

# **The Victorian Crimes (Workplace Deaths and Serious Injuries) Bill 2001**

**Commonly called the 'Corporate Manslaughter Legislation'**

## **A Discussion Paper**

**11 March 2002**

### **1. Purpose of this discussion paper**

This paper aims to help people understand the Victorian Corporate Manslaughter Bill, which is due to be debated in the Victorian Upper House in the May 2002 session of Parliament.

The Bill has been proposed by the Government as part of an effort to reduce the number of workplace deaths and serious injuries in Victoria. The Bill seeks to achieve this objective by creating a new form of crime, that of corporate manslaughter.

The Bill, however, has serious structural deficiencies that:

- Breach key human rights normally protected under criminal law.
  - Create new criminal law for corporations, while at the same time exempting government and government agencies that are not corporations from its scope. The government has not explained how these mechanisms in the Bill will lower the workplace death and injury rate in Victoria, or if its deficiencies will have a counter-productive outcome.

This discussion paper explores the Bill from the perspective of its deficiencies. The Bill represents such an enormous and historical change to the idea of criminality that its concepts and implications must receive robust community consideration before it becomes law.

### **2. Summary of the Bill**

The Bill amends the *Victorian Crimes Act* to create a new and additional crime of manslaughter by a corporation. Under the Bill, a corporation becomes criminally liable for the actions or non-actions of its employees and agents. Specific individuals (senior officers) become personally liable and can be gaoled for up to 7 years for the criminal actions of a corporation---even where those individuals were not involved in a death or injury, and even if they do not live in Victoria. The Bill assigns criminality to a corporate 'system' and it hinges on the transfer of liability from one party to another.

The Bill only applies in instances where death or injury occurs to persons paid by a corporation. It does not, however, apply where death or injury occurs to persons paid by a government department, or to persons who were unpaid, no matter for whom they work. The Bill excludes senior officers of government and unpaid senior officers of corporations from this new criminal liability.

### 3. Some background facts

The Bill needs to be considered in the light of some key facts:

- 1) Since 1992, there has been a steady decrease in the number of workplace-related deaths in Victoria.
- 2) The agriculture sector persistently accounts for around one-third of deaths each year. This sector is predominately small business and where those businesses are structured as corporations, the implications of the Bill are considerable.
- 3) The construction industry accounts for the next highest incidence of deaths. This sector is structured around large corporations which make heavy use of subcontracting. The 'agency' provisions in the Bill hold significant implications for the construction sector.
- 4) The remaining 4 sectors each suffer similar incidence of deaths. Three of the areas---manufacturing, transport and 'other'---all face serious problems should the Bill become law.
- 5) One area, Public and Community Sectors, will largely be able to ignore the Bill, because where deaths occur under government departments or volunteer groups the Bill does not apply.
- 6) Data are needed on the incidence of deaths occurring in other categories---partnerships, trusts, the self-employed, government departments and volunteer organizations. These groups are not targeted by this new concept of criminal liability and, presumably, the Bill will have no impact on the incidence of deaths in these sectors.

Sector Incidence of Work Related Deaths in Victoria												
	'01	'00	'99	'98	'97	'96	'95	'94	'93	'92	Total	%
Agriculture	9	13	14	13	13	11	13	16	10	10	122	33.9
Construction	8	6	12	3	7	11	6	7	5	11	76	21.2
Manufacturing	4	5	4	4	2	5	4	6	10	6	50	13.9
Transport	3	3	1	3	3	2	5	5	2	3	30	8.4
Public & Community Sectors	4	1	7	8	2	2	6	3	6	6	45	12.5
Other	1	2	1	5	6	2	3	4	2	10	36	10.1
Totals	29	30	39	36	33	33	37	41	35	46	359	100.0
Source: Victorian WorkCover Authority: Fatalities Investigated												

### 4. New notions; new inconsistencies

The Victorian Bill draws on the *Commonwealth Criminal Code Act* of 1995 that came into law on 15 December 2001.

The Victorian Bill establishes a historically new idea of criminal liability that breaks the traditional tie between criminal responsibility and direct personal actions. Under this Bill, individuals can and will be gaoled for actions they did not personally

commit.

