NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi

to the

Treasury

on the

Statutes Repeal Bill Exposure Draft

P O Box 6645
Wellington
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1. Introduction

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU is generally supportive of the repeal of redundant or spent legislation along with other measures to make legislation more accessible and understanding.

1.4. We restrict our specific comment to one suite of legislation, the Sentencing Council Act 2007 (along with associated amendments to the Administration of Community Sentences and Orders Act 2013, the Parole Amendment Act 2007 and the Sentencing Amendment Act 2007).

2. The Sentencing Council Act 2007

2.1. We oppose the repeal of the Sentencing Council Act 2007.

2.2. There is a strong basis for the retention of this Act (subject to amendment if necessary). The problems which it aims to address remain real and present.

2.3. The Sentencing Council Bill was introduced in response to an important Law Commission Report, *Sentencing Guidelines and Parole Reform* NZLC R98.

2.4. The Report found considerable problems of reliability and consistency in sentencing and parole. The Law Commission summarised these issues at [4]-[9]:

> 4. In our view, one of the core problems with New Zealand's current sentencing and parole arrangements is their highly discretionary nature.
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> 5. The Sentencing Act 2002 codified sentencing purposes and principles; listed aggravating and mitigating factors; required judges to impose the maximum sentence or something close to it in the worst cases; provided for 17-year minimum terms for aggravated murder; and established a hierarchy of sanctions. However, in general judges remain free to determine policy as to sentence levels, both generally and in the individual case, subject only to the constraint of the maximum penalty for the offence.
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> 6. The key problems that arise from the extent of judicial sentencing discretion are:

- To the extent that guidance as to sentence levels exists, it is provided by the higher court judiciary. Judicial guidance cannot be informed by the range of perspective, experience and expertise that would be beneficial in the development of sentencing policy, including the setting of sentence levels.
- Guidance is given only in the context of cases that come before the courts on appeal. It is reactive rather than proactive, which may adversely affect its timeliness. For the same reason, guidance tends to be given in relation to offences at the upper end of the spectrum of seriousness, so that the coverage is incomplete.
- There is significant inconsistency in the sentences imposed between judges and between courts, particularly in relation to lower end offences.
- There is no mechanism whereby Parliament can reliably alter policy as to sentence levels, or reliably predict what sentence levels will flow from particular maximum penalties or other legislative prescriptions.
- The guidance as to sentence levels that currently exists does not adequately take into account the cost-effectiveness of different sentencing options, including their prison population impact.

7. Under the Parole Act 2002, most offenders sentenced to a determinate sentence of more than two years are eligible for parole release after serving one-third of their sentence. The sentencing judge can impose a longer minimum period of imprisonment under section 86 of the Sentencing Act 2002, but this rarely happens: figures supplied by the Ministry of Justice for 2004 and 2005 indicate that minimum periods of imprisonment are imposed in around 11 percent of eligible cases.

8. The fact that the current parole structure sets eligibility at one-third has created some problems, chiefly:

- · The potentially large disjunction between the sentence imposed by the judge and the actual time served gives rise to public anger and frustration, particularly on behalf of victims and their supporters. It is one of the principal drivers of calls for “truth in sentencing”, and may fuel the view that the system is unduly lenient.
- · It places pressure upon the Parole Board to revisit matters of punishment and deterrence in addition to risk; this is a problem because punishment and deterrence are the province of the sentencing judge and will have already been fully considered at the time of sentence.
- · The wide discretion available to the Board, combined with uncertainty about the effect of the current statutory tests governing release, produces inconsistent decision-making.
- · It also results in unpredictability, thus posing a problem for prison population forecasting and Department of Corrections’ sentence planning.

9. These are not new issues. They have been features of New Zealand’s sentencing and parole system for a very long time. This paper considers what might be done to address them.

2.5. In the preparation of their report, the Law Commission undertook extensive consultation with judges and surveyed other jurisdictions for a solution to the problems of inconsistent sentencing. The Law Commission’s proposed solution was the introduction of a Sentencing Council. This proposal is summarised in the Report at [10]-[13]:

10. We recommend the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines. Such a Council is the only vehicle that can address all of the necessary issues: the sentencing problems that we have identified; and shorter sentences to compensate for our proposed parole reforms, which are predicted to increase the proportion of time served from around 62 percent to over 80 percent of the sentence.

11. First, a Sentencing Council would broaden the base of responsibility for determining sentencing policy. Recommendations directed to this issue include the Council’s mix of judicial and non-judicial membership, and its consultation process.

