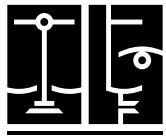
Criminal Liability for Workplace Death and Serious Injury in the Public Sector

Report

Victorian Law Reform Commission



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1 March 2002

The Honourable Rob Hulls MP
Attorney-General
55 St Andrews Place
MELBOURNE Vic 3002

Dear Attorney-General

On 24 December 2001 the Commission received a reference from you under the *Victorian Law Reform Commission Act 2000* to report on the criminal liability of the public sector for the death or serious injury of its workers. The Commission was required to report by 1 March 2002.

On behalf of the members of the Commission I am pleased to present the Report relating to this reference: *Criminal Liability for Workplace Death and Serious Injury in the Public Sector*.

Yours sincerely

Marcia Neave

Professor Marcia Neave
Chairperson

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Preface

The Victorian Law Reform Commission received this reference from the Attorney-General, the Honourable Rob Hulls MP, on 24 December 2001. The reference required the Commission to report by 1 March 2002. The Report makes recommendations as to the means by which the provisions of the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 could be applied to the public sector.

The Commission was able to complete the Report within the timeframe largely because of the outstanding research support provided by Chris Dent. Chris Dent undertook the onerous task of 'mapping' the public sector and prepared drafts of large sections of the Report. The Commission also acknowledges the work of Trish Luker, who was responsible for editing the Report under very tight time constraints.

The Commission expresses its appreciation to a number of people who assisted us in understanding the dimensions of the 'public sector' and in refining our recommendations. These include Eamonn Moran, Chief Parliamentary Counsel and Diana Fagan from the Office of the Chief Parliamentary Counsel; James Syme, Victorian Government Solicitor and James Ruddle, Deputy Victorian Government Solicitor; Peter Salway, the Commissioner for Public Employment; Alex Mills and Marco Bini of the Government Branch, Governance, Legal and Administrative Division of the Department of Premier and Cabinet; and Dr David Neal, Barrister.

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Terms of Reference

Under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*, the Attorney-General requests the Victorian Law Reform Commission to examine, report and make recommendations to the Attorney-General on the following matters relating to the criminal liability of the public sector.

1. How to impose criminal liability on public sector entities, excluding bodies corporate that represent the Crown if the body corporate is established by or under an Act or is deemed or declared to be a body corporate by or under an Act, for proposed statutory offences of corporate manslaughter and negligently causing serious injury by a body corporate, with particular reference to the following questions:

   (a) The imposition of criminal liability on the following entities:

   (i) 'Agencies' as defined in section 4 of the *Public Sector Management and Employment Act 1998*;

   (ii) 'Offices' as referred to in section 16(1) of the *Public Sector Management and Employment Act 1998*;

   (iii) 'Public authorities' as defined in section 5 of the *Public Sector Management and Employment Act 1998*.

   (b) The issues which arise where it is sought to impose criminal liability on such entities, including:

   (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.

2. Any issues which have not been considered under 1, which in the view of the Commission require consideration as the result of imposition of criminal liability on public sector bodies.

The Commission is required to report on item 1 no later than 1 March 2002.

Abbreviations

AC	Appeal Cases (United Kingdom)
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
All ER	All England Reports (England)
CEO	Chief Executive Officer
CFA	Country Fire Authority
CJ	Chief Justice
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports (Canada)
DNRE	Department of Natural Resources and Environment
ed	edition
eg	for example
FCA	Federal Court of Australia
FCR	Federal Court Reports
FLR	Federal Law Reports
HCA	High Court of Australia
ibid	in the same place (as the previous footnote)
ie	that is
J	Justice (JJ pl)
LC	Lord Chancellor
n	footnote
NZLR	New Zealand Law Reports
NSWLR	New South Wales Law Reports
P	President (AP Acting President)
para	paragraph
PSMEA	*Public Sector Management and Employment Act 1998*
QB	Queen's Bench Law Reports (England)
QBD	Queen's Bench Division Reports (England)
s	section (ss pl)
SASR	South Australian State Reports
SES	State Emergency Service
SOEA	*State Owned Enterprises Act 1992*
VFMC	Victorian Funds Management Corporation
VLRC	Victorian Law Reform Commission
VR	Victorian Reports
WLR	Weekly Law Reports (England)

Scope of this Report

This Report discusses how to impose criminal liability on government, when the negligence of a governmental or semi-governmental body results in the death or serious injury of a public sector employee or a person providing services to government.

The Crimes (Workplace Deaths and Serious Injuries) Bill 2001 has been introduced into the Victorian Parliament to create new statutory offences of 'corporate manslaughter' and 'negligently causing serious injury by a body corporate'. The Victorian Government has announced its intention that these offences should apply both to private sector corporations and to the public sector. The Attorney-General, the Honourable Rob Hulls MP, has asked the Victorian Law Reform Commission to provide advice on the complex legal questions which will need to be resolved in determining how to apply the legislation to the public sector. This Report makes recommendations to achieve that objective.

The Report is divided into five chapters. Chapter 1 explains the provisions of the Bill and deals with some preliminary questions about the nature of 'the Crown' and the imposition of criminal liability on the Crown. Chapter 2 examines the structure of the Victorian public sector and identifies differences between various parts of the public sector which may be relevant to the imposition of criminal liability. Chapter 3 makes recommendations for imposing criminal liability on the Crown and on bodies in the broader public sector. Chapter 4 makes recommendations for imposing criminal liability on 'senior officers' whose negligent conduct contributed to the death or serious injury of employees. Chapter 5 discusses some broader issues relating to the structure of the public sector and Crown liability which have not been considered in detail in this Report. This Chapter identifies directions for other possible law reform affecting the liability of the Crown, which could be the subject of a future reference to the Victorian Law Reform Commission.

Chapter 1
Introduction

Background to the Reference

1.1 The Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (the Bill) was introduced into Victorian Parliament on 21 November 2001. In his Second Reading Speech the Attorney-General, the Honourable Rob Hulls MP, stated that the Bill is part of the Victorian Government's strategy to improve workplace safety.[1]

1.2 The Bill is intended to overcome anomalies which have arisen in prosecuting corporations for workplace injury and death. Corporations can be prosecuted for manslaughter under the common law. However, there are difficulties in obtaining such convictions in cases where the conduct of the corporation as a whole has resulted in the death or serious injury of an employee of the corporation or of a person providing services to the corporation.

1.3 As the law currently stands in Australia,[2] it is probably the case that a corporation can only be convicted of manslaughter if the death was caused by the gross negligence of a person or people who are regarded as the 'directing mind and will' of the corporation, for example the board of directors, managing director or a person to whom the board has fully delegated its functions.[3] This has enabled corporations to avoid prosecutions or convictions where the death was caused by negligence at middle management level[4] or is the result of a negligent 'corporate culture'.[5] There is

1 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2001, 1921.

2 In England, a more expansive view has been taken: see *Director General of Fair Trading v Pioneer Concrete* [1995] 1 AC 456; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001), 158; and H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (9th ed, 1999), Chapter 16.

3 See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 133; *R v AC Hatrick Chemicals Pty Ltd* (Unreported, Supreme Court of Victoria, Hampel J, 29 November 1995); and David Neal, 'Corporate Manslaughter' (1996) 70(10) *Law Institute Journal* 39.

4 As in *R v AC Hatrick Chemicals Pty Ltd*, above n 3 (Hampel J).

5 The concept of a negligent corporate culture is discussed in the work of Brent Fisse and John Braithwaite: see, eg, *Corporations, Crime and Accountability* (1993). It is also invoked in the *Criminal Code Act 1995* (Cth), s 12.3(2)(a).

only one case in Australia in which a corporation has been successfully prosecuted.[6]

1.4 The Bill is intended to make corporations criminally liable for serious injury and death in the workplace. The key provisions are as follows.[7]

- New statutory offences of corporate manslaughter and negligently causing serious injury are created. A 'body corporate' (a corporation)[8] may be criminally liable if an employee or a worker is killed or seriously injured as a result of the corporation's negligence. The expression 'worker' is broadly defined in the Bill so that it includes, for example, outworkers, apprentices and people providing services to the corporate employer. It is important to note that the Bill does not impose corporate criminal liability for the death or serious injury of people who are not employees or workers.
- The body corporate's conduct 'as a whole' must be considered to determine whether it is guilty of the statutory offences. The conduct of the body corporate is regarded as negligent if it involves 'such great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances and such a high risk of death or serious injury that it merits criminal punishment for the offence'. The conduct of any number of employees, senior officers of the body corporate and (in some situations) the conduct of agents of the body corporate, can be aggregated and attributed to the corporation as a whole. (This is described as the 'aggregation principle' in this Report.)
- A new indictable offence will apply to a 'senior officer' (a defined expression) of a body corporate if he or she was organisationally responsible for the conduct or part of the conduct of the body corporate, substantially contributed to the offences committed by the body corporate, and knew that as a result of his or her conduct there was a substantial risk that the corporation would engage in conduct that involved a high risk of death or serious injury. The sentence

6 *R v Denbo Pty Ltd and Timothy Ian Nadenbousch* (Unreported, Supreme Court of Victoria, Teague J, 14 June 1994). In this case, the corporation pleaded guilty to manslaughter arising as the result of a workplace death; however, the company was wound up and the fine of $120,000 was never paid.

7 Relevant clauses of the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 are set out in Appendix 1.

8 In the *Corporations Act 2001*(Cth) there are distinctions made between bodies corporate and corporations. One such distinction is that the definition of a 'corporation' does not include 'an exempt public authority' or a 'corporation sole' (s 57A). As entities from both these categories are important to this Report, the term 'body corporate' will be used throughout.

imposed on senior officers may include a term of imprisonment. Senior officers can be prosecuted even if the corporation is wound up. The purpose of the senior officer offences is to give people in senior managerial positions an incentive to take their workplace safety obligations seriously, by targeting those who behave 'reprehensibly and who could have acted differently'.[9]

- The Court can order bodies corporate convicted of offences to take specified actions, including publicising the offence and any penalties imposed.
- Substantial fines are imposed on bodies corporate convicted of the statutory offences.

The Rationale for the Reference

1.5 In his Second Reading Speech, the Attorney-General explained that the Government intended that the legislation should apply to both the public and the private sectors.[10] This intention is reflected in proposed section 12 of the Bill[11] which states that the provisions 'bind any body corporate that represents the Crown if the body corporate is established by or under an Act or is deemed or declared to be a body corporate by or under an Act'. The rationale for this approach is that bodies which undertake governmental functions have the same responsibility as private sector corporations to provide safe working conditions for their employees. The imposition of criminal liability helps to deter unsafe work practices. It would be unfair if a government body which negligently caused death or serious injury could escape prosecution, when a similarly situated private sector corporation could be prosecuted and convicted of an offence under the legislation.

1.6 Because of doubts about how the proposed legislation will apply to governmental and semi-governmental bodies, the Attorney-General has given the Victorian Law Reform Commission this reference. The policy decision to apply the Bill to the whole of the public sector has already been made by the Government. The Commission's role is confined to reporting to the Attorney-General on how to impose corporate criminal liability on 'public

9 Victoria, *Parliamentary Debates*, above n 1, 1927.

10 Ibid.

11 The Bill is intended to insert a new subdivision into Division 1 of Part I of the *Crimes Act 1958*. The references to 'proposed sections' in this Report are references to the proposed sections of the Crimes Act.

sector entities'.[12] For reasons which we discuss below,[13] the Report focuses on the Crown[14] 'in right of the State'[15] and does not examine in detail the imposition of criminal liability on the Crown in right of the Commonwealth. Some preliminary issues raised by the reference are discussed below.

Preliminary Questions

What is the Crown?

1.7 For the purposes of this reference, it is necessary to consider how to impose criminal liability on the Crown in right of the State of Victoria.[16] As a matter of constitutional history, the Crown was the source of the power of the three arms of government—the legislature, the judiciary and the executive.[17] Today, of course, legislative power is exercised by parliament,[18] judicial power is vested in the courts and executive power is exercised by elected governments.[19] In this Report the expression 'the Crown' usually refers to the Crown as the head of the executive arm of government.[20] The executive is made up of the Governor (as representative of the sovereign) and government ministers. Public servants employed in government departments

12 The extent of the 'public sector' is discussed below paras 2.2–7. Note that the terms of reference refer to 'public sector entities' and specifically to 'public authorities as defined in section 5 of the *Public Sector Management and Employment Act 1998*'.

13 Paras 1.16–18.

14 The extent of 'the Crown' is discussed below in paras 2.8–18.

15 As 'the Crown' is referred to in many different contexts. In Australia there are six State and one Federal Government. Each of these has a 'Crown' as the head (this issue is discussed below, see n 22). The 'Crown in the right of the State of Victoria' is the formal way of referring to the entity that has legal status and legal capacity within the jurisdiction of the State of Victoria.

16 It has been stated that 'legalistically, it would be more strictly accurate to speak of the State…in the right of the Crown than of the Crown in the right of the State': *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 356 (Rich J).

17 Peter Brett, *Cases and Materials in Constitutional and Administrative Law* (1962), 89.

18 It is the sovereign in parliament that is the heart of the doctrine of parliamentary sovereignty: see Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999), 1.

19 The Law Reform Commission of Canada considers that the 'parliamentary and judicial functions have been clearly emancipated from Crown control (*Magna Carta, 1215; Case of Proclamations, 1611; Bill of Rights, 1689; Act of Settlement, 1701*)': *Legal Status of the Federal Administration*, Working Paper 40 (1985), 8.

20 Christopher Enright, *Judicial Review of Administrative Action* (1985), 14. Or, the 'Crown normally means the Sovereign considered as the central government of the Commonwealth or a State': *Wynyard Investments Pty Ltd v Commissioner for Railways* (1955) 93 CLR 376, 393 (Kitto J).

and agencies and other Crown employees provide administrative support to the executive. Other bodies which perform administrative functions on behalf of a State government, for example, incorporated bodies performing governmental functions, may also be seen as representing the Crown for some purposes.[21] The main focus of this Report is on the imposition of criminal liability on the Crown as head of the executive branch of government in the State of Victoria.[22]

1.8 In the next Chapter we discuss the difficulties which arise in determining whether a governmental body is part of the Crown or 'represents the Crown'. In terms of the doctrine of the separation of powers it is unclear whether parliament is part of the Crown. In Chapter 3 we examine the imposition of criminal liability for the death or serious injury of people employed as parliamentary officers under the *Parliamentary Officers Act 1975* and of persons who provide services to parliament. Issues relating to the criminal liability of the Commonwealth are also briefly discussed below.

Can the Crown be Criminally Liable?

1.9 A central issue which arises in applying the Bill to governmental activities is whether 'the Crown' can be criminally liable. Historically, under the common law, the Crown could do no wrong.[23] It followed that a body which was part of the Crown or represented the Crown was not legally liable for wrongful acts.[24] In Australia, Crown proceedings legislation now allows

21 It is arguable whether the State governments of Australia actually 'represent' the Crown. One commentator says that 'in Australia, it has simply been assumed that State governments represent the Crown': Greg Taylor, '*Commonwealth v Western Australia* and the Operation on Federal Systems of the Presumption that Statutes do not Apply to the Crown' (2000) 24 *Melbourne University Law Review* 77, 79, note 7.

22 It is generally accepted that there are State and Commonwealth 'Crowns': *R v Sutton* (1908) 5 CLR 789. However, there has been some judicial comment regarding the 'single, universal Crown…for…each and every part of the Empire': *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 356 (Rich J). This issue has been discussed more recently in an academic context: Michael Stokes 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127.

23 Or more fully, the 'King, who, by virtue of his royal prerogative, is not under the coercive power of the law, which will not suppose him capable of committing a folly, much less a crime': *Blackstone's Commentaries* (1st ed, 1769) vol 4, 3.

24 The Crown is not usually considered liable for criminal offences; however, the terminology can be misleading. It is not out of the question to talk about occupational health and safety prosecutions as prosecutions which give rise to possible punitive remedies. Such offences have been usefully labelled as 'public welfare' offences (Wolfgang Friedmann, 'Public Welfare Offences, Statutory Duties and the Legal Status of the Crown' (1950) 13 *Modern Law Review* 24, 28) or 'regulatory' offences (Simon Bronitt and Bernadette McSherry, above n 2, 192) to distinguish them from criminal offences. It has been held that the Crown in right of the State of Victoria could be 'criminally' liable under the *Occupational Health and Safety Act 1985: Roads Corporation v Gerkens* (Unreported, Supreme Court of Victoria, Eames J, 28 May 1993).

people to obtain civil remedies (for example damages) against a State government or the Commonwealth Government.[25] However there is no equivalent legislation which makes the Crown in right of a State or the Commonwealth generally liable for criminal acts.

1.10 The other reason why the Crown is rarely bound by criminal laws is that legislation is assumed not to bind the Crown, unless the relevant Act makes this clear.[26] This was made explicit by the High Court in *Cain v Doyle*,[27] where the majority accepted, at least in theory, that criminal liability could be attached to the Crown.[28] Chief Justice Latham dissented on this point. He suggested that, as criminal prosecutions are brought by the State (the Crown in right of the State or the Commonwealth) against the wrongdoer, it would be 'impossible for the Crown in right of the Commonwealth to prosecute the Commonwealth'. His Honour added:

> the fundamental idea of the criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence.[29]

1.11 The majority of the court, however, regarded the criminal conviction of the Crown as a possibility. Despite the potential of such liability, it is still a strong presumption that the Crown is not bound by criminal statutes. This principle was stated by the majority of a later High Court in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[30] in the following terms: 'the Crown cannot be made criminally liable save in the most exceptional circumstances'.[31]

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25 The *Crown Proceedings Act 1958* provides that the Crown shall be liable in respect of any contract made on its behalf and liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown: s 23(1)(a) and (b). In other States and Territories, all the Crown proceedings legislation limit the Act to civil proceedings, except the *Crown Suits Act 1947* (WA) which does not explicitly define the Act as applying to civil proceedings only, but does refer to civil suits in certain sections.

26 'The principle that the Crown cannot be criminally liable for a supposed wrong…provides a rule of interpretation which must prevail over anything but the clearest expression of intention.': *Cain v Doyle* (1946) 72 CLR 409, 425 (Dixon J). Glanville Williams in *Criminal Law: The General Part* (2nd ed, 1961) suggested that the Crown could not be liable for a criminal wrong due to the 'lack of jurisdiction in the courts': 790. This point, however, has not been considered by the High Court of Australia.

27 (1946) 72 CLR 409.

28 It must be noted, however, that the comments relating to the potential criminal liability of the Crown were probably *obiter dicta* and therefore cannot necessarily be taken as statements of law.

29 (1946) 72 CLR 409, 418.

30 (1996) 189 CLR 253.

31 Ibid 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

1.12 In this Report it is assumed that the offences in the Bill can be applied to the Crown, in right of the State Government, so long as the legislation states this unequivocally. As explained above, the legislation already purports to bind 'bodies corporate that represent the Crown' established by or under Acts or deemed to be a body corporate by or under an Act. It is the existence of the body corporate which provides the means of attributing liability to the body corporate for the unconnected acts of people who work as employees, senior officers or agents.

1.13 However, for the Crown (as opposed to a corporation representing the Crown) to be criminally liable for the offences of corporate manslaughter and negligently causing serious injury, the Crown itself must be a body corporate. The High Court has used the phrase 'Crown as Corporation' to refer to a nominal defendant of the Crown.[32] Other authoritative legal opinions also support the view that the Crown is a body corporate.[33] The Government's decision to apply the legislation to public sector entities requires any doubt about this issue to be resolved. Uncertainty can be resolved by a legislative provision that for the avoidance of doubt the Crown is a body corporate for the purposes of the provisions imposing corporate liability for death or serious injury.

32 *Downs v Williams* (1971) 126 CLR 61, 79 (Windeyer J). The appellant in this decision was a person who was the nominal defendant for the Crown for the purposes of the *Claims against the Government and Crown Suits Act 1912 (NSW)*. That is, in a situation similar to one that would occur under the Victorian Bill, with the Crown being the subject of a suit, the party to the action was called the 'Crown as Corporation'. The High Court has also referred to, with approval, the works of Frederic Maitland, 'The Crown as Corporation' (1901) *Law Quarterly Review* 131 in *Sue v Hill* (1999) 199 CLR 462, 498 (Gleeson CJ, Gummow and Hayne JJ). The High Court also referred to, with approval, the work of W Harrison Moore, 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351 in *Commonwealth v Mewett* (1996) 191 CLR 471, 545 (Gummow and Kirby JJ). Further, the High Court has also directly quoted the following definition of 'the Crown' of Maitland: 'the head of a highly organised corporation aggregate of many': *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 382 (Williams, Webb and Taylor JJ). Other courts have also held the Crown to be a corporation: *WorkCover Authority of NSW v Crown in Right of the State of NSW (Police Service of NSW)* (2000) 50 NSWLR 333.

33 Peter Hogg and Patrick Monahan argue that it is 'accepted that the State is a legal person' and that the Crown is 'like a corporation': *Liability of the Crown* (3rd ed, 2000) 14. Justice Fullagar in the High Court has stated that the 'Crown…is, to all intents and purposes, a juristic person': *Commonwealth v Bogle* (1953) 89 CLR 229, 259. Stanley de Smith and Rodney Brazier have stated plainly that the Crown is a 'corporation sole': *Constitutional and Administrative Law* (8th, ed, 1998) 598.

