

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

**Criminal Liability of Organizations**

FINAL REPORT NO 9

APRIL 2007



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## About this report

The publication of this final report is made following consultation with the public and participants in the criminal justice system. The consultation was performed by the release of an Issues Paper on this topic in June 2005. The Issues Paper discussed reforming the law in relation to the criminal liability of organizations, particularly when they wrongfully cause the death or injury of a person.

The release of the Issues Paper was reported in the media, particularly on the ABC's Tasmanian current affairs program *Stateline* (17 June) and in Hobart's *Mercury* newspaper.<sup>1</sup> Responses to the Issues Paper were received from:

Australian Bankers' Association  
Tasmanian Chamber of Commerce and Industry  
Australian Mines and Metals Association  
Tasmanian Minerals Council Limited  
Housing Industry Association  
Australian Finance Conference and Australian Equipment Lessors Association  
Tasmanian Automobile Chamber of Commerce  
Australian Metal Workers Union  
Mr John O'Meara  
Dr Erica Roberts  
Unions Tasmania  
Tasmania Police (5 responses from individual officers)  
Recruitment and Consulting Services Association  
Director of Public Prosecutions

The topic for this law reform project was proposed by Benedict Bartl.

## Acknowledgments

This final report was prepared by Jenny Rudolf, Rebecca Bradfield and Benedict Bartl under the direction of the Board.

The Institute would like to acknowledge and thank the following people for their assistance with this project:

Dr Julia Davis (University of Tasmania), for her comments and suggestions on the paper as a whole, and in particular for her much appreciated input to Parts 1, 2 and 3 of the paper.

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Dr Jonathan Clough (Monash University), for his thoughts and advice on this issue generally.

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<sup>1</sup> *The Mercury* (Hobart) 'Call for shake-up of law on manslaughter' 18 June 2005, 11.

## Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

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# Executive Summary

This report considers the criminal liability of organizations. It considers the broad issue of the attribution of criminal responsibility to organizations, rather than focussing on the laws affecting workplaces and employees. However, the report is also concerned with the criminal law that applies when corporations and other entities wrongfully cause the death or serious injury of a natural person. This is most likely to be relevant to workplace deaths and injuries or ‘public disasters’ (for example a gas explosion or a ferry sinking).<sup>2</sup> The law already allows corporations to be found guilty of criminal offences, however 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. One issue in Tasmania is that manslaughter requires a homicide, which is defined as ‘the killing of a human being by another’, thus apparently excluding organizations. A broader issue is the method of attributing criminal liability to organizations given that they do not physically ‘do’ anything and do not have any ‘state of mind’. The common law has tried to circumvent this 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. However, the practices of modern corporate decision making rarely fall within the doctrine, particularly in larger corporations, where decisions are by necessity taken at the branch, unit or middle management level.

The difficulties with the identification doctrine indicate a need to reform this area of law. Reform has already taken place on a federal level in Australia and Canada as well as in the Australian Capital Territory and the Northern Territory. A number of other jurisdictions including the United Kingdom, Victoria, South Australia, Queensland and New South Wales have also considered reform, or are in the process of doing so. In the Issues Paper, three different types of reform that have been adopted or proposed in other jurisdictions were discussed –

- **Introducing a specific ‘industrial manslaughter’ offence to the Code:** This option has been considered by a number of jurisdictions, with the ACT becoming the first to implement the reform in 2004. The introduction of related specific offences (negligently causing serious injury and specific ‘senior officer’ offences) is also discussed.
- **Introducing reforms to the *Workplace Health and Safety Act 1995*:** This could include introducing:
  - manslaughter and grievous bodily harm provisions;
  - breach of duty causing death or grievous bodily harm provisions;
  - higher maximum penalties;
  - a broader range of penalties;
  - senior officer liability (in an effort to encourage organizational compliance).
- **Introducing specialised principles of criminal responsibility for organizations:** This option would involve amending the criminal responsibility chapter of the Criminal Code, so that it sets out how physical elements and mental elements can be proved when dealing with an organization.

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<sup>2</sup> Other examples are infrastructure collapses, train crashes or chemical leaks. The most infamous example being the 1984 chemical leak from the Union Carbide plant in Bhopal, India that killed at least 3800 people and seriously injured tens of thousands of others. A more recent example was the death of four Australians when a pedestrian bridge collapsed at the Maccabiah Games in 1997. The public commission which followed the collapse found that the incident was caused by a ‘chain of failures involving the bridge’s planning and construction’ while the Australian Ambassador to Israel, Ian Wilcock, described the collapse as a ‘completely avoidable accident’. In an incident closer to home, a 12 year-old girl was killed when a one-kilogram fragment of steel expelled during an implosion of the Royal Canberra Hospital struck her in the head. The victim was with her parents in a crowd estimated to be in excess of 100,000 spectators gathered on the foreshore of Lake Burley Griffin to watch the demolition. In his 657-page report on the implosion, ACT Coroner Shane Madden said the people who carried out the implosion were ‘inexperienced and incompetent’: <http://www.courts.act.gov.au/magistrates/dec/bender/Sect11.htm> (accessed: 5 January 2005).

The Institute recommends the third option, introducing specialised principles of criminal responsibility for organizations. This option is preferred because it fully addresses the broad issue of the criminal responsibility of organizations, rather than focusing solely on laws affecting workplaces and employees. The recommended principles should not be seen to be primarily aimed at improving workplace safety (this appeared to be a common misconception in the responses received to the Issues Paper), rather, these reforms are aimed at allowing the criminal law to perform its functions efficiently and justly when dealing with organizations.

Part 7 of this report considers sentencing organizations. Currently, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This paper argues that while traditional sentencing options may be effective in some instances, the potential flexibility of these options is not currently being realised, and furthermore, in many cases sentencing options more specifically designed to deal with organizations are required.

### *Coverage of ‘organization’ rather than ‘corporation’*

In Tasmania, s 35(1) of the *Acts Interpretation Act 1931* (Tas) 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, specific legislation may impose liability on other types of bodies.<sup>3</sup>

Whilst the majority of organizations whose behaviour results in death or serious injury will be corporations,<sup>4</sup> there may be merit in extending criminal liability to other types of organizations, indeed this has been the approach in some other jurisdictions. This paper deliberately uses the term ‘organization’ to refer to the range of bodies (including corporations, partnerships, associations, joint ventures and government entities) capable of incurring criminal liability. The issue of exactly which types of entities should be subject to criminal liability is addressed in detail in Part 5.

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<sup>3</sup> See B Fisse, *Howard’s Criminal Law* (5<sup>th</sup> ed, 1990) 595.

<sup>4</sup> For the purposes of this paper, the term ‘corporation’ is used interchangeably with ‘company’. In law however there is a subtle difference. Section 9 of the *Corporations Act 2001* (Cth) defines a company as one registered under the *Corporations Act 2001* (Cth). While under the *Corporations Act 2001* (Cth), s 54A a corporation is defined as a company, a body corporate or an unincorporated body capable of suing or being sued, or holding property in the name of a secretary or an officer of the body duly appointed for that purpose.

# Summary of Recommendations

## Recommendation 1

That, in the interests of certainty, the definition of homicide be amended to make it clear that an organization may commit homicide. The following definition is recommended:

Homicide is the killing of a human being by another person.

## Recommendation 2

That a new method of attributing responsibility for traditional crimes to organizations be introduced.

## Recommendation 3

That the recommendations of this report apply to all organizations and that the term ‘organization’ be defined as follows –

‘organization’ means:

- (a) a public body, body corporate, society, company, firm, partnership, or trade union, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons.

## Recommendation 4

That the Code be amended to provide that it binds the Crown.

## Recommendation 5

That specialised principles of criminal responsibility for organizations be introduced to Chapter IV of the Code, based on Part 2.5 of the Model Criminal Code.

## Recommendation 6

That the specialised principles of criminal responsibility provide –

### S 12.1<sup>5</sup>

- (1) This Code applies to organizations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on organizations rather than individuals.
- (2) An organization may be found guilty of any offence, including one punishable by imprisonment.

*Organization* means:

- (a) a public body, body corporate, society, company, firm, partnership, or trade union, or
- (b) an association of persons that:
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons.

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<sup>5</sup> For present purposes section numbers corresponding to those in the MCC are used.

**S 12.2**

- (1) The acts or omissions of all of the representatives of an organization, acting within the actual or apparent scope of their employment or within their actual or apparent authority, must be attributed to the organization.
- (2) In this section a person is acting within the apparent scope of their employment or within the apparent scope of their authority if the organization has conducted itself in a manner that it is reasonable to treat that person as acting within the apparent scope of their employment or the apparent scope of their authority.
- (3) In this Chapter “representative” includes a director, partner, officer, employee, member, agent or a person who does the work of an organization.

**S 12.3**

- (1) If intention, knowledge or foresight of consequences is a state of mind in relation to an act or omission that must be proved in relation to an offence, that state of mind must be attributed to an organization that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the organization’s board of directors:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the organization:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the organization that directed, encouraged, tolerated or led to the commission of the offence.
- (3) Paragraph (2)(b) does not apply if the organization proves that it exercised due diligence to prevent the act or omission, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the organization; and
  - (b) whether the employee, agent or officer of the organization who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the organization would have authorised or permitted the commission of the offence.
- (5) If foresight of consequences is not a state of mind in relation to an act or omission, subsection (2) does not enable the state of mind to be proved by proving that the board of directors, or a high managerial agent, of the organization had foresight of the consequences of engaging in the act or omission or had foresight of the consequences of authorising or permitting the commission of the offence.
- (6) In this section:

***high managerial agent*** means a representative of the organization, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his, her or their conduct may fairly be assumed to represent the organization’s policy.

***organizational culture*** means an attitude, policy, rule, course of conduct or practice existing within the organization generally or in the part of the organization in which the relevant activities take place.

**S 12.4**

- (1) The acts and omissions of an organization must be viewed as a whole when assessing the negligence of an organization. This may involve aggregating the acts and omissions of any number of the representatives of the organization.
- (2) The negligence of an organization may be evidenced by the negligent acts and omissions of its high managerial agents or the failure of the organization or one or more of its high managerial agents:
  - (a) to adequately manage, control or supervise the conduct of one or more of its representatives; or
  - (b) to engage as a representative a person reasonably capable of providing the contracted services; or
  - (c) to provide adequate systems for conveying relevant information to relevant persons in the organization; or
  - (d) to take reasonable action to remedy a dangerous situation of which a high managerial agent has actual knowledge; or
  - (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the organization by or under an Act.

**S 12.5**

- (1) A failure to exercise due diligence may be evidenced by the fact that the act or omission was substantially attributable one or more of the failures (of the organization or one of its high managerial agents) set out in section 12.4(2)(a)-(e).

**Recommendation 7**

That the *Sentencing Act* be amended by introducing the following clauses –

**S 6A Act to apply to organizations**

- (1) This Act applies to organizations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Act, and with such other modifications as are made necessary by the fact that sentence is being imposed on organizations rather than individuals.
- (2) The term ‘organization’ has the same meaning as it has in the *Criminal Code*.
- (3) The term ‘high managerial agent’ has the same meaning as it has in the *Criminal Code*.
- (4) The term ‘representative’ has the same meaning as it has in the *Criminal Code*.

**S 7A Sentencing orders in relation to organizations**

- (1) Instead of or in addition to making an order under section 7, a court that finds an organization guilty of an offence may do any one or more of the following, in accordance with this Act and subject to any enactment relating specifically to the offence:
  - (a) record a conviction and, if the offence is punishable by imprisonment, make a disqualification order in respect of the offender.
  - (b) record a conviction and make an adverse publicity order in respect of the offender.
  - (c) grant an injunction against the organization in such terms as the Court determines to be appropriate.
- (2) A disqualification order made in accordance with subsection (1)(a) may, among other matters:
  - (a) prevent the organization from engaging in certain commercial activities;
  - (b) revoke or suspend a licence held by the organization;
  - (c) disqualify the organization from entering specified contracts;
  - (d) deny the organization the use of its profits for a fixed period of time.

- (3) An adverse publicity order may require an organization to:
- (a) disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the organization or to which the organization has access;
  - (b) publish, at its own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.
- (4)
- (a) The Court may rescind or vary an injunction granted under subsection (1)(c).
  - (b) The power of the Court to grant an injunction under subsection (1)(c) restraining an organization from engaging in conduct may be exercised:
    - (i) whether or not it appears to the Court that the organization intends to engage again, or to continue to engage, in conduct of that kind;
    - (ii) whether or not the organization has previously engaged in conduct of that kind; and
    - (iii) whether or not there is an imminent danger of substantial damage to any person if the organization engages in conduct of that kind.
  - (c) The power of the Court to grant an injunction under subsection (1)(c) requiring an organization to do an act or thing may be exercised:
    - (i) whether or not it appears to the Court that the organization intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
    - (ii) whether or not the organization has previously refused or failed to do that act or thing; and
    - (iii) whether or not there is an imminent danger of substantial damage to any person if the organization refuses or fails to do that act or thing.

### **S 28A Community service orders in respect of organizations**

- (1) A community service order in respect of an organization should specify:
- (a) a particular project or activity which the organization should complete or contribute towards, and if so to what extent;
  - (b) a period for completion of the project or the contribution towards the project or duration of the activity;
  - (c) any other requirements the court considers necessary or expedient for enforcement of the order.
- (2) Where a community service order is made in respect of an organization the court may order that the role of the probation officer or supervisor be undertaken by the Court or a person specified by the court.
- (3) Where a community service order is made in respect of an organization the court may order that the organization pay any cost of the enforcement and/or the supervision of the order.

### **S 37(2A)**

A probation order in respect of an organization may also include any or all of the following special conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender report to a probation officer on the implementation of those policies, standards and procedures;

- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence and report its findings to its probation officer.

**S 37A Supervision of organizations**

- (1) Where a probation order is made in respect of an organization the court may order that the role of the probation officer be undertaken by the Court, Workplace Standards, a specified officer of Workplace Standards, or a person appointed by the Court (such as an independent workplace safety consultant, or an accountant, auditor or lawyer).
- (2) Where a probation order is made in respect of an organization the court may order that the organization pay the cost of the enforcement of the order.

**S 59A Conditions for undertakings by organizations**

Where an undertaking is given by an organizational offender under section 7(f), the conditions imposed on that offender under section 59(c) may include any or all of the following conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender contribute (financially or otherwise) to the establishment of policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence.

**S 82(3A) Pre-sentence reports for organizations**

- (1) In cases where the offender is an organization and the court requests a professional assessment of an organization's characteristics, the court may appoint a suitable person or persons to prepare a report on the organization, and the court may give such other directions in relation to the nature and means of obtaining the assessment as the court considers necessary or appropriate.
- (2) The court may order that the organization pay the costs of preparing the report.

**S 83(1A) Pre-sentence reports for organizations**

In addition to the matters referred to in subsection (1), in cases where the offender is an organization, the pre-sentence report may include the criminal records of its Board of Directors or high managerial agent which appear to the court or the author of the report to be relevant to the sentencing of the offender.

**S 90(2A) Attendance of high managerial agent**

The judge or magistrate presiding at the trial of an offence or receiving a plea of guilty to an offence, or any other judge or magistrate empowered to impose sentence, may require the attendance at the sentencing proceedings of any of the high managerial agents of the organization, if he or she considers it appropriate in the circumstances.

That the *Sentencing Act*, s 31 (Limitation on number of hours of community service), be amended to provide that it does not apply to community service orders in respect of organizations by the insertion of the words 'in respect of an organization' before the '.' at the end of sub-s (4).

## Part 1

# Background: the Issues Paper, Responses and Recommendations

### *Origins of the project*

1.1.1 The Institute began work on the Issues Paper for this project at the beginning of 2004. The topic of the project was proposed to the Institute by Ben Bartl when he was still an undergraduate law student of the University of Tasmania. Mid 2004, before the Issues Paper's completion, the following motion was passed at a State Labour conference:

1. *State Conference determines that the State Government conduct an investigation into legislative changes to the either the Criminal Code of Tasmania or the Workplace Health and Safety Act to provide for:*

*Industrial Assault: the injuring of a worker arising in or out of their place of employment as a direct result of negligence; incompetence or by a wilful action attributed to the employer and;*

*Industrial Manslaughter: the death of a worker arising in or out of their place of employment as a direct result of negligence; incompetence or by a wilful action attributed to the employer.*

2. *That such investigation consider other current and proposed legislation in other States and Territories,*
3. *That the investigation and report be completed by June 2005.*

As the Institute's project was already well underway, the Government did not conduct the recommended investigation, instead indicating their interest in the outcome of the Institute's project.

In further developments, one day before the Issues Paper on this topic was released, on 16 June 2005, Greens MP Nick McKim, tabled a motion calling for industrial manslaughter laws in Tasmania. The Government also released an Interim report in February 2007 that provides a review of workplace health and safety.<sup>6</sup>

### *The Issues Paper*

1.1.2 The Issues Paper on this topic was released in June 2005. For those readers who did not see the Issues Paper, or wish to review an aspect of the paper, it is still available on our web page: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform). The Issues Paper's executive summary said:

This paper considers the criminal liability of organizations. In particular, it is concerned with the criminal law that applies when corporations and other entities wrongfully cause the death or serious injury of a natural person. This is most likely to be relevant to workplace deaths and injuries or 'public disasters' (for example a gas explosion or a ferry sinking).<sup>7</sup> The law already allows corporations to be found guilty of criminal

---

<sup>6</sup> D Brown and S Hyan, *Safe from Injury and Risks to Health Review of Workplace Health & Safety Interim Report*, Department of Justice, February 2007.

<sup>7</sup> Other examples are infrastructure collapses, train crashes or chemical leaks. The most infamous example being the 1984 chemical leak from the Union Carbide plant in Bhopal, India that killed at least 3800 people and seriously injured tens of thousands of others. A more recent example was the death of four Australians when a pedestrian bridge collapsed at the Maccabiah Games in 1997. The public commission which followed the collapse found that the incident was caused by a 'chain of failures involving the bridge's planning and construction' while the Australian Ambassador to Israel, Ian Wilcock, described the collapse as a 'completely avoidable accident'. In an incident closer to home, a 12 year-old girl was killed when a 1- kilogram fragment of steel expelled during an implosion of the Royal Canberra Hospital struck her in the head. The victim was with her

offences, however 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. One issue in Tasmania is that manslaughter requires a homicide, which is defined as ‘the killing of a human being by another’, thus apparently excluding organizations. A broader issue is the method of attributing criminal liability to organizations given that they do not physically ‘do’ anything and do not have any ‘state of mind’. The common law has tried to circumvent this 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. However the practices of modern corporate decision making rarely fall within the doctrine, particularly in larger corporations, where decisions are by necessity taken at the branch, unit or middle management level.

The difficulties with the identification doctrine indicate a need to reform this area of law. Reform has already taken place on a federal level in Australia and Canada as well as in the Australian Capital Territory. A number of other jurisdictions including the United Kingdom, Victoria, South Australia, Queensland and New South Wales have also considered reform, or are in the process of doing so. Part 5 of this issues paper discusses three different types of reform that have been adopted or proposed in these jurisdictions:

- **Introducing a specific ‘industrial manslaughter’ offence to the Code:** This option has been considered by a number of jurisdictions, with the ACT becoming the first to implement the reform in 2004. The introduction of related specific offences (negligently causing serious injury and specific ‘senior officer’ offences) is also discussed.
- **Introducing reforms to the *Workplace Health and Safety Act 1995*:** This could include introducing:
  - manslaughter and grievous bodily harm provisions;
  - breach of duty causing death or grievous bodily harm provisions;
  - higher maximum penalties;
  - a broader range of penalties;
  - senior officer liability (in an effort to encourage organizational compliance).
- **Introducing specialised principles of criminal responsibility for organizations:** This option would involve amending the criminal responsibility chapter of the Criminal Code, so that it sets out how physical elements and mental elements can be proved when dealing with an organization.

Part 7 of this report considers sentencing organizations. Currently, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This paper argues that while traditional sentencing options may be effective in some instances, the potential flexibility of these options is not currently being realised, and furthermore, in many cases sentencing options more specifically designed to deal with organizations are required.

#### *Coverage of ‘organization’ rather than ‘corporation’*

In Tasmania, s 35(1) of the *Acts Interpretation Act 1931* (Tas) 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, specific legislation may impose liability on other types of bodies.<sup>8</sup>

Whilst the majority of organizations whose behaviour results in death or serious injury will be corporations,<sup>9</sup> there may be merit in extending criminal liability to other types of organizations, indeed this has been the approach in some other jurisdictions. This paper deliberately uses the term ‘organization’ to refer to the range of bodies (including corporations, partnerships, associations, joint ventures and government entities) capable of incurring criminal liability. The issue of exactly which types of entities should be subject to criminal liability is addressed in detail in Part 5.

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parents in a crowd estimated to be in excess of 100,000 spectators gathered on the foreshore of Lake Burley Griffin to watch the demolition. In his 657-page report on the implosion, ACT Coroner Shane Madden said the people who carried out the implosion were ‘inexperienced and incompetent’: <http://www.courts.act.gov.au/magistrates/dec/bender/Sect11.htm> (accessed: 5 January 2005).

<sup>8</sup> See B Fisse, above n 3, 595.

<sup>9</sup> For the purposes of this paper, the term ‘corporation’ is used interchangeably with ‘company’. In law however there is a subtle difference. Section 9 of the *Corporations Act 2001* (Cth) defines a company as one registered under the *Corporations Act 2001* (Cth). While under the *Corporations Act 2001* (Cth), s 54A a corporation is defined as a company, a body corporate or an unincorporated body capable of suing or being sued, or holding property in the name of a secretary or an officer of the body duly appointed for that purpose.

## ***Responses to the Issues Paper***

1.1.3 Copies of the Issues Paper were sent to various groups and individuals, and many others were informed of the paper via email (with a link to our web page where the paper was available). The release of the Issues Paper was also reported in the media, particularly on the ABC's Tasmanian current affairs program *Stateline* (17 June) and in Hobart's *Mercury* newspaper.<sup>10</sup> Responses to the Issues Paper were received from:

Australian Bankers' Association  
 Tasmanian Chamber of Commerce and Industry  
 Australian Mines and Metals Association  
 Tasmanian Minerals Council Limited  
 Housing Industry Association  
 Australian Finance Conference and Australian Equipment Lessors Association  
 Tasmanian Automobile Chamber of Commerce  
 Australian Metal Workers Union  
 Mr John O'Meara  
 Dr Erica Roberts  
 Unions Tasmania  
 Tasmania Police (5 responses from individual officers)  
 Recruitment and Consulting Services Association  
 Director of Public Prosecutions

1.1.4 It can be seen that most of the responses came from bodies representing either industry groups or workers. Overall, and not surprisingly, the responses tended to very much reflect the interests of the groups they came from. For that reason, combined with the rather small number of responses received, the Institute could not view the responses as reflective of any general community views towards this topic. The lack of responses from the general public may indicate a lack of interest in this topic, or may simply reflect the complexity of the issue. In his response, the Director of Public Prosecution, commented:

I have read the numerous and very interesting responses to this Paper ...  
 Without seeking to minimise the thought, research and care which has obviously gone into them, they tend to reinforce my view that this is a political question, not really a legal one. Much would seem to depend on whether one visualises organizations as reasonably homogenous entities, invested with "personality", foresight, motive, intelligence or lack of it, malice and the capacity to be wilfully blind to danger, or as being comprised of individuals, some but not all of whom may bear criminal liability for an industrial death.  
 I fall into the latter category, but to say so lacks legal content and therefore does not advance the argument much. Indeed, I have a real conceptual difficulty in envisaging how I would set out to a jury a case of manslaughter by an organization, corporate or otherwise.

The Institute agrees that there is a strong political aspect to this issue. The development of the principles of corporate criminal responsibility arose out of the social and political disquiet associated with expansion of the role of corporations in society and several major disasters resulting in large scale loss of life.<sup>11</sup> Nevertheless, the Institute is of the view that the criminal liability of organizations also raises an important legal issue albeit a complex one: what is the most appropriate method of attributing criminal responsibility to organizations?

1.1.5 As most of the responses came from bodies representing either industry groups or workers, they tended to focus their discussion on workplace deaths and injuries and workplace safety issues generally. While the Issues Paper had also focussed much of its discussion on workplace deaths and injuries, it did deal with the much broader issue of the criminal liability of organizations generally, and this aspect of the topic was largely unaddressed in the responses to the Issues Paper. The importance of this broader theme, and the

<sup>10</sup> *The Mercury* (Hobart) 'Call for shake-up of law on manslaughter' 18 June 2005, 11.

<sup>11</sup> See A Ashworth, *Principles of Criminal Responsibility* (4<sup>th</sup> ed, 2004) 115 referring to the Piper Alpha oil rig explosion, the Clapham rail disaster, the King's Cross fire, the sinking of the *Marchioness*, and in 1987 the capsizing of the ferry *Herald of Free Enterprise*. McSherry and Naylor refer to the Air New Zealand Mount Erebus crash, the Bhopal disaster in India, the Chernobyl nuclear explosion and the Exxon Valdez oil spill. See B McSherry and B Naylor, *Australian Criminal Laws Critical Perspectives* (2004) 32.

desire not to focus solely on workplace health and safety, has guided the Institute in formulating the recommendations made in this final report.

### ***Overview of the recommendations***

1.1.6 Concluding that the current criminal law does not adequately hold organizations criminally liable (due to the strictness of the identification doctrine and, in relation to the crime of manslaughter, due to the definition of homicide), the Issues Paper discussed three options for reform (set out in more detail above):

- Introducing a specific ‘industrial manslaughter’ offence to the Code;
- Introducing reforms to the *Workplace Health and Safety Act 1995*;
- Introducing specialised principles of criminal responsibility for organizations.

1.1.7 The Institute now recommends the third option, introducing specialised principles of criminal responsibility for organizations. This option is preferred because it fully addresses the broad issue of the criminal responsibility of organizations, rather than focusing solely on laws affecting workplaces and employees. The recommended principles should not be seen to be primarily aimed at improving workplace safety (this appeared to be a common misconception in the responses received to the Issues Paper), rather, these reforms are aimed at allowing the criminal law to perform its functions efficiently and justly when dealing with organizations. Although not the primary aim of the recommendations, in relation to workplace safety, these reforms are intended to improve the operation of the very tip of the regulation enforcement pyramid (see discussion at 4.3.14).

1.1.8 As an aside, the Institute is pleased to be recommending reform in line with the Model Criminal Code (the relevant Part of the Model Criminal Code has already been implemented by the Commonwealth<sup>12</sup> and the Australian Capital Territory<sup>13</sup> and the Northern Territory),<sup>14</sup> which promotes uniformity among the criminal laws of the states.

1.1.9 No recommendations are made in relation to the *Workplace Health and Safety Act*.

1.1.10 In keeping with this broad aim of allowing the criminal law to perform its functions efficiently and justly when dealing with organizations, recommendations are also made in relation to the sentencing of organizations. The recommendations relate to the *Sentencing Act*, and thus would affect organizations generally, rather than organizations convicted of any particular crime or under any other particular piece of legislation.

### ***Overview of the rest of this report***

1.1.11 Part 2: ‘Current Law – Traditional Crimes’, sets out very briefly how the current law holds corporations responsible for traditional crimes and sets out the elements of two of those crimes, manslaughter and causing grievous bodily harm.

1.1.12 Part 3: ‘Should Organizations be Liable for Traditional Crimes?’ is obviously key to this report – outlining the reasons why organizations should be able to be held responsible for crimes and thus giving relevance and force to the recommendations of this report.

1.1.13 Part 4: ‘Need for Reform’ discusses two problems: first, the definition of homicide in the Criminal Code, and secondly, the identification doctrine. Responses received in relation to these issues are discussed and recommendations for reform are made.

1.1.14 Part 5, ‘The Extent of Reform’ recommends that reforms should apply to all organizations – a term to be defined broadly, and to include the Crown. Responses to the Issues Paper that addressed this question are also discussed.

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<sup>12</sup> *Criminal Code Act 1995* (Cth).

<sup>13</sup> *Criminal Code Act 2002* (ACT).

<sup>14</sup> *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). This Act is yet to be commenced.

1.1.15 Part 6: ‘Options for Reform’ briefly sets out the options for reform that were discussed in the Issues Paper, focusing on the recommended option of specialised principles of criminal responsibility and explaining the reasons for this recommendation. Responses to the Issues Paper that expressed a preference for one of the options for reform are also discussed. The recommended provisions are based on Part 2.5 of the Model Criminal Code. Details of the provisions, and changes to a Tasmanian version, are recommended.

1.1.16 Part 7: ‘Sentencing Options’ recommends reform to the *Sentencing Act* that would introduce specialised sentencing options for organizations. Specific options are discussed and recommended. A number of responses to the Issues Paper considered sentencing options in some detail and these are discussed.

## Part 2

# Current Law – Traditional Crimes

2.1.1 This Part of report sets out briefly how the current law attributes criminal responsibility to corporations for traditional crimes. In addition, it sets out the elements of two of traditional crimes, manslaughter and causing grievous bodily harm. Although this report addresses the wider question of criminal responsibility of organizations generally, concerns over the attribution of responsibility for the offences of manslaughter and grievous bodily harm have been a central to this report. As indicated in Part 1, the State Labour conference determined that the Government should conduct an investigation into the criminal law's response to workplace accidents and death. Due to the work on this project by the Institute, the Government did not conduct its own investigation but expressed an interest in the outcome of this project.

2.1.2 The attribution of criminal responsibility to a corporation is largely a development of the twentieth century.<sup>15</sup> The historical development is well summarised by Clough and Mulhern who write:

Although corporations had existed at common law for centuries, their regulation did not become a pressing issue until the industrial revolution when the rapid industrialisation of the nineteenth century society resulted in a flurry of regulatory legislation concerned with commerce and public welfare, together with the rise of the limited liability company as vehicles for financing the growth of industry. While there was clearly a need for corporations to be regulated, the artificial nature of corporations presented a significant obstacle to regulation if personal liability or fault elements were to be insisted upon. Hence the criminal law adopted and adapted the civil law principles of strict and vicarious liability which were developing at the same time.<sup>16</sup>

Initially, criminal liability was attributed to a corporation on the basis of vicarious liability – that is corporations were responsible for the acts or omissions of its employees who were acting in the course of their employment. Vicarious liability has usually been restricted to strict liability offences.<sup>17</sup> The common law also developed to recognise 'direct' corporate liability. Under this approach, corporate criminal responsibility is established by direct liability, that is 'rather than holding the corporation criminally responsible for the acts of its employees, direct liability views the employee's acts as those of the corporation'.<sup>18</sup> This was known as the 'identification doctrine'.

### *The identification doctrine*

2.1.3 Traditional crimes like manslaughter or grievous bodily harm were specifically designed to deal with the actions of real people. Accordingly, the definitions of the crimes themselves are difficult to apply to entities. Generally, people are guilty of these crimes because they *do* the prohibited act with the requisite *state of mind*. Corporations (and other entities) usually do not physically 'do' anything, and certainly they do not have any 'state of mind'. The common law has tried to get around 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 through the identification doctrine. The identification doctrine would apply to the *Criminal Code* (Tas) by virtue of s 35(1) of the *Acts Interpretation Act 1931* (Tas) which makes it clear that individual persons and 'bodies corporate' alike can be found guilty of criminal offences.

