

Submission

by

Business|NZ

to the

Justice and Electoral Select Committee

on the

Sentencing and Parole Reform Bill

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1. Introduction

- 1.1 This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The regional organisations consist of the Employers and Manufacturers Association (Northern), the Employers and Manufacturers Association (Central), Canterbury Manufacturers' Association, Canterbury Employers Chambers of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

2. Recommendation

- 2.1 That the Bill state clearly that its reparation and other sentencing provisions will not apply to regulatory offences under the Health and Safety in Employment Act 1992 or any other such relevant legislation but only to criminal offending where there has been a conviction under the Crimes Act 1961 or the Summary Offences Act 1981.

3. Discussion

- 3.1 This submission focuses on one aspect of the Bill only – the effect in terms of relevant health and safety legislation of the Bill's new reparation provisions in light of its intended repeal of section 28 of the Criminal Justice Act 1985.
- 3.2 It has frequently in recent years been the practice of courts, when dealing with a breach of the Health and Safety in Employment Act 1992, to award part of any fine imposed on the employer to an employee injured as a consequence of the breach; jurisdiction to do so has been found in section 28 of the Criminal Justice Act. This section allows the ordering of payment by way of compensation of part or all the fine where there has been a conviction for an offence arising out of an act or omission occasioning physical or emotional harm, whether or not the occasioning of such harm constituted a necessary element of the offence at law.
- 3.3 It is the view of Business New Zealand that the decision to apply section 28 in the health and safety context largely equated to the demise of lump sum compensation payments under accident compensation legislation.
- 3.4 It is noted, however, that the Injury Prevention, Rehabilitation, and Compensation Act 2001, due to come into force on 1 April 2002, restores payments of lump sum compensation for impairment resulting from a disability caused by injury. Were section 28 to be retained, this change of itself would make its use in relation to health and safety offences even more open to question than it is at present. While acknowledging the trauma experienced by injured employees, it must also

be recognised that New Zealand's system of accident compensation has always operated on a no fault basis. Furthermore, offences under the Health and Safety in Employment Act are strict liability offences, in which intention plays no part. This is a very different situation from that with which the Criminal Justice Act is dealing where the concern, first and foremost, is with deliberate or intentional offending. No employer deliberately sets out to cause a workplace accident.

- 3.5 The problem for employers identified above appears to be intensified by Sentencing and Parole Reform Bill proposals. This is particularly so as even under the present regime employer ability to guard against future accidents is often undermined by the cost of meeting fines imposed when an accident has led to prosecution. It would make greater sense, from a health and safety perspective, if rather than paying a fine, employers – smaller employers in particular - were directed by the court to expend an equivalent amount on health and safety improvements and hazard management.
- 3.6 The repeal of section 28 of the Criminal Justice Act will mean courts no longer have a discretion to direct payment of part of any fine to someone suffering physical or emotional harm as the consequence of an offender's act or omission. However, the fact that the Criminal Justice Act's reparation provisions are retained in a somewhat extended form gives cause for concern that courts may instead make use of these to provide a form of compensation to injured employees, accident compensation legislation notwithstanding
- 3.7 The Bill's clause 29 states that a court may impose a sentence of reparation on a convicted offender whose offence has caused another person to suffer emotional or physical harm or loss of, or damage to, property. This contrasts with the corresponding Criminal Justice Act provision (section 22) which allows reparation for emotional harm, and loss of or damage to property only, but does not provide for reparation for physical damage.
- 3.8 The new reparation provision (clause 29) also contrasts with section 28 of the Criminal Justice Act and its provision for the whole or part of any fine to be paid by way of compensation to anyone suffering physical and emotional harm as the consequence of an offender's act or omission.
- 3.9 Therefore the question must now be asked: how will the courts respond to the demise of section 28? Hitherto any compensation paid under that section has been paid as part of the fine imposed. Without section 28, the concern is that the retention and extension of existing reparation provisions will see these used to award reparation to anyone suffering a physical or emotional harm, in addition to any fine imposed under the Health and Safety in Employment Act. (Any property loss or damage in this context being most likely loss or damage to the offending employer's property.)

