; and
> e) …
> f) recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; and
> g) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and
> h) prohibiting persons from being indemnified or from indemnifying others against the cost of fines and infringement fees for failing to comply with the Act.

The Act creates a general duty on every employer to "take all practicable steps to ensure the safety of employees while at work".[5,6]

To understand the flavour of the HSE Act, two definitions are important to note: firstly, "serious harm" includes death[7]; and, secondly, "all practicable steps" means the steps it is reasonably practicable to take in the circumstances, having regard to the nature and severity of the harm that may be suffered, the current state of knowledge about the likelihood of harm of that nature and severity, the current state of knowledge about the means available to achieve the result and the likely efficacy of each of those means, and the availability and cost of each of those means.[8] This is an objective test, and the obligation to take all practicable steps applies only to circumstances that the person knows or ought reasonably to know about.[9] The focus of the Act is on foreseeable and preventable harm, with an emphasis on prevention rather than punishment.

How, then, does it deal with situations where the employer fails to take all practicable steps and workers are killed? There are two offences under the HSE Act and section 49 deals with offences likely to cause serious harm, providing:

> Where a person who, knowing that any action [or failure to take any action] is reasonably likely to cause serious harm to any person, takes the action [or fails to take the action]… contrary to a provision of the Act, then the person is liable on conviction to imprisonment for a term of not more than 2 years; or a fine of not more than $500,000 or both. [10]

For this most severe offence under the HSE Act, the offender must have failed to meet the requirement of taking all practicable steps and must have knowledge of the reasonable likelihood of serious harm.

[5] Section 6.
[6] Sections 15, 16 of the Act also impose general duties on employers to ensure employees actions or inaction do not harm any other person and extend these duties to people in the workplace or its vicinity.
[7] Section 2.
[8] Section 2A.
[9] Section 2A(2).
[10] Section 49.

Section 50 of the HSE Act, on the other hand, is targeted towards breaches of duties under the Act where knowledge of the likely harm does not have to be established.[11] For those offences, one is liable to a fine not exceeding $250,000 and there is no potential for imprisonment.

A point to bear in mind about the offences under the HSE Act is that the emphasis is on the offender having created risk (whether knowingly or unknowingly). The offences do not focus on the consequences of the offender's actions or inaction, and the degree of harm that has occurred is only one of the factors to be taken into account in sentencing.[12]

Nowhere in the HSE Act is there an offence that singles out for punishment an employer whose action or inaction causes workers deaths. While such offences could be captured by either s49 or s50, those offences are more diffuse and do not reflect, by language or penalties, the public opprobrium with which killing is generally met.

Health and Safety Reform Bill

The Health and Safety Reform Bill is due to be introduced into parliament in December 2013. It has been a year in the making and reflects a new emphasis, in the wake of the Commission on Pike River.

The purpose of the Bill is described at section 3:

(1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by –
   (a) protecting workers and other persons against harm to their health, safety, and welfare through the elimination or minimisation of risks arising from work or from specified types of plant;
   (b) providing for fair and effective workplace representation, consultation, cooperation, and resolution of issues in relation to work health and safety; and
   (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
   (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
   e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
   (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
   (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.[13]

[11] Section 53 makes it a strict liability offence, with no need to prove the defendant intended the action or inaction that constitutes the offence.
[12] Section 51.
[13] Health and Safety Reform Bill (192-1), cl 3.

The emphasis in the HSR Bill is slanted towards viewing enforcement measures as a tool to achieve compliance. Neither the HSE Act nor the HSR Bill aims to punish for punishment's sake.

The Bill's use of a standard of providing the highest level of protection as is "reasonably practicable" is new and represents a shift from the current "all practicable steps" test.

> "Reasonably practicable" means:
>
> that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including –
>
> a. the likelihood of the hazard or the risk concerned occurring; and
> b. the degree of harm that might result from the hazard or the risk; and
> c. what the person concerned knows, or ought reasonably to know, about –
> i. the hazard or the risk; and
> ii. ways of eliminating or minimising the risk; and
> d. the availability and suitability of ways to eliminate or minimise the risk; and
> e. after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.[14]

It can be seen that the tenor of the Bill remains preventative, but the shift in emphasis given to cost factors signals less tolerance for sub-optimum standards of care.