! RECOMMENDATIONS

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.

1.14 These provisions will ensure that the corporate offences created by the legislation apply to 'all of the government'.[34] However, because of differences between the public and private sector, it is also necessary to consider how provisions in the legislation should apply to governmental bodies. Chapter 3 of this Report considers the following issues:

- Where an employee of a body corporate which represents the Crown is injured or killed as the result of the negligence of the body corporate, should the Crown or the body corporate be the defendant in criminal proceedings?
- How should penalties for offences be imposed on bodies corporate or unincorporated bodies which represent or are part of the Crown?
- How should provisions permitting aggregation of conduct of employees apply to unincorporated bodies or bodies corporate which are part of or represent the Crown?

1.15 As noted above, the Bill also creates senior officer offences, making it necessary to identify who should be treated as senior officers in the context of government. Because of structural differences between private sector corporations and the executive branch of government, it may be inappropriate to apply the private sector definition of a senior officer to identify persons who should be liable to prosecution if a public sector employee is injured or killed as the result of the negligence of a governmental body. This Report makes recommendations to deal with these issues in Chapter 4.

34 Victoria, *Parliamentary Debates*, above n 1, 1927.

The Crown in Right of the Commonwealth

1.16 A number of Commonwealth Government entities employ workers in Victoria. While it may be desirable for the legislation to impose corporate criminal liability on Commonwealth departments and authorities operating in Victoria, it is doubtful whether this is constitutionally permissible.

1.17 The Australian Law Reform Commission examined the application of State and Territory statutes to the Commonwealth in its recent report *The Judicial Power of the Commonwealth*.[35] The Report highlights the High Court decision of *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority*.[36] In that case it was held that a State statute could bind the Commonwealth as long as the statute only sought to regulate the exercise of the executive powers of the Commonwealth and not to modify those powers. According to the judgments in that case, the States have the power to regulate the exercise of the executive powers, but any attempt to modify the executive powers would be held to be invalid.[37] This limitation on State legislation binding the Commonwealth is still unclear given the vagaries associated with the distinction between the regulation of the exercise of Commonwealth executive powers and the modification of executive powers.[38]

1.18 The Bill could provide that corporate criminal liability applies to the Crown in right of the Commonwealth and bodies corporate representing the Commonwealth to the extent that it is constitutionally possible. However, because the terms of reference are primarily concerned with the Victorian public sector, this Report does not examine in detail the extent to which such a provision would actually ensure that the Commonwealth could be successfully prosecuted for offences under the Act.

What is the Public Sector?

1.19 The terms of reference require the Commission to advise on the criminal liability of 'public sector entities'. The expression 'public sector' does not have a precise legal meaning. Chapter 2 of this Report explains the structure of the public sector in Victoria, establishing the background for recommendations about how to apply corporate criminal liability and senior officer offences to the public sector in Chapters 3 and 4.

35 Report No 92 (2001) Chapter 28.

36 (1997) 190 CLR 410.

37 Ibid 439 (Dawson, Toohey and Gaudron JJ).

38 Some of the issues arising from this uncertainty are highlighted below in paras 5.16–17.

Chapter 2
Composition of the Public Sector

2.1 The Victorian Government has decided that corporate criminal liability and the senior officer offences should apply to the public sector. This Chapter describes the structure of the public sector of Victoria, setting the scene for the recommendations made in Chapters 3 and 4 as to how the proposed offences should apply.

Defining the Public Sector

2.2 In Victoria a number of Acts regulate the public sector and/or impose legal responsibilities on public sector bodies.[39] Most of these Acts specify the particular types of public sector bodies to which they apply. There is no universally applicable definition of the 'public sector' and nor is there any definitive list of 'public sector entities'.

2.3 In the absence of any general definition, the Commission has found the definition of the 'public sector' in the *Public Sector Management and Employment Act 1998* (PSMEA) a useful starting point. The PSMEA is particularly relevant to this reference because both that Act and the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (the Bill) are concerned with employer–employee relations in the public sector. In addition, the terms of reference require the Commission to report on the imposition of criminal liability on 'Agencies', 'Offices' and 'public authorities' as defined by the PSMEA.

2.4 Section 4 of the PSMEA defines the 'public sector' as the public service and all public authorities. The 'public service' comprises the persons employed under Part 3 of the Act.[40] Public service employees are employed by an agency head or by a person with the functions of an agency head.[41]

39 Examples include the *Financial Management Act 1994, Freedom of Information Act 1982, Whistleblowers Protection Act 2001, Victorian Funds Management Corporation Act 1994, Public Sector Management and Employment Act 1998* and *Victorian Managed Insurance Authority Act 1996*.

40 Section 9.

41 An agency head is the head of an agency.

Agencies are defined by section 4 as government departments,[42] and administrative offices.[43] Under section 16 of the PSMEA the heads of some bodies are specified as having the employment powers of an agency head.[44] Agency heads have 'on behalf of the Crown…all the rights, powers, authorities and duties of an employer in respect of the Agency'.[45] In other words, all members of the public service are employed by the agency head on behalf of the Crown.

2.5 Under the PSMEA the public sector also includes public authorities. These are defined to include bodies 'whether corporate or unincorporated established by or under an Act for a public purpose'. Many of these bodies carry out governmental functions and are part of or represent the Crown. However the breadth of the definition means that the public sector also includes some bodies which carry out non-governmental activities. For example, tertiary institutions come within the definition of public authorities. The annual report of the Commissioner for Public Employment contains a list of bodies subject to the Act. However the list relies largely on the historical inclusion of bodies and may not catch all bodies created by or under Acts for public purposes.

2.6 The definition of 'public authority' does not include local government councils, municipal associations or bodies declared not to be public authorities by the Governor-in-Council.[46] The provisions of the Bill already apply to local government councils and municipal associations because they are established as bodies corporate (*Local Government Act 1989* and *Municipal Association Act 1907* respectively). Public authorities which are bodies corporate are currently covered by the Bill even if they are excluded

42 These are the departments of Education, Employment and Training; Human Services; Infrastructure; Justice; Natural Resources and Environment; Premier and Cabinet; State and Regional Development; and Treasury and Finance. It has been announced that the department of State and Regional Development will be separated into the departments of Sport, Tourism and the Commonwealth Games; and Innovation, Industry and Regional Development (The Honourable Steve Bracks MP, Premier, Media Release, 12 February 2002).

43 These are the Office of Parliamentary Counsel, Victorian Government Solicitor, Environment Protection Authority, and official Secretary to the Governor, which are administrative offices within s 11 of the *Public Sector Management and Employment Act 1998* (hereafter PSMEA).

44 Currently these s 16 offices include the Auditor-General's Office, Office of Public Prosecutions, Victorian Electoral Commissioner, Office of the Chief Commissioner of Police, Office of the Ombudsman, Office of the Commissioner for Public Employment, Essential Services Commission, Office of the Legal Ombudsman and Office of the Privacy Commissioner.

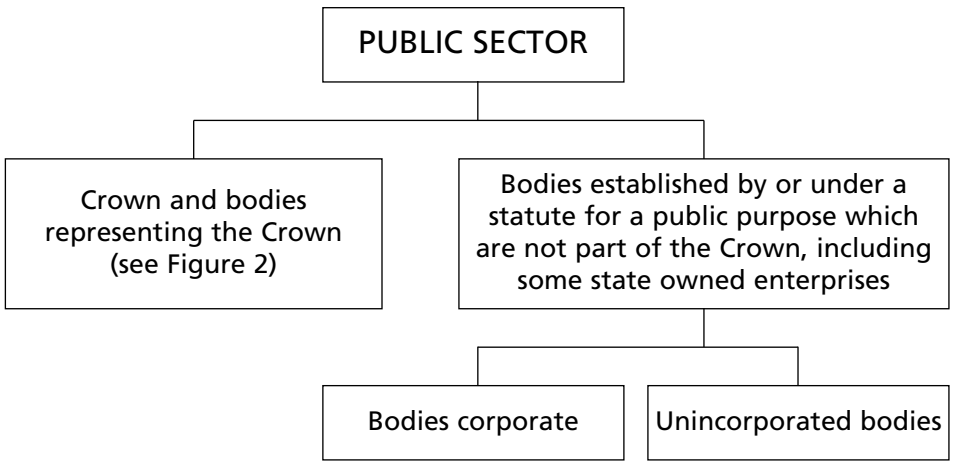
45 Section 20.

46 Some of the bodies that have been so declared under the PSMEA are the Victorian Institute of Forensic Medicine, Film Victoria, the Australian Centre for the Moving Image and the Plumbing Industry Commissioner.

from the operation of the PSMEA by a declaration of the Governor-in-Council.[47] Other issues relating to the definition of a 'public authority' are considered in more detail below.[48]

2.7 Diagram 1 shows that the expression 'public sector' covers a very broad range of 'entities'. It is not confined to bodies which are part of the Crown (for example, government departments) or those that represent the Crown (for example, bodies corporate which carry out governmental functions). Thus the terms of reference require the Commission to consider how the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 should apply to public sector entities ranging from bodies established to advise Ministers (which are likely to be part of the Crown), to complaint handling bodies such as the Legal Ombudsman and to professional regulatory bodies such as the Nurses Board of Victoria. The application of liability under the proposed Bill to the bodies will be discussed in the next Chapter.

FIGURE 1:
PUBLIC SECTOR ENTITIES INCLUDED WITHIN THE TERMS OF REFERENCE



47 A declared authority is an authority declared by the Governor-in-Council. An authority can be declared under s 5 in which case the authority is not subject to the Act at all. Alternatively, an authority can be declared under s 47(2) of the Act in which case the authority is subject to only certain, declared, sections of the PSMEA. For example Film Victoria is a declared authority that is only subject to Part 3, Division 5 and s 20(2)(d), 32 and 35 (*Government Gazette*, G51, 20 December 2001). The majority of declared authorities will be bound by the Bill because they are bodies corporate.

48 See below paras 2.19–21.

The Crown and the Public Sector

2.8 For the purposes of our recommendations it is necessary to differentiate between bodies which are part of or represent the Crown and non-Crown bodies which are part of the public sector. This distinction affects who should be the corporate defendant in criminal proceedings, how penalties should apply and who should be liable for the senior officer offences.

2.9 In the section which follows we briefly discuss some of the problems which arise in determining whether a body is part of or represents the Crown. For the sake of clarity, this Report will follow the convention that an unincorporated body will be discussed in terms of being part of the Crown or not part of the Crown and bodies corporate will be discussed as representing or not representing the Crown.

Determining Whether a Body is Part of or Represents 'the Crown'

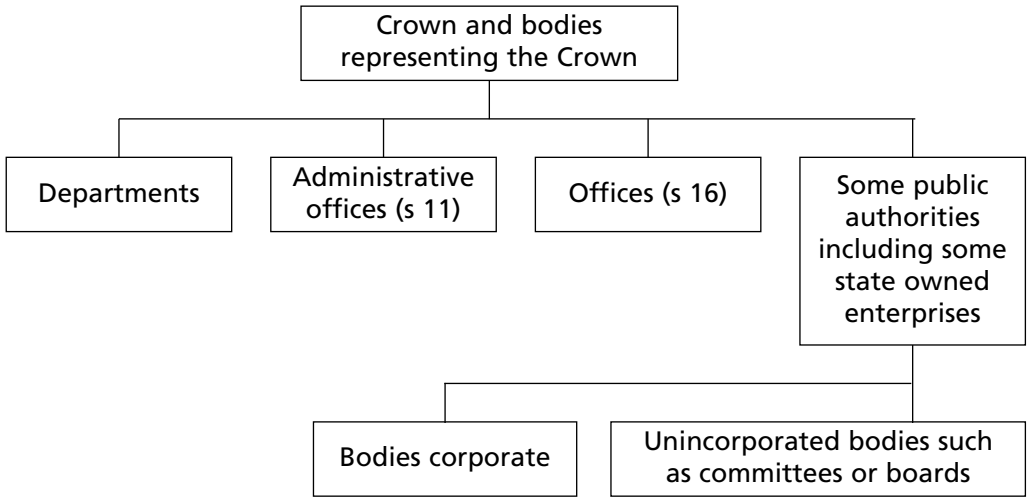
2.10 Proposed section 12 of the Bill expresses the Government's intention that the Bill should bind 'the Crown'. As the diagram below shows, the Crown includes entities such as government departments, administrative offices as defined under section 11 of the PSMEA, the offices listed under PSMEA section 16 and a number of public authorities. In certain situations the 'law sees the individuals and institutions as agents of the Crown and…executive functions as acts of the Crown'.[49] However, the law does not provide a precise description as to what constitutes the Crown[50] and there is no complete list of all the bodies that could be considered to be part of or representing the Crown in right of the State of Victoria. The Australian Law Reform Commission has recognised the 'uncertainties inherent in identifying the nature of the "Crown" ' and chose to minimise the use of the term in its discussion of 'crown immunities'.[51]

49 Peter Hanks, *Constitutional Law in Australia* (2nd ed 1996) 160. Whether this is the case depends on 'the relationship to the Crown in which the [entity] stands': see *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 394–5 (Kitto J).

50 Unless the 'Sovereign alone is the Crown': *Wynyard Investments Pty Ltd v Commissioner for Railways (1955)* 93 CLR 376, 392 (Kitto J). The widest definition of the Crown is from the Law Reform Commission of Canada which stated that the Crown is 'clearly the State, the Head of State, the Executive, the Government, the administration and the machinery of justice derived from the Crown': above n 19, 25.

51 *The Judicial Power of the Commonwealth*, above n 35, para 22.2. The Australian Law Reform Commission categorised these immunities into three groups. These groups are procedural immunities (such as immunity from being sued and immunities relating to discovery, interim relief, interrogatories and costs), immunities from substantive common law rules and the immunity from statutes (unless expressly bound): paras 22.6–8. Some of the issues that arise from these immunities are discussed in Chapter 5, paras 5.10–15.

FIGURE 2:
DIAGRAM OF THE CROWN



2.11 Courts have applied three different tests to establish whether a body should be treated as part of the Crown, whether it represents the Crown[52] or whether it is an agency or instrumentality of the Crown.[53] These tests have usually been applied in the context of assessing whether or not a body corporate performing functions is to be granted one of the various Crown immunities. The three tests discussed below may help to indicate a body's relationship with the Crown, but are not determinative.[54]

52 The 'only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown': *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, 388 (Williams, Webb and Taylor JJ). 'It must carefully be noted, however, that even assuming that a body satisfies all the principles and is enabled to enjoy immunity, that does not identify it with the Executive Government which has control over it': Herbert Vere Evatt, *The Royal Prerogative* (1987) 245.

53 It has been held that the 'description "instrumentality" is wider than "servant or agent"' of the Crown: *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 663 (Dixon CJ, Fullagar, Menzies and Windeyer JJ) citing *The Electricity Trust of South Australia v Linterns Ltd* [1950] SASR 133. It has been judicially stated that the label 'agent' or 'servant' of the Crown is preferable to the term 'emanation of the Crown' when it is applied to bodies corporate as the word 'emanation' 'is hardly applicable to a person or body having a corporate capacity': *International Railways Co v Niagara Parks Commission* [1941] 2 All ER 456, 462 (Luxmore LJ). This was based on the earlier claim that the great officers of state are delegates of the Crown and therefore emanations of the Crown: *Gilbert v Trinity House Corp* (1886) 17 QBD 759.

54 The lack of continuity (at least for the purpose of analysis) around the use of language by the courts is demonstrated in this quote from a recent High Court decision that was on appeal from the Supreme Court of New South Wales. 'The respondent's status as a public body is also relevant, as one that would have been once described as an emanation of the Crown': *Tepko Pty Ltd v Water Board* [2001] HCA 19, para 162 (Kirby and Callinan JJ with whom McHugh J agreed).

Tests Used to Describe an Entity's Relationship with the Crown

The Terms of the Act

2.12 The first test is to examine any Act that creates the body or limits the powers of a particular individual. That Act may state explicitly whether or not that body or person represents the Crown.[55] If there is no such Act, or the legislation is silent on this point, the court will use either the 'control' test, or the 'function' test.

Control Test

2.13 The control test looks at the 'nature and degree of control'[56] that a Minister exercises over the body in question. For the purpose of this test, it is the 'degree of control that the Minister is legally entitled to exercise that is relevant, not the degree of control that is in fact exercised'.[57] This test was discussed in an Australian context in *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*:

> If a [body] is no more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its acts be viewed as those of its master and…enjoying accordingly those immunities and privilege with which the Crown is clothed. If, on the contrary, a [body] is essentially autonomous…there will be little reason to clothe it with any of those immunities or privileges.[58]

Functions Test

2.14 The control test has 'supplanted the functions test as the touchstone of Crown agent status',[59] though it is not conclusive in determining a body's relationship with the Crown. The courts, however, still refer to the functions

55 For example, the *Libraries Act 1988* states that 'in performing its functions and exercising its powers under this Act the [Library Board of Victoria] represents the Crown in the right of the State (s 20), while the *Legal Practice Act 1996* states that the Legal Practice Board 'is a public authority but does not represent the Crown' (s 348).

56 Peter Hogg and Patrick Monahan, above n 33, 335. For example, the *Country Fire Authority Act 1958* states that the Country Fire Authority is 'subject to the general direction and control of the Minister in the performance of its functions and the exercise of its powers' (s 6A(1)).

57 Peter Hogg and Patrick Monahan, above n 33, 336, citing *Bank voor Handel en Scheepvart NV. v Administrator of Hungarian Property* [1954] AC 584, 617.

58 (1979) 145 CLR 330, 348 (Stephen J).

59 Peter Hogg and Patrick Monahan, above n 33, 333.

test in their judgments. The functions test was stated succinctly by the Supreme Court of South Australia:

> We therefore regard an instrumentality of the Crown and an agency of the Crown as entities whose function it is to carry on…an activity which is properly regarded as an activity of the State.[60]

2.15 The functions test can be seen as being related to the description that Hanks uses for the Crown.[61] His description, that the law sees the individuals and institutions as agents of the Crown and many executive functions as acts of the Crown, provides a useful approach to the problem of the extent or reach of the Crown. That is, the issue becomes whether or not an individual or an institution acts as an agent of the Crown or performs an executive function of the Crown. Therefore, the limits of the Crown can be found by assessing the actions of particular institutions or individuals.

2.16 The High Court appeared to use the functions test in *Grain Elevators Board (Vic) v Dunmunkle Corporation*: 'the fact that a function has been a traditional function of government and that no intention of "alienating" it appears is sufficient…in many cases'.[62] This case was cited with approval in *Townsville Hospitals Board v Townsville City Council*.[63] In *State Superannuation Board v Trade Practices Commission* the 'governmental character of the Board's activities' were important in establishing the State Superannuation Board's links with the Crown.[64] Other examples of functions that have been held to be government functions are the conduct of railways[65] and the operating of a bank.[66]

60 *Commercial Oil Refiners Pty Ltd v South Australia* (1974) 9 SASR 88, 93 (Hogarth ACJ, Bright and Walters JJ).

61 See above n 49.

62 (1946) 73 CLR 70, 75 (Latham CJ).

63 (1982) 149 CLR 282, 288 (Gibbs CJ).

64 (1982) 150 CLR 282, 297 (Gibbs CJ and Wilson J).

65 *Crouch v Commissioner for Railways (Queensland)* (1985) 159 CLR 22, 38 (Mason, Wilson, Brennan, Deane and Dawson JJ). In Victoria, however, Victorian Rail Track (which may trade as VicTrack) is a public authority that does not represent the Crown: *Rail Corporations Act 1996* s 9.

66 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 233 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

Summary of Tests

2.17 It is clear that there is no complete list of all the circumstances that must be examined in order to establish whether a particular body is part of or represents the Crown. Matters which are relevant in deciding this question, if the Act creating the body does not deal with the issue, include the degree of control exercised by the Minister, the amount of discretion that the body has in carrying out its business and the nature of the functions that it carries out. It is also important to note that a body can be seen as being an agent of the Crown for one purpose but not necessarily for all purposes.[67] Ultimately, only a court can give a definitive answer as to whether particular activities are undertaken on behalf of the Crown. The difficulty in providing a definitive answer must be taken into account in determining how criminal liability should be imposed on the public sector.

Applying the Tests to the 'Public Sector'

2.18 Usually actions undertaken by a public servant on behalf of government in the course of employment by a government department or administrative office or by an office holder with the powers of an agency head under section 16 of the PSMEA will be regarded as actions undertaken on behalf of the Crown.[68] The application of the tests may result in the activities of public authorities being treated as Crown activities in certain circumstances. As Diagram 2 shows these entities may be bodies corporate or unincorporated bodies. The Government clearly intends that both corporate criminal liability and the senior officer offences should apply to negligent acts undertaken on behalf of the Crown.

67 *The Commonwealth v Rhind* (1966) 119 CLR 584, 600 (Barwick CJ), *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 288 (Gibbs CJ).

68 A possible exception is activities undertaken by members of the public service employed in the office of the Legal Ombudsman.

