

**Restorative Justice and Work–Related Death:**  
Consultation Report

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Dr. Derek Brookes

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Derek Brookes asserts his moral right to be identified as the author of this work.

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This Report is dedicated to the interviewees who lost their loved ones, their friends, and their work-colleagues in a work-related death. It is my deepest hope that this work will, in some way, contribute to the shared goal of finding justice and healing.

Derek Brookes  
July 2009



# SECTION A

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## Introduction





## 1. Overview

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This Report is part of a wider project that aims to explore the feasibility of a restorative justice service in the context of work-related deaths in Victoria. This section provides an overview of the Report and the way in which it has developed.

### 1.1 Literature Review

The first part of this project involved a **Literature Review**. This document is available online at the Creative Ministries Network website: [www.cmn.unitingcare.org.au](http://www.cmn.unitingcare.org.au).

The Review consisted of five topics:

1. An introduction to restorative justice;
2. An analysis of fundamental questions and concerns;
3. A survey of potential applications of restorative justice;
4. A possible model or strategy for developing a pilot service; and
5. An outline of the community consultation process.

### 1.2 Working Hypotheses

As the Review concluded, it became clear that at least **three working hypotheses** had emerged. These provided a focus for the kind of questions that would be posed in the consultation process.

#### (1) Who will take responsibility?

The first hypothesis was concerned with the issue of how best to resolve the problem of ‘responsibility’. The Review found that ‘taking personal responsibility for the harm that one’s actions (or failures to act) have caused’ is essential to restorative justice. It became clear that a restorative justice process could not proceed unless one or more individuals were willing to take responsibility for their part in what happened. The problem was that there are many cases of work-related death in which the company is so large, and the causes of the incident so diffuse or obscure, that no personal criminal liability has been (or could be) established. This seemed to throw into question the general applicability of restorative justice in this context.

The Review sought to address this issue by exploring the literature surrounding the concept of ‘responsibility’. We found that those who might be resistant to taking moral responsibility may not be dishonest or in denial. Rather, they could be thinking that it would be inappropriate or mistaken for them to do so, given that they had little if anything to do with what happened on the day, or because they did not deliberately set out to harm anyone. However, this understanding of ‘responsibility’ narrows it down to its most basic or legalistic sense. It assumes that in order to take

responsibility for any harm or wrongdoing, we need to be *entirely* and *directly* responsible for having *deliberately* caused the wrongdoing in question. Yet it seems entirely legitimate, from an ethical point of view, for us to take responsibility for harmful incidents even when we did not *directly* or *deliberately* cause them. We may instead have been only one player in a complex series of decision-making that involved varying degrees of *recklessness* or *negligence* along the way. Again, we may have been nowhere near the incident at the time, but could still have played a role in *creating the conditions in which it could (and was likely to) occur*. It may be that we had an opportunity to prevent what happened, but, for whatever reason, *chose not to do so*. Finally, it may be that, as a director or senior manager, we did all that could be required of us by law. It may also be that the fatality was a result of the unforeseeable mistakes or accidents made by our employees. Nevertheless, the employee's death was a consequence of the company's existence and activities. So if we are willing to accept the rewards of the company's activities, then it is only fair that we also accept some measure of responsibility when things go wrong.

The Review concluded that it should be possible for individuals to 'take responsibility' in the context of a work-related death, regardless of the size of the company, or whether or not personal criminal liability had been or could be imposed. The Review also suggested that employers and employees would have sound psychological and moral grounds for doing so.

However, questions remained: What would employers or employees think about the prospect of 'taking responsibility' in the context of work-related death? Would they be able to distinguish between criminal liability and the more complex or nuanced types of moral responsibility mentioned above? Would they present barriers and concerns that we had not identified or adequately taken into account? These questions became a key part of the subsequent consultation process.

## **(2) What are the distinctive benefits of restorative justice?**

The second working hypothesis related to the question of whether restorative justice might have a legitimate, distinctive and beneficial role to play in the aftermath of a work-related death. This was particularly important, given the desire not to duplicate, conflict with or confuse the range of services that are currently available. After exploring the various accounts of restorative justice, the Review found that there were a number of distinctive benefits that restorative justice could bring in this context. Moreover, it seemed that restorative justice need not duplicate, replace or compete with existing processes and services. It could instead serve to complement and add value to resources that are currently available.

Again, this hypothesis needed testing. For example, we needed to know whether bereaved families were indeed expressing the kind of needs that a restorative justice service could meet. Were these needs already being met in other ways? Would stakeholders tell us that their restorative needs were insignificant or secondary when compared to a range of other more basic needs that were still not being adequately met?

### (3) How should restorative justice relate to the legal system?

The third hypothesis that emerged concerned the question of how a restorative justice service should be situated vis-à-vis the legal process.

- Should restorative justice become integrated into the legal system? For example, should it be used as a diversion from prosecution? Should participation be taken into account in sentencing, perhaps resulting in a sentence discount? Should the traditional penalty of a fine be replaced by a 'restorative sanction'?

Alternatively:

- Should restorative justice operate independently of the legal system? Should the outcomes of restorative justice have no bearing on prosecution or sentencing? For example, could it attend to some of the restorative needs of those involved alongside the legal process, but only insofar as it did not influence the legal process? Again, should restorative justice meetings be held only once the legal process had been concluded?

The Review approached this question by first presenting all of the available options, as identified in the literature. After some discussion with the Reference Group, it became clear that the resolution to these questions was, in part, a pragmatic matter: a restorative justice service would need to be situated so as to maximise the likelihood that it would be accepted and used by relevant stakeholders. The working hypothesis that emerged was that an extra-legal approach should be pursued initially, but the option left open that a more integrated model might develop over time (assuming various theoretical and practical obstacles to integration could be overcome). However, once again, we needed to find out how this view might be received by those who had been involved in or affected by work-related death. Hence, this became the third key question for the consultation process.

## 1.3 Objectives

The aim of this Consultation Report is thus threefold:

- To present the responses that we received in the consultation process.
- To identify the views of individuals, drawn from key stakeholder groups, on three working hypotheses above.
- To make a set of recommendations, based on the findings of this research project, for the use of restorative justice as a means of addressing the harm caused by work-related deaths.

## 2. Methodology

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### 2.1 Summary

There were three main **objectives** to the consultation process:

1. To test whether relevant stakeholder groups were expressing the kind of needs that a restorative justice service would have the capacity to meet;
2. To ensure that their objections or concerns were heard and taken seriously;
3. To ensure that any proposal for a restorative justice service would be accepted as the most realistic, beneficial and appealing to the widest possible range of stakeholders.

The consultation involved the following types and numbers of **consultees**:

Stakeholder Groups	Individuals
1. Bereaved Families (i.e. spouse, partner, parent, sibling)	14
2. Companies (i.e. CEO, director, manager, other employee)	3
3. Investigators and Prosecuting Lawyers	2
4. Criminal Defence Lawyers and Compensation	2
5. Coroner's Service	2
6. Unions	2
7. Roundtable Members	16
<b>TOTAL:</b>	41

The **consultation process** involved a series of semi-structured interviews and one round table. An interview schedule was created to ensure that the interviews focused on testing the three working hypothesis mentioned in the Overview.

### 2.2 Interview Model

The interviews that were conducted in the consultation process were based upon a **semi-structured** interview model. This approach was selected for several reasons. First, given the complexity, breadth and sensitivity of the topic, we wanted the kind of rich and detailed responses that a more discursive and narrative approach could offer. Second, to test the hypotheses we needed the kind of detail that can only be obtained through open-ended discussions, rather than by forcing responses into predetermined categories, as in a quantitative approach. The structured interview technique would have been too constrained for this purpose.

Third, as mentioned in the Overview, the *Literature Review* produced a number of working hypotheses and a clear sense of the kind of issues and questions that might arise in this context. Hence, whilst the interviews needed to be open and flexible, we were able to collect data systematically on the research questions that would be comparable as between respondents, even though it was not appropriate for quantitative statistical analysis.<sup>1</sup> For example, a great deal was learned as the interviews progressed. There were many issues and concerns that we encountered in earlier interviews that we were able to draw upon and explore in subsequent interviews. Hence, the particular questions asked within each interview were slightly modified over time.<sup>2</sup> Nevertheless, to ensure consistency, all of the basic questions in the original schedules were asked within each interview, using a similar wording.

### 2.3 Recording and Transcripts

We decided to use the standard method of recording the interviews electronically to ensure accuracy. However, respondents were always given the option not to have their interview recorded, but to have the researcher take notes instead. Only one interviewee selected this option.

The recordings were not fully transcribed. Rather, only those portions that were relevant to the consultation objectives were selected for transcription. Because the interviewees generally focused their attention on the questions presented, this typically involved transcribing approximately 80-90% of each interview. The transcriptions were all typed and edited by the principal researcher.

Each interviewee was given an opportunity to review the transcript of their interview, and to make any amendments as they wished prior to publication. Most interviewees made only minor changes, and these were generally in the interests of readability or accuracy rather than a change of perspective or viewpoint. Hence, all of the transcripts, as published here, have been approved by all the interviewees.

Section 3 of this report presents a summary and analysis of the interviews. This is supported by extracts from the transcripts. References (e.g. '[TA1]') are provided to allow the reader to locate the full transcript from which the extract is taken. These transcripts can be found in a separate document entitled *Restorative Justice and Work-Related Death: Consultation Transcripts*. Publishing the full transcripts is designed to provide readers with a better sense of (a) each interviewee's unique 'voice' and emotional tone, (b) the sequence of their experiences, and (c) the overall logic or coherence of their perspective. It also gives readers a way of testing the analysis presented in the Consultation Report.

Section 7 of the *Consultation Transcripts* document presents the transcriptions of individuals who took part in an actual RJ meeting. This meeting was arranged to address the harm caused by OHS advertising in the aftermath of the fatality. These transcripts are especially interesting and useful as a case study of the potential benefits of RJ in this context.

<sup>1</sup> Cf. Bryman, A. (2001) *Social Research Methods*, Oxford University Press: p. 315

<sup>2</sup> Cf. Beardsworth, A. and Keil, T. (1992) "The vegetarian Option: Varieties, Conversions, Motives and Careers", *Sociological Review*, 40: 253-93: pp. 261-2.

## 2.4 Anonymity

A commitment to preserve the anonymity of interviewees was made at the outset, and so any identifying details have been omitted from the transcripts. This has meant that the report does not present the details of any specific work-related death, as reported by the bereaved families and employers in their interviews. The report also excludes the names of lawyers, insurance companies, investigation agencies, phone companies, media outlets, and so on. It was felt that, to do so, would only serve to distract readers from the main purpose of this report, which is to present and clarify the kind of issues and perspectives that can arise in this context.

## 2.5 Interview Schedule

Prior to commencing the interviews, an Interview Schedule was created. This Schedule consisted of Introductory Comments, Questions and Closing comments.<sup>1</sup>

### (1) Introductory Comments:

The introduction to each interview consisted of the following:<sup>2</sup>

1. Explain the purpose and nature of the study to the respondent(s), telling how or through whom they came to be selected.
2. Assure respondent(s) that they will remain anonymous in any written reports growing out of the study, and that their responses will be treated in strictest confidence.
3. Indicate that the respondent(s) may find some of the questions difficult to answer or that they may not be appropriate for their situation. Explain that there are no right or wrong answers, and that we are only interested in their opinions and personal experiences.
4. Indicate that the respondent(s) are perfectly free to interrupt, ask for clarification, criticize a line of questioning, and so on.
5. Tell respondent(s) about your background, training, and interest in the area.
6. Ask permission to tape-record the interview, explaining why you wish to do this. Explain what will happen to the recording and how it will be used.
7. Explain that the respondent will have an opportunity to correct or amend any transcription of their interview prior to publication.

<sup>1</sup> "The *interview schedule* . . . [in semi-structured interviews] will be likely to include the following: introductory comments (probably a verbatim script); list of topic headings and possibly key questions to ask under those headings; set of associated prompts; closing comments." Robson, C. (2002) *Real World Research* 2<sup>nd</sup> ed. Blackwell Publishing: p. 278.

<sup>2</sup> Adapted from Robson, 2002: p. 281.

## (2) Questions

There were two sets of interview questions. One was designed for those directly involved in or affected by a specific work-related death, that is, bereaved families and companies. The other set of questions was developed for agencies or institutions that are associated with the prevention and aftermath of work-related fatalities, that is, investigators, unions, lawyers, and so on. The main difference was that the questions in the first set were focused on specific incident(s), whilst the second were more general.

The interviews were focused primarily on work-related death. But in most cases, the respondents mentioned other incidents that occurred in the aftermath of the fatality, many of which caused them (or others) significant additional harm. In such cases, the questions below were also asked in connection with these incidents.

### *Questions for bereaved families and companies*

The interviews with bereaved families and employers covered four topics: stories, needs, responsibilities and options.

#### 1. Stories

The aim of the first topic was to set the tone and the context for the remaining topics. It provided an opportunity for the respondent to tell their own story or perspective on the incident(s) in which they were involved. This way of initiating the conversation is, incidentally, very similar to the standard means by which dialogue is initiated in any restorative justice process. The questions listed in the schedule were, accordingly, not dissimilar to those found in most procedural guides for restorative justice facilitators:

#### Questions

1. Can you tell us what happened?
2. How were you affected?
3. How do you feel now about what happened?

It was anticipated that some of the subsequent questions would, to a certain extent, be answered in the telling of their story. This was taken into account during the interviews either by omitting the later questions or inviting further elaboration of the initial story.<sup>1</sup>

<sup>1</sup> "Questions that are not included in the guide may be asked as the interviewer picks up things said by interviewees." Robson, 2002: p. 314. "Question wording can be changed and explanations given; particular questions which seem inappropriate with a particular interviewee can be omitted, or additional ones added." Robson, 2002: p. 270.

## 2. Needs

The next three sections focused upon the three working hypotheses. The first hypothesis considered was the question of whether respondents were expressing the kind of needs that restorative justice might be able to meet. It was important that, during this stage of the interview, the initial questions were sufficiently open, rather than focused specifically (or explicitly) upon restorative justice.

### Questions

---

In the aftermath . . .

1. What was done well?
  2. What could things have been done better?
  3. How do you feel now about how people responded to what happened?
- 

Using such open-ended questions allowed respondents to talk about as many issues as were felt to be relevant to their situation. We wanted to ensure that they would feel free to focus on areas that were uppermost in their minds, whether related to restorative justice or not. It was felt that this approach would better enable us to find out if there was a felt need for restorative justice; and if so, how that need fitted into the context of other needs and rated against other priorities.<sup>1</sup>

## 3. Responsibilities

We then considered the issue of whether the respondents felt that people (themselves or others) might be willing to take responsibility for their part in what happened, and any obstacles that they felt might arise in that regard. The questions were slightly modified in accordance with whether we were speaking with a bereaved family or a company.

### Questions

---

1. Do you know who was involved in the events that led up to what happened?
2. Do you know what has happened to them since?
3. Do you know how they feel about their part in what happened?

---

<sup>1</sup> In a semi-structured interview “the emphasis must be on how the interviewee frames and understands issues and events – that is, what the interviewee views as important in explaining and understanding events, patterns, and forms of behaviour.” Robson, 2002: p. 314. See also Bryson’s characterisation of semi-structured interviews: he states that they provide “much greater insight into what the interviewee sees as relevant and important Bryman, 2001: p. 313.



4. If you had a chance to speak with them:
    - What questions would you ask?
    - What would you want to tell them?
    - What would you hope that they would say?
    - Is there anything that you would want them to do?
- 

#### 4. Options

Finally, we asked the interviewees about whether they could see themselves or others participating in restorative justice, and what motives and concerns might be involved. We also asked them where they felt restorative justice might be best situated in relation to the legal process.

##### Questions

---

1. Would a restorative justice process have helped you? In what way?
  2. What would have made it difficult for you to participate in a restorative justice process?
  3. What would have been your concerns?
  4. When might restorative justice have been of most benefit to you?
- 

##### *Questions for Investigators, Lawyers, Coronial Officials, Unions, etc.*

The second set of questions were designed for professionals who work in the area of work-related fatalities, such as OHS investigators, criminal defence lawyers, coronial officials and union representatives. These interviews focused more directly on the working hypotheses mentioned in the Overview, and so were structured around the following three questions:

##### Questions

---

1. Are people likely to take responsibility for their part in what happened?
  2. What would be the distinctive benefits of restorative justice?
  3. Where should restorative justice be situated vis-à-vis the legal process?
-

## 2.6 What can the evidence show?

Given the relatively small sample base available to this consultation, this report cannot provide answers to statistical questions; nor can it be used to make any projections. For example, on the basis of interviewing 14 individual family members, it is not possible to draw any conclusions about the proportion of bereaved families that would be likely to participate in an RJ process if the opportunity were presented to them. Likewise, no inference can be drawn about what most companies are likely to think about RJ on the basis of interviews with only 3 employers.

As we shall see in the following sections, key agencies were *consistently* criticised by the interviewees for the harm that they had caused in the aftermath of a fatality. These agencies deal with hundreds of cases every year; and some agencies have since rectified the policy or procedure that led to the harm in question. So on the one hand, it is hoped that the evidence presented here is taken seriously and, where necessary, acted upon by the relevant agencies. But on the other hand, from a statistical point of view, the sample base is not sufficient to justify any *general* judgments - positive or negative - on the *current* policies or performance of those agencies. What can be legitimately claimed, however, is that this report provides empirical evidence of the kinds of feelings and views that key stakeholders have expressed in relation to the three working hypotheses.

This makes a significant contribution for several reasons:

**First**, it gives us an insight into what it is *possible* for individuals, in this context, to feel or think about restorative justice.

**Second**, this, in turn, enables us to avoid making blanket assumptions about what people, in such circumstances, 'must' be feeling and thinking, or what they would or would not be prepared to do if offered the opportunity to take part in restorative justice.

**Third**, the evidence presented here gives us a sense of the *diversity* of views that are held by key stakeholders, how *strongly felt* those views are and, most importantly, the *reasons* people give for those feelings and views. Understanding the reasoning that lies behind a particular perspective is critical for making the kind of policy or program changes that are most likely to address people's feelings and views.

**Finally**, this Report may provide the basis for developing a *quantitative research project*, should that kind of needs-assessment be considered desirable before a policy decision on the application of restorative justice in this context is made.

## **SECTION B**

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### Consultation



## 1. Bereaved Families

---

### 1.1 The Interviews

As part of this consultation, the researcher interviewed 14 individuals who had suffered the loss of a loved one in a work-related death. These included spouses, partners, parents and siblings of the person who died.

Each bereaved family was very generous with their time, with most interviews running for at least 2 hours. In most cases, the interviews were held with only the researcher and one interviewee present. However, in one case there were three interviewees and in another case there were four. In both of these instances, the interviewees represented two families. (Where there were two or more interviewees present, their respective ‘voices’ are distinguished by the letters ‘A’, ‘B’, ‘C’, etc.).

In two interviews, a grief–support worker also attended, at the request of the family member. Most of the interviews took place in the homes of the families, but three were held in the offices of agencies that support bereaved families.

### 1.2 The Sources of Harm

Before presenting the families’ views on the three working hypotheses, we need to clarify the **nature of the harm** that they experienced. Hence, in this section we will look at what the families reported as being the main **sources** of this harm, and the **types** of harm they experienced.

The bereaved families identified, in total, six sources for the harm that they had experienced. These are listed below, with supporting transcript evidence.

#### 1. The preventable death of their loved one.

- “[H]e was full of life and you just can’t believe it. And it is actually a physical pain . . . I actually remember grabbing my stomach and throwing myself forward, because it hurt.” [TC2]
- “I mean your best friend has just been killed. . . . Your world has just turned, in a phone call. . . . So how I felt initially was like, you know, one dark night of the soul.” [TB2]
- “[W]e only have one chance at life, and we don’t want to lose it at work.” [TE2]
- “Our son was crushed to death at work . . . . It put a big hole in me I’ll tell ya. . . . If [the company] hadn’t have done the wrong thing, [my son] would still be alive. That’s what I say to [my wife] every Sunday we go to the cemetery. I get pee-d off because I’ve got to go there, when I know that I shouldn’t have to go there.” [TF1]
- “[My son] died from suicide related to the bullying. . . . I believe that the bullying was the one thing that, if you took that out of it, he would still be alive.” [TG1]

- “[My husband’s] death has given me such a sense of loss you would not believe. A loss that is so intense I feel numb. . . . I feel so very alone. . . . I miss [my husband] all the time; he is constantly in my thoughts both day and night. I find it very hard to sleep, and constantly walk the floor at night. During the day I try to keep my mind occupied by trying to keep busy. But nothing seems to help . . . . The void in my life becomes so over-bearing sometimes I cannot understand why me.” [TH1]
- “Not following O H & Safety by this employer killed a man that was loved. He had three children. He was married. He was struggling. He’d just built a house. He’d been building it for 15 years, and they were laying the carpet that week. He was just about to get into his house that he had built himself. That was cruel. That was really cruel. . . . His kids: he’s never going to walk his daughters down the aisle. He will never get to know his grandchildren. It’s a life taken away for no good reason.” [T11]

## 2. The way in which it has changed their lives.

### (a) Family relationships

- “[I would want to let the employer] know what it’s done to me, and probably the whole family – how it’s torn our other two children really away from us. It’s like everyone’s blaming one another. . . . [The kids] thought that I was lying to them, keeping things to ourselves [whereas it was really that we were getting the wrong information from the system]. . . . [F]or some reason, everything that goes wrong – the kids seemed to blame me, because I can’t fix it. .” [TF8]
- “It destroyed our family. At the time, my father found out that he had inoperable cancer. That was on the Friday. [My brother] was killed on the Tuesday. It destroyed our family completely. I have a sister that I haven’t spoken to for years. . . . My mother couldn’t handle it. She’s in a home with dementia. She thinks [my brother] is still alive. . . . I have one sister I see, but the whole family split. . . . It all started with this. This was all too much.” [T11]

### (b) Emotions, attitudes, reactions

- “[I]t’s changed my ways, a lot - my personality. I used to be different to who I am now. I’ll probably never get that back. There is a lot of anger. I don’t bring it out like I used to. I withhold things now. I’ve seen the change in [my husband]. He was pretty happy-go-lucky, whereas he’s a very, very angry person now. ” [TF8]
- “**B.** Sometimes I say: ‘Let it go’, and he’ll say: ‘I can’t let it go’. **A.** If [my son] had been drunk in a car, and hit a tree or a lamppost or something like that, I’d have different emotions. But seeing it wasn’t his fault, it was this bloke that’s done this to him – that’s the way I feel. And that’s it.” [TF9]
- “One day, I was walking around the supermarket, and [the man who bullied my son] was coming the other way. I just panicked and burst into tears, and ran out of the supermarket. I decided then that . . . he is never having any more of my head space. . . . [My husband] doesn’t understand how I cannot hate [him]. ‘Why don’t you?’ Because I won’t give him anymore. He’s already taken too much from me. . . . Now I would look at him and tell him: ‘You have no power over me.’ I would be

able to do it now. But that first time, running out of the supermarket, I hated that he did that to me.” [TG4]

- “[My husband] works for [a security company], and carries a gun. . . . He got a call saying ‘can you call into the post office [to make a delivery]. . . . He did, and he went in there. . . . [My husband] stopped, went white as a ghost, shoved the bag to the guy he was working with and said, ‘You do it.’ He went out to the car and didn’t speak to this guy who he worked with for the rest of the trip home . . . . Finally, the guy asked him ‘What’s up your nose?’ He walked in and [the man who bullied our son] was behind the counter at the post office. And [my husband] said, ‘I would have pulled my gun on him if I just didn’t get out of there’. The reaction was five years later. He had a gun on him. This was the first time [my husband] had seen him since before [our son] had died. He was frightened of his own reaction. . . . It was worse because that was his fantasy. He wanted to shoot him. . . . He was put in that position, but he ran out to the car. He just didn’t know what he was going to do with himself.” [TG4]
- “Went up the street to do some shopping. . . . I saw an old lady and gentleman holding hands and felt totally devastated. This is something that we will never be able to now do. Ended up in hysterical tears and went to [see my friend]. I was at [her place] for a long time She explained to me that a lot of things like this are going to happen to me during my time of grief.” [TH1]
- “Somewhere there must be a place in which to rest and regain some sort of average life. Maybe where I can just stop and just smell the flowers. . . . I hope there is somewhere where I can regain some sort of balance and just recharge my batteries before the next roller coaster hits me. I keep telling myself that ‘you are never given something in your life that you are unable to handle’.” [TH3]
- “When I lost him, my whole life changed. I have been through so many emotions that I still find hard even now to come to terms with. Little things like just having to drive to a funeral last week. I just couldn’t bring myself to do it. Not so much the drive there that wouldn’t have worried me, but the drive home on my own for such a long distance. I know my mind wouldn’t have been on what was happening on the road but on what has been happening to me. That would have put other people at risk as well as myself.” [TH4]
- “I know my self-esteem has suffered a lot because of his death and also my self-confidence, and this is something no one can help me with. . . . I miss not having someone here to give an opinion on what else to do or what not to do or even another way in which to do things. Just the ability to be able to discuss anything that is on your mind, on any given day in your normal day-to-day life. I really think this is what I miss most of all.” [TH4]
- “You’ll be driving and you’ve suddenly got tears rolling down. There’s no reason why. . . . It can hit at the most ridiculous times. I can remember the first Christmas after losing [my husband]. I went and bought all the Christmas presents for the staff, and as I went through the checkout, I had bought a shirt for [my husband]. And I picked it up and went: ‘I don’t want that’. Because that was the system you were so used to. And you walk out, carrying your bags, and you’ve got tears rolling down your face. That was seven months later.” [TH27]

- “I’m a different person now. I’m far more cynical and far colder. If I think someone is not telling me the truth, I’ll pursue it to the end. And I’ve never been like that. This has started me off on the whole journey of: ‘I want the truth and don’t bullshit me’.” [TI9]

### (c) Social Isolation

- “A. We were just home-bound. We didn’t want to go and see anybody or anything like that. We started going – well [my wife] is anyway. She’s started going to bingo every now and again. B. But that’s only happened because a very, very good friend of mine has moved to [our town] and she’s been very supportive; and she’s the one that’s got me to go out of the house and do things. But prior to her moving there I wasn’t doing a lot at all.” [TF9]
- “I think the part that is hurting is that I don’t have the comfort of having someone here. . . . Please don’t get me wrong: I have a few friends. But it is not the same. When you go through this alone, there is no one there to comfort you or hold you, or to wipe away your tears. . . . [M]ost people have their own life to lead and may not understand how much having contact with other people actually means to you.” [TH2]
- “I had put a lot of blame on my friends for abandoning me. I know now that that has not been the case. While I have been waiting for something to happen in regards to [my husband], everyone else has just got on with their life.” [TH3]