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<sup>15</sup> See discussion in E Colvin, 'Corporate Responsibility and Criminal Liability' (1995) 6 *Criminal Law Forum* 1, 2 – 3.

<sup>16</sup> J Clough & C Mulhern, *The Prosecution of Corporations* (2002) 72 (footnotes omitted).

<sup>17</sup> S Bronitt & B McSherry, *Principles of Criminal Law*, (2<sup>nd</sup> ed, 2005) p X. See also J Clough & C Mulhern, above n 16, 72 – 75, 79 – 88.

<sup>18</sup> S Bronitt & B McSherry, above n 17, p X. However, note that Colvin view the identification doctrine as a 'special form of vicarious liability', E Colvin, above n 15, 14.

2.1.4 To explain more fully, under the identification doctrine an individual who is an ‘embodiment of the company’ must be guilty of the offence for the company to be convicted.<sup>19</sup> A company can only be convicted when a sufficiently senior officer, who ‘is acting as the company’<sup>20</sup> is found guilty of an offence. Who is a sufficiently senior officer depends upon the facts of the case. However, it generally extends to company directors and senior managers. It excludes many persons who direct the day-to-day operations of corporations. The person or persons identified as the controlling mind within the corporation must also be acting within the scope of their employment or authority.<sup>21</sup>

2.1.5 The need to reform this doctrine is the primary reason for this project, and is discussed at 4.3.

## ***Manslaughter***

2.1.6 In Tasmania it is doubtful whether a corporation would be charged with and found guilty of either murder or manslaughter. This is because both crimes require a culpable homicide, and ‘homicide’ is defined in the Code as ‘the killing of a human being *by another*’.<sup>22</sup> The same definition in the New Zealand Code has been held to prevent a corporation being guilty of manslaughter.<sup>23</sup>

This restriction aside, to find a person guilty of manslaughter by criminal negligence the following three elements must be proven beyond reasonable doubt:

1. That the defendant caused the death of a person.

Causation is proved by demonstrating that the person would not have died *but for* the defendant’s act or omission, and that that act or omission was *directly and immediately* connected with the death.<sup>24</sup> In cases where this cannot be shown (where the defendant’s act or omission was not the immediate or not the sole cause of death), s 154 of the Criminal Code provides that the defendant may still be deemed to have caused the victim’s death in certain instances, for example ‘where he causes bodily injury to the other which requires surgical or medical treatment, and such treatment causes death, if such treatment is applied in good faith, and with reasonable knowledge and skill, but not otherwise’.<sup>25</sup>

2. That doing so was a breach of ‘a duty tending to the preservation of human life’.

The duties ‘tending to the preservation of human life’ are contained in Chapter 16 of the Code. The most likely duties to apply to a death or injury caused by an organization are:

Duty of persons doing dangerous acts:

149. ... it is the duty of a person who undertakes to administer surgical or medical treatment to another, or to do any other lawful act of a dangerous character which requires special knowledge, skill, attention, or caution, to employ in so doing a reasonable amount of such knowledge, skill, attention, and caution.

Duty of persons in charge of dangerous things:

150. It is the duty of every person who has anything in his charge or under his control, or who erects, makes, or maintains anything which, in the absence of precaution or care in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.

3. That the breach of that duty amounted to *culpable negligence*.

‘Culpable negligence’ (also often called ‘gross negligence’ or ‘criminal negligence’) is negligence which shows such disregard for the life and safety of others as to be deserving of criminal punishment.<sup>26</sup> The

<sup>19</sup> *Tesco Supermarkets v Natrass* [1972] AC 153, 170.

<sup>20</sup> ‘...and his mind which directs his acts is the mind of the company’: *Tesco Supermarkets v Natrass* [1972] AC 153, 170.

<sup>21</sup> *Canadian Dredge and Dock v R* [1985] 1 SCR 662, 701-14.

<sup>22</sup> Section 153(1), emphasis added.

<sup>23</sup> *R v Murray Wright Limited* [1970] NZLR 476.

<sup>24</sup> Criminal Code (Tas), s 153(2).

<sup>25</sup> Section 154(a).

<sup>26</sup> *Bateman* (1925) CR App R 8, 11; *Nydam v The Queen* [1977] VR 430, 445.

standard of care required is an objective standard in that it is based on the concept of a ‘reasonable person in the same situation as the accused’.<sup>27</sup> Whether or not an omission amounts to culpable negligence is a question of fact to be determined by the jury in the circumstances of each particular case;<sup>28</sup> the accused’s state of mind is not relevant to the question of whether or not the negligence was culpable.<sup>29</sup>

### ***Grievous bodily harm and wounding***

2.1.7 When considering the liability of organizations for a serious injury, grievous bodily harm and wounding are the crimes most likely to be relevant. Both crimes are found in s 172 of the Code. Grievous bodily harm is generally considered a more serious crime, as the injury is more severe. The Code defines grievous bodily harm as:

Any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health.

A ‘wound’ is not defined in the Code, but case law has defined it as essentially a cut, evidenced by free bleeding.<sup>30</sup>

2.1.8 If the grievous bodily harm or wound is caused by an action of the defendant, it must also be proved that the harm was caused with the required mental element: intention to cause grievous bodily harm or subjective recklessness.<sup>31</sup> Subjective recklessness means that the defendant must have foreseen the likelihood of the harm, yet proceeded (with their action) regardless.

2.1.9 If the harm was caused by an omission of the defendant, then criminal responsibility will only follow where the omission causes death, grievous bodily harm, endangers life or permanently injures health;<sup>32</sup> and the omission is a failure to perform one of the duties tending to the preservation of human life;<sup>33</sup> and the defendant was criminally negligent in failing to perform that duty.<sup>34</sup> The ability of the Crown to base a charge of wounding or grievous bodily harm on an omission by criminal negligence was recently confirmed by the Chief Justice in *Nelligan*.<sup>35</sup>

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<sup>27</sup> *Nydam v The Queen* [1977] VR 430, 439-446 rejecting a subjective standard referred to by Smith J in *R v Holzer* [1968] VR 481.

<sup>28</sup> Code s 156(3).

<sup>29</sup> *R v Adomako* [1995] 1 AC 171.

<sup>30</sup> *Devine* [1982] 8 A Crim R 45.

<sup>31</sup> *Valance* [1961] Tas SR 51; *Bennett* [1990] Tas R 72.

<sup>32</sup> Section 152, thus, less serious instances of wounding may not be able to be based on an omission.

<sup>33</sup> Contained in Chapter 16 of the Criminal Code and discussed above in relation to manslaughter.

<sup>34</sup> As discussed above in relation to manslaughter.

<sup>35</sup> *Tasmania v Nelligan* [2005] TASSC 94.

## Part 3

# Should Organizations be Liable for Traditional Crimes?

### *Introduction*

‘[T]he purposes of the criminal law are threefold – declaratory, preventive, and censuring.’<sup>36</sup> Punishment may help to achieve prevention and censuring. It is accepted that all people should be subject to the criminal law. But is this also true of organizations? Should they be liable for traditional crimes? While corporations, at least, can theoretically already be held criminally liable for most (if not all) traditional crimes, the fact that they are not natural people means that the question of why they *should* be held liable for those crimes is not simple. It can be broken down into three sub-questions:

1. Can organizations commit traditional crimes?
2. Can the aims of punishment be met in relation to organizations?
3. Can other laws meet the aims of state punishment?

The first question considers whether it can really be said that an organization can commit a crime – as opposed to one or more of its employee’s committing a crime. The second question involves considering the aims of punishment. These include retribution, denunciation, deterrence and rehabilitation. It is found that they can be met when punishing organizations. The third question looks at some other areas of law that are likely to be relevant when an organization causes the death or serious injury of an employee or member of the public, such as civil law, workers compensation law, or workplace health and safety law, and considers whether these can meet the aims of state punishment.

Although this Part refers generally to ‘organizations’, the issue of exactly which bodies should be held liable for traditional crimes is dealt with in Part 5.

## 3.1 Can organizations commit traditional crimes?

3.1.1 Organizations can already be found guilty of many criminal offences – the offences in the *Workplace Health and Safety Act* being just one example. As for more serious and traditional crimes, such as those contained in the *Criminal Code* (Tas), these already apply to corporations. As discussed at 2.1.2, this is clear from the *Acts Interpretation Act 1931* (Tas) s 35. However, the attribution of criminal responsibility to the corporate ‘mind’ via the narrow parameters of the identification principle has meant that there have been few cases where a corporation has been charged and convicted of a traditional criminal offence.<sup>37</sup> The law has granted corporations a separate legal personality. This status as a legal ‘person’ brings many benefits to an organization, and the law has imposed corresponding liabilities – including criminal responsibility.

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<sup>36</sup> A Ashworth, above n 11, 36.

<sup>37</sup> See Part 2.

3.1.2 Despite this, some suggest that there is no justification for treating an organization as a legal person for the purposes of the criminal law because an organization is not the type of ‘person’ that can commit a crime – it doesn’t really think or act in a way that is separate from its employees. In other words, although it may have a legal personality it does not really have its own ‘distinct’ personality. Accordingly, it is argued that only real ‘flesh-and-blood’ people should be held liable for traditional criminal offences. So, where an organization appears to be responsible for a crime, blame should be found among the directors, managers or employees of the organization.

3.1.3 However, the Institute takes the view that organizations often do have their own distinct personality, particularly when they are large, and that this personality can be much more than a mere legal convenience. Large organizations are more than just the individuals that make them up, they are more than their shareholders, members or employees. These individuals may come and go, but the organization remains with its own persona – sometimes a very public and well promoted one. Organizations create cultures capable of generating both action and inaction in any number of areas including work ethic, professionalism and enthusiasm for the task. Large organizations also have their own goals and formal decision-making structures to achieve those goals. Employees act and make decisions in order to further the goals of the organization rather than their own personal goals. In this way they ‘serve’ the organization, they are its tools. As Colvin writes:

Organizations comprise not only individuals but also institutionalized relationships among individuals. The resulting entities involve more than the sum of the individual parts. They shape the outlook and channel the conduct of their members in ways that may not be chosen or even understood by any of the individuals concerned. They can possess knowledge or means of knowledge that may be unavailable in total to any single individual.<sup>38</sup>

The size and complexity of large organizations can also produce a diffuse decision making process, so that decisions are often not traceable to a particular individual within the organization. All of these factors lead to organizations having their own identity, and therefore being blameworthy in a separate manner from the way that their employees or members may or may not be blameworthy.

3.1.4 An example of this can be seen in the findings of the New Zealand Royal Commission that investigated the Mount Erebus disaster.<sup>39</sup> The Commission found that the crash resulted primarily from the failure of the flight operations centre at company headquarters to communicate the correct navigational coordinates to the flight crew.<sup>40</sup> However, the Commission was not prepared to blame the personnel in the flight operations centre. Rather, criticism was directed at ‘the incompetent administrative airline procedures, which made the mistake possible’.<sup>41</sup> Air New Zealand (as an organization) had failed to demonstrate the navigational standards expected of an international airline.

## 3.2 Can the aims of punishment be met in relation to organizations?

3.2.1 Traditional criminal laws provide for state punishment of offenders who breach those laws. Penal punishment is justified by a number of goals that include: the public condemnation or denunciation of acts of wrongdoing; imposing retribution upon offenders for their wrongdoing (retribution); deterrence of future wrongdoing by both deterring the particular offender (specific deterrence) and others (general deterrence); and the rehabilitation of offenders. Restoration is now accepted as an additional legitimate goal of punishment. Can these aims be met by punishing organizations for crimes?

<sup>38</sup> E Colvin, above n 15, 23 – 24. See also A Ashworth, above n 11, 119.

<sup>39</sup> In 1979 an Air New Zealand DC 10 crashed near Mount Erebus, Antarctica killing all 257 people on board.

<sup>40</sup> New Zealand, *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand*, para 392.

<sup>41</sup> *Ibid*, para 393.

## ***Condemnation and denunciation***

3.2.2 Wrongful acts that cause death or serious injury should be condemned. This condemnation is reflected by criminal laws forbidding such conduct and the relatively severe sanctions imposed upon conviction for murder, manslaughter, grievous bodily harm, wounding and even assault.<sup>42</sup> If an organization causes the wrongful death or serious injury of a person it is important that it, like any other person, be publicly condemned for doing so. This public condemnation reaffirms the value that our community places on human life and the respect that we demand for it. Allowing a wrongful death or serious injury to go unpunished in cases where the actor is not a natural person demeans the value of that loss of life or limb. Furthermore, by characterising the killing or injury as an ‘accident’ and allowing it to remain unpunished, we can be seen to turn a blind eye to the possibility that an employer or organization was to blame for the conditions which allowed the so-called accident to occur. The high value that our society places on life means that we must denounce any wrongful act that results in death or injury, regardless of whether the ‘person’ whose wrongful conduct caused that outcome is an organization or a natural person. This denunciation is most effectively achieved through the stigma attached to a traditional criminal conviction.

3.2.3 In the context of deaths or injuries to workers or members of the public caused or contributed to by organizations, the role of the criminal law in effectively denouncing the actions (or inactions) of the organization may be particularly important. The civil law, workers compensation law and quasi-criminal health and safety laws may well be more effective than traditional criminal laws in compensating victims and preventing unsafe work places and practices through education, standard setting and monitoring compliance. But when it comes to demonstrating public condemnation there seems little doubt that this can be most effectively achieved by more traditional criminal laws.

3.2.4 The need to denounce wrongful conduct that results in these harms cannot be overstated. The significant presence and highly visible role that organizations play in our society makes it all the more important that they are not seen to be above the reach of the law. If organizations seek to create a positive public image or persona for their own profitable ends, as many organizations do, it is essential that they be publicly condemned when they are responsible for breaking the law.<sup>43</sup> These organizations and employers are vital to society, but this does not mean that they need not abide by its rules. Denouncing and condemning their wrongful behaviour, just as we would denounce the conduct of any natural person who has wrongfully caused the death of another, can therefore be particularly significant.

## ***Retribution***

3.2.5 Retribution is a rationale of criminal punishment that has many different adherents who give different accounts of its moral significance. In its simplest form, retribution is a philosophy of ‘just deserts’ that proclaims that an individual who has broken the law deserves to be punished, and insists that the punishment should be in proportion to the crime.<sup>44</sup> Human beings have a strong emotional and intellectual attachment to the notion of retribution, and an almost unshakeable need to believe in a just world ‘where people get what they deserve’.<sup>45</sup> The knowledge that the state has ensured that an offender has suffered a proportionate punishment can therefore be a source of some satisfaction both to victims and to many members of the community who feel powerless in the face of crime. Thus, punishment for a wrong done helps people to feel that justice has been served.

3.2.6 More recent accounts of the moral significance of retribution have stressed the expressive and communicative function of criminal punishment.<sup>46</sup> These theorists argue that the punishments imposed by

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<sup>42</sup> For a comprehensive range of data on the sentencing of persons convicted of murder, manslaughter, grievous bodily harm, wounding and assault see K Warner, *Sentencing in Tasmania* (2<sup>nd</sup> ed, 2002) 267-329.

<sup>43</sup> Friedman L, ‘In Defense of Corporate Criminal Liability’ (2000) 23 *Harvard Journal of Law and Public Policy* 833, 847-852.

<sup>44</sup> An eighteenth century philosopher who defends this view of retribution is Immanuel Kant, *The Metaphysical Elements of Justice* (1965) 99-107. A more recent version appears in the philosophy of Michael S Moore, *Placing Blame* (1997).

<sup>45</sup> Batson DC, ‘Justice Motivation and Moral Motivation’ in Ross M & Miller DT (eds), *The Justice Motive in Everyday Life* (2002) 91. See also Solomon RC, *A Passion for Justice: Emotions and the Origins of the Social Contract* (1990).

<sup>46</sup> Hampton J, ‘Correcting Harms Versus Righting Wrongs: The Goal of Retribution’ (1992) 39 *University of California at Los Angeles Law Review* 1659; Duff RA, ‘Penal Communications: Recent Work in the Philosophy of Punishment’ in Tonry M (ed), *Crime and Justice: A Review of Research* (vol 20, 1996) 1.

the criminal law represent not only a communal expression of solidarity with the victims of criminal wrongdoing that reaffirms their moral value, but that they are also the means through which the community communicates its abhorrence of the crime to the wrongdoers, affirms the value of the norm of conduct broken by the wrongdoers, connects them again with proper values, and affords them an opportunity both to realise the enormity of their conduct and in some cases to repent and to make amends for that wrongful conduct. On this account, by allowing organizations to shield themselves from criminal responsibility and permitting corporations to hide behind the corporate veil, the state is also failing to affirm the value of the victims, failing to stand up for the importance of our criminal laws, and failing to communicate to our corporate citizens and organizations that their conduct is deserving of blame.

3.2.7 Historically, organizations and artificial legal persons have not been subject to retribution in the same way as individual offenders, partly because it was thought that an organization ‘has no soul to be damned, and no body to be kicked’.<sup>47</sup> Whereas many organizational offenders are dealt with internally or through regulatory law, similar offences committed by natural persons generally lead to criminal conviction and punishment. However, it can no longer be argued that the public is ambivalent about imposing organizational criminal responsibility, and our criminal law should reflect these changing attitudes.<sup>48</sup> This raises two important issues based on the role of both distributive justice and retributive justice within our criminal justice system. The first argument is based on the proposition that an organization that acts as an entity (or is seen to act as an entity) should be held accountable for its actions in cases where those actions are legally wrongful. This argument is supported by our concept of distributive justice, which requires that like cases should be treated alike and that equally culpable actors should be responded to equally. If, as a community, we have criminal laws that are designed to hold accountable those whose acts are wrongful, then any entity that acts contrary to those laws should be held criminally responsible. The imposition of organizational criminal responsibility is also supported by a further argument based on distributive justice, namely, that if an organization like a corporation reaps any special *benefits* as a result of its incorporation and the construction of a new, separate legal entity that is allowed to conduct business within our community, it should not be entitled to avoid the *burdens* associated with the existence of that new legal entity and the conduct that it has engaged in. If an organization seeks to exploit the benefits that we have attached to organizational status in order to engage in a particular course of conduct within our community, it must accept the burdens of community life as well. It is distributively unjust if these organizations enjoy the positive benefits associated with their status, while at the same time avoiding the negative burdens – especially the burdens that other individual persons within the community are unable to avoid. Justice in the distribution of retribution therefore requires that the imposition of organizational criminal responsibility on all those persons and entities whose conduct wrongfully harms others.

## ***Deterrence***

3.2.8 Deterrence seeks to reduce further crime by the threat or example of punishment. The basic theory of deterrence is that, at least in some circumstances, the threat of punishment will lead people to choose to obey the law. There are two types of deterrence – general and specific. Specific deterrence is aimed at deterring the convicted criminal from committing further offences, while general deterrence seeks to deter the community as a whole (or some group within the community) from committing crimes (or particular types of crime).<sup>49</sup> For as long as it has been acknowledged that organizations could be held liable for their actions or failure to act, courts have expressed the view that the criminal law can deter corporations, as can be seen from the following statement by Denham CJ in 1846:<sup>50</sup>

<sup>47</sup> J Coffee, ‘No Soul to Damn, No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386.

<sup>48</sup> For example on the release of former One Nation leader Pauline Hanson, a supporter claimed ‘She went to jail for peanuts’; ‘Look at the banker in Perth who stole \$19 million and only got five years’; or another supporter who added ‘Yeah, and what about the Ansett collapse’, see A McGregor, D McFarlane & A Wilson, ‘Pauline’s release: one happy family’, *The Weekend Australian* 8-9 November 2003, 1.

<sup>49</sup> For a more detailed discussion of general and specific deterrence see the Tasmanian Law Reform Institute, *Sentencing*, Issues Paper No 2 August 2002, 49-55.

<sup>50</sup> *Great North of England Railway Co* (1846) 9 QB 315, 320.

There can be no effective means of deterring from an oppressive exercise of power, for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority.

3.2.9 Many factors will influence the effectiveness of both specific and general deterrence, such as:

- *Severity of punishment* - The threat of punishment must be sufficiently severe so as to outweigh any possible gain attributable to the crime. Corporations may be particularly susceptible to deterrence because they tend to make decisions on a cost/benefit analysis.<sup>51</sup> The insufficiency of civil awards of compensation and sentences for breach of health and safety laws means that they are unlikely to operate as effective deterrents.

- *Characteristics of crime* - While deterrence may always be difficult to achieve for some crimes (such as crimes of 'passion'), organizational criminal liability will generally be the result of a grossly negligent decision-making process rather than the actions of an angry, intoxicated or mentally ill offender. As such, deterrence should be readily achievable. As Braithwaite and Geis argue:<sup>52</sup>

[c]orporate crimes are almost never crimes of passion: they are not spontaneous or emotional, but calculated risks taken by rational actors. As such they should be more amenable to control by policies based on utilitarian assumptions of the deterrence doctrine.

- *Certainty of detection and punishment* - Where there is a good chance of the crime being undetected deterrence is less likely to be effective. If the law is amended so that convictions could be secured in appropriate cases then the resulting increase in certainty of punishment should boost deterrence.

3.2.10 Adverse publicity resulting from a criminal conviction is another way in which deterrence is achieved. This is because 'the stigma of criminal conviction and punishment'<sup>53</sup> has a deterrent value in its effect on organizational prestige.<sup>54</sup> Organizations and their 'brand' require public support<sup>55</sup> and any tarnishing of this brand may result in a loss of public support and consequent sales that in turn jeopardises the entire corporation.<sup>56</sup> As Pulitzer has stated:<sup>57</sup>

There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice that does not live by secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later public opinion will sweep them away.

3.2.11 A final reason for utilising the deterrent effects of the criminal law against organizations and employers lies in the fact that that these organizations now pervade our society. Their activities are so widespread in scope that their conduct is capable of affecting the welfare of many individual citizens who look to the state for protection. Organizations may also be much more powerful than ordinary persons. These factors mean that the community needs the protection that deterrence based sanctions can offer. The greater capacity and the number of opportunities that organizations have to cause serious harm to others through their wrongful conduct points up the need to use the sanctions of the criminal law to deter that organizational wrongdoing.

<sup>51</sup> For example, see the case study of the Ford Pinto motor vehicle at 3.3.6. It is important to note however that there are organizations such as universities, churches and sports groups who do make profits but have as their central motivation non-monetary concerns.

<sup>52</sup> J Braithwaite & G Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime and Delinquency* 292, 305; see also J Braithwaite & G Geis, 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' (1979) 92 *Harvard Law Review* 1227, 1235.

<sup>53</sup> B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1147.

<sup>54</sup> In an empirical study of the impact of adverse publicity crises on seventeen major corporations, it was observed that loss of corporate prestige rather than financial loss were of more concern to executives in all but two cases. As found in B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) 232.

<sup>55</sup> For example see 'New Branded World' in N Klein, *No Logo* (2001).

<sup>56</sup> B Fisse & J Braithwaite, above n 54, 1.

<sup>57</sup> J Pulitzer, as quoted in *ibid*, 1.

## ***Rehabilitation***

3.2.12 Rehabilitation aims to improve the offender's character so that they are less inclined to commit offences.<sup>58</sup> As applied to natural persons, rehabilitation is experiencing a revival. Arguably, it has even more promise in the case of organizations. A number of sentencing options may be able to achieve rehabilitation when applied to organizations, such as a specific order of organizational probation, injunction, community service orders and adverse publicity orders.<sup>59</sup> In some respects punishment may more effectively rehabilitate organizations than individuals. This is because punishment of individuals may often lead to those offenders feeling outlawed, possibly leading to greater deviant behaviour. On the other hand organizations are likely to react positively to punishment, in an attempt to minimise the damage done to their prestige and in order to regain standing in the community.<sup>60</sup>

## ***Restoration***

3.2.13 The goal of promoting the restoration of relations between the community, the offender and the victim is one of the goals the Australian Law Reform Commission (ALRC) has suggested for inclusion in the exhaustive list of sentencing purposes in its proposed sentencing Act.<sup>61</sup> Restorative justice has emerged in the last two decades to challenge traditional utilitarian and retributive theories. While it is usually associated with informal justice and processes lying outside the formal court system, restorative thinking is now accepted as a goal of state punishment. While it is hard to pin-point what such an approach involves, it is about focussing on repairing the harm caused by the criminal activity, addressing and rectifying the underlying causes, encouraging offenders to accept responsibility, reassuring the community and reintegrating the offender. Many of the sentencing options for organizations considered in Part 7, such as injunctions, community service, probation and conditional undertakings and of course criminal compensation orders, fit very comfortably under the restorative umbrella. Indeed the concept of rectification, which is central to restoration, is more apt in the case of addressing defective procedures and policies by an organisational offender than that of rehabilitation with its overtones of treatment.

## ***Conclusion***

3.2.14 Organizations and employers have traditionally been dealt with as a special case, but the rationale for continuing this special treatment has been doubted, both in Australia and internationally. Should we continue to treat these organizational actors in a different way, especially when they are so pervasive in their reach and so powerful that they can cause comparatively massive damage in our communities? Should we allow them to continue to reap the benefits of organizational status without incurring the burdens that all ordinary persons must accept and cannot avoid? The Institute believes that if the criminal law aims to condemn harmful wrongdoing, it should also condemn corporations and organizations who wrongfully cause harm. To the extent that the criminal law aims to deter wrongdoing that causes harm, it should also aim to deter corporations and organizations whose enterprises wrongfully cause harm. If the state aims to give wrongdoers their just deserts by imposing proportionate punishments that express the community's support for the value of the victims and our condemnation of all wrongful conduct, which, by breaching the community's legal norms, causes harm to others, there is no reason why it should not punish organizations whose wrongful conduct also causes harm. And if in some cases the aim is to restore the harm caused by the offence and to reassure the community that the offender will not re-offend, the criminal law can be called in aid to achieve those ends.

<sup>58</sup> N Walker, 'Punishing, Denouncing or Reducing Crime' in P Glazebrook, *Reshaping the Criminal Law* (1978) 393.

<sup>59</sup> These are discussed in greater detail in Part 1.

<sup>60</sup> B Fisse, above n 53, 1154.

<sup>61</sup> Australian Law Reform Commission, *Same Crime, Same Time, Sentencing of Federal Offenders*, Report No 103, 2006, Recommendation 4-1.

### 3.3 Can other laws meet the aims of state punishment?

#### *Workplace health and safety offences*

3.3.1 In Australia, occupational health and safety legislation is primarily intended to reduce workplace deaths and injuries by imposing an overarching duty of care on employers,<sup>62</sup> setting standards to ensure as safe an environment as possible, monitoring compliance with these duties and standards, and creating offences for non-compliance in order to punish and deter. This is reflected in the long title of the *Workplace Health and Safety Act 1995* (Tas):<sup>63</sup>

An Act to provide for the health and safety of persons employed in, engaged in or affected by industry...

3.3.2 When an organization wrongfully causes the death or injury of an employee or when another person is killed or injured at an organization's workplace the organization may be guilty of a criminal offence under the *Workplace Health and Safety Act 1995*, such as breach of one of the employer duties set out in s 9. Some of the duties and obligations imposed on employers by s 9 are:

- to ensure, so far as is reasonably practicable, that employees are safe from injuries and risks to health;
- to provide a safe working environment and safe systems of work;
- to ensure so far as is reasonably practicable, that the health and safety of any person (other than an employee, contractor, etc) is not adversely affected as a result of the work carried on at a workplace;
- to not allow a contractor or person employed by a contractor to carry on work for the employer at the employer's workplace in a manner which the employer reasonably believes would place at risk the health or safety of any person.

3.3.3 These general duties have been interpreted broadly by the courts, requiring duty holders to 'be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace'.<sup>64</sup> Importantly, these are strict liability offences. This means that guilt is established simply by proving that the breach occurred (ie the physical act or failure to act which constitutes the breach of duty) – no guilty state of mind (such as intent, recklessness or negligence) needs to be established. These offences may be committed regardless of whether death or injury results from the breach. If death or injury does result, it may be a factor to be taken into account by the sentencer. Breach of these duties carries a maximum penalty in the case of a body corporate of \$150,000, or in the case of a natural person of \$50,000. Historically, these offences have been labelled 'regulatory' or 'quasi-criminal' offences, rather than being thought of as 'proper' crimes. This is probably reflected by the relatively low sentences that have usually been imposed for breaches of the WHSA: until 2006 the highest fine imposed in Tasmania was \$40,000.<sup>65</sup> In 2006, fines of \$120,000<sup>66</sup> and \$70,000<sup>67</sup> have been imposed. At this time, it is difficult to access whether these higher fines reflect a trend towards increased penalties under the WHSA. Convictions under the WHSA also appear to lack the social stigma attached to convictions for more traditional crimes. It is theorised that these factors combine to reduce the denunciatory and deterrent effect of the offences. The Government is reviewing the operation of the *Workplace Health and Safety Act 1995* and released an interim report in February 2007.<sup>68</sup>

<sup>62</sup> A Hopkins, *Making Safety Work: getting management commitment to occupational health and safety* (1995) 74.

<sup>63</sup> *Workplace Health and Safety Act 1995* (Tas) proclamation.

<sup>64</sup> *WorkCover Authority of NSW (Insp Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80, 85.

<sup>65</sup> See Appendix A.

<sup>66</sup> N Clark, 'Rennison cops fine for death', *The Mercury*, 23 September 2006, 14.

<sup>67</sup> G Lower, 'Higher fine for death on forklift', *The Mercury*, 9 September 2006, 14.

<sup>68</sup> D Brown and S Hyan, above n 6.

## Civil liability

3.3.4 The purpose of civil liability is to compel a wrongdoer to compensate a wronged person<sup>69</sup> for a loss they have suffered which was caused or contributed to by that wrongdoer. In the context of workplace injuries or deaths or injury or death to members of the public caused by an organization, civil liability may be established by demonstrating that the organization negligently caused or contributed to the death or injury.<sup>70</sup>

To bring a successful negligence action it must be established by the plaintiff:

- That the organization owed a duty or standard of care to the plaintiff;
- That the duty or standard of care was breached;<sup>71</sup> and
- That the breach resulted in damages suffered by the plaintiff.<sup>72</sup>

3.3.5 Some commentators<sup>73</sup> are of the view that civil (rather than criminal) liability could be reformed to deal with the crimes of organizations because there is a greater range of remedies available (including injunctions and damages); a less onerous burden of proof is applied; and finally, civil liability is 'better able to calculate appropriate levels of damages to maximise deterrence in a cost-efficient manner'.<sup>74</sup> Essentially, these views are based on cost efficiency.<sup>75</sup> However, it is argued that cost efficiency should not dictate justice. Certainly cost efficiency does not seem to be an important factor in the decision to pursue, prosecute and punish the majority of criminals (who are natural persons).<sup>76</sup>

3.3.6 Furthermore, the compensatory nature of civil damages means that they are unlikely to have any significant punitive effect on an organization. The liability incurred may often be less than the cost of avoiding the risk of harm, particularly if the victim is killed and has no financial dependants.<sup>77</sup> For example in the 1960s the Ford Motor Company released the Ford Pinto motor vehicle. During the design and production phase the car was found to have serious safety problems with its fuel tank which meant that the Pinto would sometimes explode in rear-end collisions. According to Ford's estimates, the unsafe tanks would cause 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles each year. It calculated that it would have to pay \$200,000 per death, \$67,000 per injury, and \$700 per vehicle, for a total of \$49.5 million. However, the cost of fixing the fuel tanks was greater: Ford estimated that alterations to the design of the fuel tanks would have cost \$11 per car or truck, which added up to \$137 million per year. More than 500 deaths were caused by Ford Pintos that were involved in rear-end collisions. Figures received by Ford have since shown that the cost of implementing the altered fuel tank would have been \$1, not the \$11 originally estimated.<sup>78</sup>

3.3.7 Civil liability is also usually covered by insurance – thus transferring the cost to the general insuring population. The impact of payment of a damages claim may therefore be minimal. In addition to compensation, where appropriate the court has the power to award punitive or exemplary damages, although

<sup>69</sup> Or, where the wronged person is killed, the relatives of the wronged person: *Fatal Accidents Act 1934* (Tas), s 4. Also see *Workers Rehabilitation and Compensation Act 1988* (Tas), s 25(1)(d).

