

1 September 2005

Tasmania Law Reform Institute
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Dear Sir/Madam,

**ISSUE PAPER NO 9
CRIMINAL RESPONSIBILITY OF ORGANIZATIONS**

Please note that the following submission is restricted to answering the questions framed by the issues paper. We appreciate that the Institute was not required to consider its research in the light of a greatly reducing incidence of workplace injury in this state despite at least a 3% increase in employment numbers in the same period. Nor was the Institute considering this area in terms of a balance between education and penalty. We believe that these issues are very germane to any decision by Government on a change to its policy in terms of criminal penalty. As the Institute was not charged with considering these matters when it formulated its issues paper, the TCCI's views on these matters will be taken up with Government in the event that it moves to implement any of the recommendations of your work.

**ABOUT THE TASMANIAN CHAMBER OF COMMERCE &
INDUSTRY**

The Tasmanian Chamber of Commerce & Industry (TCCI) is Tasmania's peak business organisation. It provides effective leadership and a range of quality services to businesses both large and small, located throughout the state.

We seek to work with Government and other groups to shape Tasmania's economic and social environments in a way which promotes business growth and community prosperity.

TCCI and its predecessors have been providing a broad range of high quality services and advice to the Tasmanian business community for over a century.

Building on this history, TCCI today is the state's peak employer body and is recognised as the voice of the Tasmanian business community.

TCCI is a non-profit organisation that is funded by members for members.

TCCI directly represents in excess of 1,790 businesses employing 58,700 Tasmanians approximately 40% of the Tasmanian private sector workforce.

TCCI member's average number of employees (FTE) is 38.8, however, the mean number of employees is 10.

TCCI also represents members operating in every industry area as outlined by the Australian New Zealand Standard Industrial Classification System (ANZSIC).

The diversification of TCCI's membership is illustrated in the charts below:

STATEMENT OF POSITION

TCCI is of the opinion that in general terms the existing criminal law and occupational health and safety law adequately addresses issues relating to the criminal responsibility of organisations. In respect of workplace fatalities and serious injury, TCCI acknowledges that in a minority of cases the existing criminal law and occupational health and safety law fails to address community concerns regarding the conduct of business. TCCI is, however, of the opinion that any change to the existing criminal law and occupational health and safety law is unnecessary and the risks of unjust outcomes from such proposals will act as a disincentive for entrepreneurial activity within Tasmania, thereby adversely affecting the economic future of the State.

TCCI is of the opinion that workplace health and safety issues should be focused on education and training as the primary method of prevention of workplace fatalities and injuries rather than punishment or the threat of punishment by serious criminal sanction.

TCCI SUBMISSIONS IN RESPONSE TO ISSUE PAPER NO 9

Question 1

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

No. The view of TCCI is that the existing criminal law sufficiently addresses the wrongdoing of those responsible for workplace deaths.

Question 2

Should the method of attributing criminal liability to organizations (the identification doctrine) be reformed?

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

Question 3

(a) Should any reforms apply to all 'organizations'?

Whilst TCCI is opposed to any proposed reforms, rather being of the view that the existing criminal law is adequate, if reform is to be introduced, such reforms should apply to all organisations.

(b) Should the term 'organization' be defined broadly, in line with recent Canadian reforms?

Whilst TCCI is opposed to any proposed reforms, rather being of the view that the existing criminal law is adequate, if reform is to be introduced, TCCI is of the view that the term 'organization' should be broadly defined in line with recent Canadian reforms.

(c) Would it be appropriate/necessary to implement any of the recommendations of the VLRC in relation to liability of the Crown?

If reform is to be introduced it is both appropriate and necessary that such reforms apply equally to the Crown as to private sector organisations. To do otherwise would undermine the intent of the proposed reforms.

(d) Do you favour an exception like that in the UK draft bill relating to things done 'in the exercise of an exclusively public function'?

If reform is to be introduced TCCI is of the opinion that any derogation of the reforms which would have the effect of reducing the liability of the Crown and employees of the Crown would be contrary to the underlying intent of promoting workplace safety by the threat of criminal sanction. TCCI is therefore opposed to any exemption for the Crown from criminal liability even in relation to things done 'in the exercise of an exclusively public function'.

Question 4

(a) Should a specific 'senior officer' type offence be introduced to the Code?

No. TCCI's view is that the existing criminal offences provide adequate liability for criminal responsibility in respect of senior officers whose conduct is causative of the death or serious injury of a worker. TCCI is opposed to the concept of organisational responsibility being imposed on senior officers in the *Criminal Code*. Any 'senior officer' offences should, if imposed, be contained in legislation such as the *Workplace Health & Safety Act 1995*, however, it is noted that the *Workplace Health & Safety Act 1995* already imposed liability on senior officers who are either responsible officers or accountable officers.

If so,

(b) *What should the elements of such an offence be?*

Not applicable.

(c) *How should the term 'senior officer' be defined and should the definition extend to volunteers?*

Not applicable.

Question 5

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

No. TCCI is of the opinion that the existing criminal law is adequate, both under the *Criminal Code* if the circumstances of a particular case warrant prosecution on indictment, or under the *Workplace Health & Safety Act 1995*.

