SAT:OS

21 September 2005

Professor Kate Warner
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Dear Professor Warner

Thank you for your correspondence to the Commissioner of Police dated 15 June 2005 regarding the issues paper, *Criminal Liability of Organizations*.

I have had the paper distributed widely within Tasmania Police, with the responses generally comparable and largely in favour of reform.

However, as the views are varied and many of the comments extensive, rather than provide a succinct overview which may not accurately encapsulate the detail, I have enclosed copies and extracts of the various returns.

I thank you for the opportunity to comment on the issues paper and trust this response is of assistance.

Yours sincerely

S A TILYARD
Assistant Commissioner of Police
Crime and Operations

Attachment

Tasmania Law Reform Institute

Issues Paper No 9 – Criminal Liability of Organizations

Collated Responses from Tasmania Police

Response

Background

This document provides a summary of the content and key issues raised in the Tasmania Law Reform Institute's Issues Paper on the Criminal Liability of Organisations.

The Issues Paper is concerned with the criminal law that applies when corporations and other entities wrongfully cause the death or injury of another person. This is most likely to be relevant to workplace deaths and injuries, or public disasters (e.g. gas explosion, ferry sinking, train crash, infrastructure collapse or chemical leak).

While the law already allows corporations to be found guilty of criminal offences, difficulties arise when considering traditional crimes like manslaughter or grievous bodily harm which have evolved to deal with the actions of moving, thinking, animate people rather than corporations. Generally, people are guilty of these crimes because they 'do' the required act with the requisite 'state of mind'. However, corporations do not physically 'do' anything and they do not have any 'state of mind'. The common law has tried to address this problem by attributing to the company the actions and state of mind of the person (or people) who can be said to be the 'controlling mind' of the company. This is known as the identification doctrine.

The Applicability of the Criminal Law to Corporations for Traditional Crimes

There are two issues which may restrict the applicability of the criminal law to corporations for traditional crimes such as manslaughter or grievous bodily harm. These issues relate to the definition of homicide in the *Tasmanian Criminal Code*, and the currently accepted method of attributing criminal responsibility to organisations, the identification doctrine.

The Definition of Homicide in the Criminal Code

It is possible that the definition of homicide in the Criminal Code may prevent an organisation being guilty of murder or manslaughter in Tasmania. Homicide is defined in section 153(1) as 'the killing of a human being by another'. Section 35(1) of the *Acts Interpretation Act* 1931 may overcome this

problem as it provides that 'Every provision of an Act relating to offences punishable upon indictment or upon summary conviction shall be construed to apply to bodies corporate as well as to individual persons'. However, this has not been the subject of judicial consideration in Tasmania.

The Identification Doctrine

Even if the definition of homicide in the Criminal Code was amended, difficulties remain with the currently accepted method of attributing criminal responsibility to organisations: the identification doctrine. According to the identification doctrine, a company can only be convicted of an offence when a sufficiently senior officer, who is 'acting as the company' is found guilty of an offence. While the question of who is a sufficiently senior officer depends on the facts of the case, generally only company directors and senior managers are considered to be sufficiently senior for the purposes of the identification doctrine. This excludes many people who direct the day-to-day operations of corporations. Arguably the doctrine does not reflect the flattened management structures of modern corporations where decisions are by necessity often taken at the branch, unit or middle management level.

The only successful prosecutions of corporations for manslaughter in Australia and the UK have been against small organisations to which the identification doctrine was readily applicable. In Tasmania, while there have been successful criminal prosecutions against organisations responsible for breaches of the *Workplace Health and Safety Act* 1995, there has never been a criminal prosecution for a traditional crime in the Criminal Code brought against an organisation responsible for the death or serious injury of another. Thus, no Tasmanian case has considered whether the identification doctrine applies to crimes in the Criminal Code. However, the Tasmanian Law Reform Institute (TLRI) considers it likely that the Tasmanian courts would apply the identification doctrine if a corporation was charged with a crime in the Criminal Code.