The HSR Bill also introduces the concept of "a person conducting a business or undertaking" (a "PCBU") and imposes on a PCBU stringent and specific duties that flesh out the "reasonably practicable" requirement and which emphasise an intention to have work environments without risks to health and safety. [15]

This sharper focus on eliminating sources of potential harm is complemented by an obligation on officers of PCBUs. Section 29 of the Bill is a clear response to the call for action from the Commission on Pike River. It provides:

1. If a PCBU has a duty or an obligation under this Act, an officer of the PCBU[16] must exercise due diligence to ensure that the PCBU complies with that duty or obligation.
2. In this section, due diligence includes taking reasonable steps –
   a. to acquire and keep up-to-date knowledge of work health and safety matters; and
   b. to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and
   c. to ensure that the PCBU has available for use and uses appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
   d. to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and responding in a timely way to that information; and
   e. to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and

[14] Clause 9.

[15] Interestingly, there are specific duties on PCBUs who design plant, substances or structures. This is perhaps a reflection of the widespread concern about the design of the CCTV building that collapsed during the Christchurch earthquake.

[16] An officer is defined in section 4 of the Bill and means a company director; any partner in a partnership; or in more loosely structured organisations, any person in a position comparable to that of a director of a company and it includes anyone who makes or participates in making decisions that affect the whole or a substantial part of the business of the PCBU such as the chief executive or a chief financial officer.

f. to verify the provision and use of the resources and processes referred to in paragraphs (c) to e).

In addition to those obligations on officers of PCBUs, the HSR Bill proposes three new offences.

The most serious of these is where a person has a health and safety duty under the Act and,

> without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or illness; and is reckless as to the risk to an individual of death or serious injury or illness.[17]

Under this offence, the proposed penalties are graduated, depending on the status of the offender. For individuals, there would be a maximum term of imprisonment of five years or a fine not exceeding $300,000 or both. For an individual who is a PCBU or an officer of a PCBU, the maximum five years imprisonment is retained but the maximum fine increases to $600,000. And for a body corporate, there would be a fine not exceeding $3 million.

For an offence of failing to comply with a health and safety duty that exposes an individual to the risk of death or serious illness or injury, without the element of recklessness, there is no imprisonment and the fines proposed are $150,000 for individuals, $300,000 for a person who is a PCBU or an officer of a PCBU; and for a body corporate, a fine not exceeding $1.5 million.[18]

The proposed fines reduce further to $50,000 for individuals, $100,000 for PCBUs and officers of PCBUs and $500,000 maximum for a body corporate convicted of a simple breach of a health and safety duty.[19]

Whereas the current HSE Act offence under section 49 is concerned with the knowing creation of risk, the HSR Bill calls for a subtly different inquiry into whether the offender has created a risk to which an individual is exposed and the offender is reckless as to whether the potential harm ensues from that risk.

Under the HSR Bill, the penalties for directors and senior managers who cause workplace deaths would be more substantial than those available under the current HSE Act.

The Crimes Act 1961

No review of the legislative framework in the area of workplace deaths is complete without considering the criminal statute.

The Crimes Act 1961 defines homicide[20] as the killing of a human being by another, directly or indirectly, by any means whatsoever. Under section 160(2) homicide is culpable when it consists in the killing of any person by an unlawful act; or by an omission without lawful excuse to perform or observe any legal duty; and culpable homicide is either murder or manslaughter, the penalty for which is life imprisonment.[21]

[17] Clause 32.
[18] Clause 33.
[19] Clause 34.
[20] Crimes Act 1961, s 158.
[21] Section 177.

While greater than what is currently available under the HSE Act, a potential penalty of five years imprisonment under the HSR Bill, even with a substantial fine imposed, is a relatively low level penalty compared with the potential outcome of a conviction for manslaughter.
One may, therefore, question whether a corporate killer and the senior management of companies who kill should continue to be treated more leniently than a private citizen who commits manslaughter.

Crimes (Corporate Manslaughter) Amendment Bill

The Crimes (Corporate Manslaughter) Amendment Bill ("the Corporate Manslaughter Bill") is a private members' Bill that has been put forward by Andrew Little, MP. The purpose of the Bill is to add the offence of corporate manslaughter to the Crimes Act 1961. The general policy statement at the commencement of the Bill summarises it thus:

> Corporate manslaughter is culpable homicide when committed by a body corporate. It will be a charge that is appropriate to situations where the actions or omissions of the directors or senior managers of a body corporate cause a person's death when those actions or omissions amount to a gross breach of a relevant duty of care owed by the organisation to the deceased. The introduction of this charge remedies a gap that currently exists in New Zealand law, as demonstrated by the Pike River Mine tragedy.[22]

This Corporate Manslaughter Bill proposes that an organisation will be guilty of an offence:

> if the way in which any of its activities are managed or organised by its senior managers causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.[23]

A "relevant duty of care" means any duty of care which, but for the accident compensation system, may be said to exist as a matter of law, whether the law of negligence or any other law.[24]