### (d) Health

- “B. it affected my health a lot. . . . A. I’m not the bloke that speaks out. I just keep everything bottled up inside. . . . That’s why I’m on the depression tablets. That’s another thing: I shouldn’t have to be on them either. . . . I’ve never, ever taken tablets. Never had a tablet for a headache or anything. Yet I’ve got to take these tablets for someone’s stupidity. That’s all it was. It was just stupidity. I hope he suffers for the rest of his life, which I don’t think he will – the same as what we have to. . . . I despise that man.” [TF9]
- “I got sick for a little while after this, because I just couldn’t deal with it. But I got over the immediate pain.” [TI9]

### (e) Employment

- “I gave up my life. I gave up my work. I’ve given up my future to look after my grand-daughter, because [my son] died.” [TG14]
- “My life has not been the same since losing [my husband]. Each time I start to feel good about myself or where I am heading something else kicks me firmly from behind. . . . The part that is really hurting is that I may have to give up my swimming teaching for a short time until I can get everything sorted out. My teaching has always been such an important part of my life.” [TH16]



### 3. The response of the company to the fatality.

- “My family laid flowers between [my husband’s] dying and the funeral at the site, and within an hour security had removed them. The main company that owns the building . . . ordered them to be removed. They didn’t want anyone to know.” [TA1]
- “This was simply an accident waiting to happen, that’s very clear. However, the response to it was fairly calculating. . . . [It] was, I think, an attempt to manage the situation in the most selfish way. And ‘manage’ is a pleasant euphemism for driving everyone else to the wall.” [TB2]
- “The boss was on his phone, I believe to his solicitor, while my brother was dying.” [TI5]

### 4. The behaviour of professionals in the justice system or the system itself.

- “I would like to have seen due process. I would like to see people behaving responsibly and honestly, as most people would. . . . I mean it’s only common humanity.” [TB1]
- “I found that [the social worker] rang me at work . . . and I would just say ‘I can’t talk to you at work’. But she continually rang me at work, because that was her time at work. . . . I didn’t want to bring all that to work with me. I just needed to be able to get away from it. So her bringing that up at work was making me not being able to cope again.” [TD5]
- “[S]omeone should have involved [the employer] a bit more I think. . . . Because once he wasn’t found negligent, he was really shoved out of the picture. . . . There was probably nothing offered to [him], like counselling.” [TD6]
- “I actually had a policeman say to me . . . ‘You can’t put in an impact statement mate, your son was just killed at work’. . . . And I thought, well, how do they know? . . . Immediately in his mind, he was killed at work, so there’s no crime. And that is basically the problem. . . . They do not treat crimes in the workplace as crimes, as very serious crimes. Until that’s addressed, nothing will change. . . . In the 80s . . . they brought in culpable driving charges to put people in jail. That’s what this industry needs.” [TE4]
- “**A.** Well, the first person that hurt me . . . was a detective. [After my son] was killed . . . [the detective] walked into my house with my sister and brother-in-law. They knew before [my wife] and I knew that he was dead. His reason was that he thought we wouldn’t be able to cope with it without having my sister there. **B.** Quite a few family members knew before we did. **A.** It was 20 past 4 in the afternoon when we were told, and he was killed at 19 minutes past 1.” [TF8]
- “We had just lost two of our children. We were filing through the system, no idea what we were doing. . . . I had nobody to support me at all. I guess because it wasn’t an [OHS agency] thing, and we didn’t know about [the grief-support] service. . . . I was all alone. I was by myself. I never had anyone with me the whole time I was doing all this stuff. . . . [I]f I’d had somebody to help me through at

first, with the lawyers, [so that we could have known] that we had a choice. We didn't know that his life insurance could have been paid to his daughter with us as his trustees. If we'd known that, it would still be here. . . . That would be something that she would have of her dad's that she now doesn't have." [TG3]

- "I'm still very angry that the police never turned up [to tell me what happened]. When I eventually did ask about it, I was informed that when they arrived they found I already had family here. Well, how could they know that I had family here? No one turned up. . . . So, it was not a very nice situation." [TH5]
- "His employer was never charged. What do you need to do to an employee before the system makes an employer accountable? If he is not made accountable (after a death) then when? . . . It sends a terrible message to other employers. He needed to know that he did wrong. . . . I think if you don't make people accountable the lessons get harder. He will continue to ignore safety, because he basically gets away with it. When we do this we are just promoting irresponsibility." [TI2]

## 5. Procedures used by agencies/companies/schools to deal with bereavement.

- "[The benefits agency] told me, at 42, I was too young to be a widow. They have this 'widow's payment', but you can't have it because you're too young. . . . I think I said: 'But my husband's died. That makes me a widow. How can you say this?' ... Is it that nobody's allowed to die until after [you are] 65?" [TC4]
- "[The phone company] would let me do everything except cut the phone off, because . . . they wanted [proof of the accident]. . . . It's none of their business ... They have got no right to ask for things like that. If they think that you can go and photocopy something like that and send it to them, they got rocks in their head ... They don't care about you. . . . It [went on for] two years. And it was something that was really eating at me." [TD3]
- "[W]hen I went to change the insurance on the Ute, I got told: 'This is a matter of privacy'. And I said, 'He's dead. What do you mean: his privacy?' . . . [The insurance agency told me I would have to] cancel it and re-issue it for four or five hundred dollars I didn't have. . . . I stood there for an hour or more, while they worked their magic . . . It just seemed so wrong." [TC5]
- "It was an ad, using [the place and situation in which my husband was killed]. I was never informed [by the safety regulator]. . . . I just didn't understand how they could be so thoughtless. Imagine if I was just walking along, and they were just handing them out." [RJ1]
- "[My husband] had an interest-free card, and he had . . . something like 2 or 3 hundred dollars [owing] . . . Now that [finance] company, they put it into the debt collectors – and I got a letter from a debt collector to say they wanted this money . . . It wasn't even overdue. . . . [T]hey should have actually sent out a letter to the estate. But to not even inform you that they are going to put it into the hands of a debt collector. . . was very painful. I wrote this huge letter, but . . . I couldn't send it, because I thought: 'What's the point. They don't care'." [TD3]

- “[My 16 year old daughter had been out of **school** for a week or two after my husband’s death]. She went to her first class, and the teacher said: ‘Where have you been?’ And she said ‘Away’. And – I’m told – got up and walked out of the class.” [TC3]
- “[E]very time [my sister] rang up [**the benefits agency**] she had to explain why she was ringing. It just wasn’t fair. She should have been able to either talk to someone who already knew, or quote a number and they could read it instead of having to go through the whole story every time. So she was speaking for me, but if I had to do it, I just simply wouldn’t have done it. I just would have let it go, and left it at that.” [TD2]
- “Went to [the **benefits agency**] and they have informed me that they have to get their [OHS insurance] department to OK any payments. I have no money coming in just money going out. Thank goodness I have always kept a well-stocked refrigerator and pantry.” [TH6]
- “I rang [the **benefits agency**] to [ask] what I had to do after the bereavement pension finished. I was informed that I was too young to be on the widow’s pension and that I had to get a full time job. . . . [But when I later explained this to my new council worker, she] looked at me as though I was silly and said “but the widow’s pension starts at fifty” and . . . that I was entitled to it.” [TH10]
- “I think [the **benefits agency**] need to have a process where they have someone who is emotionally able to deal with [grief-stricken] people. I spent an hour and a half on the phone trying to find out what happens after the bereavement pension finished. I was transferred, I think there were 10 departments, before someone said ‘Well, you’ve got to go and get a full time job, basically.’ . . . You don’t need that 3 months after losing your husband. . . . Most people, it takes a good 12 months [for] the grieving process to start subsiding slightly.” [TH28]
- “There was so much evidence for him to be charged, that I couldn’t believe they didn’t. . . . [The legal department of **the OHS agency**] made my life so difficult. Every time I tried to get information, they would put blocks in my way - they would make it difficult . . . I just wanted them to tell me why they did not charge him. I thought that was a simple reasonable question.” [TI8]
- “Then the **insurance company** came up with this sort of crap: ‘Oh, he had an unhappy marriage. We think he suicided.’ Bullshit! He was running away, and it hit him in the back of the head! . . . This is the sort of thing they do that torments the minds of the family. They screw with you. They screw with you big time.” [TI10]

## 6. The responses of family, friends, colleagues and the wider public.

- “[T]here were a lot of different stories [about how my husband died, going about the town]. . . I thought: Where the hell are they coming up with this sort of rubbish? . . . Why would you start something like that? Some people are just mean. . . . [I]t was very hurtful.” [TC7]

### 1.3 The Types of Harm

The **primary harm** experienced by the families was the immense loss and grief caused by *the death of their loved one*. However, the interviews were designed to focus more on the experience of the families in *the aftermath of the fatality*. In this respect, they identified a range of **additional harms** that they had suffered. The majority of these harms, as illustrated in the extracts below, can be classified under the general heading of **disrespect**. That is to say: the bereaved families felt that that they had experienced a range of behaviours and attitudes that failed, in one way or another, to acknowledge their intrinsic dignity and worth as human beings.

#### 1. Insensitivity

- “They refer to you in a very – it’s not an inhumane way – but it’s an insensitive way [the OHS investigators] refer to you in reports.” [TB1]
- “There was . . . nothing nice about it at all, the way [the Security officers] went about it. There’s just no respect there at all.” [TA1]
- “[A]fter he was killed, we went up to the shed where he was killed in. [Our children and] two or three people went up there . . . and took a couple of photos of him and put them up there on the post. And a few days later, one of my other nephews found the photos ripped up and thrown in a rubbish bin.” [TF5]
- “Went to [the benefits agency] today. . . . [A] council worker . . . asked me about the superannuation. I informed her nothing had come through yet. Her reaction was: ‘Why not? That is why we give you three months to get it all cleared up’. I said it was all in the hands of the solicitor. How do you explain a tone of voice when you are already at a loss? Cried when I got to work and ended up not doing my shift.” [From interviewee’s journal: TH12]
- “[The OHS agency’s legal counsel] sent me all this stuff about my brother by courier at Christmas. I thought that was mean, sending me the video of them putting him in the ambulance, the autopsy report. That was just *mean*. How cruel.” [TI9]

#### 2. Lack of compassion

- “My family laid flowers . . . at the site [where my husband died], and within an hour security had removed them. . . . I’m still angry with it, really. I think about it on and off. I just can’t believe people can have absolutely no human compassion at all”. [TA1]
- “[After my husband’s death] work was the only thing I could do properly. . . . [But the social worker] rang me at work quite a few times. And I just said, Look I can’t talk. I’m at work. But she would keep going . . . because it wasn’t practical for her to talk at another time. . . . They should have more compassion.” [TD5]

### 3. Little understanding of the grief process

- “I suppose I just want people to understand. But of course they don’t. . . . They’ve got no idea . . .” [TC6]
- “Anyone that is bereaved like that, they’ve never experienced it before. They’re in emotional shock. They really need the support of someone who is compassionate. . . . [T]hey don’t understand what they’re putting [you] through. . . . But you can’t make people go through it to understand.” [TD1]

### 4. Professional incompetence

- “[What I wanted was] a competent and proper inquiry, some sort of objective analysis . . . There’s a sense of incompetence, and distractedness about the people involved in the investigation; and it undermines faith in the authorities.” [TB1]
- “**B.** In one day, we had [five] phone calls [each of which gave us contradictory information about whether or not the court was going to sit on a certain day]. . . . I felt like my head was a bouncing ball. Like they were bouncing it: ‘Yes we are’, ‘No we’re not’. My head was just so clogged. I didn’t know what was going on. . . . **A.** I rang [the grief-support worker] and I just said: ‘I’m sick of this’. I had a rope in the shed, ready to hang myself and everything. I just wanted it over and done with. That’s all we wanted, just to finish it. . . . **B.** If they can’t give you a time or a date, don’t give it. . . . [D]on’t mislead us. You want something concrete. You’re going through enough and you’re dealing with enough.” [TF3]
- “**A.** [When we did go to the court] they told us that our impact statements would not be read. . . . [But] then the barrister read them all out. . . . **B.** [So our children] walked in after the impact statements were read out. . . . I felt really, really bad. It’s like they felt we were trying to keep everything from them . . .” [TF3]
- [From the interviewee’s journal:] “We have not gotten any closer than we were before with the coroner’s inquest. . . . We are now two and a half years along since [my husband] was killed and [the OHS agency] has still not assembled their statements. How long is it supposed to take? [TH17] [From the interview:] [It’s now been 7 years since my husband died]. I have just [rung the Coroners court] and been informed that they are waiting to see if [the employer] is going to put in an appeal against the court decision. . . . I was also informed they are waiting for [the OHS agency] to send their paper work. Once again I am still waiting. Will this never end?” [TH26]
- “I could not understand why it had taken so long to eventually go to court. I believed that a lot of blame could be put down to [the investigator] going on sick leave for 7 to 8 months . . . [D]uring the time that he was off why didn’t another investigator look at the case file to continue the work that should have been still going on? . . . . I should now be going through the healing time - not trying to come terms with this new setback. . . . When you are already feeling vulnerable and get treated that way you believe the world has not only come to an end but everyone and everything is also against you as well.” [TH22]

- “When the legal barrister for [the OHS agency] appeared at the hearing he did not have the documentation he was supposed to have. I came with everything I needed. He had nothing.” [T18]

## 5. Neglect

- “What really annoyed me was that so many people in town knew so much more than I did, before I did. I didn’t think that was right at all. Then I had to – I mean days later – I had to go and see the police and get more information, because they didn’t give me any. They didn’t come and see me or anything like that to actually give me information.” [TC1]
- “It was, right from the start, about needing a manual or something, written in point form about what was going to happen – straight from that first minute. I needed someone right then. Because it was two weeks [before the OHS agency] actually contacted me. . . . And there’s a lot that happened in that two weeks.” [TD1]
- “How can you expect the bereaved one to do all this? There needs [to be] someone as a close support or liaison [they can have] access to. It mightn’t necessarily be [the OHS agency], but it needs to be someone connected to step in and help.” [TD1]
- “**B.** [The OHS investigators] were very good to us from the start. Then we found that they really didn’t want to know us in the end. . . . After court, I think there was one phone call. **A.** I think all they were worried about was just what money they were going to get out of it. . . . They just didn’t care. **B.** They were not worried about us, as parents. . . . They’ve just cut us right off. They became our friends. . . [but we have] not even [had] a phone call to say: ‘How are [you] going?’” [TF2]
- “The court case is about [the OHS agency], not about [our son]. It was about [the OHS agency]. Not about us sitting there listening to everything about our son. We were nothing on that day. We were just people sitting in chairs. . . . They dealt with it, and that was their outcome. We had no say in it.” [TF12]
- “I took [my son’s] sick certificate in for two years to [his work-place] and I handed it over to the desk to the first girl for 12 months and to the second girl for another 12 months. We talked every week. After [my son] died, they walked across the street rather than talk to me. There was no acknowledgement that he’d even died. . . . It’s like: ‘He’s dead. He’s gone. Over.’ I understand that they didn’t know how to speak to me, but a letter in the mail acknowledging his death, anything.” [TG3]

## 6. Minimising the harm done

- “We did speak to the company afterwards . . . Non-event really, as far as the incident was concerned. There was no discussion, very little. In fact, their term was ‘It was just bad luck’. . . . It killed [several] people. Bad luck.” [TE3]
- “The judge will stand up there . . . he will give the company a serve, and we think, ‘you beauty, he’s going to hand down a good sentence’. We are disappointed

every time, because it does not match what he has stated. . . . [In our case, the company was fined] \$45,000. I know it was [many] years ago, but even then it was a pittance. It's . . . a multi-national company, worth \$700 million. They fine them \$45,000. It's about what they'd pay for their Christmas do. So it's a hit in the face . . . an insult to the person killed." [TE4]

- "[T]here was a case in Melbourne being heard . . . [where] they got fined a phenomenal \$300,000. . . . [The social worker told us that] it would have a big bearing on our case. [But we] were just led on once again. . . . [T]he bloke that killed my son was fined \$35,000. . . . **B.** They really led us to believe that it was a very, very, very serious thing; and this man would have to pay for what he had done. But he doesn't have to if he hasn't got the money. . . . **A.** What he got fined was shocking, I thought. I think there should be a jail term for people who do this sort of thing. Let them feel the same as what everybody else is feeling. Because it's not right." [TF4]
- "You don't waste a death. That was one of the things that really outraged me. It wasn't just me that lost a partner. There was a lot of loss, and these people were prepared to just piss this opportunity to learn up against the wall." [TB6]
- "After he died we had someone come from [the OHS agency] to us and explain that they . . . couldn't use [my son's] statement, because he wasn't there to be cross-examined. . . . I argued with the lawyer, 'But what about fining the company for putting him in an unsafe workplace?' And she said, quote: 'It would be a minimal fine. It wouldn't be worth it.' That was just a red rag. That's what [my son] believed for two years, that: 'They believe me [when I say that I was bullied], but I'm not worth it.' So when she said that, that just made me so angry. . . . Even though that man did what he did to [my son] and it was unforgivable, the process [that followed] – 'We believe you, but you're not worth it' – that's what damaged him." [TG2]
- "He was paid \$60,000 to leave the workplace, because he was an embarrassment. That was while [my son] was still alive. . . . He was given a slap across the wrist and told that he'd been a bad person, but that was it. . . . He was the bully, but the fact that they did nothing; the fact that they tried to shut [my son] up with what [he] called 'shut-up money'; they believed him and did nothing about it: that was probably much worse effect on him and all of us, than the actual bullying was." [TG6]
- "The lawyer said to us that the only way you can get anything out of it is if you were mentally and emotionally damaged. And he said: 'Quite frankly, you'd never prove it.' Two of your children just died – didn't affect you at all! What did you need for proof? They had to have 30 points on the American psychiatric scale to prove permanent psychiatric damage. They judge that in an hour interview, in the first couple of months after the person's died. We *are* permanently damaged. . . . I gave up my life. I gave up my work. I've given up my future to look after my grand-daughter, because [my son] died. And it hasn't impacted? . . . And the Kennett government changed the pain and suffering claims, so you can't even claim that. Not that you want the money. You just want that acknowledgement that this *hurts*." [TG14]

- “[T]he legal counsel gave the employer an ‘out’. I’m sure of it. I don’t know why. Even [the OHS] investigators at the time recommended prosecution. But they let him walk. They didn’t even give him a fine. You get more for jay-walking than killing an employee through not following critical safety procedures. Such a waste.” [T18]

## 7. Avoidance of Responsibility

- “They call it the corporate veil. Everyone just hides behind it. That’s very common.” [TE2]
- ‘Well, [the company] have had bad publicity with deaths. So they don’t want any publicity. They don’t want anyone to know that things happen. It’s total avoidance of any responsibility.” [TA1]
- “We always say that a workplace death is a hidden death. They’re hidden. No one wants to know about them.” [TE4]
- “The facts don’t come out either – the lead up to the incident and what actually happened. All that messy stuff they don’t want the public to know about – the messy stuff about their company. So they plead guilty and none of that comes out.” [TE6]
- “I don’t think [the employer would] tell me [the truth in an RJ process]. If he’d lie in his statement, I don’t think he’d tell me [what really happened].” [T16]
- “You’ve got to block it from the legal side, so they can’t hide from their responsibilities . . . I reckon if you go bankrupt after a death or serious injury to avoid responsibility then send the directors responsible to jail. I don’t care who they are. We have got to make them take responsibility . . . The legal system has got to be fixed, so they can’t [find] loopholes and walk away.” [T16]

## 8. Humiliating and Degrading Treatment

- “There’s a nuance of: ‘How dare you question us’. Which can actually blend into: ‘We know what’s best for you’. . . Much of it is nuance, and it tends to be patronising. It tends not to be supportive. In my case it wasn’t.” [TB1]
- “I was just pee-d off at the way we were treated [by the court system]. It’s not right. We’re human beings the same as everyone else, so why should we be treated any different.” [TF3]
- “B. [A.] sent a letter [of complaint] off [to an agency involved in the case] regarding quite a few of the things that had gone on. . . Their response was that they had handled everything in the best way possible. Really nothing that satisfied what you wrote for. A. I might as well have used [the paper I’d written on] for toilet paper, that’s all it was worth as far as [they] were concerned. It didn’t really address any of the issues. . . I’m just appalled at the whole thing, the whole situation. It’s just an absolute disgrace - the way it was handled, the way we were treated. We were treated like mongrel dogs. That’s the way I felt. . . You wouldn’t even treat an animal the way we were treated.” [TF6]



- “The day before [the court case] I had to meet my barrister. He was an absolute mongrel in the way he treated me. I felt humiliated, and was an absolute mess after. I cried on the way home. The only thing that kept me calm was the comforting feeling of [my friend’s] hand on my shoulder. According to [my friend] he placed his hand on my shoulder because he thought I was going to get up and hit the barrister. On reflection now, the only thing I can think of was that he was testing me on how I would have responded if I had been placed in the witness box. But that never occurred to me at the time.” [TH15]

It may be that many of the practical difficulties and obstacles that these families encountered have since been rectified by the agencies involved. However, in case after case, the families remembered each incident vividly and with enduring distress and pain. These events remained unresolved for them. In each case, this was primarily due to the fact that, with rare exception, those concerned had failed to take responsibility for the personal hurt they had caused, however unintentional their actions may have been. They had not fully acknowledged, to the family, the hurt they had caused. They had not apologised in a meaningful way. They had not attempted to make amends. As one family member put it:

- “It was just straight out rude. Like not: ‘We’re sorry for what happened, but you can’t put flowers here’. That would have been ok. If they’d said: ‘We’re really sorry that something happened, and send our condolences.’ But no, not that – just: ‘Get rid of the flowers and don’t come back’. That was their attitude towards it. That just made me so infuriated.” [TA1]

The disrespect shown by this **failure to take responsibility for causing additional harm to the bereaved family** therefore constitutes yet another type of harm experienced by the families.

It must be said that families were usually willing to accept that the additional harms were unlikely to have been intentional or deliberate; and that they were probably caused by underlying fear, misunderstanding, inexperience, a sense of shame, personal trauma over the death, or other personal circumstances. However, the families also expressed the view that ‘to explain is not to excuse’; and that, when mistakes are made, the decent, humane thing to do is to own up to it and try to ‘make things right’, rather than avoid one’s responsibility.

- “I can’t answer why they’re playing at it: probably inadequacy or adolescence. Why don’t you be honest and follow the rules?” [TB4]
- **B.** It was all about [him] . . . what a poor life he’d had. Not what we’d lost - not what we were coping with. It was ‘poor me, poor me, poor me.’ . . . **A.** [He had] lost his house, and all this sort of rubbish. But he still had his life. We’d lost one, you know. . . . I know he might have been suffering too, having a death in his factory. But if he hadn’t of built the stupid thing he built, it wouldn’t have happened. I’ve got no sympathy for him at all. None. No sympathy whatsoever.” [TF4]

## 1.4 Who will take responsibility?

The first working hypothesis of this research project was that it would be possible, at least theoretically, for individuals to take some measure of moral responsibility for a work–place death; and, to that extent, that restorative justice could therefore have a place in this context.

In order to ascertain how the families felt about this hypothesis, they were asked two kinds of questions: (a) who was it whom they felt was in fact responsible; and (b) who, if anyone, would they like to meet in connection with what happened. These questions were designed to elicit their thoughts about who it was that they felt *should* take responsibility for the work-related death; and whether they would be interested in participating in a meeting or restorative justice process, and under what conditions.

From these responses, it was possible to deduce how the families viewed the first working hypothesis. This included whether they considered the notion of individuals taking responsibility in a restorative justice process as only a *theoretical ideal*, or whether they felt that, under the right conditions, it might be a *genuine possibility*.

In the following presentation, the answers families gave to questions (a) and (b) have been merged into one list. This is because the person they wanted to meet was invariably also the one they felt was, in some way, responsible. A second list has been created to present the conditions under which families felt that a restorative justice process might be considered viable.

### *Who needs to take responsibility?*

#### 1. The CEO or the person who heads the company or agency

- “[T]he man I’m thinking of is just a functionary. I want to deal with the ‘head banana’. I want to deal with the people who bore the responsibility but failed in their duty. A bit like the issue of Abu Ghraib. It was known that minor officials were ‘behaving badly’, But they’re not the only people who should bear the responsibility; they’re not the people who are promoting themselves as good, honest, fine upstanding leaders . . . I don’t want to deal with the monkey, I want to deal with the organ–grinder, senior managers.” [TB3]
- “[I]f there’s going to be a meeting between management and the victim’s families, it needs to be . . . someone who matters, someone who can make decisions. It always ends in one person. I want to talk to him – because if I don’t talk to him, I’m not talking to anyone. Because they sit up in their ivory towers and they’re protected. They’ve got no responsibility for [what happens], because [they say] ‘No, I appoint managers for that. I’ve delegated. It’s not my responsibility’.” [TE3]
- “It wasn’t [the OHS agency’s] fault. It wasn’t anyone else’s fault. It was that bloke who owned that shed, and built that crap thing that he built. That’s what killed my son. I’ll despise that man for the rest of my life.” [TF1]

- “I probably don’t blame the person who was working [with our son at the time]. The fact is we all work for bosses, we’re always told to do something. And he was probably given the job to do, even though he probably thought it was wrong – as it’s part of his responsibility. But that’s the way you used to work. You were given a job, and you went and done it – whether it was right or wrong. . . . [So] if I had to [speak to someone, I would] have spoken to the man who was responsible for the shed.” [TF9]
- “The other employee working on the site that day . . . followed the boss’s instruction and he should not feel any guilt. He thought the boss knew what he was doing. Many employees are the meat in the sandwich. They want to keep their job, they have commitments, and they’ve got to do what the boss says. Some owners put supervisors in charge, put pressure on them to perform and take short cuts on safety. It is just not right. If anything goes wrong they blame the employee. Many bosses do anything to avoid responsibility.” [TI3]
- “I wanted them to charge this employer with industrial manslaughter. I didn’t necessarily want him to go to jail. But I wanted him to be charged, because I wanted him to see that you just can’t do it. . . . Obviously, he didn’t want to kill my brother. I understand that. [But he] was actively involved and in control of the work site that day.” [TI5]
- “*So if you had the opportunity to have a restorative justice meeting, who would you want to be there?* I would like to meet the [OHS agency’s] legal counsel responsible for prosecution, particularly [the person who gave the decision not to prosecute on my brother’s death]. [TI6] [I want to meet] someone who can make some decision on the prosecution or not of employers - not someone just to fob me off or some counsellor. I hate people who waste my time. So if we’re going fix the system then we must do it seriously. If there is someone there who can make decisions on prosecution, I’ll definitely talk to them.” [TI11]
- “If [the employer] had to have a sit-down face-to-face with the family, he would know how much it hurt. [He] would take it on that he really did wrong. . . . The boss needs to be sitting at that table, whoever he is, and front on with the family. . . . A lot of times the boss [thinks]: ‘The workers are just collateral damage’. . . . It’s not collateral damage. . . . It’s a person. It’s not nothing. . . . In some places, there are a lot of people from overseas who own the business. They hide from the damage that’s done, and cushion themselves. They need to know that it’s just not on. Safety’s got to be put right up there. . . . Things can be done to protect workers, as much as possible. They must not be able to fly off . . . and not see the damage that’s happened. I think they need to. Unless they get it themselves, they’re never going to do anything to protect the workers.” [TI18]

## 2. Those directly involved in the incident itself, which may include the employee who died.

- “[I]f they do find [that someone] was working at the time, who couldn’t be bothered staying back 5 more minutes to sign something off. . . . [T]hey might not think that doing some paperwork or double checking something is not necessarily important. But when someone dies it’s important.” [TA4]

- “Who has to take the responsibility? The responsibility is on the firm, guaranteed, on the safety of their workers. But the worker also has to be responsible for their own safety too. If you’ve got a worker, as in [my husband’s] case, who walks into an area that he [knew he] shouldn’t have been in . . . he’s got to take some of the responsibility too. . . . Where do you draw the line?” [TH28]
- “I do honestly believe part of the responsibility rests with the people working there. Sadly many feel insecure and don’t stick up for themselves especially the young. I often wonder what the outcome with my brother would have been if he had said: ‘I want a helmet and safety vest.’” [T14]

### 3. Multiple contributions

- “It was ignorance on the part of the young lad that was involved with the incident. . . . And the company have the responsibility also to put education and training in place. . . . There was a forklift driver – he could have been apportioned some blame. There was a site manager, for not knowing – he didn’t know there was anything wrong with the site. There was the general manager, for putting it there in the first place. There was a lack of procedures. There was a lack of instructions to the workers” [TE2]
- “[Who would I want to talk to?] That’s so hard, because there’s such a line of people, really, when it comes to big companies. Because the CEO says it’s the management, and the management says it’s the one under that and then it goes right down to the poor guy that, you know. And he probably got it pushed up, that there wasn’t time for this and that, you know, as well. So, I don’t know who that would be at the moment – probably a mix across the board.” [TA4]

### 4. Other employees who knew about the problem, but failed to speak up.

- “There’s perhaps a broader group to address also, the workmates who failed to speak up. If you don’t speak up, you’re complicit in the crime. As Edmund Burke said, ‘All it needs for evil to succeed is for good men to say nothing.’ . . . I can’t begin to think how [the other employees] feel. I know that numbers of them were upset, the vicar’s wife told me. But why did you also fail to act in a timely manner, fail to open your mouths when you knew there was a problem, thus contributing to the angst and disintegration of your community.” [TB4]
- “I wouldn’t want to do [restorative justice] in a blaming way, because there’s no point. And it’s different. . . . [a person at work] bullied [my son]. But from that, [my son] made choices about the way he handled it. He made the choice to smoke marijuana. Had he not, he may have been able to mentally handle it a lot better. So it wasn’t all one person’s fault. But to have some chance, an opportunity to say to, not so much [the man who bullied my son], but the people who stood by and watched it happen, and allowed it to happen, to say to them that they had the power to stop it. . . . You can’t change what’s happened to us. But if they understand it and acknowledge it, then they may think twice before letting it happen to the next person. But while . . . everyone blames [the man who bullied my son, saying] it’s all [his] fault, they can sit back and say, ‘It wasn’t me’. Even though we know they could have stopped it. That workplace had a very long

history of bullying. That man had a 20 year history of bullying. Some of the people who'd worked with him had worked with him for 20 years. [They] stood by and laughed at his silly little jokes. They were part of it. [I want to hear them say:] 'We screwed up'." [TG13]

In considering the questions above, the families also identified a range of conditions that would need to be met before: (a) any individual would be likely to take responsibility in a restorative justice process; and before (b) the family themselves would be prepared to meet with any such individuals.