The TLRI argues that the identification doctrine is ineffective, resulting in larger organisations being essentially free from all but strict criminal liability (i.e. crimes where no mental state, or guilty mind, is required). It is suggested that reforming this area of the law could improve community confidence in the ability of the criminal justice system to adequately prosecute and punish organisations that wrongfully cause deaths or injuries, and may also improve attitudes towards workplace safety. The Institute is therefore of the preliminary view that this area of the law should be reformed.

It is also pointed out in the Issues Paper that currently in Tasmania only natural persons and bodies corporate can be held liable for crimes in the Criminal Code. The TLRI considers that criminal liability should be imposed

on *all* organisations, including those which are currently exempt from the criminal law, such as partnerships, government departments and other types of organisational structures.

The Need for Reform

The Institute points out that wrongfully causing the death or serious injury of another is a firmly established basis for criminal liability and that this protects the right to life and physical integrity. The Institute argues that where life is wrongfully taken, it is appropriate that traditional criminal liability be found so that the criminal law can fulfill its functions of denunciation, punishment, deterrence and rehabilitation. The Institute suggests that this also promotes public confidence in the criminal justice system.

Given the significant harm organisations can cause, it does not seem appropriate for them to continue to remain beyond the reach of the criminal law. Arguably, the existing workplace health and safety offences are inadequate for dealing with cases where an organisation wrongfully causes the death or serious injury of an employee or other person at the organisation's workplace. It is doubtful whether the current maximum penalty of $150,000 for breach of duty is a significant deterrent to an organisation. The traditional labeling of such offences as 'regulatory' or 'quasi-criminal' offences may also diminish their deterrent effect.

Options for Reform

The Issues Paper discusses three types of reform which have been adopted or proposed in other jurisdictions to address the problems associated with the identification doctrine:

1) introducing a specific 'industrial manslaughter' offence to the Criminal Code;
2) introducing reforms to the *Workplace Health and Safety Act*; and
3) introducing specialised principles of criminal responsibility for organisations.

Option 1 – Introducing a specific 'industrial manslaughter' offence to the Code

The first option for reform discussed in the Issues Paper is to introduce a specific 'corporate manslaughter' provision into the Tasmania Criminal Code. This would be a crime that would only apply to 'corporations' (or 'organisations' or 'employers', depending on how the offence was defined). The ACT, Victoria and the UK have all undertaken or proposed this type of reform. This option could also potentially involve the introduction of related

specific offences (e.g. specific 'senior officer' offences and negligently causing serious injury).

Option 2 – Reforming the Workplace Health and Safety Act (WHSA)

The second option for reform is to introduce some or all of the following reforms to the Workplace Health and Safety Act (WHSA):

- manslaughter and grievous bodily harm provisions;
- breach of duty causing death or grievous bodily harm provisions;
- higher maximum penalties;
- a broader range of penalties; and
- senior officer liability.

The Introduction of Industrial Manslaughter Offences

The Institute is of the preliminary view that the introduction of specific 'industrial manslaughter' offences to the Workplace Health and Safety Act (WHSA) would fail to challenge the current perception that workplace health and safety deaths and injuries are somehow less serious or less blameworthy than other deaths and injuries. The Institute states that another reason why this option is not preferred is that it is inappropriately limited to the occurrence of *workplace* deaths and injuries.

Breach of Duty Causing Death or Grievous Bodily Harm

Another option (which could be implemented independently or in conjunction with the other reform options outlined in the Issues Paper) is to introduce new offences to the WHSA which are centred around breaching a duty under the WHSA, but which also require that the breach of duty causes some harm.

The Institute notes that if such offences were strict liability (i.e. no mental element is required to be proved) they could appropriately cover the current gap between serious offences such as manslaughter or grievous bodily harm and the less serious offence of breach of duty under the WHSA (section 9). It is suggested that having a wider variety of offences may mean that charges (and sentences) can more appropriately reflect the gravity of the offence.

Higher Maximum Penalties

When a worker is killed or injured at work, employers are sometimes prosecuted under the WHSA for offences such as failing to provide a safe workplace (section 9). To date, sentences imposed for breaches of the WHSA, even where those breaches resulted in serious injury or death, have been low, the highest being $40,000. The maximum penalty under the WHSA for a corporation is 1,500 penalty units ($150,000), and for a natural person is 500 penalty units ($50,000).