Determining Whether a Body is a Public Authority

Definitions

2.19 The PSMEA defines a 'public authority' as a body created by or under a statute for a public purpose. There is no clear test, however, for what constitutes a public purpose. What has been established is that the scope of public purposes is wider than governmental purposes.[69] Public purposes are also wider than Crown purposes.[70] For example, in one case, the Tasmanian Hydro-Electric Commission was held to be a public authority with public purposes but not a part of the Crown.[71] In another instance, the Victorian Roads Corporation was not, in the carrying out of its activities of reorganising traffic control signals, held to be representing the Crown.[72]

2.20 The courts have considered the definition of a 'public authority'. In *Renmark Hotel Inc v Federal Commissioner of Taxation*, Latham CJ held that a public authority was a body which performed statutory duties or exercised public functions,[73] and McTiernan J held that a public authority 'should be constituted under statute and that it should also be given by statute powers or duties to be exercised for public objects'.[74] Whether or not a 'body is a public authority is one of fact and degree which often requires a balancing of the various features of the body concerned.'[75] Factors that can be considered are whether any private individuals have a financial interest in an organisation's profits or assets,[76] whether its public functions are only incidental to its non-public endeavours[77] and whether it gains its powers from a statutory or a non-statutory base.[78] Again, there is no precise test as to what constitutes a 'public authority' that can be applied in practice.

69 *Australian Tape Manufacturers Association Ltd v the Commonwealth* (1993) 176 CLR 480, 504 (Mason CJ, Brennan, Deane and Gaudron JJ).

70 *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 13 (Higgins J).

71 *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654, 661–2 (Dixon CJ, Fullagar, Menzies and Windeyer JJ).

72 *Roads Corporation v Gerkens* (Unreported, Supreme Court of Victoria, Eames J, 28 May 1993).

73 (1949) 79 CLR 10, 23. It should be noted that this discussion related specifically to the definition of a 'public authority' for the purposes of the *Income Tax Assessment Act 1936-1947*.

74 (1949) 79 CLR 10, 23 (Latham CJ).

75 *Re Anti-Cancer Council (Vic); ex parte State Public Services Federation* (1992) 175 CLR 442, 450 (Mason CJ, Brennan and Gaudron JJ). Note, however, that for a body to be a public authority under s 4 of the PSMEA, it must be established 'by or under an Act'.

76 *Western Australian Turf Club v Federal Commissioner of Taxation* (1978) 139 CLR 288, 298–9 (Stephen J).

77 Ibid, 313 (Aickin J).

78 *Re Anti-Cancer Council (Vic); ex parte State Public Services Federation* (1992) 175 CLR 442, 450 (Mason CJ, Brennan and Gaudron JJ).

2.21 Public authorities may be bodies corporate or may be unincorporated. As currently drafted, the Bill covers incorporated public authorities, whether or not they represent the Crown.[79] It does not explicitly apply to unincorporated public authorities. If the Bill, as currently drafted, binds the Crown (as opposed to bodies corporate which represent the Crown), activities of unincorporated public authorities which could be treated as activities of the Crown could give rise to corporate criminal liability on the part of the Crown. However the Bill does not cover the activities of unincorporated public authorities which are not undertaken on behalf of the Crown. The difficulties that arise in assessing whether a body is part of, or representing, the Crown, particularly in terms of unincorporated bodies, must be considered in determining how criminal liability should be imposed on these bodies.

State Owned Enterprises

2.22 Public authorities that are created, or brought under, the *State Owned Enterprises Act 1992* (SOEA) are an easily identified category of public authority. Governments have used a variety of regimes over the years to create statutory corporations, which undertake commercial or semi-commercial activities on behalf of the government. In Victoria the SOEA is the latest such regime.[80] However, the SOEA does not cover all incorporated public authorities. Some of its provisions would appear to exclude entities it regulates from being regarded as the Crown.[81] Although the bodies covered by the SOEA generally have commercial functions, the Act makes some provision for them to undertake activities in the public interest.[82] Since all of

79 Assuming that proposed s 12 makes clear the intention to make the Crown criminally liable.

80 The *State Owned Enterprises Act 1992* (hereafter SOEA) provides for four separate categories of entities: 'state bodies' (s 14); 'reorganising bodies' (s 7, eg Gascor Pty Ltd); 'state business corporations'; and 'state owned companies' (Part 5; currently there are four state owned companies: City West Water Ltd, South East Water Ltd, Yarra Valley Water Ltd and State Trustees Ltd).

81 Section 70 of the Act says that a state owned company or a subsidiary of a state owned company 'is not and does not represent the State', a provision which appears to preclude the imputation of liability on the Crown for acts of the company. This echoes the position of Fullagar J in *Commonwealth v Bogle* (1953) 89 CLR 229, 267. As further evidence of the separation between the entities under the SOEA and the Crown, section 90 of the Act prevents the *Freedom of Information Act 1982* and the *Ombudsman Act 1973* from applying to state business corporations, state owned companies and state bodies. In this respect, therefore, these entities are more akin to private sector than to public sector bodies.

82 For example, the relevant Minister may direct a state business corporation to perform functions in the public interest and the relevant Minister and a state owned company may enter an agreement under which the company undertakes activities which are not in the commercial interest of the company: *State Owned Enterprises Act 1992*, ss 45, 72.

the entities dealt with in the SOEA are bodies corporate,[83] the Bill as currently drafted applies to them. The Commission, therefore, does not consider them in detail in this Report.

CONCLUSION

2.23 It is clear from the discussion in this Chapter that there is no precise way in which either the Crown or the public sector can be described. The only certainty is that if an entity is part of the Crown then that entity is part of the public sector. The recommendations that follow in Chapters 3 and 4 will make use of this distinction between the Crown and the public sector. That is, a body or a senior officer will be considered either as being part of the Crown or as being part of the public sector. Given the uncertainties involved in the categorisation of entities there is no reliable way for the Commission to state in advance whether a particular body is part of the Crown or public sector. Therefore, this Report will focus on the broad categories of the Crown and the public sector and will highlight the problems that are presented by the use of these categories. In making recommendations about the imposition of corporate criminal liability on the public sector we draw on examples of existing entities to identify inconsistencies and problems.[84]

83 Under s 14 of the *State Owned Enterprises Act 1992*, state bodies may be created by an order of the Governor-in-Council. They are bodies corporate under s 14(3). State business corporations and state owned companies are bodies corporate by definition.

84 It is assumed that there will rarely be a need to prosecute a body under this Bill. It is a complex process to apply the Bill to the public sector. The complexity is due to the sector's organisational intricacies. In order to demonstrate the difficulties and to illustrate the entities that prevent the proposal of a blanket formulation for public sector liability, particular organisations and positions in organisations will be used as examples. There is no intention on the part of the Commission to suggest that these organisations or the people who fill particular positions in these organisations are any more likely than any other organisation to be prosecuted under the Bill or to contribute to the death or serious injury of a worker. Particular positions and organisations are only named to demonstrate the finer points of the organisational structure of the public sector and to more carefully describe the application of the Bill to the public sector.

Chapter 3
Imposing Criminal Liability on 'Public Sector Entities'

Introduction

3.1 Chapter 2 explains that 'the Crown' and the 'public sector' are not precise concepts, and shows how the bodies which comprise the public sector will change from time to time. This makes it necessary for the recommendations in this Report to apply to a relatively fluid body of entities, some of which will be part of the Crown and some of which will not.

3.2 The recommendations in this Chapter and the next are intended to promote the principles of 'certainty, consistency and predictability',[85] which are fundamental to our 'rule of law'. These principles are particularly important for statutes that create criminal offences and provide for criminal penalties. The legislation must be clear as to when corporate criminal liability applies and must provide certainty and predictability to public servants who may be affected by the recommendations. It must ensure that public sector employees understand the circumstances in which they could be liable for prosecution.

3.3 The discussion which follows draws upon the classification of public sector bodies in Chapter 2. We make recommendations relating to the imposition of corporate criminal liability for the activities of agencies under section 4 of the *Public Sector Management and Employment Act 1998* (PSMEA) and offices under section 16 of the PSMEA. We also make recommendations about the imposition of corporate criminal liability on other public authorities.

3.4 This Chapter considers some types of relationships between public sector entities and those who work for or provide services to them, which may not be covered by the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (the Bill) as currently drafted. These are relevant both to the provisions relating to aggregation of the acts of employees, agents and senior officers and to the application of the Bill to the death or serious injury of employees and workers in the public sector. The Chapter also considers the application of the penalty provisions to the public sector. The application of

85 Simon Bronitt and Bernadette McSherry, above n 2, 68.

the senior officer offences to senior employees in the public sector is addressed in Chapter 4.

AGENCIES AND OFFICES UNDER THE *PUBLIC SECTOR MANAGEMENT AND EMPLOYMENT ACT 1998*

3.5 In this section we consider how the concept of corporate criminal liability should apply to agencies (government departments and administrative offices) under section 4 of the PSMEA and offices designated under section 16 of the Act.[86] Most of these bodies are part of the administrative machinery of government and appear to be part of the Crown.[87] Generally, staff in these departments and offices are employed by the Crown as public servants under Part 3 of the PSMEA, although this is not invariably the case.[88]

3.6 As currently drafted, the Bill applies to bodies corporate representing the Crown.[89] Because agencies and offices are generally not incorporated, the Bill does not apply to them. We have recommended that the Bill should provide that the Crown is a body corporate. This would enable the prosecution of the Crown where a body which is a part of the Crown, for example a department, behaves in such a way as to attract liability.

Who Should be the Corporate Defendant?

3.7 Should the Crown be the defendant in a criminal prosecution under the legislation? Alternatively, should agencies and offices be deemed to be bodies corporate for the purposes of imposing criminal liability on them? There are some arguments in favour of the 'deeming' approach. The purpose of the Bill is to facilitate prosecution and conviction of bodies corporate whose negligence results in the death or serious injury of an employee or worker. Arguably prosecution of the agency or office is more consistent with this goal than prosecution of the Crown. The prosecution of these bodies as

86 Current agencies and s 16 offices are identified above, n 42–4.

87 The Legal Ombudsman may not be part of the Crown. The Legal Ombudsman's role is to investigate complaints about the private legal profession. The Office of the Legal Ombudsman is not funded from the consolidated fund, but employees may be public servants: *Legal Practice Act 1996* s 425. The Office is, however, a s 16 office, therefore the provisions in this Report will cover the office, regardless of the relationship of the office with the Crown. Given that existing structures for complaint handling against lawyers are under consideration by government, the Report does not deal with the Legal Ombudsman in detail.

88 For some special cases, see below paras 3.48–79.

89 Proposed s 12: the body must be established by or under an Act or be deemed or declared to be established by or under an Act.

deemed entities could help to expose dangerous practices within particular areas of government. If the agency or office were the defendant, penalties such as fines and the 'name and shame provisions' (proposed section 14D) would apply to the agency or office, bringing home liability to the entity which was negligent. If the Government decided to follow the 'deemed entity' approach it would be necessary to deem staff working in the agency or office to be employees of the department. This is because the legislation imposes liability for the acts of 'employees' and public servants working in these bodies are generally employees of the Crown, rather than employees of the particular entity.

3.8 On the other hand there are advantages in making the Crown the defendant, rather than deeming agencies or offices to be bodies corporate, for the purposes of prosecution. As we discuss in more detail below, some department heads are already constituted as bodies corporate.[90] If the Crown was the defendant the same principle would apply to all agencies and departments. Because the administrative structures of the public sector may change, for example, by the processes under the *Administrative Arrangements Act 1983*, provisions which deem agencies and offices to be bodies corporate for the purposes of the legislation may become outdated very quickly. Imposition of corporate liability on the Crown makes it unnecessary to provide for such changes. This approach would also make it unnecessary for people employed as public servants under Part 3 of the PSMEA to be deemed to be employees of particular departments or offices. This approach would be analogous to that which is applicable to civil liability. Under the *Crown Proceedings Act 1958* the 'Crown under the title of the "State of Victoria"' is the defendant in actions for damages based on the negligent act of a public servant, acting in that capacity.[91]

3.9 On balance, the Commission favours the approach of making the Crown the corporate defendant. The objective of ensuring identification of the entity responsible for causing death or serious injury can be achieved in ways other than deeming the entity to be a body corporate. The fact that the Crown is the defendant will not prevent the identification of the area of government within which the negligent conduct occurred. This can be achieved by providing the particulars of the conduct relied upon by the prosecution in the presentment (the document containing the counts upon which the defendant is to stand trial). In addition, the Bill could provide for the name of the relevant agency to be included in the name of the case (for

90 See below paras 3.16–17.

91 Section 22(2).This is not the case where the negligence is attributable to a public statutory corporation (s 23(3)(b)). The issues that arise from the application of the proposed Bill to statutory corporations that represent the Crown are discussed below paras 3.27–31.

example, proceedings could be by the Director of Public Prosecutions against the Crown in Right of the State of Victoria, with the name of the relevant agency being identified).[92] Imposing corporate criminal liability on the Crown, rather than deeming individual departments and offices to be corporations for the purposes of the legislation, does not preclude administrative arrangements which ensure that financial losses are borne from the budget of the agency or office, as currently occurs in the case of civil liability. Such administrative arrangements, which are discussed in more detail below, could 'bring home' liability to a department or other body with a negligent corporate culture. The Bill could also provide for the 'name and shame' provisions, which are discussed in more detail below, to be applied to the body whose negligent conduct gave rise to the Crown's conviction.

How Should the Aggregation Principle Apply to the Crown?

3.10 The Bill permits the imposition of corporate criminal liability on a private sector corporation, where the negligent conduct of employees working in different divisions of the company results in the death or serious injury of a worker.[93] This may be the case even where the divisions are separately managed and in different locations. However the Bill does not permit aggregation of the acts of employees within one private sector corporation with the acts of employees in another private sector corporation. Our recommendation that the Crown should be the corporate defendant, will allow the Crown to be prosecuted where death or serious injury results from the negligence of employees working in different areas of government. For example if the combined negligent behaviour of employees working in different departments resulted in the death of a public servant, the Crown could be prosecuted.[94]

3.11 This approach could be criticised on the basis that it makes the Crown liable in circumstances where a private sector corporation would not be liable.[95] It could also be argued that permitting the aggregation of acts of

92 Compare, eg *Workcover Authority of New South Wales v Crown in Right of the State of New South Wales (Police Service of New South Wales)* (2000) 50 NSWLR 333.

93 Proposed s 14B(4).

94 The application of criminal liability to the Crown, particularly given the breadth of the application suggested by the recommendations in this Report below, may raise potential concerns with regard to the liability of the Crown for purposes outside the scope of the proposed Bill. The Commission recognises the potential for these flow-on effects, however, it is beyond the scope of this Report to include a detailed analysis of the wider effects of our recommendations.

95 In the private sector a similar situation would be where separate companies engage in a joint venture but no separate joint venture company is created.

employees working in different parts of government dilutes the objective of bringing home responsibility for negligent acts to the area in which those acts have occurred. The contrary argument is that there are significant differences between the public and the private sector. Management and employment principles as well as a range of administrative guidelines apply to all agencies and section 16 offices.

3.12 In our view it is appropriate to take a 'whole of government' approach to the aggregation issue. If the aggregation principle was not to apply in this manner it could not apply in a situation where a number of government agencies share the occupation of a single building and the combined acts of public servants in different agencies result in the death or injury of an employee. For example, each entity may have their own fire safety procedures,[96] the combination of which could create a situation where a public servant could be killed if a fire broke out. If there is an incompatibility in fire safety procedures then it can be seen that there is a higher level failure in the management of fire safety procedures. Such a higher level is indicative of a breach of the duty of care that the employer, the Crown, owes to its employees, the public servants. There will be many other situations where the negligent acts of employees in different agencies or section 16 offices combine to cause the death or serious injury of a worker. People working for agencies and offices should be regarded as equivalent to employees of a single body corporate, which employs staff in different divisions and at various locations.

3.13 Our recommendation that it should be possible to aggregate the acts of employees working in different agencies and section 16 offices does not mean that the Crown 'as a whole' will always be criminally liable in situations where the combined acts of people employed in different parts of the public service result in death or serious injury of an employee or worker. It will still be necessary to show that this combination of acts could have been

96 Other safety procedures could be used in this example, such as bomb scare evacuation procedures or noxious fumes safety procedures.

anticipated and prevented. Negligence of the Crown as a whole could be evidenced, for example, by failure to adequately manage or supervise the conduct of employees or by failure to provide adequate systems of conveying information to relevant people, in circumstances where a combination of acts causing death or serious injury could have been foreseen.[97]

3.14 If the Government decided to follow the 'deemed entity' approach, rather than accepting our recommendation that the Crown should be the defendant in a criminal prosecution, the aggregation principle would not apply to the acts of employees in different entities, unless provision was made to that effect.

How Will the Offence be Prosecuted?

3.15 Proposed section 12 of the Bill provides for prosecution of bodies corporate representing the Crown by the Director of Public Prosecutions (DPP). We have recommended that the Bill should provide for the prosecution of the Crown, as a body corporate. There are conceptual oddities in the DPP prosecuting the Crown on behalf of the Crown. However this is a necessary consequence of the Government's decision to extend the legislation to the public sector. The conceptual problem could be overcome by the statutory creation of a 'nominal defendant' for the purposes of prosecution,[98] but there do not appear to be any practical advantages in including such a provision in the Bill.

97 Proposed s 14B(6). The proposed section also includes other manners in which a corporation's negligence may be evidenced. The list provided in the proposed section is not exhaustive of the ways of evidencing negligence. Other tests can be more general. The behaviour of employers can be measured against standard practices followed within their particular industry: *Foufoulas v F G Strang Pty Ltd* (1970) 123 CLR 168. This case and two other relevant cases: *Morris v West Hartlepool Steam Navigation* [1956] AC 552 and *Brown v Rolls-Royce Ltd* [1960] 1 WLR 210 were civil cases and therefore the employers were judged according to the civil standard. In a criminal prosecution, similar behaviours will be examined; it is only the extent of the failure to reach the appropriate standard that will change. Yet it has been held that an employer has been considered negligent even where the employer followed the general practice *(Morris v West Hartlepool Steam Navigation* [1956] AC 552) and employers have escaped liability where they have not adopted the common practice (*Brown v Rolls-Royce Ltd* [1960] 1 WLR 210).

98 In the same manner as a nominal defendant has been created by statute for the purpose of civil liability, for example, see above n 32.

! RECOMMENDATIONS

3. The Bill should provide that the Director of Public Prosecutions may prosecute the Crown for an offence under the Act.
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 officers 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

3.16 Although the majority of departments and offices are not bodies corporate, the holders of some public service offices have been created as bodies corporate by legislation. Examples include the persons who are for the time being the department heads of the Department of Natural Resources and the Environment,[99] Department of Human Services,[100] Department of Infrastructure[101] and the Department of State and Regional Development.[102] The department heads that are bodies corporate are known as 'Agency corporations' under the *Administrative Arrangements Act 1983*. The Director of Housing[103] in the Department of Human Services is also a body corporate, as is the Commissioner for Corporate Affairs.[104]

3.17 The holders of these offices are corporations sole. A corporation sole is a corporation that comprises one person only: '[a] corporation sole has two

99 *Conservation, Forests and Lands Act 1987* s 6.

100 *Health Act 1958* s 6.

101 *Project Development and Construction Management Act 1994* s 35.

102 *Project Development and Construction Management Act 1994* s 41A.

103 *Housing Act 1983* s 9.

104 *Companies (Administration) Act 1981*. The Corporate Affairs Commission is not an active body. See also below n 197.

capacities, that of the natural person and that of the corporation'.[105] The legal relationship between the Crown and such a corporation sole has been described clearly by the South Australian Supreme Court in the following way:

> Sometimes the superior officer administering an area of ministerial responsibility is separately incorporated but still remains under direct ministerial control. In such a case the administration remains an administration by the Crown.[106]

3.18 Although on its face the Bill applies to these bodies corporate,[107] employees who undertake duties on behalf of a head of department who is also a body corporate are employed by the Crown under Part 3 of the PSMEA, rather than by the corporation sole.[108] Corporate criminal liability under the Bill applies in respect of negligence causing death or serious injury to 'an employee in the course of his or her employment by the body corporate' or a 'worker in the course of providing services' to, or relating to, the body corporate.[109] Agency heads exercise 'all the rights, powers, authorities and duties of an employer' on behalf of the Crown.[110]

3.19 The corporations sole mentioned above may have no employees whose conduct could be aggregated to make the body corporate liable, because public service employees are employees of the Crown.[111] Unless the corporation sole has agents, it is difficult to anticipate circumstances in which there would be a basis for application of the provisions imposing corporate liability on the corporation sole. In appropriate cases, the holder of the

105 *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521, 534 (Dixon, Williams, Fullagar and Kitto JJ). The statutes that create the department heads as corporations sole do not use this term but refer to the department heads as being bodies corporate.

106 *Commercial Oil Refiners Pty Ltd v South Australia* (1974) 9 SASR 88, 92 (Hogarth ACJ, Bright and Walters JJ).

107 Proposed s 12 provides that the Bill applies to bodies corporate which represent the Crown. As the corporations sole are Crown employees, then these corporations sole are bodies corporate that represent the Crown.

108 Some of the legislation is not clear on this point. For example, the *Conservation, Forests and Lands Act 1987* creates the department head of the Department of Natural Resources and the Environment as a corporation sole (s 6(2)). Section 8 states that the powers of the department head are unaffected by the creation of the office as a corporation sole. That is, the department head does not have any special powers of employment. However, s 83(1) states that the department head 'may appoint as authorised officers–(a) any specified employee or a specified class of employees employed by the Secretary, or in the Department or in the Public Service'.