### *Conditions for Taking Responsibility in an RJ process*

#### **1. The truth about what happened and who was responsible needs to have been authoritatively determined beforehand as the basis for the RJ.**

- "Unravel what's really happened. In a careful and scientific way, with proper evidence; and really know, be very, very certain of what these people did, and certain that these people have some understanding of the harm that they have contributed to." [TB6]

#### **2. Any RJ process must be entirely voluntary for families.**

- "But it would be up to the family – totally up to the family. It would be their choice as to whether they wanted to do that." [TE3]

#### **3. The company must participate in RJ with honesty and integrity.**

- "You really need to know that, whoever you're going to talk to is fair dinkum. And that's hard to know, because all the crap that comes your way, the solicitors, they're all coming from different directions, they're all with their own agendas" [TE6]
- "It's got to be genuine. It has to be a genuine apology." [TE6]
- "Well, when it's in the future, would I be open to [restorative justice]? . . . Yes, with a qualification, which would be: Are these people really being genuine? Has the light globe gone on? And have these people, in their adolescent stupidity, grown up a bit? . . . I think it's a valid technique, but you've got to know people are genuine. Otherwise it's just going to degenerate into spin. And people, could get cynical about it. . . . In [my] particular case, you'd be very wary and very circumspect. I have a fair understanding of these people; they're a pretty slippery mob." [TB6]
- "I think with a letter of apology like this [from the investigators], I think it is part of the process they go through. They know they've done the wrong thing. But they try to cover their own bum (excuse my expression) by a letter that, to me, should have put a little more heartfelt into it. You know the stress factor that *they* put me

back through again was probably as bad as losing [my husband] again. . . . What I expected was not just a brief [apology] at the top of the letter. . . . [A] bit more explanation as to what had occurred would have been nice . . . because they put me through hell. . . . That letter to me is totally impersonal.” [TH28]

- “I did meet with [the investigators]. . . . [But] I can remember thinking it when I was talking to them: ‘Are you here to appease me? Or are you here to apologise? Or is it because I threatened the media with you?’ That was running through my head while I was crying.” [TH28]

#### 4. The timing of any RJ process must meet the needs of the family.

- “Too soon after the accident, you feel like – there’s a lot of anger there. Whereas too long after the accident, there’s no trust there. . . . So you’ve got to find the right time and the right people. It would be very difficult to do. I think there’s only a very small time frame between the initial anger and shock and then the time frame of being too long.” [TE6]
- “A. I wouldn’t have liked it soon after. I would have liked a bit of time to elapse, just to get our thoughts together, and even jot down a lot of things first, and then try and pull everyone together, and then do it I reckon. About now [i.e. two years later] would probably be the right time I’d say, for us, wouldn’t it – if we were going to do it. . . . Not that I really want to do it, but I’d say about now would be my time I reckon . . . [b]ecause I’ve had time to think about things. B. It’s a hard one to answer because you don’t really know, because if you waited until now you might think: ‘No, I don’t want to hear it. You’ve waited too long.’ Or they come at you too early . . .” [TF11]
- “After [my son’s] funeral, we had two things happen. We got a phone call a week later from the other girl who was bullied. She had refused to make statements, because she was also offered money. She rang us a week after his funeral and said that she was so sorry, she’ll go back to [the OHS agency] and she’ll change her statement, and tell them what really happened. It was like: ‘Thanks a lot, but don’t bother.’ And she did. She went into [the OHS agency] and they told her: ‘Too late. You’ve now got two statements.’ They’ll make mincemeat of her. So they couldn’t use either of her statements. We got another phone call from somebody who’d worked with [my son], and it was much the same. ‘We had no idea, and we’re sorry. We should have done more.’ I just told him to go - It’s too late now to be sorry. Don’t bother’.” [TG8]
- “If the families are to meet with the employers it would probably be best not to do it too early. Wait till the real pain has gone, a little. Maybe 6 months or something like that - or a few months anyway. The immediate pain has to subside a bit.” [TI6]

#### 5. The company should accept responsibility before a legal finding of guilt.

- “The company would have to take that approach very, very quickly. They couldn’t wait for the coroner. . . . The company know the results anyway.” [TE6]

- “[T]hey need to stand off on their own bat, rather than wait for the courts to find them responsible, and they say ‘Oh well, I’d better do it now’.” [TE6]
- “So prosecution can take 18 months to two years. Sometimes three. You’re talking about a long way down the track for them to change their minds and say ‘sorry’. That’s something that should be done right from the front, I think.” [TE1]

**6. Any individual from the company who participates in RJ must be able and willing to take personal responsibility.**

- “[I]t’s very hard to get someone you believe is important enough, to talk to, that you can get your point across, to think that they’re fair dinkum, or they’re not just there as, you know, they drew the short straw, so I’ve got to turn up.” [TE6]
- “*On that list of people [you wanted to see], did that actually include the people who had bullied [your son]? No, I won’t go there. They will never admit it. The same workplace is still having huge problems with bullying. They’re still dealing with it badly.*” [TG4]
- “*Did you feel that they took responsibility for making those statements [to the insurance company about your son]? Some of the people did. Some of them were quite uncomfortable with me facing them. One or two just got their back up and didn’t want to know about me. The last lot felt good because I made them squirm. Nobody took responsibility [for his death], no.*” [TG7]
- “[If they were going to come and say ‘it wasn’t me’, that] would just inflame the situation” [TI6]

**7. If a company participates in RJ, they should be prepared to have ongoing contact with the family, if that is what the family wants.**

- “The best part for the company would be to be fair dinkum, and not lose contact – once the meeting’s over, don’t say: ‘That’s it, we’ve done our job’. Stay in contact.” . . . Just a phone call: ‘How are you doing’, ‘How are you going?’, ‘Is there anything we can do for you?’” [TE6]

**8. If a company participates in RJ, they should keep any promises they make.**

- “**A.** [Our son’s] own boss has . . . [n]ever done any of the promises. . . . **B.** [He promised a] barbeque in memory of [our son] in front of his shed, so he can have a barbeque Friday night after work. . . . He was going to give me [a stone] so I could take it up and he was going to put a little plaque on it in memory of [our son] and put it up at the cemetery. But, nope - haven’t heard from him.” [TF5]

**9. The family should decide who it is that they want to meet in any RJ process.**

- “**A.** I don’t want to meet [the employer] ever again. Just despise that fellah, for what he’s done. . . . [My wife] does want to meet up with the chap that was in the shed with [our son when he died], to have a talk to him. But I don’t know if I can handle it.” [TF8]

## 1.5 What are the Distinctive Benefits of RJ?

In the interviews, the families were asked to reflect on what it was that they wanted in the aftermath of both (a) the death of their loved one and (b) the additional harms they had experienced. Six desired outcomes emerged: **truth, accountability, acknowledgement, apology, reparation** and **prevention**. Some of these outcomes were identified by the families in the context of what they might hope to gain from a RJ process. Others were raised independently, as answers to general questions such as: ‘What would you have wanted those responsible to do or say?’ or ‘What would count as justice for you’?

These six outcomes clearly match the core benefits that restorative justice is designed to deliver. However, most of these outcomes could also be delivered, in a different way, by the legal system. In this respect, the families did not generally wish to by-pass or discard the legal system, even if that were possible. They wanted a system that was better able to achieve its own core objectives: to establish the *truth*, to hold individuals *accountable*, to *acknowledge* the harm done, to set appropriate *reparation* and to put in place effective *prevention* strategies. In other words, they wanted (a) an expeditious and fair legal process; (b) due recognition and involvement of the family; and (c) a legal outcome that would both (i) convey the profound seriousness with which society regards work-related death, and (ii) seek to prevent it from happening again.

But there was another, more personal side to what the families meant by these six outcomes. These were objectives that were not (and, arguably, *should* not) be met by any legal system. This included individuals in the company (a) telling the family what really happened, rather than revealing no more than would be in their legal interests; (b) expressing, in person, a sincere apology to the family; (c) coming to a deeper understanding of the personal cost and impact of their actions; (d) accepting moral responsibility for their part in the death, rather than merely being found guilty (or admitting legal guilt) for having breached OHS regulations; and (e) making amends in a way that would be meaningful to and beneficial for the family, rather than merely paying a fine to the state.

In other words, the families were saying that – in addition to the outcomes that an effective and efficient legal process would have delivered – they wanted the kind of outcomes that restorative justice is, uniquely, able to offer. These are presented below, under the six themes mentioned above.

### *The Potential Benefits of RJ*

#### 1. Truth

- “Justice is the truth. It’s not pointing fingers at everybody. It’s just that everybody is 100% clear on what happened. There’s no hiding injuries or facts. So there’s no question in anyone’s mind, good or bad, that we all know exactly what happened. . . . I know that it’s not going to make me happy, knowing the truth, but – I just



think if people acknowledge that, yes, that is what happened – not just fighting against it.” [TA5]

- “B. I’d like to meet with the man that was actually on the site when it happened. . . . He was the last one to know what was said, what they were doing. [I’d just] want to know – [my son] was always a little bit of a sookie child. He always used to say he wanted his mum – no matter what, no matter how old he was. I’ve always had a vision that he’d be screaming out ‘Mum, mum!’” [TF8]
- “I rang one day and . . . asked him: ‘Was there ever any time that he thought that this might happen?’ And he said: ‘Off the record’ – because he didn’t want to be part of it – he said ‘Yes, there were several times that he thought [that]’. I just breathed a sigh of relief. It was like: ‘I wasn’t the only one that was worried about him.’ I never saw that. I never got that while he was alive. I felt like I was the only one fighting to save his life. But when he said that, he actually did believe that there was a problem.” [TG3]
- “I’ve done my own type of restorative justice. I’ve gone to and what I call ‘faced’ all these people who made statements [to the insurer] . . . trying to make it sound like [my son]’s suicide was because for other reasons rather than his work. So I had a long list of about 25 people . . . I went to see them and took the statement with me and said: ‘But you know us. You know this person. How could you say that?’ Most of them were gracious and the questions they were asked made it sound like the answers were different. Some of them wouldn’t face me. . . . Going to all the people . . . just gave me back some power over myself, not over what had happened. It made me feel that I’m back in control of how this affects me, rather than all those letters and statements saying that we were bad parents and that [my son] was a bad person. They didn’t know him at all. It was just all this really negative stuff that was made to look like his death wasn’t to do with [work]. And I understood that, but I wanted to face the people who had said it. And I got a lot of satisfaction out of that.” [TG3]
- “[The social worker] has informed me that she wants me to meet up with [the investigator] again and that he is still upset because of never informing me of the court cases or of the whole investigation as it was occurring. I have agreed to meet with him . . . . What I am hoping to achieve is that maybe I can make them understand how hurt you feel.” [TH23]

## 2. Accountability

- “[What I would want is] the company actually coming and saying that they didn’t do everything within their power, or they didn’t take as much responsibility for what should have been going on. . . . [Taking responsibility] doesn’t mean . . . it’s all your fault. It’s just that accepting that you had some role in it. . . . I mean they should front up and just say it.” [TA3]
- “[M]ost people out there . . . just want people to admit it when they’re wrong. . . . Because if they don’t, it just means that they have no care for human life at all. . . . [T]hey just don’t want to know about what happened. And they’ll make the same mistake again.” [TA3]

- “I do think I should be told if [the individual concerned] feels responsible. I would like to know. . . . I know that [my husband] wasn’t responsible. So who was? Does he feel like he was or he wasn’t? . . . I’d like to know what he thought, how he perceives that he was part of it.” [TD7]
- “I would have preferred him to really realise that this should not have happened; and [say] ‘Yeah, we were definitely wrong.’” [TE3]
- “I guess we would like to see them acknowledge and apologise and realise they have got that responsibility.” [TE6]
- “It’s just like, [the employer] walked out a free man and lit up a cigarette. . . . He was probably going to go to the pub and have a beer. **A.** He went across the road smiling, as well – after the court.” [TF7]
- “We’d spent probably 18 months with [a range of different OHS agencies, lawyers and mental health systems] trying to get some validation and righting the wrong for him. But it never did happen.” [TG2]
- “If you don’t hear them say ‘I’m sorry’, and they’re trying to deflect the responsibility: ‘Oh, there was a helmet and he didn’t put it on’ - you know, that just gets me mad, because I know that’s a lie. That just makes me think he doesn’t get it, and he’s still trying not to accept responsibility.” [TI6]
- “I just wanted him to know that he did wrong. That’s why I pushed for an inquest. He can’t continue to do wrong. You’ve got to pull it up and say ‘enough’.” [TI8]

### 3. Acknowledgement

- “I think they need to see the human side of it. And that’s for those people up there that make the big decisions. You know, the ones that choose that flowers shouldn’t be left at a site. Those are the people that need to be told that there are human beings involved – heavily pregnant ones. . . . We just want acknowledgement I think. We don’t get acknowledgement from any government department.” [TA4]
- “Ideally, you would want them to say, ‘Yeah, look, we made a mistake, for various reasons.’ I’d like them to understand what damage they have done.” [TB5]
- “I believe [the company] should also be in touch with the families. They should acknowledge the families, because . . . all of a sudden they don’t want to know you. They won’t talk to you, and you feel like, ‘What on earth have I . . . done’ . . . I believe that it would help to realise that, ok, they’re still talking to me. Just the acknowledgement I guess, instead of just shunning you aside – ‘Can’t talk to them’, you know.” [TE6]
- “I just think that anything that keeps any communication open can only benefit you. . . . [T]he real killer in this whole thing I think, is that loneliness of not being able to talk to anyone. And you just get so involved in your own mind, that it’s not healthy. That’s why it’s always good after I’ve seen [the employer] – it’s just that, you know, you feel like you can breathe again, a bit. . . . And then I think you can

support each other when it comes to the actual end of it all, whenever that may be, in the next few years.” [TA6]

- “A. When the barrister was reading [our impact statements] out [the judge] just went: ‘Mm. Mm. Mm.’ . . . She didn’t say anything about the impact statements, about us, or the family, or anything like that. I don’t know why she couldn’t say, ‘As far as I’m concerned, Mr and Mrs \_\_\_\_\_ and the family are really devastated over this.’ . . . We were told to do [the victim impact statements], but it didn’t make any impact whatsoever. B. It didn’t make any difference.” [TF7]
- “[The grief-support worker] was the only one that acknowledged that [my daughter’s suicide] was related to [my son’s] work. Nobody has since, or again. . . . [My son] said, the day [she] died: ‘If I wasn’t f---ed in the head, she wouldn’t be there now.’ There was some truth in that. . . . [T]here should have been some acknowledgement that his work played some part in both of their deaths. . . . It’s something that possibly should happen, but it probably never will.” [TG10]
- “I came down here, we were here in this room. It was [a meeting with the director of the OHS agency and an OHS lawyer] . . . During the time that [my son] was unwell, I had done everything. Absolutely anything and everything that I could think of. The only thing we hadn’t done was go public, and I was too frightened to do that because I thought he would take his life. . . . I had a list of all the people I had been too, and all the dates – because I diarised everything. I gave it to [the director] and asked him to please explain how this got to that. He couldn’t. He was just flabbergasted. He couldn’t believe that I’d been to the [OHS] minister, and I’d been to the local [OHS agency], just anything and everything I could possibly think of. Everybody said: ‘That’s dreadful that that happened to him’. But nobody did anything that made a difference. Even though [the director] couldn’t answer the question, just the fact that he admitted that somebody screwed up, or that this shouldn’t have happened that way, was probably a beginning of feeling like people were listening.” [TG15]
- “[The investigator] informed me that he was a team leader and had been constantly informing his investigators of the importance of keeping the families informed of what was happening. He was so devastated about how I was forgotten. Funny enough, I actually believe him.” [TH23]

#### 4. Apology

- “[It] would have been ok. If they’d said: ‘We’re really sorry that something happened, and send our condolences’.” [TA1]
- “ok, you could sit down, but . . . it would have to be someone [the family] could relate to, who could understand what happened; who has that ability to acknowledge, even apologise if they have to, just to take it on board, that ‘Look, we are really sorry this has happened. We have, unfortunately, only now put something in place – something that doesn’t help us – but we can assure you it won’t happen again’.” [TE3]
- “[Five years later] I received a letter from [the solicitors] apologizing for the problems I had with them during a time when I needed so much help. [TH19] I

believe [this letter] was heartfelt. It wasn't the wording that made it heartfelt. The gentleman concerned was really upset because that had happened." [TH28]

- "I'd want [the employer] to say, 'Look, I'm really sorry. I never meant to hurt your brother. I've done the wrong thing. I realise I've done the wrong thing. I'll do whatever I can to protect anybody that works for or with me again.' I want him to say: 'I get it: I get what I've done. I'm really sorry. I can't bring your brother back. But I'll do everything I can to make sure that it never happens again.' That's what I want to hear. And then he's got it, you know – he's got it." [TI6]
- "They are all so scared of saying sorry I believe because of the legal implications. Because they're scared you're going to sue them, because if you say sorry then you're admitting guilt . . . The legal system does not promote honesty. It's not justice." [TI7]

## 5. Reparation

- "I could ask them to put a plaque up, on the pole. I mean that would be a way of them showing something. . . ." [TA1]
- "Even with the fines that might be handed down, they go back into the government system. [We think they should] go to the families." [TE4]
- "[We would want them to] change something, to prevent it from happening again. And spending what little money it might have been – it might cost them thousands, but it might be minimal as well, to fix something, to prevent it, so, in that way, I guess in their mind, in their way of thinking, it's all they can do to take that responsibility and fix it." [TE6]
- "How would they make reparation? Be honest. Don't do it again." [TB6]
- "**B.** There was something that I always felt in the back of my mind that I would've liked to have seen happen. It's not for the money factor. [My son] had some nieces and nephews that he absolutely adored. I really wanted something that they could have put in a trust . . . for when they're older, [they could] say 'This was from my Uncle'. Because he spent a lot of time with the eldest two anyway, from the time they were born, right through to until he died. He used to show them the Christmas lights, you know, special events. . . . [My son] never had children. But he adored his [nephews and nieces]. I just wish that later on in life, they can say, 'My Uncle got me this.' . . . They're so young - and so hurt. [Two of them] have just been destroyed by this." [TF12]
- "**A.** Why do [the OHS agency] get all the money. That's what I can't comprehend. It's *our* loss. What do they do with it? . . . Why can't it be distributed around family members? Keep half of it, but not the whole kit and caboodle. Because we're the ones who are putting up with the pain and everything." [TF12]
- "[W]e didn't actually get the [insurance] money: it went to his partner. I never felt guilty for profiting from his death. So there was some justice, satisfaction in that. I was actually able to take all my diaries and make sure everybody knew what had happened, and they had to pay 75% of the total death benefit. So somebody had

to pay, and we didn't benefit from it. So that gave me some justice too, instead of feeling guilty about getting paid for it." [TG11]

## 6. Prevention

- "I think if they have to start facing up to families, then they'll start thinking about what [OHS procedures] they're not doing 100%. Because it puts reality into it, and that's the problem at the moment: there's no reality. It's all: 'sign off on paperwork'. And they just fight in court to say that they weren't responsible." [TA1]
- "I don't think it's to be wholly punitive, more a blend of reparation and education. This was a mistake. What we don't want in the future. So with the evolution of things, in this society where I live, the cog moves one more notch and things improve a bit. You don't waste a death." [TB6]
- "We'd like to see some sort of change you've brought on, a change for the good. Something can come out of the death." [TE6]
- "I wrote a letter about bullying in the local newspaper, which caused a huge uproar. . . . A good thing that came out of it was that a committee was formed, and there was a lot of publicity about bullying. . . . [T]he DVD [we made on bullying in the workplace has also] been a good thing that's come out of it. Don't know that it's restorative justice. But along the journey, it's knowing that something has changed, that something good has come from what's happened. About 300 companies across Australia have got copies of the DVD; two in New Zealand, and two in America." [TG9]
- The letter I received from [the OHS agency] as an apology has said that it was a "misunderstanding" on their part and that was why I was never informed. This is not just a misunderstanding, but to me a great part of what I should have been included in. This letter answered some of the questions that I wanted to find out about. Like that if some process could be implemented so that no one will ever be hurt again as much as I have. I have now been informed that there is now in place a process where the family will be asked to nominate a spokesperson to act on their behalf. This will then be followed up at different stages throughout the investigation. Thank goodness for that." [TH21]
- "When [the social worker] was last down we talked about me talking to some of the investigators, as she believes it will help them understand how you feel when a work death happens. . . . If the investigators can have more compassion or know of some of the pitfalls that may occur, then . . . there will have been some reason for all of this to have happened. [After my talk, the investigator in my case] said he feels that his investigators will never be the same in the way they feel about their job. . . . I feel as though I have . . . made a difference to the way they will now be looking at how they conduct themselves when they eventually meet up with the families." [TH25]
- "I need to know he's got it - he's sorry - he can't change what's happened - but he gets it. He'll do whatever he can to make sure that nothing like that ever happens around him again. That's what I need to know. . . . Because then I feel like my

brother's life wasn't in vain. That we've done something to make these people realise that you can't **not** do the right thing, because it affects a lot of people around you; and it can't be changed once it's done. If he can understand that it creates waves that go on forever. I'm always going to have a brother that died at work." [T16]

- "[If I had a meeting with the employer I would want to ask] what are you doing to fix it, the safety of others working now, and whether the immediate and long term danger's been addressed. That's the bottom line." [T16]
- "Ok, there's a safety issue there, which has killed or maimed. There is a legal issue that has denied justice. Let's fix it NOW. Block the loophole, so that there's no 'out'. That's what I need to know has been done . . . I know that I cannot bring my brother back. But I just want it to be fixed, so it's just not going to be a problem for someone else, and someone else after that. Protecting workers must be a priority. The bottom line for me is: Will it happen again?" [T111]
- "[I would like to] have meetings with the staff of each business, with [the OHS agency] . . . [and say to them]: 'My brother died as a result of this industry because he didn't do this, this and this. I want none of you to have that happen to you. This is what you do to keep yourself safe.' . . . I reckon that's how you win them over. . . . They have to be their own safety officers everyday and be responsible for the safety of others." [T117]

The families also identified a 'higher level' benefit that RJ could potentially give them: that is, if RJ could address and resolve the additional harms (by achieving the six outcomes listed above), RJ could facilitate their grieving process. To explain: The personal cost of the additional harms experienced by the bereaved families was profound. They reported reactions that would not be uncommon in people who have experienced serious crimes of violence: shock, anger, frustration, fear, distrust, exhaustion, disorientation, and, in some cases, self-destructive thoughts and feelings. As some family members put it:

- "It takes you right to the edge. There's a river that sweeps round down near home, and as I drove the car back that evening I thought, 'Am I going to drive in the river?' What saved me were the pets. 'No. I've got to go home and feed them.' It takes you to the edge of the 'abyss'. . . . Things have improved from there. But that's what it did." [TB2]
- "I can understand why people commit suicide. I really can understand it, because you are put to the point of being so stressed that you feel as though there's nothing you can do. You drive down the street, and you pull over, because you've got no idea where you are: a road that you travel every day, to and from work. . . . Your brain just isn't there." [TH27]
- "Lucky I'm not one of those people who go up the Westgate bridge and jump off . . . . People lose it for a reason . . . . If I was one of these people that had a gun, and was that way inclined, I'd go down to the [OHS agency] and shoot the hell out of them. But I'm not like that. I. But it could make you 'click' – you could just lose it . . . I'm lucky that I've got a happy marriage and a strong family. I think if I didn't have that I'd be a wreck. It's pulled me through it." [T19]

However, what is rarely acknowledged or understood in this context is the way in which **the *additional* harms prevent the families from dealing with the *primary* harm they have experienced**. What the families needed was to be supported in a way that would enable them to grieve the loss of their loved one – in their own way, and in their own time. Instead, they were unexpectedly confronted with new sources of pain, frustration, anger and distress: such as the company refusing to admit any fault, an unaccountably protracted legal process, a bewilderingly insensitive and intrusive phone company, or an investigation that somehow fails to identify or take into account what seems to the family to be the most important issues. As some family members said:

- “You know the stress factor that *they* put me back through again was probably as bad as losing [my husband] again.” [TH28]
- “[The] lack of [due] process can delay healing. . . . If I hadn’t made my own enquiries I could have ended up propping up the bar at the local pub, with chronic alcoholism taking its toll.” [TB1]
- “They hurt probably more than the boss did, because the boss didn’t mean to kill my brother. They were deliberately mean to me. I wrote to them and said that they had contributed so much to the sadness of what happened.” [TI11]

Put another way, the disrespectful ways in which families were treated after the fatality, caused such hurt and distress that their natural process of grieving was obstructed or ‘put on hold’. As one family member put it:

- “[My journey of grief] would look like a road with a lot of paths. That’s how I visualise it: that one goes there, that one goes there. . . . The weight of the worry of what’s happening, and trying to deal with everything has probably squashed the grief.” [TC6]

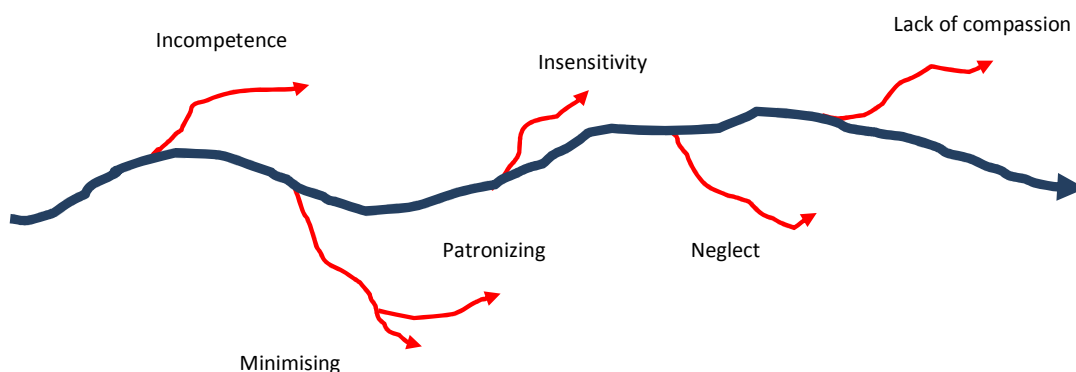
Another family member, when asked to explain how all of these hurts along the way had impacted on her grieving process, replied:

- “Continues it: you live with it every day. Your first 12-18 months is probably the worst, because this is when . . . most of this is happening. Each time that you’re forgotten or something else happens, it brings that stress factor and you *re-grieve*. . . . It may take me 24 hours [to recover]. It may take a week. It may take longer. I don’t know. . . . It’s as though you’ve been suddenly dropped into this whopping great black hole. Every time you just get your fingers on the top rim, some bastard kicks out a rung; and once again you’re at the bottom of it. Once again I’m climbing back out. That’s the way it works. . . . I get to a stage where I start enjoying life, and something like this hits again.” [TH27]

Other family members described similar experiences:

- “You’re just so upset about what’s happened. But they keep throwing fuel on the fire, instead of trying to help you. They just make it worse and worse and worse. . . . These guys aren’t trying to fix it. They’re just trying to fix me.” [T19]
- “[Y]ou end up pretty bloody traumatised. And you have to climb your way out of despair. What you’re faced with is very little hope. . . . Bit by bit, it comes back but you end up with little faith in people.” [TB2]

The families were, in other words, shunted off their ‘journey of grief’, each time they encountered one of these additional harms.