- 3.10 These are concerns which urgently require to be allayed the consequences for employers, notwithstanding clause 32's requirements to take an offender's financial circumstances into account, could be severe. Moreover, paying reparation in a personal injury context is a contradiction in terms given, as earlier noted, that the accident compensation system is based on the concept of no fault. If positions were reversed with, for example, an accident clearly able to be sheeted home to an employee, could the employee likewise be sentenced to pay reparation to the employer for loss or damage to property?
- 3.11 The matter is the more urgent in that the reparation provisions themselves exhibit an inherent anomaly. Although clause 29 appears to provide courts with a discretion to impose a sentence of reparation ("A court *may* (emphasis added) impose ..."), clause 11 states: "If a court is lawfully entitled under **Part 2** to impose a sentence of reparation, it *must* (emphasis added) impose it unless it is satisfied that the sentence would result in undue hardship for the offender or the dependents of the offender, or that special circumstances would make it inappropriate". Subclause (2) allows a sentence of reparation to be imposed on its own or in addition to any other sentence, while subclause (3) requires a court to give reasons if it does not impose such a sentence although lawfully entitled to do so.
- 3.12 As a consequence, it seems likely that courts will see themselves as required by the mandatory nature of clause 11 to impose a sentence of reparation in cases where employers are prosecuted for workplace accidents (although these are not police cases), notwithstanding the apparently discretionary nature of clause 29(1). It is also likely that any sentence of reparation will be imposed in addition to any fine under the Health and Safety in Employment Act.
- 3.13 However, in light of the no fault accident compensation principle and the strict liability nature of health and safety legislation (with fines under the Health and Safety in Employment Act imposed regardless of intention), section 28 of the Criminal Justice Act has never been an appropriate vehicle for awards of compensation in accident injury cases. And the same is true of the new Bill's reparation provisions.
- 3.14 Section 28 of the Criminal Justice Act and the Bill's reparation provisions are directed to persons who have committed intentional criminal offences. This is not the case with workplace accidents. It is of some significance that the reparation provisions of the Criminal Justice Act have not been used to compensate persons injured in this way and it would be a retrograde step if, with the repeal of section 28 and the arguably mandatory nature of the Bill's clause 11, courts were in future to seek to compensate such injured employees by means of a reparation sentence.

- 3.15 With the intended reintroduction of lump sum compensation it is time to re-examine the situation that has existed over recent years, where courts have sought to do the perceived right thing through the use of an inappropriate statute. The new legislation should state plainly that its reparation provisions do not apply to regulatory offences under the Health and Safety in Employment Act or under any other relevant legislation. Instead it should be made clear that these provisions are directed to established cases of intentional criminal offending in terms of the Crimes Act 1961 or the Summary offence Act 1981.
- 3.16 Clarification of the situation regarding the imposition of sentences of reparation has become even more urgent with the recent introduction of amendments to the Health and Safety in Employment Act, not least among which are provisions removing the Occupational Safety and Health Service's monopoly on prosecutions and significantly increasing fines. Not only can unnecessarily high fines cripple a company but, as well, a widened power to take prosecutions can all too readily become the subject of abuse. Were reparation sentences to be imposed on top, costs for employers – required to support the monopoly accident compensation system – may simply be unsustainable. The further amendment proposal, to remove the ability to insure against the imposition of a fine for commission of a non-intentional (not criminal) offence, can only compound employer difficulties.

4. Recommendation

- 4.1 That the Bill state clearly that its reparation and other sentencing provisions will not apply to regulatory offences under the Health and Safety in Employment Act 1992, or any other such relevant legislation, but only to criminal offending where there has been a conviction under the Crimes Act 1961 or the Summary Offences Act 1981.

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