

## **Law Drafting Competition 2023**

Second runner-up

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Topic 2: Homicide Offences

Legislative Proposal Outline

## BACKGROUND AND CURRENT PROBLEMS

1. From the death of a patient arising from the improper procedures in an aesthetic treatment, to the killing of the cleaner falling from the refuse chute in a public housing estate, breach of duty of care arising from corporate malpractices have increasingly led to the death of employees and consumers in recent years.
2. However, while corporate malpractices leading to loss of human lives are growing, current laws seem to have created inadequate deterrent effect on these corporations, to the extent that either corporations are difficult to be held accountable whereas human lives are at stake, or that current regulations are only confined to the employer-employee relationship, not to mention that that deterrent effect imposed is minimal given the limited fine imposed.
3. In *HKSAR v Mak Wan Ling*,<sup>1</sup> where the malpractices and the gross breach of duty of care of a doctor in an aesthetic treatment led to the death of a client, only the doctor and the technician involved, as well as the owner of the cosmetic company, are charged with gross negligence manslaughter and were subsequently convicted.
4. Further in *HKSAR v Hong Kong Commercial Cleaning Services Ltd*,<sup>2</sup> where a cleaner was killed after falling down the refuse chute, the employer was convicted of “failing to ensure safety and health of employees”, and was sentenced to a fine of \$20,000 (the conviction was later overturned at the magistracy appeal).
5. From the above cases, it is evident that while human lives are lost in these contexts, the consequential penalties on the corporate, even if they are found liable, are disproportionate. The current offences provide little, if any, deterrent effect to corporate malpractices.

## PRINCIPAL OBJECTIVES AND JUSTIFICATIONS

6. Considering the background explained above, currently, corporations are seldom prosecuted for corporate manslaughter when human lives are lost

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<sup>1</sup> *HKSAR v Mak Wan Ling* [2020] HKCFI 3069.

<sup>2</sup> *HKSAR v Hong Kong Commercial Cleaning Services Ltd* (translated) [2022] HKCFI 3262.

due to gross negligence. In fact, the last and only conviction of corporate manslaughter in Hong Kong was in 1993, when a firm was fined HK\$3 million after an industrial accident caused 12 deaths.

7. The proposed legislation aims to codify and reform the common law offence of corporate manslaughter in Hong Kong. It intends to protect the public, including individuals like customers and employees of a company, by applying universally in cases involving deaths.
8. In particular, the current Hong Kong position of corporate manslaughter has mainly adopted the English common law position, namely the emphasis on the doctrine of identification and vicarious liability.
9. As will be explained below, the doctrine of identification has rendered the prosecution of organisations difficult, given the organisations' complex structures and the high prosecution threshold. Therefore, this proposed legislation aims to reformulate the Hong Kong position to expressly provide the scope of the offence of corporate manslaughter in Hong Kong, such that when human lives are at stake because of organisations' malpractice, the current loophole can be cured.

## **CONTENT OF THE LEGISLATIVE PROPOSAL**

### ***Coverage of the offence***

10. Safeguarding the safety of the general public is of utmost importance. Social justice can be achieved by implementing a broad application of the legislation that covers the public, including any person who dies from any accident caused by a corporation.
11. The proposed legislation provides that certain organisations, including corporations, government departments, the police force and partnerships, can be held liable under the present offence.
12. It ensures their safety consciousness and accountability to the public. The legislation aims to drive improvement by reducing future deaths as the senior management level of the organisations will be more cautious in making decisions and taking proactive steps for prevention.

13. Concerning the legislative intent, the punishment of individuals of organisations, including senior management staff, is unnecessary.
14. Since the legislation carries an enormous scope protecting the public, and is not limited to company employees, it is hard to hold specific individuals accountable for faults.
15. It is further emphasised that for large or multi-national corporations, there are diffuse management structures where extensive delegation and critical decisions are not made by senior management and that the senior managers don't have full knowledge of the day-to-day operations.<sup>3</sup> Therefore, with such complex structures, the difficulty in identifying the culpable individual arises, and it is better to focus on the liability of corporations as a whole.

### *Elements of the offence*

16. Elements of the offence include: -
  - i. The activities managed or organised by the senior management of the organisation cause the death of another person;
  - ii. A gross breach of duty of care owed by the organisation to the deceased.
17. Since the legislative intent is to create deterrence to corporate practices and operations, the "activities" included above will only be restricted to those organised or managed by senior management.
18. Without such requirement, any death caused by immediate operational gross negligence will make organisations liable for this offence.<sup>4</sup> Such narrow scope is designed to prevent overlapping with the common law offence of manslaughter by gross negligence.
19. In addition, the legislation aims to cure the loophole by targeting the large or multi-national corporations that often escape liability as they can distance themselves from the operations of a regional branch when they are criminally liable. Therefore, the international branch of corporation and

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<sup>3</sup> Cathy Wong Hiu Yan, 'Comparative Homicide Legislation' (2011) 5 HK J Legal Stud 3, 36.

<sup>4</sup> Cathy Wong Hiu Yan (n 3) 44.

the parent company can also be liable to extend deterrence to the core of the company's management.

20. Regarding elements of the offence and the replacement of the old identification doctrine, the proposed legislation references the UK Corporate Manslaughter and Corporate Homicide Act 2007 (hereinafter "UK Act").

