

## **Industrial Manslaughter**

### **Response to Issues Paper No.9 Criminal Liability of Organisations**

#### **Unions Tasmania**

As a matter of policy Unions Tasmania says

**“Where a worker is injured or killed in the workplace and the cause of that death is found to be a result of reckless or negligent behaviour on the part of an individual or as a result of systemic or cultural recklessness or negligence on the part of the employer it is appropriate that criminal charges be considered.**

**Noting the difficulties with charging an employer who is not an individual a new offence of industrial manslaughter or industrial bodily harm should be introduced.”** Decision of the Council of Unions Tasmania 2005

## **General Comment**

The starting proposition for Unions Tasmania is that too many Australian workers are killed or seriously injured at work. This includes both physical and mental injuries. For too long this has been considered allowable, to be written off as bad luck, as a cost of business or, in the worse cases a breach of duty of care with limited liability. A death outside the workplace or even a non work related death in the workplace has attracted the full attention of the law but attitudes to accidental death at work have been very different.

There has existed a corporate curtain behind which very highly paid managers have been able to avoid responsibility for their actions by spreading that responsibility down a chain of command that cheapens human life to being just another cost factor in the drive for profits. That corporate curtain must be lifted and accountability for decision making made a factor in the drive for safer workplaces. Concern for life should not stop at the sign on clock.

A positive first step in this matter has been flagged by The Attorney General in requiring all workplace deaths not found to be from natural causes to be the subject of a coroners inquiry.

It is recognised that culpability for deaths and injuries that occur as result of negligent or reckless behaviour cannot always be attributed to a single person, to a single decision or to a single event. Often the chain of command defines outcomes demanded from successive levels without thought to how it may be finally implemented. A decision to cut budgets by 10% at the top may become a decision to delay vital maintenance at the bottom, a decision to not fund training may become avoidance of critical safety training, an attitude of ignorance about safety at the top may become reckless indifference down the line.

In these cases negligence or recklessness may be a result of the culture of an organisation or of its systems but no one individual has identifiably caused the incident. The organisation may be guilty of causing the incident but no one part sufficiently blameworthy to accept responsibility. This is the point where the law needs to be able to recognise corporate industrial manslaughter.

The discussion paper has focussed on death or injury by wounding and has not therefore considered psychological injury. It is right to say that an injury of the mind can be more debilitating than a cut or a bruise, that the recovery may take years and the scars run just as deep.

The paper asks a number of questions about the forms of punishment. Unions Tasmania takes the broad view that punishment should fit the crime. For a corporate entity the equivalent of jail may be to shut it down for a period but that would perhaps deny an income to workers and impact in other ways undesirably. Clearly fines are appropriate and the quantum should reflect the capacity of the offending corporation to pay them. Equally the loss of capacity of an individual may affect their capacity to

contribute to their community or home. Appropriate retribution may include making good that loss to the community or family.

Unions Tasmania welcomes this paper and encourages further development of the concepts to modernise the law to deal with them.

### **Psychological Injury**

Under the definition of wounding needed to support grievous bodily harm (*Para 1.1.6*) the concept is restricted to physical injury.

It is submitted that there are situations where the result of workplace behaviours can create a mental injury of greater severity that cuts and bruises. Psychological injuries can be complex in treatment, lengthy in recovery and every bit as damaging as a physical injury.

Two clear possible causes are bullying and work overload. Both situations can be either individual or have organisational components.

Bullying has often been part of a corporate culture to teach newcomers the pecking order. It may also be the individual targeting of someone, usually a subordinate, by another but it rare if the events are noted and observed by others in the workplace.

Work overload can be a great stressor in the workplace and although normally associated with other factors can arise from deliberate and unreasonable demands.

While currently outside the scope of this discussion paper it is submitted that this is an issue is worthy of consideration.

### **Organisational Responsibility**

One of the clear difficulties in this process is the shift in law from individual responsibility to collective responsibility.

The process of investigating the actions of a person to establish whether that person has acted negligently or recklessly will be relatively simple when compared to the process for investigating organisational behaviour, actions or culture.

For example we may have the following steps in the chain of command

- The Sydney Boardroom notes falling profits and decides that all non salary budgets must be cut by 15%
- CEO issues an edict that all non salary budgets must be cut by ten percent and directs line managers to implement the decision
- The Tasmanian manager receives the edict and advises the operational areas to comply

- An operational area advises that it can't be done without compromising safety as the only significant expenditure that is available is annual maintenance on a key machine
- The Tasmanian Manager reluctantly tells the line manager it can't be done without compromising safety
- The line manager has thought to her own performance bonus and knows that she has previously lost fights over safety standards with the CEO. She also knows that the Board and hence the CEO has never treated OHS as a priority matter
- The line manager finally tells the Tasmanian manager to just do it I don't care how
- The Tasmanian manager finally bows to the culture of the organisation of downgrading safety and obedience in the command structure and gives that same message to the operational area supervisor
- The operational supervisor protests and considers quitting but doesn't and defers the crucial maintenance to the next financial year
- The machine fails and the operator is severely injured as a result

Every step in the chain of command has contributed to the safety failure through an organisational culture that ultimately has put profit above safety. An element of recklessness toward safety is present and there is clear negligence or worse in allowing an unsafe machine to remain in service.