<sup>70</sup> Additionally a person injured or the family of a person killed may be able to sue for breach of statutory duty or breach of contract.

<sup>71</sup> This standard is usually measured by what the 'reasonable person of ordinary prudence would do in the circumstances'.

<sup>72</sup> If the defendant is the employer of the plaintiff the required level of impairment (30% whole body) must also be shown and the election to claim civil damages must be made within 2 years: *Workers Rehabilitation and Compensation Act 1988* (Tas) s 138AB.

<sup>73</sup> V Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109 *Harvard Law Review* 1477; D Fischel and A Sykes, 'Corporate Crime' (1996) 25 *Journal of Legal Studies* 319; G Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) *Cambridge Law Journal* 515; C Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557.

<sup>74</sup> C Clarkson, 'Corporate Culpability' [1988] 2 *Web Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html> (accessed 6 August 2004).

<sup>75</sup> For example, it is estimated that the cost of the proceedings following the acquittal of those charged with manslaughter brought about as a result of the Zeebrugge disaster in 1987 were about £10 million even before the defence had presented its side of the case. See D Bergman, 'Recklessness in the Boardroom' (1990) 140 *New Law Journal* 1496, 1496.

<sup>76</sup> S Box, *Power, Crime and Mystification* (1983) 79.

<sup>77</sup> As the victim's claim for general damages does not survive their death: *Administration and Probate Act 1935* (Tas), s 27.

<sup>78</sup> L Newton & D Schmidt, *Wake-Up Calls: Classic Cases in Business Ethics* (1996).

they will usually only be awarded ‘against defendants guilty of contumelious disregard of plaintiffs’ rights’.<sup>79</sup> This may be difficult to show in the case of an organization,<sup>80</sup> and in any case the remote threat of them being awarded is unlikely to have any deterrent effect.

3.3.8 In addition, the lack of social stigma attached to civil liability, the fact that many claims are settled behind closed doors and out of court and the corresponding lack of media attention means that civil liability is rarely an effective vehicle for achieving public condemnation of an organization.<sup>81</sup> The well known cost (in time, stress and money) of civil litigation is also likely to deter many people from bringing a civil action, thus further reducing the potential of the civil law to deter or punish those who wrongfully cause death or injury. Even when a plaintiff is determined to see a defendant publicly exposed, it may be very difficult for a plaintiff to refuse reasonable or generous offers of compensation.<sup>82</sup>

3.3.9 Another difficulty facing any system of civil liability lies in the fact that it cannot always ensure that compensation occurs. Even in cases where legal liability is imposed by the courts, compensation of the victims does not always follow. This is because individuals and corporations who cannot pay their debts can go into bankruptcy and have their liabilities brought to an end. In cases of impecunious defendants, injured plaintiffs may not have any incentive to sue for damages and the wrongful conduct may never be brought to public light. If bankruptcy occurs after judgment is given in a civil case, successful plaintiffs may not be able to enforce payment of damages. Furthermore, even in cases where funds are available to pay damages, the amount can simply be passed on to the public as one of the costs of doing business. For these reasons, the criminal law and its punitive responses, which offer public condemnation of wrongful conduct that causes harm to individuals, may offer a more certain result.

### **Workers compensation**

3.3.10 When an employee is killed or injured at work they may be able to make a statutory claim for compensation from their employer in accordance with the *Workers Rehabilitation and Compensation Act 1988* (Tas). Employers must have insurance to cover the payment of such benefits.<sup>83</sup> The majority of workplace injuries are addressed through the workers compensation scheme. Due to the strict regime by which the amount of compensation is calculated,<sup>84</sup> in some instances, particularly where there is a fatality or serious injury, a worker may be better compensated through a successful civil claim. However, recent tort law reforms restricting the ability of injured workers to bring a civil action against their employer mean that workers compensation is now the only avenue for compensation available to most injured workers.

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<sup>79</sup> J Fleming, *The Law of Torts* (9th ed, 1998) 257.

<sup>80</sup> *Ibid.*

<sup>81</sup> This is particularly true in Tasmania with a recent newspaper article claiming that Tasmanians who sue for compensation for personal injuries are awarded less than their counterparts in the other States of Australia. See G Lower, ‘Lagging Tassie injury payouts’, *The Mercury*, 7 March 2005, 11.

<sup>82</sup> This is particularly the case in light of r 289 of the *Supreme Court Rules 2000*, which stipulates that if the plaintiff refuses an out of court offer, and the defendant then pays that amount into court, if the court eventually awards a lesser amount, the plaintiff is liable to pay the legal costs of the defendant from the date that the offer was made.

<sup>83</sup> *Workers Rehabilitation and Compensation Act 1988* (Tas), s 97.

<sup>84</sup> See Part VI – Amount of Compensation of the *Workers Rehabilitation and Compensation Act 1988* (Tas). Under s 69B of the *Workers Rehabilitation and Compensation Act 1988* (Tas) incapacitated workers are entitled to weekly payments of 100% for the first thirteen weeks of the period of incapacity, 85% for the period between 13 weeks and 78 weeks and 80% from 78 weeks to maximum of 9 years.

Workers compensation legislation is primarily concerned with rehabilitating and compensating the victims (or their families) of workplace accidents. No fault or negligence by the employer need be shown in order to bring a successful claim. Thus workers compensation legislation allows the injured worker (or dependants of a deceased worker) to be compensated,<sup>85</sup> even where fault cannot be proven on the balance of probabilities, or if there is some other reason why the victim cannot or does not wish to bring a civil claim.<sup>86</sup> Workers compensation legislation is not aimed at, and is unlikely to serve the function of punishing, denouncing or deterring organizations' unsafe workplaces or practices.<sup>87</sup>

## **Conclusion**

3.3.11 While other areas of the law apart from traditional criminal law have an important role to play when an organization wrongfully causes a death or injury, the importance of the criminal law cannot be underestimated.<sup>88</sup> The fact that criminal laws are prosecuted by the state means that the expertise and resources of the state can be used to ensure that justice is done. Also important are the strong procedural protections provided to defendants within the criminal justice system (such as the high standard of proof: beyond a reasonable doubt). But it is the impact of state punishment that is most important. It can denounce behaviour, punish wrongdoing (by making the perpetrator suffer), allow victims and society to feel that justice has been done, deter further wrongdoings (both by the perpetrator and by others), rehabilitate offenders, rectify the harm and reassure the community.

## **Responses to the Issues Paper**

3.3.12 The Issues Paper did not ask a specific question in relation to whether organizations should be able to be held liable for traditional crimes, although it was clear that the Institute was of the view that they should. One response to the Issues Paper disputed this. The Tasmanian Automobile Chamber of Commerce wrote:

TACC disputes that there is any tangible evidence in the conclusions contained within the discussions contained in Part 2 of the paper to support the conclusion that organizations should be liable for traditional crimes. TACC also disputes that there is recognition by "many" common law jurisdictions that it is and should be possible to find corporations and other organizations guilty of manslaughter.

In response, the Institute points to the considerable interest in the liability of organizations for workplace deaths and injuries, as well as criminal responsibility more generally. The recognition of the appropriateness of corporate criminal responsibility for traditional crimes led to the development of the common law identification doctrine. More recently, law reform initiatives have been directed at matching corporate blameworthiness with corporate criminal responsibility to overcome the difficulties created by the narrow limits of the identification doctrine.<sup>89</sup> As Rose writes, 'responsibility and accountability are now the keywords for corporations'.<sup>90</sup> This entire Part (Part 2 in the Issues Paper) was aimed at addressing this issue.

<sup>85</sup> To the extent provided by the legislation, *Workers Rehabilitation and Compensation Act 1988* (Tas).

<sup>86</sup> For example the expensive, stressful and uncertain nature of civil proceedings, or that the claim may be of a minor nature.

<sup>87</sup> This is particularly so as insurance for liability is compulsory - thus it makes little financial difference to the employer whether a claim is made against them or not. It may however be likely that an increase in insurance premiums would over time be the outcome of a consistently unsafe workplace.

<sup>88</sup> V Khanna, above n 73, 1492.

<sup>89</sup> For example, the MCC, the *Criminal Code ACT 2002* (ACT) and the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). In Canada, see <http://www.justice.gc.ca/en/dept/pub/c45/section02.html#5>. In the United Kingdom, see Home Office (UK), *Corporate Manslaughter: The Government's Draft Bill for Reform*, March 2005. For the progress of this Bill, see [http://www.publications.parliament.uk/pa/pabills/200607/corporate\\_manslaughter\\_and\\_corporate\\_homicide.htm](http://www.publications.parliament.uk/pa/pabills/200607/corporate_manslaughter_and_corporate_homicide.htm) (accessed 9 January 2007).

<sup>90</sup> A Rose, 'Developments in Criminal Law and Criminal Justice: 1995 Australian Criminal Code Act - Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* 129, 132.

## Part 4

# Need for Reform

4.1.1 Wrongfully causing the death or serious injury of another is a firmly established basis for criminal liability. This protects the right to life and physical integrity. There is no doubt that our society places great importance on these rights and it is appropriate that they are protected by the criminal law. Where life is wrongfully taken, it is fitting that traditional criminal liability be found so state punishment can fulfil its functions of denunciation, punishment, deterrence and rehabilitation.<sup>91</sup> This also promotes public confidence in the criminal justice system. The previous Part concluded that traditional criminal laws have an important role to play when an organization wrongfully causes a death or injury, in other words, organizations should be able to be held criminally responsible for traditional crimes such as manslaughter or causing grievous bodily harm. This Part recommends specific and general reforms to facilitate this. The specific recommendation relates to the definition of homicide. The general recommendation is for reform of the identification doctrine. Specific recommendations as to how the identification doctrine should be reformed are made in Part 5.

## 4.2 The definition of homicide

4.2.1 Although the matter has not been given judicial consideration in Tasmania, it is possible that, as discussed above (see para 2.1.6), the definition of homicide in the Tasmanian Code ('the killing of a human being by another': Code, s 153(1)) may prevent an organization from being guilty of murder or manslaughter in Tasmania.<sup>92</sup> In the light of the conclusion in the previous Part that organizations should be liable for traditional crimes, and in the light of the recognition by many common law jurisdictions that it is and should be possible to find corporations and other organizations guilty of manslaughter, it is argued that such a restriction is inappropriate. The *Acts Interpretation Act 1931* (Tas), s 35(1), provides:

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.

This provision *may* overcome the restriction, however, in the light of the New Zealand case discussed above (see para 2.1.6), doubts remain.

4.2.2 The Issues Paper asked:

### Question 1

Should the definition of homicide in the Code be amended so that an organization can be criminally responsible for homicide?

Although some responses expressed a view as to whether the definition of homicide should<sup>93</sup> or should not<sup>94</sup> be changed, none discussed the legal issue in any detail. The Institute therefore retains its preliminary view that the current position is uncertain. Uncertainty in the law is undesirable. Therefore, the following recommendation is made.

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<sup>91</sup> As discussed in Part 2.

<sup>92</sup> However, *Acts Interpretation Act 1931* (Tas), s 35(1), may overcome this, it provides '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'.

<sup>93</sup> TMC, Unions Tas, Police (d).

<sup>94</sup> TCCI, HIA, TACC.

## Recommendation 1

That, in the interests of certainty, the definition of homicide be amended to make it clear that an organization may commit homicide. The following definition is recommended:

Homicide is the killing of a human being by another person.

4.2.3 This definition will encompass killing by an organization because the *Acts Interpretation Act 1931* (Tas), s 41, provides that ‘In any Act the expressions “person” and “party” respectively shall include any body of persons, corporate or unincorporate, other than the Crown’. However, as the principles of criminal responsibility set out in this Report will also apply to the Crown, a definition of ‘person’ should be included in the *Criminal Code* that provides that ““person” includes any body of persons, corporate or unincorporated, including the Crown’.<sup>95</sup>

## 4.3 The identification doctrine

4.3.1 The identification doctrine was explained above at para 2.1.3. It is argued that the identification doctrine does not *effectively* attribute liability to corporations (or other organizations).<sup>96</sup> The leading case on the identification doctrine is the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass* in which it was held that only those employees identified as being at the centre of the organization could be construed as ‘the directing mind and will’.<sup>97</sup>

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them.

4.3.2 The identification doctrine is now subject to a growing level of criticism, primarily in relation to the limited application of the doctrine, in that only the actions and mental states of those individuals who constitute the ‘controlling mind’ of the organization can lead to organizational liability. It is argued that by tightly restricting the range of persons whose actions and state of mind can lead to the organization being found criminally liable, the identification doctrine fails to reflect the ‘flatter’ structure and operation (such as the increasing delegation of responsibility to relatively junior officers) of modern corporations, particularly large corporations:

Corporate structure is becoming increasingly diffuse, with the day-to-day running of many larger corporations being devolved upon semi-autonomous division and lower level managers.<sup>98</sup>

4.3.3 It has been observed that the practices of modern corporate decision making rarely fall within the doctrine, particularly in larger corporations, where decisions are by necessity taken at the branch, unit or middle management level.<sup>99</sup> Morland J made this point in *National Rivers Authority v Alfred McAlpine Homes East* in which he claimed:<sup>100</sup>

<sup>95</sup> The application of the Criminal Code to the Crown is discussed at 5.1.6.

<sup>96</sup> This has led some commentators to argue that the criminal law is in a state of crisis because it is rooted in the ‘ideology of individualism’ and consequently is unable to deal with the very real responsibility of collectives: B Fisse & J Braithwaite, ‘Accountability and the Control of Corporate Crime’, in M Findlay & R Hogg (eds) *Understanding Crime and Criminal Justice*, (1988). Also see C Wells, ‘The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility’ [1988] *Criminal Law Review* 788, 799.

<sup>97</sup> [1972] AC 153 per Lord Reid, 171.

<sup>98</sup> T Woolf ‘The Criminal Code Act 1995 (C’t) – Toward a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257.

<sup>99</sup> For example see G Williams, *Textbook of Criminal Law* (2<sup>nd</sup> ed, 1983) 973; B Fisse, ‘Consumer Protection and Corporate Criminal Responsibility: A critique of *Tesco Supermarkets Ltd v Nattrass*’ (1971) 4 *Adelaide Law Review* 113; C Clarkson, above n 73.

<sup>100</sup> [1994] 4 All ER 286, 298.

In almost all cases the act or omission will be that of a person such as a workman, fitter or plant operative in a fairly low position in the hierarchy of the industrial, agricultural or commercial concern.

4.3.4 Few prosecutions against organizations for manslaughter have been brought before the courts. It seems likely that this is at least partly the result of the difficulty in securing a conviction using the identification doctrine, even in instances of gross negligence. All of the organizations that have been successfully prosecuted for manslaughter have been ‘small companies in which the directors took an active part in the day-to-day operations of the company’.<sup>101</sup> In fact, the Institute is aware of only three prosecutions of corporations for manslaughter in Australia,<sup>102</sup> only one of which was successful: *R v Denbo Pty Ltd*,<sup>103</sup> and in that case there was a plea of guilty. The case involved a small family construction company, with only two directors, and so the identification doctrine was readily applicable. In the UK the situation is similar. Only six small organizations have been convicted since 1992.<sup>104</sup> This means that it can be argued that in practice the law is discriminating against small businesses. Generally, with larger organizations, the fault stems from a lapse in safety standards and procedures, a failure that is often the result of a more general systemic problem rather than (as the identification doctrine requires) being traceable to ‘a directing mind and will’. For example:

- In the Victorian case of *R v A C Hatrick Chemicals Pty Ltd*,<sup>105</sup> the defendant company was charged with manslaughter and negligently causing serious injury following the explosion of a large vessel used to store gum resin. Applying the identification doctrine, Hampel J held that the company could not be liable unless there was criminal negligence on the part of an individual who could be identified as the directing mind and will of the company. As responsibility for the ‘accident’ lay with two employees<sup>106</sup> rather than anyone who could be construed as the ‘directing mind and will’ the defendant company was acquitted, with Hampel J concluding that if the doctrine for determining organizational criminal liability for manslaughter and negligently causing serious injury was to be modified, it was the responsibility of parliament, and not the courts, to change it.<sup>107</sup>
- Following a series of massive explosions at the Longford facilities of Esso Australia Pty Ltd,<sup>108</sup> which killed two workers and injured eight others, Esso Australia Pty Ltd was found guilty of 11 indictable offences under the *Occupational Health and Safety Act 1985* (Vic) and fined \$2,000,000 (the largest fine for a workplace offence in Australian history).<sup>109</sup> A Royal Commission found that the ‘real causes’ of the explosion were the failure of Esso’s management systems to ensure there was proper assessment of the hazards associated with the plant, and to provide appropriate training and supervision of employees in operating procedures to deal with the disaster that transpired.<sup>110</sup>
- \*The English case of *R v Stanley and Others*<sup>111</sup> concerned the infamous Zeebrugge ferry disaster, in which a failure to ensure that the bow doors of a passenger ferry were securely closed before sailing out to sea resulted in water flooding the car decks, the ferry sinking and the death of 193 people on board. According to P&O management ‘responsibility lies squarely with those on board who had professional responsibility to ensure that the ship sailed safely’.<sup>112</sup> However, this view was not supported in the official

<sup>101</sup> J Clough & C Mulhern, above n 16, 175.

<sup>102</sup> *R v Dynamic Demolitions Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 8 December 1997; *R v Denbo Pty Ltd* (1994) 6 VIR 157; *R v A C Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995.

<sup>103</sup> *R v Denbo Pty Ltd* (1994) 6 VIR 157.

<sup>104</sup> Home Office (UK), above n 89, at 8 of the Introduction. The Bill is available on the Home Office website at: [http://www.homeoffice.gov.uk/docs4/con\\_corp\\_mans.html](http://www.homeoffice.gov.uk/docs4/con_corp_mans.html) (accessed 24 May 2005).

<sup>105</sup> *R v A C Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995.

<sup>106</sup> The employees were the plant manager and safety co-ordinator, and the plant engineer.

<sup>107</sup> See generally K Wheelwright, ‘Corporate Liability for Workplace Deaths and Injuries – Reflecting on Victoria’s Laws in the Light of the Esso Longford Explosion’ (2002) 7 *Deakin Law Review* 323.

<sup>108</sup> Esso Australia Pty Ltd, a subsidiary of the US Exxon Mobil Corporation, operates three gas plants at Longford in south-eastern Victoria to process gas from wells in Bass Strait.

<sup>109</sup> P Gregory and M Shaw, ‘Esso Fined a Record \$2M’ *The Age*, 31 July 2001, 1.

<sup>110</sup> Report of the Longford Royal Commission, *The Esso Longford Gas Plant Accident* (1999).

\* Information and references provided are taken from, The Law Commission (of England and Wales), *Legislating the Criminal Code: involuntary manslaughter* (Report 237, 1996) at para 6.49, 6.50, 8.45 – 8.50.

<sup>111</sup> CCC No 900160, 19 October 1990.

<sup>112</sup> H Young, Where Does the Buck Stop? *Guardian Weekly*, 18 October 1987, 1.

inquiry<sup>113</sup> which held that the management of the ferry company, Townsend Car Ferries Limited (a subsidiary of P&O), had been jointly at fault in failing to ensure adequate standard operating procedures on board the ferry:<sup>114</sup>

All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.

A coronial inquest<sup>115</sup> resulted in the company, P&O European Ferries (Dover) Limited and seven individuals being prosecuted. However, the trial process was ultimately unsuccessful with the Judge ruling that there was insufficient evidence against any director or senior manager involved.<sup>116</sup>

### ***Meridian: a new approach?***

There have been some indications of a possible move away from the strictness of the identification doctrine when considering corporate liability for modern statutory offences. In *Meridian*,<sup>117</sup> the Privy Council said that where an offence was intended by the legislature to apply to a company the courts should ‘fashion a special rule of attribution’ by interpreting how it was intended to apply. The interpretation of this intention should be done by ‘applying the usual canons of interpretation, taking into account the language of the [statute creating the offence] and its contents and policy’.<sup>118</sup> While the flexible approach taken by the Privy Council in *Meridian* shows a willingness to hold corporations liable for criminal offences, the decision has been criticised as not being based on good principle or precedent, and being too uncertain and complicated.<sup>119</sup>

### ***Tasmania***

4.3.5 In Tasmania, while there have been successful criminal prosecutions against organizations responsible for breaches of the *Workplace Health and Safety Act 1995*, there has never been a prosecution for a traditional crime in the *Criminal Code* brought against an organization responsible for the death or serious injury of another. Thus, no Tasmanian case has considered whether the identification doctrine applies to crimes in the *Tasmanian Code*. While *Meridian* suggests a move away from the strictness of the identification doctrine in relation to statutory offences, it seems likely that Tasmanian courts would apply the identification doctrine if a corporation were charged with a crime in the *Criminal Code* because –

- *Meridian* particularly dealt with statutory offences which the legislature intended to apply to corporations – this does not include the types of traditional crimes in the *Criminal Code*.
- There is a legislative trend to provide specifically for alternative methods of attributing a state of mind to a company. In the absence of such a provision, it should be assumed that the legislature intended the traditional identification doctrine to apply.
- One of the main themes of the criminal justice system is to safeguard the rights of suspects, particularly where they may be held liable for serious crimes (such as manslaughter), therefore any ambiguities should be interpreted in favour of a defendant. In the absence of a clear intention to the contrary, the stricter identification doctrine should apply.

<sup>113</sup> *MV Herald of Free Enterprise*: Report of the Court (No 8074), Department of Transport (UK).

<sup>114</sup> *Ibid*, para 14.1.

<sup>115</sup> See *R v HM Coroner for East Kent, ex parte Spooner* (1989) 88 Cr App R 10.

<sup>116</sup> The jury were directed to acquit all accused: *R v Stanley and Others* CCC No 900160, 19 October 1990. The company was however held liable civilly for compensation to those injured and to the relatives of the victims who perished.

<sup>117</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

<sup>118</sup> *Ibid*, 507.

<sup>119</sup> For a detailed discussion of the application of the identification doctrine to traditional crimes, and criticism of the approach taken in *Meridian*, see J Clough & C Mulhern, above n 16, 94–104.

4.3.6 The following are examples of incidents in Tasmania in which a company may have been wholly or partly responsible for a death or injury. It is not suggested that traditional criminal prosecutions would have been appropriate in the following examples or that they involved criminal negligence. Rather, they are instances where prosecution for traditional crimes *might* have been appropriate.

- In July 2004 a 16-year-old boy was killed at Blue Ribbon Meats in Launceston when the forklift he was driving overturned.<sup>120</sup> The teenager, who had only been working at the plant for three weeks, was unlicensed for either a motor vehicle or forklift at the time of the incident and while he was working for a contractor on site, it is alleged he was receiving instructions from Blue Ribbon Meats employees. The defendant company was convicted of breaches of s 9(1) and (4) of the *Workplace Health and Safety Act 1995*. It was initially fined \$25,000. On appeal, the fine was increased to \$70,000.<sup>121</sup>
- In 2003, a mine worker was killed in a mine rockfall, while trying to recover a piece of equipment trapped by an initial rockfall. The defendant was convicted at an ex-parte hearing of one count of failing to ensure that a person at their workplace was safe from injury under the *Workplace Health and Safety Act 1995* (Tas). It was also found guilty of requiring or allowing an off-design and unsurveyed drive to occur in an attempt to retrieve the equipment without conducting risk assessment. The company was fined \$120,000.<sup>122</sup>
- In November 2003, an employee's arm became trapped in the gantry conveyor at a meat processing plant, resulting in severe injuries. The defendant company pleaded guilty to a breach of s 9(1) of the *Workplace Health and Safety Act 1995* (Tas). At the sentencing hearing, the magistrate stated that the evidence showed the company was aware of the dangerous condition of the conveyor and that there was a high degree of negligence. The company was fined \$30,000.
- In February 2000 an employee was killed when there was an explosion in a tank on the work site. The employee at the time of the incident was working on top of the tank, welding a threaded sleeve to one end of a pipe to enable the installation of a new valve. The use of the equipment ignited gas inside the plant resulting in the explosion. The force of the explosion blew open a bolted manhole lid which hit the employee, causing him to be hurled four metres into the air and then land approximately eight metres away and five metres below where he had been working. The defendant company was charged with failing to ensure that an employee was safe from injury under s 9(4) of the *Workplace Health and Safety Act 1995* (Tas). It was fined \$30,000 and a conviction recorded.
- A 19-year-old who had only been working for eight days was killed at a cable logging operation when a 25 metre log which was being hauled in, swung around and struck the deceased in the chest and head region. The investigation revealed the log was attached in the middle region which caused it to swing, striking the uphill bank and subsequently the deceased. The deceased was not a safe distance away from the area. The defendant company was charged under s 9(2)(d) and s 9(2)(e) of the *Workplace Health and Safety Act 1995* (Tas). According to the Senior Inspector for Forestry, Pulp and Paper the cause of the accident was a 'combination of fatigue and lack of specific training'. Interestingly, while s 4(2) of the *Industrial Safety, Health and Welfare (Forest Industries) Regulations 1990* provided that all personnel employed in the forest industry must be trained and accredited, exceptions were granted to cable logging and harvesting operations to defer accreditation 'until such time as an approved course becomes available'. According to the Senior Inspector for Forestry, Pulp and Paper if training and accreditation had been available at the time of the incident, the incident 'probably could have been avoided'.

<sup>120</sup> N Clark, 'Boy, 16, killed while driving work forklift', *The Mercury*, 13 July 2004, 3. Also see N Clark, 'Family wants answers in boy's forklift death', *The Mercury*, 14 July 2004, 9.

<sup>121</sup> G Lower, above n 67, 14.

<sup>122</sup> N Clark, above n 66, 14.

- A Devonport steel fabrication company had a metal punching, shearing and notching machine (known as a cropping machine) located within their work plant. In May 1996 while using the cropping machine an employee who had commenced work with the company three weeks earlier had the fingertips of two fingers severed. In evidence before the court it was discovered that the warning signs on the machine were written in German. The defendant company were charged under s 9(1)(a)(iii) of the *Workplace Health and Safety Act 1995* (Tas) for failing to ensure workplace health and safety. It was convicted and fined \$20,000.
- In September 1999, an employee was injured when his right arm became caught in a crushing plant. The employee at the time was attempting to realign a conveyor belt on the tail drum by lubricating it with water and on standing up fell, catching his arm in the tail drum. The defendant company was charged with failing to provide a safe plant and failure to provide a safe system of work, failing to maintain plant in a safe condition and failure to give adequate training or supervision.<sup>123</sup> Evidence was given that a Senior Inspector with Workplace Standards Tasmania had investigated the tail drum prior to the accident and had pointed out the requirement for a guard and emergency stop switches to be placed around the tail drum. Following the workplace incident, the Senior Inspector had found ‘basically the same set up as... when he first saw it’. Magistrate Wilson found the company guilty of all of the charges finding a ‘high level of culpability by the company’ and fining it \$15,000.<sup>124</sup>
- In May 1999 an employee was injured when he was splashed with chromic acid solution causing burns to the groin and eye. At the time the employee was standing below the chromic acid storage tank and attempting to transfer the acid to a storage tank by means of a portable pump and a length of pipe when the pipe fractured. The employee was then hit in the back of the neck by chromic acid solution escaping from the tank. The defendant company was charged with failing to provide a safe plant and failure to provide a safe system of work under ss 9(1)(a)(iii) and 9(1)(a)(ii) of the *Workplace Health and Safety Act 1995* (Tas). It was fined \$7,500 for failing to provide a safe plant and a conviction was recorded for failing to provide a safe system of work.<sup>125</sup>
- In January 1999 a 19-year-old temporary employee became caught in a conveyor belt and was trapped for three hours before he was found. The employee suffered extensive damage to his left shoulder requiring a muscular transplant, skin grafts and neuro-surgery on damaged nerves. The defendant company was charged with failure to provide information, instruction, training and supervision reasonably necessary to ensure that employees are safe from injury and risk to health, pursuant to s 9(1)(c) of the *Workplace Health and Safety Act 1995* (Tas). The defendant pleaded guilty to the charge. In handing down his decision, Magistrate Hill stated that the accident could have been prevented and fined the defendant company \$10,000.<sup>126</sup> Since the accident, the company has modified the plant to prevent a recurrence, and has introduced a ‘buddy system’ to enable workers to look after each other. They also conducted a safety audit and consequently upgraded the guards on conveyor belts.
- In September 1997 two contractors suffered electrical burns and shock whilst working in a high voltage sub-station at Bell Bay. In the Launceston Magistrates Court, Magistrate Wilson fined the defendant company \$40,000 for breach of s 9(4)(a) of the *Workplace Health and Safety Act 1995* (Tas). The defendant company was found guilty of the charge of failing to provide and maintain a safe working environment for its contractors. The Magistrate found that the two contractors were not qualified to work on live high voltage equipment and should not have been left to make a decision as to the need to have a person experienced in high voltage work present. This is the largest penalty ever handed down under this legislation.<sup>127</sup> The defendant company has since changed its safety procedures.

<sup>123</sup> *Workplace Health and Safety Act 1995* (Tas) ss 9(1)(a)(ii), 9(1)(a)(iii) and 9(1)(c).

<sup>124</sup> ‘Fined over injury’, *The Advocate*, 1 November 2001, 6.

<sup>125</sup> ‘Workplace fined’, *The Advocate*, 24 February 2001.

<sup>126</sup> ‘Company admits guilt’, *The Advocate*, 21 June 2000, 5.

<sup>127</sup> G Hose, ‘\$40,000 fine imposed on Lend Lease’, *The Examiner*, 2 December 1999, 12.

- In March 1999 an employee was carrying out repair work inside a calcine cooler. A boiler, located two floors above the cooler was having work done on it resulting in an inspection hatch being opened to allow the heated calcine to flow out on to the floor and then out a drainage hole. The employee working below suffered burns to his feet.<sup>128</sup> The defendant company was fined \$18,000 for a breach of s 9(4) of the *Workplace Health and Safety Act 1995* (Tas). Section 9(4) provides that employers must ensure that contractors and employees and others engaged by contractors are safe from injury and risks to health, and in particular that the employer must provide a safe working environment.