109 Proposed s 14.

110 PSMEA s 20.

111 Proposed s 14B(5) provides for aggregation of the conduct of 'employees, agents and senior officers'. The corporations sole may have 'agents'. It is possible that public servants could be regarded as 'agents' of the corporation sole.

relevant office could, of course, be prosecuted for their own negligence. On the assumption that the corporations sole mentioned above have power to purchase the services of an independent contractor, a person who is a corporation sole could be criminally liable under the legislation for the injury of a worker who is an independent contractor providing those services. He or she could also be liable for the death or injury of an employee of the Crown, since the definition of worker includes such employees.

3.20 We have proposed that the Crown should be treated as a body corporate capable of conviction under the legislation. It would be anomalous if the effect of legislation making a department head or a senior public servant a corporation sole, for the purpose of holding property, prevented the aggregation of the negligent acts of employees or agents employed by the Crown, rather than the corporation sole, when those acts resulted in injury or death. To overcome this anomaly the legislation should allow aggregation of the acts of a corporation sole representing the Crown, with the acts of employees of the Crown. For example, if an employee is killed as the result of the conduct of the department head of the Department of Human Services, in his or her capacity as a corporation sole,[112] combined with the conduct of employees working in the Department of Human Services, the Crown should be able to be prosecuted under the legislation. This recommendation is consistent with the approach we have taken to agencies and offices. Issues relating to the application of the senior officer offences to department heads, who are also corporations sole, are discussed in more detail below.

112 It is assumed that acts of the corporation sole could not be treated as acts of a 'senior officer'.

! RECOMMENDATIONS

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.

Corporations Sole as Crown Employees

3.21 The Bill should also ensure that the death or serious injury of a person employed by the Crown, who is also a corporation sole, can result in the imposition of criminal liability.

! RECOMMENDATION

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.

PUBLIC AUTHORITIES

3.22 As we have seen in Chapter 1, the definition of the public sector in the PSMEA extends to unincorporated or incorporated bodies established by or under an Act for a public purpose. The vast majority of the bodies listed as organisations covered by the PSMEA in the annual report of the Commissioner for Public Employment[113] are incorporated. As currently drafted, the Bill applies to all bodies corporate.[114] As discussed in Chapter 2, these bodies may or may not represent the Crown.

Incorporated Bodies Which Represent the Crown

3.23 The terms of reference exclude 'bodies corporate that represent the Crown'. This is because the Bill, as currently drafted, applies to these bodies.[115] However the Bill raises some interrelated questions about the application of liability to these bodies. The questions raised are listed below.

- What provisions are necessary to cover the situation where a body corporate that represents the Crown is staffed by Crown employees, but does not have employees of its own?
- Should the body corporate or the Crown be the defendant in criminal proceedings?
- How should the aggregation principle apply to these bodies?

WHERE THE BODY CORPORATE EMPLOYS PUBLIC SERVANTS

3.24 Some incorporated public authorities are staffed by public servants who are employees of the Crown, rather than employees of the corporation. The Victorian Law Reform Commission is an example. Although the Commission is a body corporate, its employees are not employees of the Commission, but of the Crown.[116]

3.25 As the Bill currently stands, the body corporate, rather than the Crown, is the defendant in criminal proceedings. However the Bill may not allow the conduct of people working in the body corporate to be taken into

113 Commissioner for Public Employment, *2001 Annual Report.*

114 The list from the Report of the Commissioner is included, with annotations, in Appendix 2.

115 Proposed s 12.

116 The department head of the Department of Justice has the powers of an employer in relation to these employees. These powers have been delegated to the Chairperson of the Commission.

account to determine whether the corporation as a whole was negligent, because they are not 'employees' of the body corporate.[117] There are two ways of resolving this problem. First, the Crown, rather than the body corporate representing the Crown, could be the defendant in criminal proceedings. This would allow the conduct of Crown employees working in the body corporate to be considered. Secondly, if the Bill continues to provide for prosecution of the body corporate, rather than for the Crown to be the defendant, employees of the Crown working for the body corporate could be deemed to be employees of the body corporate, for the purposes of determining whether the body corporate as a whole was negligent.

3.26 The question of whether the Crown, or the body corporate representing the Crown should be the defendant is discussed below. The Bill will also need to deal with cases where an incorporated public authority has a mixture of staff which it employs and staff employed as public servants.

Who Should be the Corporate Defendant?

3.27 In the case of corporations sole we have recommended that the Crown, rather than the corporation, should be the defendant. Should this principle apply to other bodies corporate which represent the Crown?

3.28 The arguments for and against making the Crown the defendant, rather than the 'entity' within which the conduct occurs, have been discussed in the context of agencies and offices. We have recommended that the Crown should be the defendant in cases involving unincorporated agencies and offices. Under the Bill as currently drafted, if the entity is a body corporate representing the Crown, the body corporate, rather than the Crown, will be the defendant. In other words, if the government accepts our recommendation relating to agencies and offices, a different approach will apply to agencies and offices and to bodies corporate, even though both are part of, or represent the Crown. This could be seen to be an arbitrary result, since the decision about whether an 'entity' should be established as a body corporate or not will not have been based on whether the criminal liability should apply to that body or to the Crown as a whole. On the other hand it may be suggested that the separate legal existence of bodies corporate representing the Crown justifies their prosecution as distinct entities.

117 It is possible that they could be regarded as 'agents' of the body corporate.

3.29 On balance, our view is that the Crown, rather than a body corporate representing the Crown, should be the defendant. This approach is simple, since it treats agencies and offices, corporations sole and other bodies corporate which are part of or represent the Crown in the same way. The Commission's recommendation on this matter is also influenced by our recommendations on the application of the aggregation principle, which is discussed in the next section.

3.30 A possible disadvantage of this approach is that it could result in considerable time in criminal proceedings being taken up with argument about whether or not a particular public sector body represents the Crown. It may be argued by the defendant Crown that the incorporated public authority does not represent it, so that the body corporate, rather than the Crown should have been prosecuted. Difficulties could also arise because there are many public authorities that may represent the Crown for one, or more, of their statutory functions but not for all of them.[118] It is possible that an employee could die as a result of the negligence of an incorporated public authority that is part of the Crown for some functions but not for all of its functions. In our view these difficulties do not outweigh the advantages of making the Crown, rather than a body corporate representing the Crown, the defendant in criminal proceedings. However it may be necessary for the courts to deal with questions relating to the status of the body corporate. Where the question of whether a body corporate is part of the Crown arises in a prosecution, the trial judge will have to rule on the question in order to determine whether the jury could consider evidence of the conduct of the body corporate as representing the Crown. Whether a body corporate represents the Crown may be a question of law, or of mixed law and fact. Section 5 of *the Crimes (Criminal Trials) Act 1999* sets out a procedure for dealing with such issues in a pre-trial directions hearing.

3.31 It should be noted that if, instead of accepting our recommendation that the Crown should be the defendant in cases involving agencies and offices, the government decides to deem agencies and offices to be bodies corporate for the purposes of prosecution, then the current provision permitting prosecution of bodies corporate should be retained.

118 VicRoads is one such entity.

How Should the Aggregation Principle Apply?

3.32 The decision about who should be the corporate defendant in a criminal prosecution is linked with this question. As has already been explained, the Bill allows the acts of 'employees, agents and senior officers' to be aggregated in determining whether the corporation 'as a whole' has been negligent.

3.33 Death or serious injury may be caused by the combined acts of public servants working in an agency or office (who will normally be public servants) and people working in an incorporated body representing the Crown. If the Crown is the defendant then the conduct of all employees, agents and senior officers of the Crown can be aggregated. However if the incorporated body is the defendant this is not the case. Only the acts of employees, agents or senior officers of the incorporated body[119] could be aggregated.

3.34 For example, the Victorian Coroner found that, with regard to the death of the firefighters at Linton in 1998, among others, both the Department of Natural Resources and the Environment (DNRE)[120] and the Country Fire Authority (CFA)[121] contributed to the deaths. The CFA is an incorporated body. Assuming that the CFA represents the Crown,[122] a provision under which the Crown was the defendant would, under the current provisions of the Bill, allow the behaviour of the employees and senior officers of the CFA and the employees and senior officers of DNRE to be aggregated.[123] If, on the other hand, the CFA were the defendant (as the current Bill provides), the conduct of both sets of employees could not be aggregated to determine whether the CFA was criminally liable, unless the Bill made special provision to this effect.

3.35 It is possible that even if a body corporate was the defendant, the Crown may be able to be prosecuted as well. Under the Bill as it currently stands, in the example above both the Crown and the CFA could be criminally liable for the acts of their own employees, agents or senior officers which resulted in the death of employees or 'workers', if (and we do not suggest the Coroner's findings established this) there was evidence pointing

119 As discussed above these could be defined to include employees of the Crown working for that body.

120 State Coroner's Office (Victoria), *Report of the Investigation and Inquests into a Wildfire and the Deaths of Five Firefighters at Linton on 2 December 1998* (2002), para 22.1.68.

121 Ibid, para 22.1.69.

122 Because it is under the direction and control of the Minister: *Country Fire Authority Act 1958* s 6A.

123 See below paras 3.61–4 for a discussion of the manner in which the Bill can be applied to volunteers.

to such a great falling short of the standard of care. In certain situations criminal law principles allow the prosecution of accessories to offences,[124] and persons acting in concert[125] or in pursuance of a common purpose.[126] However these principles are not a substitute for the aggregation principle contained in the legislation, which permits the attribution of all of the acts of the employees to the defendant. Another difficulty in applying these principles under the Bill is that corporate criminal liability only applies where the employee who is killed or injured is an employee of the defendant. The Bill does not impose liability for death or injury of third persons.

3.36 We have already canvassed the arguments for applying the aggregation principle across the public sector, rather than confining its operation to employees working within a particular entity, or the agents or senior officers of that entity. We recommend that a similar approach should normally apply to employees, agents and senior officers of bodies corporate representing the Crown. There may be situations in which the Victorian Government considers that it is inappropriate for the acts of employees, agents or senior officers of a body corporate representing the Crown to be aggregated with the acts of other Crown employees, agents or senior officers. For example, this may be the case where the body corporate is mainly involved in conducting commercial activities and does not employ public servants.[127] The Bill should specify the bodies corporate which should not be treated as part of the Crown for the purposes of the legislation. The effect of such a provision would be that the conduct of Crown employees, agents and senior officers will not be capable of being aggregated with the conduct of employees, agents or senior officers representing the Crown, for the purpose of determining whether the conduct of the body corporate as a whole is negligent.

124 See eg *Osland v R* (1998)197 CLR 316, *Giorgianni v R* (1985) 156 CLR 473.

125 It is unlikely that the public sector bodies would be jointly prosecuted under the doctrine of 'acting in concert' as that doctrine requires that 'two or more persons reach an understanding or arrangement that a criminal act or acts will be committed by them or by one or some of them': *R v Jensen and Ward* [1980] VR 194, 201. It would be very difficult to demonstrate that a body corporate representing the Crown and the agency reached an understanding that they would commit the act of corporate manslaughter or the act of negligently causing serious injury by a body corporate.

126 *Johns v The Queen* (1980) 143 CLR 108.

127 These factors may result in a court holding that the body corporate does not represent the Crown, in which case the above recommendations will not apply.

! RECOMMENDATIONS

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.

Incorporated Bodies Which do not Represent the Crown

3.37 In the case of incorporated statutory authorities which do not represent the Crown, no changes to the Bill are required. The principle of aggregation will apply within the authority, as is the case for private sector corporations. Where the body corporate does not represent the Crown, the body may be named as co-defendant in a prosecution against the Crown if the conduct of employees of both the body corporate and the Crown contributed to the death or serious injury of the worker. However, the behaviour of the employees of the body corporate would not be able to be aggregated with the behaviour of the Crown employees. This approach places incorporated public authorities which do not represent the Crown in the same position under the Bill as private corporations. For example, Monash University, which is an incorporated public authority, could only be subjected to corporate criminal liability for the conduct of its employees, agents and senior officers. If the acts of Monash University employees,

combined with the acts of employees of Melbourne University, resulted in the death of a Monash employee, both Monash University and Melbourne University could be prosecuted, but for Melbourne University to be criminally liable it would be necessary to show that the person came within the definition of a 'worker'.[128]

Unincorporated Bodies

3.38 Appendix 2 of this Report sets out the bodies which are listed in the *2001 Annual Report* of the Commissioner for Public Employment as covered by the PSMEA. The Appendix indicates whether or not they are bodies corporate. Of the 243 bodies listed in the Commissioner for Public Employment's annual report, 221 (or around 91%) are incorporated and will be covered by our earlier recommendations. In addition to the bodies listed in the Commissioner for Public Employment's annual report, there are a number of other bodies created by or under an Act for a public purpose. As far as we are aware there is no comprehensive list of these bodies held by government, but in the course of work on this reference we have identified a large number of them. Although many of these bodies are incorporated, there are also some unincorporated bodies. These unincorporated bodies are extremely diverse. They include bodies in the following categories.[129]

- Bodies which provide advice to government, for example the Building Regulations Advisory Committee which advises the Minister and accredits building products, construction methods or designs[130] and the Victorian Emergency Management Council which advises the Co-ordinator in Chief of Emergency Management on all matters relating to the prevention of, response to and recovery from emergencies.[131]
- Bodies which register and/or control professions and occupations, for example the Building Practitioners Board.[132] These bodies may also

128 The Bill only covers death or serious injury of an employee. In this hypothetical example, the employee is not an employee of Melbourne University but could come within the definition of a 'worker' because, for example, he or she is providing services to Monash University.

129 This is a modified version of a classification used by Peter Hogg and Patrick Monahan, above n 33, 331.

130 *Building Act 1991* s 211.

131 *Emergency Management Act 1986* s 8.

132 Section 122 of the *Mental Health Act 1986* does limit the personal liability of the member of the Mental Health Review Board in the following terms: '[n]o civil or criminal proceedings lies against any person for anything done in good faith and with reasonable care in reliance on any authority or document apparently given or made in accordance with the requirements of this Act'. This is qualified by the notion of 'good faith' and the provision would not prevent the behaviour of the member being aggregated with the behaviour of others for the purposes of corporate liability of the Crown itself.

have quasi-judicial functions such as hearing complaints about members of the profession. The Nurses Board is an example of such a body.

- Bodies which hear appeals from administrative decisions, for example the Firearms Appeals Committee or the Mental Health Review Board. Again some of the functions exercised by these bodies may be quasi-judicial.
- Bodies which carry out administrative functions on behalf of government, for example the Victorian Relief Committee.[133]

3.39 Some of these bodies are simply committees which operate on a part-time basis. Some have volunteer members, while others have paid members. As we have seen there is no clear test for determining which of these bodies are part of the Crown, though it is likely that if they are under the control of the Minister then they will be part of the Crown.[134]

3.40 The terms of reference make it clear that the Attorney-General wishes the Commission to consider the application of the Bill to such unincorporated public authorities, although the Bill does not apply to unincorporated bodies in the private sector.

133 Section 5 of the *Victorian Relief Committee Act 1958* reads:

'(1) Subject to this Act the Committee shall have power to—
(a) collect money commodities and other goods;
(b) expend money so collected in the purchase of commodities and other goods;
(ba) invest money so collected in any manner approved for the time being by the Treasurer;
(bb) sell in accordance with the regulations any commodities or other goods so collected and prescribed by the regulations;
(bc) engage agents to conduct sales under paragraph (bb);
(c) consider applications for assistance made by persons in distress;
(d) distribute or cause to be distributed commodities and other goods to—
(i) benevolent societies on the register of the Hospitals and Charities Commission;
(ii) persons in distress; and
(e) exercise such powers as may be conferred on it by or under this or any other Act.

(2) The Committee may exercise it powers under subsection (1)(bb) and (bc) only if the Committee is of the opinion that in all the circumstances it would be better able to provide assistance to persons in need by use of the proceeds of sale than by distributing the commodities or other goods.'

134 *Commonwealth v Bogle* (1953) 89 CLR 229, 251 (McTiernan J).

3.41 We have considered two possible ways of dealing with these bodies. These are to:

- deem unincorporated public authorities to be bodies corporate, so that corporate criminal liability applies to them; or
- deem the members and/or employees of unincorporated public authorities to be employees of the Crown in certain situations.

3.42 The Commission does not recommend that the Bill should include a general provision deeming unincorporated public authorities to be bodies corporate, for the purposes of prosecution. We have rejected this approach for a number of reasons. First, it is inconsistent with the purpose of the Bill. The Bill was intended to overcome difficulties in prosecuting corporations where the conduct of the 'corporation as a whole' resulted in death or serious injury. If the government wishes to deem unincorporated bodies to be 'entities' it would be appropriate to do so in the case of both public and private sector unincorporated bodies. Secondly, as we have explained above, unincorporated public authorities are an extremely diverse group and deeming them all to be bodies corporate might result in the Bill applying to unincorporated bodies comprising part-time or volunteer members, in circumstances where this was entirely inappropriate. Thirdly, it will normally be unnecessary to prosecute the unincorporated body. If death or serious injury is caused by the actions of a member or members of an unincorporated body there will normally be individuals who can be prosecuted. The fact that the person acted in their capacity as a member of an unincorporated body does not affect the individual's criminal liability.

3.43 In certain situations however, it may be appropriate for members of unincorporated public sector bodies or the staff or senior officers of these bodies to be treated as if they are employees of the Crown and for proceedings to be taken against the Crown, for the acts of these 'deemed employees'.

3.44 Members of the body may not be Crown employees even when they are carrying out functions on behalf of government, so that their acts will not be able to be taken into account in deciding whether the Crown as a whole is criminally liable. If the body employs staff to support its work they may not be employees of the Crown. Technically speaking an unincorporated body cannot employ staff. In the past the courts have held that if the body is an 'unincorporated association' and therefore not a legal entity, the employer will be the members comprising the association, or some officer or trustee of

the association.[135] The courts have also found that, in other circumstances, a management committee of an unincorporated association may be an employer.[136] In some cases legislation permits unincorporated public authorities to employ staff.[137] Alternatively, the work of the body may be supported by public servants employed under Part 3 of the PSMEA working within a department or administrative office.[138]

3.45 The Commission's view is that where the body is carrying out functions on behalf of government, or is under the control of the government, the Crown's corporate criminal liability should include liability for the acts of members, staff or agents of that body. The Bill should also ensure that the Crown may be held criminally liable where a member, employee or agent of that body is killed or seriously injured in the course of his or her service, as the result of acts of employees, agents or senior officers of the Crown. Many of the members of these bodies will already be covered as they are deemed to be employees of the Crown for the purposes of the *Accident Compensation Act 1985*.[139] However, there may be members of these bodies who are not be covered by the provisions of the Accident Compensation Act. The recommendations below are not intended to cover unincorporated private sector bodies whose only connection to the government is that they receive public funds or perform services under contract with government. The recommendations only apply when the body is effectively controlled by government.

3.46 The behaviour of those who volunteer as members of an unincorporated body would only be relevant for the purposes of aggregation

135 *Buckley v Tutty* (1971) 125 CLR 353, 372 (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ). The High Court has been reluctant to attach corporate status to an unincorporated body, even in cases where a statutory body has been endowed with some corporate features but not all. In *Chaff and Hay Acquisition Committee v J.A. Hemphill and Sons Ltd* (1947) 74 CLR 375, the Chaff and Hay Committee was constituted as being capable of being sued but it did not have a corporate seal. The Court held that it could be sued but not as a corporation.

136 *Peckham v Moore* [1975] 1 NSWLR 353; *Re: Peter Rochfort, TNT Management, Ansett Transport Industries and Associated Steamships* (1981) 53 FLR 364; *Re Independent School's Staff Association (ACT); Ex parte Hubert* (1986) 60 ALJR 458.

137 See eg *Victorian Relief Committee Act 1958* s 6A.

138 There has been judicial opinion that suggests that, where an unincorporated body is created by statute, 'if the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done by its authority and procurement': *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426, 436 (Earl of Halsbury LC).

139 Proposed s 14. The Bill includes in the definition of 'worker' any person who is deemed to be an employee for the purposes of an Act of a State, a Territory or the Commonwealth.

of behaviour in a prosecution of the Crown. The Bill provides that the senior officer offences are not available against senior officers who act 'as such without any fee, gain or reward or the expectation of any fee, gain or reward'.[140]

! RECOMMENDATIONS

16. The definition of an 'employee of the Crown' should include a member of an unincorporated body being a board, council, committee, sub-committee 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.[141]

3.47 The above recommendation should not apply where the member of the unincorporated body is performing quasi-judicial functions, independently of the executive. For example it would be inappropriate for criminal liability to be imposed on the Crown if, as a result of a negligent decision of members of the Victorian Civil and Administrative Tribunal (VCAT) a Crown employee was injured. The Acts creating these bodies often contain provisions exempting members from criminal liability.[142] The Bill should identify existing bodies which exercise these functions, for example VCAT, and permit the other bodies to be added by regulation.

140 Proposed s 14C(4).

141 A somewhat analogous provision is contained in the *Freedom of Information Act 1982* s 5(2).

142 For example, *Mental Health Act 1986* s 122: see above n 132.

! RECOMMENDATION

20. Recommendation 17 should not apply to the conduct of members of unincorporated bodies exercising quasi-judicial functions.

The effect of the recommendations relating to the criminal liability of agencies and section 16 offices, bodies corporate representing the Crown and unicorporated public authorities is summarised in the table below.