12. Secondly, it is expected to promote sentencing consistency, because judges would be required to adhere to the guidelines unless satisfied that this would be contrary to the public interest. Furthermore, the Council would be in a position to issueguidelines in relation to the whole range of offences.

> 13. Thirdly, it would give the executive greater input into sentencing policy. Avenues for executive input include provision for a formal request by the Minister of Justice for consideration of a particular issue; official observers to the Council; informal dialogue channelled through the Chair; and ultimately the need for the Council to satisfy Parliament that its guidelines should proceed. In essence, the recommended process enables contributions to the development of sentencing policy from all three branches of government – the judiciary, Parliament, and the executive.
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> 14. Finally, sentencing guidelines coupled with parole reforms are a proven mechanism for managing penal resources. We recommend that this should be a key consideration for the Council and for Parliament: the Council should undertake prison population modelling, to assess the effect of its recommendations, and attach a forecast to each set of draft proposals. The need for compensatory sentencing changes in the light of our proposed parole reforms has already been noted; this is an issue with which a Sentencing Council can assist, and from our perspective is a strong argument in favour of the establishment of such a body. However, it should also be noted that the establishment of a Council in itself will not guarantee or even indicate this outcome. Whether there is increased or decreased demand for penal resources will be wholly dependent upon the nature of the resulting sentencing guidelines.

2.6. We think that the concept of a Sentencing Council remains useful. We are particularly concerned with the problems of sentencing for breaches of health and safety law.

2.7. We attach as appendix one an article written for the Employment Law Bulletin by Jeff Sissons, CTU General Counsel setting out some of the history of attempts by the upper Courts (primarily the High Court) and the Legislature to lift and regularise fines for breaches of health and safety law.

2.8. We therefore recommend that the Sentencing Council Act 2007 and associated legislation remain in force. If necessary, the Ministry of Justice may be asked to review provisions of those Acts that the Government is unhappy with but let us not throw out the baby with the bath water.

APPENDIX 1:
The end of the honeymoon?
Sentencing under the Health and Safety Reform Bill

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July 2014

INTRODUCTION

It has been almost 22 years since the passage of the Health and Safety in Employment Act 1992 ('the Act'). For at least 18 years of these years, politicians and the courts (primarily the High Court) have been attempting to lift the level of penalties imposed for breaches of the Act.

In *Fairfax Industries Ltd v Department of Labour* [1996] 2 ERNZ 551 dismissing an appeal against an allegedly inordinate fine of $20,000 Paterson J memorably held that:

> …It is noted, and has been noted in more than one case recently, that the honeymoon period under this Act is over. When it first came into force, fines were on the low side but more recently they have become more realistic.

The honeymoon period continued, however, to the extent that the Health and Safety in Employment Amendment Act 2002 quintupled many fines under the Act to their current levels. The Select Committee Report on that Bill contained a cross-party consensus agreement that fines imposed were too low.[i]

Despite the statutory uplift, fines remained stubbornly low. The High Court provided comment and guidance on the sentences levied under the Act on a number of occasions. For example, in *Affco New Zealand Ltd v Department of Labour* (HC, Wellington, 17 September 2008, Gendall J, CRI-20080283-12) BC200893146 Gendall J said:

> [34] The aim of legislation is to prevent workplace harm. References have been made in other cases to sentences not merely being at 'licence level' and that sentences should 'bite', so as to reflect the increase in penalty. Some have asked why should they bite? The reason that they should 'bite' is to ensure that there is general and personal deterrence and that the major companies, especially, who offend, do not regard them as an unfortunate business expense. The 2002 Amendment made it clear the 'honeymoon' period under the Health and Safety in Employment Act was over and that penalties had become more realistic to recognise the purpose of the Act….

In the important sentencing guideline decision by the Full Court in *Department of Labour v Hanham & Philp Contractors Ltd, Cookie Time Ltd, and Black Reef Mine Ltd* (HC, Christchurch CRI 2008-409-000002/000034/000009, 17 December 2008, Randerson and Pankhurst JJ) after endorsing the concept that penalties must bite and not be at a 'license fee' level[ii] the Court noted that:

> [59] A substantial uplift in existing levels of fines is needed to reflect the five-fold increase in maximum fines effected in 2003, the effects of inflation, the ongoing cost and seriousness of workplace accidents and the need for deterrence. Significantly, s 8(c) and (d) Sentencing Act require the court to impose penalties at or near the maximum for offending within or near the maximum for offending within or near to the most serious of cases unless circumstances relating to the offender make that inappropriate. Sentencing levels under s 50 HSE have not generally reflected this policy.
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> [60] It is important to reiterate that the levels of fines suggested reflect starting points before taking into account financial capacity, the payment of reparation or any other aggravating or mitigating factors relating to the offender. Tailoring to the individual circumstances of the case remains essential, as is the need to avoid undue hardship.