### ***Replacement of the doctrine of identification***

21. The doctrine of identification suggests organisations will only be liable when an individual is proven to have fulfilled all elements of gross negligence manslaughter, and that person has to be the "directing mind" of the organisation.<sup>5</sup>
22. The two-fold requirement provides an escape for organisations. Individuals can be proven to have fulfilled all elements. Still, he is not the organisation's directing mind and hence, the organisation is not liable for his actions. Under the complex and diffuse management structure, it is difficult to identify an individual solely responsible for owning a duty of care and breaching it.
23. In the present proposal, the identification doctrine is replaced, and there is no requirement for identifying an individual fulfilling all elements of the offence. And the condition of being the "directing mind" of the company is replaced by the broader scope of "senior management".
24. Furthermore, under the old doctrine, the aggregation principle is not applicable. It means there must be one identified person who fulfils all the offence elements alone. It is impossible to artificially construct a *mens rea* by combining two different states of mind to produce one guilty state of mind.<sup>6</sup>
25. By including the requirement of "senior management" in the elements, the construction of *mens rea* is not limited to an individual's state of mind. An organisation can be liable for the offence when a few senior managers are

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<sup>5</sup> David Ormerod, *Smith & Hogan Criminal Law: Cases and Materials* (10<sup>th</sup> edn, OUP, Oxford 2009) 235.

<sup>6</sup> David Ormerod (n 5) 236.

negligent, and their state of mind can be combined to construe the requirement of “gross breach”.

### ***Clear definition of “negligence”***

26. The proposed legislation includes the codification of common law negligence, referencing the codified definition in Australia Criminal Code Act 1995 (hereinafter “**Australian Act**”).
27. Section 5.5 of the Australian Act states the test of negligence, in which a person is negligent concerning a physical element of an offence if his or her conduct involves: -
  - i. Such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
  - ii. Such a high risk that the physical element exists or will exist.
28. Such test will be included under the section of “duty of care” in the proposed legislation.

### ***Holistic approach in covering corporate policies and systems***

29. It is viewed that in determining the criminal liability of organisations, their policies and systems are often neglected when these can also carry the risk of causing deaths.
30. These systems are often related to the control and monitoring of the organisation’s employees that ensure the employees’ compliance with the relevant law. Once it is found that such compliance is inadequate, deaths of the innocent public can be resulted.<sup>7</sup>
31. Therefore, it is crucial to adopt a holistic approach to cover the corporate policies and systems in the proposed legislation.
32. Section 12(3)(b) of the Australian Act states that negligence may be evidenced by the fact that the prohibited conduct was substantially

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<sup>7</sup> Edwin Mujih, ‘Reform of the Law on Corporate Killing: A Toughening or Softening of the Law?’ (2008) 29 *Company Lawyer* 76-83, 78; Law Reform Commission New South Wales Report 102 (2003) - Sentencing: Corporate offenders 20.

attributable to failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

33. Above section will be adopted in defining “negligence” as it includes the fault of the corporate by looking into corporate culture and aggregating the scope of negligence. Aligning with the legislative intent, such a holistic approach can strengthen deterrence on organisations concerning its system and policies.

### ***Suggested penalties and sentencing options***

34. Currently, corporate manslaughter can only be prosecuted under the common law and is only punishable under Section 7 of the Offences against the Person Ordinance (Cap. 212) (“OAPO”). In that sense, the Court could only sentence an organisation, if convicted of corporate manslaughter under the common law, to a fine under the OAPO, as all organisations are not natural persons.
35. While fine remains the only sentencing option in this instance, it does not ensure that the malpractices and wrongdoings of the organisations can be remedied. While imposing sentences, the court shall ensure that “the protection of the public should loom as large in the mind of the court assessing sentence as do the interests of the defendant”.<sup>8</sup>
36. Therefore, this proposed legislation aims to increase the deterrent effect by enhancing the social stigma attached to the organisations convicted of corporate manslaughter and allowing the Court to impose appropriate orders on the convicted organisation.
37. With reference to the UK Act, the proposed legislation confers the court with powers to make (i) remedial orders, which require the convicted organisations to take specified steps to remedy the relevant breach of duty of care, and (ii) publicity orders, which require the convicted organisations to publicise the fact that it has been convicted for corporate manslaughter, the specified particulars of the offence and the sentence imposed.

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<sup>8</sup> *Re Applications for Review of Certain Sentences by the Attorney General* (CAAR 8, 9, 11 & 12, 11 November 1972).

38. These power conferred on the courts to issue such orders is to ensure that the offence, apart from a fine, can produce adequate deterrents for organisations from continuing their malpractices. In particulars, the publicity order is said to provide social censure, which is an important feature of criminal punishment.<sup>9</sup> Further, for organisations with strong financial resources, fine is often of limited deterrent effect, and the imposition of such orders can ensure the denunciatory aim of sentencing.

### *Procedural Issues*

39. Given the gravity of the offence, the proposed legislation can only be tried upon indictment in the Court of First Instance. Such an offence would also be included in Part III of Schedule 2 of the Magistrates' Ordinance.

40. Further, since offence of corporate manslaughter will be tried by jury, the proposed legislation would also provide factors for the jury to consider when ruling on the question of fact, which further codifies the jury direction for this offence that is rather novel in our criminal justice system.

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<sup>9</sup> Law Reform Commission New South Wales Report 102 160.