4.3.7 As stated above, it is not suggested that any of these Tasmanian cases necessarily involved criminal negligence. Nevertheless, the point to be made is that the circumstances of many workplace deaths or injuries are indicative of negligence, and it is therefore difficult to believe that criminal prosecutions have never been appropriate. In relation to a similar situation in Western Australia, Laing wrote:<sup>129</sup>

A brief analysis of a series of cases, where prosecutions have been pursued by WorkSafe or Department of Mineral and Petroleum Resources indicates there is no recent record of charges under the Criminal Code in relation to workplace fatalities or serious injury where there is no immediate and direct link between the fatality and the senior executive. It is difficult to believe that in all of the fatalities in WA in recent years that here has not been a case of criminal neglect or culpability.

## Responses

4.3.8 Question 2 of the Issues Paper asked ‘Should the method of attributing criminal liability to organizations (the identification doctrine) be reformed?’ Although the primary focus of the question was the identification doctrine, the problems with the doctrine were largely unaddressed in the responses to the Issues Paper. Some of the more extensive answers were as follow:

### 4.3.9 *Tasmanian Chamber of Commerce and Industry:*

No. The identification doctrine provides an adequate balance for attributing criminal responsibility based on the numerous factors differentiating various business types, structures, industries and sizes.

### 4.3.10 *Tasmanian Minerals Council Limited:*

The TMCL were not convinced of the need to reform the identification doctrine. In particular stating that it is not biased towards small organizations, suggesting that past prosecutions have been against small organizations because there are more ‘checks and balances’ in larger organizations (TMCL seems to be implying that this results in less deaths and injuries and/or less criminal negligence). They concluded:

Gathering the evidence necessary to prove that anyone (including organizations) acted carelessly is the issue – not how the organization is identified.

We have grave concerns about the whole issue arising from the inference that the instances quoted in 3.1.8 [4.3.6 of this report] might have been pursued under the Criminal Code but for the definitional or attribution problems. On the information provided the problems seem to centre around less than adequate risk controls, or inadequate proof, not whether anyone thought they might actually do harm to another person or that there was inadequate attribution.

Lack of criminal negligence or the inability to prove criminal negligence may well explain the lack of past prosecutions and will no doubt continue to be a factor in future decisions to prosecute. This does not address the *different* problem discussed in relation to the identification doctrine – i.e. its failure to adequately attribute criminal liability to organizations due to its tight restriction of the range of persons whose actions and state of mind can be said to be those of the organization.

<sup>128</sup> ‘Pasminco fined \$18,000’, *The Mercury*, 23 March 2004, 12.

<sup>129</sup> R Laing, *Final Report, Review of the Occupational Health and Safety Act 1984* (2002) 127.

#### 4.3.11 *Australian Finance Conference and Australian Equipment Lessors Association:*

The AFC did not clearly say whether they think the identification doctrine should be reformed. However, their response focused on the desirability of imposing criminal liability ‘on the organizations or individuals who are in a position to have real control over the events and behaviours which can lead to injuries, deaths or public disasters.’ Upon the Institute’s assessment of the identification doctrine it can fail to attribute liability even where there is this type of ‘real control’, therefore, we view the AFC’s comments as supporting reform of the identification doctrine.

#### 4.3.12 *Overview of responses*

As stated above (see overview of responses at 1.1.4), most of the responses came from bodies representing either industry groups or workers, and reflected the interests of the groups they represented. This also tended to be the case in relation to their position on reform of the identification doctrine. The industry groups in particular tended to view reform of the identification doctrine as a push for a more punitive approach to workplace safety, and were generally of the view that this would not in fact produce better workplace safety. Some responses expressed the view that such an approach may in fact reduce safety. There are two responses to this:

4.3.13 First, while the Issues Paper focussed much of its discussion on workplace deaths and injuries, it did deal with the much broader issue of the criminal liability of organizations generally. This is reflected in the statement below in the ‘Conclusion’ to this part (which is essentially unchanged from that in the Issues Paper) that reform of the identification doctrine could ‘improve community confidence in the ability of the criminal justice system to adequately prosecute and punish organizations that wrongfully cause deaths or injuries’. Thus it can be seen that the primary reason for reform is simply ‘doing justice’ (see 3.2.14).

4.3.14 Secondly, the current enforcement of workplace health and safety legislation in Tasmania follows the enforcement pyramid model.<sup>130</sup> This ‘employs advisory and persuasive measures at the bottom, mild administrative sanction (improvement and prohibition notices and on the spot fines) in the middle, and punitive sanctions (prosecution) at the top’.<sup>131</sup> Workplace standards describes the approach in its *Enforcement Policy* as follows:<sup>132</sup>

Workplace Standards will use promotion, education and advice to encourage compliance with the provisions of the legislation it administers.

Where these methods are inadequate, compliance will generally be secured through the use of formal notices and directions, and other enforcement methods provided for under the legislation.

Prosecution is normally the last resort in a line of alternative actions that are to be considered before a person or body corporate is proceeded against in court.

However, in some circumstances, prosecution will be considered as the only appropriate response to the offender and the only means of deterring other prospective offenders from contravening the legislation.

So while the dominant approach is one of persuasion, there is still a role for criminal prosecutions in achieving compliance with workplace standards. It may well be a small role, an action to be taken as a last resort, but nevertheless it is important that the enforcement mechanisms at the top of the pyramid operate effectively, and they must be serious enough to operate as an incentive to compliance with the milder enforcement mechanisms at the bottom of the pyramid. While prosecutions will usually be for offences under the WHSA, it is appropriate that prosecutions for more serious crimes are also integrated into the enforcement pyramid. Thus, while the primary aim of reform is doing justice, theoretically, the increased effectiveness in the law relating to the very tip of the workplace standards enforcement pyramid may increase the overall effectiveness of the whole enforcement approach.

<sup>130</sup> Workplace Standards Tasmania, *Enforcement Policy* 2005, Department of Industry, Energy and Resources, 3.

<sup>131</sup> R Johnstone, ‘Rethinking OHS Enforcement’ in L Bluff, N Gunningham and R Johnstone (eds) *OHS Regulation for a Changing World of Work* (2004) 156.

<sup>132</sup> Workplace Standards Tasmania, above n 130, 3-4.

## ***Conclusion***

4.3.15 The Institute concludes that the identification doctrine is ineffective, resulting in larger organizations being essentially free from all but strict criminal liability (i.e. crimes where no mental state, or guilty mind, is required). Reforming this area of the law has the potential to improve community confidence in the ability of the criminal justice system to adequately prosecute and punish organizations that wrongfully cause deaths or injuries, and may also improve attitudes towards workplace safety. The Institute recommends reforming the identification doctrine.

## **Recommendation 2**

That a new method of attributing responsibility for traditional crimes to organizations be introduced.

## Part 5

# Extent of Reform

5.1.1 This Part deals with the issue of what types of bodies the reforms recommended in this report should apply to. In this report, reference has been made to organizations generally, without discussing how this should be defined for the purposes of imposing criminal liability. When considering this it is helpful to keep in mind that the main recommendations of this report (which are set out in detail in the following parts) are introducing specialised principles of criminal responsibility to the *Criminal Code* and expanding the range of sentencing options available for sentencing organizations. Thus we are concerned with the application of the *Criminal Code* and the *Sentencing Act*.

5.1.2 Although it may be arguable, it appears that under current Tasmanian law only natural persons and bodies corporate can be held liable for the crimes in the *Criminal Code*.<sup>133</sup> Likewise, the Commonwealth Criminal Code applies only to natural persons and bodies corporate. In contrast, the Australian Capital Territory's new industrial manslaughter offence<sup>134</sup> applies to 'employers' rather than corporations. The term 'employer' is defined broadly: essentially as any person who engages a worker or who has an agent who engages a worker.<sup>135</sup> This was intended to include bodies such as schools, hospitals and other not-for-profit organizations as well as Government Departments and Government Business Enterprises. Penny Shakespeare, the Director of Work Safety and Labour Policy with the Chief Minister's Department stated:<sup>136</sup>

all organizations have to abide by the ACT occupational health and safety law. Anyone who has an employment relationship, who has workers, has to abide by the law of the territory.

5.1.3 This more inclusive approach is taken even further by the recent reforms to the Canadian *Criminal Code*. These apply to 'organizations', which is very broadly defined:

"organization" means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons.

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<sup>133</sup> Section 35(1) of the *Acts Interpretation Act 1931* (Tas) 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', thus there is no doubt that corporations can be found criminally liable. However, it could be argued that s 35 is otiose because the Criminal Code and other statutes creating criminal offences such as the *Workplace Health and Safety Act 1995* (Tas) (WHSa) refer to 'people' or 'a person' when they define offences, and s 41(1) of the *Acts Interpretation Act 1931* (Tas) provides that 'In any Act the expressions "person" and "party" respectively shall include any body of persons, corporate or unincorporate, other than the Crown'. What then is the combined effect of ss 35 and 41? Section 41 could have the effect of making any criminal offence that applies to a 'person' also apply to 'any body of persons, corporate or unincorporate, other than the Crown'. However, it could also be argued that by expressly providing in s 35 that only bodies corporate can be liable for criminal offences, it is implied that other bodies cannot ('expressio unius est exclusio alterus'), and that s 41(1) does not therefore extend to provisions in any Act creating criminal offences. However, this latter interpretation would mean that unincorporated bodies, such as partnerships (as distinct from their members as individuals), are not criminally liable under the WHSA. This would seem to be contrary to the purpose of the WHSA (to deal with *all* employers). If this interpretation were not accepted, then it would appear that these unincorporated bodies may also be already able to be held liable under the Code. Whatever the correct interpretation, it would seem desirable to clarify the effect of ss 35 and 41 of the *Acts Interpretation Act* in relation to criminal offences.

<sup>134</sup> Introduced to the *Crimes Act* by the *Crimes (Industrial Manslaughter) Amendment Act 2003*.

<sup>135</sup> *Crimes Act 1900* (ACT), s 49A.

<sup>136</sup> Legislative Assembly for the Australian Capital Territory, Standing Committee on Legal Affairs, (Reference: Crimes (Industrial Manslaughter) Amendment Bill 2002) 21.

The Canadian Department of Justice explains that this could include even non-formal bodies, such as ‘biker gangs’.<sup>137</sup> The importance of all organizations – rather than just corporations – being subject to sanction was articulated in Canada by Paul Macklin, the Parliamentary Secretary to the Minister of Justice and Attorney General:<sup>138</sup>

There has been a great deal of creativity shown by corporate lawyers in developing new structures, for example, limited liability partnerships and joint ventures. Quite simply, we want to ensure the Criminal Code applies to every organization of persons without any artificial distinctions based on how these persons chose to structure their legal relations.

5.1.4 Part 3 of this Report discusses the justifications for holding organizations criminally liable. These justifications are based upon an organization’s possession of ‘personality’, not only legal personality, but more importantly a ‘distinct’ personality – distinct from its shareholders, members or employees. It was argued that an organization’s goals and decision-making structures can result in its ‘actions’ being truly its own, rather than reflecting the goals or decisions of any particular employee. In this way, organizations *themselves* can ‘commit’ crimes. The ‘personality’ and structured nature of organizations were also important factors in concluding that the aims of the criminal justice system (denunciation, retribution, deterrence and rehabilitation) could be successfully met when punishing organizations.

5.1.5 In the Issues Paper the Institute expressed the preliminary view that criminal liability should be imposed on all organizations and expressed a preference for the Canadian approach. All the respondents to the Issues Paper that commented on this issue were in general agreement.<sup>139</sup> The Institute recommends this approach.

### Recommendation 3

That the recommendations of this report apply to all organizations and that the term ‘organization’ be defined as follows:

"organization" means:

- (a) a public body, body corporate, society, company, firm, partnership, or trade union, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons.

### *The Crown*

5.1.6 The Crown is immune from criminal prosecution unless a statute expressly states that it binds the Crown.<sup>140</sup> The Code does not currently state that it binds the Crown.<sup>141</sup> Furthermore, the definition of ‘person’ in the *Acts Interpretation Act 1931* specifically states that it does not include the Crown. The historical rationale for the presumption of Crown immunity lies:

<sup>137</sup> <http://www.justice.gc.ca/en/dept/pub/c45/section02.html#5> accessed 16 November 05.

<sup>138</sup> Paul Macklin, Parliamentary Secretary to the Minister of Justice and Attorney General, C-45, Second Reading Speech.

<sup>139</sup> This included the Tasmanian Chamber of Commerce and Industry, Tasmanian Minerals Council Limited, Tasmanian Automobile Chamber of Commerce, Australian Metal Workers Union, Unions Tasmania, and two of the police respondents.

<sup>140</sup> *Cain v Doyle* (1946) 72 CLR 409; *Acts Interpretation Act 1931* (Tas) s 6(6).

<sup>141</sup> In the issues paper it was stated that because the Code applies to bodies corporate it would apply to state owned corporations and government business enterprises (issues paper, at 4.1.5), however, this may be incorrect. In Canada, similar provisions have been interpreted as not extending liability to Crown bodies. Although the term ‘every one’ in the Canadian Code is defined to include Her Majesty, this has been interpreted to mean that offences can be committed against Her Majesty, but was held not to be specific enough to amount to an ‘express’ displacement of the presumption that Her Majesty is not bound: *Canadian Broadcasting Corporation v A-G Ontario* [1959] SCR 188. Similarly, the *Acts Interpretation Act 1931* (Tas) s 35 states that criminal offences apply to bodies corporate, these are not express words that the Crown is bound, and are not contained within the Code itself (as required by *Acts Interpretation Act 1931* (Tas) s 6(6)). The question may depend on whether the body was an ‘agent of the Crown’.

in a mixture of considerations: regard for the dignity and majesty of the Crown; concern to ensure that any proposed statutory derogation from the authority of the Crown was made plain in the legislative provisions submitted for the royal assent; and, the general proposition that, since laws are made by rulers for subjects, a general description of those bound by a statute is not to be read as including the Crown.<sup>142</sup>

5.1.7 However, it is argued that Crown immunity from serious criminal offences is not justified on any of these bases. The reasons for holding organizations liable for crimes (discussed in Part 3) also apply to Crown organizations. This is particularly so because of the extensive operations of the modern Crown:

the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and... it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents... to compete and have commercial dealings on the same basis as private enterprise.<sup>143</sup>

5.1.8 Different jurisdictions have taken different approaches to this issue. The Canadian reforms apply to the Crown by specifically defining an organization to include a public body. Similarly, the unsuccessful Victorian Bill in 2001, *Crimes (Workplace Deaths & Serious Injuries) Bill*, specifically dealt with application to the Crown. As discussed above, the ACT crime of industrial manslaughter simply applies to all ‘employers’, a term clearly intended to include the Crown.

5.1.9 In the United Kingdom, the draft Corporate Manslaughter and Corporate Homicide Bill<sup>144</sup> applies generally to corporations and to those government departments and bodies listed in a schedule. This general lifting of Crown immunity was said to recognise ‘the need for [the government] to be clearly accountable where management failings on its part lead to death.’<sup>145</sup> However, the proposed offence does not apply to things done ‘in the exercise of an exclusively public function’ this means ‘functions that fall within the prerogative of the Crown or that are, by their nature, exercisable only with statutory authority or with authority conferred by the exercise of the prerogative.’<sup>146</sup> The Bill makes it clear that decisions involving matters of public policy are outside its scope.<sup>147</sup> This is said to be justified on the basis that decisions involving matters of public policy are subject to other types of accountability, such as public inquiries or reports. The government received over 180 responses to their consultation on the draft Bill. The general view of these was that the offence should apply as widely as possible, including to Crown bodies.<sup>148</sup> The UK Bill is currently before the House of Lords.<sup>149</sup>

5.1.10 The Institute’s Issues Paper asked respondents whether they were in favour of a UK style exception for activities done ‘in the exercise of an exclusively public function’. No respondents commented in detail on this issue. Generally, respondents were not in favour of a UK style exception; however, the Tasmanian Minerals Council was in favour of such an exception.

5.1.11 The Institute does not recommend a UK style exception for activities done in the exercise of a public function. Crown criminal liability is already possible in Tasmania in relation to some offences, for example those in the WHSA.<sup>150</sup> While Crown prosecutions would no doubt be exceptional, as they are rarely in the

<sup>142</sup> *Bropho v Western Australia* (1990) 171 CLR 1, para 14, citing *The Attorney-General v Donaldson* (1842) 10 M and W 117, 123-124 (152 ER 406, 408-409); *British Broadcasting Corporation v Johns*, 78.

<sup>143</sup> *Bropho v Western Australia* (1990) 171 CLR 1, para 15.

<sup>144</sup> *Corporate Manslaughter and Corporate Homicide Bill*, as brought from the Commons and ordered to be printed in the Lords. The Bill is available online at <http://www.publications.parliament.uk/pa/ld200607/ldbills/019/2007019.pdf> (accessed 9 January 2007).

<sup>145</sup> Home Office (UK), above n 89, 15. See further discussion in House of Commons Research Paper, *The Corporate Manslaughter and Corporate Homicide Bill*, Research Paper 06/46, 2006, 24 – 33.

<sup>146</sup> Clause 3(4).

<sup>147</sup> Clause 3(1).

<sup>148</sup> Home Office (UK), *Summary of Responses to Corporate Manslaughter: The Government’s Draft Bill for Reform* March 2005, at 9, available at [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk) (accessed 22 November 2005).

<sup>149</sup> See progress of Bill online at [http://www.publications.parliament.uk/pa/pabills/200607/corporate\\_manslaughter\\_and\\_corporate\\_homicide.htm](http://www.publications.parliament.uk/pa/pabills/200607/corporate_manslaughter_and_corporate_homicide.htm) (accessed 9 January 2007).

<sup>150</sup> *Workplace Health and Safety Act 1995* (Tas), s 4 provides that the Act binds the Crown. Another example is the *Workers Rehabilitation and Compensation Act 1988* (Tas), which contains criminal offences (s 4(1) provides that the Act binds the Crown; s 3 defines ‘employer’ to include the Crown).

public interest,<sup>151</sup> a valuable message is sent by providing that *all* people, including the Crown and government bodies, must obey criminal laws. The exercise of prosecutorial discretion should result in only appropriate cases being prosecuted. A factor relevant to this would no doubt be the extent to which the potential defendant had already been held accountable in another arena.

#### **Recommendation 4**

That the Code be amended to provide that it binds the Crown.

#### *Victorian Law Reform Commission recommendations*

5.1.12 A final matter to be addressed here is the recommendations of the Victorian Law Reform Commission (VLRC) as to how Crown liability could be imposed by the 2001 *Crimes (Workplace Deaths & Serious Injuries) Bill*. The Bill initially applied only to bodies corporate, but the Victorian Government had made the policy decision to apply the Bill to the whole of government, and for this reason gave a reference to the VLRC on how to impose criminal liability on public sector entities (excluding bodies corporate) such as ‘agencies’, ‘offices’ and ‘public authorities’. In particular it was asked:

- (i) the way in which, and the basis upon which, such criminal liability should be attributed to the entity;
- (ii) the way in which sentences can be imposed on the entity;
- (iii) how personal criminal liability could be imposed on senior officers/employees of the entity, in circumstances where a negligent act or omission attributed to the entity causes death or serious injury to an employee or worker of the entity.

The VLRC recommended<sup>152</sup> that the Bill should provide that for the avoidance of doubt the Crown is a body corporate and that it is intended that the Bill should bind the Crown in all its capacities as far as is constitutionally possible and it is intended to make the Crown criminally liable and subject to criminal sanctions. These (and other) recommendations were introduced into the Bill.<sup>153</sup> The VLRC gave detailed consideration to the issue of how this liability should be imposed, making 38 recommendations in all. These are reproduced in Appendix B.

5.1.13 Our Issues Paper asked whether these VLRC recommendations would be appropriate/necessary in Tasmania. No respondents addressed this issue in any detail, although two respondents stated their support for the recommendations of the VLRC.

5.1.14 Unfortunately the resources of this project do not permit the extensive research and consideration that was given to this issue in Victoria. However, many of the Victorian recommendations derive from concerns that would not apply to the reforms recommended in this report. For example, the Victorian Bill only applied to corporations, this necessitated recommendations in relation to the corporate status of the Crown and how unincorporated Crown bodies should be dealt with. In contrast, the Institute’s recommended broad definition of the term organization would mean that whether a Crown body had corporate status would not be relevant to the decision to prosecute. Furthermore, the DPP would be free to determine the most appropriate defendant – whether this was a small public body or the Crown as a whole.

5.1.15 Therefore, in relation to the scope of the application of the reforms, the Institute makes no recommendations akin to those made by the VLRC.

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<sup>151</sup> Prosecution guidelines are available at: [http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines) (accessed 6 December 2006). The guidelines set out the factor relevant to the DPP’s decision to prosecute including whether the prosecution is required in the public interest.

<sup>152</sup> Victorian Law Reform Commission, *Criminal Liability for Workplace death and Serious Injury in the Public Sector Report*, 2002.

<sup>153</sup> As sent to the Upper House in Autumn 2002. The Bill is available at: [http://dms003.dpc.vic.gov.au/archive/Autumn\\_2002/bills/B01048/B01048S.html](http://dms003.dpc.vic.gov.au/archive/Autumn_2002/bills/B01048/B01048S.html) (accessed 8 June 2005).

## Part 6

# Options for Reform

### *Introduction*

6.1.1 The problems with the identification doctrine outlined in 4.3.1 – 4.3.4 of this paper demonstrate a need to change this area of law. The Issues Paper outlined three different types of reform that have been adopted or proposed in other jurisdictions:

- Introducing a specific ‘industrial manslaughter’ offence to the Code;
- Introducing reforms to the WHSA; and
- Introducing specialised principles of criminal responsibility for organizations.

### *Responses to the Issues Paper*

6.1.2 After discussing each of the three types of reform in detail, and in particular of the specific approaches that have been taken or considered in other jurisdictions,<sup>154</sup> the Issues Paper asked which type of reform respondents preferred. Responses were varied but generally either contained no, or very little, explanation of the reasons for the preference. In summary the preferences of the respondents were:

- Two respondents<sup>155</sup> did not indicate whether they favoured reform at all, let alone which type of reform they preferred.
- Six respondents took no clear position on their preferred option for reform. This included three industry groups who were not in favour of reform at all,<sup>156</sup> as well as the DPP, Dr Erica Roberts, and one of the police respondents.
- Five responses<sup>157</sup> preferred reforms to the WHSA. A common reason stated for this view was that the matter was better dealt with in specialised legislation. These respondents tended to view the move to reform as an issue of workplace safety rather than as an issue of criminal liability of organizations more generally.
- Two of the police respondents and the Tasmanian Minerals Council preferred introducing specialised principles of criminal responsibility.
- Unions Tasmania stated merely that they preferred the matter not be dealt with in the WHSA.
- One of the police responses was in favour of a specific crime such as industrial manslaughter, although it was not stated whether the preference was for this to be in the Code or the WHSA.

6.1.3 The Institute remains of the view that the best option for reform was the third type: introducing specialised principles of criminal responsibility. This Part explains this type of reform more fully, outlines the reasons for recommending this change, and then makes recommendations as to the detail of the specialised principles.

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<sup>154</sup> That detail will not be repeated here, however, the issues paper remains available on the Institute’s webpage: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform). A summary of the types of reform can also be found in 1.1.2 of this report.

<sup>155</sup> Mr John O’Meara, Recruitment and Consulting Services Association.

<sup>156</sup> Australian Mines and Metals Association (however the cover letter to the AMMA’s response states that as a member of the TCCI they endorse the TCCI response also, which prefers reforms to the WHSA), the Housing Industry Association and the Australian Finance Conference and Australian Equipment Lessors Association.

<sup>157</sup> Tasmanian Chamber of Commerce and Industry, Tasmanian Automobile Chamber of Commerce, Australian Metal Workers Union, Australian Bankers’ Association and one of the police respondents.

## 6.2 Specialised principles of criminal responsibility for organizations

6.2.1 In short, ‘principles of criminal responsibility’ are the general ‘rules’ that apply when deciding if a person is guilty of an offence. These are contained in Chapter 4 of the *Criminal Code* (Tas). They deal with things like voluntariness, insanity and intoxication, and they apply generally to the crimes in the Code. This option involves introducing into the *Criminal Code* (Tas) provisions setting out how criminal responsibility (including physical and mental elements) can be proved when dealing with an organization. This change would recognise the reality that organizations do not have minds or bodies and do not ‘think’ or ‘act’ in the way that natural people do, and so, when seeking to prove that an organization had a certain ‘state of mind’, it is necessary to look to 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 generally, regardless of the crime an organization was charged with.<sup>158</sup>

6.2.2 This type of reform has been undertaken in Australia by adoption of Part 2.5 of the Model Criminal Code (MCC) by the Commonwealth, the Australian Capital Territory and the Northern Territory. Canada has also undertaken this type of reform, although using a different approach from that in the Australian MCC.

### *The Model Criminal Code – Commonwealth, the ACT and the Northern Territory*

6.2.3 For over a decade the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC) have been developing a national criminal code for Australian jurisdictions with the aim of increasing uniformity in the criminal law in Australia. Rather than introducing any specific corporate offences such as ‘corporate manslaughter’ the MCC approaches the problem of corporate liability in a very general way. Like Chapter 4 of the Tasmanian Code, Part 2 of the MCC sets out the general principles of criminal responsibility. This Part of the MCC includes general principles of corporate criminal responsibility, namely, Part 2.5: ‘Corporate criminal responsibility’. In Part 2.5 the MCCOC sought to ‘develop a scheme of corporate criminal responsibility which as nearly as possible, adapted personal criminal responsibility to fit the modern corporation’.<sup>159</sup> The model attempts to impose liability where there is corporate *blameworthiness*.<sup>160</sup> The focus is on those express and implied policies of the corporation that influence the manner in which the corporation operates, and can therefore be considered to represent the ‘state of mind’ of the company. This model of corporate criminal liability has been described as ‘arguably the most sophisticated model of corporate criminal liability in the world’.<sup>161</sup>

## 6.3 Reasons for recommending third type of reform

### *Fixes the identification doctrine only*

6.3.1 One of the primary reasons for recommending the introduction of specialised principles of criminal responsibility is that this solution seems to best ‘fit’ the problem – i.e. the identification doctrine. The identification doctrine is essentially a common law principle of criminal responsibility. By introducing specialised principles to replace the identification doctrine, we fix the problem without going beyond it.

### *Only one crime of manslaughter*

6.3.2 This approach does not offend the basic principle of equality before the law. While specialised activities often require specialised laws, when considering the types of traditional crimes in the Code,

<sup>158</sup> However, as part of the Code principles of criminal responsibility, the specialised principles would only apply to indictable offences, or summary offences with a Code parallel.

<sup>159</sup> Model Criminal Code Officers Committee, *Chapter 2: General Principles of Criminal Responsibility, Report* (1992) 109.

<sup>160</sup> J Clough & C Mulhern, above n 16, 138.

<sup>161</sup> *Ibid.*

particularly very serious crimes like manslaughter, it seems only fair that the same laws should apply to all people. The Law Society of NSW for example argued in their submission to the NSW Legislative Council Standing Committee on Serious Injury and Death in the Workplace that the creation of a specific industrial manslaughter offence would ‘offend the long standing principle of the Criminal Law pertaining to equal justice and equal punishment. The fact that a death occurs at work should not mean that the accused is treated in a more or less favourable way than had for example the crime of manslaughter been committed in a non-industrial context.’<sup>162</sup>

6.3.3 Introducing organizational principles of criminal responsibility means that the *same* crimes – defined in the same way – would apply to all defendants, there would simply be a different way of proving the physical and mental elements when the defendant is an organization.

6.3.4 A disadvantage of this approach may be that the crime is not defined in a way that makes it applicable to organizational activities. For example, negligent manslaughter under the Code requires a breach of one of the Code’s duties tending to the preservation of human life (see 2.1.6). It could be argued that when considering organizational conduct the more appropriate duties to consider would be those in the *Workplace Health and Safety Act 1995* or any other duties imposed by regulatory legislation. However the Institute is of the view that the importance of having serious crimes defined in the same way for all people outweighs this possible disadvantage. However, if it was thought appropriate, this may be a matter that could be solved by amendment to the definition of the crime of manslaughter.<sup>163</sup>

### ***Applies beyond the workplace***

6.3.5 Another advantage of a reform that applies traditional crimes to organizations generally is that it is not limited to an employment or workplace context. For example the ACT crime of industrial manslaughter must be committed by an employer, against a worker, and in the course of their employment. This restriction means that deaths of non-workers are not covered. Thus, for example, the crime would not apply if a member of the public on or nearby a worksite was killed (such as the 12-year-old girl who was killed in Canberra during the implosion of the Royal Canberra Hospital a few years ago<sup>164</sup>) or if a consumer was killed or injured by an organization’s products or services. Reforms to the *Workplace Health and Safety Act 1995* would naturally be similarly restricted.

### ***Uniformity***

6.3.6 As the recommendations in this report are based on the Model Criminal Code, a final advantage of this type of reform is that it promotes uniformity with other jurisdictions that have adopted the Model Criminal Code provisions (the Commonwealth, the ACT, and the Northern Territory (once commenced)). There is also some prospect that the Model Criminal Code will be implemented in other Australian jurisdictions. This is advantageous to law makers and those seeking to apply the law, as well as being advantageous to organizations operating on a national level. The desirability of uniformity was a point made by a number of respondents to the Issues Paper, including the Australian Bankers’ Association and the Australian Mines and Metals Association.

## **Recommendation 5**

That specialized principles of criminal responsibility for organizations be introduced to Chapter IV of the Code, based on Part 2.5 of the Model Criminal Code.

<sup>162</sup> NSW Legislative Council Standing Committee Report, *Serious Injury and Death in the Workplace* (2004) para 12.48.

<sup>163</sup> For example the range of duties that if breached (with culpable negligence) can give rise to culpable homicide could be expanded to include the duties under the *Workplace Health and Safety Act 1995*, or perhaps any legally imposed duty.

<sup>164</sup> See footnote 2.

## 6.4 Specialised principles of criminal responsibility for organizations – detailed recommendations

6.4.1 The Institute recommends the introduction of specialised principles of criminal responsibility for organizations based on Part 2.5 of the Model Criminal Code. While the Institute wishes to promote uniformity, some modifications to the Model Code provisions are recommended. This section discusses the various provisions and modifications recommended for Tasmania. Part 2.5 of the Model Criminal Code was introduced (without modification) in the Commonwealth *Criminal Code Act 1995*<sup>165</sup> and has also been enacted in the Australian Capital Territory's *Criminal Code 2002* and the Northern Territory's *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*,<sup>166</sup> although with some fairly minor modifications and re-phrasing. Under the MCC:

Essentially, advertant fault will be attributed to a corporation either where the board of directors or a high managerial agent was at fault or where the corporation had a criminogenic 'corporate culture', that is, where its general attitudes, policies, rules and codes of conduct encouraged the performance of the prohibited conduct.<sup>167</sup>

The following discussion uses the section numbers of the Commonwealth and Model Codes. Part 2.5 is reproduced in full in Appendix C.

6.4.2 As a preliminary matter, in accordance with Recommendation 3, the Tasmanian provisions should apply to 'organizations' rather than 'bodies corporate'.

### *General principles*

6.4.3 Section 12.1 of the MCC states the general principles of Part 2.5:

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

These general principles offer guidance and flexibility in the interpretation and application of the rest of Part 2.5 and the Code. Accordingly the Institute recommends they be part of the Tasmanian amendments.