TABLE 1: RECOMMENDATIONS AND APPLICATION

Entity	Employees	Defendant	Aggregation
Crown agency eg department, s 11 administrative office	Crown employees	Crown	Across all Crown entities
Body corporate representing the Crown	Crown employees and/or employees of the body	Crown	Across all Crown entities
Body corporate not representing the Crown	Crown employees and/or employees of the body corporate. Crown employees deemed to be employed by the entity.	Entity	Within entity
Unincorporated bodies where members are under control of government or perform functions or advise a Minister, or perform functions connected with an agency or office	Crown and non-Crown 'employees'	Crown	Across all Crown entities

Particular Employment Relationships

3.48 In making recommendations for the application of the Bill to the public sector it is necessary to examine the definition of 'agents', 'employees' and 'workers' and to deal with some people who may not fall within these definitions. These definitions must be considered for two purposes. First, to decide whether the person is covered by the aggregation principle which applies only to the conduct of the employees, agents and senior officers of the corporate defendant.[143] Secondly, to determine whether the death or injury of the person may result in the imposition of corporate liability. Bodies corporate are not criminally liable unless the person who is killed or injured is an 'employee' or a 'worker'.[144]

3.49 In the Bill the definition of 'employee' for the purposes of aggregation, is not the same as the definition of 'worker'.

Agents

3.50 The Bill defines 'agent' as a person 'engaged by the body corporate to provide services'.[145] The definition of 'worker' includes a 'person engaged by an employer to provide services to the body corporate'.[146] Therefore, the Bill allows the aggregation of the conduct of agents with the conduct of employees and covers the death or serious injury of an agent who is providing services to an employer, if the death or serious injury occurred while she or he was carrying out the contracted services.[147] The Commission does not consider that an agent of the Crown should be treated any differently to an agent of a private sector corporation.[148]

143 The senior officer offences are considered in Chapter 5.

144 The aggregation principle in proposed s 14B(5) refers to the aggregation of the conduct of 'employees, agents or senior officers of the body corporate', not workers. In proposed s 11, the definitions of 'worker' and 'employee' are not synonymous.

145 Proposed s 11. There are some additional requirements about the circumstances in which the services are provided.

146 Proposed s 11. However, the definition of 'worker' does include reference to independent contractors, as does the definition of 'agent'.

147 Proposed s 14A(2).

148 It has been held that an agent of the Crown and his or her employees can be entitled to Crown immunities: *Roberts v Ahern* (1904) 1 CLR 406. However, if the Crown is bound under the Bill then no immunities will exist.

3.51 Within the public sector, the category of agent applies to a broad range of people. Many people who perform work for the government are not employed subject to the PSMEA and are appointed directly by the Governor-in-Council.[149] These people are agents of the Crown and are therefore already covered, as agents, by the Bill, if the Bill applies to the Crown.

Police

3.52 The police force is a 'special case' in terms of the employment relationship of officers and the Crown. The Office of the Chief Commissioner of Police is a section 16 office under the PSMEA, although the police officers themselves are expressly excluded from the PSMEA.[150] The case law holds that, in general, police officers are agents of the Crown.[151] Thus the aggregation principle can apply to their conduct.

3.53 Police are employees for the purposes of the *Accidents Compensation Act 1985* which deems them to be employed by the Crown.[152] Proposed section 11 of the Bill defines 'worker' to include 'a person who is, or is a member of a class of persons, deemed or declared to be an employee by or under an Act of this or any other State or a Territory or of the Commonwealth'. This means that corporate liability can apply if a member of the police force is killed or injured.

Delegates

3.54 The proposed Bill does not refer at all to delegates of a corporation, though in some cases they may come within the definition of 'agents'.[153] Private sector corporations can delegate their powers. Boards of directors may 'delegate any of their powers to: (a) a committee of directors; or (b) a director; or (c) an employee of the company; or (d) any other person'.[154] As section 198D(3) of the *Corporations Act 2001* (Cth) states that 'the exercise of the power by the delegate is as effective as if the directors had exercised it' then

149 An example is somebody who is appointed as a Crown Prosecutor by the Governor-in-Council under the *Public Prosecutions Act 1994* s 31.

150 Section 6(1)(h).

151 *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1954) 92 CLR 113. Police officers were also deemed to be employees for the now repealed *Industrial Relations Act 1988* (Cth): *Konrad v Victoria Police* [1999] FCA 988.

152 *Accidents Compensation Act 1985* s 14(4).

153 However, it is doubtful whether this definition is sufficiently expansive.

154 *Corporations Act 2001* (Cth) s 198D(1).

the Bill will probably treat a delegate who is lawfully performing a function lawfully delegated by the board of directors as if the delegate was a director, for the purposes of aggregating their acts with those of employees of the corporation. It would also mean that a delegate of the Board comes within the definition of a worker, if he or she is killed or seriously injured.[155]

3.55 The situation for public sector bodies is more complex. Many public sector bodies and corporations sole have the power of delegation. For example, the Director of Housing has the power to delegate under section 35 of the *Housing Act 1983*.

3.56 If functions could only be delegated to employees of the Crown, the aggregation principle would apply to these delegates. The definition of 'worker' (which defines the persons whose death or serious injuries attract liability) would also apply, since it expressly covers Crown employees (including employees of other States or the Commonwealth Government).

3.57 The Director of Housing, however, may 'in relation to any particular matter or class of matters concerned with the management and control of land, delegate to any regional housing council or to any person or body of persons any of the powers, discretions, functions or authorities of the Director under this or any other Act, except this power of delegation'.[156] This situation is not dissimilar to that in the private sector. In the same manner that a delegate in the private sector could be seen as a Director, when the delegate is performing the functions of a Director, then a delegate in the public sector can be seen, or deemed, to be in the similar position as the person who had the power of delegation. That is, in the view of the Commission, in the public sector, someone who lawfully performs a delegated function can, and should, be deemed to be an employee of the Crown for the purposes of the aggregation of behaviour of Crown employees or in the event of the death or serious injury of the person performing the delegated power. Section 42A(c) of the *Interpretation of Legislation Act 1984* provides that if a 'responsibility, power, authority, duty or function' is delegated, it is to be regarded as having been exercised by the person or body which made the delegation. This means that if an employee of the Crown delegates his or her functions they are taken to be exercised by that employee. The provision could arguably result in the delegate being treated as if he or she was an employee of the Crown for the purposes of the Bill. However the Commission considers that this should be put beyond doubt by a specific provision in the Bill.

155 Directors are senior officers: see below para 4.3.

156 *Housing Act 1983* s 35(1).

Secondment

3.58 In terms of this Report, there are three groups of workers on secondment that need to be examined. These are:

- non-government employees that are on secondment to a body corporate or unincorporated body that represents, or is part of, the State of Victoria;
- Victorian Government (Crown) employees on secondment to a body corporate that does not represent the Crown; and
- Commonwealth Government employees on secondment to a State Government body.

3.59 In our view the aggregation principle should apply to seconded workers, so that their conduct can be considered together with the conduct of employees or agents of the body to which they are seconded. Similarly, if the negligence of the body (including the Crown in right of the State of Victoria) results in the death or serious injury of the person who is seconded to that body, corporate liability should apply.

3.60 In the first situation described above, the person might not come within the definition of 'worker' because she or he would not be an employee of the Crown, although they might possibly be an agent of the Crown. In the second situation the body corporate would be liable for the person's death or injury, because the definition of 'worker' covers a Crown employee even if he or she is not working for the Crown. The third situation would be covered for the same reason. The Commission therefore recommends that the definition of 'worker' be changed to include reference to employees on secondment to a government body.

Volunteers

3.61 Within the public sector there are many volunteers who perform important work for the community. These volunteers include some members of the State Emergency Service (SES) and the Country Fire Authority (CFA). Both of these bodies are public authorities. The CFA is a body corporate, while the SES is not a body corporate.[157] Volunteers are not employees of the Crown and their situation must be considered as the result of the application

157 In terms of any potential prosecution, it is likely that the Country Fire Authority (CFA) would be seen as representing the Crown as the body is subject to the direction and control of the Minister: *Country Fire Authority Act 1958* s 6A. However, it could be argued that the CFA does not represent the Crown as the Authority gets the bulk of its funding (77.5%) from insurance companies and the balance from the consolidated fund: *Country Fire Authority Act 1958* s 76(1).

of the Bill to the public sector. The CFA and SES volunteers need to be discussed specifically and the position of volunteers in general also needs to be addressed.

3.62 Under the Bill the aggregation principle may not apply to volunteers because they are not employees. In some situations they may be agents. The definition of 'agent' requires amendment to ensure that people may be agents even if they are volunteers.

3.63 Does the definition of 'worker' cover volunteers, so that corporate liability applies in respect of their death or injury? As already noted, as long as a person is deemed or declared to be an employee by or under an Act then he or she is a 'worker' for the purposes of the Bill. The volunteers of the SES are deemed to be workers employed by the Crown for the purposes of the *Accident Compensation Act 1985*.[158] The volunteers of the CFA are not afforded quite the same status.[159] Therefore, if the Bill is amended to apply to the Crown, the Crown could be criminally liable if SES volunteers died or were seriously injured, but it is less certain whether CFA volunteers would be similarly covered.[160]

3.64 If a government body is responsible, through gross negligence, for the death or serious injury of a volunteer under its direction, there is no reason why corporate liability should be excluded. Therefore, for the avoidance of doubt, and in particular to ensure CFA volunteers are treated in the same way as SES volunteers, the Bill should include a provision that volunteers, under the direction and control of a Crown body, are considered to be employees of the Crown.

158 The State Emergency Service itself also represents the Crown for certain purposes: *Victoria State Emergency Service Act 1987* s 26.

159 Section 63(3) of the *Country Fire Authority Act 1958*, which relates to compensation payable to its officers states:

'The persons to whom or for whose benefit compensation is payable are, in respect of personal injury suffered on or after the appointed day within the meaning of the *Accident Compensation Act 1985*, those persons to whom or for whose benefit compensation would be payable under that Act if the casual fire-fighter or volunteer auxiliary worker were a worker within the meaning of that Act and the personal injury were caused in the employment of the casual fire-fighter or volunteer auxiliary worker by accident arising out of or in the course of the employment.'

160 Under the *Corrections Act 1986* volunteers working in a prison or in a 'location' are deemed to be employees of the Crown for the purposes of the *Accident Compensation Act 1985*. Thus they would be covered by the definition of 'worker' in the Bill.

Inspectors

3.65 It is also necessary to consider how the Bill applies to inspectors. Many Acts authorise inspectors to carry out inspections, usually to assist in the regulation of a particular industry or type of behaviour of the private sector or individuals. These inspectors may be employees of the Crown,[161] agents of the Crown,[162] employees or agents of public sector authorities,[163] representatives of non-government organisations,[164] private individuals who undertake authorised regulatory work,[165] or they may be employees of a private sector corporation.[166]

3.66 The Bill already permits the negligent conduct of an inspector employed by a particular body to be aggregated with the acts of other employees of that body (including the Crown), because they are employees of the body, so that recommendations on that matter are not required.

3.67 However the Bill may not apply in all situations when inspectors are killed or injured. If an inspector is killed or seriously injured as a result of the gross negligence of the organisation that employs him or her, the Bill applies. If the Bill applies to the Crown, the Crown could be liable if a person employed by one government agency was killed or injured while inspecting another agency or office. Because the definition of 'worker' includes an employee of the Crown, a private body corporate will also be liable if an inspector who is employed by the Crown is killed while undertaking an inspection of private premises.

3.68 However there may be some situations where the death or injury of a person carrying out an inspection under powers conferred by legislation (for example a council building inspector) is not an employee or agent of the Crown. If a building inspector[167] was injured or killed as the result of the gross

161 *Conservation, Forests and Lands Act 1987* s 83. Authorised officers under the *Conservation, Forests and Lands Act 1987* are also authorised officers for the purposes of the *Fisheries Act 1995*.

162 Police officers 'must assist an authorised officer at the request of that officer in the execution of his or her functions': *Conservation, Forests and Lands Act 1987* s 85.

163 WorkCover field officers can be appointed by the Victorian WorkCover Authority under the *Accident Compensation Act 1985* ss 22, 23.

164 A full-time officer of the Royal Society for the Prevention of Cruelty to Animals may be an inspector under the *Prevention of Cruelty to Animals Act 1986* s 18.

165 For example, the *Building Act 1993* authorises private building surveyors to act in a capacity of a municipal building surveyor or authorised building surveyor.

166 Under the *Transport Act 1983* employees of the passenger transport companies have powers of inspection and in certain circumstances the detention of offenders.

167 Acting under the *Building Act 1993*.

negligence of a development company, the Bill does not make the development company liable.[168] Similarly, a body corporate (including the Crown) whose gross negligence resulted in the death or serious injury of an RSPCA (Royal Society for the Protection of Cruelty to Animals) inspector could not be prosecuted because the inspector would not be a Crown employee. This is a consequence of the limited scope of the corporate offences created by the Bill.

3.69 To deal with this situation, the Government may consider it appropriate to include persons carrying out powers of inspection under an Act of Victoria or any other State or Territory within the definition of worker. We have not made a formal recommendation on this matter, because it is outside our terms of reference.

Other Deemed Employees

3.70 There are some other categories of people whose employment status may give rise to difficulties. These include Ministers of the Crown, and Members of Parliament. Section 14 of the *Accident Compensation Act 1985* deems them to be employed 'by or under the Crown' for the purposes of that Act.[169] They will therefore come within the definition of 'worker' in the Bill, and their death or injury could give rise to Crown criminal liability.[170] To avoid any doubts, the Bill should also include ministerial officers (persons employed by Ministers) and the parliamentary adviser to the Leader of the Opposition, within the definition of 'worker'.[171]

Parliamentary Officers

3.71 In Chapter 1 we recommended that the Bill should be amended to ensure that it applies to the Crown. This recommendation will only cover the Parliament of Victoria if it is held to be part of the Crown. On one view, parliament is one of the arms of government and therefore part of the Crown. Other interpretations limit the Crown to the executive arm of government,

168 Arguably these inspectors could be agents (as they would be 'engaged by another agent of the body corporate…to provide services relating to the body corporate) and would therefore come within the definition of 'worker'.

169 Bail justices are also included under that section.

170 Under the *Corrections Act 1986* offenders required to work or take part in a programme of activities are also deemed to be workers employed by the Crown. If offenders are killed or injured as the result of the actions of Crown employees, the Crown could be criminally liable.

171 These are dealt with by Part 8 of the PSMEA. However that Act does not deem them to be employees of the Crown.

leaving parliament outside the umbrella of the Crown. Either way, the Parliament of Victoria would be seen as part of the public sector.

3.72 In terms of its organisational structure, Parliament of Victoria looks more like a separate 'government'. Parliament itself is divided into five departments. Each department has its own appropriation. The employees of Parliament are parliamentary officers who are appointed under the *Parliamentary Officers Act 1975*. They are not public servants employed under the PSMEA.[172] Whether a parliamentary officer is appointed by the President of the Council or the Speaker of the Assembly depends on the department of Parliament in which the officer is employed.[173] As the Parliamentary Officers Act does not allow for the 'employment' of parliamentary officers, the officers are not covered by the Bill as it stands. The Commission therefore considers it necessary to deem the parliamentary officers to be employees for the purposes of the Bill. Members of Parliament, however, do come within the definition of 'workers' because they are treated as employees under the Accident Compensation Act.[174] However, Parliament itself may not be a body corporate.[175]

3.73 There are two options, in the opinion of the Commission, for the inclusion of Parliament of Victoria and parliamentary officers in the proposed Bill. The first is to deem Parliament to be a body corporate. If this was done, then Parliament could be a defendant in a prosecution under the Bill. The conduct of all parliamentary employees could be aggregated and the senior officers could be personally prosecuted for the senior officer offences. Parliament could be criminally liable, if, as a result of the gross negligence of Parliament, an employee was killed or injured.

3.74 The second option is to provide that, for the avoidance of doubt, Parliament is to be regarded as part of the Crown. Under such a provision, the Crown would be the defendant if a parliamentary officer were killed or seriously injured. The conduct of all Crown employees, whether they are parliamentary officers or public servants working in administrative support of Parliament, could be aggregated. However the conduct of members of

172 PSMEA s 6(1)(i).

173 *Parliamentary Officers Act 1975* s 7. Further, the Act differentiates between the 'appointment' of parliamentary officers and the 'employment' of temporary staff.

174 *Accident Compensation Act 1985* s 14. Proposed s 11 of the Bill includes within the definition of worker those people who are deemed to be an employee by an Act of a State, a Territory or the Commonwealth.

175 It is, however, a body politic. The term 'body politic now refers to people constituting a political unit with a government. The prime example is the state or organised society… But body politic was formerly applied beyond the state to other organised groups with a government. For a long time grants of incorporation created a "body corporate and politic" ': H A J Ford, R P Austin and I M Ramsay, above n 2, para 2.050.

parliament could not be aggregated with the conduct of employees, because they would not come within the definition of an employee for the purposes of aggregation. In our view this is an appropriate result.

Court Employees and Judicial Officers

3.75 The Supreme Court, County Court, Magistrates' Court and Children's Court are another part of the public sector which may or may not be part of the Crown. Historically the courts were the King's courts;[176] however, as was discussed above,[177] they 'have been clearly emancipated from Crown control'. The courts are part of the public sector and therefore have to be considered in this Report.

3.76 The courts are not bodies corporate and are therefore not covered by the Bill as it stands. The alternatives are the same as for Parliament. That is, the courts (either individually or as a group) could be deemed to be bodies corporate or could be deemed to be part of the Crown for the purposes of the Bill. For the same reasons as discussed in relation to Parliament, the Commission recommends that the courts be deemed to be part of the Crown for the purposes of the Bill.

3.77 Within the court system, much of the administrative support work is carried out by public servants. If the Crown is the corporate defendant, then, if a public servant, as an employee of the Crown, is killed or injured, his or her employer can be prosecuted. Judges themselves are deemed to be employees of the Crown for the purposes of the *Accident Compensation Act 1985*[178] and, therefore, are covered by the provisions of the Bill if they are killed or injured.

3.78 The other group of employees that form part of the court system are judicial employees such as judges' associates. These employees are covered under Part 9 of the PSMEA (Judicial Employees). That Part is not clear as to whether these employees are employed by the Crown. For the avoidance of doubt, therefore, these employees should be deemed to be employees of the Crown for the purposes of the Bill.

3.79 As was discussed above in terms of the application of the aggregation principle to the conduct of members of unincorporated bodies exercising quasi-judicial functions,[179] it would be inappropriate to apply the principle to

176 J H Baker, *An Introduction to Legal History* (2nd edition, 1979), 15ff.

177 See above n 19.

178 Section 14.

179 See above para 3.47.

the conduct of judges and masters in the exercise of their judicial functions. Some judicial officers exercise these functions independently of the government; their conduct should not be aggregated with the conduct of Crown employees.

! RECOMMENDATIONS

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 should 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

3.80 We have been asked to make recommendations as to the imposition of penalties on public sector entities convicted under the proposed legislation. Under the Bill a private sector corporation is liable to a fine not exceeding 20 000 penalty units[180] for negligently causing serious injury[181] and a fine not exceeding 50 000 penalty units after being found guilty of corporate manslaughter.[182] If the defendant is a body corporate, the penalty provisions as they stand now would apply. However, if the Crown is the defendant, issues as to the payment of the penalty arise.

3.81 If the Crown is to be penalised by the imposition of a fine, administrative arrangements should be put in place to ensure that the agency, office or body corporate representing the Crown, which is responsible for the death or serious injury of the worker, is the agency that pays the fine. This is because the trial court, after a guilty verdict from the jury, will only be able to impose a fine on the named defendant, the Crown. This would also be the case in situations where more than one department is responsible, or where the behaviours of employees are aggregated from a department and a body corporate. That is, the court would still only be able to impose a fine on the Crown itself. In other words, an administrative regime has to be put in place in order to ensure the appropriate department, office or statutory authority pays the fine.

3.82 The Commission understands that the Government already has informal administrative arrangements in place for the payment of compensation or damages by government departments whose acts have resulted in a civil judgment against the Crown.[183] We have been unable to document a formal legislative or administrative basis for these arrangements, which are not included in subordinate legislation. Given the serious nature of criminal proceedings and criminal penalties it would be more appropriate for any administrative arrangements to be formalised.

180 As at 31 January 2002, one penalty unit is $100.

181 Proposed s 14.

182 Proposed s 13.

183 At present, if a writ is served on the Crown, the Rules of the Supreme Court specify that it be served on the Victorian Government Solicitor's Office (rule 6.04). This Office then passes the writ on to the relevant department. If there is a refusal on the part of a department (for example, when two or more departments are involved) then the Attorney-General may decide which department accepts and defends the writ. If the court rules that the department is to pay damages then the department pays them out of an internal departmental fund set up specifically for the purpose of paying compensation and damages. If two or more departments are involved and a question of contribution arises, and no agreement can be reached with regard to the contribution of each department, then the Government Solicitor may act as mediator: Information supplied by James Ruddle, Deputy Victorian Government Solicitor, 4 January 2002.