In breaking the tie between criminal liability and personal actions, the Victorian Bill creates significant inconsistencies because it is applied selectively.

- *Criminality tied to payment 1* Under the Bill, these new criminal acts can only occur with the death or injury of a person who has engaged in paid work for a corporation. Where a death or injury occurs and the person was not engaged by the corporation in paid work, the provisions of the Bill do not apply. A different value is being placed on human life where payment is involved from those where payment is not.
- *Criminality tied to payment 2* Persons who control a corporation in an unpaid capacity cannot be held liable for the criminal manslaughter actions of the corporation. For the first time, criminal liability is a function both of actions and payment for actions. If a senior officer is unpaid, then he cannot be liable for the criminal actions of the corporation. But if he receives any material benefit or payment, then he is potentially liable.
- *Government exempt* The Bill holds publicly-owned corporations to be criminally liable. But it exempts the State and senior officers of the State from liability. The Bill applies a different measure of criminal liability to the managers and directors of a corporation, than is applied to the managers and Ministers of the State of Victoria or the Commonwealth.

## **5. The Bill**

### **Specific Provisions**

To understand this new concept of criminality it is important to understand the key clauses in the Bill. (Note: This discussion is based on the Bill in circulation dated 23 November 2001.)

- **Part 2. 3.11 (1) Definitions. Agent**
  - This extends the definition of 'agent'. The normal idea of an agent is of a person who acts for and on behalf of and as if they were another person. For example, an employee is normally considered to be an agent of an employer. The Bill will create a new class of persons who would not normally be considered agents at common law---even if this were not the intent of the parties.
  - The Bill embraces cascading contracts within agent provisions. That is, it captures the agent of an agent, of an agent, of an agent, *ad infinitum* without limitation. Under this provision, a corporation cannot be certain that it has control of determining who its agents are. In addition, other provisions make the corporation liable for the actions of its 'deemed' agents.
- **Part 2. 3.11(1) Definitions. Outworker = worker**

By defining outworkers as workers of a corporation, a corporation commits a criminal act when an individual who was not working at the premises of the

corporation is killed or injured. This introduces the idea that a corporation can be criminally liable for death or injury on premises it neither owns nor controls.

- **Part 2. 3.11(1) Definitions. (e) Deemed employees = worker**

This makes a person who is deemed to be an employee (even though the person may not be a common-law employee) under any legislation in any jurisdiction in Australia to be a worker in Victoria for the purposes of corporate manslaughter. This provision appears to be unlimited. Thus, a person who may be deemed or declared an 'employee' for tax-collection purposes in one State automatically becomes declared a worker within the manslaughter legislation. For example, if payroll tax legislation in some States declares professional football players to be employees for tax-calculation purposes, then that declaration makes footballers in Victoria 'workers' for the purposes of criminal manslaughter legislation. A football club constituted as a corporation becomes potentially criminally liable for the death or serious injury of a football player, and the paid officers of the football club are capable of being gaoled.

- **Part 2. 3.12. Crown**

This limits the liability of the Crown to a 'body corporate that represents the Crown'. By omission, the Crown, its senior officers, cabinet, ministers and a Premier are excluded from the criminal manslaughter provisions.

- **Part 2. 3.14A. Body Corporate liable for agents' actions**

This ensures that a corporation (that is, its senior officers) is criminally liable for the actions of its agents or the employees or senior officers of its agents where death or injury occurs. This means that a corporation needs to exercise direct control over all employees of all of its agents. For example, a food manufacturer that outsources some of its manufacturing can be criminally liable for the actions of the employees of the outsourced manufacturer.

- **Part 2. 3.14B. What constitutes criminal negligence**

- The Bill spawns a new idea---namely, that 'the conduct of the body corporate as a whole' must be considered when assessing criminal action. This indicates that the focus of the Bill in finding criminal behaviour (also evidenced in the second reading speech) is on the *system of control* that a corporation uses, and that personal liability of senior officers relates to their capacity to design or manage the system of control that a corporation utilises. This is important because to understand the Bill fully it is necessary to comprehend the centrality of corporate control systems to the Bill's idea of criminal behaviour.