### *Physical elements and 'fault elements'*

A central aspect of the MCC is the splitting up of the elements of an offence into 'physical elements' and 'fault elements'.

6.4.4 The MCC defines the term 'physical elements' to include conduct (which means an act, an omission to act as well as a state of affairs), a circumstance in which conduct occurs, or a result of conduct. Thus essentially the 'physical elements' of a crime are what must be physically *done* or what circumstances must exist to commit a crime. For example to be guilty of murder or manslaughter your action (or omission) must cause the death of the victim; to be guilty of assault by application of force, your action must 'apply force to

<sup>165</sup> In Australia, the criminal jurisdiction of the federal government is restricted to crimes where the criminal activity is related to the heads of power in s 51 of the *Constitution*. It has no express power to legislate in the field of criminal law. The Commonwealth has the power to legislate in relation to crimes against the Commonwealth and Commonwealth employees and organizations e.g. espionage and environmental pollution. The states have primary responsibility for the criminal law with respect to offences against private individuals e.g. manslaughter and assault.

<sup>166</sup> This Act has not commenced.

<sup>167</sup> T Woolf, above n 98, 258 – 259.

the body of another’,<sup>168</sup> and so on. Although the term ‘physical element’ is not used in the Tasmanian Code, it is the usual terminology in this state, and has the same meaning as the definition in the MCC.

6.4.5 ‘Fault elements’ are akin to ‘mental elements’, that is, the ‘guilty’ state of mind required. It is recommended that the Tasmanian provisions adopt the term ‘mental element’ rather than ‘fault element’ as this is the usual terminology in Tasmania. The MCC defines the fault elements of intention, recklessness, knowledge and negligence. The *Criminal Code* (Tas) relies on case law for the meaning of the mental elements. It is beyond the scope of this paper to consider adopting the MCC definitions of these different fault elements in our *Criminal Code* (Tas), as this would have an effect well beyond organizational liability.

6.4.6 This difference in terminology has necessitated considerable modification of the MCC provisions in the recommended Tasmanian version of s 12.

6.4.7 Central to the attribution of criminal responsibility to corporations in Part 2.5 is that the MCC makes specific provision for how the physical elements and the fault element of an offence can be proven when dealing with a corporation. Leader-Elliott writes:

Though the conduct elements of offences – acts, omissions or states of affairs – may be brought into existence directly, by corporate action or inaction, most offences committed by corporations will result from the acts or omissions of corporate agents. In the general run of offences, the prosecution will find it necessary to rely on rules which permit the attribution of an agent’s act and omissions to the corporation. When fault is in issue, rules for attributing the fault of agents to the corporation are essential in all cases.<sup>169</sup>

### *Attribution of physical elements*

6.4.8 In relation to the physical elements of an offence, the MCC and Commonwealth *Criminal Code* provide in s 12.2<sup>170</sup> that:

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Leader-Elliott writes that ‘when Chapter 2 speaks of “physical elements of an offence committed by an employee”, it refers to the physical elements of the offence for which it is sought to hold the *corporation* responsible’.<sup>171</sup>

6.4.9 This broad test for attribution of physical elements may seem a somewhat strict approach, as these actions may not truly represent the actions of the corporation.<sup>172</sup> However, the Institute supports this approach for the following reasons. It has the appeal of simplicity, and its strictness is tempered by two things: first, the requirement that the employee be acting within the scope (actual or apparent *as defined by the Tasmanian draft provision*) of their employment or authority;<sup>173</sup> and secondly, by the fault element of an

<sup>168</sup> For a full definition of assault see ss 182 and 184 *Criminal Code* (Tas).

<sup>169</sup> I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners*, Commonwealth Attorney-General’s Department, (2002) 297, 299.

<sup>170</sup> Section 50 of the ACT amendment is to the same effect, although reworded.

<sup>171</sup> I Leader-Elliott, above n 169, 305.

<sup>172</sup> See discussion in T Woolf, above n 98, 260-261.

<sup>173</sup> The phrase ‘scope of employment or authority’ is not defined by the Commonwealth Code. I Leader-Elliott, above n 169, 305 states that the common law applies. For a thorough discussion of the common law see F Trindade and P Cane *The Law of Torts in Australia* (3<sup>rd</sup> ed., 1999) 735-742. The position was recently stated by Gleeson CJ in *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HC 4, [42] as follows: ‘It is clear that if the wrongful act of an employee has been authorised by the employer, the employer will be liable. The difficulty relates to unauthorised acts. The best known formulation of the test to be applied is that in Salmond, *Law of Torts* in the first edition in 1907 and in later edition: an employer is liable even for unauthorised acts if they are so connected with the authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.’

offence. Thus the MCCOC stated ‘this does not impose vicarious liability because liability depends also on fault’.<sup>174</sup>

6.4.10 The Institute recommends three changes to a Tasmanian version of s 12.2:

First, in keeping with the rest of our Code, and in particular with s 13, the provision should refer to acts or omissions rather than ‘physical elements’ that are ‘committed’.

Secondly, in the light of Recommendation 3 (that the reforms apply to ‘organizations’), it is recommended that the terms ‘employee, agent or officer’ should be replaced by the more general term ‘representative’ which should be defined broadly. The recommended definition of the term ‘representative’ is based on that in the Canadian Code. It is noted that this definition extends to contractors. In the modern workplace contractors can vary from totally independent workers hired to perform a single, short-term, specific task, to workers who are hired on a long-term, full-time basis, and wear the company uniform. It may therefore be important to attribute the actions of contractors to the organization in circumstances where they are doing the work of an organization.<sup>175</sup> As with other employees, the possible harsh effect of this is tempered by the need to prove the mental element, that the act must be within the scope of the employment, and also the defence of due diligence by the organisation (discussed below).

Thirdly, the Institute’s view is that the concept of ‘apparent’ authority derived from agency law is too broad. Notwithstanding potential difficulties that may flow from this,<sup>176</sup> our preferred approach is to specify that ‘apparent’ authority only exists if the organisation has conducted itself so that it is reasonable to treat that person as acting within the scope of their apparent employment or authority.

6.4.11 It is therefore recommended that a Tasmanian version of s 12.2 provide:

- (1) The acts or omissions of all of the representatives of an organization, acting within the actual or apparent scope of their employment or within their actual or apparent authority, must be attributed to the organization.
- (2) In this section a person is acting within the apparent scope of their employment or within the apparent scope of their authority if the organization has conducted itself in a manner that it is reasonable to treat that person as acting within the apparent scope of their employment or the apparent scope of their authority.
- (3) In this Chapter “representative” includes a director, partner, officer, employee, member, agent or a person who does the work of an organization.

### ***Attributing fault elements other than negligence***

6.4.12 It is always necessary to attribute fault (the mental element) to an organization. Section 12.3 of the MCC<sup>177</sup> sets out how fault elements other than negligence,<sup>178</sup> such as intention, knowledge or recklessness, are to be attributed to a body corporate. In the *Criminal Code* (Tas) these fault elements (or mental elements) are necessary to prove guilt for many crimes, such as murder, manslaughter, wounding, causing grievous

<sup>174</sup> Model Criminal Code Officers Committee, above n 159, 111.

<sup>175</sup> This changing nature of employment relations has been recently discussed by the High Court in *Sweeney v Boylan Nominees Pty Limited* [2006] HCA 19. For example Kirby J said at [37] ‘it must keep in mind the changing social conditions that affect economic activities of employment, or quasi-employment, in contemporary Australia’ see also [63], [102] - [105].

<sup>176</sup> Clough & Mulhern comment (in relation to the use of the terms agent in the MCC) that ‘a more realist approach might ask whether, “in light of the size, complexity, formality, functionality, decision-making process, and structure of the corporation, is it reasonable to conclude that the employee or agent was acting within the scope of his or her employment or authority”. However, they ‘while appealing to the purist, the pragmatists have thankfully prevailed. The benefits of simplicity cannot be underestimated in an area as complex and notoriously difficult to prosecute as corporate criminal responsibility’, J Clough & C Mulhern, above n 16, 139 – 140.

<sup>177</sup> Section 51 in the ACT Code, with some re-phrasing.

<sup>178</sup> In fact the section only refers to the three fault elements of intention, knowledge or recklessness. Presumably the section could be used by courts in attributing other fault elements to bodies corporate, this is implied by the very general heading of the section ‘Fault elements other than negligence’, and also by the general principle in s 12.1 (1): ‘This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.’ See further discussion in I Leader-Elliott, above n 169, 307.

bodily harm and assault. Although introducing this type of reform would theoretically allow organizations to be found guilty of these types of crimes, it is important to realize that the nature and activities of organizations mean that they will rarely be guilty of crimes requiring mental elements other than negligence. For example, under the *Criminal Code* (Tas), murder requires an intention to cause death, an intention to cause bodily harm which the offender knew to be likely to cause death or an unlawful act which the offender knew or ought to have known to be likely to cause death.<sup>179</sup> It is difficult to imagine circumstances where a board of directors might authorise an act to be carried out in such circumstances. However, criminal liability could be based on knowledge that an omission (breach of the duty of a person making a dangerous thing) was likely to cause death in the kind of situation that arose in the Ford Pinto case.<sup>180</sup>

6.4.13 Section 12.3(1) provides:<sup>181</sup>

If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

Thus, a body corporate can be found to have the required mental element if the offence has been committed and that commission of the offence was authorised or permitted by the company. There are two important elements here: (1) the offence must be committed, and (2) it must be authorised or permitted.

### *Commission of the offence*

6.4.14 Section 12.3 refers to the ‘commission of the offence’. Upon a strict interpretation this would mean that an employee or agent must be guilty of the offence.<sup>182</sup> As Leader Elliott argues, ‘the language of the provision suggests that there must be an offence committed, before fault is attributed’,<sup>183</sup> and ‘if that is the case, it will be necessary to prove intention, knowledge or recklessness – as the case may require – against an agent of the corporation before any of those fault elements can be attributed to the corporation’.<sup>184</sup> This does not require that the employee or agent has been *convicted* of the offence, but he or she must have done the prohibited physical act (or omission) *with* the required state of mind, *and not* have any defence available (eg insanity, self-defence) to excuse him or her from liability.

6.4.15 An alternative interpretation of s 12.3 is advanced by Colvin, who argues that it is not always necessary for an individual to be guilty of an offence. He argues that the fault element of intention, knowledge or recklessness can be attributed to a corporation in the absence of any evidence that an individual had the requisite intention in cases where the ‘corporate culture’ provisions are relied upon: ‘the fault element ... can be located in the culture of the corporation even though it is not present in any individual’.<sup>185</sup> While conceding that such an interpretation is possible, Leader-Elliott suggests that ‘the practical difficulties of implementing such an interpretation seem insurmountable. The better view is that intention, knowledge and recklessness cannot be attributed to a corporation unless an agent acted with intention, knowledge or recklessness’.<sup>186</sup>

6.4.16 A further observation is that it is not simply the relevant act or omission that must be authorised, but the ‘commission of the offence’, which includes *all* the relevant elements of the offence. In practice, because many crimes require that the relevant act be done unlawfully (eg assault, arson, damage to property), this would often require the corporation to be aware of the unlawfulness of the conduct. So, in a case of arson for example, it would not be sufficient for a corporation to have merely permitted the lighting of a fire, the permission would also have to relate to the fact that the fire was to be ‘unlawfully’ lit, that is, without claim of right, and with the intention or recklessness (on the part of the lighter) that the object in question (eg a building, structure or stack of timber) was to be set fire to.<sup>187</sup>

<sup>179</sup> For the detailed requirements for the offence of murder, see the *Criminal Code* (Tas), ss 153 – 157.

<sup>180</sup> See para 3.3.6.

<sup>181</sup> See *Criminal Code Act 1995* (Cth), s 12.3(1), and *Criminal Code 2002* (ACT), s 51(1).

<sup>182</sup> I Leader-Elliott, above n 169, 309.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, and see further consideration of the issue at 309, 311.

<sup>185</sup> E Colvin, above n 15.

<sup>186</sup> I Leader-Elliott, above n 169, 309.

<sup>187</sup> Arson is defined in the Code, s 268, and also note s 267.

6.4.17 The Institute has given consideration to the views of commentators who have argued that the requirement that the authorisation relate to a ‘commission of the offence’ is too strict. Clough and Mulhern comment, ‘it seems a backward step to make criminal liability contingent upon individual liability, particularly as the difficulty of prosecuting individuals is one of the justifications for proceeding against a corporation.’<sup>188</sup> Clough and Mulhern suggest that ‘far simpler would be to attribute fault to the corporation if it authorised or permitted the relevant conduct’.<sup>189</sup> Despite this criticism, the Institute’s view is that the Tasmanian provisions should be based as closely as possible on the MCC. The advantage of uniformity is the ability to rely on developing jurisprudence in other jurisdictions to assist in the application and interpretation of the Tasmanian provisions. It should be remembered that an offence can be committed by an instigator, even if the person who does the relevant act is not criminally responsible.<sup>190</sup>

#### *Authorisation or permission*

6.4.18 The Model Criminal Code’s s 12.3(2) sets out four means by which authorisation or permission may be established (although these are not exclusive):<sup>191</sup>

12.3(2) The means by which such authorisation or permission may be established include:

- (a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in<sup>192</sup> the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.<sup>193</sup>

6.4.19 There are a number of points to be made about this provision:

First, it is an inclusive rather than exclusive definition, meaning that authorisation or permission (and thereby intention, knowledge or recklessness) may also be proved by means other than those set out.

Secondly, it enacts the identification doctrine (by providing that a company authorises or permits conduct that the board of directors or a high managerial agent intentionally, knowingly or recklessly carried out) but also extends the doctrine in a number of ways –

- by attributing the relevant fault element (mental state) where the Board expressly, tacitly or impliedly authorises or permits the commission of the offence.

<sup>188</sup> J Clough & C Mulhern, above n 16, 144.

<sup>189</sup> Ibid.

<sup>190</sup> See *Criminal Code*, s 3(2).

<sup>191</sup> See *Criminal Code 1995* (Cth), s 12.3(2).

<sup>192</sup> The Institute can think of no distinction between ‘carried out the relevant conduct’ in (a) and ‘engaged in the relevant conduct’ in (b), and accordingly proposes that the terms ‘engaged in the relevant conduct’ be adopted in both paragraphs. This is the same as the modifications contained in the *Criminal Code 2002* (ACT).

<sup>193</sup> These are further qualified in s 12.3(3) – (5) of the *Commonwealth Criminal Code 1995*.

- by attributing the relevant fault element where a ‘high managerial agent’ expressly, tacitly or impliedly authorised or permitted the commission of the offence: s 12.3(2)(b). ‘High managerial agent’ means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy: s 12.3(6). It is important to note that paragraph (b) does not apply if the body corporate proves that it exercised due diligence<sup>194</sup> to prevent the conduct or the authorisation or permission: 12.3(3).

Thirdly, it introduces the notion of ‘corporate culture’, and the idea that this can be likened to the state of mind of a company. Subsection (6) states that:

**Corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

Subsection (4) also states that factors relevant to paragraph (2)(c) or (d) (which refer to corporate culture) include:

- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

This notion of ‘corporate culture’ is significant as it ‘focuses on blameworthiness at an *organizational level* [in a] detailed and tenable way’.<sup>195</sup> According to MCCOC in its Final Report corporate culture would allow:<sup>196</sup>

The prosecution to lead evidence that the company’s unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. It would catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected. For example, employees who know that if they do not break the law to meet production schedules (eg by removing safety guards on equipment) they will be dismissed. The company would be guilty of intentionally breaching safety legislation.

Bucy says that the key factors in determining corporate culture are:<sup>197</sup>

- The structure of the corporation;
- The goals of the corporation;
- The training and education of employees;
- The means by which compliance within the corporation is monitored;
- The nature of the offence; and
- The reaction of the corporation to past misdemeanours.<sup>198</sup>

<sup>194</sup> ‘Due diligence’ is not defined in the Code, however s 12.5(2) provides that:

A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:  
(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers;  
or (b) failure to provide adequate systems for conveying relevant information to the relevant persons in the body corporate.

<sup>195</sup> M Wilkinson, ‘Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault’ (2003) 9 *Canterbury Law Review* 142, 174.

<sup>196</sup> Model Criminal Code Officers Committee, above n 159, 111-113.

<sup>197</sup> P Bucy, ‘Corporate Ethos: A Standard for Imposing Corporate Criminal Liability’ (1991) 75 *Minnesota Law Review* 1095, 1128-46.

<sup>198</sup> Also see *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161, 185 in which the court had to establish that a city ‘had exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of that system’. In determining this, the court looked at factors including previous legislative or regulatory compliance; the preventative systems in place; the foreseeability of the effect and the alternative solutions available; as well as efforts made to address the problem, in particular the actions of officials.

6.4.20 The Institute is of the view that s 12.3, and in particular the concept of corporate culture, make a significant advancement to the traditional common law identification doctrine, and should be implemented in a Tasmanian version of s 12.3.

6.4.21 The Institute acknowledges that there have been criticisms directed at the provisions of the MCC as it essentially replaces the requirements of intention, knowledge and recklessness with the requirement of ‘authorises or permits’. For example, Clough and Mulhern write:

The fault element of the corporation is determined not by proving that the corporation exhibited that fault element or its equivalent, but by attributing the fault element to the corporation if it is proved that it authorised or permitted the commission of the offence. There is no link between proof of the authorisation or permission and the fault element that must be attributed to the company.<sup>199</sup>

The criticism is that this approach collapses the three mental elements (intention, knowledge and recklessness) into one, failing to acknowledge the important differences in culpability that have traditionally attached to these different mental elements.<sup>200</sup>

Despite this criticism, the Institute considers that the preferred approach is to adopt the approach of the MCC so far as is feasible within the limits of the *Criminal Code* (Tas). This problem is partly recognised by s 12(3) providing that:

If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

In addition, the criticism is partly addressed in the provisions recommended by the Institute, as we do not include an equivalent to s 12.3(2)(d). Section 12.3(2)(d) provides that authorisation or permission can be proven by showing that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. This provision incorporates a form of negligence (as discussed below) and it appears inappropriate for intention to be established by proof of negligence, that is the corporation failed to develop a culture of compliance.<sup>201</sup> Factors concerned with corporate blameworthiness can also be taken into account in the exercise of the prosecutorial discretion, and the sentencing process.

6.4.22 While the Institute has sought to promote uniformity with the MCC, Tasmania cannot simply adopt all of the provisions of the MCC in relation to fault elements. Unlike the MCC, the term ‘fault element’ is not used or defined in the *Criminal Code* (Tas). Neither are definitions of the terms of intention, recklessness or knowledge included. As a result, in adopting the MCC provisions, we need to draft our own provisions relating to knowledge, intention, and foresight, to give effect to the provision of the *Criminal Code* (Tas) and the case law concerning their interpretation.

6.4.23 In addition, the Institute considers that s 12.3(2)(d) of the MCC referring to proof that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision is too broad and unnecessary in light of s 12.3(2)(c). Section 12.3(2)(c) refers to proof that a corporate culture existed that tolerated non-compliance. The concept of ‘tolerate’ appears to be very broad and would seem to encompass the circumstance where there was a culture within an organization of failing to ensure compliance with the criminal law. In addition, as Colvin has identified, the failure of a corporation ‘to develop a culture of compliance is a form of negligence’ and it is ‘questionable ... whether it is an appropriate ground on which to hold a corporation responsible for the intentional, knowing, or reckless commission of an offence’.<sup>202</sup>

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<sup>199</sup> J Clough & C Mulhern, above n 16, 145.

<sup>200</sup> See for example, *Ibid*; T Woolf, above n 98, 267; and E Colvin, above n 15, 38.

<sup>201</sup> J Clough & C Mulhern, above n 16, 146.

<sup>202</sup> E Colvin, above n 15, 37. See also *ibid*.

6.4.24 Accordingly, the following provision is recommended as a Tasmanian version of s 12.3:

12.3

- (1) If intention, knowledge or foresight of consequences is a state of mind [mental element] in relation to an act or omission that must be proved in relation to an offence, that state of mind must be attributed to an organization that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the organization's board of directors:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the organization:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the organization that directed, encouraged, tolerated or led to the commission of the offence.
- (3) Paragraph (2)(b) does not apply if the organization proves that it exercised due diligence to prevent the act or omission, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the organization; and
  - (b) whether the employee, agent or officer of the organization who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the organization would have authorised or permitted the commission of the offence.
- (5) If foresight of consequences is not a state of mind in relation to an act or omission, subsection (2) does not enable the state of mind to be proved by proving that the board of directors, or a high managerial agent, of the organization had foresight of the consequences of engaging in the act or omission or had foresight of the consequences of authorising or permitting the commission of the offence.
- (6) In this section:

**high managerial agent** means a representative of the organization, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his, her or their conduct may fairly be assumed to represent the organization's policy.

**organizational culture** means an attitude, policy, rule, course of conduct or practice existing within the organization generally or in the part of the organization in which the relevant activities take place.

## ***Negligence***

6.4.25 While there may be some circumstances where the fault of an organization equates to intention, knowledge or recklessness, in most instances of death or injury caused by organizations criminal negligence would be the relevant mental element to be proven (as an element of negligent manslaughter, or grievous bodily harm based on criminal negligence).

Criminal negligence by corporations is dealt with in s 12.4<sup>203</sup> of the MCC and the Commonwealth Criminal Code. Subsection (1) provides that the test for negligence for a body corporate is that set out in s 5.5 – which

<sup>203</sup> *Criminal Code 2002 (ACT)*, s 52.

is the section that defines negligence.<sup>204</sup> As was stated above (6.4.5), introducing a general definition for negligence is beyond the scope of this project, and is therefore not recommended. However, the MCC definition is based on the common law definition of criminal negligence,<sup>205</sup> which already applies in Tasmania.<sup>206</sup>

The essence of manslaughter by criminal negligence is a great falling short of the standard of care which a reasonable person would have exercised, involving such high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

6.4.26 It should perhaps also be kept in mind that for criminal liability to arise under the *Criminal Code* (Tas) the criminal negligence must relate to one of the duties tending to the preservation of life in our Code (see 2.1.6).

6.4.27 Section 12.4(2) and (3) provide:<sup>207</sup>

- (2) If –
- (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element;
- that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

6.4.28 In relation to negligence, it was the MCCOC's intention to focus on the blameworthiness of the corporation itself:<sup>208</sup>

Where negligence is the requisite fault element, it is not necessary to establish that any one employee, etc was negligent. If the conduct of the company when the acts of its servants, agents, employees and officers, viewed as a whole, is negligent, then the corporation is deemed to be negligent. In some cases this may involve balancing the acts of some servants against those of others in order to determine whether the company's conduct as a whole was negligent.

6.4.29 The Institute supports this goal and its consequent focus on *corporate* blameworthiness. This is reinforced by the possible ways of evidencing negligence provided in sub-s (3). The body corporate's negligence can be evidenced by its failure (i.e. of its systems and structure) in *allowing* the harmful conduct to occur, rather than solely focusing on the degree of negligence involved in the particular act or omission that caused the harm. Leader-Elliott observes that 'corporate negligence may arise from an aggregation of particular failures of foresight and precaution none of which, taken singly, would justify the imposition of criminal punishment'.<sup>209</sup>

<sup>204</sup> Leader-Elliott states that although the *test* for negligence by a corporation is the same as it is for any other person, it is 'implicit in the provisions [of the MCC] that the *standard* against which the defendant corporation is to be judged is the standard expected of a reasonable *corporate* actor' rather than a reasonable natural person (emphasis added): I Leader-Elliott, above n 169, 327. Leader-Elliott elaborates: 'There are two significant grounds for the implication: (a) corporate negligence can be imposed in the absence of negligence by individual employees, agent or officers (section 12.4(2)) and (b) corporate negligence can be proved by establishing absence of adequate "corporate management, control or supervision" and "failure to provide adequate systems for conveying relevant information to relevant persons within the body corporate": section 12.4(3). These criteria require reference to standards of appropriate *corporate* behaviour.'

<sup>205</sup> This is also made clear by the MCCOC commentary: Model Criminal Code Officers Committee, above n 159, 29.

<sup>206</sup> *R v AC Hatrick Chemicals Pty Ltd* Unreported, Supreme Court of Victoria, 29 November 1995 per Hampel J, 5-6.

<sup>207</sup> Note that sub-s (3) is omitted from the *Criminal Code 2002* (ACT), s 52. The reason for this omission could not be ascertained.

<sup>208</sup> Model Criminal Code Officers Committee, above n 159, 115.

<sup>209</sup> I Leader-Elliott, above n 169, 327.

6.4.30 Differences in terminology dictate considerable re-wording of this subsection. The Institute is of the view that the conditions of sub-ss (2)(a) and (b) are unnecessary.<sup>210</sup> The following version is recommended:

12.4(1) Negligence may exist on the part of an organization if the organization's acts or omissions are negligent when viewed as a whole (that is, by aggregating the acts or omissions of any number of its representatives).

6.4.31 Secondly, the Institute recommends adding to the two ways of evidencing corporate negligence set out in sub-s (3). The recent Victorian Bill provided (in s 14B(6)) that negligence of a body corporate could be evidenced by the failure of the body corporate to:<sup>211</sup>

- (a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or
- (b) to engage as an agent a person reasonably capable of providing the contracted services; or
- (c) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or
- (d) to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or
- (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.

It is noted that the two examples of how negligence may be evidenced in the MCC are very similar to (a) and (c) in the Victorian provision. The Institute prefers the greater assistance offered by this broader list.

6.4.32 It is therefore recommended that a Tasmanian version of s 12.4(2) provide:

Negligence by an organization may be evidenced by –

- (a) inadequate management, control or supervision the conduct of one or more of its representatives; or
- (b) failure to engage as a representative a person reasonably capable of providing the contracted services; or
- (c) failure to provide adequate systems for conveying relevant information to relevant persons in the organization; or
- (d) failure to take reasonable action to remedy a dangerous situation of which the board of directors or a high managerial agent has actual knowledge; or
- (e) failure to take reasonable action to remedy a dangerous situation identified in a written notice served on the organization by or under an Act.

It should not be forgotten that proving that one of these failures occurred is not proof of *criminal* negligence. To be 'criminal' negligence the conduct of the organization (when viewed as a whole) must amount to such a great falling short of the standard of care which a reasonable organization would have exercised that it merits criminal punishment. Furthermore, liability under the *Criminal Code* (Tas) also requires that the negligence relate to one of the duties tending to the preservation of life in the Code (see 2.1.6).

### ***Mistake of fact, due diligence and intervening conduct or event***

6.4.33 Part 2.5 of the MCC also sets out when a body corporate may rely on the defence of mistake of fact, due diligence or intervening conduct or event:

<sup>210</sup> It is noted that the subsections are also combined in the *Criminal Code 2005* (ACT) s 52(2).

<sup>211</sup> *Crimes (Workplace Deaths & Serious Injuries) Bill 2003* (Vic).

### 12.5 Mistake of fact (strict liability)

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
  - (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proved that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agent or officer; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

### 12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

6.4.34 The Institute does not recommend that these corporate-specific defences of mistake of fact or intervening conduct or event be adopted in a Tasmanian version of Part 2.5, preferring that organizations, like other ‘people’, are able to rely on the existing defences in the Code. However, because due diligence can be relevant to the attribution of faults other than negligence (see discussion above at 6.4.18), it is recommended that it be provided that a failure to exercise due diligence may be evidenced by the same factors that can evidence negligence of an organization (as set out in the recommended 12.4(2)).

## Recommendation 6

That the specialized principles of criminal responsibility provide –

### s 12.1<sup>212</sup>

- (1) This Code applies to organizations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on organizations rather than individuals.
- (2) An organization may be found guilty of any offence, including one punishable by imprisonment.

**Organization** means:

- (a) a public body, body corporate, society, company, firm, partnership, or trade union, or
- (b) an association of persons that:
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons.

<sup>212</sup> For present purposes section numbers corresponding to those in the MCC are used.

**s 12.2**

- (4) The acts or omissions of all of the representatives of an organization, acting within the actual or apparent scope of their employment or within their actual or apparent authority, must be attributed to the organization.
- (5) In this section a person is acting within the apparent scope of their employment or within the apparent scope of their authority if the organization has conducted itself in a manner that it is reasonable to treat that person as acting within the apparent scope of their employment or the apparent scope of their authority.
- (6) In this Chapter “representative” includes a director, partner, officer, employee, member, agent or a person who does the work of an organization.

**s 12.3**

- (1) If intention, knowledge or foresight of consequences is a state of mind in relation to an act or omission that must be proved in relation to an offence, that state of mind must be attributed to an organization that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the organization’s board of directors:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the organization:
    - (i) intentionally, knowingly or with foresight engaged in the relevant act or omission; or
    - (ii) expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the organization that directed, encouraged, tolerated or led to the commission of the offence.
- (3) Paragraph (2)(b) does not apply if the organization proves that it exercised due diligence to prevent the act or omission, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the organization; and
  - (b) whether the employee, agent or officer of the organization who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the organization would have authorised or permitted the commission of the offence.
- (5) If foresight of consequences is not a state of mind in relation to an act or omission, subsection (2) does not enable the state of mind to be proved by proving that the board of directors, or a high managerial agent, of the organization had foresight of the consequences of engaging in the act or omission or had foresight of the consequences of authorising or permitting the commission of the offence.
- (6) In this section:
 

***high managerial agent*** means a representative of the organization, or group of such persons (such as the board of directors of a body corporate) with duties of such responsibility that his, her or their conduct may fairly be assumed to represent the organization’s policy.

***organizational culture*** means an attitude, policy, rule, course of conduct or practice existing within the organization generally or in the part of the organization in which the relevant activities take place.

**s 12.4**

- (1) The acts and omissions of an organization must be viewed as a whole when assessing the negligence of an organization. This may involve aggregating the acts and omissions of any number of the representatives of the organization.
- (2) The negligence of an organization may be evidenced by the negligent acts and omissions of its high managerial agents or the failure of the organization or one or more of its high managerial agents –
  - (a) adequately to manage, control or supervise the conduct of one or more of its representatives; or
  - (b) to engage as a representative a person reasonably capable of providing the contracted services; or
  - (c) to provide adequate systems for conveying relevant information to relevant persons in the organization; or
  - (d) to take reasonable action to remedy a dangerous situation of which a high managerial agent has actual knowledge; or
  - (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the organization by or under an Act.

**s 12.5**

- (1) A failure to exercise due diligence may be evidenced by the fact that the act or omission was substantially attributable one or more of the failures (of the organization or one of its high managerial agents) set out in section 12.4(2)(a)-(e).

## 6.5 Workplace health and safety – other possible reforms

6.5.1 In the Issues Paper it was stated that reforms to the Code could be accompanied by one or more of the following reforms to the *Workplace Health and Safety Act 1995* (Tas) (WHSA):

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

These options were discussed in detail in the Issues Paper.<sup>213</sup> While specialised legislation has an important role to play, the Institute has expressed the view that serious crimes like manslaughter should be dealt with by the Criminal Code, and that the definitions of those crimes should be the same for all people. Accordingly, the Institute does not recommend the introduction of a new crime of manslaughter or causing grievous bodily harm to the WHSA.