3.83 The Bill also provides for an additional (or alternative) punishment for corporations that have been found guilty of an offence. The punishment involves the publicising of the offence, the consequences of the offence (including the deaths or serious injuries) and the penalties imposed, either in the general media or in a specific forum, such as the corporation's annual report.[184] This punishment has been made available to the courts in recognition of the importance of a corporation's reputation in the marketplace.[185]

3.84 This penalty would also be appropriate, in principle, in the event that the Crown is found guilty of an offence under the Act. The penalty may have to be modified to reflect the fact that it is a part of the Crown, rather than the Crown as a whole, which contributed to the death or serious injury of the worker. The court could order that the head of the department or administrative office responsible be required to publicise the event and the consequences.

! RECOMMENDATIONS

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.

184 Proposed s 14D.

185 Victoria, *Parliamentary Debates*, above n 1, 1925.

Chapter 4
Application of Senior Officer Offences to Senior Employees

4.1 As well as imposing criminal liability on bodies corporate, the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 imposes criminal liability on 'senior officers'. The terms of reference require the Commission to consider how these offences should apply to public sector employees. This Chapter makes recommendations for imposing personal criminal liability on senior employees of the public sector whose behaviour is caught by the proposed section in the Bill.[186] It begins with a general discussion of the senior officer offence. The discussion then follows a similar approach to Chapter 3. That is, the imposition of the senior officer offences is discussed is terms of the type of body in which the officer is employed. The Chapter also briefly examines the penalties that apply to those convicted of senior officer offences.

Senior Officer Offences

4.2 Under the Bill, senior officers of corporations may be criminally liable in certain situations. The senior officer offences are described in proposed section 14C and one of the requirements is that a 'body corporate' has committed an offence of either corporate manslaughter or negligently causing serious injury. This does not mean that the body corporate must have been found guilty of either offence, or even that the body corporate must have been prosecuted for the offence.[187]

4.3 For the purposes of the Bill, a senior officer 'has the same meaning as "officer" has, in relation to a corporation, in the Corporations Act'.[188] Under section 9 of the *Corporations Act 2001* (Cth), an officer means:

(a) a director or secretary of the corporation; or
(b) a person:
  (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  (ii) who has the capacity to affect significantly the corporation's financial standing; or

186 Proposed s 14C.

187 Proposed s 14C(5).

188 Proposed s 11.

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

(c) a receiver, or receiver and manager, of the property of the corporation; or

(d) an administrator of the corporation; or

(e) an administrator of a deed of company arrangement executed by the corporation; or

(f) a liquidator of the corporation; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

4.4 In addition to office holders such as a director or secretary of the corporation, the definition is intended to cover persons who are responsible for making financial or business decisions or who exercise control over directors.

4.5 The definition from the Corporations Act is not readily transferable to all of the public sector. That is, there are different regimes of control and organisation in many public sector bodies. For some parts of the public sector, there will not be any person who clearly falls within the Corporations Act definition. For example, government departments do not have 'directors' or 'secretaries' in the sense used in the Corporations Act. If an incorporated statutory body is abolished by legislation there will be no receiver or administrator or liquidator. Extension of the legislation to the public sector will require the inclusion of a definition of senior officer which is appropriate for bodies representing the Crown and other public sector bodies.

! RECOMMENDATION

33. That the Bill 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.

4.6 This recommendation is intended to expand the definition of 'senior officer' with respect to public sector entities. It does not negate or replace the definition, or any part of the definition, of senior officer in the Bill as it stands.

WHO ARE SENIOR OFFICERS?

In this section we discuss who should be defined as senior officers for the different types of public sector entities.

Who are Senior Officers of Section 4 Agencies and Section 16 Offices under the *Public Sector Management and Employment Act 1998*?

4.7 Under the Westminster system of government, Ministers of the Crown are responsible to parliament for the administration of their portfolios. This has been expressed judicially in the following terms: '[a] system of responsible ministerial government is a key element in our polity. Executive power is made accountable…to the organs of representative government'.[189]

4.8 Under section 13 of the PSMEA, the department head is responsible to the agency Minister or Ministers for the management of the department and any administrative office existing in relation to the department. Although it is not entirely clear, it seems that individuals with the powers of an agency head under section 16 of the Act are also responsible to the Minister.

4.9 Because Ministers have ultimate responsibility for the conduct of the executive arm of government, we believe that they should be included within the definition of senior officers. However, in recent times it has been recognised that it is impracticable to require Ministers to take day to day responsibility for everything which occurs within their portfolios.[190] In addition, the power to make employment decisions on behalf of the Crown,

189 *Wetzel v District Court (NSW)* (1998) 43 NSWLR 687, 688 (Mason P).

190 Because of the 'complexities of modern bureaucracies…Ministers can not reasonably be expected to supervise the activities of public servants [and] can scarcely be held responsible for the activities of those public servants…Ministers are, however, answerable…for what they can reasonably be expected to answer. Ministers for Education are not expected to resign because somewhere, somehow, a student has managed to fail the year 12 assessment requirements…[But an] inability to exercise direct supervision does not mean non-answerability: the Minister can be held responsible for failure to ensure that there are systems in force to minimise mistakes by subordinates.': Roger Douglas and Melinda Jones, *Administrative Law: Commentary and Materials* (3rd ed, 1999), 25.

under Part 3 of the PSMEA, is conferred on the department head and not on the Minister. Section 15 of the PSMEA provides that an agency head is not subject to direction in relation to the exercise of his or her powers as employer and must act independently. In these circumstances it is difficult to envisage a situation in which a Minister could actually be guilty of an offence under proposed section 14C of the Bill, even if the legislation includes Ministers in the definition of senior officers.

4.10 The department head has responsibility for the management of the department. While the responsibilities of the department head are delegated to other Crown employees, these employees must normally act in accordance with the instructions of the department head. In addition, the department head has overall responsibility for the financial management of the department within its budget.

4.11 The definition of an 'agency' in section 4 of the PSMEA covers 'administrative offices' as well as departments. An administrative office head has the same functions as a department head in relation to the administrative office, although he or she is responsible to the department head for 'the general conduct and the effective, efficient and economical management of the functions and activities of the Administrative Office'.[191] Certain office-holders have the powers of department heads under section 16 of the Act.

4.12 There are obviously differences between the position of senior managers in the public and the private sector. In private sector organisations, senior officers make both financial decisions and policy decisions. In the public sector it is parliament, rather than a board of directors, which is responsible for making budget allocations. The role of a department head, administrative office head or the head of a section 16 office is to manage the agency or office within the boundaries of these externally imposed budgetary constraints. As the result of budgetary decisions made by parliament and of policy decisions made by the government, a department head may have to limit expenditure in one area of departmental activity, in order to have sufficient funds available to expend on an activity which has been given a higher priority by the government. For example, a department head may have to make a choice between upgrading security systems in the department, and spending money on a program which the government regards as a central part of its policy. This is an extreme example, however, it does indicate that department heads have some discretion, albeit not as much as a board of

191 Section 14.

directors in a private corporation, which, if negligently exercised, could materially contribute to the death or serious injury of an employee.[192]

4.13 Some may argue that this lack of budgetary and policy control makes it inappropriate for senior officer offences to apply to senior managers in the public sector. The Commission does not agree. A senior officer cannot be convicted of an offence unless he or she 'contributed materially to the commission of the offence', 'knew that as a consequence of his or her conduct there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or serious injury', and 'having regard to the circumstances known to the senior officer it was unjustifiable to allow the risk to exist'.[193] The budgetary and policy constraints which are imposed on departments and offices could never justify management decisions which knowingly expose employees or workers to the risk of death or serious injury. The management control and responsibilities reposed in agency heads and people with the functions of an agency head justify including them within the definition of senior officers.

4.14 As we have seen, some agency heads are corporations sole. The fact that a person is concurrently a department head and a corporation sole should not prevent her or him being treated as a senior officer of the Crown for the purposes of criminal liability.

4.15 As was discussed above, the Bill should be applicable to the Parliament of Victoria and parliamentary officers.[194] Therefore, the senior officer provisions need to apply as well. As the Commission recommends that Parliament be deemed to be part of the Crown for the purposes of the Bill, our recommendations that the definition of senior officer be extended to department heads can be applied to Parliament. In the *Parliamentary Officers*

192 The High Court has recognised that governmental bodies are subject to 'competing interests'. Justices Gaudron, McHugh and Gummow in *Brodie v Singleton Shire Council* [2001] HCA 29 repeated, with approval, the position of Mahony AP in *Hughes v Hunter Hill Municipal Council* (1992) 29 NSWLR 232 which considered the competing interests in the situation of highway authorities to be 'the cost to the community (or the responsible portion of it) for maintaining highways, the allocation of priorities for expenditure of public moneys, and the interests of individuals in safe use of those highways. To require expenditure sufficient to remove most if not all risks would be too extreme; to abandon citizens to hazardous road conditions also would be unacceptable': [2001] HCA 29, para 59. This balancing of competing interests is integral to the allocation of funds performed by agencies and Cabinet itself. The High Court in *Brodie*, however, was willing to modify longstanding rules to 'require the adoption of higher standards of care for individuals using public facilities notwithstanding that the adoption of them will require the expenditure of additional moneys or the diversion of moneys to those areas of public activity': para 60.

193 Proposed s 14C(1).

194 See above paras 3.71–4.

Act 1975, certain positions are listed as department heads in Parliament.[195] The Commission sees no reason why the recommended expanded definition of senior officer should not include these positions.

! RECOMMENDATION

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.

4.16 People who are executives under Part 3 of the PSMEA may have responsibility for running divisions within a department or administrative office. It may be appropriate for such employees to be designated as senior officers for the purposes of particular programs. Differences in departmental functions and structures make it impossible to designate in advance the areas of departments within which all those executives who should be designated as senior officers may be located.

4.17 It is suggested that this issue be dealt with in two ways. First, the definition of a senior officer of the Crown should include a person who is employed as an executive[196] under Part 3 of the PSMEA, who makes or participates in decision-making that affects the whole or a substantial part of the activities of a department, administrative office or section 16 office. Secondly, the legislation should also permit prosecution of a person who is an executive under Part 3 of the Act, who does not participate in decision-making that affects the whole or substantial part of the body, but who has responsibility for overseeing a distinct program or activity which is separate from the main activities of the agency or office.

4.18 An example of such a senior officer is a person who would be in charge of a unit like the Public Correctional Enterprise (CORE). CORE is part of the Department of Justice. It is headed by a Chief Executive Officer

195 Section 6.

196 Note that under the PSMEA s 21, certain other persons, for example the holders of statutory offices of declared authorities, and the holders of prerogative offices which are declared authorities, are executives for the purposes of Part 3 Division 5. The recommendation does not apply to such persons.

(CEO). The position attracts an employee of the executive level for the purposes of the PSMEA. CORE itself is a body which is separate from the main activities of the Department. The CEO of CORE would, therefore, be held to be a senior officer for the purposes of the legislation.

4.19 An executive with responsibility for a particular program may hold office as a corporation sole. An example is the Director of Housing in the Department of Health and Community Services.[197] This should not prevent that person being a senior officer, for the purposes of the Bill, provided that the other elements of the definition of senior officer are satisfied. The designation of a particular office holder as the senior officer for a particular organisational entity does not preclude anyone else within the organisation from being prosecuted as a senior officer. The individual circumstances of each case will suggest who is the senior officer; it could, in extreme circumstances, be the Minister.

! RECOMMENDATION

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.

197 The Commissioner for Corporate Affairs is also a body corporate: *Companies (Administration) Act 1981*. The Commissioner has few functions remaining given the national reforms in the corporations law in the past decade (one remaining power is as the operational officer for the *Trustees Companies Act 1984*). The responsibilities of the Commissioner are currently carried out by the Director, Consumer and Business Affairs in the Department of Justice.

Who are Senior Officers of Incorporated Public Authorities?

4.20 We have already discussed the position of department heads and executives who are corporations sole. In this section we discuss the position of other bodies corporate falling within the definition of 'public authorities'. These bodies corporate may or may not represent the Crown.

4.21 Because incorporated public authorities may differ from private sector corporations it will often be difficult to apply the existing definition of senior officer to them. We have already recommended that the definition of senior officer should cover an agency head or the head of an office under section 16. However, this does not cover persons who are responsible for financial and policy decisions within incorporated bodies which are established under an Act for a public purpose. Some of these bodies will not have a governing body equivalent to a board of directors or a person equivalent to a secretary. The people with overall responsibility for financial and policy decisions made by the body corporate may be statutory officers appointed by the Minister[198] or the Governor-in-Council, or they may be the directors of the body corporate, or they may be employees or executives. Some of these employees or executives may be employees of the Crown, but this is not the case in all public authorities.[199]

4.22 The legislation creating the body corporate may vest management powers in an individual holding a particular office rather than in a board. If the body corporate has a board, it may have a similar role to the board of a corporation in the private sector or it may have an advisory role, rather than decision-making powers.

198 The Clinical Director of the Victorian Institute of Forensic Mental Health (also known as ForensiCare) is appointed by the Minister under the *Mental Health Act 1986* and is responsible for, among other things, the development and maintenance of the research functions of the Institute: s 117H.

199 The Chief Executive Officer (CEO) of the Victorian Institute of Forensic Mental Health is responsible for: (a) developing the corporate plans for the Institute; (b) ensuring the efficient and effective utilisation of resources by the Institute; (c) service development and planning; and (d) any other functions specified by the Council: *Mental Health Act 1986* s 117I. The CEO is not employed subject to the PSMEA.

EXAMPLES

The Building Commission is a body corporate.[200] The Commission is constituted by a Commissioner[201] who is appointed by the Governor-in-Council on the recommendation of the Minister and is under the direction and control of the Minister.[202] The Commissioner may employ public servants under Part 3 of the PSMEA or may appoint its own employees.[203]

The Victorian Law Reform Commission (VLRC) is a body corporate.[204] The Commission comprises a Chairperson, and such full-time and part-time members as the Governor-in-Council considers necessary to enable the Commission to perform its functions.[205] Its Chief Executive Officer must be employed under Part 3 of the PSMEA.[206] Its employees are also public servants employed under Part 3.[207]

The Victorian Funds Management Corporation (VFMC) is a body corporate.[208] The Corporation is controlled by a Board of Directors,[209] appointed by the Governor-in-Council, having regard to the expertise necessary to carry out its functions.[210] The Chief Executive Officer and any other staff are appointed or engaged by the Board without reference to the PSMEA .[211] The Corporation is a public authority but is not, and is not taken to represent, the Crown.[212]

4.23 In the first example, it appears that the Building Commissioner should come within the definition of senior officer. In the second example, the Chairperson and the CEO should be covered. The part-time Commissioners of the VLRC are involved in making policy

200 *Building Act 1993* s 193.

201 *Building Act 1993* s 194.

202 *Building Act 1993* s 195.

203 *Building Act 1993* s 205.

204 *Victorian Law Reform Commission Act 2000* s 4.

205 *Victorian Law Reform Commission Act 2000* s 7.

206 *Victorian Law Reform Commission Act 2000* s 15(1).

207 *Victorian Law Reform Commission Act 2000* s 15(2).

208 *Victorian Funds Management Corporation Act 1994* s 5.

209 *Victorian Funds Management Corporation Act 1994* s 12.

210 *Victorian Funds Management Corporation Act 1994* s 13(1).

211 *Victorian Funds Management Corporation Act 1994* s 28.

212 *Victorian Funds Management Corporation Act 1994* s 7.

recommendations to government but not in the day to day management of the Commission. They should not be included within the definition of senior officer. In the third example, the structure of the VFMC more closely resembles the structure of a private sector corporation than the other two bodies. Its structure suggests that its board should be potentially liable for the senior officer offences, in the same way that the board of a private sector corporation would be potentially liable.

4.24 The Bill should, therefore, contain a definition of senior officer which is capable of being applied to bodies corporate structured along private sector lines and those which are not. In addition to directors and the secretary of the body (if any) and employees of the body with relevant management responsibility, senior officers should include statutory office holders and executives under Part 3 of the PSMEA who have responsibility for managing the functions or activities of an incorporated body, or who make or participate in making decisions that affect the whole or a substantial part of the functions or activities of the incorporated body. While these persons are likely to be caught by the current definition it may be appropriate to make it clear that it applies in this context.

! RECOMMENDATION

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.

Who are the Senior Officers of Unincorporated Statutory Bodies?

4.25 We have shown that the definition of 'public authorities' includes unincorporated bodies established by or under an Act for a public purpose. In the case of such bodies, there is no body corporate to which corporate liability can apply. We have recommended that where the statutory body carries out functions on behalf of government or is under the control of government, members, employees or agents of the body should be deemed to be employees of the Crown, so that the acts of these members, employees and agents can be aggregated. The provisions of the Bill are rarely likely to be relevant to bodies which exercise advisory or regulatory functions. However, there may be some situations where a member or members of an unincorporated statutory body or staff employed by such a body are responsible for the administration of a program. A worker could be injured or killed because of the negligent administration of such a program. The member of the authority or the staff member may make or participate in making decisions that affect the whole of the activities or functions of the unincorporated statutory body or may have control over a distinct activity or program. Statutory appointees and staff members who have this level of responsibility should be included within the definition of a senior officer. If such a member is a volunteer, however, they are expressly outside the scope of the Bill in terms of the senior officer offences.[213] We do not propose any change to this principle.

! RECOMMENDATION

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.

Delegation

4.26 As was discussed above in Chapter 3, agency heads, some Crown executives and other Crown employees and some office bearers in bodies corporate have the power of delegation. That is, these people have the power to give the power to exercise their functions to other employees, persons or

213 Proposed s 14C(4).

classes of persons. The Bill, as it stands, includes, within the description of the senior officer offences, the requirement that the senior officer be 'organisationally responsible for the conduct, or part of the conduct…in relation to the commission of the offence'. If a 'senior officer' delegates her or his power, they remain responsible for decisions made by the delegate.[214] The Commission considers that it is important that people who have the power of delegation should not be able to absolve themselves of responsibility under the Bill, by delegating all their powers to others.

! RECOMMENDATION

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.

Senior Officer Penalties

4.27 The Bill provides for penalties of a level 6 imprisonment or a level 4 fine (or both) for senior officers found guilty of a senior officer offence in circumstances that involved the death of a worker and penalties of a level 7 imprisonment or a level 5 fine (or both) in circumstances of the serious injury of a worker.[215] The Commission sees no reason why these penalties should not apply to the senior officers in the public sector who have been convicted of the same offences. It will be noted that the Bill does not prevent a fine imposed on a senior officer in the private sector from being paid by the body corporate. However the Commonwealth *Corporations Act 2001* prohibits 'a company'[216] from indemnifying certain liabilities incurred as an officer of the company. Section 199A(2)(c) prevents indemnification for 'a liability that is owed to someone other than the company…and did not arise out of conduct in good faith'. In addition, a company cannot indemnify a person for legal cost incurred in 'defending or resisting criminal proceedings in which the person has been found guilty'.[217] It is not clear whether the prohibition of

214 *Interpretation of Legislation Act 1984* s 42A(c).

215 Level 6 imprisonment has a maximum term of 5 years, level 7 imprisonment has a maximum term of 2 years, a level 4 fine is a penalty of a maximum of 1800 penalty units and a level 5 fine has a maximum of 1200 penalty units: *Sentencing Act 1991* s 109. A penalty unit currently is $100.

216 This is a defined expression: see s 9.

217 *Corporations Act 2001* (Cth) s 199A(3)(c).

indemnification for liability in section 199A(2)(c) applies to criminal penalties, although the section is capable of this interpretation, particularly given the provision relating to legal costs in criminal proceedings.[218] This means that a private sector body corporate may be prevented from indemnifying a senior officer who is convicted and fined under the Bill. This provision may not bind the Crown in right of the State of Victoria. However the Government has expressed the intention that the public and private sectors should be treated in the same way. The Government will need to decide whether fines incurred by senior officers in the public sector should be borne by the offender personally or whether the Government should indemnify them.

218 The case law is inconclusive. There has been little judicial discussion of s 199A or of s 241 of the preceding *Corporations Law*. A body corporate cannot indemnify a person against criminal liability where intent is a requirement of the offence. It is less clear whether indemnity is possible for strict liability offences or offences based on negligent acts: see H A J Ford, R P Austin and I M Ramsay, above n 2, para 8.410.

Chapter 5
Other Reform Issues

5.1 The terms of reference for this Report confine the Commission to making recommendations for applying the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (the Bill) to the public sector. However, work on the Report has exposed a number of deficiencies and anomalies in laws governing the public sector and has highlighted some areas where further reform may be desirable. This Chapter discusses some directions for future law reform that could be the subject of a broader reference to the Commission at some time in the future.

Public Sector Reform

5.2 The concept of the 'public sector' is extremely complex. As was demonstrated in Chapter 2, there is no clear definition of the 'public sector' and there is no universally applicable definition of 'the Crown'. Although there may be good historical reasons for this state of affairs, there is little reason to maintain it.

5.3 Other jurisdictions have recognised the problems associated with a Crown, steeped in British history, being twisted to fit the realities of the modern bureaucracy. The Law Reform Commission of Canada has investigated the 'lack of legal unity' of the federal administration in Canada.[219] In the investigation it focussed, naturally, on the Canadian system and its British heritage. The Law Reform Commission of British Columbia has also done research in the area.[220]

5.4 The relationship between one particular Crown entity and the Victorian Government has been examined recently. Many of the outcomes of the Ministerial Administrative Review into the operations of Victoria Police were specific to the police force.[221] However, one of the studies that was cited

219 Law Reform Commission of Canada, above n 19, 1. The Law Reform Commission of Canada has also produced *Independent Administrative Agencies*, Working Paper 25 (1980), which, while focussing more on the regulation of the administrative agencies also considers the administrative framework as a whole. It has also published *Parliament and Administrative Agencies*, Study Paper (1982) which examined the relationship between the agencies and parliament.