The Institute observes that the maximum penalty available for the offence is intended to reflect the seriousness with which the legislature views the prohibited conduct. It is suggested that this relatively low maximum does not indicate to the courts or to the public that breaches of the Act are 'heinous' crimes.

A Broader Range of Sentencing Options

The Institute suggests that it may be desirable to introduce a broader range of sentencing options for offences under the WHSA, tailored with the organisational offender in mind.

Senior Officer Liability

As stated above, the Institute has expressed the preliminary view that it would not be appropriate to introduce a 'senior officer offence' to the Code, and that the WHSA may be a more appropriate location for any such offence. The primary reason for this view is that when considering very serious traditional crimes, such as manslaughter or causing grievous bodily harm, the law should apply to all people.

Option 3 - Introducing specialised principles of criminal responsibility for organisations

The third option for reform is to introduce provisions into the criminal responsibility chapter of the Criminal Code setting out how criminal responsibility (including physical and mental elements) can be proved when dealing with organisations. This change would recognise that organisations do not have minds or bodies and do not 'think' or 'act' in the way that natural people do. Thus, when seeking to prove that an organisation has a certain 'state of mind', it would be necessary to look at different evidence from that generally used when establishing the state of mind of a natural person. Because this reform would be in the criminal responsibility chapter of the Code, it would apply no matter what crime the organisation was charged with.

This type of reform has been undertaken in Australia through the adoption of Part 2.5 of the Model Criminal Code by the Commonwealth and the ACT.

Canada has also undertaken this type of reform, but by a different approach to that used in the Australian Model Criminal Code.

Part 2.5 of the Model Criminal Code makes specific provision for how both the physical elements and the fault element (mental element) can be proven when dealing with a corporation – how they can be *attributed* to the corporation. An important element of this is the ability to aggregate the conduct of a company's employees, so that the conduct of more than one employee can be attributed to the company when assessing the company's liability.

According to the Institute, introducing this type of reform to the criminal responsibility chapter of the Criminal Code would address the problems with the identification doctrine by introducing a modern and comprehensive way of proving that organisations are criminally responsible for crimes. The Institute also states that this option for reform has the attraction of fairness and simplicity. It would avoid the need to introduce new criminal laws (like 'industrial manslaughter'), instead the *same* law would apply to all 'people', there would simply be a different way of proving the physical and mental elements when dealing with organisations. Another attraction of this type of reform is that it would apply no matter what crime the organisation was charged with.

Recommended Option

Based on the Institute's assessment of each option, it is recommended that the Department express a preference for option 3 – introducing specialised principles for criminal responsibility for organisations.

This option is preferred because it would avoid the need to introduce new criminal laws, and because it would apply no matter what crime the organisation was charged with.

It is also recommended that new offences be introduced to the *Workplace Health and Safety Act* (WHSA) centred around breaching a duty under the WHSA, but which also require that the breach of duty causes some harm. These offences should be strict liability offences. The introduction of these offences would cover the gap between serious offences such as manslaughter or grievous bodily harm and the less serious offence of breach of duty under the WHSA.

In principle, the Department of Police and Public Safety is supportive of the proposal to increase the maximum penalties for breaches of the WHSA.

Issues

If the law is amended to enable organisations to be charged with offences under the Criminal Code, this will have implications for Tasmania Police in relation to the investigation and prosecution of workplace deaths and injuries. In some circumstances the investigation of these offences could be quite onerous, because it may be necessary to investigate the entire corporate structure of the organisation to determine whether the relevant 'fault elements' of the offence are satisfied.

Sentencing Options

The Issues Paper argues that the range of sentencing options available for sentencing organisations in Tasmania should be expanded to allow the aims of punishment such as denunciation and deterrence to be better met.

It is pointed out that at the Commonwealth level, and in various other jurisdictions, a broader range of sentencing options fashioned specifically for organisations is available.

Two particular issues associated with the sentencing of organisations include 'spill-over' and the 'deterrence trap'.

