COMMUNITY
LEGAL CENTRES
TASMANIA

5 February 2024

WorkSafe Tasmania
Department of Justice
PO Box 56
Rosny Park TAS 7018
attn: Acting Director of Policy and Projects

via email: worksafepolicy@justice.tas.gov.au

To Lindi Bell,
Re: *Consultation on Industrial Manslaughter Offence*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the consultation into introducing an industrial manslaughter offence in Tasmania.[1] Twenty years ago, the Tasmania Law Reform Institute commenced work on its *Criminal Liability of Organisations* project which recommended criminal law reform for corporations and other entities wrongfully causing the death or serious injury of natural persons.[2] Since then, the Commonwealth and all States and Territories have either introduced industrial manslaughter offences or committed to do so. Whilst Tasmania is likely to be the last Australian jurisdiction to introduce an industrial manslaughter offence, the Government is to be commended for finally committing to its introduction.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

The case for an industrial manslaughter offence in the *Work Health and Safety Act 2012* (Tas)

As the law currently stands, it is extremely difficult to prosecute a successful manslaughter conviction against a corporation. This is because the test established in common law requires the identification of a grossly negligent individual/s who is the embodiment of the corporation and whose conduct and state of mind are attributable to the corporation (the identification doctrine).[3] Reliance on the actions and state of mind of individuals constituting the 'controlling mind' of an organisation has been the subject of much academic criticism due

[1] CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.
[2] Tasmania Law Reform Institute, *Criminal Liability of Organisations* (Final Report No. 9: April 2007) at 28.
[3] *Tesco Supermarkets v Nattrass* [1972] AC 153 at 170.

to the size of many corporations and the increasing delegation of responsibility to relatively junior staff.

The Tasmania Law Reform Institute (TLRI) recognised the limitations of the identification doctrine in Australia noting that "all of the organisations that have been successfully prosecuted for manslaughter have been small companies in which the directors took an active part in the day-to-day operations of the company".[4] In Tasmania, the TLRI found that there had never been a prosecution for a traditional crime in the *Criminal Code* brought against a corporation responsible for the death or serious injury of another.[5] The failure of the common law to reflect modern organisational decision-making led the TLRI to recommend the introduction of specialised principles of criminal responsibility for organisations which in turn would make it easier to successfully prosecute for death or serious injury.[6]

In 2018, Work Safe Australia's *Review of the model Work Health and Safety Laws* recommended the introduction of industrial manslaughter offences in Work Health and Safety legislation.[7] In the same year, a Senate inquiry recommended that the model Workplace Health and Safety legislation be amended to provide for an industrial manslaughter offence.[8]

All Australian jurisdictions except New South Wales and Tasmania have now amended their Work Health and Safety Acts to introduce industrial manslaughter provisions.[9] In New South Wales the Government committed in October 2023 to introducing an industrial manslaughter offence.[10]

Negligence or Gross Negligence?

The proposed offence requires a person to engage in conduct that amounts to 'gross negligence'. Gross negligence is not defined but in common law has been defined as negligence which shows such disregard for the life and safety of others to be deserving of criminal punishment.[11] We strongly believe that the applicable test should be negligence rather than gross negligence. In Queensland, prior to its industrial manslaughter legislation being introduced a review of workplace health and safety legislation found:[12]

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[4] Tasmania Law Reform Institute, *Criminal Liability of Organisations* (Final Report No. 9: April 2007) at 28.

[5] Tasmania Law Reform Institute, op. cit. at 29.

[6] Tasmania Law Reform Institute, op. cit. at 11.

[7] Safe Work Australia, *Review of the model Work Health and Safety Laws* (Final Report December 2018).

[8] Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (Commonwealth of Australia: Canberra, 2018) paras 5.2–5.54 and Recommendation 13.

[9] Part 5A of the *Occupational Health and Safety Act 2004* (Vic); Division 2.6 of the *Work Health and Safety Act 2011* (ACT); Part 2A of the *Work Health and Safety Act 2011* (Qld); Division 6 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety (Industrial Manslaughter) Amendment Bill 2023* (SA) has passed both houses of the South Australian Parliament but not due to commence until mid-2024; Section 30A of the *Work Health and Safety Act 2020* (WA).

[10] New South Wales Government, *Industrial manslaughter law to be introduced in NSW* (Minister for Work Health and Safety). As found at https://www.nsw.gov.au/media-releases/industrial-manslaughter-law-to-be-introduced-nsw (accessed 31 January 2024).

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

[12] Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland – Final Report* (Worksafe Queensland: July 2017) at 113. Also see recommendation 46.

In terms of terminology, it is the view of the Review that the offence should be that of 'negligence' causing death as opposed to 'gross negligence' causing death. The rationale for this view is that gross negligence has a particular legal meaning that requires more than negligence. The consequence of this is that it may make prosecutions more difficult to pursue and may be the reason minimal prosecutions have been pursued in jurisdictions who have industrial manslaughter provisions. Subsequently, proving negligence to the criminal standard of proof is considered to be the appropriate framing for the new offence.