(b) *Should such offences be indictable?*

No.

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

The existing penalties are adequate and appropriate.

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

No. The introduction of different maximum penalties depending on the consequences of a breach of duty focuses on the outcome and not the blameworthiness of the conduct. Such differences in maximum penalties could lead to unfair or inappropriate outcomes. For example, it is conceivable that a relatively minor breach of duty could be perceived as having the outcome of causing death or serious injury. On the other hand a gross disregard for occupational health and safety standards could result in no deaths or injury.

TCCI is concerned that the focus of occupational health and safety legislation should be on prevention and education with the intent of reducing the incidence of workplace accidents and near misses. Viewing the issue from that perspective, the organisation which grossly disregards occupational health and safety standards, but such disregard has not resulted in death or injury, presents a serious problem that needs to be addressed for the immediate protection and safety of employees within that organisation. Additionally, that hypothetical organisation, if its conduct is viewed from this perspective, is engaged in conduct which attaches to it a high level of blameworthiness, and to which significant penalties should apply.

Question 6

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

No. TCCI is of the opinion that the penalties under the *Workplace Health & Safety Act 1995* are appropriate for the Tasmanian business community and economy.

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

Not applicable.

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

No. The focus of the *Workplace Health & Safety Act 1995* should remain on prevention and education rather than punishment. In circumstances in which death or serious injury results from criminally culpable negligence the existing criminal law provides an adequate criminal liability to punish those who were actually responsible for the death or serious injury.

Question 7

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

Yes. S 53 of the *Workplace Health & Safety Act 1995* imposes a harsh liability of directors of companies. It also contains a reverse onus of proof which TCCI believes is unwarranted. TCCI is also concerned that s 53 only applies to bodies corporate with directors (i.e. corporations).

If so,

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

Yes.

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

Yes.

(d) *To whom should the offence apply?*

All officers of bodies corporate, as defined in the *Victorian Occupational Health and Safety Act 2004*.

Question 8

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

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

Reforms to the *Workplace Health & Safety Act 1995*. TCCI is of the view that the *Workplace Health & Safety Act 1995* is specialised legislation designed to promote better workplace health and safety practices together with a system of monitoring, and in some cases the imposition of criminal sanction for serious breaches of acceptable workplace health and safety standards.

TCCI does not, however, support the introduction of manslaughter or grievous bodily harm provisions, the introduction of breach of duty causing death or grievous bodily harm provisions, or the introduction of higher maximum penalties. The reasons for such views are expressed elsewhere in this submission.

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

- *manslaughter and grievous bodily harm provisions*
- *breach of duty causing death or grievous bodily harm provisions*

(b) higher maximum penalties

- *senior officer liability*

Not applicable.

Question 9

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

Yes. TCCI is of the opinion that fines are both an effective and appropriate punishment in most cases of organisations wrongfully causing death or injury. The imposition of a fine strikes at the economic heart of a business organisation and punishes the business in relation to its very reason for existing – for economic gain.

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

The organisation's size, revenue and assets already is a factor that is taken into account by courts when imposing a fine. The courts are required to consider the means and ability of an offender, including an organisation, to pay a fine. The courts should not, however, be expressly required to impose a fine in proportion to the organisation's size, revenue and assets. To do so would derogate from the other factors that the courts are required to take into account when imposing a

sentence, and would interfere with the ‘instinctive synthesis of the sentencer’ approach to sentencing that was recently approved by the High Court in *Markarian v. The Queen* [2005] HCA 25.

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

Traditionally information regarding matters such as the means and ability of an offender to pay a fine is provided to the sentencing court by defence counsel during the course of a plea of mitigation. If the prosecution disputes the statements made by defence counsel the defendant is required to prove the disputed facts on the balance of probabilities. The disputed facts hearing process involves the adducing of evidence in the ordinary way. Evidence of the means and ability of an organisation to pay a fine could be adduced by proving the books of account of the organisation, calling accountants and financial officers to give evidence etc.

TCCI considers that there is no need to shift away from this traditional method of proving facts relevant for sentencing.

Question 10

Should disqualification orders be an additional sentencing option?

TCCI opposes disqualification as a sentencing option in respect of corporations. The effects of a disqualification order could be disproportionate to the offence in terms of the consequential impact on workers employed by the organisation, their families and shareholders.

TCCI does not oppose the concept of disqualification of individual directors or office holders in circumstances where the individual has been convicted of a serious criminal offence and in which the individual concerned demonstrated a gross failing in the standard of care expected of a director or office holder in the position of the individual concerned.

Question 11

Should dissolution of a corporation be an additional sentencing option?

No. TCCI believes that dissolution of a corporation as a sentencing option could unfairly and adversely affect innocent workers, shareholders, creditors, suppliers and other people and organisations who conduct business with or are otherwise economically involved with a corporation.

TCCI is also concerned that ordering the dissolution of a corporation upon conviction is unlikely to provide a long term remedy due to the likelihood of the corporation being re-established under a different corporate structure as a ‘Phoenix corporation’.

Question 12

Should community service orders be a sentencing option for organizations?