'Spill-over' occurs when the punishment imposed on one person has an effect on other people. According to the Issues Paper, 'spill-over' is inevitable when punishing an organisation because the legal person that is the organisation is made up of other 'real' people. Thus, a punishment imposed on an organisation may affect shareholders, employees, creditors, consumers and so on.

The 'deterrence trap' is 'the situation where the only way to make it rational to comply with the law is to set penalties so high as to jeopardise the economic viability of corporations'. Whereas a minimal sanction imposed upon an individual offender (such as a fine or community service order) can be assured through the threat of imprisonment, the same assurance is not possible against corporations which cannot be imprisoned. Thus, if a corporation is heavily fined and becomes insolvent, the fine may not be recovered, and possibly few of the purposes of punishment will be met (particularly if the company is able to rise again as a phoenix company).

Existing Sentencing Options Which Could Apply to Corporations

The following existing sentencing options could be applied to corporations:

- Fines - no limit is placed on the amount of a fine imposed for a crime in the Criminal Code;

- Community Service Orders - the Institute observes that community service orders can be tailored to an offender's area of expertise which may make them a particularly attractive sentencing option when dealing with organisations. Another positive feature is that they reduce possibly unwarranted 'spill-over' effects;
- Probation Orders - it is suggested that if probation orders were to be made available when sentencing organisations it may also be desirable to introduce conditions tailored to organisations. Advantages of probation orders are that they can be tailored to the individual case and could largely avoid 'spill-over'. A possible disadvantage is that the intervention could 'stifle innovation and reduce competitiveness'. They could also be costly for the state although this could be off-set to some extent by imposing costs on the offending corporation;
- Adjournment with Conditions; and
- Conviction.

Additional Sentencing Options

The Institute identifies the following additional sentencing options which could be applied to corporations:

- Disqualification - disqualification prevents an organisation from carrying out certain activities or denies it the right to enter into certain contracts. The New South Wales Law Reform Commission has recommended that disqualification orders should only be invoked in extreme cases. There are already provisions existing in Tasmanian legislation dealing with disqualification, though not as a sentencing remedy [e.g. 34(2) of the *Fair Trading Act* 1990];
- Dissolution - dissolution or deregistration is applied in instances where 'it would remove from the community an organisation which has fragrantly violated the rules of society'. The Institute states that there are substantial 'spill-over' effects involved in dissolving an organisation and consequently the sanction should only apply to the most serious cases of improper conduct. One potential problem with dissolution is that it does not necessarily ensure incapacitation as the members of the dissolved organisation can create a new 'phoenix' organisation, i.e. an organisation with a new name that carries on the same activities. Another issue is that legislation giving courts the power to sentence a corporation by dissolution has the potential to be inconsistent with Commonwealth corporations law;
- Adverse Publicity Orders – the purpose of these orders is to force the convicted offender to inform others of the offence committed. This could mean the taking out (at the organisation's expense) of

'advertisements' in newspapers or the writing of letters to shareholders or consumers of the convicted corporation's product. The Institute notes that an adverse publicity order will usually be in addition to any other sanction imposed by the court. A potential problem with these orders is the unanticipated consequences which can flow from the order and the possible spill-over effect. Under the *Fair Trading Act 1990* (Tas) the court can make an order which is similar to an adverse publicity order but is not connected with sentencing;

- The Equity Fine – this could involve the corporation being required to authorise and issue a certain number of shares to a crime victim compensation fund. The NSW Law Reform Commission did not recommend the introduction of equity fines in that state, and the Institute is of a similar view;
- Punitive Injunctions – a punitive injunction is an order which requires the convicted corporate offender to introduce specific court-ordered internal-controls, at the risk of further punishment for failure to do so. The Institute considers that as long as an enforceable undertaking is one of a number of possible sanctions there is no reason why an enforceable undertaking could not be imposed along with sanctions which have a punitive element;
- Compulsory Compensation Orders – the Institute considers that it may be desirable to consider the introduction of these orders in relation to organisations found guilty of a crime in the Code.