The investigation to determine the contributions through the organisation would be complex as would be the prosecution. It may be easy to say the operational supervisor made the key decisions and therefore is the guilty party but to do so is to overlook the contributions to that decision all the way down the chain of command. Each of the contributions on its own may be insufficient to warrant individual prosecution but collectively they have produced the result that may be.

The tendency will of course be to blame the final and lowest level decision maker but that would be unfair. For that reason there is a need for well crafted provisions that can define and respond to the series of contributions and to the collective outcome.

## Discussion Paper Questions

### Q1

Yes

What is important in this process is to recognise that consideration is being had to applying provisions to, effectively, a new area. The cases that fall into it will in all probability be few and far between. Indeed if the provisions have the desired deterrent affect they may never be used. For that reason the provisions need to have maximum clarity and the clearest possible definition.

In general if there is a work related death that is caused by negligence or recklessness by an individual that individual should be liable to criminal prosecution. Where that recklessness or negligence is spread over an organisation so that no one individual is liable then the concept of organisational liability should apply.

It is submitted that amending existing provisions that may be somewhat obfuscated and still dependent on judicial decision for clarity will not achieve that aim. Therefore a carefully defined concept of organisational industrial manslaughter or organisational industrial grievous bodily harm is worthy of being developed.

### Q2

A shortcoming with the above approach is that creating an offence of industrial manslaughter as distinct to ordinary manslaughter may have the affect of somehow making it seem a lesser crime.

If reform of the identification doctrine can provide the clarity and clear definition needed to establish that management processes and decision making have created collective guilt under current provisions it may be preferable.

### Q3

- (a) There is no strong argument for excluding any organisation from the provisions.
- (b) The Canadian model appears all inclusive. The inclusion of the "less formal structures" would seem to run the risk of making people liable for decisions they may not have been an active party to but without the protection of limited liability. This could have unintended and unfair outcomes.
- (c) There is no strong argument for excluding the Crown from these provisions particularly if resultant penalties extend to making good losses to family or community.
- (d) There doesn't seem to be any strong argument for the exclusion. Naming in a public inquiry is not a feared occurrence.

**Q4**

- (a) If the concept of individual culpability and corporate culpability has a gap in it a senior office category would be needed.
- (b) Depending on the gap but the elements would include an area of responsibility that has been neglected or deliberately downgraded or under funded so as to create an unsafe work situation.
- (c) The issue of volunteers is complex.

**Q5**

- (a) Yes
- (b) Yes
- (c) Maximum penalties should be set as a percentage of the business turnover so that bigger businesses are fined proportionally to smaller ones
- (d) No

**Q6**

- (a) Unions Tasmania has not formed a view as to the best vehicle for such legislation ie Crimes Act or WHSA. Either way the investigation should be a police matter not an inspectorate matter.
- (b) Ditto
- (c) Ditto

**Q7**

- (a) Yes as described
- (b) No comment
- (c) Yes could be
- (d) Any person knowing of or responsible for decision making in an area or for negligent or reckless behaviour that has failed to exercise their duty of care in that area.

**Q8**

- (a) Unions Tasmania has a preference that these matters not be in the WHSA but will happily accept the process that most effectively affects the results needed.
- (b) Yes

**Q9**

- (a) If it is sufficiently large in proportion to the size of the business and that may include consideration of company structure, parent corporations etc
- (b) Yes
- (c) Audited annual accounts exist for all corporations but consideration should be given to the entire corporate structure so that small offshoot and subsidiary companies are seen as part of the whole.

**Q10**

Removing a companies source of income may be counter productive but should be an option where effective.

**Q11**

As a last resort measure this may be appropriate but in the main dismantling the corporate structure may not prevent the people who caused the problem simply re-emerging in another guise.

**Q12**

YES

**Q13**

(a) Yes

(b) Broad provisions allowing for specific conditions to be imposed may be more effective. This should include being placed under close supervision by the Workcover Board or Workplace Standards at company expense.

(c) Yes

**Q14**

Yes

**Q15**

Shareholders will be impacted by fines as profit margins will fall. An equity fine is spreading the impact beyond those directly responsible but may be appropriate in some circumstances.

**Q16**

Yes

**Q17**

Yes

**Q18**

Yes, any of the above. Particularly in terms of community service orders where the outcomes of negligence or recklessness have an impact in a community ie someone is prevented from some public volunteer duty such as coaching a team or mowing the park or what ever. In those cases an order may repair the loss.