There is good evidence that moving forward along one’s individual ‘journey of grief’ is a process by which those who have lost a loved one can achieve a measure of healing. If so, then any preventable diversions from that path should be of paramount importance to any society, agency or individual that cares about the health and well-being of bereaved families.

In that respect, the greatest efforts should be placed on developing and implementing **prevention strategies**. This would include education and training, policies and procedures that are sensitive to the needs of bereaved families, paying more attention to the way in which legal processes can impact upon their well-being, developing more efficient and expeditious methods of investigating such cases, and so on. Where such strategies fail, as they invariably will, and families are faced with the kinds of additional hurts identified above, then **remedial action** must be swift, sensitive to the needs of those harmed and effective. It is at this point that RJ can make a distinctive contribution:

- First, when the additional harms occur, RJ processes may help to provide a means by which the family can address or repair the harm that has been caused, whether material or emotional. This may help the family to resume their grief journey, rather than becoming ‘stuck’, as many are – for months, if not years – on paths that only lead to further pain.



- Second, as individuals and organisations become aware of the devastating personal impact of their actions and attitudes, it is likely that they will take steps to ensure that it doesn't happen again. Creating a plan to ensure that preventative measures are put in place is an intrinsic part of any RJ process. Families who participate in RJ will therefore gain the benefit of knowing that they are contributing to individual and cultural change, so that other families will be less likely to undergo similar experiences.

## 1.6 How should RJ relate to the legal system?

Towards the end of each interview, the family was asked where, in relation to the legal process, they felt that a RJ process would best meet their needs. The various options, as stated in the *Literature Review*, were usually presented to the family.

What emerged was a virtually unanimous response – one that was in accord with the third working hypothesis of this research project: (a) RJ should not be used as an alternative to the legal process; (b) RJ may (and some families thought it should not) be used to modify the sentence; and (c) RJ would work best independently of or subsequent to the legal process.

### *RJ where there has been no Prosecution*

- “I think [restorative justice] could be done in two parts, like a letter acknowledging the death. Because ours was different: we didn't have a legal system. I would have liked to have seen some sort of letter from [the company] saying they were sorry about [my son's] death. Not so much taking responsibility, because they're not likely to anyway, but offering: 'If there was a time that you would like to come and discuss it or whatever'. [In terms of meeting with them], it [would need] to be a little bit later so you could get some of the raw emotions past and have time to think about what you wanted to say.” [TG13]

### *RJ should not be used as an Alternative to Prosecution*

- “Despite the fact that we have a somewhat rough and ready adversarial system it's the best we have – I think there's some value in a trial, even if it's just that people can say, 'Well, yes, look, it did go to trial'. I don't understand how restorative justice would fill the role of an impartial umpire. . . . And there is a sense in my mind at the moment – and I might be wrong – that it could be used as a cheap way out, which could be dangerous. Restorative justice is a pretty reasonable idea. In a Victorian industrial death context [it is] perhaps ahead of its time. But that doesn't diminish its value. It's very valuable.” [TB7]
- “[If] it [was] going to take over the actual legal procedure . . . we didn't feel that that would have been appropriate. We still feel it's got to go through the legal system.” [TE1]

- “I believe there has to be a legal procedure definitely. If there’s a serious injury or definitely a fatality, there has to be legalities. There’s been a death. It’s a criminal offence. In some form . . . It’s justice for the person that’s killed.” [TE6]
- “If you had to choose between the two, I think most people would go the legal way. They would still want them to be accountable, rather than have a face-to-face, someone say, ‘Oh, look we’re really sorry about this and blah, blah blah.’ That just, ‘oh well, just move on with your life.’ You’ve lost a member of your family. Your heart is broken. That’s like an empty, an empty thing.” [TE6]
- [If the justice system does not prosecute, then the community is likely to respond in its own way.] “[He] was run out of town after [my son’s] funeral. A small town works in different ways. His business just went down - very, very quickly. Nothing violent, it was just word of mouth. People just stopped going there. It was more revenge than justice.” [TG7]

### *RJ processes as a ‘Restorative Sanction’*

#### **1. RJ could be used as a means of modifying the sentence**

- “[I]f people show some contrition and some understanding of what they’ve done then, yes. We all make mistakes. But we’re supposed to be forgiving. So, yes, it has a value there. Value as an adjunct. A bit like saying to the magistrate, ‘Ok, I’ll do the drink driving course’ when you’re caught driving over .05. That’s fair.” [TB7]

#### **2. A traditional punitive sentence should always apply.**

- “[I]f someone is killed – your husband, wife, son or daughter – you would like to see them suffer the penalty that’s due them. Because basically, there’d be a lot of people out there who would say, ‘Well what’s going to happen to me. It doesn’t matter. Let’s just do it. Never mind. I’ll just admit it. Nothing’s going to happen to me. I’ll admit it. We’re making money.’ That’s how some people [think].” [TE6]
- “I suppose there’s a bit of revenge in there somewhere, but it’s more justice for the person that’s been [killed] . . . you want them to see, ok, you didn’t die for nothing.” [TE6]

### *RJ could be used after the Legal Process*

- “Definitely, as a process [after the legal process has been completed]. In a sense, it becomes therapeutic at that point. . . . you’re tying things off. At that point it moves out of the justice system into the health system almost. You’re cleaning stuff up. Tidying up. The issues are settled. The computer program’s not running in the back of your mind. . . . [I]t moves into the domain of somebody with a spiritual background, healing of the mind. Let’s settle these issues and let them go. So then there’s peace with the world. Not only personally, but for others.” [TB7]

## 2. Employer Companies

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### 2.1 The Interviews

It was exceptionally difficult to identify individuals in employer companies who might be willing to speak about their experience of a work-related death. Most did not respond to our invitation to take part in the research. Some explained that they still felt too personally traumatised to speak about what happened. Hence, we are very grateful for the trust and generosity shown by those who did participate. We were also very fortunate to have established a strong working relationship with a criminal defence lawyer, who referred each of the employer companies represented below.

Together the interviewees represented a range of cases and legal responses. For example, one company was still awaiting news as to whether or not they would be prosecuted; another had been found guilty, but not convicted; a third had been prosecuted and fined, but is now appealing the decision. The incidents took place from two to seven years ago. The individuals who died included direct employees and contractors. The companies in which the fatality occurred ranged from a large multi-national corporation to a small family-run business.

Separate interviews were held with three individuals from the upper management of companies that had experienced or been associated with a work-related death. One interview was held at the grief-support agency office. The remainder were held at the workplace, in the office of the individual concerned. These interviews mostly ran for one hour or more and were attended by the interviewee and the researcher.

### 2.2 The Type of Harms

Before presenting the thoughts of the interviewees as they relate to the three working hypotheses, it is important to acknowledge their perspective on the **harm caused by the work-place death**. The interviewees identified three broad types of harm that they had experienced or witnessed: (a) the grief and personal loss experienced by the bereaved families, fellow workers and management; (b) the harm that they felt had been caused to them by the investigation and legal process; and (c) the harm that they witnessed in relation to people's shift toward 'fear-based' motives and cynical attitudes regarding safety in the work-place.

#### *The Personal Impact*

##### 1. The primary harm was the suffering and loss experienced by the family.

- "How do I feel about the death? I can't put my feelings next to what the wife and children of the person who died have gone through. I didn't suffer the loss of a loved one." [TJ1]

- “The fellow had a wife and young children. Tragic. I mean absolutely tragic. It was devastating. There’s no changing that.” [TL1]

## 2. Multiple individuals in the company were also deeply affected.

- “The death affected a whole group of people in the company: the workers, the supervisor . . . The worker with him at the time was his mate, so he felt pretty traumatised by the whole thing.” [TK1]
- “[M]ultiple people suffered as a consequence. If this program is about well-being, then it should be for all parties: for employees who, for example, actually saw the guy die.” [TJ1]
- “[I]n my earlier investigations I spoke to various guys [he worked with] and got a real sense of their loss.” [TL14]
- “The management group who were involved in dealing with the incident, I tell you, every one of them can tell you when it happened. They’ve got really strong recall of all of the events. . . . I couldn’t tell you what my three kids’ birthdays are, but I can remember this.” [TK1]

### *The Impact of the Investigation and the Legal Process*

#### 1. The length of the investigation and legal process.

- “It was about five years to the original hearing and prosecution. That directly affected the guy who was on site and the supervisor who was implicated . . . I think this lengthy duration has been an unreasonable burden on everyone who was involved. . . . I can’t believe that you can’t get these things on in 6 months. . . . It just left the matter open for everyone - not only the family, but the company and the employees.” [TK5]

#### 2. The time taken to notify a company that it will be prosecuted.

- “[I]t’s a two year period that the authority has to advise you, from the day of the incident, whether they are going to commence a prosecution. But they left it to the last day. They notified us, our lawyers, by email. They just haven’t got their stuff together. Why, in a case like this, you can’t get all the evidence in weeks, you know. We’d given all of our statements, all of our records, all of our training records, the whole box and dice. It’s almost like a game for them, to delay the process. . . . They could have told us on day two.” [TK5]

#### 3. The cost associated with employing legal professionals.

- “The legal costs associated with all this are horrific. Relative to the fine that was imposed . . . let me tell you the legal fees were three or four times that. The amount of time invested. I spent hundreds of hours, probably, involved in this matter, as others did.” [TK9]

- “The better penalty for us would have been: Give \$250,000 to the Salvation Army, rather than, with due respect, feed the lawyers - because the lawyers were getting fed on both sides (the [OHS agency] engage a team you can’t jump over). It’s just a nonsense.” [TK10]

#### 4. The overall financial cost for the company

- “We did experience a massive financial impact. It came close to closing us down.” [TJ1]

### *The Impact on Safety*

#### 1. People’ experience of the legal process has shifted their motivation from a focus on their duty to prevent injury and death to avoiding the penalties.

- “I would say 90% [of the change to OHS practice has come about because of the] fear of further legal retribution . . . rather than feeling any link with the death. So you could argue for all the wrong reasons.” [TL5]
- “[Before the work-place death] I think things were heading in the right direction. Maybe not with the speed that occurred after the event, but I think it was happening for the right reasons . . . Forget about complying with the law, it was because we want to have a safe workplace. We want to have a workplace where people want to come to work, feel safe, and go home. . . . Ultimately we’ll probably end up getting similar results, from the perspective of people going home safe - but with that sort of fear struck into you. Yeah, it’s more fear than anything else.” [TL13-14]
- “What we’ve seen in the organisation is that the pendulum has swung. We have a fear factor, the fear of retribution, the cynicism around the legislation, and everything else. But what we’ve lost is that human element, why we got there in the first place. Regardless of whether it was right or wrong, regardless of whether the [OHS investigators] are a ‘bunch of bastards’ who had no right doing what they did and all the rest of it. Forget about that. At the end of the day, a guy died.” [TL16]
- “Not only do we have basic legal requirements, but we have these moral requirements as well. [We have] a duty towards the public, towards our staff . . . [But] some of our people [say]: ‘Why would we do [any more than is legally required]?’ Well, because that’s not sufficient on its own. There is more to it. And of course [the law firm] would acknowledge that too, but that’s not what their argument is in the legal sense.” [TL8]
- “[We recently had an independent safety auditor question us on a certain matter], but we said: ‘You show me where it says in the Act where it says we’ve got to do that. We have legal advice that we don’t need to do it, and it’s our preference not to do it . . . at this point in time.’ . . . Anyway, he couldn’t argue the point. He knew he was cornered. At one level, I felt vindicated. But at another level, I just thought: ‘It’s ludicrous’.” [TL11]

## 2. The legal system has created a disincentive for people to look into what went wrong and cooperate with regulator to solve the problem and improve safety for the future.

- “[The ideal would be that] if we had a serious workplace accident [we] . . . would identify what went wrong and put in process, as a result of the investigation, a change. We would share our findings with the regulator. But you don’t do that in Australia. You hide it. You get legal privilege on your investigation, because [otherwise] you hang yourself. If you find that something had gone wrong, then it’s used against you. There’s no spirit of cooperation between the company and the investigation and the police (if they’re involved). So it just seems a stupid system, really.” [TK8]
- “We were being noble, in a sense, in what we were trying to achieve with our OHS system, but because we didn’t get up to the mark, even though it was well and truly beyond what was required legally, we were prosecuted. We got punished for trying to do good things. . . [As a result], there has been this swing in attitude that: . . . ‘We don’t even want to look. Because if we look, and we don’t see something, we will be prosecuted.’ So this is just the absolute stupidity of the system.” [TL7]
- “In one sense it is a real lesson about doing what you say you’re going to do. . . . If that’s caused us to minimise some of our systems in some ways, that’s not ideal; but in other ways, from a strictly business point of view and a governance point of view, it has actually improved our business somewhat and certainly improved our risk position in relation to litigation.” [TL13]
- “Our rationale behind any OH&S type work that has occurred since the incident has been: [1] ‘Ok, have we got a system of compliance here?’ . . . and [2] ‘Do we have things written in our policies and procedures that are beyond compliance that we’re not actually doing or that for whatever reason, that we’re not actually able to do in accordance with our procedures?’ If [so], let’s take it out of the procedures to protect ourselves. . . . Because that’s basically where we exposed ourselves to prosecution. . . . [W]e still keep doing the good things that we’re doing, but we won’t necessarily enshrine that in policy [because] if somebody fails to do it, or if it’s something we don’t have the resources to check up on it to make sure that it’s being done, then we’re safe.” [TL10]
- “[We recently put out a] draft OH&S Strategy [based on] the Commonwealth Safety Strategy [which puts forward a] ‘vision that we will have a workplace free from injury, death and that sort of thing’. [The response was:] ‘That’s impossible. That’s not going to happen. How can you say that? You’re setting us up.’. . . In the end I’m going to have to seek legal advice on the implications of a strategy document, in order to be able to convince the staff that it’s ok: you’re not going to be exposed and get caught out.” [TL10]

## 2.3 Who will take responsibility?

One of the findings of the *Literature Review* was that the possibility of restorative justice hinges upon one or more individuals taking responsibility for their part in causing harm. Hence, one of the most important tasks of this consultation process was to test whether this notion of ‘taking responsibility’ might have any application in this context.

The *Literature Review* also found that the relevant concept of responsibility was not ‘black and white’ or a ‘one-size-fits-all’ matter. People could be morally responsible even if they could not be held criminally liable. For example, individuals could take responsibility in situations where they had not directly or intentionally caused a death. They could still take some measure of moral responsibility even where they had contributed only partially or indirectly to what happened. They may have been several steps removed from the immediate circumstances that led to the incident. There may have been multiple parties, each in some way contributing to what happened. Even though no one would ever have wanted or deliberately planned for the fatality to occur, people may yet have failed to put in place the safety systems or equipment that would have prevented it. To the extent that these more ‘distant’ types of responsibility were possible, it seemed to follow that restorative justice could, at least theoretically, have a place in the context of work-place death.

However, the question remained: What would individuals in companies associated with a work-place death think about the prospect of ‘taking responsibility’? Would they, for example, be able to disentangle the concept of legal compliance from the more fine-grained requirements of moral duty? Would they present practical or psychological obstacles? Might they have moral objections to the idea? Would they be willing themselves to meet with the bereaved family? What would they want to say? Would they apologise? Would they be prepared admit that they had something to do with the events that led up to the fatality, however ‘physically distant’ or unintentional their decisions and actions might have been?

The thoughts and reflections of the interviewees on these types of questions are presented in summary below, with supporting transcript evidence.

### *There would be a Willingness to Take Responsibility*

- “Oh it wouldn’t be a problem for us. . . . [I]f we had another workplace fatality, our CEO would be involved. There would be no question about that.” [TK14]
- “I wouldn’t have any hesitation in making a recommendation that we participate in something like that. No, not at all. Gosh.” [TL20]

### *Different Levels and Types of Responsibility*

#### **1. People cannot take responsibility if they do not know the truth.**

- “We don’t know the truth, really, to this day.” [TK13]
- “If we were to meet with the family now, how could we say ‘sorry’? We don’t yet know who was at fault. It is one and a half years later, but the court case still hasn’t started. We could say ‘sorry for the loss’ - but we have already done that at the funeral.” [TJ3]

#### **2. There is a distinction between managerial responsibility and the responsibility of those more directly involved.**

- “[S]ome of our guys . . . might say: ‘. . . Maybe if I’d thought about, I would have seen that maybe they weren’t really being as safe as we thought that they were.’ . . . It might have been that wisdom of hindsight. It might have been nothing related to the incident, just patterns of behaviour or something that they should have twigged to. So in many respects, I can talk from one angle, and in some ways, I would be [talking] on behalf of the organisation. But it would only be the guys who worked really closely with [the person who died] who would be able to have that kind of conversation and any closure that came with that. So I think there would be two levels of conversation.” [TL21]
- “I would be the first - and I’m sure our Victorian Manager and the other people involved - if we thought we had done something wrong, we would put our hands up. Every day you bugged something up, you do it wrong, you don’t do the right process, you don’t have the right equipment, or you have a failure, or a system breakdown. But here, something [happened that didn’t involve any failure at that level]. Unless we had a supervisor on site to say ‘Don’t cross that road. Don’t [do that procedure].’ You know, how much control do you have?” [TK7]
- “You can’t be responsible for things over which you don’t have control, which sounds pretty fair and logical.” [TL11]
- “There wasn’t that direct link with the death. It’s not making excuses. It just wasn’t particularly direct. It would have been different if our guys had been working on site and something had happened.” [TL4]

#### **3. There are cases where the person who died was partly or even wholly responsible for the decisions or actions that led to their own death.**

- “To do this [kind of task during which the employee died] you need to be trained, and the employee had been. There’s a 6 month refresher course. He had done it 4 times. . . . And all the right equipment was there. But we didn’t have a supervisor on site to say: [‘Don’t do that task without the safety equipment’]. Now this guy was a leading hand. He had worked for us for [several] years. This wasn’t his first time on the job. Our view is that you need to take some personal responsibility as well, for ‘crossing the road’. That didn’t happen.” [TK6]



**4. The company might be charged under the OH&S Act, yet no one feels directly or indirectly responsible for what happened.**

- “We ended up being charged under the OH&S Act for failing to maintain safe systems at work, on the basis that we had developed a system but failed to use it in accordance with how we’d said we were going to use it. [TL2] . . . I don’t think that there would have been anybody in the [company] environment that would have felt themselves to be either directly or indirectly responsible.” [TL3]
- “I might be wrong [about people feeling responsible]. There might be somebody out there who thinks: ‘Maybe I could or should have done something.’ That’s not a conversation I’ve had with anybody. But neither am I sure that there would have been anything that anybody could have done . . . It’s not our guys’ job to go and check a contractor’s [equipment]. . . . [But] I would have no reason to think that, had they seen something awry that they wouldn’t have said anything.” [TL3]

**5. It would be unfair to require that people take responsibility for failing to live up to the expectations of OHS management from today that are higher than expectations at the time of the incident.**

- “[Y]ou need to deal with things concurrently. We were judged [using today’s standards] on circumstances from 5 or 6 years ago. And the industry has moved significantly towards better practice, better training, better understanding, better supervision – all of those things.” [TK11]

**6. It would be unfair to require that people take responsibility for not adhering to OHS guidelines that the company believes are unrealistic, given its limited resources and the relatively low risks involved.**

- “It’s a spectrum. At one end you’ve got [the OHS agency] and their view of the world, and how you should be doing business. At the other end - I call it ‘[the law firm]’s view of the world’ - these are your basic legal requirements. Where we need to be is somewhere in the middle.” [TL8]
- “When [the OHS agency] put out a guideline or Code of Practice what they are giving you is: ‘This is the Rolls Royce version of how we expect you to manage safety in relation to contractors’, for argument’s sake. That’s fantastic - if you’ve got a bottomless pit of money and resources to throw at it. . . . This is the first workplace death in the recorded history of [this company]. So it is not what you call a ‘high risk factor’, in our area. So it’s not something that you’re going to put endless resources into.” [TL9]

**7. It would be unfair to assume that companies are always driven by money or that they have little or no concern for the safety of their employees.**

- “I don’t think we are driven here by the fear of the penalty. We are driven here because we employ people, and they are like you and I. Anything that impacts on them, impacts on their families. It’s just what you do. I don’t think that the penalties are a deterrent to the way you do things. It’s education and training and just moving forward as a civilised society really. You go to Hong Kong, and they’re

hanging off bamboo scaffolding. Well, that's what we were doing here 40 years ago. But you move on. We are mindful of the penalties, but whatever the penalty was here it didn't impact on the outcome." [TK12]

- "[T]he fines under the Act are – particularly now – a million dollars. What does it all prove? . . . [W]hat's a life worth? . . . No one sets out to have an unsafe workplace. Those who do, and who act recklessly, are not corporate-style companies. They are backyarders who don't think about the consequences. The consequences for them are: they can't afford to pay anyway, so it doesn't matter." [TK9]

The interviewees presented a range of concerns about employers or employees 'taking responsibility' in an RJ process. Some of these were legal or moral obstacles that would make RJ a virtual impossibility. But there were other issues raised that may not be insurmountable, given an understanding of what would constitute best practice in the field of RJ. In the following, these 'best practice considerations' are presented first, followed by the 'potential obstacles'.