The High Court's guidance in *Hanham v Philp* has led to a material increase in subsequent sentences handed down by the District Courts in cases under the current Act.[iii]

However, the Independent Taskforce on Workplace Health and Safety was unconvinced by the effectiveness of the regime. The Taskforce Report noted that:[iv]

> 386. …[F]ine ceilings do not necessarily reflect what actually happens in the courts. In their paper *An Empirical Analysis of Changing Guidelines for Health and Safety in Employment Sentences in New Zealand* (2013), Woodfield et al found, for example, that "the magnitude of discounts for the many permissible mitigating factors makes endpoint fines very much smaller than typical starting points[69]. Woodfield et al also found that "for offenders found to have financial limitations, the effect is to drive many fines to be a small proportion of their endpoints, let alone their starting points".
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> 387. And as noted in MBIE's submission to the Taskforce:
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> > *"Fines imposed in HSE Act prosecutions continue to be low. Fifty five percent of all fines imposed are less than $30,001 (12% of the maximum set in the Act), and 92% of all fines imposed are less than $50,001 (20% of the maximum). Low fine levels undermine the general deterrent effect intended by penalties, and send wider societal signals that offending of this type is less serious, or that workplace health and safety is not important."*
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> 388. Woodfield et al also noted that judges seem averse to putting small businesses out of business through the size of the fines or the reparation orders they impose. They noted that "the judiciary also occasionally gives generous treatment to small, relatively impoverished employers on the grounds that their importance in small communities is such that their failure would cause excess social hardship".
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> 389. The Taskforce considers that it might be the best outcome if some firms are put out of business. Profit gained in the context of causing reasonably preventable harm to workers is ill-gotten gain. The Taskforce concurs with Woodfield et al's view that the generous treatment of small businesses in this context seems at odds with the dynamics of business life more generally, which mean that:
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> > *"Many small enterprises fail because demand falls, costs increase, or expectations of their success are over-optimistic. Others move location, including offshore. But more importantly, the failure of a business for any reason does not destroy the physical resources invested, which can generally be purchased by others. Trading and employment may cease, but only temporarily"*
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> 390. Woodfield et al said that "one issue that may loom large [in the Taskforce's work] is whether or not the severity of HSE sentences should be increased in order to provide greater incentives for workplace health and safety precautions". The Taskforce's response to that question is an emphatic 'Yes'.

In relation to penalties, the Independent Taskforce recommended that New Zealand should effectively adopt the system set out in the Australian Model Workplace Health and Safety Act ('the Model WHS Act') with adaptions to suit the New Zealand context.

This article looks at the Health and Safety Reform Bill ('the Bill') currently before the Transport and Industrial Relations Committee and asks whether the Australian system as adapted will provide the necessary bite. We do not discuss the detailed sentencing framework set out by the courts but take a step back to look at the sentence in the context of the wider criminal framework in New Zealand.

Penalties are only one cog in building an effective health and safety system. The Independent Taskforce identified critical factors as having an effective regulator, strong leadership, a robust level of capacity and capability, tripartism throughout the system, genuine and effective worker participation, effective incentives (which include both penalties and positive incentives), high quality data, a greater much emphasis on occupational health, better information for small and medium enterprises, targeting of high risk population groups, effective regulation of major hazard facilities, and cultural changes nationally.

We discuss many of these components in detail in the CTU submission on the Health and Safety Reform Bill[v] along with other key components of the proposed regime such as the new duty of officers to exercise due diligence in relation to the PCBU's health and safety obligations.[vi]

BREACHES OF HEALTH AND SAFETY DUTIES

It is proposed that maximum sentences for breaches of health and safety duties under the Bill rise significantly but not universally. A conviction under cl 42 of the Bill (reckless conduct in respect of a health and safety duty) carries a maximum penalty of $300,000[vii] and five years' in prison for any person excluding an officer[viii] or self-employed person, $600,000 and five years' imprisonment for an officer of the PCBU[ix] or individual who is a PCBU (such as a self-employed person) or $3,000,000 for any other person including a body corporate. Currently, a person convicted under s 49 of the Act (offences likely to cause serious harm) is liable to a maximum penalty of $500,000 and two years' imprisonment.