Recommendation

The following sentencing options are recommended in addition to the existing options:

- Disqualification;
- Punitive Injunctions;
- Adverse Publicity Orders; and
- Compulsory Compensation Orders.

Sentencing under the Workplace Health and Safety Act (WHSA)

The Institute suggests that it may be necessary to expand the sentencing options currently available when sentencing an organisation for an offence against the WHSA.

In South Australia there is a Bill currently before the Parliament which proposes additional non-monetary penalties for breaches under the *Occupational Health, Safety and Welfare Act 1986* (SA).

Recommendation

It is recommended that the additional non-monetary penalties specified in the SA Bill be considered for inclusion in the WHSA.

Response

Present legislation does not cover organisations, especially regarding charges of manslaughter or grievous bodily harm, as manslaughter requires an act which is defined as 'the killing of a human being by another', thus apparently excluding organisations.

There is, at law, no doubt that organisations have a 'duty of care' to their employees and as such must provide a safe working environment for all employees.

In the event that death or serious injury occurs in a workplace, and the cause of the death or serious injury (after investigation) is found to be due to unsafe or inadequately organisational standards or policy, the 'controlling mind' of the organisation should be held to account for its policy or work practices, as it is presently in the civil jurisdiction.

To bring a successful negligence action, the present civil liability for organisations requires that the plaintiff shows:

- that the organisation owed a duty or standard of care to the plaintiff;
- that the duty or standard of care was breached; and
- that the breach resulted in damages suffered by the plaintiff.

As it is clearly accepted that organisations have a clear civil liability in the event of damages suffered by an employee, there can be little doubt that organisations should have a criminal liability in the event that the identified negligence amounts to criminal misconduct.

Once criminal misconduct has been identified in the organisation's work practices or procedures, the difficulty becomes identifying the individuals who encompass the 'controlling mind' of the organisation.

The identification doctrine should be reformed to clearly identify what individuals or positions constitute the 'controlling mind' of an organisation to allow for criminal charges to be brought against organisations.

A definition of organisation would also be necessary to ensure that creative corporate lawyers, in developing new structures, do not do so with a view to removing any criminal liability for the 'controlling mind' of the structure. The Canadian definition of 'organisation', as at page 22 of the paper, was developed for this purpose and may be appropriate to the Tasmanian perspective.

In the event that the 'identification doctrine' is reformed, the introduction of a specific crime of 'industrial manslaughter', and related specific offences, would be the preferred option.

Response

Of the three types of reforms discussed in the issues paper the most favourable would be reforms to the Workplace Health and Safety Act 1995, instead of a specific "industrial manslaughter" offence in the Criminal Code.

Workplace Standards Tasmania is responsible for administering much of the legislation that regulates business in Tasmania. They currently have the resources, infrastructure and expertise to carry out investigations where serious injury or death has been caused on an industrial site.

There would be an impact on the resources of Tasmania Police to be involved in the investigations of industrial accidents.

Response

<u>Question 1</u>

The case for a definition of homicide in the Criminal Code so that an organisation can be criminally responsible for homicide is well-argued. It is more appropriate to amend or create a new definition within the Code than to create a new offence within any workplace safety legislation to reinforce the seriousness of negligent deaths in a workplace.

Question 2

The method of attributing criminal liability to organisations (the identification doctrine) should be reformed to ensure that an organisation can be deemed criminally liable for certain acts or omissions. The paper highlights that liability is often readily attributable to an individual or group of individuals, but not to an organisation. It is appropriate to reform criminal liability to encompass both individuals and organisations for certain acts or omissions, or sustained patterns of behaviour.

Question 3

Reforms should apply to all organisations with as broad a term as possible. In the current climate, any organisation which is required to take out any form of public liability insurance/workers compensation or such undertaking would encompass most organisations to which this legislative reform may apply. This would then flow on to include government bodies.

Question 4

To make specific 'senior officer' type offences would involve the necessity to identify all possible organisations to which the legislative reform may apply and to require them to specifically define the order of hierarchy and responsibility. This is impractical in contemporary management practices due to the fluid nature of most organisations. Even in an hierarchical structure such as Tasmania Police, the sphere of responsibility shifts according to task as well as location. Such offences could inhibit individuals from applying for promotion or positions of increased responsibility. Offences should, as with criminal liability of an individual, be judged on the circumstances and merits of each particular case.