TCCI supports the concept of community service orders being a sentencing option for organisations. TCCI perceives the concept of community service orders as being an ideal mechanism for the courts to sentence organisations for serious breaches of occupational health and safety laws. At the same time, the imposition of a community service order would impose a realistic punishment on an organisation because it would require the organisation not only to spend money but also expend other resources such as labour. The punishment would demonstrate the atonement of the organisation and at the same time directly benefit the community.

Additionally, from the perspective of the community, the organisation would have been punished by the imposition of a penalty other than simply a fine.

Community service orders could be tailored by the sentencer to fit individual circumstances of the organisation and the blameworthiness of the conduct giving rise to conviction.

Question 13

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

TCCI does not oppose the concept of the imposition of probation orders as an additional sentencing option for organisations, and is of the opinion that such a sentencing option would promote rectification of poor systems of work, prevention of similar incidents and education to the organisation and its officers.

If so,

(b) Should legislation list organizational specific conditions?

If probation orders are to be made an additional sentencing option for organisations, the *Sentencing Act 1997* should be amended to list organisational specific conditions. The possible conditions should, however, be both broad and flexible to enable the sentencer the ability to carefully tailor the sentence to both the particular organisation and the particular offence for which that organisation has been convicted.

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

Other than the two matters addressed below, no.

Question 14

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

TCCI has no objections to the making of adverse publicity orders on organisations convicted of offences relating to the death or serious injury of the organisation's workers in the course of their employment and for which the organisation is responsible.

Question 15

Should equity fines be an additional sentencing option?

No. TCCI agrees with the Tasmania Law Reform Institute's preliminary view that equity fines should not be introduced and agrees with the criticisms of the concept of equity fines that was made by the New South Wales Law Reform Institute.

TCCI notes that the main group disadvantaged by the imposition of equity fines would be shareholders, and notes the Institute's comments that it is those shareholders who have failed in their duty to adequately supervise management as well as being unjustly enriched. The reality of the modern Australian financial system is such that the majority of shares are typically held by superannuation funds, managed funds and the like. Many working Tasmanians with superannuation or other managed investments may therefore be adversely affected by the imposition of equity fines. The investment of superannuation funds or other managed investment involves fund managers making investment decisions and not the individual fund member. Accordingly, the imposition of equity fines may punish those investors for whom decisions have been made on their behalf by a fund manager and over which they have little, if any, effective control.

Question 16

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

No. Whilst TCCI is not opposed to the concept of punitive injunctions it is concerned about the ability to effectively impose them. For example, it is relatively straight forward to impose an injunction preventing an organisation from engaging in specified conduct. It is much more difficult to frame a mandatory injunction, particularly if it was to require the development of innovative techniques. An organisation may simply not be capable of developing such techniques, or the techniques themselves may not be technically capable of being developed. A further concern is that when introducing any new system, an organization must undertake a risk assessment of that system. In some circumstances, whilst a particular system may at face value, alleviate a risk in one area, it may have adverse consequences in other areas which in turn results in a greater risk than the risk intended to be alleviated. The imposition of such punitive injunctions by the courts could result in organisations being unable to effectively manage the risks within their organisation. TCCI is also concerned

about how the courts would obtain evidence upon which to base a punitive injunction order.

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

Not applicable.

Question 17

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

No. The current system in which a sentencing judge has discretion to make a compensation order is appropriate. The reality is that in the vast majority of cases in which a worker dies or is seriously injured, the circumstances giving rise to such death or serious injury which result in conviction will by necessity result in a finding of negligence on the part of the employer.

Question 18

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

No. TCCI is of the opinion that the existing legislation confers sufficient and appropriate powers on the Courts to address issues relating to poor occupational health and safety practices within Tasmanian business and industry. TCCI does not, however, oppose the introduction of community service orders, probation orders and adverse publicity orders for organisations.

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

TCCI does not believe that any additional sentencing options are either necessary or desirable, but does not oppose the introduction of community service orders, probation orders and adverse publicity orders for organisations.

OTHER MATTERS

TCCI observes the difficulties associated with the proposed reforms in Victoria, specifically that despite the Bill being introduced in November 2001 has still not passed the Upper House.

Additionally, in relation to the Australian Capital Territory legislation, the fact that the Commonwealth has taken steps to have itself excluded from the legislation by the introduction of a proposed s 11A to the *Occupational Health & Safety (Commonwealth Employment) Act 1991* (Cth). The proposed s 11A would also operate to exclude the Commonwealth from similar liabilities imposed by Tasmania. TCCI is opposed to a system in which a large proportion of the employment sector can not be held criminally liable, but others can be.

TCCI is also concerned that the proposed legislation is aimed predominantly at workplaces. There appears to be little good reason for differentiating between workplaces and other occupiers of premises.

Thank you for the opportunity to input into the issues paper. TCCI briefed Messrs Dobson Mitchell and Alport Solicitors to assist compilation of this response. In turn Steve Knight of DMA briefed Mr Peter Tree SC who has provided assistance and who is also providing a more formal advice over the next few days. Although out of time, I am happy to provide part of this advice when it has been received.

Yours faithfully,

Damon Thomas
CHIEF EXECUTIVE