Under this Bill there will be a "gross breach" of a duty of care if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances.[25]

In terms of penalties for the offence of corporate manslaughter, the Bill proposes that an organisation be liable to a maximum fine of $10 million; that any senior manager whose acts or omissions contributed materially to the offence be liable to imprisonment for up to 10 years; and that the Court have the discretion to make a "publicity order" requiring the organisation to publicise, in a specified manner, the fact that it has been convicted of the offence; specified particulars of the offence, including the names and positions of any senior managers who are convicted; and publicising the amount of any fine or term of imprisonment imposed. Orders would specify a time in which they must be complied with and may specify the manner and form of publication including whether publication should be in the organisation's statutory or other annual report.[26]

This private members' bill goes significantly further than the HSR Bill in holding companies and their officers accountable for workplace deaths; and it represents a substantial departure from the two years imprisonment and $500,000 fine available under the HSE Act.

[22] Crimes (Corporate Manslaughter) Amendment Bill (Draft for Consultation) (explanatory note).
[23] Proposed s 177A.
[24] Subs (3)(b).
[25] Subs 3(c).
[26] Section 177A.

Whereas the HSR Bill requires evidence that the accused person has recklessly exposed the individual to a risk of death, the Corporate Manslaughter Bill (CMB) shifts the focus from risk creation to the occurrence of harm. Under the CMB, liability accrues because there has been conduct "far below" what can reasonably be expected. While this is evaluated objectively against the standard of what a fair and reasonable employer would be expected to have done in the circumstances, it also carries a nuance of disapproval of those who fall far below reasonably expected standards. And by avoiding the need to show recklessness, the Corporate Manslaughter Bill adopts a more objective test that is more likely to be able to be enforced.

The United Kingdom

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) abolished the common law offence of manslaughter by gross negligence in relation to organisations covered by the Act.[27]

Prior to the Act coming into force in April 2008, there were prosecutions under the common law but the great majority failed to secure convictions because of the difficulty of identifying an individual to whom blame could be attributed. The larger the company, the harder that task became. Most of the literature in this area focusses on that shortcoming in the common law and contrasts this with the approach under the CMCHA.

New Zealand's Corporate Manslaughter Bill mirrors some aspects of the CMCHA, most significantly in the definition of the offence and in the adoption of the concept of publicity orders. For that reason, those provisions are not duplicated here.

However, the CMCHA also utilises "remedial orders" by which the organisation can be required to remedy the breach in issue or "any deficiency, as regards health and safety matters, in the organisation's policies, systems or practices of which the relevant breach appears to the court to be an indication".[28]

The CMCHA has the same definition of "gross" breach of a duty of care as appears in the NZ Corporate Manslaughter Bill. That is, that there is conduct that falls far below what can reasonably be expected. But in addition, it requires the jury to consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach and, if so, how serious that failure was and how much of a risk of death it posed.

This intertwining of the general health and safety law with the offence of corporate manslaughter is interesting. It both reinforces acceptable standards of conduct and acknowledges there is perceived to be a difference between general health and safety offences and the over-arching crime of killing people at work.

In addition, the jury may also consider, when deciding if there has been a gross breach of duty, the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it.[29]

These considerations indicate a seismic shift from the common law search for responsible individuals who can be said to embody the mind of the company, and allow an aggregation of responsibility that

[27] Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s 20.
[28] Section 9(1)(c).
[29] Section 8.

may have its source at a systemic level of the organisation, spread amongst a number of individuals no one of whom is individually responsible for the failings but whose collective shortcomings give rise to fault on the part of the organisation.

The CMCHA provides that an organisation that is guilty of corporate manslaughter or corporate homicide (as it is known in Scotland) is liable to a fine. The level of fines is open ended and addressed through sentencing guidelines.

Australia

Like the UK, Australia has, at times, invoked common law corporate manslaughter charges, with equally little success. Taylor and MacKenzie[30] have summarised that the position in Australia regarding corporate manslaughter remains similar to the UK's pre-CMCHA position, except as regards the Australian Capital Territory (ACT) and it is extremely difficult to successfully prosecute corporations due to the frequently insurmountable difficulties associated with identifying a senior individual in the corporation who is or was both the "directing mind" of the corporation and someone also personally guilty of the crime of gross negligence manslaughter.