### *Best Practice Issues in relation to 'Taking Responsibility'*

#### **1. Any RJ process must first ensure that the family is able and willing to hear the truth about what really happened.**

- *"Were the family just able to hear that [he may have made a decision that led to his own death]? No, they just didn't want to know. [When we attempted to hold conciliatory meetings with the family in our offices, they said:] 'You f---ing killed my f---ing husband, you f---ing - and it got worse. How did that make you, and everyone feel? Pretty bad.'" [TK6]*

#### **2. Any RJ process must ensure that no individual is expected to take responsibility when they do not believe that they were to blame.**

- "One of my employees went out to see the family, two weeks after the incident. He has a soft, genuine character. But the union had spoken to the family before he arrived. So it was highly charged; and it wasn't nice. It did personal damage to my employee. He came back in tears. He was very shaken. Emotionally, he was a wreck for quite a while. Even though what happened was not his fault, he still feels what he feels." [TJ2]
- "The supervisor was apportioned blame in the court. I would say he has still not got closure on that matter. When this was going to court, he would ring me up two or three times a night: 'Been on the booze', you know. He just wanted to make it go away. I reckon it's made a big impact on his life - still - six years later. . . . I think if we are able to successfully appeal the judge's finding of causation that would help. I guess that's one of the reasons why we're doing this. . . . [it is about] closure for the blokes involved" [TK7]

- “I would not place the well-being of my employees at risk. If they went to a meeting and were screamed at and abused by the family, that could just reinforce their own feelings of guilt and self-blame – which they might have even if they were not personally responsible for what happened. After the meeting, they might think: ‘Maybe it was my fault.’” [TJ5]

**3. RJ in this context would need to employ mental health professionals who can assess whether or not someone can cope with taking responsibility.**

- “Who will decide who is strong enough to front up to a grieving family and say: ‘I am partly to blame for your son’s death’? What sort of training are facilitators expected to have for this kind of work? I wouldn’t allow any of my employees to take part unless a professional psychologist assessed them as being able to cope. You would need experts in the field to assess people properly. At this level, they would need to be professionals in the mental health field.” [TJ10]

***Obstacles to the Possibility of ‘Taking Responsibility’ in this Context***

**1. A company may feel obligated to defend an employee whom they believe was falsely implicated or charged, even if doing so impacts the family.**

- “*Was the potential impact on the family taken into account in considering whether or not to appeal?* . . . [L]ook – there’s no evidence taken, so there’s no requirement [for them] to attend the court or do anything. . . . So yes, it might keep the thing open for the family as well. [But this is about doing what we feel is right for] the blokes who work for us. And I don’t know what the situation with the family is. Like, you never replace your son. You never replace your husband.” [TK7]

**2. Companies are not likely to admit fault openly because of the adversarial, punitive approach of the OHS regulator.**

- “The problem is the corporation thinks they’re going to get whacked with a bit of four-by-two. So they put the barriers up, call the lawyers in and deal with the lawyers. . . . The regulator used to be an educator. They are a policeman now; and there’s a lot of distrust from management about where they align themselves. So there’s less will to want to involve them in your business. If you ring up and seek assistance, you can. But they come out with the stick. I don’t think that’s effective.” [TK10]

**3. Individuals should not be expected to ‘take responsibility’ if no guilt or causality has been established.**

- “[I]t could be that no one knows who or what was to blame. The investigators and the coroner may not have been able to discover what happened. . . . So what happens if you get this sort of case . . . ? If the family are convinced that there is someone to blame, and that the company is just hiding behind the ‘corporate veil’, what would a meeting achieve? Would the employer be expected to say

whatever the family wants to hear? Would they have to ‘take responsibility’ even if they don’t believe they were at fault? If the employer honestly doesn’t know what happened, what ‘facts’ could he tell them? Would he just have to make it up? How could that help a family who wants to ‘get to the bottom of it’? My view is that if blame is to be attributed, then it should be done by the courts – not by the families or by well-meaning company directors.” [TJ9]

**4. If the company is defending itself in a legal process, then individuals may not (a) allow themselves to feel responsible, or (b) be allowed to say that they were responsible.**

- “[W]hen you’re trying vigorously to defend the case, you wouldn’t allow yourself to feel responsible.” [TL4]
- “[E]ven if somebody might have [felt responsible], they may not have been given the opportunity to [say anything]. I can’t comment on that directly, because I simply don’t know. Maybe it is a possibility.” [TL4]
- “My boss and I sat in court for the few days that that went on. I guess commiserated, or participated in that with them in that sense. Not particularly overtly, but we were there. There was a bit of a show of caring and concern. I mean we had our own interest in how that went and how it was dealt with. But there was also that level of ‘we’re in this together’. And it was more than just that legal sense. You know, we’re in this together. . . . [Although] I have to say I wore a completely different hat through all that. I was there very much to protect the organisation, so you couldn’t let a lot of that creep in. I had a job to do.” [TL14]
- “[B]ecause of the way the legal system works . . . [e]ven if you might have a doubt [about whether you could have prevented the incident], you’re not going to say it.” [TL21]

**5. If the regulator uses a ‘big stick’ or ‘name and shame’ approach, then the individuals in the company are more likely to feel victimised, defensive and cynical, rather than be willing to take responsibility.**

- “I’ll never forget: there was a seminar that [the OHS agency] put on . . . 5 or 6 years ago now. They came out and said: ‘We’re doing less of the big stick thing. We’re here to help.’ . . . I just saw the absolute antithesis of that in this case . . . . They were out to get us. They were out to use us to set an example to the broader industry that: ‘This is what happens if you don’t do things properly.’” [TL5]
- “I think there is still that quite defensive attitude from others around the organisation: ‘Oh this happened. [The OHS agency] went to town on us. We’ve had to pull these other ridiculous systems and things into place. The cause of death wasn’t even known anyway.’ So it’s very arm’s length from it.” [TL5]
- “I’m very disappointed in the way that the whole thing was treated and blown out of proportion. . . . I think we’re just feeling victimised now, to be perfectly honest. We’re ultra-sensitive to it now.” [TL13]

## 2.4 What are the Distinctive Benefits of RJ?

Despite the many strong reservations that the interviewees expressed around the concept of ‘taking responsibility’, they were nevertheless able to identify a number of potential **benefits** that RJ could bring. They also suggested a number of potential **obstacles** that might prevent RJ from occurring. These are both presented below.

### *The Potential Benefits*

#### 1. RJ may help to establish the truth

- “[L]et’s establish exactly what the facts are, as best you can. I would be very happy to do that.” [TK13]
- “I think [a meeting] might have helped [the family] understand exactly what happened on the day, because they didn’t know anything about what happened on the day initially, other than that their husband and son were killed.” [TK17]
- “[A]t the end of the day, what you want to establish is: what happened - why did it happen - how can we stop it from happening again. Because once it’s happened, you can’t go back.” [TK10]

#### 2. RJ would provide an opportunity to apologise

- “In these particular circumstances, I guess of course you’re sorry. And at one level you’re not in the least bit aware of anything that you could have done necessarily to have prevented the incident. But obviously had there been anything – gosh: we’d be so sorry if we’d overlooked something.” [TL20]

#### 3. RJ would allow expressions of compassion and empathy

- “I guess, as much as anything, we would like the other parties involved to understand that - we’re not in their shoes - but you understand.” [TK17]

#### 4. RJ would provide an independent third party to facilitate communication

- “I think you would need a professional to be the person in the middle, between the parties. It would be hard to do it without them.” [TK17]
- “I think there needs to be someone who says to the family: ‘These people want to deal with it. We think it would be important for you to deal with it. Let’s get together and we can take some small steps together.’ You can never undo what’s been done. But certainly that would have been our strong desire to have done that.” [TK4]

**5. RJ could challenge the scepticism and bitterness that workers feel about the OHS requirements that were imposed after the incident.**

- “I had this vision of [the managing director of the contractor]. He was a very nice guy, down to earth . . . It would have been devastating for him. . . . There’s the impact of maybe having him along, and talking about it – especially to the sceptical people as well. I mean that could be tremendous.” [TL15]
- “We have responded in the sense that we now have a pretty darn robust system in place to prevent future occurrences of this, but the problem is that because there is so much bitterness or angst around that system, I don’t know that I would want him to get a sense of that. I don’t know that that would be beneficial to him. Although, it might just take someone like him saying: ‘You’re all bitter and twisted. Get over yourselves’.” [TL15]

**6. The RJ process could help shift the motivation from fear to wanting to make sure it never happens again.**

- “[T]he people that knew [the person who died] and were involved that were directly involved in all the legal stuff that came out of it . . . now preach to the rest of the organisation [about the need to comply with OHS regulations] - yeah, but for the wrong reasons: ‘Protect yourself from litigation’. I don’t therefore think it would shift their behaviours necessarily, but just shift their argument a bit, maybe.” [TL25]
- “[C]ertainly the preference would be to be [to comply with OHS] for the right reasons – because you’ve seen the impacts and because you don’t want that to happen to anyone else. You don’t want it to happen to anyone you know. You don’t want it to happen to you. Because it sucks. That’s the attitude that you want.” [TL26]

**7. RJ process could lead to a more productive and healthier workplace.**

- *“What difference do you think it would make, if workers did it for the right reasons? . . . It’s not because of fear. It’s because of trying to do the right thing. It’s a different feeling that gets you there. It’s a more productive, constructive way of getting a result. It’s not because you’ve got a great big black cloud hanging over you. It’s to do with altruism almost. . . . So it’s a healthier way of doing things. I mean that is a far better reason for doing things. . . . You’d also feel better doing it for these reasons. It’s not because you have to, but because you want to. There’s no resentment about it or anything like that. You’re doing it of your own free will. . . . This is a whole different way of looking at it.”* [TL26]

**8. Any benefit that RJ might bring for workers should be secondary to the concerns of the family.**

- “It could be part of our own healing, even though we don’t know we need healing, maybe. . . . It would have to, as I say, benefit [the family member]. I wouldn’t want to use him as just somebody to come and cure us of our angst in relation to what happened.” [TL15]

### *The Potential Obstacles to RJ*

#### **1. Companies may believe that RJ is not possible, having experienced very negative reactions from the family in their early attempts to communicate.**

- “Our Victorian Manager said . . . ‘I’ll go down and see the family. . . . But he met a real block at the door, from the family. . . . I think that was partly because [there was a delay in the family being notified of the death by the police] as well, the way it was communicated. [The police] could have made greater steps to track down the wife, and the rest of the family. . . . I think that contributed to their angst.” [TK2]
- “I must say the deceased’s wife was very, very, very angry with [this company]. Blamed us for the incident. We sought to have a number of meetings. Our Victorian manager went down with a counsellor to see if we could assist. He just got told where to go. That just continued on. There was no respite from the family, although the father was reasonably conciliatory. But his wife and her brother: They came in and we had screaming matches in the office. It was very unpleasant.” [TK3]
- “I think [we] did as much as we possibly could. We paid for the funeral. We paid for the wake afterwards. And the company closed down for the day. But we got no recognition from the family about that. Like, there was a pretty strong message through the group.” [TK3]

#### **2. Companies may believe that RJ would not be safe for their employees, given their experience of highly damaging meetings.**

- “I would do anything I could to help the family, but not at the risk of damaging people along the way. The other parties may not have suffered the loss of a loved one, but they are still affected by what happened. If an employee is already feeling vulnerable and grieving themselves, they could be even more emotionally damaged by what is said to them at a meeting. I have seen instances where the employees have been in such an emotional state that I got the feeling they might do themselves harm.” [TJ4]
- “I still don’t think that you can control whether the family will or will not hurl abuse. . . . Yes, you can prepare people, but you can’t control what they say in the meeting. I’m not saying that there are no positives – but only if it all goes to plan. I just think that the potential dangers outweigh the benefits. Who is going to stand up and take responsibility for the damage that might be done to the parties involved?” [TJ4]
- “I have seen the detriment that it had on my employee. I have seen the impact it had on him and on his young family. I can only go by what I have seen. Had that experience been different, then this interview may have been very different. So I’m not necessarily saying that I am right. It may work for some people. But I saw how dangerous it was for him, to have gone through that experience. All I am saying is: Just be aware.” [TJ10]

**3. Companies may believe that the risk of an employee unintentionally causing more harm to the family in an RJ process is too high.**

- “There is a danger that the family of the deceased would read too much into what you said. Even your facial expressions might be taken in the wrong way. . . . There are so many other variables that may escape the notice of the facilitator. Could the meeting be so completely controlled and sanitized, that every word and every expression is understood in the right way? I just don’t believe that it can. . . . And that means that the risk is just too high. Put it this way: if, after three years, a professional counsellor has not been able to help the family, then how could you expect an employer or a worker – who has no training or qualifications in how to deal with a grieving person – to give the right answers or say the right thing? They can be as well-meaning as you like, but still say the wrong thing.” [TJ6]
- “This may be an honourable, noble idea; and there may be some people who might want it. But I think you are putting lives and people’s health at risk because you are not able to control what happens in that meeting. That’s why I do not agree with it.” [TJ10]

**4. Companies may believe that RJ is unfair insofar as it assumes that the presence of remorse can only be judged by an outward display,**

- “But who judges that there is no remorse? I might show no outward signs of remorse, but that doesn’t mean that I am not suffering inside. For example, I went to a funeral of a close relative recently. I didn’t cry because I am just not the sort of person who cries. But that doesn’t mean I’m not affected. That’s just my way of dealing with it.” [TJ8]

**5. Companies may believe that RJ is not for everyone insofar as individuals may wish to keep their feelings about what happened private.**

- “Perhaps this depends, to some extent, on your personality. I come from a private family. We don’t put our emotions on display. We deal with things like this privately. So it might work for some people, but this is the way I am. I would not want it if I was a family member of the deceased.” [TJ8]



## 2.5 How should RJ relate to the legal system?

In the *Literature Review*, a range of options was presented in terms of how RJ might be situated vis-à-vis the legal process. In the course of the interviews with the company representatives, these options were presented. Their reflections on the main options are presented below: that is, (a) RJ prior to prosecution; (b) the idea of a ‘restorative sanction’ (which encompasses both enforceable undertakings and court-ordered undertakings); and (c) after the legal process had been concluded. Like most of the interviewees in this research, they were more supportive of the second two options than the first.

### *RJ prior to Prosecution*

#### 1. Meeting with the family prior to the court case would prejudice the legal position of companies, so their lawyers would advise them of this risk.

- “If you’re up for a million dollars, are you going to want to contribute to the process? I don’t know. Our lawyers would be saying, ‘No’.” [TK15]
- “You’d like to think [that] your actions [in relation to RJ] shouldn’t contribute further to the penalty you’re likely to get. That’s the problem. Unless you could quarantine those discussions and say: ‘There’s privilege around this’. But I don’t know how you do that. Because there will then be people in those discussions calling you to give evidence. I don’t know, but I reckon that’s a real impost on getting the social bit sorted.” [TK15]
- “On this particular matter, being that it’s been so ongoing and sensitive, I don’t know that I would get a lot of support, necessarily, to go outside legal advice. If anything, I would use my powers of manipulation to work on our lawyers, to give me some way of being able to do it. . . . I’m mindful of risks . . . [but] I won’t necessarily let it stand in the way of doing what I consider to be the right thing.” [TL18]
- “[The] lawyers [said]: ‘You don’t have indemnity. If you give evidence here, you might implicate yourself in the finding. So don’t say anything.’ So how does that create an environment where you get the truth? There the threat of prosecution penalties actually negated the truth being on the table.” [TK13]

### *‘Restorative Sanctions’*

#### 1. Companies would be willing to negotiate a ‘restorative sanction’, particularly if it offered a cheaper and quicker alternative to traditional sentencing.

- “I know in environmental matters, the courts give orders and require companies to do things: make apologies, put an apology in the paper, and then go and do some restoration work somewhere else and those sorts of things. We’d have

been happy to have contributed to something that we thought was worthwhile, particularly if we thought it would circumvent the journey. Because we're spending money pretty quickly on our defence I can tell you. It just goes on forever." [TK16]

- "It can't be that difficult to get a legal person to sit there with the parties and determine why it happened, who contributed, and what's a reasonable penalty. You could use the arbitration process. Get one of those retired judges or someone who knows the system." [TK5]

### *RJ after the Legal Process*

#### **1. Companies were open to meet with the family after the legal process.**

- "We'd be very happy to talk to them [at that point]." [TK17]

#### **2. Companies would need to be assured that the family were not intending to take civil action. RJ might also help prevent civil action.**

- "We still don't know whether the family might even come at us in a civil action. . . . I don't know whether they've got a statute of limitations on that, whether they've got to do it within X amount of years or whatever. But that's still a possibility. So of course there's this bit of a barrier . . . [to] apologies, admissions or anything like that." [TL14]
- "I'd want to know what's the likelihood of a civil suit? . . . It's heart versus head stuff, isn't it. . . . I mean it could be best thing you could possibly do. She might be sitting there, twiddling her thumbs right now, thinking: 'How can I take [them] to task on this?' But after some overture like that, she might say: 'Geez, why would I want to do that?'" [TL17]

#### **3. The workers involved might want to put the incident behind them.**

- "If you're asking an employer or employee to meet with the family after three years, after the court case, it would just bring it all up for them again. It could break them." [TJ4]
- "[After the legal process] it's almost too late. Because I think a lot of the guys have put it to bed. I think the court case was very stressful for those witnesses. They would have just wanted to wipe it from their minds. I think we're past optimal timing. I think closer to the end of the court case [might be better]. I don't know." [TL23]

#### **4. It should not be assumed that workers have 'moved on': they should be given a choice about whether or not they wish to participate.**

- "Ok, I think a lot of them will have wanted to put it to bed. Whether or not they in fact have, maybe there might be something still niggling. Maybe there isn't. I guess that's where you give the choice: 'Do you want to participate in something

like this?’ - ‘No, thank you. I’ve put it to bed. I’m absolutely over it. I’m done.’ Or ‘Yes’. I would be reluctant to speak for them in that respect. I think choice is important though.” [TL23]

#### **5. People may not be so defensive or fearful, and so could be more open.**

- “I think it’s fresh and still a bit raw, for our people, at the start. Whereas even further down the track, they might be more open and less defensive. It’s very much in the past. They’re over any fear of legal retribution or anything like that. They could be just more free about it. They’ve had a lot of thought and time then to reflect. That would seem logical.” [TL24]

### 3. Investigators and Prosecuting Lawyers

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#### 3.1 The Interviews

One interview was held with two individuals representing an agency in Victoria that looks after health and safety investigations and prosecutions, manages the emergency response service, and employs two social workers as part of its family support service. The interview was held at the agency. It ran for one hour, and was attended by the two interviewees and the researcher.

#### 3.2 Who will take responsibility?

*To what extent might individuals within a company be prepared to take responsibility for their part in a work-related death?* Like the bereaved families, this question was addressed by the interviewees as they reflected on two key issues: Can individuals be held responsible for a work-related death? And who, from a company, would be prepared to meet with the bereaved family in a RJ process? The following provides a summary of the views expressed in relation to these questions:

**1. Work-related death is never deliberate, but employers are responsible to the extent that it is their duty to provide a safe work-place.**

- “I’ve never come across a matter where the death has been deliberately caused. They’re not accidents because employers have a requirement to provide safe working environments, but there’s never a deliberate act. They’re not accidents because employers have a requirement to provide safe working environments, but there’s never a deliberate act.” [TM7]

**2. The person who should ‘take responsibility’ for what happened in an RJ process depends on who it is that the family wishes to speak to.**

- “[W]e wouldn’t assume that one family’s sense of closure and vindication in meeting with the employer will meet the needs of another family. Because for others it might be, ‘I don’t actually care about the employer. I want to meet the investigator or the inspector’. Or ‘I want to meet the head of health and safety, and tell him how this has affected me’.” [TM2]
- “[I]t’s important that any restorative justice considerations, first and foremost, in our work, start with the family’s expectations.” [TM1]

**3. Directors of large companies would be more likely to distance themselves from the incident by sending a representative to attend any RJ process.**

- “I’ve got no doubt that the employer would be legally represented and prepared for a case conference” [TM6]
- “In the employer’s case, they can distance themselves. They could actually send a representative of the company. So it could be the general counsel . . . or a supervisor. It’s very rare to see a director in court for a prosecution. It’s almost always an operations manager or a HR manager, sometimes no company rep.” [TM6]

### 3.3 What are the Distinctive Benefits of RJ?

The interviewees were asked to discuss their views on the potential benefits of RJ in the context of work-related death. Their reflections included (a) recognising the application of broad restorative principles in their own agency; (b) supporting the use of RJ processes that involve face-to-face meetings between families and employers, if that is their wish; and (c) noting that any RJ process would need to take into account a range of important barriers and qualifications.

**1. The application of restorative principles should not be limited to RJ processes like ‘conferencing’. There should also be approaches that are more broadly tailored to meet the unique restorative needs and wishes of each family (see next point).**

- “I don’t see just a victim conferencing scenario as the only restorative practice that we would support, or not support. Because, as I said at the outset, we think it needs to be tailored.” [TM2]
- “We are certainly supporters of restorative principles. But we are also conscious that what is sometimes referred to as ‘restorative justice’, like family conferencing etc., is a really formal construct” [TM1]
- “[W]e see those restorative principles as being much broader than just family conferencing or just victim conferencing or shaming or any of the other sort of programs that might exist.” [TM1]

**2. Examples of the application of broader restorative principles by our agency include:**

- “[The family might think] ‘I want to tell my story to the media’. With appropriate controls and a framework around that, which we’ve got, we’ll allow that to happen as well.” [TM2]
- “[O]ne of the things that we did in ‘05 was to employ two social workers [who] provide crisis counselling in the immediate aftermath. [They] make immediate

contact with the family; and they will, if the family wants, establish a formal relationship then that will take them to the end of the prosecution potentially, or beyond – although it’s obviously not something that’s indefinite: they do eventually need to close off the relationship.” [TM1]

- “[W]e’ve taken [the families] to the scene of an incident, and explained to them how it’s happened, whether through an investigator or a lawyer or the social worker.” [TM1]
- “In some cases, the families are really intent on seeing – having access to documents and photographs. We generally will provide access to an investigation brief. We’ve got a policy that allows access without putting the family through, say, Freedom of Information Act, or anything like that. . . . [And we will] both prepare and then debrief them in relation to showing them the brief or any photos of the scene.” [TM1]
- “We also provide a service, obviously within the Sentencing Act, for families to prepare a Victim Impact Statement. Sometimes we’ll facilitate the statement. We’ll help them draft it and obviously work with them to ensure that they’re supported in doing that” [TM1]

### **3. If a family wishes to meet with an employer, we would support that.**

- “We may not facilitate [a meeting between an employer and a family], but we would not have the slightest objection to the family being in constant contact with the employer. It’s not a matter that causes us any difficulties.” [TM2]
- “We work with families with varying levels of interest in the prosecution and also whether meeting with the employer or whether there’s some other restorative issue that they want to explore.” [TM2]

### **4. Any use of RJ would need to take into account the range of unique logistical complexities presented in each case. These include the following:**

#### **(a) There may be internal inconsistencies within families**

- “[S]ometimes families have very different views, internally. So we’ve had a family involved in a case that was very anti-prosecution – the deceased had two families which is not unusual – and the other family was the opposite. And very different views about [our agency], about publicity and all of that. It beggars belief how you would approach that, when . . . [there is] an internal inconsistency amongst family members.” [TM6]

#### **(b) There may be a power imbalance between the family and the employer.**

- “The employer is in a very different position to the family, in terms of power and resources. [For example:] Who represents them is disparate. So I’ve got no doubt that the employer would be legally represented and prepared for a case conference; and the family may or may not be; and [they] may have social workers and all sorts of other people assisting them, but may or may not have

legal representation. [They are therefore] in a much more vulnerable state I think, notwithstanding that the employer may be facing prosecution.” [TM6]

- “[There may be] family members that are still employed by that company” [TM6]

**(c) There may be language or cultural concerns for the family.**

- “Many of the families we work with are families where English is a second language.” [TM6]
- “[Many families] are from a working class background; and there’s a real, there may be a real cultural reluctance to be involved in a process like that, and a nervousness, or a fear about the process. They’d be factors which we really take into account in how we deal with, how we liaise with families. And they are matters that really need to be taken into account if there’s a conferencing model ever considered.” [TM6]

**(d) There may be a range of pre-existing vulnerabilities.**

- “[A] really high proportion of the families that we deal with in investigations and prosecutions are clients of other government services – in terms of child protection, in terms of needing – you know whether they’ve got mental illness in the family, or are being supported in some other way by the government; and they’re vulnerable from other perspectives as well. So I think that’s also a dynamic that you would factor in.” [TM2]

**(e) The process would need to adapt to the size of the company involved.**

- “[A]bout two thirds of the employers we prosecute are also small companies. So that’s again a factor that – it’s not a one size fits all. A small employer is affected very differently, in a very personal way, to a large company.” [TM6]

**(f) There can be a variety of relational dynamics involved between the family and the employer.**

- “[W]hat makes occupational health and safety offences a different type of offences in that there has been a relationship – and often a good relationship – between the deceased worker, his or her family, and the employer. That relationship often continues. It changes, but it continues after the death. That’s something we’re very mindful of.” [TM2]
- “In some cases the employer is in fact a family member of the deceased. . . . In other cases there’s real hostility between the two, in the sense of outrage, that sort of thing.” [TM2]
- “In some cases, where we’re prosecuting the employer in a fatality matter, the family has a very strong relationship with the employer. . . . [P]erhaps that employer has been a very long term and supportive employer before the death and remains supportive after the death; and it’s important that we acknowledge that as the dynamic of that family.” [TM2]

### 3.4 How should RJ relate to the legal system?

In considering the various options set out in the *Literature Review*, the interviewees presented clear positions on how RJ should be situated vis-à-vis the legal process.

#### *RJ as an Alternative to Prosecution*

In terms of the use of RJ as an alternative to prosecution, they stated that they would not “support that option” [TM3], for the following reasons:

**1. The decision to prosecute a health and safety breach is based primarily upon whether prosecution will serve as a general and specific deterrent.**

- “If we decide that there’s a public interest in prosecuting, although we will advise and take on board the views of the parties, including the family, we are by no means bound by that, and in fact that wouldn’t override the public interest. Our decision of prosecution is also reviewable by the Director of Public Prosecution.” [TM3]
- “[T]he purpose of prosecution is deterrence, both specific to the offender and general to a similar type of offender who, but for this enforcement action, may offend. That’s why we bring charges. That’s why we publicise the bringing of charges. That’s why we have all these media alerts and so forth, because it’s important that those who may offend. . . . I’m not so convinced that a restorative justice process, as an alternative to prosecution, would actually achieve the same level of deterrence.” [TM3]
- “[G]eneral deterrence is actually - and the supreme court, the court of appeal, have said this - is actually the primary driver of OHS prosecution, not just a driver as it is in regular criminal law. So whether you take a rape prosecution or not is predominantly dictated by whether there’s enough evidence – but also the specific offender – to incapacitate that offender or punish that offender. In OHS it’s actually the reverse, because we have so much discretion about which prosecutions to take, and there are so few prosecutions, that the law has accepted that you’re actually taking a prosecution to make an example of a person so that others would be deterred.” [TM4]

**2. Given the criminal law framework of health and safety in Victoria, the use of RJ in this context must be consistent with the DOJ’s principles and policies for the use of RJ in the criminal justice system generally.**

- “Our fundamental view is that whilst health and safety has those subtleties that we’ve just talked about, it’s actually a piece of criminal law; and the broader criminal law notions of restorative justice ought to apply to it. So it’s not just a unique pocket, although it has its own subtleties. . . . [W]e see ourselves just as [much as being] in the criminal justice system, and needing the broader considerations.” [TM3]



- “[W]e would want any recommendations around restorative justice to be consistent with whatever is happening in the general criminal law. . . . Because you wouldn’t want to say that OHS actually has a lesser standard; or there’s different arrangements, because we’re talking about the OHS Act as opposed to the Crimes Act.” [TM3]
- “[For this sort of reason, any RJ Service] should be a whole of government justice intervention so that we don’t treat these matters necessarily differently to other offending that affects people in the same way.” [TM11]

**3. We would also not support the use of RJ in the context of enforceable undertakings for fatalities (even if employers and families were prepared to do so) for the reasons given above:**

- “[A]nything that comes out of an enforceable undertaking would be commensurate with what the penalty would be in a court. So in our experience that would mean, at a starting point, it would be probably 200,000 to 300,000 dollars of investment; and then go up to whatever, a million, a million plus. I think there are probably companies who would do that to avoid a prosecution. I think there are some families who would probably entertain that option as well. But we’ve not entertained it, at this stage, because of the reasons that I’ve said. It’s hard to imagine really.” [TM4]
- “We followed a policy position that had been set already in Queensland – where they’ve got much more experience with enforceable undertakings – that they wouldn’t accept them in fatalities. We adopted the same policy position.” [TM4]
- “It would have to be an exceptional circumstance before we would accept that – predominantly because our experience was that: firstly, most families didn’t see that as an option; and our overriding concern that these are criminal offences.” [TM4]

***‘Restorative Sanctions’***

The interviewees then considered the possible use of RJ in the context of sentencing. They suggested that restorative principles could be applied here in three ways: first, in court ordered undertakings, second, by the reading of Victim Impact Statements, and third by the employer offering an apology in court.