As well as Queensland,[13] negligence has been adopted as the appropriate standard in Victoria,[14] the Australian Capital Territory[15] and the Northern Territory.[16] At a Commonwealth level, a Bill has passed the House of Representatives and is currently before the Senate which would adopt negligence as the appropriate standard.[17]

If Tasmania does adopt the negligence standard as the majority of Australian jurisdictions have done, the fault element should be defined and clarified. A model that should be considered is section 39E of the *Occupational Health and Safety Act 2004* (Vic) which defines 'negligence' as follows:

39E When is conduct negligent?

(1) Conduct is negligent for the purposes of this Part if it involves—

(a) a great falling short of the standard of care that would have been taken by a reasonable person in the circumstances in which the conduct was engaged in; and

(b) a high risk of—

(i) death; or
(ii) serious injury; or
(iii) serious illness.

(2) In determining whether conduct engaged in by a body corporate is negligent for the purposes of this Part—

(a) what matters is the conduct engaged in by the body corporate itself; and

(b) it does not matter whether the conduct is, or is not, conduct imputed to the body corporate under section 143; and

(c) it does not matter whether any of the body corporate's officers were involved in all or any part of the conduct; and

(d) the standard to be applied under subsection (1)(a) is the standard of care that would have been taken by a reasonable body corporate in the circumstances in which the conduct was engaged in.

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[13] Section 34(1)(c) of the *Work Health and Safety Act 2011* (Qld).
[14] Section 39E of the of the *Occupational Health and Safety Act 2004* (Vic).
[15] Section 34(1)(f) of the *Work Health and Safety Act 2011* (ACT).
[16] Section 34B(1)(e) of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT).
[17] Section 30A of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023.*

Sentencing

A successful industrial manslaughter prosecution should result in a sentence that denounces the conduct, deters and leads to rehabilitation. We strongly believe that the maximum sentence for industrial manslaughter in the *Work Health and Safety Act 2012* (Tas) should mirror a manslaughter conviction pursuant to the *Criminal Code Act 1924* (Tas). The reason for this is that the threat of a life sentence carries important symbolism and is more likely to lead to greater vigilance by persons to ensure that their policies, procedures and practices meet the requisite standard of care.

We also believe that a greater range of sentences should be made available because the offender will often not be a natural person. Organisations cannot be imprisoned and their dissolution will often have spill over effects to genuinely innocent parties. As well, a fine may amount to a 'deterrence trap' which describes "the situation where the only way to make it rational to comply with the law is to set penalties so high as to jeopardise the economic viability of corporations".[18] The TLRI's *Criminal Liability of Organisations* noted that if sentencing purposes are to be met a broader range of sentencing options for organisations were required:[19]

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

The *Work Health and Safety Act 2012* (Tas) does provide alternative sentencing options including adverse publicity orders, restoration orders, work health and safety project orders and training orders.[20] Nevertheless, there are other orders that the TLRI recommended should be available to address organisational wrong-doing including disqualification orders and punitive injunctions.[21]

Family Liaison Officer

The introduction of an industrial manslaughter offence should not be created in a vacuum. As well as the ability to prosecute and sanction it is also important that support is provided to victims and their families. In Victoria, Family Liaison Officer positions have been created to provide support to families whose loved one has died at work as well as workers who have been seriously injured where there is a criminal prosecution. The role of the Family Liaison Officer includes:[22]

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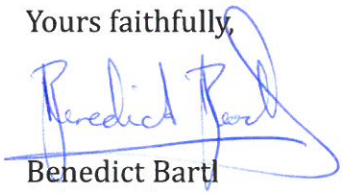
[18] Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (1993) at 136. As found in Tasmania Law Reform Institute, *Criminal Liability of Organisations* (Final Report No. 9: April 2007) at 58.
[19] Tasmania Law Reform Institute, op. cit. at 55.
[20] Sections 236, 237, 238 and 241 of the *Work Health and Safety Act 2012* (Tas).
[21] Tasmania Law Reform Institute, *Criminal Liability of Organisations* (Final Report No. 9: April 2007) Recommendation 7.
[22] WorkSafe Victoria, WorkSafe's Family Liaison Officer. As found at https://www.worksafe.vic.gov.au/worksafes-family-liaison-officer (accessed 4 February 2024).

- keep interested parties informed about the investigation and prosecution processes
- help interested parties understand court processes
- help interested parties get to court and support them on the day
- connect interested parties with other support services

We strongly believe that an industrial manslaughter offence in Tasmania should be introduced and Family Liaison Officer position/s being created. The role could be incorporated within WorkSafe Tasmania's existing workforce or alternatively Worker Assist and should have a similar role as that carried out in Victoria.

If you have any queries, please do not hesitate to contact us.

Yours faithfully,



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