In *R v Denbo Pty Ltd*[31] the company was prosecuted, under the common law, when one of its drivers was killed when his truck's brakes failed. It was found that the company's vehicle service record was appalling. The company pleaded guilty to a charge of corporate manslaughter so a conviction resulted, and it was fined $80,000. But overall, achieving a conviction under the common law is difficult, with good cause: It has been said that:

> The criminal law was not developed with companies in mind. Concepts such as *mens rea* and *actus reus*, which make perfectly good sense when applied to individuals, do not translate easily to an inanimate fictional entity such as a corporation. Trying to apply these concepts to companies is a bit like trying to squeeze a square peg into a round hole.[32]

In 1995, the Commonwealth Criminal Code Act introduced the notion of corporate liability into Australian law, but the Code only applies to Commonwealth offences, and manslaughter is not a Commonwealth offence. Only in the ACT has industrial manslaughter legislation been introduced, other States having considered and rejected similar proposals.

The ACT's Crimes (Industrial Manslaughter) Amendment Act 2003 makes it an offence if a worker dies in the course of employment and the employer's conduct causes the death of the worker; and the employer is reckless about causing serious harm to the worker or negligent about causing the death. The maximum penalty for this offence is 20 years imprisonment.[33]

There is also an offence by a senior officer of an employer if that senior officer's conduct causes the death of the worker and the senior officer is reckless about causing serious harm or negligent about causing the death. This, too, carries a maximum penalty of imprisonment for 20 years.[34],[35]

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[30] Des Taylor and Geraldine Mackenzie "Staying focused on the big picture: Should Australia legislate for corporate manslaughter based on the United Kingdom model?" (2013) 37 Crim LJ 99 at 106.

[31] *R v Denbo Pty Ltd* (1994) 6 VIR 157.

[32] James Gobert and Maurice Punch *Rethinking Corporate Crime* at 10, as cited in Rick Sarre "Sentencing those convicted of industrial manslaughter" (paper presented to National Judicial College of Australia Sentencing Conference, Canberra, February 2010).

[33] Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT, Australia), s 49C.

[34] Section 49D.

[35] A senior officer is a person occupying an executive position who makes or takes part in making decisions affecting all or a substantial part of the functions of the entity: see section 49A.

Interestingly, where there is a conviction of corporate manslaughter, under the ACT Act, the Court may (as in the UK and as proposed in the NZ Corporate Manslaughter Bill) order the company to publicise the offence, the deaths and the penalties imposed.

But it may also, alone or in conjunction with other penalties, require the company to "do stated things or establish or carry out a stated project for the public benefit even if the project is unrelated to the offence".[36]

The cost of compliance is capped at $5,000,000, including any fines, and the court must take into account the financial circumstances of the company.[37]

The carrying out of a project by way of making amends to the community is potentially a powerful tool to provide a legacy for those whose lives were lost; to stand as an ongoing caution and deterrent to other companies; and to make a meaningful response to the killing in circumstances where a company is cash-strapped or, at the other extreme, so substantial that a fine has little impact.

While it is yet to be tested, I suggest the ACT Act has harnessed a suite of responses to the white collar crime of corporate killing that should prove flexible, robust and effective whatever the circumstances of workplace deaths.

Options for New Zealand to Consider

The HSE Act is aspirational. It sets out to promote excellence in health and safety management and it is not particularly prescriptive about how this will be attained. Such standard setting is a legitimate function of legislation that can influence community attitudes over time.

But some members of society require more than gentle persuasion. Thus, deterrence plays a role in our law-making. Companies that kill must know that they are likely to be held accountable and that the consequences will not be desirable. The senior office holders in such companies must receive the message that they will be personally responsible for their actions and inactions if workers are to be made genuinely safe at work.

Wong[38] notes that some commentators believe that the existence of the HSE Act renders otiose the need for a corporate manslaughter offence. They contend that the only added advantage of such an offence is stigma. One can imagine that this refrain is likely to be heard even more loudly in light of the increased levels of fines and duration of imprisonment available under the HSR Bill. But sight must not be lost of the value of stigma in society. It has its place. As Wong observed, current legislation fails to properly reflect the moral outrage that the community feels when a death occurs through the gross negligence of the employer, and fails to reinforce the notion that all workplace fatalities are unacceptable.[39]

Similarly, there is intolerance in society for the idea that companies are beyond the reach of the law. Almost 170 years ago Lord Denman CJ remarked that:

[36] Section 49E(2).
[37] Section 49E(4),(5).
[38] Jonathan Wong "Corporate Manslaughter: A proposed Corporate Killing Offence for New Zealand" (2006) 12 Canterbury Law Review 157.
[39] At 167.