**1. RJ in court ordered undertakings was supported for the following reasons:**

**(a) The standard fine does not do much for the families, particularly if the company folds before it can be paid.**

- “We in many respects would agree with that. Like you said, sometimes the fine is not paid, and there’s no way of clawing that back against the individuals. Then it is just purely general deterrence, because the individual defendant hasn’t been punished at all.” [TM5]

**(b) The judge can compel the company to undertake reparative tasks or projects that take into account the views of the bereaved families.**

- “Court imposed undertakings . . . may take the form of a company doing a range of things for example, introducing a change to its health and safety auditing, or make a contribution to a charity, or pilot a project around the reform of health and safety. So if they are more esoteric aspects of the restorative process, then there’s certainly scope.” [TM5]
- “[I]n [a] prosecution, . . . [in addition to] one of the highest fines ever . . . the judge compelled the company to do a few things. One was to pay compensation to the family. One was to pay some money to a charity that was local. The other was to invest I think \$50,000 in [OHS] training for engineers . . . . The other is that he compelled the company to publish in the company’s annual report – it is a publically listed company – their OHS performance. Then on a quarterly basis for three years they meet with the regulator. A board member was to attend on a quarterly basis to report on their OHS. I mean that’s really the high water mark in terms of Court–Ordered Undertaking. The family as I recall – I mean it was a tragic case – they were certainly pleased with the outcomes. They were consulted about the conditions, and their preferred charities, and how they felt about that – so that all that could be conveyed to the court.” [TM5]

**(c) Court imposed undertakings could be negotiated between the bereaved family and the employer using an RJ process:**

- **AGAINST:** “Not between them, but certainly that would take into account their respective views, absolutely.” [TM5]
- **FOR:** “I think if the disposition at the court is a health and safety project or an undertaking, it would be a better opportunity to consider bringing the family and employer together; because there’s something to talk about that [is] hopefully forward thinking, long–term and will affect change.” [TM7]

**(d) court ordered undertakings can take remorse into account.**

- “[A] court imposed undertaking . . . requires the company to either be found guilty or plead guilty – which means there is commensurate remorse, which is very, very important in our prosecutions. A number of cases specifically talk about a company’s remorse, and how influential it’s presence or absence may be.” [TM5]

**2. The potential role of Victim Impact Statements to achieve broad restorative objectives was described by the interviewees as follows:**

**(a) Victim Impact Statements enable families to voice their grief and loss.**

- “[A]s you were talking around the employer and family coming together and being able to voice their grief, so to speak – that in fact there are avenues for that to happen. For the victim obviously, through the Victim’s Charter and the Victim

Impact Statement. They are really comprehensive statements about their own loss, but also about the process.” [TM8]

**(b) Victim Impact Statements allow the harm caused to the families to be recognised and acknowledged**

- “I think it’s about recognition and acknowledgement; and sometimes about balance as well.” [TM8]

**(c) There is a difference between a Victim Impact Statement and expressing the impact in a RJ setting.**

- “I agree [that giving a victim statement in a court context is quite different from doing it in a kind of face-to-face scenario, where there is that potential for a response of an apology and remorse, and so on.]” [TM8]

**3. The interviewees felt that an apology could be offered by the employer to the families in a court context, but were currently being blocked by legal advice:**

- “Although I’m yet to hear it, it’s also open to employers to apologise and talk about their own grieving [in court]. Unfortunately . . . lawyers tell them not to speak with the families, not to apologise. I think that’s a really immature short-sighted way of giving advice, because most clever lawyers should be able to craft an apology that doesn’t admit responsibility.” [TM9]

### *RJ after the Legal Process*

The interviewees were asked what they thought of the possibility of RJ as a process that is independent of any legal process.

**1. RJ as a post-finding option.**

- “We’d be very interested in that process. Very, very, very interested. [TM10]
- “[W]e’ve facilitated people coming in here, to address our investigators, or inspectors, or me, or whoever [after the legal process has finished]. . . . They’re families who have very rich . . . information and feedback for us” [TM10]

**2. RJ to address additional harms experienced by families.**

- “I’d be supportive [of this approach]” [TM11]
- “I could share anecdotes [about] families, for example, a few days after the death they received a letter from the company – a faceless letter – saying ‘here’s a termination payment’, or something. Or ‘you’ve got to hand in your security card or keys of your dead husband’. It’s just unimaginably hurtful.” [TM11]

## 4. Criminal Defence Lawyers and Compensation

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### 4.1 The Interviews

This section presents interviews with two individuals. The first ('TN') is a criminal defence lawyer who has had many years of experience defending companies in the context of work-related death and injury. The second interviewee ('TO') holds a position in the upper management of a company that, among other things, offers a workers' compensation advice service.

Both interviews were held at or nearby the offices of the individuals involved. The first interview ran to almost two hours, whilst the second was one hour. In each case, only the interviewee and the researcher were present.

### 4.2 Who will take responsibility?

One reason why this project consulted a criminal defence lawyer and an OHS compensation expert was to understand the perspective of people who had experienced many years of protecting the legal interests of employers and employees in the context of work-related death.

In particular, we wanted to gain a sense of whether the legal paradigm might dominate to such an extent that individuals would be unable or unwilling to risk taking responsibility in a restorative justice process. Would lawyers advise their clients against making any admissions to the family? What would they say to employers who *felt* responsible or who might want to own up to their part in what happened? What would lawyers working in this area think about the presumption that an employer must be indirectly or partially responsible if a death has occurred on their work-site? These are the kind of questions that are considered below.

#### *Different Levels and Types of Responsibility*

#### **1. There are cases in which the cause of death is an accident, a convergence of coincidences for which no one can be held responsible.**

- "I reckon the potential risk involved in almost any situation is death. So the fact that it occurred can often be just a convergence of coincidences, rather than anything to do with what the employer or the employee did or didn't do. Sometimes it's got nothing to do with those two things, but rather that he or she was there at the time. . . . I investigated traffic accidents for 12 years. Sometimes the difference between a fatal and a bruised shoulder from the seat belt was a fluke. The same can be said of dealing with a fatality at work." [TN8]

- “It’s really a conspiratorial view that if a death happens on a worksite, the employer must be negligent. . . . There’s no intention to kill anyone. If there was all this going on, why aren’t the [OHS prosecutors] charging people with the offences. They’re not, because it doesn’t occur.” [TN18]

**2. The employer cannot take (sole) responsibility if an employee’s independent decisions and actions contributed to their own death.**

- “[The employer] can’t have a responsibility to stand next to somebody every day of their working life. . . . [E]mployers quite rightly say: ‘Geez, we’ve got all these hats hanging up in the room, and he didn’t take one.’ Oh, well you should have been standing there making sure he took it. Come on. . . . There’s a point at which those people have to say: ‘Here’s my hard hat. I’m doing something where I need to wear this hard hat. I’ll now put it on.’ Otherwise you’re suggesting that someone in a car without their seatbelt on is somehow a victim when they run into the back of a car and break their chest on the steering wheel. No one has much sympathy for those people. Why are we having sympathy for people who don’t put on their safety equipment at work and yet when you’re in a car, it’s all about individual responsibility. . . . [If they’re not provided with safety equipment, then that is a] different story of course. Mind you, if you buy a car that hasn’t got seat belts and you choose to drive it. . . . [You] still have a choice. ‘No I’m not doing this.’ . . . You actually do have responsibilities for yourself. . . . If [some of these cases] were civil cases, then there would often be a huge element of contributory negligence.” [TN15]

**3. In larger companies, where many employees might have played a role, it is not always clear who should apologise to the family.**

- “[W]hen you get into the sorts of organisations I’ve worked in (where there are 800 people on site and there is a parent company in the States) who is it that does the apologising? Is it the Production Manager? Is it the Line Supervisor? Is it the Maintenance Manager who got it wrong? Is it the Safety Manager who didn’t have a high enough priority on it? Is it the CEO? If it is about [being] restorative for everyone - not just for the victim - how do you make sure that it is restorative for everyone in that management structure who needs it? . . . . It’s so much different to other criminal law isn’t it, where it’s one person and that’s fairly easy.” [TO4]

**4. It may be best if the RJ process began with a preliminary internal session in which organisational responsibilities were identified, followed by the CEO representing the organisation in an RJ meeting with the family.**

- “Maybe . . . participation in restorative justice [would have to involve] everyone who could be classified as a senior officer. [The] process [could then start by holding] an open facilitated discussion with [the senior officers] to try and identify what the organisational contribution was. Then the CEO adopts that position and does the apology or whatever on behalf of the organisation.” [TO5]

**5. As with industrial manslaughter legislation, it would be unfair if the CEO was asked to take personal responsibility for a death if there is no evidence they were causally involved.**

- “[W]hat we don’t like about the concept of industrial manslaughter legislation . . . is that some poor person at the top of the tree is held personally accountable for all the failings that happened all over the organisation. That person can end up in jail because somebody five levels removed did something stupid. That just doesn’t seem to be fair justice. That’s about finding someone to put in jail, rather than really looking at what the true causes for the incident were.” [TO8]

The interviewees presented a number of potential concerns about employers ‘taking responsibility’. Some would constitute reasons to think that RJ would be highly unlikely, given certain legal or moral obstacles. But there were also issues that related more to how RJ Facilitators need to work in this context. These ‘best practice issues’ are presented first, followed by the ‘potential obstacles’.

*Best Practice Issues in relation to ‘Taking Responsibility’*

**1. RJ Facilitators would need to be aware that employers can blame themselves for what happened, even where there is no evidence of their culpability.**

- “[I]n my experience, employers will usually say, ‘Well, we really could have done that better’. How? ‘Oh, I don’t know, but we could have.’ How? In so many places they just want to beat themselves up. Doesn’t matter what you said. If someone was injured, therefore I must have done something wrong.” [TN8]

**2. The question of who people perceive as being responsible would need to be resolved prior to an RJ meeting.**

- “[Y]ou run the real risk of it becoming a slanging match [if people disagree about who was responsible]. You’re sort of relying on the good will and the open-mindedness of all involved. . . . [T]he parties involved [would need to be properly assessed] before they put them in a room. If they’re just going to hold their line, then what’s the point? . . . You’d have to put those things to each of the two parties, and say: ‘Well they’re going to say that you didn’t do this, or did do this. What do you say about that?’ And presumably if the response was, ‘Well they can get f---ed’, then you pack it up.” [TN19]

**3. Given the legal risks, employers may be advised not to speak openly to an RJ Facilitator about what happened.**

- “There have been plenty of employers who’ve said: ‘I need to do this [i.e. talk to the family].’ The best you can do is get them to go to counselling or something. But even then, you’ll often get the question: ‘If I tell the counsellor, does the counsellor have to tell anyone?’ Well, actually yes. ‘Well, then I can’t tell the

counsellor.’ So you become the moral counsellor, you’re managing the legal risk but you become the only person they can talk to. It is crazy.” [TN9]

#### 4. Lawyers should not be present in any RJ process, even as observers.

- “Have you ever observed a conversation between the employer and the family? I stay away. There’s no value for me to be there as a lawyer.” [TN6] I just think we get in the way. Get us out of the picture. Because while we’re there, you’ll always get some lawyer wanting to say: ‘Oh no, don’t say that. Don’t answer that. Don’t answer that.’ That process can’t work unless it’s entirely open, and without there being any further [legal] implications.” [TN12]

#### 5. RJ Facilitators need to ensure that an employer can be honest about their part in what happened - otherwise it would be worse for the family.

- “I would have thought the worst thing that could happen would be to start the process and then find that the manager who is involved isn’t being honest. I would have thought that would be even worse for the victims, than having no process at all. So you’d really have to get the manager – or whoever else in that process – really to a point where they recognise all the issues and they’re prepared to be honest with themselves first.” [TO6]

#### 6. RJ Facilitators need to ensure that the family are able to ‘hear’ and respond in a respectful way to an employer who agrees to take responsibility.

- “There’s no point in standing there and saying, ‘Yeah, I contributed to this’ - and the family saying, ‘Yeah, you pack of bastards.’” [TN19]

#### 7. The process must be as safe and beneficial as possible for all those involved.

- “It’d be a pretty steep learning curve, wouldn’t it, to try and do it, to try and run it . . . you’d never know what the reactions were going to be. But you’d want to throw the invitation out, then you’d have to interview both of them separately: ‘Is this something you want to do? Why do you want to do it? What do you think you’ll get out of it?’ . . . So even the process itself, assuming that you got positive responses, would take some months, I would think.” [TN11]

### *Obstacles to ‘Taking Responsibility’ in a RJ Process*

#### 1. Given the legal risks, employers are not likely to be step forward and take responsibility for their part in what led to a work-related death.

- “[If families are wanting people to take responsibility, that’s] legitimate. . . . [But] I think as long as the legal risks are so severe, you’re just not going to get anyone to do it - whether they are big employers, small employers or otherwise. Because we’re talking deaths here, they will automatically bring a legal frame of mind to the table. That will either lead them to completely clam up and it will lead them to

get legal advice. And if they do, I don't know of a lawyer that's going to tell them to say any of those things. That's a product of the legal system." [TN1]

- "[I]t's about how you do [RJ] without people feeling that: 'Anything that I say to . . . the family of the person who has died is going to be used against me in some later point of time'. I think that at the moment . . . it's potentially too easy for the conversation that was had with the family – 'Look I'm really sorry and it was all my fault' (which might be the conversation that happens early) to be used later on in a prosecution: 'When it happened, you said it was all your fault. But now two weeks later you've had legal advice and you've changed your story.' 'No it was just at the time I felt it was my fault.' I mean it's like the advice you get when you have a car accident. The insurance company say: 'Whatever you say, don't admit that it was your fault - even if you think it was'." [TO1]

## **2. Criminal defence lawyers will not advise employers to admit responsibility unless they receive indemnity against prosecution.**

- "No lawyer is going to tell his client to talk in those ways unless he has that indemnity in front of him; and the indemnity's got to come from the [Director or Public Prosecutions]. Whilst it remains like that, particularly in relation to deaths, the legal implications are so tough." [TN1]
- "As soon as the lawyers get involved . . . then you are in that track of 'Don't admit things'." [TO1]

## **3. If an employer wants to talk to a family, then they need to weigh the legal risk against their personal morality.**

- "There's been a couple of cases in which I've said, 'Look I can't give you moral guidance. I'll tell you what the legal position is.' Some clients have said to me: 'Well, what would you do?' And I've said: 'I'd go and talk to the family. To hell with the legal'." [TN6]

## **4. An RJ process might result in an action plan whereby the employer agrees to 'take responsibility' by putting in place preventative systems. This may include conducting internal investigations or engaging the OHS regulator to assist with potential OHS issues. But lawyers would advise against either of these approaches, given the inherent legal risks of disclosing OHS breaches.**

- "I had a client this morning who said, 'Look, we want to keep doing investigations as a learning tool. But we want to know how to cover them with privilege.' And I said: 'Well, you can't. There are reasons for such things being privileged and a learning tool ain't one of them.' . . . That's no incentive to them." [TN5]
- "I don't think that law enforcement should be dealt with by the same organisation who deals with all the other aspects of workplace safety. In my view that organisation ought to be absolutely separate. . . . It makes for so much confusion for employers. So who is this? Is this my insurer[?] . . . Or is this the guy who is going to serve the summons? . . . Well, the way they sort it out is: 'I don't want to



talk.’ . . . All of it goes to inform an employer, that if they are involved in a death, they should shut up.” [TN17]

- “[I]f you keep upping the ante, it has the impact of closing down what, in my view, ought to be the real purpose of even bothering to investigate the death . . . which is, surely, to prevent it from happening again – to use it as an example of what went wrong and why it shouldn’t happen again.” [TN1]
- “Employers are nervous about identifying a major problem because if they fix it, that proves that that was what the problem was. So they’re afraid that what they do in the investigations, doing their corrective actions, are going to help prove that it was reasonably practicable to do it. A lot of the cases show that the fact that somebody has been remorseful and that they’ve put control measures in place actually reduces the fine, but it is that whole thing that ‘if I fix it, it’s just admitting that I did it’.” [TO3]

#### 5. Some organisations may scapegoat an employee who steps forward to take responsibility in an RJ process, as it would implicate them.

- “People are unlikely to say: ‘Yes, I’m going to buy into this process’ because there’s a lot of organisational finger-pointing when a major incident happens. . . . [T]hey might get off in the legal system, but [if they admit responsibility in an RJ process] that’s the end of their career. . . . So if you’ve got half a dozen people in an organisation who have contributed, they’re not necessarily going to step forward and say, ‘Do you want to include me in this process?’ . . . That puts them in the firing line of obviously saying that they believe it was something that they could have had control of.” [TO5]

### 4.3 What are the Distinctive Benefits of RJ?

The interviewees were asked, in various ways, whether RJ might bring distinctive benefits to those responsible for and affected by a work-related death. The interviewees tended to identify these benefits (explicitly and implicitly) in terms of a range of needs that were *not* being met within the existing legal system. Their thoughts and reflections also suggested a number of potential obstacles to RJ, most of which, in their view, were caused by the legal system. But they also argued that RJ may not be for suitable for everyone, regardless of the legal process.

#### *Potential Benefits of RJ*

#### 1. RJ might provide the only place in which the family can ‘hear’ that the cause of death included the independent decisions and actions of their loved one.

- “[In work-related deaths] the initial reaction is always to blame the employer: ‘The employer must have done something. We don’t know what yet, but we’re going to find it.’ Well, what message does that send to the employee’s families?

No wonder when you speak to them they say: ‘They’re negligent. They’re culpable. Our bloke’s dead, so don’t blame him.’ *So they’re looking for answers that they can’t find because the truth is too hard to hear – or they are not allowed to hear it?* There should be the opportunity for that to happen.” [TN15]

**2. RJ may enable employers to show remorse in a way that is not possible in a court process, thereby meeting a need that families often express.**

- “How many times have you heard victim’s families - in murders or car accidents - say, even for a guilty plea: ‘He didn’t show any remorse.’ Well, he pleaded guilty. How do you show remorse in the legal system? Your lawyer stands there and says: ‘He’s remorseful’. How else do you do it? I think there’s an expectation that is driven by the media that isn’t accurate, and so sets up expectations that just will never be fulfilled.” [TO14]

**3. An RJ process may be the only place in which employers can challenge the presumption that they are only motivated by commercial interests.**

- “I don’t think the fines deter anyone, or more accurately, it’s not the fines that motivate people. People come to me and say, ‘We want to do this because we want a safe workplace.’ They don’t come to me and say they want to do this because so and so were fined half a million.” [TN5]
- “I think [the current philosophy of deterrence] is based on the assumption that most employers run the risk of prosecution and fines because they don’t care. They care. They mightn’t get it right all the time. But it’s not a matter of, in my experience, employers saying: ‘Oh well, we’re not going to get prosecuted for this, so we don’t give a rats.’ That’s not true.” [TN2]
- “This might be unfair, but I think [the prosecutors] often see us as, ‘You’re just representing the bad employer.’ The fact is, that’s not the case. The employer will make decisions to manage its risk, whatever they might be. But I have never had a client - in the 12 odd years I’ve been doing this - that didn’t care. I’ve had clients that showed that in varying ways, from breaking down in complete tears, to ringing me at 3 o’clock in the morning, saying: ‘I can’t deal with this. I can’t live with this’. I’ve had people threatening suicide because of what happened. That never comes out, because there is nowhere for it to come out. That can’t come out in court. Even in a plea hearing, if you try to raise that, the other side will say: ‘Who cares about them? What about the family of the deceased.’ They might be crying, but ‘Sorry, you’re still alive. Imagine what we feel like.’ You get that sort of response. Why? Because there is no avenue, or method by which these things can be openly aired by people.” [TN9]
- “I remember reading a report which was done through CMN a few years ago about the suffering that the managers and the business owners have, and that often the business ends up falling over because they fall apart. I can’t help thinking that part of that is because they haven’t had the opportunity to do what they need to do, which is deal with it and address it and have the appropriate support, so that they know how to handle it as well.” [TO2]

### *Potential Obstacles to RJ*

**1. Employers might plead not guilty in court for purely commercial reasons, but the family may interpret this as a failure to take responsibility.**

- “[T]he fines keep going up . . . [So] a lot of people say, ‘Well, why would I bother pleading guilty. I might as well try and fight it.’ . . . [But as] soon as you enter that plea of not guilty, the family are going to say, ‘You bastards.’ At that point the damage might have been done. I’m sure some families would want to ask the person: ‘Why did you plead not guilty?’ And the answer is not because the lawyer said so. There are often other reasons why you might decide to do that. It’s very difficult, I know, for the employee’s family to understand that there are commercial implications to all those decisions, but that’s the reality.” [TN13]

**2. The experience of being prosecuted may overwhelm the feelings of concern that employers might have otherwise conveyed to the family.**

- “I’ve never had a client that just didn’t care. Most of them are absolutely distraught that something has happened. *So when they are prosecuted, what happens to that distress?* Sometimes the emotion gets channelled towards [the OHS agency], negatively. . . . In a lot of cases, any feelings toward a deceased’s family will get lost in it.” [TN2]
- “I’m not sure that it’s a good idea to meet after the dust has settled. Everyone wants to analyse these things ad infinitum. That’s where you can start a fight. Because then people want to protect their own interests, whatever they think their own interests are. But if what you’re doing is consoling the [family]? I think it almost runs in a cycle. Initially, people want to console. Then at some later stage [people start to protect their interests.]” [T07]

**3. The legal system may engender or reinforce feelings and views about ‘justice’ that are incompatible with a restorative justice approach.**

- “The family often fall into the trap of: ‘We want justice’ – whatever that might mean. Mostly it seems to mean retribution. We fall into the old, ‘We all hate each other. You’re going to get taken through the criminal justice system. Then we’re going to get compensation.’ If that worked, it would’ve worked by now.” [TN3]

**4. Employers may feel reluctant to engage with the family in RJ if their initial attempts to communicate have been rejected or even denied by the family.**

- “I had one situation where a family denied that the employer ever spoke to them. The family just said, ‘No they didn’t’. I sat in the car out the front and watched them go in the door, and watched them come out again half an hour later. But they denied it. The family denied that they cared, and said that ‘they didn’t even come around to see us’. I think sometimes people just forget that things happen; and work themselves into a position where, even if they are reminded, they feel obliged to reinterpret, I don’t think it’s a lie. They’ve just forgotten. But then when they’re pressed on it, the hole is already dug.” [TN6]

**5. The personalities of those involved play a critical role in whether or not a meeting will be beneficial.**

- “They’ll always come back and say: ‘I’m glad I did that’ or ‘They called me every name under the sun’. . . . I think so much of it relies on the personalities of the particular persons you’re dealing with, the employer and the family.” [T06]

**6. Employers may want to meet with the family immediately, which would prevent proper preparation or third party facilitation.**

- *Suppose an employer said to you, ‘I’d like to see the family’. What would you think if there was an RJ service available, so that you could say, ‘Go and see the service, and they’ll make sure that it’s done properly’. I’ve [referred them to a grief-support worker to organise a meeting]. A couple of times the employer just wanted to do it so quickly that it just wasn’t possible to organise. . . . Usually this is something that, if the employer wants to do it, they want to do it straight away – the day of the accident. They want to go around there and console the family.” [TN7]*

**7. The population of potential participants in this context would be relatively small, so a pilot would need to operate for a number of years.**

- “It would be interesting to see, in some kind of pilot project, just how it would unfold. . . . With around 30 work-place deaths per year, that doesn’t give you much of a statistical population to work with. So you’d have to run something for a reasonable length of time to get any reasonable view about [it]. . . . Maybe, in the end, with all best endeavours, you’ve just got to throw it in and see what sort of response you get.” [TN11]

#### 4.4 How should RJ relate to the legal system?

In the course of the discussions, the interviewees reflected on the question of where might be the best place to situate RJ vis-à-vis the legal process. They presented arguments for and against the idea of using RJ in three contexts: (a) as part of an enforceable undertaking, (b) as part of a community-based order (or court-ordered undertaking), (c) after the legal process, and (d) the coronial inquest.

##### ***RJ as part of an enforceable undertaking***

**1. Enforceable undertakings in the context of work-related death would be opposed by the OHS agency and potentially the unions.**

- “In our experience [the OHS agency] won’t entertain it, unless charges have been laid. It’s hardly an alternative if you’ve already been charged. . . . The only way it’s going to happen is if [the OHS agency] gets an indemnity from the DPP, and say ‘Righto, this indemnity is given to you on the basis that you are going to enter into

this enforceable undertaking.’ But because you’ve got these legal risks sitting around, it almost becomes impossible to administer.” [TN12]

- “[P]otentially the union . . . are likely to say, ‘You’ve pressured the family into this, and it’s not really what they want. You’ve asked them this because they want the questions answered. In two years time, their issue will be not that they don’t know the answers, but the fact that the employer wasn’t prosecuted’.” [TO7]

## 2. If the OHS breach was so minor that only a small fine is warranted, then an RJ process might be offered as an alternative or supplement.

- “There [can be] this relatively small fine when there has been a fatality, because really in the overall scheme of things it was only a minor breach. It was just that all the circumstances came together at the one time and it resulted in a fatality. . . . *I guess that’s where something like restorative justice might fill in the gap in terms of some kind of acknowledgement that the death occurred. You can sit through a court case and it is rarely mentioned, because all the focus is on the breach, what is actually being prosecuted. So the family don’t get the sense that, you know: someone died here. Was my brother really there at all? Yeah, exactly. . . . If the concern is to prosecute in order to meet the needs of . . . the bereaved family, that’s one need that’s not being met through prosecution. So how do we address that aspect? I don’t think you can, unless it’s by saying: just because it’s a fatality doesn’t necessarily mean that we’re going to focus on a prosecution. We need to look at other options instead. It’s much better to have a good enforceable undertaking restorative justice outcome, than a small fine or to have the family sit through a court case where their family member hasn’t even been mentioned. But that’s a huge change of thinking – not just for the families involved, but for the unions. . . . I think it would be very hard to convince them that anything other than a prosecution, when there was a fatality, was appropriate. So it would have to be a prosecution plus? Well, from their perspective. But . . . where we’re talking about a minor breach that leads to a fatality, then maybe having another option is important.” [TO10]*

## 3. RJ as part of an enforceable undertaking would only work if the family agreed to it and had an input into the nature of the undertaking.

- “I don’t like the enforceable undertaking model. . . . [T]he money that would otherwise go to Consolidated Revenue, through the paying of the fine, goes to some community project directly. Well, the money in Consolidated Revenue should go to community projects. It should end up in the same place. . . . [A]ll it does is relieve the local council or the state government from prioritising things that need to be done. That’s their job. Hardly the court’s job. . . . Much better [if] the people actually involved can have an input. That might happen through the backdoor. [The OHS agency] might sit down with those people and decide what they want done. But it’s sort of through the back door. Why don’t you do it up front, face-to-face? . . . Why do it behind the coat tails of lawyers. . . . That process can’t work unless it’s entirely open, and without there being any further [legal] implications, we’ll work out the penalty. . . . [M]aybe it just has the potential to have much better results for everyone.” [TN12]

- “I think you could only argue [for enforceable undertakings] on the basis of the benefit to the victim’s family, because [the OHS agency argue that the] victim’s family will demand a prosecution and therefore that’s why we do it. . . . Maybe it’s about the family having an opportunity to say: ‘If we’re going to get X, Y, and Z out of this and the health and safety is going to be of benefit to other people and it’s going to cost them more than it would have cost them for a fine, then we’re happy for an enforceable undertaking’.” [TO7]

### 3. RJ as part of an enforceable undertaking could potentially come up with more useful OHS outcomes than just court fines.