- The Bill also suggests the idea of aggregating all behaviour within a corporation. In other words, the behaviour of a single employee cannot be attributed to a corporation, but the behaviour of all employees, even if in breach of written instructions, becomes the behaviour of the corporation. 'Aggregating' reinforces the pivotal idea in the Bill that a corporate culture and its control systems are the cause of criminality.

- Negligence can thus be the result of a failure to (a) manage or supervise, (b) engage a suitable person © provide adequate systems or (d) take reasonable action.

- **Part 2. 3.14C. When is a senior officer liable for a corporation's criminal negligence?**

A senior officer includes directors, company secretaries and senior managers. Because the definition of senior officer is imprecise, any person who exercises management discretion over an area of a corporate system could be classified as a senior officer. The Bill embraces small, medium and large business and even a person in a comparatively junior position could be caught by the definition.

The focus is on the systems of control of a corporation. If a corporation has been found to be criminally negligent, a senior officer becomes liable for the punishment of the corporation (a fine or a gaol term of 7 years maximum). It must be proven that the senior officer (a) (i) was organisationally responsible and (ii) failed to perform his responsibilities and (iii) knew of a risk and, in addition, (b) was unjustified in allowing the risk to exist.

In considering a senior officer's liability, consideration must be given to the extent to which a senior officer could make or influence decisions, the participation of the senior officer in the decisions of the board of directors, and the degree of participation in management.

- **Part 2. 3.14F. Territory unlimited. Senior officers liable.**

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

This provision makes it clear that the directors or senior managers located anywhere in the world can be held liable and gaoled for a criminal finding in Victoria against the corporation for which they work. This would apply even if the death or injury occurred at the site of any agent, or sub agent, or agent of an agent of the corporation. The finding is of *criminal action by the corporate system* and it is for this that the non-Victorian resident senior officer then becomes liable for imprisonment.

## **6. Hypothetical: Death at a school**

The inconsistencies in the Bill can best be understood through a hypothetical case study.

Take a small country school. Take a tragedy where a limb falls off a tree in the school ground and people are killed. Assume that the principal and board of the school were aware that the tree was unsafe and had failed to act to have the tree limb removed.

If the corporate manslaughter legislation were in place, then two different types of criminal liability would now apply to the principal and school board, depending on the legal structure of the school and the status of the persons working in it. One type is the normal criminal concept that is consistent across all scenarios which holds people liable on the basis of their personal actions. The other is the new corporate manslaughter legislation which creates potential criminal liability not on the basis of personal behavior, but on an individual's legal status and whether or not payment has

occurred.

The following scenarios show how differences in status change liability for criminal negligence under the corporate manslaughter legislation.

1a) If the school were privately owned and operated under a corporate structure, then the corporation could be criminally liable and the principal and board members capable of being gaoled.

1b) If the school were privately owned and operated under a trust, no liability would exist.

1c) If the school were owned by the state, no criminal liability would exist.

1d) If the school were owned by the state, but operated under a corporate structure, then the corporation could be criminally liable and the principal and board members capable of being gaoled.

2) If the school were privately or publicly owned and operated under a corporate structure and:

a) a student or parent or member of the public were killed, then no corporate criminal liability would exist.

b) a teacher employed by the school or a contract gardener working at the school were killed, then corporate criminality could exist and the principal and board members would be capable of being gaoled.

3) If the school were privately or publicly owned and operated under a corporate structure and:

a) the board members were unpaid, corporate criminality could exist and the principal, but not the board members, would be capable of being gaoled

b) the board members were paid or received a benefit (for example, received lower school fees for a child as a student), then corporate criminality could exist and the principal and board members would be capable of being gaoled.

## **7. Discussion**

### **7.1. Why the legislation?**

The legislation springs from an apparent dissatisfaction with the way in which centuries-old criminal law interfaces with the legal idea and operation of a corporation. There seems to be a notion behind the Bill that, under current law, corporations are able to avoid criminal liability because of legal technicalities. That is, that the rules of criminal law that apply to all persons in a society fail when applied to corporations. The view reflects the new Commonwealth Criminal Code (December 2001) and its like application of criminality to corporations. The legislation seeks to address this alleged failure of criminal law by treating corporations and those who control corporations differently from other persons in society. It is legislation that criminally discriminates against corporations.