In relation to the other options for reform discussed, the Institute has decided not to make any recommendations. The primary reason for this decision is that the Department of Industry Energy and Resources is currently undertaking a comprehensive review of the WHSA and it is felt that this review is best placed to make recommendations in relation to these options for reform. The Institute will formally request that the review take note of the discussion of these options in the Issues Paper and in the responses to the paper.<sup>214</sup>

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<sup>213</sup> See para 5.2 of the issues paper, available at [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform)

<sup>214</sup> Both of which are available at [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform)

## Part 7

# Sentencing

### 7.1 Introduction

7.1.1 This report has recommended reforms aimed at more fairly attributing criminal liability to organizations. With liability comes sentence. The sentence imposed after a finding of guilt is the outcome of the whole process. To make the process worthwhile the sentence should go some way to achieving some or all of the goals of criminal punishment that were discussed in Part 3: denunciation, retribution, deterrence, rehabilitation and restoration. However, just as principles of criminal responsibility developed around the culpability of natural persons, 'sentencing law has been traditionally concerned with the sentencing of individual offenders and does not translate seamlessly to the sentencing of corporations.'<sup>215</sup>

7.1.2 This report has focused on the criminal liability of organizations for causing death or serious injury. If a natural person is guilty of manslaughter or grievous bodily harm a sentence of imprisonment is usually imposed.<sup>216</sup> An organization cannot be imprisoned. Instead, the type of sentence usually imposed is a fine. In many instances a fine may be ill suited to achieving the aims of punishment such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury.

7.1.3 Organizations are not real people, and of course this is, and must be, taken into account when they are being sentenced for a crime. Ideally, the sentence will achieve some or all of the purposes of punishment (such as denunciation, deterrence, rectification and reassurance), will not result in spill-over effects (see below) to *genuinely* innocent parties, and will avoid the 'deterrence trap' (see below). This report concludes that while fines and other traditional sentencing options may be able to achieve these goals in some instances, the potential flexibility of these options is not currently being realised, and furthermore, in many cases sentencing options more specifically designed to deal with organizations are required. This report recommends expanding the range of sentencing options available for sentencing organizations in Tasmania to allow these goals to be better met.

7.1.4 At the Commonwealth level, and in various other jurisdictions, a broader range of sentencing options fashioned specifically for organizations is available.<sup>217</sup> According to Fisse, a broader range of sentencing options:<sup>218</sup>

[I]s promising because they increase the variety of deterrent, retributive and rehabilitative measures available against corporations and in so doing circumvent some of the major limitations of monetary sanctions... [T]he anatomy of corporate crime is so diverse that effective sentencing requires a range of sanctions.

7.1.5 In Tasmania, the range of sentencing options that may be imposed following a finding of guilt is set out in the *Sentencing Act 1997*, s 7:

7. A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence –
  - (a) record a conviction and order that the offender serve a term of imprisonment; or
  - (b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or

<sup>215</sup> A Gibson, 'The Intangible Offender' (2005) 87 *Reform* 57.

<sup>216</sup> K Warner, above n 42, 275, 287.

<sup>217</sup> For example, new sanctions have recently been introduced into the *Trade Practices Act 1974* (Cth). These include community service orders, probation orders and publicity orders. See ss 86C(2)(a); 86C(2)(b); 86C(4) and 86D.

<sup>218</sup> B Fisse, 'Sentencing Options Against Corporations' (1990) 1 *Criminal Law Forum* 211, 249.

- (c) record a conviction and, if the offender has attained the age of 18 years and the offence is punishable by imprisonment, make a community service order in respect of the offender; or
- (d) with or without recording a conviction, make a probation order in respect of the offender if the offender has attained the age of 18 years; or
- (e) record a conviction and order the offender to pay a fine; or
- (ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or
- (f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or
- (g) record a conviction and order the discharge of the offender; or
- (h) without recording a conviction, order the dismissal of the charge for the offence; or
  - (i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

7.1.6 The Issues Paper discussed the capacity of these current sentencing options to appropriately punish organizations and considered the desirability of introducing a number of new sentencing options specifically designed for organizations. Seven respondents specifically commented on this part of the Issues Paper. Three of these were industry groups,<sup>219</sup> who were generally opposed to reform.<sup>220</sup> Two union bodies<sup>221</sup> and two of the police officers who responded were generally in agreement that fines are not always an effective or adequate sentence and were in favour of broadening sentencing options.

7.1.7 The Institute considers that introducing new sentencing options designed for organizations will assist sentencers in their endeavours to achieve the purposes of punishment when sentencing organizations. Increased options will also allow sentencers to better ‘fit’ the punishment to the varying types, sizes and financial viability of organizations. The Institute recommends that current sentencing options should still be available when sentencing organizations, but that sentencing options tailored to organizations (as opposed to natural people) should also be provided for in the *Sentencing Act*. It is recommended that this be done by the introduction of a section similar to s 7 (say, a s 7A), but applying to ‘organizations’ rather than ‘people’. The new options recommended are:

- Dissolution orders
- Disqualification orders
- Adverse publicity orders
- Punitive injunctions

How these and existing sentencing options should be applied to organizations is discussed in more detail below.

7.1.8 It should be noted that by including these sentencing options in the *Sentencing Act* they will be available when sentencing organizations are found guilty of offences not only in the Criminal Code, but also in the *Workplace Health and Safety Act 1995* and other Acts creating criminal offences.

7.1.9 The Institute’s recommended changes to the *Sentencing Act* are discussed throughout this Part, however, all the recommendations in relation to the *Sentencing Act* are grouped together into one formal recommendation (Recommendation 7).

<sup>219</sup> Tasmanian Chamber of Commerce and Industry, Housing Industry Association, Tasmanian Automobile Chamber of Commerce.

<sup>220</sup> Although they gave some support to specific sentencing options, see discussion below.

<sup>221</sup> Australian Metal Workers Union, Unions Tasmania.

7.1.10 A general and somewhat preliminary recommendation, is for the *Sentencing Act* to specifically provide that it applies to organizations, for example, by introducing a section stating:

This Act applies to organizations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Act, and with such other modifications as are made necessary by the fact that sentence is being imposed on organizations rather than individuals.

The term ‘organization’ has the same meaning as it has in the Criminal Code.

7.1.11 Recommendation 4 was that the Code be amended to bind the Crown. The WHSA appears to already bind Crown bodies. However, the nature of Crown bodies may mean that it is not appropriate for some types of sentences to be imposed on them. This issue is dealt with below at 7.12.

### ‘Spill-over’

7.1.12 ‘Spill-over’ occurs when the punishment imposed upon one person has an effect upon other people. ‘Spill-over’ is inevitable when punishing an organization, because the legal person that is the organization is made up of other ‘real’ people. Thus a punishment imposed on an organization may affect shareholders, employees, creditors, consumers and so on.<sup>222</sup>

7.1.13 The punishment of a real person may also have a large or small spill-over effect, for example the imprisonment of an offender may have a significant impact upon their family, employer, friends and so on. In the context of offenders who are real people, the courts have traditionally been reluctant to take such spill-over effects into account when deciding upon the appropriate sentence – <sup>223</sup>

Hardship to the offender’s family is usually given very little weight as a mitigating factor; it is regarded as part of the price to be paid for committing a crime. So in *Sullivan*,<sup>224</sup> it was stated that where the public interest requires a prison sentence, substantial or otherwise, that sentence must be imposed despite the regrettable hardship which innocent members of the family will suffer. But exceptional hardship other than financial may be relevant, and where the offender is a single parent or the imprisonment of both parents would leave children without parental care, courts have adopted a more sympathetic attitude. The circumstances, however, must be truly extreme or exceptional.

7.1.14 In the corporate context, the spill-over effect is not only inevitable, it may often be immediate, and is perhaps least likely to affect the corporation’s decision makers (who are perhaps responsible, in accordance with the identification doctrine, for the corporation incurring the liability in the first place). More likely, the sanction will be internally dealt with through a reduction in dividends, or if externally applied could result in the imposition of a product price rise. Other spill-over effects include the likelihood of job losses, reduced tax revenue and the liquidation of a corporation’s assets often at grossly inadequate prices. In short ‘when the corporation catches a cold, someone else sneezes’.<sup>225</sup> It is perhaps for these reasons that it is often argued that these spill-over effects should be given particular consideration when deciding upon the appropriate penalties for organizations.

7.1.15 On the one hand, it is easy to understand the inclination to try to reduce the spill-over to innocent parties. On the other hand, it must be recognised that these people may not always be so innocent. Shareholders, for example, may have been reaping the rewards of increased profits due to corner cutting in safety measures; consumers and employees may have been similarly benefiting. Thus it can be argued that where a corporation has been convicted of a serious criminal offence there may be no real spill-over effect because the corporation may have been unfairly and unjustly enriched through illegal activity. Consequently, it can be argued that any apparent ‘spill-over’ is merely the righting of a wrong through enforced levelling procedures – restoring the corporation to the position it would have held prior to the illegality. In the end, the wider public interest in fulfilling the purposes of punishment (denunciation, retribution, deterrence,

<sup>222</sup> See J Coffee, above n 47, 400-405.

<sup>223</sup> K Warner, above n 42, 115 (some footnotes omitted).

<sup>224</sup> Serial No 9/1975.

<sup>225</sup> J Coffee, above n 47, 401.

rehabilitation and restoration) should prevail over fears of ‘innocent’ parties being affected by the organization’s punishment.

### *The ‘deterrence trap’*

7.1.16 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’.<sup>226</sup> Thus, the ‘trap’ occurs in trying to find the appropriate penalty. For example, if a fine is too low it provides no deterrent, but if it is too high it can send a company insolvent and no fine can be recovered at all. This is a particularly bad outcome if a company ‘rises again’ as a phoenix company, (i.e. the company reforms with a new name, but it is essentially the same company, as happened in the case of *Denbo*<sup>227</sup>). Thus, it is important that penalties imposed on corporations find the right level of severity.

## 7.2 The fine

7.2.1 The fine remains the most common sentence imposed against organizations in all Australian jurisdictions.<sup>228</sup> The fine has some advantages over other forms of sanctions including that it is an administratively cheap option. There is also some evidence that it is more effective in curbing recidivism than imprisonment.<sup>229</sup> In Tasmania, s 4 of the *Sentencing Act 1997* defines a fine<sup>230</sup> and s 7(e) grants the courts the power to fine offenders for both summary and indictable offences. A fine cannot be imposed unless a conviction is recorded.<sup>231</sup> If an organization is convicted of a crime in the *Criminal Code*, the maximum penalty of 21 years imprisonment is of little relevance, as an organization cannot be imprisoned. However the Code provides (in s 389(3)) that punishment may also be by fine, and no limit is placed on the amount of such a fine, it is simply as the judge thinks fit in the circumstances of each particular case. While it may be desirable in the interests of certainty to introduce maximum penalties for the crimes in the Code, such a proposal would be well beyond the scope of this project. In any case, having no maximum affords flexibility, meaning that the level of fine imposed on an organization is, in theory, able to be varied so that it may meet the goals of punishment by adjusting to the circumstances of the particular case. As the Institute is aware of no prosecutions of a corporation under the *Criminal Code* it is not known to what extent the Supreme Court would utilise this unlimited fining capacity.

7.2.2 The level of a ‘fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate defendants as to any other.’<sup>232</sup> Currently in Tasmania, while an offender’s limited financial means can be mitigating, leading to a lesser fine being imposed, the means of an offender cannot lead to an increase in an otherwise appropriate fine.<sup>233</sup> The Institute recommends no change to this position.

7.2.3 If a fine is the only sentencing option imposed, then imposing the appropriate level of fine seems to require a difficult balancing act – on the one hand the disadvantage of committing the wrong has to sufficiently outweigh the advantage of non-compliance to have any hope of achieving deterrence, but on the other hand if a fine is too high it may result in unintended spill-over effects or lead to the organization becoming insolvent and so no fine being recovered at all (note discussion above at 7.1.12 to 7.1.16). Case studies continue to demonstrate that in relation to corporations, the imposition of a fine is generally

<sup>226</sup> B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993) 136.

<sup>227</sup> See discussion below at 7.3.3.

<sup>228</sup> New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102, (June 2003) 88. Also see the Tasmania Law Reform Institute, *Sentencing*, Issues Paper No 2, August 2002, 35 where, with specific reference to the Tasmanian jurisdiction, it is pointed out that fines are imposed in 60% of all offences.

<sup>229</sup> A Ashworth, *Sentencing and Criminal Justice* (3<sup>rd</sup> ed, 2000) 272.

<sup>230</sup> A fine is defined as ‘the sum of money payable by an offender under an order of a court made on the offender being convicted of an offence and includes a sum of money payable as costs, a restitution order and a compensation order’.

<sup>231</sup> *Sentencing Act 1997* (Tas), s 7(e).

<sup>232</sup> *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249, 255 per Scott Baker J.

<sup>233</sup> This is the generally accepted common law position. See K Warner, above n 42, 128; A Ashworth, *Sentencing and Criminal Justice* (4<sup>th</sup> ed, 2005) 310.

inadequate.<sup>234</sup> For example in the case of *Director of Public Prosecutions v Esso Australia Pty Ltd*<sup>235</sup> in which two workers were killed and eight others seriously injured, the defendant corporation was fined \$2,000,000 the largest for a workplace offence in Australian history.<sup>236</sup> However, when it is acknowledged that the defendant corporation earned a similar figure *each day* from its Bass Strait operations<sup>237</sup> and its parent company reported a net income in the year 2000 of just under US\$18 billion,<sup>238</sup> the fine appears insignificant or as one commentator expressed ‘a drop in the bucket for the company’.<sup>239</sup> In the case of *Workcover Authority of NSW (Inspector Ankucic) v McDonald’s Australia*<sup>240</sup> the defendant company and its subsidiary were fined \$120,000 and \$150,000 respectively, for breaches of the occupational health and safety law following the death of an employee. The fine was minimal when compared with the maximum fine allowed of \$500,000 and was less than one per cent of profit earned by the two companies in the year of the offence.<sup>241</sup>

7.2.4 Other reasons why a fine alone may be inadequate when an organization causes a death or serious injury are that:

- relatives and friends of the victim or victims of corporate manslaughter are unlikely to regard the imposition of a fine as adequate punishment for the crime committed.<sup>242</sup>
- fines generally fail to rehabilitate, as they do not explicitly compel reform of internal procedures or a review of management structure.<sup>243</sup>
- reliance on a monetary sanction diminishes the significance of the harm caused, resulting in the belief that the commission of an offence can be bought for a price.<sup>244</sup>

Furthermore, fines may be particularly inappropriate when dealing with non-corporate organizations such as the Crown and charities.

### *Responses to the Issues Paper*

The Issues Paper asked:

#### Question 9

- (a) Do you think that a fine is likely to be an effective and/or appropriate punishment in most cases of organizations wrongfully causing death or injury?
- (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?
- (c) If so, how should information about these matters be established by courts?

<sup>234</sup> For example a study commissioned by the NSW Judicial Commission on the fines imposed for fatalities in the workplace under the NSW *OH&S Act 1983* found that in 23 per cent of cases, defendants were fined five per cent or less of the maximum penalty; in 48 per cent of cases, defendants were fined 10 per cent or less of the maximum penalty; and in 75 per cent of cases, defendants were fined 20 per cent or less of the maximum penalty. According to the Commission only nine per cent of cases attracted 50 per cent or more of the maximum penalty and there were no cases that attracted 80 per cent or more of the maximum penalty. As found in the NSW Legislative Council Standing Committee Report, above n 162, 109-110.

<sup>235</sup> [2001] VSC 263.

<sup>236</sup> P Gregory and M Shaw, above n 109, 1.

<sup>237</sup> *Ibid.*

<sup>238</sup> Exxon Mobil Annual Report, 2000.

<sup>239</sup> See J Gobert, *Controlling Corporate Criminality: Penal Sanctions and Beyond*. As found at <http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html> (Accessed 20 January 2004).

<sup>240</sup> (2000) 95 IR 383.

<sup>241</sup> The fine was 0.19 per cent of McDonald’s Australia’s gross operating revenue of \$774,000,000, while for the subsidiary it was 0.57 per cent of the gross operating revenue of 209,000,000. Figures were obtained from respective Financial Statements for 2000. Another example is that of British Petroleum (as it was then known) which was fined £750,000 for safety violations, in a year in which it reported a profit of £1,391,000,000. Again, less than one per cent of the company’s profit.

<sup>242</sup> J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) 3.

<sup>243</sup> For example in one study on the rehabilitation of corporations following fines, the author found that in approximately 40 per cent of cases studied, companies convicted did not institute any significant organizational reform. See A Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (1978).

<sup>244</sup> B Fisse, above n 218, 220.

7.2.5 Eight respondents specifically addressed these questions. Four of these were industry groups,<sup>245</sup> who were of the view that fines are effective and appropriate in most cases of organizations wrongfully causing death or injury. The Tasmanian Chamber of Commerce and Industry stated ‘The imposition of a fine strikes at the economic heart of a business organisation and punishes the business in relation to its very reason for existing – for economic gain.’ While this may be true, it does not follow that this will achieve the purposes of punishment, and in any case the view takes no account of non-profit organizations. The other four respondents who commented on this issue agreed that fines may not always be effective and appropriate in such cases.<sup>246</sup> Six respondents stated their support for at least some of the other sentencing options.<sup>247</sup>

7.2.6 Two union bodies<sup>248</sup> were in favour of courts being required to impose a fine in proportion to an organization’s size, revenue and assets, but gave no explanation for their views. Three industry groups<sup>249</sup> were against this proposal, with the Tasmanian Chamber of Commerce and Industry stating that this is already a factor taken into account in sentencing and that there are already accepted methods for establishing such facts.

### *Conclusion*

7.2.7 The Institute is of the view that a fine alone may not be an appropriate punishment in all cases of organizations wrongfully causing death or injury, and accordingly recommends the introduction of various other sentencing options below. The Institute does not recommend any changes in relation to fines. The maximum fines for offences should continue to be governed by the legislation creating the offence, this being unlimited for crimes in the Criminal Code. The courts should not be under a duty to impose a fine in proportion to the organization’s size, revenue and assets. However, inability to pay should remain relevant, allowing courts to reduce a fine.

## **7.3 Incapacitation**

7.3.1 Incapacitation by imprisonment is a punishment of last resort reserved for the most serious crimes and consequently the most culpable offenders. It is only imposed in instances where a non-custodial sentence is inappropriate.<sup>250</sup> One of the aims of incapacitation is to deprive individuals of their liberty and thereby guarantee that the crime by the offender (at least while they are imprisoned) is not committed again. While an organization cannot be imprisoned, incapacitation can be achieved through a number of alternative sentencing options including dissolution and disqualification.<sup>251</sup>

### *Dissolution*

7.3.2 Deregistration is another word for dissolution<sup>252</sup> and is applied in instances where ‘it would remove from the community an organization which has flagrantly violated the rules of society’.<sup>253</sup> As such, it is a more severe sanction than disqualification. Dissolution can be achieved either through the actual dissolution of an organization<sup>254</sup> or indirectly through the imposition of a large fine that effectively strips the

<sup>245</sup> Tasmanian Chamber of Commerce and Industry, Housing Industry Association, Tasmanian Automobile Chamber of Commerce, Tasmanian Minerals Council.

<sup>246</sup> Australian Metal Workers Union, Unions Tasmania and two of the police respondents.

<sup>247</sup> Tasmanian Minerals Council, Australian Metal Workers Union, Unions Tasmania and two of the police respondents.

<sup>248</sup> Australian Metal Workers Union, Unions Tasmania.

<sup>249</sup> Tasmanian Chamber of Commerce and Industry, Tasmanian Automobile Chamber of Commerce, Housing Industry Association.

<sup>250</sup> *Bell v Lowe* [1988] Tas R (NC 2); *Underwood v Schiwy* [1989] Tas R 269.

<sup>251</sup> Examples of this in current Tasmanian law can be found in the *Sentencing Act 1997* (Tas) s 96: a person subject to a sentence of imprisonment exceeding two years is incapable of holding public office; and the *Firearms Act 1996* (Tas) s 51: the Commissioner of Police may cancel a firearms licence of a person convicted of a crime involving violence.

<sup>252</sup> The term ‘dissolution’ was replaced by ‘deregistration’ under s 601AD(1) of the *Corporations Act 2001* (Cth).

<sup>253</sup> Australian Law Reform Commission, *Sentencing: Penalties*, Discussion Paper 30, (1987) para 292. Also see *Corporations Act 2001* (Cth), s 490.

<sup>254</sup> This can be achieved by placing the organization’s assets in receivership (liquidation) or government (nationalisation): New South Wales Law Reform Commission, above n 228, para 8.19, citing J Braithwaite and G Geis, ‘On theory and action for corporate crime control’ [1982] *Crime and Delinquency* 292, 307.

organization of all assets. There are substantial spill over effects involved in dissolving an organization, and consequently the sanction should only apply to the most serious cases of improper conduct.<sup>255</sup>

7.3.3 One potential problem is that dissolution does not necessarily ensure incapacitation, as members of dissolved organizations can create a new ‘phoenix’ organization – that is an organization with a new name, but which carries out the same activities.<sup>256</sup> For example, in the only successful Australian prosecution of a company for manslaughter, *Denbo*<sup>257</sup> was in liquidation and owed its secured creditors over \$2,000,000 when it was convicted. The company was wound up six months before sentencing and the fine of \$120,000 was never paid. However, soon after the sentence, another company, Toorongu Constructions, was formed, registered at the same address as the defendant company, and with operations similar to those of its predecessor.<sup>258</sup>

7.3.4 There has also been some suggestion that dissolution is a more appropriate sanction for small organizations where the impact on members, shareholders, volunteers and employees is more confined.<sup>259</sup> Dissolution of large organizations on the other hand would have a spill-over effect many times larger than that experienced with smaller organizations and so is unlikely to be a sentence proportionate to the crime. Liquidation allows for some protection of third parties as assets can be sold off and creditors paid. Liquidation could also see the corporation bought either by a parent organization or by an interested outsider, in which case many of the third parties interests will be protected – although some of the purposes of the punishment may therefore not be fulfilled.

#### *Potential inconsistency with Commonwealth corporations law*

7.3.5 Legislation giving courts the power to sentence a corporation by dissolution has the potential to be inconsistent with Commonwealth corporations law. In relation to this potential the New South Wales Law Reform Commission (NSWLRC) has stated:<sup>260</sup>

A question arises whether the inconsistency provisions of the Commonwealth *Constitution* would operate to render a New South Wales provision for the winding up of a corporate offender invalid. The interaction between the Commonwealth’s corporations legislation and State law is dealt with expressly by the *Corporations Act 2001* (Cth). First, the Commonwealth legislation is not intended to “exclude or limit the concurrent operation of any law of a State or territory” [*Corporations Act 2001* (Cth) s 5E(1)]. Secondly direct inconsistencies are dealt with by limiting the operation of the Commonwealth legislation so that Commonwealth provisions relating to the external administration of a corporation do not apply to any winding up or administration carried out in accordance with a State provision and furthermore any New South Wales provision enacted after the commencement of the *Corporations Act* must be declared to be a “Corporations legislation displacement provision” in order to displace a Commonwealth provision [*Corporations Act 2001* (Cth) s 5G].

The Commission went on to recommend (Recommendation no. 7) that a provision relating to the dissolution of corporations should contain a statement to the effect of: ‘to the extent necessary to do so, this provision is declared a Corporations legislation displacement provision’.

<sup>255</sup> F Rush, ‘Corporate Probation: Invasive Techniques for Restructuring Institutional Behaviour’ (1986) 21 *Suffolk University Law Review* 33, 87.

<sup>256</sup> See B Fisse, ‘Responsibility, prevention and corporate crime’ (1973) 5 *New Zealand Universities Law Review* 250, 253. See also J Clough, ‘Sentencing the corporate offender: the neglected dimension of corporate criminal liability’ (2003) 1 *Corporate Misconduct eZine*. As found at <http://www.lawbookco.com.au/academic/Corporate-Misconduct-ezine/html-files/index.asp> (accessed 20 April 2005).

<sup>257</sup> *R v Denbo Pty Ltd* (1994) 6 VIR 157.

<sup>258</sup> S Perrone, ‘Workplace Fatalities and the Adequacy of Prosecutions’ (1995) 13 *Law in Context* 94. It is however interesting to note that according to s 600AA of the *Corporations Act 2001* (Cth) a company can only be deregistered in instances where it is not a party to legal proceedings, a provision that remains unhelpful where the organization deregisters before criminal charges are laid.

<sup>259</sup> E Lederman, ‘Criminal law, perpetrator and corporation: rethinking a complex triangle’ (1985) 76 *Journal of Criminal Law and Criminology* 285, 335.

<sup>260</sup> New South Wales Law Reform Commission, above n 228, para 8.28.

## Responses to the Issues Paper

7.3.6 The industry groups<sup>261</sup> did not support this option on the grounds that it would be disproportionate, cause undue spill-over, and because of the identified potential problems of conflicting with Commonwealth law and the creation of phoenix companies.

## Conclusion

7.3.7 After considering the issues and the responses, the Institute's view is that that sentencing courts should not be able to order the dissolution of organizations where they are found guilty of an indictable offence. It is the Institute's view that the dissolution of a company is too harsh a penalty, would cause undue spill-over effects and would be likely to cause problems in relation to the Commonwealth law. In addition, it was considered that the dissolution order may have limited practical consequences, as dissolution does not necessarily ensure incapacitation, as members of dissolved organizations can create a new 'phoenix' organization – that is an organization with a new name, but which carries out the same activities.

## Disqualification

7.3.8 Disqualification prevents an organization from carrying out certain activities or denies it the right to enter into certain contracts.<sup>262</sup> In short, disqualification involves a restraint of business and is a moderate form of punishment when contrasted with dissolution. There are a number of different forms a disqualification order may take including a restraint of trade for a particular period; disqualification from a particular geographical area; the revocation of a particular licence; and a disqualification from tendering for particular contracts (such as government contracts).

7.3.9 An advantage of disqualification is that it may reward law-abiding organizations for compliance by decreasing their competition.<sup>263</sup> Some commentators have suggested that disqualification could exist 'for a term to which an individual would have been sentenced for the same offence'.<sup>264</sup> However, in some extreme cases disqualification could result in the dissolution of the corporation, particularly in instances where the restraint of trade ensured that there was no work for the corporation and consequently no reason for its existence.<sup>265</sup> Other criticisms of disqualification are that it focuses on deterrence, without a corresponding focus on rehabilitation, and that it has potential spill-over effects, particularly on employees and shareholders.<sup>266</sup> Following a detailed consideration of the use of disqualification orders in relation to corporations, the NSWLRC stated that while they supported such orders in principle, they 'should be invoked only in extreme cases'.<sup>267</sup> The NSWLRC recommended:<sup>268</sup>

As part of an order for disqualification a court may, among other matters:

- prevent the corporation from engaging in certain commercial activities;
- revoke or suspend a licence held by the corporation;
- disqualify the corporation from entering specified contracts;
- deny the corporation the use of its profits for a fixed period of time.

The ALRC has recently recommended that federal sentencing legislation should include disqualification orders as a sentencing option for corporations.<sup>269</sup>

7.3.10 There are already provisions existing in Tasmanian legislation dealing with disqualification, although not as a sentencing remedy, for example, s 34(2) of the *Fair Trading Act 1990* (Tas) provides that:

<sup>261</sup> Tasmanian Chamber of Commerce and Industry, Housing Industry Association, Tasmanian Automobile Chamber of Commerce.

<sup>262</sup> New South Wales Law Reform Commission, above n 228, para 8.2.

<sup>263</sup> Australian Law Reform Commission, above n 253, para 293.

<sup>264</sup> S Yoder, 'Criminal Sanctions for Corporate Illegality' (1978) 69 *Journal of Criminal Law and Criminology* 40, 54. Also see D Miester, 'Criminal Liability for Corporations that Kill' (1990) *Tulane Law Review* 919 at 946.

<sup>265</sup> F Rush, above n 255, 83.

<sup>266</sup> D Miester, above n 264, 946.

<sup>267</sup> New South Wales Law Reform Commission, above n 228, 120.

<sup>268</sup> *Ibid*, para 8.18, Recommendation 6.

<sup>269</sup> Australian Law Reform Commission, above n 61, Recommendation 30-1.

... an injunction granted under that subsection may be, or include, an injunction restraining a person from carrying on a business of supplying goods or services (whether or not as part of, or incidental to, the carrying on of another business) –

- (a) for a specified period; or
- (b) except on specified terms and conditions.

7.3.11 In the United States, broader provisions allow corporate offenders to be disqualified from entering into government contracts. The United States' *Federal Acquisition Regulations* provide that contractors may be excluded if they have been convicted of fraud, embezzlement, theft, forgery, bribery, tax evasion, receiving stolen property and 'any other offence indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor'.<sup>270</sup>

7.3.12 The TCCI, TACC and HIA<sup>271</sup> objected to disqualification orders on the grounds of their potential spill-over effects. The other five respondents either specifically approved of introducing this option or approved generally of all the options discussed.

7.3.13 The Institute is of the view that disqualifications orders could be a valuable addition to the range of sentencing options for organizations in appropriate cases. It notes that because such orders can be for a determinate period or conditional, they can create a context for reintegration and therefore can fulfil restorative aims as well as deterrence. Therefore the Institute recommends the introduction of disqualification orders, based on the form of disqualification orders recommended by the NSWLRC.

## 7.4 Community service orders

7.4.1 Community service orders require an offender to participate on a voluntary basis in community projects, under the direction of a probation officer or supervisor<sup>272</sup> and are usually tailored to the offenders' area of expertise.<sup>273</sup> The ability of community service orders to tap into the existing expertise of an offender may make them a particularly attractive sentencing option when dealing with organizations. The organization could be required to supply its expertise or labour force to a community project or make its facilities available to community groups. It is also often thought that by participating in a community service order, the offender is able to atone for the crime committed as well as benefit the community in a way that more traditional forms of punishment (such as incapacitation or fines) do not address.<sup>274</sup> In other words, a community service order has a restorative element. Other positive features of community service orders are their relatively low cost; they reduce possibly unwarranted spill-over effects (for example where a large fine might bankrupt an organization); and can be used to a restitutive, compensatory and/or reconciliatory effect. The NSWLRC recommended the introduction of corporate community service orders<sup>275</sup> and the ALRC has also recently expressed the view that they should be introduced at a federal level.<sup>276</sup>

7.4.2 Most respondents to the Issues Paper who commented on sentencing options were in support of this option.<sup>277</sup> The HIA commented that it may be unfair 'to make employees undertake the service if they were not directly or even indirectly involved in the offence'. This comment seems to be based on the misunderstanding that the employees would undertake the work on a voluntary basis. As the convicted 'person', it would be up to the *organization* to ensure that the order was carried out – this may involve voluntary work (eg by members of a club), paid work by employees (where the work is within the scope of

<sup>270</sup> *Federal Acquisition Regulations* § 9.406-2.

<sup>271</sup> Tasmanian Chamber of Commerce and Industry, Tasmanian Automobile Chamber of Commerce, Housing Industry Association.

<sup>272</sup> *Sentencing Act 1997* (Tas), ss 4 and 7.

<sup>273</sup> For example in one American case, a convicted corporate officer was ordered to help design a rehabilitation programme for ex-offenders: *United States v Mitsubishi International Corporation* (1982) 677 F 2d 785. In another example, convicted bakeries were required to supply fresh baked goods to needy organizations for a twelve-month period without charge: *United States v Danilow Pastry Co* (1983) 563 F Supp 1159.