220 *The Legal Position of the Crown*, Report 9 (1972).

221 John Johnson, *Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues (*2001).

has a much wider relevance:

> Our system of government has been adapted from a Westminster system of parliamentary democracy, developed over a long period of time. Constitutional values also evolve over time, with the result that tension may develop between contemporary values and the inherited principles. Where common law principles come into play, the flexibility which they offer is often tempered by their uncertainty.[222]

The relationship between any arm of the Crown and the government or Minister involved reflects the same tension as between contemporary values and the legal principles that have been developed over time.

5.5 The question of the relationship between the executive, parliament and statutory corporations has also been the subject of academic and judicial comment. Finn J, in *Hughes Aircraft Systems International v Airservices Australia* stated:

> I would have to say, though, that the absence of authoritative guidance on the place of statutory corporations in our system of government—and, importantly, on their proper relationship both with Parliament and the Executive—is an abiding difficulty in divining the proper resolution of cases of this variety.[223]

His Honour referred to a number of texts[224] and cases[225] and suggested that these statutory corporations function as the 'fourth arm' of government.

222 University of Melbourne, Centre for Comparative Constitutional Studies, quoted in John Johnson, above n 221, 37.

223 [1997] 558 FCA (30 June 1997).

224 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995); Mark Aronson, 'Ministerial Directions: The Battle of the Prerogatives' (1995) 6 *Public Law Review* 86–8; Stephen Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *Australian Journal of Public Administration* 521; Sir Matthew Hale, *De Portibus Maris* 77 (c.1660); Janet McLean, 'Contracting in the Corporatised and Privatised Environment' (1996) 7 *Public Law Review* 223; Senate Standing Committee on Finance and Government Operations, *Statutory Authorities of the Commonwealth, Fifth Report*, Ch 6 (1982); Michael Taggart, 'Corporatisation, Contracting and the Courts', [1994] *Public Law* 351; Michael Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997).

225 The cases His Honour cited mainly focussed on questions of discretion, that is, the relationship between the entity concerned, the executive and others outside the public sector: *Air India v The Commonwealth* [1977] 1 NSWLR 449; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; *Horta v The Commonwealth of Australia* (1994) 181 CLR 183; *L'Huillier v State of Victoria* [1996] 2 VR 465; *Martselos Services Ltd v Arctic College* (1994) 111 DLR (4th) 65; *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385; *R v East Berkshire Health Authority, Ex parte Walsh* [1985] 1 QB 152; *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84; *Tickner v Chapman* (1995) 57 FCR 451.

Again this suggests the need for greater clarity about the role and legal responsibilities of such bodies.

5.6 As was seen in Chapter 2, there is no way of ascertaining whether or not a specific entity is part of, or represents, the Crown. Yet, many statutes make reference to the Crown.[226] Statutes also make reference to 'public authorities'.[227] If there was a comprehensive, logical framework upon which the executive and its instrumentalities were built, then there would be greater clarity in the operation of the executive and a reduced need for expensive litigation.

5.7 The issue of the extent of the Crown is of specific importance to the recommendations contained in this Report. There are many entities which may or may not be part of, or represent, the Crown, or that may be part of, or represent, the Crown for one purpose but not for others. Problems may arise in prosecutions under the Bill because there is doubt as to whether or not a particular body was part of, or represents, the Crown.

Civil Liability of the Crown

5.8 This Report is solely concerned with criminal liability for the offences created by the Crimes (Workplace Deaths and Serious Injuries) Bill. The *Crown Proceedings Act 1958* regulates civil proceedings against the Crown. The time is overdue for a re-examination of the principles which govern civil proceedings in Victoria. The Crown Proceedings Act, and in particular the sections on proceedings by and against the Crown, have not been substantially amended since proclamation. The 1958 Act is similar to the *Crown Remedies and Liability Act 1928*, so that there has been a considerable amount of time since the Act has been thoroughly reviewed. It would be particularly valuable to formalise the processes by which damages are recovered from the government departments and offices that were responsible for the behaviours that gave rise to the award of damages.

226 Particularly in terms of clauses that bind the Crown. This reference to the Crown may be to 'the Crown' or to 'the Crown not only in right of Victoria but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities'.

227 For example, 'this Act does not bind the Crown in right of the State of Victoria or a public authority'.

5.9 Although civil actions and criminal prosecutions deal with different issues and different standards of proof apply to them, it would be desirable for the same principles governing the selection of the defendant to apply in both contexts. Similarly, the process for apportioning damages awarded on the basis of the negligence of several Crown 'entities' will also be relevant in apportioning fines imposed under the Bill.

Crown Immunities and Liabilities of the Crown

5.10 Law reform bodies in jurisdictions around the world have examined issues relating to crown immunities which have arisen in the context of civil proceedings. Topics covered include the immunities and liabilities of the Crown, the nature of proceedings against the Crown, the presumption of the application of statutes to the Crown and the availability of execution of judgment against the Crown. The reform bodies that have done the work have included the Law Reform Committee of South Australia,[228] the New South Wales Law Reform Commission,[229] the Law Reform Commission of Canada,[230] the Ontario Law Reform Commission[231] and the Alberta Law Reform Institute.[232] The Law Commission of New Zealand has released two publications on the topic in the past five years.[233] The Senate Standing Committee on Constitutional and Legal Affairs has also released a report on the topic.[234]

228 *Proceedings By and Against the Crown*, No 104 (1987). The South Australian Parliament did enact the *Acts Interpretation (Crown Prerogative) Amendment Act 1991* which reversed the presumption of Crown immunity from statute.

229 *Proceedings By and Against the Crown*, Report No 24 (1976).

230 *Statutory Immunities and the Liabilities of the Crown*, Research Paper (1985); *Immunity from Execution*, Study Paper (1987).

231 *Report on the Liability of the Crown* (1989).

232 *The Presumption of Crown Immunity*, Report No 71 (1994).

233 *Crown Liability and Judicial Immunity*, Report 37 (1997) and *To Bind their Kings in Chains*, Study Paper 6 (2000).

234 *The Doctrine of the Shield of the Crown* (1992). Another related area ripe for examination is the royal prerogative: Law Reform Commission of Canada, *Crown Prerogatives: Where Are They Now?*, Research Paper (1983); Herbert Vere Evatt, *The Royal Prerogative*, above n 52, and other publications have focussed more widely on administrative law but which discuss the judicial review prerogatives as well, eg, Law Commission, *Report on Remedies in Administrative Law*, Report No 73 (1976).

5.11 Beyond these reform body reports, the inconsistencies of the current state of Crown immunities have been pointed out by commentators. One writer has highlighted that a 'private sector company contracting with a government may enjoy Crown immunity'.[235] Much of the litigation involved in ascertaining the extent of the Crown relates to statutory corporations trying to claim Crown immunity. It is the lack of clarity in terms of the definition of the Crown and the presumption of Crown immunity from statutes that creates the anomaly where a private sector entity can be deemed to be part of the Crown.

5.12 The growth in the number of government business enterprises has further muddied the line between the Crown and the private sector. The application of the immunities doctrines as they now exist is not straightforward. The Senate Standing Committee on Constitutional and Legal Affairs noted in their Report that there is a need 'to clarify the legal status of Commonwealth and State Government Business Enterprises and statutory authorities'.[236] The use of the various Crown immunities by a large number of bodies detracts from any claim of a 'level playing field'. One of the judges on the Supreme Court of Canada has put it in the following way:

> I have serious doubts that the doctrine of Crown immunity, developed at a time when the role of government was perceived as a very narrow one, was ever intended to protect the Crown when it acted, not in its special role qua Crown, but in competition with other commercial entities in the market place.[237]

5.13 Given the trend toward privatisation and corporatisation in the public sector the special position of the Crown and its liabilities should be investigated. Gibbs CJ has argued that:

> all persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appear that it was the intention of the legislature to confer them.[238]

235 Nick Seddon, 'Crown Immunity and the Unlevel Playing Field' (1998) 5(4) *Agenda* 467, 467. In this article the writer cited the decision in *Woodlands v Permanent Trustee Co Ltd* (1996) 139 ALR 127.

236 Above n 234, 114.

237 *AGT v CRTC* [1989] 2 SCR 225 (Wilson J), cited in Alberta Law Reform Institute, above n 232, 8.

238 *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282, 291. See also Nick Seddon, '*J S McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: The Trade Practices Legislation and Government Immunity' (1998) 26 *Federal Law Review* 401.

5.14 Other issues that arise when examining the extent and liability of the Crown include the possible change to an Australian republic and the liability of the Crown for tortious maladministration.

5.15 If the Crown is to be bound by the Crimes (Workplace Deaths and Serious Injuries) Bill, this is tantamount to the removal of the Crown immunity from prosecution. For the reason of consistency and fairness, it would be appropriate to re-examine all Crown immunities.

COMMONWEALTH–STATE LEGISLATIVE RELATIONS

5.16 This Report has dealt with the application of the proposed Bill to the public sector of Victoria. A substantial part of the Report has dealt specifically with the application of the proposed Bill to the Crown in right of the State of Victoria. The Victorian public sector is not the only public sector in Victoria and the Crown in right of the State of Victoria is not the only aspect of the Crown that has a presence in Victoria.

5.17 As was noted in Chapter 1, the Australian Law Reform Commission has touched on the issue of the application of State and Territory statutes to the Commonwealth.[239] 'Considerable practical difficulties' arise as the result of the High Court's distinction between the capacities of the Crown in right of the Commonwealth and the exercise of those capacities[240] in *Re The Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority*.[241]

239 *The Judicial Power of the Commonwealth*, above n 35, Chapter 28.

240 Mark Gladman, '*Re The Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410: States' Power to Bind the Commonwealth' (1999) 27 *Federal Law Review* 151.

241 (1997) 190 CLR 410.

Corporate Responsibility

5.18 The Bill deals with corporate responsibility for workplace death or injury. It reflects the view that corporations have a social responsibility to avoid injuring or killing their employees. It is not immediately apparent why offences similar to those created by the Bill should not apply where the gross negligence of a corporation as a whole results in the death or serious injury of other people, who are not employed by the company, for example visitors to a site or consumers of a company's products. The extension of the Bill is another issue which could be the subject of a reference to the Commission.[242]

242 The issue of corporate responsibility is current in terms of accounting standards with the collapse of the Enron company in the United States. It has been suggested that one way to protect shareholders, the economy and the wider society from a repeat of the Enron collapse 'would be to take responsibility for audits away from private accounting firms altogether and give it, lock, stock and barrel, to the government': *The Economist*, 9 February 2002, 9.

Appendix 1
Relevant Proposed Sections of the Crimes (Workplace Deaths and Serious Injuries) Bill 2001

PART 2–AMENDMENT OF CRIMES ACT 1958

3. New Subdivision (3) inserted into Division 1 of Part 1

After section 10 of the Crimes Act 1958 insert —

(3) Corporate liability for death or serious injury

11. ***Definitions***

(1) In this Subdivision—

"**agent**" means—

(a) a person (including an independent contractor) engaged by the body corporate to provide services to the body corporate in relation to matters over which the body corporate—

(i) has control; or

(ii) would have had control but for any agreement between the body corporate and the agent to the contrary; or

(b) a person (including an independent contractor) engaged by another agent of the body corporate, or an agent of an agent, to provide services relating to the body corporate to that other agent in relation to matters over which that other agent—

(i) has control; or

(ii) would have had control but for any agreement between the agents to the contrary;

"**conduct**" includes an omission to act;

"**employee**" does not include an independent contractor;

"**industry**" includes—

(a) any trade, manufacture, business, project or occupation in which persons work; or

(b) part of an industry or a number of industries;

"**outworker**" means a person engaged, for someone else's industry, in or about a private residence or other premises that are not necessarily business or commercial premises—-

(a) to pack, process or work on articles or material; or

(b) to carry out clerical work;

"**senior officer**" has the same meaning as "officer" has, in relation to a corporation, in the Corporations Act;

"**serious injury**" has the same meaning as in Subdivision (4);

"**worker**" means—

(a) a senior officer of a body corporate, who is not an employee of the body corporate; or

(b) a person (including an independent contractor) engaged by an employer to provide services to the employer; or

(c) a person (including an independent contractor) engaged by another person on behalf of an employer to provide services relating to the employer to that other person; or

(d) an employee or senior officer of the person first mentioned in paragraph (b) or (c); or

(e) a person who is, or is a member of a class of persons, deemed or declared to be an employee by or under an Act of this or any other State or a Territory or of the Commonwealth; or

(f) an employee of the Crown in right of Victoria or the Crown in any other capacity; or

(g) an outworker; or

(h) an apprentice or trainee.

(2) The death of an employee or a serious injury to an employee is deemed to occur in the course of his or her employment if the death or serious injury occurs in any circumstance referred to in paragraph (a), (b), (c) or (d) of section 83(1) of the **Accident Compensation Act 1985**.

(3) The death of a worker or a serious injury to a worker is deemed to occur in the course of providing services if the death or serious injury occurs in any circumstance referred to in paragraph (a), (b), (c) or (d) of section 83(1) of the **Accident Compensation Act 1985** and those paragraphs apply as if any reference in them to employment included a reference to providing services under a contract or other arrangement.

(4) A reference in this Subdivision to providing services to a person or body includes a reference to performing work for the person or body.

12. ***Subdivision to bind bodies corporate that represent the Crown***

(1) This Subdivision binds any body corporate that represents the Crown if the body corporate is established by or under an Act or is deemed or declared to be a body corporate by or under an Act.

(2) For the avoidance of doubt, it is declared that this Subdivision renders a body corporate of a kind referred to in sub-section (1) liable to be prosecuted and sentenced for an offence against a provision of this Subdivision.

(3) For the avoidance of doubt, it is declared that the Director of Public Prosecutions may, on behalf of the Crown, prosecute a body corporate of a kind referred to in sub-section (1) for an offence against a provision of this Subdivision.

(4) This section does not affect the binding of the Crown by any other provision of this Act.

13. ***Corporate manslaughter***

A body corporate which by negligence kills—

(a) an employee in the course of his or her employment by the body corporate; or

(b) a worker in the course of providing services to, or relating to, the body corporate—

is guilty of the indictable offence of corporate manslaughter and liable to a fine not exceeding 50 000 penalty units.

14. ***Negligently causing serious injury by a body corporate***

A body corporate which by negligence causes serious injury to—

(a) an employee in the course of his or her employment by the body corporate; or

(b) a worker in the course of providing services to, or relating to, the body corporate—

is guilty of an indictable offence and liable to a fine not exceeding 20 000 penalty units.

14A. ***Attribution of certain conduct***

(1) For the purposes of the definition of "agent" in section 11, the conduct of—

(a) an employee of an agent; or

(b) a senior officer of an agent—

acting within the actual scope of their employment, or within their actual authority, must be attributed to the agent.

(2) For the purposes of sections 13 and 14, the conduct of an employee, agent or senior officer of a body corporate acting within the actual scope of their employment, or within their actual authority, must be attributed to the body corporate.

14B. ***Negligence***

(1) For the purposes of section 13, the conduct of a body corporate is negligent if it involves—

(a) such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances; and

(b) such a high risk of death or really serious injury—

that the conduct merits criminal punishment for the offence.

(2) For the purposes of section 14, the conduct of a body corporate is negligent if it involves—

(a) such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances; and

(b) such a high risk of injury—

that the conduct merits criminal punishment for the offence.

(3) In determining whether a body corporate is negligent, the relevant duty of care is that owed by the body corporate to the person killed or seriously injured.

(4) In determining whether a body corporate is negligent, the conduct of the body corporate as a whole must be considered.

(5) For the purposes of sub-section (4)—

(a) subject to paragraph (b), the conduct of any number of the employees, agents or senior officers of the body corporate may be aggregated;

(b) regard may be had to the negligence of any agent in the provision of services but that negligence must not be attributed to the body corporate.

(6) Without limiting this section, negligence of a body corporate may be evidenced by the failure of the body corporate—

(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.

14C. ***Senior officer offences***

(1) If it is proved that a body corporate has committed an offence against section 13 and—-

(a) a senior officer of the body corporate—

(i) was organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate; and

(ii) in performing or failing to perform his or her organisational responsibilities, contributed materially to the commission of the offence by the body corporate; and

(iii) knew that, as a consequence of his or her conduct, there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or really serious injury to a person; and

(b) having regard to the circumstances known to the senior officer, it was unjustifiable to allow the substantial risk referred to in paragraph (a)(iii) to exist—

the senior officer is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum) or a level 4 fine (1800 penalty units maximum) or both.

(2) If it is proved that a body corporate has committed an offence against section 14 and—

(a) a senior officer of the body corporate—

(i) was organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate; and

(ii) in performing or failing to perform his or her organisational responsibilities, contributed materially to the commission of the offence by the body corporate; and

(iii) knew that, as a consequence of his or her conduct, there was a substantial risk that the body corporate would engage in conduct that involved a high risk of serious injury to a person; and

(b) having regard to the circumstances known to the senior officer, it was unjustifiable to allow the substantial risk referred to in paragraph (a)(iii) to exist—

the senior officer is guilty of an indictable offence and liable to level 7 imprisonment (2 years maximum) or a level 5 fine (1200 penalty units maximum) or both.

(3) For the purposes of sub-sections (1)(a)(i) and (2)(a)(i), without limiting the matters that may be considered in determining whether a senior officer of a body corporate is organisationally responsible for the conduct, or part of the conduct, of the body corporate in relation to the commission of the offence by the body corporate, consideration may be given to—

(a) the extent to which the senior officer was in a position to make, or influence the making of, a decision concerning the manner in which the conduct, or part of the conduct, was performed; and

(b) the participation of the senior officer in a decision of the board of directors of the body corporate concerning the manner in which the conduct, or that part of the conduct, was performed; and

(c) the degree of participation of the senior officer in the management of the body corporate.

(4) In this section "**senior officer**" does not include a senior officer who acts as such without any fee, gain or reward or the expectation of any fee, gain or reward.

(5) A senior officer of a body corporate may be prosecuted for an offence against sub-section (1) or (2), whether or not the body corporate has been prosecuted for or convicted or found guilty of an offence against section 13 or 14, as the case may be.

(6) To avoid doubt, an offence against sub-section (1) or (2) is not an offence to which section 53(1) of the **Magistrates' Court Act 1989** applies (indictable offences triable summarily).

14D. *Court may order offenders to take specified actions*

(1) This section applies if a court finds a body corporate guilty of an offence against a provision of this Subdivision.

(2) In addition to or instead of any other penalty the court may impose on the body corporate, the court may order the body corporate to do one or more of the following—

(a) to take any action specified by the court to publicise (for example, to advertise on television or in daily newspapers)—

(i) the offence; and

(ii) any deaths or serious injuries or other consequences arising or resulting from the offence; and

(iii) any penalties imposed, or other orders made, as a result of the commission of the offence;

(b) to take any action specified by the court to notify one or more specified persons or classes of persons of the matters referred to in paragraph (a)(for example, to publish a notice in an annual report or to distribute a notice to shareholders of the body corporate);

(c) to perform specified acts or establish or carry out a specified project for the public benefit (for example, to develop and operate a community service) even if the project is unrelated to the offence.

(3) In making the order, the court may specify a period within which the action must be taken, the act must be performed or the project must be established or carried out and may also impose any other requirement that it considers necessary or expedient for enforcement of the order or to make the order effective.

(4) The total cost to the body corporate of compliance with an order or orders under sub-section (2) must not exceed—

(a) in the case of a body corporate found guilty of corporate manslaughter, $5 000 000; and

(b) in the case of a body corporate found guilty of negligently causing serious injury, $2 000 000.

(5) If the court decides to make an order under sub-section (2), it must, in determining the type of order, take into account, as far as practicable, the financial circumstances of the body corporate and the nature of the burden that compliance with the order will impose.

(6) The court is not prevented from making an order under sub-section (2) only because it has been unable to find out the financial circumstances of the body corporate.

(7) If a body corporate fails, without reasonable excuse, to comply with an order under subsection (2)(a) or (b) within the specified period, if any, the court may, on application by the Victorian WorkCover Authority established under the **Accident Compensation Act 1985**, by order authorise that Authority—

(a) to do anything that is necessary or expedient to carry out any action that remains to be done under the order and that it is still practicable to do; and

(b) to publicise the failure of the body corporate to comply with the order.

(8) If the court makes an order under sub-section (7), the Victorian WorkCover Authority must comply with the order.

(9) Nothing in sub-section (7) prevents contempt of court proceedings from being started or continued against a body corporate which has failed to comply with an order under this section.

(10) The Victorian WorkCover Authority may recover any costs it incurs in complying with an order under sub-section (7) as a debt due and payable by the body corporate against which the order was made.

14E. ***Liability of body corporate for other offences***

Nothing in this Subdivision prevents a body corporate being prosecuted for manslaughter or any other offence.

14F. ***Territorial nexus for offences***

It is immaterial that some of the conduct constituting an offence against this Subdivision occurred outside Victoria, so long as the death or serious injury occurred in Victoria.