While an increase in the maximum term of imprisonment from two to five years is significant, it remains out of step with sentences for comparable offences. It is important to note upfront that New Zealand is not well served by a cogent system of sentences for different crimes.[x]

Bearing this caveat in mind, it is instructive to review the maximum sentences available for some other crimes leading to death or serious injury or involving mistreatment of workers or corporate malfeasance along with other crimes with a five year maximum sentence.[xi]

Crime	Act and section	Current maximum prison term
Murder	Crimes Act 1961 s 172	Life
Manslaughter	Crimes Act 1961 s 177	Life
Attempted murder	Crimes Act 1961 s 173	14 years
Aggravated wounding	Crimes Act 1961 s 191(1)	14 years
Wounding with intent to cause grievous bodily harm	Crimes Act 1961 s 188(1)	14 years
Destroying property knowing danger to life	Crimes Act 1961 s 268(2)	10 years
Driving recklessly or dangerously causing death	Land Transport Act 1998 s 36AA	10 years
Wounding with intent to injure or with reckless disregard	Crimes Act 1961 s 188(2)	7 years
Exploitation of persons not legally entitled to work[xii]	Immigration Act 2009 s 351(1)(b)	7 years
Threats of widespread harm to people or property	Crimes Act 1961 s 307A	7 years
Damaging a computer system	Crimes Act 1961 s 250(2)	7 years
Destroying property with disregard for other property	Crimes Act 1961 s 269(3)	7 years
Taking, obtaining or copying trade secrets	Crimes Act 1961 s 230	5 years
Waste or diversion of electricity, gas or water	Crimes Act 1961 s 271	5 years
Counterfeiting corporate seals	Crimes Act 1961 s 262	5 years

Given the range of other penalties under New Zealand criminal law, a five year maximum sentence is very difficult to justify. It is immoral that we should penalise damage to a computer system more gravely than the reckless killing of a worker. The CTU has called in our submission for the maximum of imprisonment sentence under cl 42 to be raised to 10 years.

Although the maximum penalties under the Bill for corporations in particular have increased significantly on those in the current Act it is important to consider their effect in practice. Leading Australian experts Richard Johnstone and Michael Tooma note that:[xiii]

> [A] critique of the current approaches to enforcement by the Australian work health and safety regulators … is that enforcement is too heavily slanted towards advice and persuasion, with too little a focus on deterrence and other forms of punishment. Partly this is a problem with the structure of the Model Act itself. While the maximum financial penalties available to the courts appear to be large, in fact, they are

> a moderate advance on the maximum penalties in the pre-Model Act work health and safety statutes. Category 1 offences will be extremely rare, because recklessness will be very difficult to prove, and so for the vast majority of offences, the maximum penalties for corporations will be $1,500,000 if the offence results in the risk of exposure to serious injury or disease; and $500,000 for all other offences against the general duties. These are not the 'mega' penalties that are required to ensure an effective 'responsive' approach to enforcement, particularly for large corporations….

The CTU believes that the *mens rea* of recklessness is too high for cl 42 offences particularly in comparison to that of manslaughter.[xiv] We propose in our submission on the Bill at [59.3] that the *mens rea* for penalties at this level should include negligence and wilfulness.

A well thought-through maximum penalty under the Bill reduces the need for a separate charge of corporate manslaughter. The exemption for corporations from manslaughter remains puzzling however and we support the call of the Independent Taskforce to remove this exemption and to create an enhanced framework for corporate criminal liability.[xv] It is disappointing to see this work being given a low priority by the Ministry of Justice.

The Bill effectively splits the current Act's s 50 other offences into three categories:

- Cl 43 Offence of failing to comply with a health and safety duty that exposes individuals to risk of death or serious illness. The maximum penalty for an individual who is not a PCBU or an officer is a fine not exceeding $150,000; for an individual who is a PCBU or an officer a fine not exceeding $300,000; and for any other person a fine not exceeding $1,500,000.

- Cl 44 Offence of failing to comply with a health and safety duty. The maximum penalty for an individual who is not a PCBU or an officer is a fine not exceeding $50,000; for an individual who is a PCBU or an officer a fine not exceeding $100,000; and for any other person a fine not exceeding $500,000.

