

## Death in the workplace

---

Manslaughter is a crime punishable by a maximum penalty of twenty-five years imprisonment.

There are two types of involuntary manslaughter:

- manslaughter by unlawful and dangerous act carrying with it an appreciable risk of injury,
- manslaughter by criminal negligence involving such a high risk that death or serious bodily injury would follow the act/omission of the accused so as to merit criminal punishment.

There has never been a successful prosecution of an individual for manslaughter arising from a workplace fatality<sup>1</sup>.

In evidence to a Legislative Council Standing Committee <sup>2</sup>the Director of Public Prosecutions gave evidence. He said that the DPP had considered six unsuccessful prosecutions arising out of workplace deaths. It was the level of evidence necessary to prove beyond

---

<sup>1</sup> para 12.10, NSW Legislative Council General Purpose Standing Committee No 1 [report published May 2004] (“Report 24”)

<sup>2</sup> Mr Cowdery, DPP, Evidence 15 March 2004, p 37, Report 24

reasonable doubt that prevented successful prosecutions.

Unions and family members of workers who have died in the workplace called for the creation of an “industrial manslaughter” offence.

The argument against this is that it is absurd to have a specially created crime with a lesser or different standard of proof, simply because the death occurs in the workplace. Why should more responsibility attach to a work supervisor than someone carrying out an activity elsewhere? Why, for example, more responsibility than someone driving a car? Far more people are killed in car accidents than in industrial accidents. There are many human activities that carry an inherent risk of injury to others.

### Occupational Health and Safety Act, 2000

Section 8 of the Act provides:

*(1) Employees. An employer must ensure the health, safety and welfare at work of all the employees of the employer. That duty extends (without limitation) to the following:*

*(a) ensuring that any premises controlled by*

## Death in the workplace

---

*the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,*

*(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,*

*(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,*

*(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,*

*(e) providing adequate facilities for the welfare of the employees at work.*

*(2) Others at workplace An employer must ensure that people (other than the*

*employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.*

The Hon B O'Farrell, MLA, Leader of the Opposition in the NSW State Parliament, introduced a Private Members Bill in 2007 to amend the OH&S Act so that the offence provisions are amended to include, as an element of the offence, "reasonably practicable", "reasonably necessary" or "without reasonable excuse". The bill languishes.

### **Penalties**

The offence for failing, through act or omission, to fulfil the duties in section 8, is contained in s 12 of the Act. The maximum penalty **for an individual** is \$55,000 for a first offence, and \$82,500 or 2 years imprisonment for a previous offender.

### **Manager and defences**

Section 8 is directed to the duties of an employer, but section 26 provides that "each person concerned in the management of the corporation is taken to have contravened the same provision unless the (person) satisfies the court" that:

## Death in the workplace

---

- he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

This defence would be very difficult to prove.

Under section 28 it is a defence if the person proves that:

- it was not reasonably practicable for the person to comply with the provision, or
- the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

Again, this would be very difficult to prove.

Another section to be aware of is section 32A :

### *Reckless conduct causing death at workplace by person with OHS duties*

Section 32A is an offence punishable by up to 5 years imprisonment and or a \$150,000 fine.

#### *Reckless conduct causing death at workplace by person with OHS duties*

*(1) In this section: "conduct" includes acts or omissions.*

*(2) A person:*

*(a) whose conduct causes the death of another person at any place of work, and*

*(b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct, and*

*(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,*

*is guilty of an offence.*

## Death in the workplace

---

*(3) It is a defence to any proceedings against a person for that offence if the person proves that there was a reasonable excuse for the conduct.*

*(4) For the purposes of this section:*

*(a) a person's conduct causes death if it substantially contributes to the death, and*

*(b) the death of a person is taken to have been caused at a place of work if the person is injured at the place of work but dies elsewhere as a result of the injury, and*

*(c) it does not matter that the conduct that causes death did not occur at the place of work.*

*(5) If a corporation owes a duty under Part 2 with respect to the health or safety of any person, any director or other person concerned in the management of the corporation is taken also to owe that duty for the purposes of subsection (2).*

The maximum penalty under section 32A for an individual is 5 years imprisonment and/or \$150,000 fine

Section 26 (liability of directors and managers) is specifically excluded although this does not prevent a director or manager from being prosecuted under the section.

There have been no successful prosecutions under section 32A although some are presently under consideration by WorkCover.

### **OH&S Prosecutions**

WorkCover NSW brings twice the number of prosecutions of all the other jurisdictions in Australia. Because of the reverse onus in the Act there is no presumption of innocence<sup>3</sup>.

On the basis of prosecutions to date WorkCover believes that a "manager" goes down as far as a supervisor<sup>4</sup>.

---

<sup>3</sup> Serious Injury and Death in the Workplace: [report 24] NSW Legislative Council General Purpose Stranding Committee No 1, evidence

<sup>4</sup> para 12.78, Report 24.

## Death in the workplace

---

Safety related decisions are, by definition, made at the workplace level. They are not generally made in board rooms. The board might implement a general safety policy, and might reach particular views about appropriate levels of training, supervision and so on, but the day to day decisions which result in either safe workplaces or unsafe workplaces generally are made at lower, hands-on levels<sup>5</sup>.

It is therefore logical that those most at risk of being prosecuted are middle and lower level managers.



---

<sup>5</sup> para 12.21, Report 24.