Appendix 2
Bodies Subject to the *Public Sector Management and Employment Act 1998*

The list is taken from the *2001 Annual Report* of the Commissioner for Public Employment. As such, it is neither a complete list of the entities that make up the public sector, nor is it current. The list reflects the state of bodies that are subject to the *Public Sector Management and Employment Act 1998* at the end of the financial year 2000–01.

The list shows entities being linked to a single department only. Some entities, however, are the responsibility of two departments, for example, the Melbourne Port Corporation and the Victorian Channels Authority are the shared responsibility of the Department of Infrastructure and the Department of Treasury and Finance (Department of Infrastructure, *Annual Report 2000–2001*).

Some lists that detail the public sector have particular bodies being part of a department different to the one listed here, for example, the Docklands Authority is listed under the Department of Infrastructure on this list but the *Docklands Authority Act 1991* is listed as the responsibility for the Minister for Major Projects and Tourism in the Department of State and Regional Development, *Annual Report 2000/2001*.

If there are no entries with respect to the Crown against a particular entity then the statutes are silent as to the relationship between the entity and the Crown.

Legend

CL	the links to the Crown have been established in case law (this category is not exhaustive)
Dept	The entity is a government department
N	No
s 11	The entity is an administrative office under s 11 of the *Public Sector Management and Employment Act 1998*
s 16	The entity is an office under s 16 of the *Public Sector Management and Employment Act 1998*
St	The links to the Crown are specified by statute
Y	Yes

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & Control of Minister?
Department of Education, Employment and Training				
Adult Multicultural Education Service	Y			
Bendigo Regional Institute of TAFE	Y			
Box Hill Institute of TAFE	Y			
Central Gippsland Institute of TAFE	Y			
Chisholm Institute of TAFE	Y			
Centre for Adult Education	Y			
Deakin University	Y			
Department of Education, Employment & Training	N		Y - Dept	
East Gippsland Institute of TAFE	Y			
Gordon Institute of TAFE	Y			
Goulburn Ovens Institute of TAFE	Y			
Holmesglen Institute of TAFE	Y			
Kangan Batman Institute of TAFE	Y			
Latrobe University	Y			
Monash University	Y			
Northern Melbourne Institute of TAFE	Y			
Royal Melbourne Institute of Technology	Y			
South West Institute of TAFE	Y			
Sunraysia Institute of TAFE	Y			
Swinburne University of Technology	Y			
University of Ballarat	Y			
University of Melbourne	Y			
Victoria University of Technology	Y			
Victorian College of the Arts	Y			
William Angliss Institute of TAFE	Y			
Wodonga Institute of TAFE	Y			
Department of Human Services				
Alexandra and District Ambulance Service	Y			
Alexandra District Hospital	Y	N-St		
Alpine Health	Y	N-St		
Anderson's Creek Cemetery Trust	Y			
Anti-Cancer Council	Y			
Austin and Repatriation Medical Centre	Y	N-St		
Bairnsdale Regional Health Service	Y	N-St		

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister?
Ballarat General Cemeteries Trust	Y			
Ballarat Health Services	Y	N-St		
Barwon Health	Y	N-St		
Bayside Health	Y	N-St		
Beaufort and Skipton Health Service	Y	N-St		
Beechworth Hospital	Y	N-St		
Benalla & District Memorial Hospital	Y	N-St		
Bendigo Cemetery Trust	Y			
Bendigo Health Care Group	Y	N-St		
Boort District Hospital	Y	N-St		
Casterton Memorial Hospital	Y	N-St		
Central Gippsland Health Service	Y	N-St		
Cheltenham & Regional Cemeteries Trust	Y			
Chiropractors Registration Board	Y			
Cobram District Hospital	Y	N-St		
Cohuna District Hospital	Y	N-St		
Colac Community Health Services	Y	N-St		
Coleraine and District Hospital	Y	N-St		
Dental Health Services Victoria	Y	N-St		
Dental Practice Board of Victoria	Y			
Department of Human Services	N		Y - Dept	
Djerriwarrh Health Services	Y	N-St		
Dunmunkle Health Services	Y	N-St		
East Grampians Health Service	Y	N-St		
East Wimmera Health Service	Y	N-St		
Eastern Health	Y	N-St		
Echuca Regional Health	Y	N-St		
Edenhope and District Memorial Hospital	Y	N-St		
Far East Gippsland Health and Support Service	Y	N-St		
Fawkner Crematorium and Memorial Park	Y			
ForensiCare	Y			
Geelong Cemeteries Trust	Y			
Gippsland Southern Health Service	Y	N-St		
Goulburn Valley Health	Y	N-St		
Hepburn Health Service	Y	N-St		
Hesse Rural Health Service	Y	N-St		
Heywood and District Memorial Hospital	Y	N-St		
Infertility Treatment Authority	Y			

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister?
Inglewood and District Health Service	Y	N-St		
Kerang and District Hospital	Y	N-St		
Kilmore and District Hospital	Y	N-St		
Kooweerup Regional Health Service	Y	N-St		
Kyabram and District Memorial Community Hospital	Y	N-St		
Kyneton District Health Service	Y	N-St		
Latrobe Regional Hospital	Y	N-St		
Lilydale Memorial Park and Cemetery	Y	N-St		
Maldon Hospital and Community Care	N			
Mallee Track Health and Community Services	Y	N-St		
Manangatang and District Hospital	Y	N-St		
Mansfield District Hospital	Y	N-St		
Maryborough District Health Service	Y	N-St		
McIvor Health and Community Services	Y	N-St		
Medical Practitioners Board	Y			
Melbourne Health	Y	N-St		
Memorial Park Cemetery Trust	Y			
Metropolitan Ambulance Service	Y			
Moyne Health Services	Y	N-St		
Mt Alexander Hospital	Y	N-St		
Nathalia District Hospital	Y	N-St		
Necropolis Springvale	Y			
Northern Health	Y	N-St		
Numurkah District Health Service	Y	N-St		
Nurses Board of Victoria	Y			
Omeo District Hospital	Y	N-St		
Otway Health & Community Services	Y	N-St		
Peninsula Health	Y	N-St		
Peter MacCallum Cancer Institute	Y	N-St		
Pharmacy Board of Victoria	N			
Portland and District Hospital	Y	N-St		
Prince Henry's Institute of Medical Research	Y			
Psychologists Registration Board of Victoria	Y			
Queen Elizabeth Centre	Y	N-St		
Robinvale District Health Services	Y	N-St		
Rochester and Elmore District Health Service	Y	N-St		
Royal Victorian Eye and Ear Hospital	Y	N-St		

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister
Rural Ambulance Victoria	Y			
Rural Northwest Health	Y	N-St		
Seymour District Memorial Hospital	Y	N-St		
South Gippsland Hospital	Y	N-St		
South West Healthcare	Y	N-St		
Southern Health Care Network	Y	N-St		
St Georges Health	Y	N		
Stawell Hospital	Y	N-St		
Swan Hill District Hospital	Y	N-St		
Tallangatta Hospital	Y	N-St		
Templestowe Cemetery Trust	Y			
Terang and Mortlake Health Service	Y	N-St		
Timboon and District Health Care Service	Y	N-St		
Tweddle Child and Family Health Service	Y	N-St		
Upper Murray Health and Community Services	Y	N-St		
Victorian Health Promotion Foundation	Y			
Wangaratta District Base Hospital	Y	N-St		
West Gippsland Health Care Group	Y	N-St		
West Wimmera Health Service	Y	N-St		
Western District Health Service	Y	N-St		
Western Health	Y	N-St		
Wimmera Health Care Group	Y	N-St		
Wodonga Regional Health Service	Y	N-St		
Women's and Children's Health	Y	N-St		
Wonthaggi and District Hospital	Y	N-St		
Yarram and District Health Service	Y	N-St		
Yea and District Memorial Hospital	Y	N-St		
Department of Infrastructure				
Architects Registration Board of Victoria	Y			
Building Control Commission	Y			Y-St
Department of Infrastructure	N		Y - Dept	
Docklands Authority[1]	Y	Y-St		

1 The statute that creates the Docklands Authority (*Docklands Authority Act 1991*) as a body corporate specifies certain circumstances where the Authority represents the Crown: s 6(3)(b).

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister
Marine Board of Victoria[2]	Y			
Melbourne City Link Authority	Y	Y-St		
Plumbing Industry Commission	Y			
Public Transport Corporation	Y			
Urban Land Corporation	Y	N-St		
VicRoads	Y	Y-CL[3]		
Department of Justice				
Country Fire Authority	Y			Y-St
Department of Justice	N		Y - Dept	
Legal Ombudsman	N		s16[4]	
Legal Practice Board	Y	N-St		
Metropolitan Fire and Emergency Services Board	Y			Y-St
Office of Chief Commissioner of Police	N		Y - s16	
Office of Public Prosecutions	N		Y - s16	
Victoria Legal Aid	Y	N-St		
Victorian Electoral Commission	N		Y - s16	
Victorian Government Solicitor	N		Y - s11	
Victorian Law Reform Commission[5]	Y			
Department of Natural Resources and the Environment				
Barwon Region Water Authority	Y			
Central Gippsland Region Water Authority	Y			
Central Highlands Water	Y			
Coliban Region Water Authority	Y			
Corangamite Catchment Management Authority	Y			
Dairy Food Safety Victoria	Y	N-St		

2 The statute that creates the Marine Board of Victoria (*Marine Act 1988*) is silent as to the relationship with the Crown but specifies that the members of the entity are not personally liable for anything done in good faith and that any liability attaches instead to the Crown (ss 66C, 66D prior to the amendment of the Act by the *Marine (Further Amendment) Act 2001*). It should be noted, however, that the role of the Marine Board has been taken over by the Director of Marine Safety. The immunity from liability of the Director is the same as with the Marine Board.

3 VicRoads (or the Roads Corporation as it used to be called) may represent the Crown for some purposes but not for all: *Roads Corporation v Gerkens* (Unreported, Supreme Court of Victoria, 28 May 1993).

4 It is unclear whether the Legal Ombudsman is part of the Crown, see above n 84.

5 The Victorian Law Reform Commission does not appear in the Commissioner for Public Employment's *2001 Annual Report*, however, the Commission is included in this Appendix for the purposes of completeness.

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister
Department of Natural Resources and Environment	N		Y - Dept	
East Gippsland Catchment Management Authority	Y			
East Gippsland Region Water Authority	Y			
Ecorecycle Victoria	Y	N-St		
Environment Protection Authority	Y	Y-St - s11		
Falls Creek Alpine Resort Management Board	Y	Y-St		
First Mildura Irrigation Trust	Y[6]			
Glenelg Region Water Authority	Y			
Glenelg-Hopkins Catchment Management Authority	Y			
Goulburn Valley Region Water Authority	Y			
Goulburn-Broken Catchment Management Authority	Y			
Goulburn-Murray Rural Water Authority	Y			
Grampians Region Water Authority	Y			
Lake Mountain Alpine Resort Management Board	Y	Y-St		
Least Waste	Y			
Lower Murray Region Water Authority	Y			
Mallee Catchment Management Authority	Y			
Melbourne Market Authority	Y			Y-St
Melbourne Water Corporation	Y	N-St		
Mount Baw Baw Alpine Resort Management Board	Y	Y-St		
Mount Hotham Alpine Resort Management Board	Y	Y-St		
Murray Valley Citrus Marketing Board	Y	N-St		
North Central Catchment Management Authority	Y			
North East Catchment Management Authority	Y			
North East Region Water Authority	Y			
Parks Victoria	Y	N-St		
Portland Coast Region Water Authority	Y			

6 The statute that creates the First Mildura Irrigation Trust (*Mildura Irrigation and Water Trusts Act 1958*) gives the entity a corporate name, perpetual succession and a common seal (s 5(1)), but the entity was not created as a body corporate. It is likely, however, that it would be held to be body corporate: *Chaff and Hay Acquisition Committee v J.A. Hemphill and Sons Ltd* (1947) 74 CLR 375.

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister
Royal Botanic Gardens Board	Y	Y-St		
Shrine of Remembrance Trust	Y			
South Gippsland Region Water Authority	Y			
South West Water Authority	Y			
Southern Rural Water	Y			
Sunraysia Rural Water Authority	Y			
Timber Promotion Council	N			
Trust for Nature	Y			
Veterinary Practitioners Registration Board of Victoria	Y			
Victorian Meat Authority	Y	N-St		
West Gippsland Catchment Management Authority	Y			
Western Region Water Authority	Y			
Westernport Region Water Authority	Y			
Wimmera Catchment Management Authority	Y			
Wimmera-Mallee Rural Water Authority	Y			
Zoological Parks and Gardens Board	Y	Y-St		
Parliament				
Office of the Auditor-General	N		? - s16	
Department of Premier and Cabinet				
Department of Premier and Cabinet	N		Y - Dept	
Geelong Performing Arts Centre Trust	Y			Y-St
Museums Board of Victoria	Y	Y-St		
National Gallery of Victoria	Y	Y-St		
Office of Public Employment	N		Y - s16	
Office of the Chief Parliamentary Counsel	N		Y - s11	
Office of the Governor	N		Y - s11	
Office of the Ombudsman	N		Y - s16	
Queen Victoria Women's Centre Trust	Y			
State Library of Victoria	N			
Victorian Arts Centre Trust	Y	N-CL[7]		Y-St
Victorian Interpreting and Translating Services	Y			

7 See *Re: The Paul Dainty Corp and the National Tennis Centre Trust; the Victorian Arts Centre Trust and Olympic Park Management* (1990) 22 FCR 495.

BODY	Body Corporate?	Represent Crown?	Part of Crown?	Direction & control of Minister
Department of State and Regional Development				
Australian Grand Prix Corporation[8]	Y	N-St		
Cinemedia	Y	Y-St		
Department of State and Regional Development	N		Y - Dept	
Emerald Tourist Railway Board	Y			
Greyhound Racing Control Board	Y			
Harness Racing Board of Victoria	Y			
Melbourne and Olympic Parks Trust	Y			
Melbourne Convention and Exhibition Centre Trust	Y			Y-St
Overseas Projects Corporation of Victoria Ltd	Y			
State Sports Centre Trust	Y	Y-St		
Depatment of Treasury and Finance				
Department of Treasury and Finance	N		Y - Dept	
Emergency Services Superannuation Board	Y			
Government Superannuation Office	Y			
Melbourne Port Corporation	Y	N-St		
Office of Gaming Regulations	Y	Y-St		
Office of Gas Safety	Y			
Office of the Regulator-General	Y	Y-St - s16		
Rural Finance Corporation of Victoria	Y			Y-St
Sustainable Energy Authority	Y			
Transport Accident Commission	Y			Y-St
Treasury Corporation of Victoria	Y	N-St		
Victorian Channels Authority	Y	N-St		
Victorian Energy Networks Corporation (VENCorp)	Y	N-St		
Victorian Funds Management Corporation	Y	N-St		
Victorian Managed Insurance Authority	Y			Y-St
Victorian WorkCover Authority	Y			Y-St

8 The Act that creates the Australian Grand Prix Corporation (*Australian Grand Prix Act 1994*) states that the Corporation does not represent the Crown but holds its property on behalf of the Crown: s 8.

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, sub-committee 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.[1]

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.

1 A somewhat analogous provision is contained in the *Freedom of Information Act 1982* s 5(2).

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.

Bibliography

Administrative Review Council *Government Business Enterprises and Commonwealth Administrative Law*, Report 38 (1995).

Alberta Law Reform Institute *The Presumption of Crown Immunity*, Report 71 (1994).

Aronson, Mark 'Ministerial Directions: The Battle of Prerogatives' (1995) 6 *Public Law Review* 86.

Australian Law Reform Commission *The Judicial Power of the Commonwealth*, Report 92 (2001).

Baker, J H *An Introduction to Legal History* (2nd ed, 1979).

Blackstone's Commentaries (1st ed, 1769).

Bottomley, Stephen 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *Australian Journal of Public Administration* 521.

Brett, Peter *Cases and Materials in Constitutional and Administrative Law* (1962).

Bronitt, Simon and Bernadette McSherry *Principles of Criminal Law* (2001).

Commissioner for Public Employment *2001 Annual Report*.

Department of Infrastructure *Annual Report 2000–2001*.

Department of State and Regional Development *Annual Report 2000/2001*.

Douglas, Roger and Melinda Jones *Administrative Law: Commentary and Materials* (3rd ed, 1999).

Enright, Christopher *Judicial Review of Administrative Action* (1985).

Evatt, Herbert Vere *The Royal Prerogative* (1987).

Fisse, Brent and John Braithwaite *Corporations, Crime and Accountability* (1993).

Ford, H A J, R P Austin and I M Ramsay *Ford's Principles of Corporations Law* (9th ed, 1999).

Friedmann, Wolfgang 'Public Welfare Offences, Statutory Duties and the Legal Status of the Crown' (1950) 13 *Modern Law Review* 24.

Gladman, Mark '*Re The Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410: States' Power to Bind the Commonwealth' (1999) 27 *Federal Law Review* 151.

Goldsworthy, Jeffrey *The Sovereignty of Parliament* (1999).

Hale, Sir Matthew *De Portibus Maris* (c. 1660).

Hanks, Peter *Constitutional Law in Australia* (2nd ed, 1996).

Hogg, Peter and Patrick Monahan *Liability of the Crown* (3rd ed, 2000).

Johnson, John *Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues* (2001).

Law Commission *Report on Remedies in Administrative Law*, Report 73 (1976).

Law Commission of New Zealand

Crown Liability and Judicial Immunity, Report 37 (1997).

To Bind their Kings in Chains, Study Paper 6 (2000).

Law Reform Commission of British Columbia *The Legal Position of the Crown*, Report 9 (1972).

Law Reform Commission of Canada

Independent Administrative Agencies, Working Paper 25 (1980).

Parliament and Administrative Agencies, Study Paper (1982).

Crown Prerogatives: Where are they now?, Research Paper (1983).

Legal Status of the Federal Administration, Working Paper 40 (1985).

Statutory Immunities and the Liabilities of the Crown, Research Paper (1985).

Immunity from Execution, Study Paper (1987).

Law Reform Committee of South Australia *Proceedings By and Against the Crown*, No 104 (1987)

Maitland, Frederic 'The Crown as Corporation' (1901) *Law Quarterly Review* 131.

McLean, Janet 'Contracting in the Corporatised and Privatised Environment' (1996) 7 *Public Law Review* 223.

Moore, Harrison W 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351.

Neal, David 'Corporate Manslaughter' (1996) 70(10) *Law Institute Journal* 39.

New South Wales Law Reform Commission *Proceedings By and Against the Crown*, Report 24 (1976).

Ontario Law Reform Commission *Report on the Liability of the Crown* (1989).

Seddon, Nick

'Crown Immunity and the Unlevel Playing Field' (1998) 5 (4) *Agenda* 467.

'*J S McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: The Trade Practices Legislation and Government Immunity' (1998) 26 *Federal Law Review* 401.

Senate Standing Committee on Constitutional and Legal Affairs *The Doctrine of the Shield of the Crown* (1992).

Senate Standing Committee on Finance and Government Operations *Statutory Authorities of the Commonwealth*, Fifth Report (1982).

Smith, Stanley de and Rodney Brazier *Constitutional and Administrative Law* (8th ed, 1998).

State Coroner's Office (Victoria) *Report of the Investigation and Inquests into a Wildfire and the Deaths of Five Firefighters at Linton on 2 December 1998* (2002).

Stokes, Michael 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127.

Taggart, Michael

'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351.

'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77.

Taylor, Greg 'Commonwealth v Western Australia and the Operation on Federal Systems of the Presumption that Statutes do not Apply to the Crown' (2000) 24 *Melbourne University Law Review* 77.

Williams, Glanville *Criminal Law: the General Part* (2nd ed, 1961).

Zines, Leslie *The High Court and the Constitution* (4th ed, 1997).

Other Publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law: Options for Reform—Information Paper (July 2001)

Sexual Offences: Law and Procedure—Discussion Paper (September 2001) (Outline also available)

Annual Report 2000–01 (October 2001)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper (January 2002)

Disputes Between Co-owners: Report (March 2002)

Chapter 1 (as below but 50% black)
Heading Level 1 (18pt Frutiger Bold)

HEADING LEVEL 2 (13PT ADOBE GARAMOND BOLD — CAPS)

1.1 Body copy is set in Adobe Garamond 12pt/13.5pt leading. There should be 2mm of space after a paragraph return. There is no tracking.

1.2 Glossary Headings and de facto partners often become co-owners of land when they buy a house together. People may also become co-owners of land if they buy a house to live in or for investment purposes, or if they inherit land under a will.

HEADING LEVEL 3 (13PT ADOBE GARAMOND — CAPS)

1.4 Two forms of co-ownership are recognised in Victoria and other parts of Australia. These are the joint tenancy1 and the tenancy in common.2

Sub Heading Level 4 (12pt Frutiger Bold — Small Caps)

1.5 This means that when a joint tenant dies, the property belongs to the joint tenants are seen as sharing the same interest in the property, rather than as having separate interests.

Sub Heading Level 5 (12pt Frutiger — Small Caps)

1.6 It follows that the provisions in the *Transfer of Land Act 1958* relating to the creation of tenancies in common and joint tenancies in Torrens system land have an identical effect to the principles that operate at law and in equity.

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