The failure of normal criminal law alleged by the Bill's proponents is identified in the second reading speech that introduced the Bill:

*The Existing Law is Inadequate.*

*The full force of the [criminal] law as it currently exists has been sought to be used in three contested prosecutions of corporations in Victoria for manslaughter and negligently causing serious injury. This is possible because a corporation can be liable for such offences under the common law. However, on each occasion the corporation was acquitted.'*

*'The main limitations of the common law are that it requires the identification of one person who is the directing mind and will of the corporation. That person in effect must commit the offence. If the person has committed the offence and is the directing mind and will of the corporation, then the corporation may be guilty of the offence.'*

In effect, the Bill springs from failed prosecutions under existing criminal law. Its proponents seem to take the view that, in the specific instances where the prosecutions were attempted (and failed), criminal action nonetheless occurred--- despite the findings of the courts. The approach to this alleged problem is to create a new type of criminal law that applies only to corporations and under which persons can be gaoled for actions they did not directly commit.

## **7.2 A lay person's understanding of criminal law. A cornerstone of a just society.**

Peaceful, civilised societies depend heavily upon mechanisms which ensure that people who breach the peace or commit harm to others can be punished or removed from society so as to prevent further harm. A key principle of criminal law is that sane adults are personally liable for their actions. Liability is not transferred. A parent cannot be gaoled for a murder committed by an adult child. Family membership does not make family members legally responsible for the criminal actions of other members of the family. The idea and legal practice of personal liability for personal action is essential to the maintenance of civilised society.

This has been demonstrated in the larger context of the war against terrorism in 2001 and after. Following the September 11 calamity, a good deal of effort has gone into ensuring that the actual perpetrators of the crimes are held responsible to the fullest extent possible. Care has been taken to ensure that blame is not attributed to Islam or to the people of Afghanistan. The terrorists may consider that they are at war against the system of capitalism. But a civilised response must not seek retribution against the system of Islam. Personal responsibility for personal actions is a cornerstone of a civilised society and is reflected in the detail of criminal law.

If a society holds a race or class of persons to be capable of collective criminal acts, that society begins the descent into class- and race-conscious warfare. Where a society holds specific persons within a class or race to be personally liable for the deemed collective, criminal, actions of the entire class or race, that society begins the descent into human rights abuse. Mostly, the initial steps in this destructive direction are small and done under the guise of good intent.

The Victorian Corporate Manslaughter Bill takes a first step in this dangerous social direction because it criminally discriminates against a specified class of persons.

This is demonstrated in the structure of the Bill that holds that,

a) a collective (a corporation) can conduct a criminal action.

b) a specified and limited class of persons within that collective (senior officers) are to suffer punishment by the state for the criminal actions of the collective.

The Bill breaches a core principle of criminal law that underpins a just and civilised society.

This is a very different idea of corporate responsibility to that applied where a corporation is held financially responsible for its actions.

### **7.3 What is a corporation?**

The Bill is predicated on a particular view of what a corporation is. The view is quite contorted, because it assumes that a corporation must be a large and well-resourced organization, and that any given corporation operates through an all-controlling, centralized system. This runs directly counter to the legal and practical realities of what a corporation is.

A corporation is a legal structure through which a business can be organised. A corporation can be a one-person business or a large multinational conglomerate. As an organisational reality, the larger a corporation becomes, the more complex and disparate become its internal human dynamics.

#### 7.3.1 Small businesses can be corporations

The proponents of the Bill see a difference between a small business and a large corporation and claim that the Bill puts small business on a level playing field with large corporations.

The second reading speech states:

*'At the moment it is very difficult to prosecute large corporations, but less difficult to prosecute small business due to the fact that it requires the identification of one controlling mind and will of the corporation..... Under this legislation large corporations will be placed on the same footing as small business, leveling the playing field.'*

As far as normal law is concerned, however, the only difference between a small and large corporation is the size and complexity of the organization. Small and large corporations are, in essence, the same sort of legal entity and are treated before the law as equals. The Victorian Bill does not change this legal fact.