Question 5

I do not support the introduction of new strict liability offences into any workplace safety legislation. Current offences and penalties exist. This issues paper is written around the premise of liability and deterrence for serious offences attracting to an organisation and any detraction from that diminishes the aims of the paper.

Question 6

There was considerable argument within the issues paper concerning the inadequacy of penalties under workplace safety legislation when serious injury or death resulted in the workplace. If specific offences were created under the Criminal Code to deal with this, the workplace safety legislation would not require penalties to be increased. If penalties were to be amended to be indictable or

punishable by imprisonment, I would prefer to see a mechanism similar to Section 115 of the Firearms Act 1996 where an offence of assault committed with a firearm is indictable under the Criminal Code as an aggravated assault.

Question 7

The question as to whether Section 53 of the Workplace Health and Safety Act 1995 should be amended has been addressed, I feel, by the fact that no-one has ever been charged with the offence because of the difficulty with the section itself. Should suitable definitions be drafted for homicide and organisation, then bodies corporate should be included as part of those reforms.

Question 8

I would support the third broad type of reform, specialised principles of criminal responsibility for organisations. A specific 'industrial manslaughter' offence, or reforms to workplace safety legislation do not create a sufficient degree of seriousness to such deaths or injuries within a workplace where an organisational responsibility would apply.

I would support reforms to workplace safety legislation were manslaughter and grievous bodily harm provisions linked to the Criminal Code in the same manner as aggravated assault under the Firearms Act 1996, along with the addition of breach of duty causing death or grievous bodily harm provisions within the Workplace Heath and Safety Act 1995 in the same manner as causing death by driving under the Traffic Act 1925.

Questions 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

These questions all relate to sentencing options for conviction relating to death or serious injury where an organisation is found criminally liable. I personally believe that the range of options discussed in this paper could all be included to provide an adjudicator with the most appropriate means of sentencing according to the circumstances of the death or injury, as currently available with sentencing options under the Code. There are additional options discussed in this paper which specifically apply to the activities of the particular organisation and which would be equally as effective as more traditionally punitive options. As discussed in the paper, monetary fines are not adequate in many instances where reform, education and public awareness are more likely to be effective and beneficial to the workplace and the public.

Response

Question 1: Should the definition of homicide in the Code be amended so that an organisation can be criminally responsible for homicide?

No.

The criminal acts of homicide and GBH require *actus reus* and *mens rea*, neither of which can be fairly attributed to an organisation. The actions of individuals involved in these criminal acts are already adequately proscribed in the Criminal Code. To the extent that Directors of an organisation are responsible they are liable under s9 & s53 of the *Workplace Health and Safety Act 1995* (note proposed reforms to s53 under question 7).

Penalties imposed on organisations will necessarily fall upon innocent third parties (shareholders, employees, creditors and their employees, consumers).

Civil compensation to victims is sufficient to ensure that shareholders do not profit from criminal activity of company directors.

Question 2: Should the method of attributing criminal liability to organisations (the identification doctrine) be reformed?

No.

The identification doctrine blurs the distinction between the organisation and its director(s) as separate legal entities. Further 'reform' of this doctrine would further blur this distinction and is undesirable.

Question3:

a) *Should any reforms apply to all 'organisations'?*
b) *Should the term 'organisation' be defined broadly, in line with Canadian reforms?*
c) *Would it be appropriate/necessary to implement any of the recommendations of the VLRC in relation to liability of the Crown?*
d) *Do you favour an exception like that in the UK draft bill relating to things done 'in the exercise of an exclusively public function'?*

See answers to questions (1) & (2).

Question 4: Should a specific senior officer type offence be introduced to the Code?

The view of the Institute is supported; a specific senior officer offence should not be introduced into the *Criminal Code*.

Question 5

a) *Would you support the introduction of two new strict liability offences in the WHSA: breach of duty causing death, and breach of duty causing GBH?*

   No.