- “[O]ne of the arguments for enforceable undertakings [is that the] fines do just go into the state coffers. That doesn’t make sense. They should at least be going into some process of safety improvements, which is what enforceable undertakings do.” [TO9]

#### *‘Restorative Sanctions’*

- *“One option that we’re exploring is to have RJ in the context of community-based orders. This would be where the judge sets a certain amount of hours of unpaid work, and then the restorative process is the forum within which people decide the type of work to be done to complete the hours. That is then written into the sentence. Perfectly reasonable way to do it. . . . I think you’d probably have to get over the hurdle of fatalities first. . . . [Also] if it was up to the court to order everyone to attend that . . . they’ll close up. . . . [But] it certainly has, on the face it, some real attractions. . . . It’s a sentence that is, I hate to use the word, ‘victims’ have got some input into. . . . [and] because the employer and the people involved with that company are always – they care. But they have no opportunity to show that. In fact, the legal system really does clamp down. It says: ‘No, you can’t show that. So you just bottle it up’.” [TN12]*

#### *RJ after the Legal Process*

### 1. People are more likely to be honest and less defensive after the legal process.

- “[A]fter the legal process [is] obviously a much better place to be doing it. When it’s all complicated with the legal process, I don’t think people will be completely honest with themselves. I suppose it’s self-protection. It’s an automatic thing. You know the concept of cognitive dissonance: ‘I’m a good safety manager; therefore I couldn’t have contributed to that.’ You just come up with all the reasons why it wasn’t you.” [TO6]

### 2. Employers or managers who were involved in a work-place death may not want to re-open the matter or they may have left the organisation.

- “One of the challenges with seven years down the track is that the family hasn’t moved on, but potentially the manager has. They’ve worked out where they’re

going to bury that bit in the back of their head. It hasn't gone completely away. But they're not confronted with the loss of a family member every day, so they've been able to bury that. How do you get them to be prepared seven years down the track to open it all up again?" [TO6]

- "The other problem with 'seven years later' is that the organisation might be a very different place. The CEO might say: 'Let's get the whole management team together'. But they might be far-flung by that time, in a large organisation." [TO6]

### 3. RJ could be a part of the Coronial Inquest

- "The closest thing we've got to restorative justice is the inquest. I think that would be the place for restorative justice. I think inquests shouldn't be about legal responsibility at all. I sometimes have real difficulty just having lawyers involved in the inquest process. That's not what they should be about." [TN7]

## 5. Unions

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### 5.1 The Interviews

Two interviews were held with two individuals, each of whom represented a different union in Victoria. Both work in the area of Occupational Health and Safety. The interviews were held at the union offices. They ran for a little over one hour each, and were attended by only the interviewee and the researcher.

### 5.2 Who will take responsibility?

It was crucial that the industrial unions be represented in this Report. They could offer a hard-won insight on how the ‘power imbalance’ between employers and employees might play out in this context. This proved to be the case, as the two interviewees presented their perspective on the subject of ‘taking responsibility’. For example, it was clear that the union representatives felt that, for moral and legal reasons, responsibility should only be attributed to the employer. Again, they predicted significant obstacles to any employer (in a large company) being able or willing to lift the ‘corporate veil’ and step forward as an accountable individual.

#### *Who needs to take responsibility?*

**1. In large corporations, only the decision-maker (i.e. the individual who, under the OH&S Act, has the relevant legal duties) should take responsibility.**

- “[For large corporations, restorative justice seems to assume that there are a number of individuals who could be identified as having contributed, including possibly the health and safety officer, other employees on the site, the maintenance manager, the director, and so on.] But we’d look at it and say: the health and safety officer’s got nothing to do with it, in the end, because he’s not the decision maker. . . . It may be a hypothetical [possibility that the OH&S officer steps forward and takes responsibility]. But it’s just not legal, because the duties under the OH&S Act are actually non-delegable.” [TP3]

**2. It would be unfair to characterise any employee as a ‘moral equal’ with the employer, when attributing responsibility for a work-place death.**

- “[You might say that people who didn’t do anything to stop the accident from happening are ‘partly responsible’. But that would mean that] every worker who sat there and said: ‘If I speak up I’m going to lose my job’, [would need to be involved] in the [restorative justice] process. I don’t think that that is helpful. I don’t think it’s practical. And I actually don’t think it’s realistic. We’re not talking about equal players in a workplace. That’s the bit that I think is missing: class. . . . It really is about [people with] power and money making decisions or non-



decisions that lead to these tragic outcomes. To say that those people have the same responsibility as the person who says ‘I’ll keep my head down, otherwise I’m going to lose my job’, I don’t think that’s fair. You have to have a filter which is about power.” [TP4]

### *Obstacles to ‘Taking Responsibility’*

#### **1. Companies will only send a ‘representative’ to meet the family.**

- “[Who do you get at the table in a restorative justice sense? You’d get some PR person, or a consultant. You wouldn’t know whether they are an employee of the company or not. They get a nice, soft mild mannered person. They get briefed about a particular task to perform. It might be to front up to the family. You won’t get the managing director there. You won’t get the CEO. . . . [T]he company would decide who it was that represents the company. They would claim some right to do that. They generally accept it as a right in this country that you can choose who will represent you at any time.” [TQ2]

#### **2. Those who are responsible tend to be ‘removed’.**

- *“So they wouldn’t even think of pulling together to ask: Who was actually there at the incident? Who had some part in what happened? No. Not in the building industry. Why is that? Well, their capacity to shift and transfer people out of the jurisdiction, for a start, has been one method they’ve used to deny the courts the truth of what occurred. You know: ‘Oh we’ve got a job in Indonesia and he’s busy up there.’ So the capacity to drag him out or even interview him is lost. There have been numerous people who’ve been shifted overseas to escape the jurisdiction of the investigator. It’s just too easy.” [TQ2]*
- *“On rare occasions you see the family or the kin of a major corporate figurehead fall victim as well, as easily as everyone else. Their response is they bail. So they don’t remain in a position of influence. Their own personal grief removes them from the process. So you can’t rely on, or shouldn’t rely on the personal grief of senior leaders in industry to move this issue on.” [TQ8]*
- *“The vast majority of employers in the building industry are labour only structures which distribute their profit each year and have no tangible assets. The advice they get when they are being investigated in these circumstances is to wind-up their affairs, put the ‘company’ through the shredder, and purchase another corporate shell for about \$1000. The directors of the first ‘company’ become the directors of the second ‘company’, and the previous employer ceases to exist. That’s how the system works. Imagine if Carl Williams could change his name and cease to exist, start a new life as a re-born person, as regularly as he liked. The system wouldn’t work. We say the system doesn’t work when the corporate shroud is used in the same way.” [TQ8]*

### 3. People will be advised against taking responsibility.

- *“Do you think anyone would step forward voluntarily, if they felt personally involved in what happened? Oh, well, look I think there are good people. But all the advice they would get would be to the contrary. They would have to have deep commitment to humanity itself to fulfil that. . . . We really are getting down to the 1 or 2% of people who care. There’s so much other advice. No one stands alone in this world. Family, friends and other advisors would overwhelmingly suggest that wisdom be that they made themselves scarce rather than available. The corporate veil just provides a reason not to flee the country, but doesn’t exclude them from doing so. They often do both.” [TQ3]*

### 4. There are psychological reasons why denial is the more likely response.

- *“They would do anything but be identified with that class of people regarded as criminal. The killing of another person, wherever you sit in society, is not regarded as a credit.” [TQ4]*
- *“If [taking responsibility] was much more of a practice in the criminal code, observers, free men could observe the benefits. They are just unlikely to stand in the shoes of the victim. Denial comes too easily.” [TQ5]*
- *“[C]learly if someone’s been bashed after they were arrested, or mistreated while they were in remand . . . they might just harden up. There are many things that can influence the capability of people . . . to sit down and talk to someone across the table, victim or otherwise.” [TQ5]*

### 5. The justice system can only ‘evoke’ an admission by appealing to self-interest.

- *“[W]hen people are faced with options about terms of imprisonment or size of the penalty, they may be persuaded by those issues to come forward and express some genuine remorse [since] the courts give some credence to [that] . . .” [TQ5]*

### 6. RJ will face opposition from those who have an interest in the corporate veil.

- *“The wall of corporate interest is as hard and solid as the bluestone at Pentridge. It’s very hard. Very hard men. Their advocates - that you see in the media and in the courts - are very hard men. They know the system is solid. It’s important to them at least that it remains solid. It’s their watch. If they saw any softening in it, they would take it personally. So those people who are leaders of the bar council and all those sorts of organisations, they are very much front-liners around this issue. They make their money out of this issue: protecting the corporate veil. That’s where their bonuses and their very fast red cars come from.” [TQ8]*
- *“It would require the consent of the Business Council for government to have the intestinal fortitude to proceed with a concept that traded off the protections of a corporate veil - the imputation of offence from the individual to the corporation - and therefore allow a person, a real person to come forward. . . . But you’d need to understand that the corporate sector would be absolutely opposed. It’s black and white to them. There’s a corporate veil and that’s what it’s for. It’s to avoid personal responsibility.” [TQ8]*

### 5.3 What are the distinctive benefits of RJ?

Whilst both interviewees were, in principle, positive about restorative justice, they were also very concerned about ensuring that the benefits were weighted toward those who had been harmed, rather than the employer. This was expressed in several ways, but the following extracts are the most explicit examples.

First, one interviewee suggested that the problem with RJ is that it can only benefit the victim if, at the same time, it provides the offender with some degree of moral consolation ('being able to live with themselves'). But for victims who do not want to take part in RJ – or who do not want the offender to benefit in any way – then the court process, on its own, should be reformed so as provide victims with at least some of the other core restorative benefits, such as decision-making power.

- "It seems like [restorative justice] should happen, in a way. But also it's so challenging. So I wondered: if you could get those things that the victim wants – to be treated with dignity, to let them be the one who decide things – then do you need this other bit: where the guilty meet with them just so they can live with themselves." [TP2]

Second, one interviewee was willing to accept that RJ may evoke remorse in the individuals responsible; but the problem is that (a) this response is too late, and (b) it would not function as a deterrent for other companies.

- "We've often said it here: If we could take that remorse and that wake-up call when something terrible happens and they come out and say: 'I never want this to happen to anyone ever again' - if [only] we could get them to think like that *before* they did it. It's an awful thing to say that it's only those tragedies that change behaviour. For the most part, they only change the behaviour of that individual. It's not a learning that goes beyond that." [TP5]

Third, the other interviewee was interested in how RJ might be used to create a 'forced-choice' scenario: either face the family as a morally responsible human being or lose substantial financial assets, if not the entire company. This might provide sufficient incentive for them to 'lift the corporate veil', behind which so much harm can be hidden and individual responsibility avoided.

- "[I]f the corporate veil disappeared, and the directors were personally accountable, *that* would be effective. . . . I think if . . . people knew the rules well beforehand, that in the event of a serious incident, if you want to protect your own assets, your own economy, you had the option of fronting up personally or allowing the corporation to take the full brunt of it, that's where I think you might see some traction with a restorative justice approach. . . . You might then get someone like the managing director fronting up, and not just a well-rehearsed script or a substitute. You might actually get a lot more tangible support for the victim's family from that circumstance. If they lift the corporate veil, they're in the gun. If they front up, then they have something to draw upon to provide some tangible support for their sharing of the grief. I think that's what it comes down to. If you're prepared to sit down with victims then you share their grief. You can't leave the room without doing that." [TQ6]

## 5.4 How should RJ relate to the legal system?

The union representatives suggested two positions on the place of RJ vis-à-vis the legal process. First, RJ should not be offered as an alternative to prosecution, since that would only benefit the employers. Second, RJ could be used to create a ‘restorative sanction’, since that could ensure that the penalty was more likely to benefit the family of the employee directly.

### *RJ as an Alternative to Prosecution*

#### 1. RJ should not be used to allow guilty employers to avoid punishment.

- “Who benefits from this stuff? Is it a victim driven approach that says: ‘Courts are a crock, we want – whatever it is’. I don’t really get a sense that that’s where it’s driven from. . . . My cynical view is that ‘saying sorry’ is what lawyers and PR people now tell people to do: ‘Don’t go on the TV. Don’t say, oh well, or whatever. Go and say we’re really truly sorry. But without admitting guilt.’ That seems to be the latest corporate tool. The sooner you come out and apologise the better. And people are enormously forgiving. But who does that suit? I think apologising and all those things have to happen. They are still very important. But we have to make sure that it’s not done to get them off the hook. . . . Or about trying to minimise what could be massive payouts. So again, who does it suit?” [TP1]

#### 2. No employer will take responsibility unless there has been a prosecution.

- “I got a 2006 report on Comcare: There were 19 employees of the federal government killed at work. One prosecution. So in a restorative justice sense, how do you get someone up to the mark when no one is prepared to say, ‘We think you are as close to guilty as a conviction might make you.’ They will walk away. None of them take responsibility.” [TQ1]

#### 3. RJ should focus on those who are prepared to plead guilty in court.

- “I don’t know what percentage of people . . . are prepared to acknowledge their . . . intent or at least the facts [in court]. But that’s the group you work with. I think that’s where a system of restorative justice is rooted. . . .” [TQ5]

#### 4. We would support RJ as an alternative if the company actively met the needs of the bereaved family.

- “How do you think the union would feel about that sort of approach? Oh, I think it would be entirely positive. Even if it meant that a prosecution was avoided? Yes, where a director is being investigated for prosecution as a corporate officer. Because the victims would be getting more from it? Yes, because at the moment penalties just goes into Consolidated Revenue. If any of the major companies took an active interest in the future of the workers’ children and those sorts of things, we’d be very supportive of it.” [TQ7]

## 6. Coronial Services

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### 6.1 The Interviews

One interview was held with two senior officials currently working in the State Coroner's Office of Victoria. The interviews were held at their respective offices, and they ran for a little over one hour each. The interviews were attended only by the interviewee(s) and the researcher.

### 6.2 Who will take responsibility?

The *Literature Review* argued that it was at least theoretically possible for an employer or employee to take responsibility for their part in a work-related death. However, in the course of the interviews for this report, it has become apparent that they would be strongly advised by their legal counsel not to do so, given the legal risks involved.

However, a coronial inquest is not a criminal court, and so is not designed to establish legal guilt. Hence, we wondered whether, in this context, an employer or employee might be willing to speak more openly in an inquest about their part in what happened? Or would the risk, again, be considered too great? Would they simply plead the right to silence, rather than say anything that might incriminate them?

In this respect, we also were interested in the potential impact of the new Coroner's Act, which comes into force on November 1<sup>st</sup> 2009. Under that Act, individuals can be forced into the witness box, and so will not be able to claim the right to silence. But they will also receive indemnity for anything said in the box. We wondered whether the coronial officials felt that, under these new conditions, individuals might be more likely to admit responsibility? More importantly, we wanted to know what the implications might be for restorative justice if they did 'confess' during the inquest. For example, if a RJ service were made available, would the coronial court be prepared to recommend that those concerned participate on a voluntary basis?

#### *Obstacles to 'Taking Responsibility' in a RJ Process*

The officials we interviewed were virtually unanimous in their answers to the questions raised above. Whilst they felt more research was needed, experience suggested that any admission of responsibility in the context of a death would be a rare exception to the rule, even with the protection of indemnity.

## 1. Individuals involved in a work-related death tend not to testify in an inquest because of the legal risk, even if they are remorseful.

- “A. I don’t know about industrial deaths, since they tend not to get in the witness box at the moment.” [TR5]
- “A. I can just think of a couple of inquests in the last six months where employers have said, ‘I’m not saying anything. I’m going to exercise my right to remain silent’. The Coroners have had to rule on the law and say: ‘Yes, it’s a very broad privilege; and yes in these circumstances you may expose yourself to a criminal prosecution. So I’m going to grant you the privilege’.” [TR7]
- “B. The industrial deaths I’ve been involved in are so much more difficult because as soon as it happens, everyone shuts up. They won’t say a thing. They are scared. A. Yes, everyone just lawyers up. They go off into their corners. B. I think some of them genuinely do have remorse and some concerns. But they just don’t know how to handle it. They just don’t know what to do. So they shut up shop.” [TR10]

## 2. Legal counsel will sometimes express regret, but without admitting liability.

- “[S]ometimes there will be an acknowledgement in the hospital-style deaths, which is a potentially comparative model. The legal counsel for the hospitals will express regret to the families for what happened. They express an acknowledgement that this was a shocking thing, but with no admissions of liability. [They] just get up there and say it was a terrible, terrible thing. I don’t know whether families are comforted to hear that.” [TR5]

## 3. Even under the new Coroner’s Act, admissions are unlikely to increase.

### (a) It is unlikely that an inquest will be held prior to any criminal prosecution.

- “A. [A]fter the 1<sup>st</sup> of November 2009, in the new Coroner’s Act, we . . . are going to have the capacity to force somebody into the witness box to answer questions, even in circumstances where to do so may tend to incriminate them in an indictable offence. . . . So in the event that there’s a criminal prosecution for an industrial death, we won’t be going before that criminal prosecution has been exhausted. So in other words, trial – verdict – penalty – appeal.” [TR7]

### (b) Anyone forced into the witness box receives indemnity.

- “A. [I]f we’re going to force them on, then we’re required to give them a certificate of indemnity from any criminal prosecution or civil liability – except not from perjury. So if they perjured themselves in the witness box, then they’re not protected. But if they hopped into the witness box and said: ‘I did it’, they’ve got a certificate of indemnity.” [TR7]

**(c) Even with an indemnity, they are unlikely to admit to anything.**

- “A. I recall talking to my colleagues in the other jurisdictions about [potential problems that might arise. For example] what happens if you’ve got the journalist sitting there and you’ve got this incredible scenario where someone says ‘Yes it was me’. Do you put a suppression order on it so the journalist cannot report it? My colleagues in the other jurisdictions say it has not presented a problem for them.” [TR7]
- “A. But maybe they won’t [plead guilty] before we run through our process.” [TR12]

**(d) Other states may have evidence of an increase in admissions.**

- “I know that NSW and WA for example have this system already that they can force on witnesses. So we’re actually playing catch-up here in Victoria. It would be interesting to ask the other states about whether or not families feel that, in this industrial death area, they get more out of it.” [TR7]

**4. The family may be satisfied with an acknowledgement and a sense of remorse from the CEO, rather than an admission of responsibility.**

- “B. Sometimes the families only want that acknowledgement and for the head of the company to show some sort of remorse. So they don’t need to have full-blown admissions: ‘I killed him’. So I suppose it’s a matter of assessing each case with the families, and assessing the family too.” [TR8]

**5. Even if employers were willing to take responsibility, they may not want to participate in RJ because of their experiences with the family.**

- “[W]e certainly couldn’t direct them. So if the employer says ‘I’m not going to a conference. The family were unreasonable. They’re not going to be satisfied by anything that we say’, we cannot take that further.” [TR8]

**6.3 What are the distinctive benefits of restorative justice?**

One question that we needed to ask the coronial officials was whether they could see a *distinctive* role for restorative justice. We wanted to know whether they felt restorative justice could fill a significant gap; or whether it might simply duplicate or overlap with existing processes, in particular, those provided by existing coronial services. The coronial officials suggested that there were now a number of therapeutic aspects to an inquest that did indeed overlap with many of the potential benefits of RJ. But they also agreed that there might still be a unique set of benefits that could be provided by a separate, more informal meeting. For example:

- “[In an RJ process the family have the opportunity to] see the offender sitting there sobbing his heart out saying: ‘I get nightmares every night. I can’t believe what’s happened.’ It’s something for the family, rather than just the stony silence of the court-room. . . . ‘What does he really think? I need to know.’” [TR10]

Nevertheless, the officials focused, in their interviews, more on the ways in which an inquest can provide bereaved families with a range of ‘restorative’ outcomes, rather than having to do these things in a subsequent RJ process:

### 1. The inquest can give families answers about what happened.

- “A. Families report to us that [the inquest] can be a therapeutic process for them. They have felt like . . . somebody independent has had a look and said ‘Look this is what I think has happened . . . .’” [TR2]
- “A. The State Coroner’s Assistance Unit [SCAU] are the police members who are permanently stationed here. They do most of our in-court work. So it’s [their] staff that run most of the inquests in front of the Coroners. They are the ones who are talking with the families about the issues of concern to them before the court process starts. [They ask the family questions like:] ‘What would you like to draw to the attention of the coroner?’ . . . ‘Have you got any more questions?’” [TR3]
- “[A]t least somebody’s telling the truth about what happened. That’s big, you know. The truth is coming out. Even if nobody at the end stands up and says (like in Perry Mason): ‘I did it and I’m sorry’ – just that process itself, I think, works some powerful therapy. That’s what we are told. I actually think that’s right. I’ve been in practice myself. I’ve seen people say, ‘Well we don’t like it. We wished that something else would have happened. But at least the truth has come out.’” [TR6]
- “There was a lot of research in this area of restorative justice in the children’s court. There were families reporting back saying: ‘It was a great relief to actually be able to talk to a young person who burgled the house. We asked: ‘Why us? Why did you come to our house?’ And they say: ‘I was just walking by. That’s it. It was that simple’. I remember a family who had their van torched by a couple of young boys. The family (victims) were in an organic green grocery business. They thought they were being targeted by the underworld. They truly believed that their van had been torched by some Footscray market underworld figure. Instead, these two 16 year old kids were walking past and thought it was funny or a good idea. (They couldn’t explain it really. They just did it). The kids were remorseful; but what was much more important [to the family] was to just understand what happened. [Industrial death] is different territory. We’re doing our best [in the inquest] to find out what happened, rather than [leaving that up to] the employer. . . . [So] I just can’t imagine that [restorative justice is] going to change what the family are going to get.” [TR11]

### 2. Individuals can take responsibility in an inquest, which can benefit the family.

- “B. The best example [I know of was where] one of the doctors did not do something; and if he had done, it this woman would more than likely have lived. This more or less came out in the evidence. He was asked: ‘If you had done this,



would she have lived?’ and he said: ‘Yes’. Now the families at first they were a bit: ‘Ok that’s it. We want blood.’ But when I explained to them and said: ‘That is just amazing, that you’re getting someone to admit that. He didn’t have to do that. He didn’t have to go [into the box]. He could have actually denied all knowledge, and you would never know. He’s actually said something that you didn’t know about and admitted [it]. It wasn’t negligence as such.’ They actually took something from that. They actually felt he had genuine remorse; and they did actually in the end feel sorry for him. . . . They really drew some comfort from that, definitely.” [TR5]

- “A. One of my colleagues told me about this [case]. A doctor got into the witness box and said: ‘Look what can I say, it was too little too late.’ . . . She said that he looked absolutely devastated when he said it. He looked pained, distressed, under pressure, but honest. That I think has a positive impact on a family. They feel like they’re not going mad. They feel like it’s vindication for the position that they’ve maintained all the way through.” [TR5]

### 3. The inquest can make preventative recommendations.

- “A. [T]he preamble to the [new Coroner’s] Act will actually say that a major reason for [the coronial jurisdiction] existing is to assist in the prevention of preventable deaths . . . I listened to a chap this morning talking about the loss of his son . . . in the wake of the carnage on the roads on the weekend. . . . He’s clearly feeling comforted about being able to hope that something positive will come out of the loss of his son. I’m sure that’s why many people are going off to the Royal Commission. Some bushfire victims go there, with their heartbreaking stories, hoping that something positive will come of their tragedy and to bear public witness to what happened.” [TR2]
- “A. If, at the end of the process, the Coroner makes recommendations about changes that should happen in hospitals as a result of what’s happened here, that the family says: ‘Well at least no one else will have to go through what we go through.’ You know how you hear that, like a mantra, over and over again in the community. . . . But they were comforted to think that something positive came from it.” [TR6]

### 4. Coronial officials can personalise the experience for families.

- “A. [W]e refer to the deceased by their names. We personalise the experience for families as best we can, so that we actually include them at the beginning. . . . Even in the course of our findings, [we might say] something a little bit personal about whoever it is . . . [such as] ‘John being the much-loved son of these people.’ I sometimes say to my colleagues, ‘You know this is a little bit like the last official word on this human being who has lived and walked this earth. This is the last official record of their life.’ It’s not a eulogy. That’s not what we’re doing. But I don’t think it detracts from any part of our work to put in just something that humanises this person a little bit for anyone who comes along and reads it afterwards, without crossing the border into an apparent lack of impartiality. They are small things, endeavouring to ensure people their loved ones are not just another number in this jurisdiction or a case file, instead of a valued human being.” [TR4]

## 6.4 How should RJ relate to the legal system?

One of the main reasons for speaking to coronial officials was to determine their views on whether restorative justice could be situated within or connected to the Coronial Court in some way. For example, would they concur with Michael King's suggestion that any RJ process should only "be held after the coroner has handed down a decision"<sup>1</sup>, and not when factual matters and issues of responsibility are still in dispute? The following extracts indicate that the interviewees tended to agree with this view. In particular, an RJ process, they felt, could be used as a kind of debriefing session after the inquest, if all those involved were willing and suitable. Another suggestion was that RJ could be used to address the range of non-criminal, undisputed harms that families experience in the aftermath of a fatality, and which are brought to the attention of the coronial service in the form of complaints.