The Bill's advocates are wrong when they claim that the Bill is aimed at large business and that small business will not be affected. In fact, the Bill introduces a new and additionally onerous level of criminal liability to small businesses which operate as corporations. The Bill has significant implications for all businesses---small or large.

Moreover, under this Bill, it is more likely that owners and operators of small corporations will suffer the most because of the introduction of a different idea of criminality from that applying to a person acting as an ordinary citizen. In this new and untested world of corporate criminal law, directors of small businesses will have



substantially fewer resources to defend themselves than directors of large corporations. In particular, during the case-testing phase of this new field of criminal law, prosecutors will find it easier to win (and establish case law of the type they desire) against small corporations than they would against large corporations. Small business is likely to be the first target of prosecutors.

### 7.3.2 Large corporations are like governments

The proponents of the Bill have made it clear that their fixation is with large corporations. Given this context, the Bill should perhaps be seen as a subset of a larger debate within Western societies where some sections of society see something wrong, even sinister, with large and multinational corporations. The Victorian Bill appears to be a legal manifestation of this demonization of corporations. This is a sadly destructive view for them to adopt.

Organizationally, a large corporation is much like a government. It relies on systems of control that are created and managed by humans to overcome the vagaries of nature, luck and human imperfections. The Victorian Bill functions on an underlying idea that a large corporation is perfectly controlled by an elite senior class of senior individuals.

If this view is valid, how do the proposers of the Bill explain the contrived legislative difference between corporations and governments, partnerships and trusts? As large organizations there is no systemic difference between the ways in which these organizations function.

## **8. Some Implications**

The reaction to this legislation is unpredictable but we can attempt some reasonable speculations.

- *Unknown territory* Because the legislation so dramatically changes the idea of criminal liability, no person who could be construed to be a 'senior officer' can be sure about how their actions or inactions will be interpreted. The defenses of reasonable action, of needing to find a duty of care, and of determining what constitutes gross negligence are unknown within the context of this legislation, and will not be known until tested by the courts. Clarity will not exist until substantial test cases have been conducted. No person working inside a corporation will feel secure.
- *Elimination of corporations* The operation of any corporation within the State of Victoria will become a highly risky business. It is conceivable that people will look to dissolve corporations and run their enterprises as trusts or other creative legal structures to avoid this new form of criminal legislation.
- *Risk of business* Many corporations may decide that the risk of doing business in Victoria is excessive. This may particularly apply in essential service areas. It is one thing for a business to consider the financial costs of system breakdown, it is another thing to contemplate gaol for actions for which one is not directly responsible.
- *'Fall guy' problem* Where corporations remain operating in Victoria, people are likely to manoeuvre themselves inside corporations to ensure that they personally could not be classified as 'senior officers' for the purposes of the corporate manslaughter legislation. The outcome could be the creation of 'fall guys', that is,

individuals set up by a clique of senior officers to be the person/s who suffer the gaol penalty for the corporation.

- *Staffing of senior officer positions* It is likely to prove difficult to find people willing to be directors of corporations, financial controllers or senior safety officers given the high risk of gaol for actions which they did not personally undertake.
- *Cost of litigation. Insurance* Where a death or serious injury occurs, all senior officers will need to engage legal counsel individually to consider their personal position in isolation from other senior officers and from the corporation. The huge unknown risk and associated cost implications are likely to be reflected in insurance-cost escalation and difficulty in obtaining insurance.

## **9. Key Questions**

For the Bill to be passed, the following questions, at least, need to be answered:

- 1) In the light of the inconsistencies and breaches of human rights in the Bill, how will this Bill lower the incidence of work-related deaths and injuries in Victoria?
- 2) What are the time-lines for expected reductions in deaths and injuries if the Bill is passed?
- 3) In the industry sectors unaffected by the Bill, how will a lowering of deaths and injuries be effected?
- 4) Has the possibility of an *increase* in deaths and injuries been considered if the Bill is passed?