<sup>274</sup> Community service orders thereby address the twin goals of deterrence and retribution. For example the United States Sentencing Guidelines provides that community service is to be 'reasonably designed to repair the harm caused by the offence': s 8B1.3.

<sup>275</sup> New South Wales Law Reform Commission, above n 228, 120.

<sup>276</sup> Australian Law Reform Commission, *Sentencing Federal Offenders*, Discussion Paper 70, (2005) 30.25.

<sup>277</sup> HIA and TACC were not in support, although the TCCI was. One of the police officers was not in support.

employment contracts or where employees are willing to undertake the work as part of their employment) or outsourcing some or all of the work.

7.4.3 It is the Institute's view that the previously stated recommendation (see 7.1.10), that the *Sentencing Act* be stated to apply to organizations with such modification as is necessary, will have the effect of allowing community service orders to be imposed on organizations,<sup>278</sup> and will allow for most of the provisions in the Act dealing with community service orders to be successfully applied to organizations without amendment. However, the Institute recommends that a new section be introduced (for eg, s 28A) providing that a community service order for an organization should relate to a specific project, rather than to a certain number of hours to be worked, because setting a certain number of hours to be worked focuses more on the employees of the organization than on the organization itself. This would be consistent with other Australian legislative provisions authorising the use of community service orders for corporate offences.<sup>279</sup> The NSWLRC state that these provisions have been construed liberally and on occasion used to order offenders to pay a sum of money to meet the costs of a project rather than ordering them to implement the project themselves.<sup>280</sup> The NSWLRC supports orders being able to be made in this form, but recommends that 'the project should bear a reasonable relationship to the offence and/or the objectives of the sentence.'<sup>281</sup> Although in such cases the organization would only be paying money (and in this way the sentence is similar to a fine), the NSWLRC points out that '[t]his form of community service increases the usefulness of a sentence by achieving some form of reparation to a dispersed group of victims, the general community or a section of it.'<sup>282</sup>

7.4.4 Also, a flexible approach to supervision is recommended. Depending on the circumstances of the case, the court should be able to order supervision either by the court (with the offender reporting back to the court), or by an independent officer appointed by the Court (such as the manager of a particular project).

## 7.5 Probation orders

7.5.1 Probation orders oblige an offender 'to be supervised by and to obey the reasonable directions of a probation officer'.<sup>283</sup> In Tasmania, probation orders are defined in the *Sentencing Act 1997* as:<sup>284</sup>

an order of a court that the offender in respect of whom it is made be of good behaviour during the period of the order or do or refrain from doing such things as are specified in the order.

7.5.2 The primary aim of a probation order is to rehabilitate through supervision,<sup>285</sup> and for this reason they may be particularly suited to organizations because of their potential for rehabilitation. Probation orders also largely avoid spill-over,<sup>286</sup> and their inherent flexibility means that they can be tailored to the individual case. A possible disadvantage of imposing probation orders on organizations is that the intervention could 'stifle innovation and reduce competitiveness',<sup>287</sup> however, it should be possible to avoid this, and in cases where it is not, alternative sanctions can be imposed. There is also the possibility that supervising organizational probation orders would be expensive, although this may be able to be reduced by using less intensive types of supervision, and/or by the imposition of costs on the offender.<sup>288</sup>

Section 37(1) of the *Sentencing Act 1997* (Tas) specifies mandatory conditions to which probation orders must comply:

<sup>278</sup> Although community service orders are already provided for under the *Sentencing Act*, their restriction to offenders who have 'attained the age of 18 years', s 7(c) probably prevents their imposition on organizations.

<sup>279</sup> New South Wales Law Reform Commission, above n 228, 10.20, citing *Protection of the Environment Operations Act 1997* (NSW) s 250(11)(c); *Occupational Health and Safety Act 2000* (NSW) s 116; *Environment Protection Act 1979* (Vic) s 67AC(2)(c); *Environment Protection Act 1993* (SA) s 133(1)(b).

<sup>280</sup> New South Wales Law Reform Commission, above n 228, 10.16.

<sup>281</sup> *Ibid*, 10.17, Recommendation 10.

<sup>282</sup> *Ibid* 10.17.

<sup>283</sup> K Warner, above n 42, 202.

<sup>284</sup> *Sentencing Act 1997* (Tas), s 4.

<sup>285</sup> *Sentencing Act 1997* (Tas), ss 7(f) and 59.

<sup>286</sup> 'Spill-over' is explained above, at 7.1.12.

<sup>287</sup> M Jefferson, 'Corporate criminal liability: the problem of sanctions' (2001) 65 *Journal of Criminal Law* 235, 252.

<sup>288</sup> S Box, above n 76, 72.

- (a) during the period of probation the offender must not commit any offence punishable by imprisonment;
- (b) the offender must report within a specified time of the making of the order to the designated supervisory officer;
- (c) during the period of the probation the offender must submit to the supervision of the supervising officer.
- (d) during the period of probation the offender must report as required to the supervising officer;
- (e) during the period of probation the offender must not leave or stay outside Tasmania without the permission of a probation officer;
- (f) during the period of probation the offender must comply with the reasonable and lawful directions of the supervising officer;
- (g) the offender must notify the supervising officer within a specified time of any change of address or employment.

7.5.3 It can be seen that most of these conditions involve a supervising officer, and this reflects the rehabilitative aim of this sentencing option. Their intrusive (and therefore often punitive) nature also means that they are considered a serious penalty, for example, they are considered to be more severe than a fine. When considering their use for organizational offenders, the same principles should apply. That is, they would be appropriate where rehabilitation is one of the main aims of the sentence (eg for a recalcitrant offender, or where the offence is part of a pattern of conduct) and the court considers that some type of supervision would assist in achieving that aim. Probation orders should not be ordered where the offence is of a minor nature, more appropriately punished by a lesser sentence, such as recording a conviction or imposing a fine.

7.5.4 Only two of the respondents to the Issues Paper who commented on sentencing options were not in favour of introducing probation orders for organizational offenders.<sup>289</sup> In favour of this option, the Tasmanian Chamber of Commerce and Industry were of the opinion that ‘such a sentencing option would promote rectification of poor systems of work, prevention of similar incidents and education to the organisation and its officers.’

7.5.5 The Institute recommends the introduction of probation orders as a sentencing option for organizations. It is also recommended that conditions tailored to organizations be introduced, aimed at achieving rehabilitation.<sup>290</sup> In the light of the previous recommendation that the *Sentencing Act* provide that it applies to organizations with such modification as necessary (see 7.1.10), the Institute is of the view that the existing provisions relating to probation orders (including the mandatory conditions to a probation order in s 37(1)(a)-(g)) would be able to be successfully applied to organizations without amendment. However, it is recommended that the courts be provided with further guidance by listing further optional conditions to an organizational probation order in a new sub-s (2A) in s 37, providing as follows:<sup>291</sup>

A probation order in respect of an organization may also include any or all of the following special conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender report to a probation officer on the implementation of those policies, standards and procedures
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;

<sup>289</sup> Housing Industry Association, Tasmanian Automobile Chamber of Commerce.

<sup>290</sup> Where a more punitive sentence is required, the orders should be combined with other sanctions to achieve that aim.

<sup>291</sup> The recommended subclauses (a)-(c) are based on the Canadian *Criminal Code Act 1985*, s 732.1 (b)-(d). The recommended subclauses (d)-(f) are based on discussion in New South Wales Law Reform Commission, above n 228, para 9.34, which cites *Trade Practices Act 1974* (Cth) s 86C(4)(b),(c) and *Protection of the Environment Act 1997* (NSW) s 250(1)(d).

- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence and report its findings and actions to its probation officer;
- (g) a specified officer or employee of the offender investigate the organization's activities, undertake appropriate disciplinary action and return a detailed and satisfactory compliance report to the court or an officer appointed by the court.<sup>292</sup>

7.5.6 Who should supervise the order poses a difficulty. A flexible approach is recommended. Depending on the circumstances of the case, supervision should be either by the court (with the offender reporting back to the court), by Workplace Standards (this may require additional resources and training for Workplace Standards), or by an independent officer appointed by the court (such as an independent workplace safety consultant, or an accountant, auditor or lawyer). It is recommended that a s 37A be inserted into the *Sentencing Act*, providing:

Where a probation order is made in respect of an organization the court may order that the role of the probation officer be undertaken by the Court, Workplace Standards, a specified officer of Workplace Standards, or a person appointed by the Court (such as an independent workplace safety consultant, or an accountant, auditor or lawyer). Where such an order is made the provisions of this Act shall apply with such modification as necessary.

Where a probation order is made in respect of an organization the court may order that the organization pay the cost of the supervision of the order.

## 7.6 Adjourment with conditions

7.6.1 Section 7(f) of the *Sentencing Act 1997* (Tas) gives courts the power to adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender. This can be done with or without recording a conviction against the offender. So long as the conditions are satisfied, then at the expiry of the adjournment period or upon the further hearing of adjourned proceedings, the offender will be discharged or the charge will be dismissed, depending upon whether a conviction has or has not been recorded.<sup>293</sup> Section 59 provides that the conditions to which the undertaking is subject are to appear before the court if called on to do so or when specified, to be of good behaviour during the adjournment, and any other conditions imposed by the court. Non-compliance with the conditions of the undertaking may expose the offender to being re-sentenced for the original offence as well as to being fined for the breach.<sup>294</sup>

7.6.2 The flexibility in the types of conditions that can be attached to such an order<sup>295</sup> can be used to great effect in relation to organizations, as was demonstrated in a recent Victorian case. In May 2004, Judge Gebhardt in the Victorian County Court imposed significant and imaginative penalties for four breaches of the *Occupational Health and Safety Act 1985* (Vic) that resulted in a death and serious injuries to a number of workers.<sup>296</sup> The fines for the first two counts totalled \$325,000. The third count was adjourned with conviction subject to the special conditions that the company pay \$70,000 to two charities and \$90,000 to the trusts funds of the deceased worker's children. The fourth count was adjourned with conviction subject to the special conditions that the directors meet with Victorian Worksafe representatives three times a year, that Leighton contribute \$40,000 to the funding of a training programme, and that Leighton approach the Universities of Monash, Melbourne and Deakin to discuss the enhancement of the training of engineers in safe systems of work associated with the design of temporary structures (falsework) for bridge construction.

<sup>292</sup> This encompasses an internal discipline order. This is a type of corporate probation order that has been recommended by the NSWLRC. See New South Wales Law Reform Commission, above n 228, paras 9.8 – 9.13; Australian Law Reform Commission, above n 61, paras 30.15, 30.16.

<sup>293</sup> *Sentencing Act 1997* (Tas), ss 60 and 61.

<sup>294</sup> *Sentencing Act 1997* (Tas) ss 60(4), 62(4)(c) and 62(5).

<sup>295</sup> Although the order should be reasonable: *Keur* (1973) 7 SASR 13; and have some pertinence to the offence committed: *Isaacs v McKinnon* (1949) 80 CLR 502; *Bantick v Blunden* Serial No 19/1981 [1981] Tas R (NC 9).

<sup>296</sup> *The Queen v Leighton Contractors Pty Ltd* [2004] VCC.

7.6.3 The Institute is of the view that the potential flexibility of these adjournments and their potential to promote rehabilitation makes them well suited to organizations. While such adjournments can already be imposed when sentencing organizations under the *Sentencing Act*, it appears that this option is not currently being utilised. Therefore, it is recommended that their use be promoted and that the courts be provided with further guidance by listing further optional conditions to an organizational adjournment order in a new s 59A, as follows:<sup>297</sup>

Where an undertaking is given by an organizational offender under section 7(f), the conditions imposed on that offender under section 59(c) may include any or all of the following conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender contribute (financially or otherwise) to the establishment of policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence.
- (g) a specified officer or employee of the offender investigate the organization's activities, undertake appropriate disciplinary action and return a detailed and satisfactory compliance report to the court or an officer appointed by the court.

7.6.4 The conditions that may attach to adjournment with conditions are intended to be the same as the conditions that may attach to a probation order.<sup>298</sup> Although these provisions are dealt with separately in this Report, these provisions could be consolidated in the amendment to the *Sentencing Act*.

## 7.7 Conviction

7.7.1 A further sentencing option available under the *Sentencing Act 1997* (Tas) is a conviction. The stigma attached to a criminal conviction can act an important punishment and deterrent when sentencing organizations – conviction ‘cannot simply be written off as a business cost or passed on to others’.<sup>299</sup> Convictions can already be imposed on organizations under the existing provisions of the *Sentencing Act* and no reforms are recommended in relation to this.

## 7.8 Adverse publicity orders

7.8.1 Criminal sanctions are often reported by the media, and this may be one of the most effective ways of achieving denunciation.<sup>300</sup> However, corporate criminal sanctions can receive less media attention, perhaps due sometimes to their ‘technicality’ or a perceived lack of public interest. One way the courts have sought to ensure denunciation (or ‘shaming’) is by making adverse publicity orders.<sup>301</sup>

<sup>297</sup> The recommended subclauses (a)-(c) are based on the Canadian *Criminal Code Act 1985*, s 732.1 (b)-(d). The recommended subclauses (d)-(f) are based on discussion in New South Wales Law Reform Commission, above n 228, para 9.34, which cites *Trade Practices Act 1974* (Cth) s 86C(4)(b),(c) and *Protection of the Environment Act 1997* (NSW) s 250(1)(d).

<sup>298</sup> See above at 7.5.

<sup>299</sup> B Fisse, above n 218, 229.

<sup>300</sup> It is no doubt also an important method for achieving general deterrence.

<sup>301</sup> D Skeel, ‘Symposium norms and corporate law: shaming in corporate law’ (2001) 149 *University of Pennsylvania Law Review* 1811.

7.8.2 The purpose of an adverse publicity order is to force the convicted offender to inform others of the offence committed. Adverse publicity orders can require an organization to advertise (eg in specified newspapers) or inform certain people (such as shareholders, members or customers) of their conviction and sentence. Thus, they are unlikely to be appropriate where there has already been significant publicity surrounding a case.<sup>302</sup> Adverse publicity orders may be a powerful shaming tool in relation to organizations that are keen to promote and protect their brand<sup>303</sup> or reputation. The possible negative effects of adverse publicity may also have a significant specific deterrent effect.<sup>304</sup> Such negative publicity can cause the public to boycott an organization and its products or services in future.<sup>305</sup> A potential problem with the adverse publicity order is that its effect can be described as a ‘loose cannon’<sup>306</sup> in that the impact of the order may be unpredictable. The order could result in a substantial spill-over effect or alternatively have little impact.<sup>307</sup> It is also possible that counter-publicity could be employed, although the effect of this is unclear.<sup>308</sup>

7.8.3 An adverse publicity order will usually be in addition to some other sanction imposed by the court. For example under s 36 of the *Fair Trading Act 1990* (Tas), which is not a sentencing order, the court may make either or both of the following orders:

- (a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that last-mentioned person has access;
- (b) an order requiring that person or a person involved in the contravention to publish, at his own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

Similar adverse publicity order provisions are contained in other Tasmanian and Australian legislation,<sup>309</sup> and their introduction in relation to corporations has also been recently recommended by both the Australian and the New South Wales law reform commissions.<sup>310</sup>

7.8.4 Respondents to the Issues Paper were generally in favour of the introduction of this sentencing option, only the Housing Industry Association and the Tasmanian Automobile Chamber of Commerce were against the introduction of adverse publicity orders.

7.8.5 The Institute recommends the introduction of adverse publicity orders as a sentencing option for organizations in the *Sentencing Act*.

<sup>302</sup> *Dawson v World Transport Headquarters Pty Ltd* (1981) 53 FLR 455, 478 per Fisher J.

<sup>303</sup> One commentator has recommended that a state-sanctioned ‘corporation journal’ be created in which details of corporate convictions be published. Another commentator has suggested that companies’ wrongdoings be broadcast over the Internet on a dedicated World Wide Web page entitled ‘Punitive Damages Awards’. See B Fisse, ‘The Use of Publicity as a Criminal Sanction Against Business Corporations’ (1971) 8 *Melbourne University Law Review* 107; A Curcio, ‘Painful Publicity – An alternative punitive damage sanction’ (1996) 45 *DePaul Law Review* 341.

<sup>304</sup> For example one study found that of seventeen corporations that had had experienced extensive negative publicity following conviction, in all but two instances, the corporate executives believed that the adverse publicity had resulted in a drop of corporate prestige. See B Fisse & J Braithwaite, above n 54, 289.

<sup>305</sup> For example negative publicity received after the ExxonValdez oil spill in 1989 resulted in thousands of consumers returning their Exxon credit cards. See A Curcio, above n 303, 369.

<sup>306</sup> J Coffee, above n 47, 427.

<sup>307</sup> In the only successful conviction of corporate manslaughter in Australia (*R v Denbo Pty Ltd* (1994) 6 VIR 157) the \$120,000 fine was never paid, as at the time of conviction the company was in liquidation and owed its secured creditors over \$2,000,000. The company was wound up six months before sentencing and never paid the fine. Neither did it suffer from the adverse publicity that flowed from the case. See *The Age*, 15 June 1994 at 7.

<sup>308</sup> B Fisse & J Braithwaite, above n 54, 295-298.

<sup>309</sup> For example see *Food Act 2003* (Tas), s 117; *Income Tax Assessment Act 1936* (Cth), s 14; *Customs Act 1901* (Cth), s 265; and *Trade Practices Act 1965* (Cth), 105.

<sup>310</sup> Australian Law Reform Commission, above n 61, Recommendation 30-1; New South Wales Law Reform Commission, above n 228, Recommendations 12 - 14.

## 7.9 The equity fine

7.9.1 Share dilution of a convicted corporation through the imposition of an ‘equity fine’ is an alternative sentencing option that is sometimes recommended for corporations in particular.<sup>311</sup> An equity fine involves the transfer of shares from a corporation to a state criminal compensation fund. The compensation fund is then entitled to dispose of the shares and distribute the assets to persons adversely affected by the conduct of the corporation.<sup>312</sup>

7.9.2 The equity fine has some advantages over other forms of sanction including a minimisation of the spill-over effect on employees and consumers. Indeed, the only materially disadvantaged group from the imposition of an equity fine are the shareholders whose share value in the company is reduced. However, it can be argued that it is these very same shareholders who have failed in their duty to adequately supervise management as well as being unjustly enriched. It is therefore likely that the imposition of an equity fine could well spur shareholders to take a more pro-active role in the management of the company, and ensure that transgressions do not happen again.

7.9.3 Equity fines also allow for much greater punishment than a monetary fine, as the market value of corporations will generally exceed the capital available to the corporation if a fine were to be imposed.<sup>313</sup> Further, additional income may be earned in instances where the corporation were to exceed expected revenue, for example in companies with high growth potential.

7.9.4 However, the dilution of shares through the imposition of an equity fine may place the corporation at threat of a hostile take-over.<sup>314</sup> Another problem with the equity fine is that it ultimately lends itself to a cost-benefit analysis,<sup>315</sup> and is not ultimately concerned with rectification of defective procedures or policies. As such, equity fines share a similar shortcoming to that experienced with other forms of fines.

7.9.5 Another limitation of the equity fine is that it would generally be restricted to sentencing companies which have share capital.

7.9.6 The NSWLRC did not recommend the introduction of equity fines in that state.<sup>316</sup> Their primary criticisms of equity fines were:

- Unfair burden on shareholders;
- Insufficient deterrence or rehabilitation;
- Gravity of corporate crime not reflected;
- Difficulties in administration;
- Limited application.

7.9.7 The ALRC has also recently expressed the view that equity fines should not be introduced in relation to corporations ‘because it is undesirable for the quantum of a financial penalty to be inextricably linked to the financial circumstances of the offender.’<sup>317</sup> They also reported that the Commonwealth DPP had submitted that they could significantly complicate the sentencing process by requiring the court to consider complex accounting issues.<sup>318</sup>

7.9.8 In the Issues Paper the Institute expressed the preliminary view that equity fines should not be introduced. This view has not changed. Accordingly, the Institute does not recommend the introduction of equity fines for organizations. Two respondents supported their introduction: the Australian Metal Workers

<sup>311</sup> J Coffee, above n 47, 413.

<sup>312</sup> Australian Law Reform Commission, above n 61, 30.8

<sup>313</sup> As Underwood J pointed out in *Chugg v Stanford* [2000] TASSC 93 ‘[t]he capacity of an offender to pay a fine is not measured by reference only to his or her circumstances at the moment the fine is imposed’.

<sup>314</sup> In general however, the equity fine would have to be quite substantial for a serious takeover to be a risk. There is a chance that the threat of a takeover could well provide a catalyst for corporations to ensure effective internal compliance systems. See B Fisse, above n 218, 232.

<sup>315</sup> B Fisse, above n 53, 1234.

<sup>316</sup> New South Wales Law Reform Commission, above n 228, Chapter 7.

<sup>317</sup> Australian Law Reform Commission, above n 276, 30.24.

<sup>318</sup> *Ibid*, 30.12. The recommendation against equity fines is confirmed in the final report: Australian Law Reform Commission, above n 61, 30.9.

Union (who expressed general support for all the options discussed) and Unions Tasmania, who said that ‘An equity fine is spreading the impact beyond those directly responsible but may be appropriate in some circumstances’.

## 7.10 Punitive injunction

7.10.1 A punitive injunction is similar to a probation order (and is often discussed as a type of probation order) in that it seeks to ensure that an offending organization improves the internal controls that lead to the offence, however, the difference lies in its punitive approach and lack of supervision. According to the ALRC, a punitive injunction:<sup>319</sup>

requires a corporation to take steps to reform its organisational structure or activities in a manner that incorporates a punitive element. The punitive element might be that the reforms need to be undertaken within a short period of time or that particular member of senior management be actively involved in the reforms.

7.10.2 Fisse describes the punitive injunction as ‘a hard-hitting and yet remedial form of punishment that would be appropriate in cases where liquidation would be unwarranted and yet where the record of non-compliance is such as to call for more than merely a probationary sentence or a fine.’<sup>320</sup>

7.10.3 In their report *Sentencing: Corporate Offenders*, the NSWLRC recommended the introduction of punitive injunctions as a sentencing option for corporate offenders and stated that a court should be able to issue a punitive injunction:<sup>321</sup>

- setting out in detail the conduct that the corporation must not engage in;
- specifying particular actions that the corporation must undertake or internal controls that the corporation must be subject to; and
- identifying individuals who will be responsible for failure to comply with the order.

7.10.4 The punitive injunction has been described as ‘both punishment and super-remedy’<sup>322</sup> as it requires a defendant to introduce preventative procedures as well as possibly requiring the development of innovative techniques. The punitive injunction as a sanction is therefore able to rehabilitate through ‘forcible restraint upon corporate decision-making’.<sup>323</sup> Moreover, for serious offences, it can be imposed as an alternative to harsh fines, avoiding the deterrence trap. Thus the more serious the offence, the ‘greater the justification for imposing stringent monitoring of the company’s future activities’.<sup>324</sup> It has also been suggested that where a fine is imposed, the spill-over effects of the fine could be reduced by use of a punitive injunction prohibiting the corporation from passing the costs on to consumers.<sup>325</sup>

7.10.5 The ALRC has also recently expressed the view that punitive injunctions (discussed as a type of corporate probation) be introduced as a sentencing option for corporations.<sup>326</sup>

7.10.6 Respondents to the Issues Paper varied in their support of punitive injunctions. The most detailed response to Question 16: ‘Should the imposition of a punitive injunction be an additional sentencing option?’ came from the Tasmanian Chamber of Commerce and Industry (TCCI), who wrote:

<sup>319</sup> Australian Law Reform Commission, above n 61, 30.18 citing B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 237.

<sup>320</sup> B Fisse ‘Chapter 18: Rethinking criminal responsibility in a corporate society: an accountability model’ in P Grabosky and J Braithwaite (eds) *Business Regulation and Australia’s Future*, Australian Institute of Criminology (1993) 263.

<sup>321</sup> New South Wales Law Reform Commission, above n 228, para 9.50, footnotes omitted.

<sup>322</sup> B Fisse & J Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1988) 11 *Sydney Law Review* 469, 501.

<sup>323</sup> B Fisse, above n 218, 237-238.

<sup>324</sup> B Fisse & J Braithwaite, above n 226, 83.

<sup>325</sup> New South Wales Law Reform Commission, above n 228, para 9.44, citing M Jefferson, ‘Corporate criminal liability: the problem of sanctions’ (2001) 65 *Journal of Criminal Law* 235, 256.

<sup>326</sup> Australian Law Reform Commission, above n 61, 30.18 and Recommendation 30-1.

No. Whilst TCCI is not opposed to the concept of punitive injunctions it is concerned about the ability to effectively impose them. For example, it is relatively straight forward to impose an injunction preventing an organisation from engaging in specified conduct. It is much more difficult to frame a mandatory injunction, particularly if it was to require the development of innovative techniques. An organisation may simply not be capable of developing such techniques, or the techniques themselves may not be technically capable of being developed. A further concern is that when introducing any new system, an organization must undertake a risk assessment of that system. In some circumstances, whilst a particular system may at face value, alleviate a risk in one area, it may have adverse consequences in other areas which in turn results in a greater risk than the risk intended to be alleviated. The imposition of such punitive injunctions by the courts could result in organisations being unable to effectively manage the risks within their organisation. TCCI is also concerned about how the courts would obtain evidence upon which to base a punitive injunction order.

7.10.7 To some extent the Institute agrees with this view point. Injunctions are usually prohibitive rather than mandatory and where actions are required to be taken it may be that a community service order or probation order is a more appropriate sentence. On the other hand, it is likely that a court could frame a mandatory injunction in such a way as to avoid the potential problems discussed in the Tasmanian Chamber of Commerce and Industry response. Therefore, this option may serve as a useful sentencing alternative where the supervision associated with a probation order is not required and the actions required by the injunction are specific, yet would not mandate substantial changes to work practices that might have uncertain effects. The Institute therefore recommends the introduction of punitive injunctions as a sentencing option for organizations. The Trade Practices Act 1974 (Cth), s 80, appears to be an appropriate model for such a provision (see details in 7, below).

## 7.11 Compulsory Compensation Orders

7.11.1 Section 68 of the *Sentencing Act* allows a sentencing judge to make a compensation order against a person found guilty of an offence if the court finds that another person has suffered injury, loss, destruction or damage. Furthermore, s 68(1)(a) requires such an order to be made if the defendant is guilty of certain offences (burglary, stealing and injury to property). In the Issues Paper it was stated that while there are problems with mandatory compensation orders (in particular that orders are often adjourned indefinitely, or if they are made they are often never paid),<sup>327</sup> in the light of the different nature of organizational offenders, they may be a desirable option for organisations.

7.11.2 The Issues Paper asked whether the *Sentencing Act* should require the sentencing judge to make a compensation order where an organization is found guilty of a crime in the Code. While some respondents expressed support for compulsory compensation orders, none addressed the problems with such orders. The Institute is of the view that it is not necessary or appropriate to treat organizations differently to natural people in this regard. Therefore, the Institute does not recommend any special provision for organisations in this regard.

## 7.12 Crown organizations

7.12.1 Recommendation 4 was that the Code be amended to provide that it binds the Crown. A related issue is whether special provision should be made for sentencing Crown organizations. The Institute has considered this and has rejected it on the basis that the sentencer would already be required to take the fact that the defendant was a Crown organization into account as one of the relevant factors relating to the offender.

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<sup>327</sup> See further discussion in K Warner & J Rudolf, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36 *The Australian and New Zealand Journal of Criminology* 60.

## 7.13 Procedural issues

### *Pre-sentence reports*

7.13.1 In Tasmania, the *Sentencing Act 1997* provides that before passing sentence, the court can order a pre-sentence report to be prepared.<sup>328</sup> Under s 82(2), the court may direct that particular matters are to be investigated for the purposes of the pre-sentence report and may give such other directions as it considers necessary or appropriate in connection with the report. There is a list of matters in s 83(1) which may be contained in a pre-sentence report: age; the social history and background of the offender; the medical, psychological and psychiatric history and condition of the offender; the offender's educational background; the offender's employment history; the circumstances of any other offences of which the offender has been found guilty and which are known to the court; the extent to which the offender is complying with any sentence currently in force in respect of the offender; the offender's financial circumstances; any special needs of the offender; any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which he or she may benefit; the nature and history of the relationship, if any, between the offender and the victim of the offence. While these matters clearly have the individual offender in mind, many of them could be adapted to the context of an organization as offender.

7.13.2 The NSWLRC's *Sentencing: Corporate Offenders* addressed the several issues that arose in connection with the preparation of pre-sentence reports for corporations. Responses to the NSWLRC Issues Paper suggested that the following information be supplied in a pre-sentence for a corporate offender:

- prior convictions of the corporation;
- whether new compliance systems have been implemented to prevent a future occurrence of the same behaviour (and an independent audit of such systems);
- whether existing effective compliance systems are already in place to prevent and detect criminal activity;
- previous positive and negative behaviour of the corporation;
- any attempts at reparation; and
- prior convictions of high-level personnel of the corporation.<sup>329</sup>

7.13.3 The NSWLRC observed that not all these matters would need to be contained in a formal pre-sentence report because information as to prior conviction, and positive and negative behaviour of the corporation would normally be presented to the court at the sentencing hearing. However, matters such as 'compliance programs and the management of a corporation's finances' would likely need to be the subject of an expert report. The Commission's view was that the court should be able to request a report from a relevant expert to provide this type of information, that there should be flexibility as to the expert appointed (eg accountants, auditors or corporate lawyers) and that the corporation should pay the costs.<sup>330</sup> The NSWLRC suggested that there was no need to have a list that detailed the information that should be contained in a pre-sentence report, it would be necessary to have special provision made in regard to high-level personnel.<sup>331</sup>

7.13.4 As the *Sentencing Act 1997* (Tas) sets out factors that may be contained in a pre-sentence report, it is recommended that amendments be made to the *Sentencing Act 1997* (Tas) to include factors that are specifically relevant a pre-sentence report that relates to an organization. The changes set out in Recommendation 7 are based on the recommendations of the NSWLRC.

### *Victim impact statements*

7.13.5 A victim impact statement allows the court to receive information about the particulars of any injury, loss or damage suffered by the victim as a direct consequence of the offence, and a description of the

<sup>328</sup> Section 82(1).

<sup>329</sup> New South Wales Law Reform Commission, above n 228, para 14.5.

<sup>330</sup> Ibid, paras 14.7 – 14.8.

<sup>331</sup> Ibid para 14.9. See also Australian Law Reform Commission, above n 61, paras 30.35 – 30.36, 30.38.

effects on the victim of the commission of the offence.<sup>332</sup> Under s 81A *Sentencing Act 1997* (Tas), the court may receive a victim impact statement where a person has suffered loss or damage as a direct consequence of the offence or is a direct family member of a deceased victim of the offence. This provision appears to allow a victim impact statement to be received where an offence is committed by an organization and the Institute does not recommend any change.