   The reasoning of the Institute that it opposes the introduction of 'industrial manslaughter' offences into the *WHSA 1995* because it "would fail to challenge the current perception that workplace deaths and injuries are somehow less serious or less blameworthy than other deaths and injuries" is *not* supported: the average member of the public is unaware of the Act in which these offences reside.

   Rather than following the reasoning of the Institute, the proposition is opposed because existing *WHSA 1995* offences under s9 are sufficient.

b) *Should such offences be indictable?*

c) *If not, what should the maximum penalty for the offences be?*

d) *Or, do you prefer the Queensland approach of introducing different maximum penalties depending on the result of the breach?*

   N/A. See answer to (a).

Question 6:

a) *Should maximum penalties under the WHSA be increased?*

   While some reform to penalties is proposed (see answer to question 18), the financial penalties should not be increased. These penalties would be suffered by innocent third parties (ie shareholders, employees, creditors and consumers).

b) *If so what should the maximum be?*

   N/A

c) *Should any offences under the WHSA be indictable or punishable by imprisonment?*

No. If a person has some personal responsibility for the crime they should be able to be charged as an individual.

Question 7:

a) *Should section 53 of the WHSA be reformed?*

Yes

b) *Should the reverse onus of proof be removed?*

Yes

c) *Should reform be based on section 144 of the Victorian Occupational Health and Safety Act 2004?*

In the absence of other options the Victorian provision appears preferable to the Tasmanian provision.

d) *To whom should the offence apply?*

As per s5 of Victorian act.

Question 8

a) *Which of the three broad types of reform do you prefer:*

1. a specific 'industrial manslaughter' offence to the Code;
2. reforms to the WHSA; or
3. specialised principles of criminal responsibility for organizations?

Reforms should be limited to those proposed under question 7.

b) *If you prefer the first or third types of reform, would you also support one or more of the following reforms to the WHSA?*

- manslaughter and grievous bodily harm provisions
- breach of duty causing death or grievous bodily harm provisions
- higher maximum penalties
- senior officer liability

N/A

Question 9

a) Do you think that a fine is likely be an effective and/or appropriate punishment in most cases of organizations wrongfully causing death or injury?

No. See answer to question 1.

b) When imposing a fine on an organization, should courts be required to impose a fine in proportion to the organization's size, revenue and assets?

N/A

c) If so, how should information about these matters be established by courts?

N/A

Question 10: Should disqualification orders be an additional sentencing option?

N/A – see answers above

Question 11: Should dissolution of a corporation be an additional sentencing option?

N/A – see answers above. The fact that this is an option underlines the inequity of penalties which have severe consequences for innocent third parties.

Question 12: Should community service orders be a sentencing option for organizations?

N/A – see answers above.

Question 13

(a) Should the imposition of a probation order be an additional sentencing option for organizations?

If so,

(b) Should legislation list organizational specific conditions?

(c) Should a section based on section 732.1(3.2) of the Canadian Code be included?

Probation orders could be included as a sentencing option for offences under s9 of the *WHSA 1995*. The Canadian Code addresses issues that would be best left to a civil action but is not opposed.

Question 14: Should sentencing courts be able to impose adverse publicity orders on organizations?

No.

Question 15: Should equity fines be an additional sentencing option?

No. See above.

Question 16

(a) Should the imposition of a punitive injunction be an additional sentencing option?

(b) If so, on what model should it be based?

Punitive injunctions could be made a sentencing option for offences under s53 of the *WHSA 1995*.

Question 17: Should the Sentencing Act *require the sentencing judge to make a compensation order where an organization is found guilty of a crime in the Code?*

The matter of compensation is best left to civil proceedings but this option is not opposed.

Question 18

(a) Do you think that the range of sentencing options currently available when sentencing an organization for an offence against the Workplace Health and Safety Act should be expanded?

(b) If so, what additional sentencing options do you think should be available?

Yes. See answers to 13, 16 & 17 and penalties under s60A Occupational Health, Safety and Welfare (SafeWork SA) Bill 2004.

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