

ENDING THE DEATH PENALTY IN WHS MATTERS

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Labour, Employment and Workplace Safety Alert

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INQUEST AFFIRMS THAT IT'S TIME TO END THE DEATH PENALTY FOR WHS MATTERS

Despite the fact that Australia has not executed anyone for a crime since February 1967, a recent coronial decision^[1] has lamented the willingness by some businesses to continuing with the death penalty for WHS matters.

The coronial inquest was specifically examining a string of quad bike deaths and in the process raised a very important principle in the work health and safety legislation. That principle is the key role the WHS legislation has in ensuring that workers who make an error of judgement should not be subject to death or serious injury.

The coronial inquest focused on eight fatalities involving quad bikes and found that many quad bike fatalities are the result of 'user error'. As part of this finding, however, the inquest also noted that the 'penalty' for user error (i.e. an error of judgement) should not be death or serious injury.

The inquest noted that:

- user error was involved in almost all cases with the operator failing to follow various manufacturer warnings, such as a warning against riding on 'steep' terrain
- the phrase 'all-terrain vehicle' was often misleadingly used to describe the bike
- many operators overestimated the capabilities and stability of the vehicles because of the bike's appearance.

The inquest held that it was apparent that a number of the deaths involved riding quad bikes on terrain that was 'too steep', but that there was little information to guide on determining exactly 'how steep' is 'too steep'. Even so, the inquest ruled that businesses, manufacturers and the community still needed to reduce the unacceptable level of deaths by adopting well accepted work health and safety risk assessment principles.

WE ACCEPT THE DEATH PENALTY

This circumstance is not unique. Yet, although we eschew the death penalty for shocking crimes, it is puzzling that so often we accept death or serious injury for a person who 'does something stupid'. Being human means that from time to time workers will make an error of judgement at work (a human will be 'stupid'), and, while it is true that workers must take responsibility for their actions in the workplace, it is clear that humans by their very nature are at times, tired, careless, inadvertent, distracted, or can have a brain snap.

We know that humans, as clever as they are, are subject to a range of life events that may detract from their ability to act without error. If we had a machine in our workplace that was subject to the same sorts of errors, WHS risk assessment principles would probably lead us to substitute that machine for one with a lesser risk. Alternatively, risk assessments would consider controls that would isolate the machine errors or engineering controls to provide a barrier between workers and the machine in the event that an error takes place.

THE HAZARD OF HUMAN ERROR

How much more then must our WHS risk assessment take into account human error as a hazard and assess the risk? What happens if:

- the worker is careless (not recklessly so, but humanly so)
- the worker is inattentive or acts inadvertently (because they are stressed or tired or ill)
- the worker is foolish.

So often after an accident people are left saying that the worker was trained, the worker knew better and "I don't know what [the worker] was thinking when they ...".

So while workers may be subject to administrative controls such as training and directed to adopt the use of personal protective equipment, as the inquest into quad bikes held – "at the top of the hierarchy, and considered to be more effective, are engineering controls which design out the hazard." In this case, the 'hazard of simply being human'.

WHAT TO DO

This inquest is a timely reminder to all businesses that in order to comply with the WHS legislation, businesses must:

- recognise that being human means from time to time we fall into an error of judgment
- review SOPs or SWMS to see if they take into account human error and if they have high level risk controls to eliminate or minimise the hazard of 'humanness'
- ask the question, if a worker using this SOP or SWMS has a moment of normal human error or human carelessness or human inadvertence, will they still be safe?

The death penalty for criminal matters has long been wiped from the criminal codes. Its time to remove the death penalty for an error of judgement, for merely being human in the workplace.

Notes:

[1] Inquest into the deaths of Donald Eveleigh, Angela Stackman, FW, ML, Anthony Waldron, Colin Reid, Bradley Jackson, Robert Beamish and LE (26 November 2015)

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