### ***Attendance at court***

7.13.6 As an organization does not have a physical body, it is not possible for the court to compel an organization to be present in court. The NSWLRC considered whether courts ‘should have the power, when they consider it desirable, to compel representatives of a corporation to attend sentencing’.<sup>333</sup> As with the NSWLRC, the Institute’s view is that it is desirable for the court to have the power to compel a high managerial agent of the organization to be present in court. The attendance of an appropriate representative in court achieves the denunciation and deterrent aims of sentencing.<sup>334</sup> In addition, ‘compelling the attendance of officers at sentencing may also overcome some of the theoretical concerns about the value of denouncing corporate offenders, given the view held by some that a corporation is an incorporeal entity that lacks the capacity of suffer moral condemnation’.<sup>335</sup> Particular benefits include bringing ‘home the seriousness of the [organization’s] ... conduct to the people who are ultimately responsible; provid[ing] a forum for expressing denunciation of the [organization’s] ... conduct’.<sup>336</sup>

7.13.7 The Institute recommends that the court have the power to require the attendance of any high managerial agent of the organization, if the court considers this is necessary. It is recommended that the changes be made to the *Sentencing Act* based on the recommendations of the NSWLRC.

## **Recommendation 7**

That the *Sentencing Act* be amended by introducing the following clauses –

### **6A Act to apply to organizations**

- (1) This Act applies to organizations in the same way as it applies to individuals. It so applies with such modifications as are set out in this Act, and with such other modifications as are made necessary by the fact that sentence is being imposed on organizations rather than individuals.
- (2) The term ‘organization’ has the same meaning as it has in the *Criminal Code*.
- (3) The term ‘high managerial agent’ has the same meaning as it has in the *Criminal Code*.
- (4) The term ‘representative’ has the same meaning as it has in the *Criminal Code*.

### **7A Sentencing orders in relation to organizations**

- (1) Instead of or in addition to making an order under section 7, a court that finds an organization guilty of an offence may do any one or more of the following, in accordance with this Act and subject to any enactment relating specifically to the offence –
  - (a) record a conviction and, if the offence is punishable by imprisonment, make a disqualification order in respect of the offender.
  - (b) record a conviction and make an adverse publicity order in respect of the offender.
  - (c) grant an injunction against the organization in such terms as the Court determines to be appropriate.
- (2) A disqualification order made in accordance with subsection (1)(a) may, among other matters:
  - (a) prevent the organization from engaging in certain commercial activities;

<sup>332</sup> *Sentencing Act 1997* (Tas) s 81A(2).

<sup>333</sup> New South Wales Law Reform Commission, above n 228, para 14.25. See also Australian Law Reform Commission, above n 61, paras 30.31 – 30.34, 30.37.

<sup>334</sup> New South Wales Law Reform Commission, above n 228, para 14.26.

<sup>335</sup> *Ibid*, para 14.26.

<sup>336</sup> *Ibid*, para 14.38 – organization substituted for corporation.

- (b) revoke or suspend a licence held by the organization;
  - (c) disqualify the organization from entering specified contracts;
  - (d) deny the organization the use of its profits for a fixed period of time.
- (3) An adverse publicity order may require an organization to –
- (a) disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the organization or to which the organization has access;
  - (b) publish, at its own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.
- (4)
- (a) The Court may rescind or vary an injunction granted under subsection (1)(c).
  - (b) The power of the Court to grant an injunction under subsection (1)(c) restraining an organization from engaging in conduct may be exercised:
    - (i) whether or not it appears to the Court that the organization intends to engage again, or to continue to engage, in conduct of that kind;
    - (ii) whether or not the organization has previously engaged in conduct of that kind; and
    - (iii) whether or not there is an imminent danger of substantial damage to any person if the organization engages in conduct of that kind.
  - (c) The power of the Court to grant an injunction under subsection (1)(c) requiring an organization to do an act or thing may be exercised:
    - (i) whether or not it appears to the Court that the organization intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
    - (ii) whether or not the organization has previously refused or failed to do that act or thing; and
    - (iii) whether or not there is an imminent danger of substantial damage to any person if the organization refuses or fails to do that act or thing.

### **28A Community service orders in respect of organizations**

- (1) A community service order in respect of an organization should specify –
- (a) a particular project or activity which the organization should complete or contribute towards, and if so to what extent;
  - (b) a period for completion of the project or the contribution towards the project or duration of the activity;
  - (c) any other requirements the court considers necessary or expedient for enforcement of the order.
- (2) Where a community service order is made in respect of an organization the court may order that the role of the probation officer or supervisor be undertaken by the Court or a person specified by the court.
- (3) Where a community service order is made in respect of an organization the court may order that the organization pay any cost of the enforcement and/or the supervision of the order.

### **37(2A)**

A probation order in respect of an organization may also include any or all of the following special conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;

- (c) the offender report to a probation officer on the implementation of those policies, standards and procedures
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence and report its findings to its probation officer.

### **37A Supervision of organizations**

- (1) Where a probation order is made in respect of an organization the court may order that the role of the probation officer be undertaken by the Court, Workplace Standards, a specified officer of Workplace Standards, or a person appointed by the Court (such as an independent workplace safety consultant, or an accountant, auditor or lawyer).
- (2) Where a probation order is made in respect of an organization the court may order that the organization pay the cost of the enforcement of the order.

### **59A Conditions for undertakings by organizations**

Where an undertaking is given by an organizational offender under section 7(f), the conditions imposed on that offender under section 59(c) may include any or all of the following conditions:

- (a) the offender establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (b) the offender communicate those policies, standards and procedures to its representatives;
- (c) the offender contribute (financially or otherwise) to the establishment of policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (d) the offender implement/undertake specified reporting, record keeping or auditing controls;
- (e) the offender establish compliance programs or education and training programs for its employees and/or representatives;
- (f) the offender review its internal operations or activities which led to the offence.

### **S 82(3A) Pre-sentence reports for organizations**

- (1) In cases where the offender is an organization and the court requests a professional assessment of an organization's characteristics, the court may appoint a suitable person or persons to prepare a report on the organization, and the court may give such other directions in relation to the nature and means of obtaining the assessment as the court considers necessary or appropriate.
- (2) The court may order that the organization pay the costs of preparing the report.

### **s 83(1A) Pre-sentence reports for organizations**

In addition to the matters referred to in ss (1), in cases where the offender is an organization, the pre-sentence report may include the criminal records of its Board of Directors or high managerial agent which appear to the court or the author of the report to be relevant to the sentencing of the offender.

### **S 90(2A) Attendance of high managerial agent**

The judge or magistrate presiding at the trial of an offence or receiving a plea of guilty to an offence, or any other judge or magistrate empowered to impose sentence, may require the attendance at the sentencing proceedings of any of the high managerial agents of the organization, if he or she considers it appropriate in the circumstances.

That the *Sentencing Act*, s 31 (Limitation on number of hours of community service), be amended to provide that it does not apply to community service orders in respect of organizations by the insertion of the words 'in respect of an organization' before the '.' at the end of sub-s (4).

## Appendix A

Sentences for convictions under the *Workplace Health and Safety Act 1995* (Tas), ss 9, 14, 16, 20, 47 and 48.<sup>337</sup>

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
12/04/1996	Individual: PRB	Section 16(a)	The defendant partially felled a tree. The following day a fellow worker was hit by the tree while working nearby. No warning was given.	\$2,000	\$10,000
8/04/1997	Individual: IDY	Section 9(a)(I)(ii) & Section 9(b)	An employee was injured while working near 20,000 volt overhead power lines. He received third degree burns and the amputation of several toes.	\$10,000	\$50,000
9/04/1997	MRP Pty Ltd	Section 47	An employee fell through an unguarded floor, falling 2.4 metres below. Received fractures to neck, back and ribs.	\$1,000	\$5,000
19/06/1997	DF Pty Ltd	Section 9(2)(d) Section 47	An employee was injured when his shirt caught alight while undertaking foundry duties causing extensive burns.	\$3,500 \$500	\$150,000 \$5,000
10/09/1997	TS Pty Ltd	Section 9(1)(a)(ii)	An employee was turning the flitch on a saw when he came in contact with it, receiving severe injuries. Eventually, his arm had to be amputated.	\$8,000	\$150,000
19/09/1997	Individual: ALC	Section 16(a)	The defendant placed a corrosive chemical in a milk carton for the purpose of playing a prank on an employee, resulting in a potentially life threatening situation.	\$3,500	\$10,000
3/10/1997	WSE Pty Ltd	Section 9(4)	An employee of a sub contractor fell through a roof approx 8.5 m causing a fracture to right elbow and right leg.	\$7,000	\$150,000
31/10/1997	AN Pty Ltd	Section 9(1)(a)(iii)	An employee whilst using a cropping machine had the fingertips of two fingers severed. The warning signs on machine were written in German.	\$20,000 Company had a previous conviction	\$150,000
1/12/1997	Individual: RME	Section 37(1)(a)	Obstructing an Inspector	84 hours' community service	\$20,000
26/02/1998	TP Pty Ltd	Section 9(2)(f)(I)	Change in procedure in relation to isolation from power supply to conveyor.	\$8,000	\$150,000
24/08/1998	B Pty Ltd	Section 47(b) ISH&W Regulations 1979 38(2)	Failing to give notice of serious incident. Failing to maintain electrical equipment. An employee using vacuum cleaner received electrical shock and suffered burns and associated injuries.	Conviction recorded. No fine	\$5,000
24/08/1998	Individual: JBF, Managing Director of B Pty Ltd	Sec 47(b) Sect 48(1)	Failing to give notice of serious incident. Failing to maintain electrical equipment. An employee using vacuum cleaner received electrical shock and suffered burns and associated injuries.	Conviction recorded. No fine	\$2,000
17/11/1998	Individual: PJZ	Section 16(a)	The defendant, a crane driver, lifted a porta loo with a boom crane into an unsafe proximity with overhead power lines. As a result two workers who were guiding the porta loo by hand received severe bodily injuries to hands and feet as electricity passed through them to the ground.	\$3,000	\$10,000
22/03/1999	PA Ltd	Section 9(4)	The defendant, the principal contractor failed to provide a safe working environment when hot liquid calcine was spilt onto two persons who were sub-contractors on the site, resulting in second degree burns to feet, full thickness burns to ankles and superficial burns to neck region.	\$18,000	\$150,000
25/03/1999	PF Pty Ltd	Section 9(1)(a)(ii)	An employee of the defendant received facial injuries when he was struck by an exploding float he was pressure testing at the time.	Conviction recorded	\$150,000
9/06/1999	Individual: MGD	Section 16(a)	A 12-year-old boy was injured when his trouser leg came into contact with an unguarded power take off shaft which attached to a Grasslands roller mill on one end and a blue Ford 5000 tractor at the other end. Later, the boy's leg was amputated.	\$2,000	\$10,000

<sup>337</sup> The data that follows was obtained from the following sources: newspaper sources; *Lactos Pty Ltd v Kent* [2003] TASSC 82, Annexure A; The *Workplace Issues* (GB064) Magazine (this is a quarterly publication produced as a joint initiative of Workplace Standards Tasmania and the WorkCover Board. The Magazine is available at: [www.workcover.tas.gov.au](http://www.workcover.tas.gov.au); and Personal communications with Mr Phil Hickey (Senior Policy Adviser, Workplace Standards Tasmania), 16 and 17 March 2005.

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
8/07/1999	M Pty Ltd	Section 9(2)(d) Section 9(2)(e)	A 19-year-old was killed when a 25-metre log (cable logging operation) which was being hauled in, swung around and struck the deceased in the chest and head region. The investigation revealed the log was attached in the middle region which caused it to swing, striking the uphill bank and then the deceased. The deceased was not a safe distance away from the area.	\$35,000	\$150,000
27/08/1999	Boral Resources (Tas) Pty Ltd	Section 20(b)	The defendants initiated a blast at its quarry; the purpose was to widen an access road. Several pieces of fly rock were ejected from the area into the sawmill next door.	\$7,500	\$50,000
21/09/1999	P Ltd	Section 9(1)(a)	Two employees of the defendant were leaning into the skip container and the skip moved with both employees sustaining injury. The skips had not been isolated prior to entering the lower level of the mine. Also there was a lack of guards and barriers and there were inadequate warning signs.	\$5,000	\$150,000
1/12/1999	LL Pty Ltd	Section 9(4)(e)	Two contractors of the defendant suffered electrical burns and shock whilst working in a high voltage sub-station.	\$40,000	\$150,000
18/02/2000	Individual: DER, Director of R Pty Ltd	Section 9(1)(a)(iii) Section 47(a)	An employee of the defendant, whilst in the process of removing onions from a top and tail machine had her hand caught between the rollers in the machine. The accident necessitated the amputation of four fingers on her right hand and damage to the palm of the hand. There was no guard on the machine.	\$5000 \$250	\$50000 \$2000
28/03/2000	Individual: DD	Section 20 (C)	The defendant sprayed and ignited CRC through a vent hole in a toilet door at a workplace as an employee was sitting on the toilet, causing burns to the sleeve area of the person's overalls.	good behaviour for 12 months.	\$25,000
2/05/2000	D Pty Ltd	Section 9 (1)(a)(i)	Two employees who were cleaning the inside of a cool room using a forklift truck received carbon monoxide poisoning.	\$2,500	\$150,000
20/06/2000	ACH Pty Ltd	Section 9 (1)(c)	A young worker had his arm caught in a running conveyor system and was not discovered until some 3 hours after the accident.	\$10,000	\$150,000
31/07/2000	T Pty Ltd & Individual: JRV	Section 9 (1)(c)	A log truck driver was struck with a log during unloading.	\$10,000 \$4,000	\$150,000 \$50,000
15/11/2000	Individual: CAD	Section 13	The prosecution involved a fatality during a tree felling.	\$5,000	\$50,000
23/11/2000	FFP Pty Ltd	S 9(1)(a)(ii) S 9(1)(iii) S 9(1)(c). S 47	The prosecution followed an incident in which an employee whilst attempting to clean out the water jets of a potato washing machine slipped and fell into the machine causing his right arm to be crushed.	\$4,000	\$150,000
21/02/2001	DH Pty Ltd	Section 9(1)(a)(iii) Section 9(1)(a)(ii)	An employee of the defendant received acid burns to the groin area, feet, hands, forearms and left eye when a PVC pipe fractured whilst transferring chromic acid from a holding tank to a service tank.	\$7,500	\$150,000
21/02/2001	Individual: JJW, (Managing Director) of DH Pty Ltd	Section 9(1)(a)(iii) Section 9(1)(a)(ii)	An employee of the defendant received acid burns to the groin area, feet, hands, forearms and left eye when a PVC pipe fractured whilst transferring chromic acid from a holding tank to a service tank.	\$1,000	\$50,000
2/05/2001	TA Pty Ltd	Section 9(4)	An employee was fatally wounded whilst working at the workplace of TA Pty Ltd. The employee was at the time employed by SE Pty Ltd, who was engaged by TA Pty Ltd to carry out in part welding of a threaded sleeve to a pipe work connected to a tank.	\$30,000	\$150,000
28/06/2001	Individual: KRM	Section 9(1)(a)(ii) & Section 48	An employee was cutting tops out of 44-gallon drums with an oxyacetylene torch when there was an explosion and fire. The employee sustained injuries from the incident.	\$3,500 global fine	\$50,000 \$2,000
9/08/2001	B Pty Ltd	Section 14	The erection of a scaffold was not safe for use and the scaffolder failed to inspect the scaffold prior to passing it safe for use.	\$10,000	\$150,000
9/08/2001	Individual: PGDM	Section 16	The erection of a scaffold was not safe for use and the scaffolder failed to inspect the scaffold prior to passing it safe for use.	\$3,000	\$10,000

Date of Conviction	Defendant	Section	Brief Details	Penalty	Maximum Penalty
16/10/2001	W Ltd	Section 9(1)(a)(iii)	An employee who was employed at a walnut farm was working on the back of a hopper attached to a tractor for the purposes of injecting gypsum into the soil. The hopper was unguarded and bolts, which had protruding heads, were fastening the augur to the drive shaft. Later the employee's jumper became caught in the augur bolts, which caused severe damage to his left arm.	\$4,000	\$150,000
31/10/2001	WQ Pty Ltd	S 9(1)(a)(ii), 9(a)(iii), 9(1)(c)	The defendant plant was experiencing problems and when the employee attempted to fix the problem his right hand became trapped in the drum of the conveyor belt of the crushing plant.	\$15,000	\$150,000
10/07/2002	Individual: GJH	Section 20(c)	An employee whilst working at the BPC Pty Ltd was filling a LPG cylinder and left it unattended for approx 3 hours, the LPG escaping into the atmosphere.		
05/03/2003	L Pty Ltd	Section 9(1)(a)(ii) & (c)	Employee's leg caught when conveyer belt not turned off during cleaning. Systems failure as two employees both responsible for ensuring it turned off – each assumed other would do so. No "lock-out tag-out system" installed.	\$30,000	\$150,000
18/03/2003	GM Pty Ltd	Section 9(1)	Forklift with faulty brake pivoted around, pinning employee against building. Employee not qualified to drive forklift, and employer failed to provide instruction and training in the use of the forklift.	\$5,000	\$150,000
18/03/2003	Individual: BAD	Section 9(1)		\$2,500	\$50,000
07/04/2003	WS Pty Ltd.	Section 9(4)	Employee's finger amputated by hamburger machine.	\$5,000	\$150,000
28/05/2003	CM Pty Ltd	Section 9(1)	Employee pruning trees with hydraulic shears while on mobile elevated work platform. Limb he was pruning contacted power line, resulting in severe electric shock.	\$8,000	\$150,000
18/06/2003	T Pty Ltd	S 9(1)(a)(i)	A mine worker was thrown back several metres in an electrical explosion when the bucket of an excavator that he was working nearby came into contact with an underground power-line.	\$4,500	\$150,000
18/06/2003	S Pty Ltd	Section 9(1)(a)(i)		\$4,500	\$150,000
22/07/2003	NL Pty Ltd	Section 9(1)	Employee injured when the jaws of a machine crushed him as he was carrying out routine maintenance of a processing plant.	\$5,000	\$150,000
23/09/2003	Individual: BAJ	Section 38(1):	Section 38(1) -failure to comply with a direction of an inspector; also 3 counts of regulation 101(2) (using unregistered plant).	\$2,000 (global fine)	S 38(1): \$20,000*
23/12/2003	VP Pty Ltd	Section 9(1)	Employee injured while operating a packaging plant. His left hand caught in the assembly head of the machine, resulting in the lost of the end of the thumb and two fingers. It was alleged that VP failed to ensure that plant was properly guarded.	\$5,000	\$150,000
29/03/2004	SE Ltd	Section 9(1)(c)	Employee of SE. (working at C recycling factory) cleaning paper from roller at the head of a conveyer belt (owned by C).	\$25,000	\$150,000
29/03/2004	C Pty Ltd	Section 9(4)	Conveyer restarted and employee's arm pulled through maintenance plate and over the top of roller. Arm had to be removed. Employee was a new employee and not sufficiently instructed by SE. C's conveyer belt did not comply with safety standards.	\$25,000	\$150,000
28/04/2004	Individual: WBL	Section 9(1)	Employee instructed by employer to use forklift truck to lift Land Rover to remove parts, this contrary to standards. Also employee did not have forklift licence and not properly instructed of dangers. Rover moved, killing employee.	\$25,000	\$50,000
08/07/2004	Individual: BDJ	Section 16(a)	Defendant did not adhere to industry tree falling standards, had 'cavalier attitude'. Limb fell and impaled him in the chest.	\$2,000	\$10,000
13/08/2004	PBV Ltd	Section 9(4)	Employee was cleaning out tank, climbed ladder lifting 20lt container of caustic solution, as lifted bucket, it hit tank and tipped over his face and head, causing severe damage to his eye, which was later removed.	\$20,000	\$150,000
16/11/2004	H Pty Ltd	Section 9(4)	Employee drove forklift down inclined road, brakes did not work, crashed.	\$10,000	\$150,000
09/12/2004	G Ltd	Section 9(4)	An employee, undertaking clearing of a blockage in a feed duct at G's fish meal plant at Cambridge, had part of a finger severed when it came into contact with a rotating valve in the equipment being cleaned.	\$7,500	\$150,000

\* plus a daily fine of \$2,000 – he had not complied for over 150 days, so he could have been fined over \$300,000; Max for reg 101(2): \$5,000 on each charge. Total max: \$345,000.

21/04/2005	TGS Pty Ltd	Section 9(1)	Employee's arm became entangled and trapped in the moving parts of the gantry conveyor, resulting in severe injuries.	\$30,000	\$150,000
21/06/2005	Individual: B	Section 9(4)	Employee became engulfed when trench collapsed.	\$3,500	\$50,000
03/10/2005	KCWD Pty Ltd	Section 9(4)	Employee became engulfed when trench collapsed.	\$4,000	\$150,000
08/11/2005	PM Pty Ltd	Section 14(1)(a)	Employee injured arm and had finger amputated when hand became entangled in the rope mechanism of the potato transport trailer.	\$5,000	\$150,000
08/11/2005	HA Pty Ltd	Section 9(4)	Employee's hand was caught in hop picking machine when was attempting to clear vines and other material from a chain and sprocket mechanism. Hand damaged.	\$3,500	\$150,000
18/11/2006	R&HC Pty Ltd	Section 9(1)	Employee suffered multiple fractures to his wrist and hip when walkway failed.	\$20,000	\$150,000
09/01/2006	S Pty Ltd	Section 9(1)	Employee's hand was caught in hop picking machine when was attempting to clear vines and other material from a chain and sprocket mechanism. Hand damaged.	\$3,500	\$150,000
20/5/2006	W Pty Ltd	Section 9(4)	Employees removed asbestos-cement product from the ceiling and roofing.	\$8,000*	\$150,000
20/04/2006	Individual: S	Section 9(4)	An independent tree feller was working at a forest coupe. After felling two trees, the tree feller was struck by a falling piece of wood from a nearby dead tree, and killed.	\$8,000	\$50,000
20/6/2006	G Pty Ltd	Section 9(4)	Employees removed asbestos-cement product from the ceiling and roofing.	\$8,000*	\$150,000
27/7/2006	CMT Pty Ltd	Section 9(4)	An employee was attempting to clear a blockage inside the conveyor, using compressed air through a small pipe, when the pipe became caught in the rollers, dragging the employee in between the conveyor belt and the roller.	\$10,000	\$150,000
08/09/2006	AFG Pty Ltd	Sections 9(1) & (4)	Employee killed when forklift tipped over.	\$25,000 increased to \$70,000	\$150,000
11/09/2006	RB Pty Ltd	Section 9(4)	Employee killed when caught in mine rockfall	\$120,000	\$150,000

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\* The company was also convicted breaches of regulations in relation to the asbestos with a maximum penalty of \$10,000.

# Appendix B

Victorian Law Reform Commission *Criminal Liability for Workplace Death and Serious Injury in the Public Sector Report, 2002*

## Recommendations

### Chapter 1

#### Introduction

#### Preliminary Questions

1. The Crimes (Workplace Deaths and Serious Injuries) Bill 2001(hereafter, the Bill) should provide that for the avoidance of doubt the Crown is a body corporate.
2. It is intended that the Bill should bind the Crown in all its capacities as far as is constitutionally possible and it is intended to make the Crown criminally liable and subject to criminal sanctions.

### Chapter 3

#### Imposing Criminal Liability on ‘Public Sector Entities’

#### Agencies and Offices under the *Public Sector Management and Employment Act 1998*

3. The Bill should provide that the Director of Public Prosecutions may prosecute the Crown for an offence under the *Public Sector Management and Employment Act 1998*.
4. The Bill should provide that the Crown should be the defendant in cases involving negligent conduct occurring within agencies and section 16 offices.
5. The Bill should provide that, in determining whether the Crown is negligent, the conduct of the Crown as a whole can be considered.
6. Proposed section 14B(5), which permits the aggregation of the conduct of any number of employees, agents or senior offices of a body corporate should apply to the conduct of employees, agents, or senior officers of the Crown, even if they are working in different agencies or offices.

#### Corporations Sole Representing the Crown

7. Where an employee of the Crown is a corporation sole, the Crown, rather than the corporation sole, should be the defendant in prosecutions under the legislation.
8. In determining whether the conduct of the Crown as a whole is negligent, the conduct of a corporation sole which represents the Crown should be capable of being aggregated with the conduct of any number of employees, agents or senior officers of the Crown.
9. In determining whether the conduct of the Crown as a whole is negligent, the provisions of the Bill allowing the conduct of an agent providing services to be aggregated with the conduct of employees or senior officers, should apply to agents providing services to a corporation sole representing the Crown. The conduct of such agents should be capable of being aggregated with the conduct of any number of employees, agents or senior officers of the Crown. The fact that a person works in or provides services to a unit headed by a corporation sole should not prevent the aggregation of his or her conduct with the conduct of employees, agents or senior officers working outside that unit.

#### Public Authorities

10. For the avoidance of doubt, it should be made clear that a person acting in the capacity of a corporation sole representing the Crown is to be treated as an employee of the Crown, so that the Crown may be criminally liable if that person is killed or seriously injured as the result of negligence.
11. The Crown, rather than a body corporate representing the Crown, should be the defendant in criminal proceedings involving the conduct of a body corporate. When the conduct of a body corporate representing the Crown is relied upon in a prosecution against the Crown, the body corporate should not be separately prosecuted.
12. Employees, agents or senior officers of a body corporate representing the Crown should be treated as employees, agents, or senior officers of the Crown for the purposes of proposed section 14B(5) of the Bill.
13. The aggregation principle should permit the aggregation of the conduct of employees, agents or senior officers of a body corporate representing the Crown with the conduct of employees, agents or senior officers of the Crown working outside the incorporated body.
14. The Bill should list specified bodies corporate to which Recommendation 11 does not apply. In such cases, the body corporate rather than the Crown would be the defendant in criminal proceedings.
15. Where a body corporate is specified as the appropriate defendant, the conduct of employees, agents or senior officers of the Crown would not be capable of aggregation with the conduct of employees, agents or senior officers of the body corporate.

16. The definition of an ‘employee of the Crown’ should include a member of an unincorporated body being a board, council, committee, subcommittee or other body which is:
  - established by or under an Act for the purposes of advising a Minister or under the control of a Minister; or
  - performing functions connected with an agency or under the control of an agency or a person performing the function of an agency head.
17. Unincorporated private sector bodies which receive public funds or perform services under contract with government should not, solely by reason of this, be deemed to be part of the Crown.
18. The definition of ‘employee of the Crown’ should include employees, agents or senior officers of unincorporated bodies falling within Recommendation 17 above.
19. The aggregation principle should permit aggregation of the conduct of a member, employee, agent or senior officer of such a body, with the conduct of other employees, agents or senior officers of the Crown (a somewhat analogous provision is contained in the *Freedom of Information Act 1982* s 5(2)).
20. Recommendation 17 should not apply to the conduct of members of unincorporated bodies exercising quasi-judicial functions.

### **Particular Employment Relationships**

21. Delegates, who are carrying out functions delegated to them by a Minister, agency head or any public sector employee who has the statutory power of delegation should be deemed to be employees of the Crown.
22. The behaviour of any delegate who is carrying out functions delegated to him or her by a Minister, agency head or any public sector employee should be capable of being aggregated with the behaviour of other Crown employees.
23. Volunteers who are under the direction of an entity that is part of, or represents, the Crown should be deemed to be employees of the Crown for the purposes of the Bill.
24. Employees who are on secondment to an entity should be deemed to be employees of that entity.
25. Parliamentary officers should be deemed to be employees for the purposes of the Bill.
26. For the avoidance of doubt, the Parliament of Victoria is to be regarded as part of the Crown for the purposes of the Bill.
27. For the avoidance of doubt, the Supreme Court, County Court, Magistrates’ Court and Children’s Court should be regarded as part of the Crown for the purposes of the Bill.
28. For the avoidance of doubt, judicial members of the Supreme Court, County Court, Magistrates’ Court and Children’s Court should be deemed to be ‘workers’ for the purposes of the Bill.
29. For the avoidance of doubt, judicial employees under Part 9 of the *Public Sector Management and Employment Act 1998* should be deemed to be employees of the Crown for the purposes of the Bill.
30. The principle of aggregation should not apply to the conduct of judges or members in the exercise of their judicial functions.

### **Penalties**

31. Administrative arrangements should be made to ensure that fines for corporate offences under the Bill are borne by the appropriate agency. These should be formal arrangements.
32. Proposed section 14D should be varied to require the public sector entity which is responsible to publicise the event and its consequences.

## **Chapter 4**

### **Application of Senior Officer Offences to Senior Employees**

#### **Senior Officer Offences**

33. The Bill should be amended to include a definition of ‘senior officer’ applicable to bodies which are part of the Crown, to bodies that represent the Crown and to other public sector entities.
34. A senior officer of the Crown should be defined to include an agency head under section 4 of the *Public Sector Management and Employment Act 1998*, the head of an office under section 16 of the Act or the head of a department under the *Parliamentary Officers Act 1975*. The agency head may be a senior officer, even if the agency head is, in that capacity, a corporation sole.
35. A senior officer of the Crown should be defined to include:
  - a person employed as an executive under Part 3 of the *Public Sector Management and Employment Act 1998*, who makes, or participates in making, decisions that affect the whole, or a substantial part of the functions or activities of an agency under section 4 of the Act or office under section 16;
  - a person employed as an executive under Part 3 of the Act with responsibility for the management of a distinct activity or program within an agency or office; and
  - a person employed as an executive under Part 3 of the Act as a senior officer even if the person is, in that capacity, a corporation sole.
36. A senior officer of an incorporated statutory authority should be defined to include:
  - a statutory office holder who has responsibility for managing the functions or activities of a body corporate under an Act, or who makes or participates in making decisions that affect the whole or a substantial part of the functions or activities of the body corporate;

- an employee of the body corporate, who has responsibility for managing the functions or activities of a body corporate under an Act or who makes, or participates in making, decisions that affect the whole, or a substantial part of the functions or activities of the body corporate;
  - a person employed as an executive under Part 3 of the *Public Sector Management and Employment Act 1998*, who has responsibility for managing the functions or activities of a body corporate under an Act or who makes or participates in making decisions that affect the whole or a substantial part of the functions or activities of the body corporate.
37. A senior officer of an unincorporated statutory body should be defined to include a statutory appointee or an employee who makes or participates in making decisions that affect the whole or a substantial part of the activities or functions of the unincorporated statutory body.
38. For the avoidance of doubt, the Bill should make clear that ‘senior officers’ cannot avoid, or limit, their responsibility under the Bill by delegating their powers and functions to other employees or persons.

## Appendix C

Criminal Code Act 1995 (Cth), Division 12 (Part 2.5 of the Model Criminal Code):

### 12.1

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

### 12.2

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

### 12.3

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
  - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
  - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
  - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:  
*board of directors* means the body (by whatever name called) exercising the executive authority of the body corporate.  
*corporate culture* means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.  
*high managerial agent* means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

### 12.4

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
  - (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

### 12.5

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and
  - (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.
- 12.6
- A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

## Appendix D

### Criminal Code (Canada)

"organization" means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
  - (i) is created for a common purpose,
  - (ii) has an operational structure, and
  - (iii) holds itself out to the public as an association of persons;

"representative", in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

"senior officer" means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

#### Section 22.1

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
  - (i) one of its representatives is a party to the offence, or
  - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs -- or the senior officers, collectively, depart -- markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

#### Section 22.2

In respect of an offence that requires the prosecution to prove fault -- other than negligence -- an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.