> There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by indictment against those who truly commit it, that is the corporation, acting by its majority; and there is no principle that places them beyond the reach of the law for such proceedings.[40]

Sarre[41] points to the way in which white collar crime has increasingly been captured by the reach of the criminal system, and he considers that causing death in the workplace is another type of white collar criminal activity for which the offender should be held accountable. It is a view this writer endorses.

But he has identified a limitation in the way we tend to punish companies who break the law. The problem is that fines do little or nothing to address the wrongdoing if they are not paid. In R v Denbo, for instance, a fine of $80,000 was levied against the company for causing the death of a truck driver. But at the time of its conviction, Denbo was in liquidation. The company was wound up six months before sentencing and never paid the fine. Later, it was reborn as another company and recommenced operations. The successor company did not pay the fine either. In reality, no one was held accountable for the worker's death.

Again, in 2006, Lydia Carter died at a work function at a go-kart track in Victoria. Her seatbelt did not fit properly and safety barriers were incorrectly installed. The company was convicted and fined $1.4 million but it had already gone into liquidation and will never pay the fine.

A similar problem arose in New Zealand following the Pike River tragedy when substantial reparations were ordered to be paid to the families of the deceased, in relation to offences under the HSE Act, but the company had gone into liquidation and shareholder companies refused to assume the burden of liability for that cost.

Nothing in the common law or the legislation considered in this paper, including the two Bills, fully addresses this concern. The conviction and sentencing of individual office holders may go some way towards ensuring tangible results from a successful prosecution, but it is timely to consider how companies can be prevented from escaping the consequences of their actions. Perhaps we need to consider a prohibition on going into liquidation in circumstances where a company is facing prosecution, or a mechanism whereby reparation orders and fines take priority in the distribution of funds from such companies. Innovative thinking by both company and criminal lawyers and other disciplines is needed to ensure that responsibility is sheeted home when companies kill.

In a similar vein, we should not adopt an escalating scale of fines without working through the benefits and drawbacks. For instance, it would not necessarily serve the public good if a fine is so substantial that the company is forced into liquidation with subsequent job losses. But Taylor and Mackenzie[42] have made the point that, when we look into this area of the law, the quantum of fines is not the issue. They say that the purpose of the (UK) legislation is not to increase the fines that can be imposed … its purpose is to make the prosecution of corporations for corporate manslaughter easier and more likely to be successful.[43]

This, surely, needs to be New Zealand's main objective too. The formulation of the offence in the Corporate Manslaughter Bill would meet that objective. As to sentencing options, publicity orders

[40] *R v Great North of England Rly Co* (1846) 9 QB 315 at 327 cited by Rosemary Craig "Tho shall do no murder: a discussion paper on the Corporate Manslaughter and Corporate Homicide Act 2007" (2009) 30(1) The Company Lawyer 17 at 20.
[41] Sarre, above n 33.
[42] Taylor and Mackenzie, above n 31.
[43] At 108.

naming responsible individuals within an organisation may go some way towards holding companies genuinely accountable, and deterring other companies from indulging in a similar lack of care for workers safety. This is a feature of the Corporate Manslaughter Bill that is noticeably absent from the HSR Bill.

Thought should also be given to the ACT option of requiring the organisation to carry out a project of benefit to the community, but I would suggest it is also desirable to impose such an obligation on individual office-holders in the event that the company has ceased to exist or if the Court thinks, for other reasons, that it is desirable to do so.

Arguably, the HSR Bill's potential for officers of a PCBU to face up to five years imprisonment will provide a deterrent effect. So, too, would the potential for imprisonment of up to 10 years under the Corporate Manslaughter Bill. The mechanism of imprisoning senior managers has the potential to achieve accountability on the part of those responsible for workplace deaths even if the company itself goes into liquidation.

It is time for the introduction of an offence of Corporate Manslaughter in New Zealand. This does not mean that there is no place for the proposals in the HSR Bill. But there are instances, like the killing at Pike River, that cry out for greater accountability than the health and safety legislation provides. Corporate killing should be criminalised and the Courts empowered to hold criminal employers to account.

But we can do better even than the Corporate Manslaughter Bill. We have the opportunity to glean from other jurisdictions ways in which convictions can best be assured and penalties meted out that are appropriate to the offence. We also have an opportunity to rethink what can be done about companies that go into liquidation to avoid being held accountable.

One thing is certain, in a country like New Zealand, with such a poor record of workplace deaths, we are poorly served by legislation that has proven to be ineffectual in responding to those events. We have a responsibility to every worker and their families to send out a clear message that corporate killing will not be tolerated or met with lenience.

We cannot bring back the Pike 29. But we have no excuse to tolerate a legislative framework that fails to hold companies who kill to proper account. An offence of corporate manslaughter is long overdue.