### *RJ prior to the Legal Process*

#### **1. It would be ideal for the companies to engage with families early on, without admitting liability – if the families were able and willing to do so.**

- "B. [Some families] might feel it's ok for them to speak to the [employer] 2 years down the track. But for some of them, that's just too late. It's just too late. I think it's quite difficult. I mean it would be fantastic . . . if the building industry were educated to take some care with these families earlier on, without admitting responsibility. But that's a personal thing for people. . . . I mean it's very difficult. Because they don't know how the family is going to react. Some do get quite angry and aggressive." [TR9]

### *RJ only after Legal Guilt has been Determined*

#### **1. RJ is better situated in the criminal context, not a Coronial inquest**

- "A. [I]n the context of industrial deaths . . . one might say to the employer: 'You've created a harm. How are you going to restore the balance?' But there is a difficulty in our jurisdiction. Unlike a criminal court, we are not making findings about who has done a wrong. So in a way, restorative justice feels to me like it shouldn't be here. It should be in the criminal context." [TR1]

#### **2. A plea of guilty should be the pre-requisite for any referral to RJ by the Court.**

- "A. [T]he restorative justice program that we have in the children's' court was very much simpler in this regard, because basically the prerequisite was a plea of guilty. So you cough up, you plead guilty, and then there's no problem about going into the conference. You've entered your plea of guilty. . . . There's no

<sup>1</sup> King, M. (2008) "Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model": p. 15. (Unpublished).

restorative justice program for the murder, manslaughter, or culpable drive here. Although interestingly enough I believe New Zealand do it, certainly in their juvenile jurisdiction. I don't know about their adult jurisdiction. They've reported some really very profound conferences. But again, it's after the finding. They've either pleaded or been found guilty – usually it is pleading guilty." [TR10]

- **"A.** I think the ones that will be clearest [for restorative justice] is where there has been a criminal prosecution, and there's been a plea of guilty. Easy. . . . *So you're saying there would have to be plea of guilty before people will agree to do RJ, because the legal risk is too great?* I know what their lawyers are going to tell them. No lawyer, is likely to say any different to them, really - which is a shame, but understandable from the requirements of a lawyer's duty to their client." [TR12]

### *RJ as a referral from the Coronial Court*

#### **1. Given that the inquest can be held several years after the death, the family may (or may not) be willing to participate in RJ:**

- **AGAINST RJ:** **"B.** Sometimes I think it's the timing of it. We're talking about after the inquest. This can be two, three, four years down the track and the families are [only then] getting a 'sorry'. I don't know if they're going to take that as genuine." [TR5]
- **FOR RJ:** **"A.** Although if it's as opposed to never, it's still something." [TR5]
- **FOR RJ:** **"A.** [T]hree years down the track they've come to terms with the death. If it was three months down the track they'd be much angrier. It just wouldn't be enough. But three years down, they've worked through a whole lot of the periods of grief that the experts tell us are the way in which the process goes." [TR6]

#### **2. RJ as a referral from the Coronial Court is unlikely if they are found guilty in a criminal court, given that an inquest is usually not held.**

- **"A.** And if they are found guilty, then we usually wouldn't hold an inquest - unless there was something more that we thought we would find. There will have been a fairly complete investigation before it gets to us." [TR12]

#### **3. The Coronial Court could refer (but not direct) people to a RJ service, if they expressed a desired for this.**

- *"If a bereaved family expressed to you the wish to meet with an employer, and supposing there were a restorative justice service, would you be willing to . . . B.* To recommend or refer? Yes, definitely. **A.** Oh if the service existed? Yes, absolutely. To facilitate that, to have a structure for it to refer them to? Absolutely. . . . We certainly could recommend that the parties participate. We've got the power to make comments and recommendations, but we certainly couldn't direct them." [TR8]

**4. An RJ process could be offered as a way of enabling the company and the family to sit down after the inquest for a ‘debriefing’ session.**

- “A. In a way, I wonder if whether or not where you might get a toe-hold is perhaps in a debrief, if you called it a ‘debrief’ really, rather than a ‘conferencing model’. So, where we have inquests, you would come into this arena, sit through the inquest and then offer to do a debrief with the family afterwards, invite the employer to join in. That’s one possible model that might be of assistance. The family might get some comfort from someone just sitting down with them and going through it afterwards. . . . That’s one possibility. But again, we can’t force anybody into it. But if the service was there - I really don’t know. I mean they obviously want to hear from the police [i.e. in the SACU debriefing], and have respect for the position and authority that they hold. So I don’t know if they [would also want a more informal debriefing].” [TR9]

**5. RJ could be used as a way of resolving complaints made to the Coroner’s Office about additional harms that have been caused to bereaved families.**

- *“If there were complaints about the Coroner’s service that you thought were too delicate or complex to handle in the normal way, could they be handled by inviting an independent restorative justice facilitator to arrange a conference or meeting?”*

A. Oh, I think that is probably a real opportunity. . . . What I was seeing when I arrived [at the Coroner’s Service], and still see sometimes, and certainly saw during the bushfire period, was complaints about ‘the system’. People were really angry with the Coroner because ‘the funeral director came and behaved in an inappropriate way’; or because ‘the police came to the scene and did something or nothing . . . [I]t might be an orderly in a hospital that’s done something; or the way in which somebody was transported here; or something incorrect was reported in the newspaper. We are responsible for some of these issues. I am not being critical of the reasons why people complain at all. It is one big horrendous and traumatic experience. I am just saying that what the ambos did, what the funeral directors did, what the police did, what the hospital orderly did: becomes all enmeshed in our jurisdiction and it can be very difficult to talk to families about these issues without sounding defensive and like we are ‘buck passing’.”

*So if there were a service that offered to chase up these people and see if they’d be willing to come and apologise to the family for what’s happened, do you think that would be a useful thing to have?*

A. “I do. Yes, I do. Particularly in the wake of us becoming a court. At the moment, the Coroner is responsible for the delivery of the Coronial system in Victoria. . . . So we’ve just got to spend lots of time following up these complaints. [It would be helpful] if there was a service which said, ‘Look perhaps if you can go off and see whether or not this matter can be resolved in this way.’ [Having said that] the police . . . will investigate any complaints made against them; and the health services commissioner exists to follow up on poor treatment at hospitals. But often what we’re getting is the broad brush stroke of what happened. So there may well be a space there to hop in and say: ‘Look can we just try and help you sort this out and get around the table perhaps, with the funeral director or with the CEO of the nursing home, and see if we can sort it out.’” [TR13]

## 7. Roundtable

### 7.1 The Meeting

On June 5<sup>th</sup> 2009, a roundtable was held for the purpose of garnering the views of a wide range of key stakeholders and experts on the subject of restorative justice and work-related death. The following is a list of the attendees:

Name	Position	Organisation
Yossi Berger	National OHS Officer	Australian Workers' Union
John Bottomley	Director	Creative Ministries Network
Tracey Browne	Principal Adviser	Workers' Compensation and OHS, AI Group
Peter Condliffe	President	Victorian Association for Restorative Justice
Michelle Ehlers	Chairperson	Creative Ministries Network Board
Mike Hammond	Partner	Deacons [Law Firm]
Samantha Hauge	Manager	Prevention Unit, Coronial Services
Clare Keating	Director	Effective Change
Michael King	Senior Research Fellow	Faculty of Law, Monash University
Steve Kolotylo	Principal Operational Analyst	WorkSafe
Stan Krpan	Director	Legal Services & Investigations Division, WorkSafe
Judy Leitch	CEO	Coronial Services
Deanne May	President	Industrial Deaths Support and Advocacy
Christine Parker	Associate Professor and Reader	Law School, University of Melbourne
John Smith	OHS WorkCover Policy Advisor	VECCI (Victorian Employers' Chamber of Commerce and Industry)
Peter White	Senior Legal Manager	Gallacher Bassett Services, Workers Compensation

The focus of the roundtable discussion was a consideration of basic three questions. Each question was designed to elicit the views of the attendees on the working hypotheses that emerged in the *Literature Review*, that is:

1. Who will take responsibility?
2. What are the distinctive benefits of restorative justice?
3. How should restorative justice relate to the legal process?

The following presents a summary of the responses that were provided to these three questions, most of which uses the actual words of the attendees. An analysis of the responses found that key themes emerged in the way that the three questions were addressed. These themes have been identified by categorising the responses under a set of sub-questions.

## 7.2 Who will take responsibility?

### *Who needs to take responsibility?*

- It needs to be most senior person possible.
- From the families' point of view, only the CEO can give an undertaking that this will never happen again. This is why the CEO or a senior person needs to participate directly in a RJ process, rather than delegate.

“My brother was killed in the workplace. Having met some years later with the CEO of the organisation, it completely changed our progress. (We weren't progressing really: we were travelling very roughly.) He flew down from Sydney and came to visit my mother and listened to what we had to say. . . . He flew back to Melbourne some weeks later and met with us again. He brought his wife with him and we went to dinner. It did change everything. It changed things a lot. It didn't bring my brother back, but it was nice to be heard and to have somebody acting on that. It made a huge difference.”<sup>1</sup>

- It should be the one who feels that they *need* to take responsibility and who, in the family's view, has the *power* to do so.
- A RJ process should provide a safe environment where *all* those involved can acknowledge their responsibility and also find some healing.
- This process requires company representatives with 'soul': that is, people who can engage in compassionate human listening.
- It may be helpful to distinguish between who should take responsibility for the *harm* and who should take responsibility for the *restoration*.
- The question of responsibility is going to be all about what different people along the route think 'responsibility' is. Everyone in the interviews would have had a quite different definition of 'responsibility'. Some only think about it legally, but it is bigger than that. How do you get them away from the legal concept? That is where I think the criminal justice system prevents RJ.
- 'Corporate responsibility' mirrors the issue of 'corporate victims', in the sense that it can be equally difficult to identify an 'individual victim' where the crime has been committed against a large company. However, RJ can and has operated successfully in the latter context; so there is no reason why it cannot also do so in the former.
- If the company is a small organisation, there can often be a personal relationship between the business owner and the family of the person who has been killed. In that circumstance, it may be easier for RJ to happen.

<sup>1</sup> This example was provided by one of the attendees. The quote is a transcription of a recording made of the meeting

### ***What are the main obstacles to people taking responsibility?***

- Often within organisations, when something bad happens, everyone avoids responsibility, rather than taking it on. What we need is for people to be human and acknowledge their little bit in a complex situation.
- The biggest barrier is the human thing: a death has taken place, let's avoid it.
- The concept of 'responsibility' implies guilt, knowledge and negligence, and so it stands in opposition to the entire corporate veil.
- It is very rare to be able to find one individual in a company who *is* responsible, and who can *accept* responsibility. The closer to the top the better, but that may not be possible. You may never find the cause of death.
- CEOs may be reluctant to meet with the bereaved family because they think they will get abuse hurled at them.
- It is a natural human response not to want to face death or people who have been affected by death. We're frightened that we'll say the wrong thing.
- RJ requires that any admission of responsibility is sincere. But companies may, with the best of intentions, admit responsibility for the death in RJ merely because they want to help the family, rather than because they accept that they contributed to or caused the fatality. (e.g. 'If you want me to say that I'll pick up responsibility, I'll do it. But I'm more interested in helping'.)

### ***How can companies show that they are taking responsibility?***

- When companies put things right, they demonstrate that they are taking responsibility through their actions – even if this does not involve an apology.
- RJ is not an 'arm-around-the-shoulder' cynical gesture. It is a difficult, structured process that involves trained and expert facilitators, and a genuine taking of responsibility, demonstrated by action.
- A lot of bereaved families say they know nothing is going to bring their loved one back, but they want to know that other families are not going to have to go through what they went through. They want something to be done. So the employer needs to take responsibility by doing something to demonstrate to that family that they are doing their best to make sure it doesn't happen again. The RJ process can ensure that this discussion is on the agenda at the point when an action plan is formulated.
- Companies can take responsibility by giving families answers to the question 'why did this happen?' People find it difficult to get over their grief when they are unable to find any answer in the courts as to why it happened.

- The policy in our public hospital system is to take responsibility and meet with the family as soon as possible. The CEO, the nurse, or the treating doctor will go through what happened and what the error was. They will apologise to the family, ask them what they need, and work with the family to help. If the legal and insurance barriers could be overcome, perhaps companies could implement a similar policy.
- Avoidance of responsibility is a very common response to incidents of this kind. To be human is to engage in avoidance tactics. It may actually be useful, particularly if it allows time for healing to take place. So to engage in RJ, an employer would need to identify and work through their resistance to taking responsibility. This would be a normal part of any RJ process.
- RJ could be embedded in a company's corporate vision, goals, and mission statements as part of a broader commitment to how they will deal with clients, customers and staff.

#### *What are some of the risks for bereaved families?*

- Family members might be comforted by executives at the highest level in the court room. But when you speak to the family afterwards, too often they come to realise the cynicism involved in that gesture. So, in any process that brings the two sides together, there would need to be a great deal of caution. Ensuring that the company's participation is sincere would be essential.
- Legal culpability is generally black and white. In a RJ process, the question of who was responsible can be more nuanced. But this does pose a potential risk for bereaved families. For example, it could be traumatic for them to discover that the actions of the deceased might have brought about or contributed to their own death. So each case would need to be assessed for its suitability, rather than just applying RJ in a blanket fashion.
- The company may agree to send a representative to an RJ meeting to take accountability for the employer's actions or omissions. But this person may not have been personally responsible in any way. The family, on the other hand, would not be represented by another person. They would not have that 'buffer'. This situation could easily result in a power imbalance.



## 2. What are the distinctive benefits of restorative justice?

### *What are the benefits for the bereaved families?*

- RJ can be a means for enabling bereaved families to heal more fully from their grief, restoring them with the dignity needed to live a fuller life.
- RJ can benefit families by giving them an opportunity to get answers to questions, such as how could this have been allowed to happen, and what are you doing to make sure it doesn't happen again.
- RJ may help families to obtain a commitment from companies that they will remember those who died (e.g. sending a card to the family on the anniversary of the death every year).
- RJ in this context would focus upon *the person who died*, rather than a *breach of OHS regulation*. RJ may therefore benefit families who need to participate in a process in which the company and all those involved explicitly acknowledge and address the death of their loved one.
- RJ can bring to the fore the fact that work-related deaths have a deep impact on the people who work in the organisation where the fatality occurred.

### *What are the benefits for the companies?*

- One can see the benefits to families, but what's the benefit for employers? Clearly, it is the human aspect.
- There would have to be good reasons for employers to voluntarily step into this. Perhaps it can be seen as a process that helps them to 'put things right'.
- It is important that this process recognises that, whilst the family has lost someone, the employer is often struggling as well. They are grieving and feeling the burden of guilt and responsibility. RJ needs to help both sides.
- The benefit for company representatives is that to interact in a more human way may help them to understand more deeply the consequences of work-related death, and to embed their commitment to occupational health and safety at both a personal level and in the corporate culture.
- The RJ service may have an educational purpose with industry and commerce, helping to create a larger framework in which RJ is used to address any harm the organisation contributes to or causes. This would be similar to the use of RJ in schools.

***What are the benefits generally?***

- RJ could provide a space – a safe place – within the justice system for people to interact in a more human way to achieve a range of benefits not so readily available under the criminal justice system.
- RJ creates a space for a human encounter within the legal process, one that focuses on personal harm, rather than just the law.
- By taking place outside of legal constraints, RJ can allow participants to engage in an honest conversation. It lets people be people. It offers a degree of humanity.
- As RJ is implemented, there may be benefits for the wider community.
- The RJ service’s capacity to record data and conduct evaluations of its casework may help to identify trends and patterns that contribute to prevention of work-related deaths.

### 7.3 How should RJ relate to the legal process?

***What are some general principles that should govern the relationship between the legal process and RJ?***

- Criminal justice and RJ should not be regarded as mutually exclusive. They share a number of core values and principles and they each have distinctive mandates (i.e. serving the public interest / meeting private needs).
- The legal system and any RJ service should operate within a framework of mutual respect, striving to ensure that they do not undermine the integrity and quality of each other.
- The requirements of the law in relation to work-related deaths have priority over the application of RJ in any instance.

***At what stage(s) in the legal process should RJ be made available?***

- It should be acknowledged that a number of restorative practices can and do occur within the existing criminal justice framework and the coronial system.
- RJ processes should not be offered as an alternative to prosecution.

- All the remaining options for RJ in the *Literature Review* (listed below) should be considered on a case-by-case basis.
  1. Restorative and Respectful Communication with the Bereaved Family
  2. Restorative Justice in the Absence of Prosecution
  3. Restorative Justice in the Coroner's Court
  4. Restorative Justice as an Alternative to Prosecution
  5. Pre-Sentence Restorative Justice
  6. Restorative Sanctions'
  7. Post-Finding Restorative Justice
  8. Restorative Approaches in the Aftermath of Work-Related Death
- The decision to employ a particular referral pathway should be based primarily upon the needs of the bereaved family.
- Given that approx. 50% of work-related deaths are not prosecuted, RJ may meet the kind of needs that arise where no prosecution has taken place.
- When the new Act for Coronial Services comes into effect in November 2009, it will require bodies to whom coronial recommendations are made to respond within three months. It will also require the Coroner's Court to make these responses public. This may provide opportunities for RJ processes to be more closely linked with coronial processes.

***What are some suggestions for ensuring greater collaboration and coherence between RJ and the legal system?***

- A significant concern about the use of RJ is that 'what is said' might be used against a participant in a subsequent legal process. One solution might be to employ the kind of confidentiality agreements that are often used in a small business dispute resolution system. These are not 'mediation' sessions that must be reported back into the justice system, but facilitated conversations whose outcomes are confidential to the participants.
- Lawyers and the judiciary need to ensure that more attention is given to the psychological and relational impact of the legal process upon both parties. In many cases, the legal process can lead to a severe deterioration in communication between the parties, exacerbating their grief and impairing their recovery or restoration. Lawyers and the judiciary should therefore strive wherever possible to ensure that the legal process does not undermine the possible benefits of a RJ process in this way. This is likely to require further education for the legal / judicial fraternities.
- There are a range of stakeholders who are equal partners in RJ. Hence, the preferred position is to ensure that equality by having the independence of the Department of Justice as the governance agency for any RJ service in this context.



## SECTION C

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### Recommendations



## Recommendations for the use of Restorative Justice

This section presents the recommendations, based on the findings in this report, for the use of restorative justice in the context of work-related death in Victoria. They are divided into three sections: (1) the **form** that any RJ service operating in this context should take, (2) how it should **function** and (3) **implementation** issues.

### 1. Form

#### Recommendation 1. Definition of Restorative Justice

‘Restorative Justice’ should be understood as *any process that seeks primarily to address or repair the harm caused by an offence or incident*. This is generally done by providing a ‘safe place’ in which all those involved have an opportunity to discuss the following three topics, with the assistance of trained Facilitators:

- (1) what happened;
- (2) how were people affected; and
- (3) what needs to happen:
  - to repair or make amends for the harm,
  - to make sure it does not happen again, and
  - to bring about positive changes for all those concerned.<sup>1</sup>

This kind of conversation may involve a meeting between those responsible and those harmed; but it may also involve ‘shuttle dialogue’ or entirely separate discussions, depending on the needs and wishes of those involved.

In this context, the ‘primary harm’ addressed by an RJ process would be *the work-related death*. ‘Additional harms’ would include the kind of hurts caused by agencies, institutions and individuals in the aftermath of the death.

#### Recommendation 2. Relationship to Victorian Government Policy

The use of RJ in the context of work-related death should be consistent with the Victorian Government’s policies and strategies for the implementation of restorative justice, including: the *Attorney–General’s Justice Statement II*<sup>2</sup> and the *Department of Justice Strategic Priorities 2008*<sup>3</sup>.

<sup>1</sup> This definition is from the *Best Practice Standards for Restorative Justice Facilitators* (Victorian Association for Restorative Justice, 2009)

<sup>2</sup> “The Government will [identify] opportunities to expand restorative justice programs” Department of Justice, Victoria (2008) *The Attorney General’s Justice Statement II*: p. 8.

<sup>3</sup> “Priority challenges and responses [include implementing] a range of initiatives that place increased emphasis on the needs of victims . . . considering restorative justice options to give victims a greater role in the criminal justice process.” Department of Justice, Victoria (2008) *Department of Justice Strategic Priorities 2008*: p. 9.

**Recommendation 3. Governance of any RJ Service**

A RJ service operating in this context should *not* be delivered or managed by any agency that is directly involved in the area of work-related deaths (e.g. grief support services, OHS regulators, workers' compensation schemes, unions, social work, etc.). It should instead operate under the auspices of the Department of Justice.

**Recommendation 4. Relationship to other Services in this Context**

The use of RJ in this context should not duplicate (or function as a substitute for) the kind of support services that should be available to all bereaved families and companies, such as counselling, grief support, social work, and so on.

**2. Function****Recommendation 5. Quality Assurance for RJ Processes**

Any RJ process should be carried out by appropriately qualified Facilitators, meet very high standards of best practice in the field, be entirely voluntary for all participants and involve significant preparation of both parties. For this reason, a RJ service operating in this context should only employ RJ Facilitators who meet the following requirements:

- they are able to demonstrate that they have the advanced knowledge and skills required to facilitate serious and complex cases, as described in the *Best Practice Standards for Restorative Justice Facilitators* (Victorian Association for Restorative Justice [VARJ], 2009);
- they have received Advanced VARJ Accreditation, in accordance with the *Accreditation Scheme for Restorative Justice Facilitators* (VARJ, 2009);
- they have the capacity to facilitate a RJ process that may take between 6 to 18 months (from the point of referral) to complete;
- they have received specialist training in delivering RJ for (a) serious and complex cases in general and (b) work-related death in particular; and they have significant recent experience and qualifications in a relevant field (e.g. a grief-counsellor for bereaved families);
- they are provided with appropriate line management and case supervision, as described in the *Best Practice Standards* (VARJ, 2009); and the case supervisor has (a) received specialist training and has experience in delivering RJ for serious and complex cases, and has (b) significant recent experience and qualifications in a relevant field.



**Recommendation 6. Support Framework for Participants**

RJ should only be offered where participants have adequate access to independent professional assistance that may be needed to support their engagement in an RJ process, that is, in addition to the normal preparation provided by the RJ Facilitator. This includes counselling, grief support, and so on.

**Recommendation 7. Referral Criteria and Pathways**

A RJ service operating in this context should be maximally flexible, in terms of meeting the needs of all those involved or affected by work-related death. This includes ensuring that it has the capacity:

- to deliver RJ to *anyone* who (a) has experienced or caused harm in the context of work-related death and (b) requests or agrees to use the service, including bereaved family members, companies involved in the fatality and any agency or institution that may have caused ‘additional harm’;
- to offer RJ at *whatever* stage in the legal process is consistent with (a) the referral pathways and protocols established by the Department of Justice, and (b) the needs and wishes of all participants;
- to offer RJ as a means of addressing *any* of the ‘additional harms’ that can occur in this context, as described in this document.

**Recommendation 8. Context-Specific Issues**

A RJ service operating in this context should take into account the evidence provided in this report. This includes the following findings:

***Bereaved Families:***

- There are multiple and various ‘additional harms’ that bereaved families and others can experience in the context of a work-related death.
- These additional harms can obstruct and prevent the grieving process.
- The vulnerability and grief of bereaved family members can magnify the intensity and duration of the suffering caused by these additional harms.
- RJ processes must be tailored to each case, taking account of:
  - (a) the families’ expectations, interests and needs in relation to restorative justice, noting potential inconsistencies or disagreements within the family (or families) involved;
  - (b) the families’ preference to focus initially or exclusively on the use of RJ to resolve the additional harms they have experienced;

- (c) the nature of the relationship between the family and the employer company, including potential power imbalances that might arise in a RJ process;
  - (d) the families' request for a 'culturally safe' RJ process, which includes meeting their language needs;
  - (e) the families' desire to meet or communicate with those individuals whom *they* feel need to take responsibility for their part in what happened (e.g. the director, rather than general counsel), subject to the those individuals being willing and suitable to take part.
- A RJ suitability assessment should, with the consent of the family member, include an appraisal by an independent psychologist as to whether they will benefit from meeting with an employer or employee for the purpose of addressing the harm caused by a work-related death and/or additional harms caused in the aftermath of the death.
  - Families must be assured that individuals from employer companies who agree to participate in an RJ process have been assessed by the RJ Facilitator(s) as having a genuine desire and ability to acknowledge, understand and apologise for the harm that has been caused.
  - The RJ Facilitator should offer the family an opportunity to identify or create a symbolic means of acknowledging and honouring the person who died within the context of any restorative meeting.

***Employer Companies:***

- Any RJ process should not be premised upon untested assumptions about the kind of motivations or attitudes held by employers or employees that may have created or permitted the circumstances that led to the death.
- Any individual from a company should be assured that the bereaved family has been assessed as willing and able to engage in a respectful and constructive dialogue (a) with *that* individual and (b) on the understanding that a RJ process is designed to provide a 'safe place' in which intense emotions can also be voiced and heard.
- A RJ suitability assessment should, with the individual's consent, include an appraisal by an independent psychologist as to whether they will benefit from meeting a bereaved family for the purpose of taking responsibility for their part in the events that led to the fatality.
- Any individual employee who wishes to participate in a RJ process should, wherever possible, be formally supported by the CEO and upper management, which includes assurances that their participation will not lead to adverse consequences for the individual in terms of their employment or their position within the company.

- A RJ process will need to take account of (and, in some cases, may be exclusively focused upon) the harm experienced by employees or employers *subsequent* to the work-related death, including early communications with the family, the investigation, the court process, media reports, loss of employment, the penalty, and so on.
- RJ Facilitators should ensure that individuals from companies are fully aware that they should not (and should not feel under any pressure to) (a) take responsibility in a RJ process for matters over which they had no control or influence, or (b) present to the family an account of what happened, when they do not have sufficient evidence to justify that account.
- Where the company believes that the employee who died contributed to the circumstances that led to his or her death, then this matter would need to be addressed in a shuttle dialogue process with the family prior to any face-to-face meeting.
- RJ Facilitators should ensure that employers and employees understand the distinction between (a) RJ processes and (b) processes that do not involve the taking of responsibility, including post-incident debriefing sessions, grief-support or therapeutic groups and dispute-resolution processes, such as mediation or arbitration.

***The relationship between RJ and the Legal Process:***

- The referral pathways that are most likely to meet the needs of all those involved include using RJ:
  - (a) as an initial means of opening up or restoring communication between the bereaved family and the employer company before any legal process;
  - (b) as a means of tailoring a sentence (e.g. a court-ordered undertaking), so that it includes restorative elements;
  - (c) after the legal process (if any) has been completely concluded.

### 3. Implementation

#### **Recommendation 9. Legislation**

Any RJ process in this context should be afforded the kind of legislative protections that are consistent with Department of Justice's policy on the use of RJ in a criminal justice context.<sup>1</sup>

<sup>1</sup> For example, this might involve modifying the *Sentencing Act 1991* so as to include the equivalent of s.415(10) and (11) in the *Children, Youth and Families Act 2005*, which are designed to protect confidentiality in youth justice group conferences.

**Recommendation 10. Training Materials**

Training material for RJ Facilitators should be developed that is specific to the application of RJ in this context. This material should draw upon the evidence and the findings of this research project.

**Recommendation 11. Pilot Service**

The application of RJ in the context of work-related death should be piloted, for a minimum 3 year term, under the auspices of the Department of Justice. The pilot should be supported by an advisory committee, composed of key stakeholders in the area of work-related death.

**Recommendation 12. Education**

Any RJ service operating in this context should develop and implement educational and communication strategies for the purpose of ensuring that all relevant parties<sup>1</sup> have a clear understanding of: (a) RJ principles, processes and best practice standards, (b) the findings of this report, and (c) the referral criteria, protocols and pathways.

**Recommendation 13. Evaluation**

Any pilot should be evaluated to test whether it addresses the critical issues identified in this research project, including:

- the impact of RJ on the grieving and trauma of participants;
- any effect on OHS culture and performance in both participating companies and in the wider industry;
- the need for legislative protections in RJ processes;
- the most effective referral pathways;
- the quality of training; and
- the application of best practice standards.

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<sup>1</sup> This would include: judicial officials, lawyers, police, coronial service, unions, officers and employees of employer companies, bereaved families, and so on.

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