- Cl 221(q) offences set out in regulations. The proposed maximum fine for these breaches is $30,000 or an 88% decrease on the current maximum fine of $250,000.

The greater differentiation of offence categories may assist sentencing judges compared to the current s 50 offence which covers a huge range of culpability.

The major problem with cl 43 breach of a health and safety duty is the absence of a possible custodial sentence. Breaches of health and safety duties punishable under cl 43 will commonly have led to death or serious injury or illness. It is difficult therefore to see why the maximum sentence for breach of cl 43 is out of step with other similar offences. Another set of comparable offences[xvi] illustrates this:

Crime	**Act and section**	**Current maximum prison term**
Injuring by unlawful act	Crimes Act 1961 s 190	3 years
Causing injury or death while not under the influence of alcohol or drugs	Land Transport Act 1998 s 62	3 years
Aggravated careless use of a vehicle causing injury or death	Land Transport Act 1998 s 39(1)	3 years

PROSECUTION TIMEFRAMES AND SENTENCING CRITERIA

Compared to equivalent crimes covered by the Criminal Procedure Act 2011, breaches of health and safety duties have a considerably shorter timeframe for both the regulator and private prosecutors to file charging documents. [xvii]

The sentencing criteria in the Bill retain the oddities of the Act while making a number of changes.[xviii] Both s 51A of the Act and cl 169 of the Bill have problems of logical inconsistency. The courts are to "have particular regard for" a number of named factors of which:

- Some duplicate factors set out in the Sentencing Act 2002;
- Some partially duplicate Sentencing Act 2002 factors;
- Some of which have no Sentencing Act 2002 analogues;
- And include the entire purposes and principles sections of the Sentencing Act 2002 (many elements of which will never apply to health and safety offences).

Given the clumsy drafting, judges may struggle to weigh these factors up. The factors to be applied have also changed significantly, meaning that their interpretation may await another definitive ruling from the High Court (and another 'honeymoon period in the meantime. It took more than five years for *Hanham & Philp* to be decided after the 2002 amendments. We have asked the Transport and Industrial Relations Committee to retain the existing sentencing criteria.

OTHER POWERS OF THE COURT

We strongly support other new powers of the Court under the Bill that have been duplicated from the Model WHS Act. These include:

- Directions that a person who contravenes an enforceable undertaking pay costs of the proceedings, and the costs in monitoring compliance with the enforceable undertaking in the future,
- Adverse publicity orders,
- Restoration orders,
- Work health and safety project and training orders,
- Injunctions, and
- Enforceable undertakings.

ADVERSE CONDUCT

There are also strong new sanctions for engaging in adverse conduct in relation to workers attempting to assert health and safety powers backed by significant sanctions. Oddly, the Bill forces employees to use personal grievance provisions under the Employment Relations Act 2000 while granting workers outside of the employment relationship significantly better remedies and longer timeframes to file than their employed counterparts.

CONCLUSION

There are a number of positive features to the new sentencing regime under the Bill. Greater graduation of offences should assist the Courts in sentencing and some of the new penalties, powers and responsibilities may give wrongdoers pause.

However, custodial sentences remain much lower than equivalent crimes under other enactments. The sentencing provisions are incoherent and risk another "honeymoon period" as the courts decipher them. Statutes of limitations and rights of private prosecutions remain weaker than those under general law.

It is to be hoped for workers' sake that the Transport and Industrial Relations Committee manages to address these issues and give those who would breach their health and safety responsibilities serious pause for thought.

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[i] The Health and Safety in Employment Amendment Bill (163-2) as reported back from the Transport and Industrial Relations Committee. The majority report stated at 14 that:

> [P]enalties are increased for offences likely to cause serious harm. The term of imprisonment increases from one year to two and the maximum fine level increases from $100,000 to $500,000. Labour and Green members believe that current fine levels do not provide sufficient incentive for compliance with the Act. The new maximums are intended to highlight the seriousness of injury, illness and loss of life suffered in the workplace.

Rather oddly, the minority report stated at 18 that:

> National and ACT oppose proposals to increase offences and penalty from $100,000 to $500,000. Whilst National and ACT take the issue of health and safety in workplaces very seriously, they have a view that the current fines regime is not being utilised at all with an average fine during the 2000/2001 year being only $5,298 with the maximum fine awarded during that time being $40,000. National and ACT hold the view that the existing penalty regime should be used to its potential prior to increasing the maximum upper limits of those fines being proposed in the Health and Safety in Employment Amendment Bill.

[ii] Both Gendall J in *Affco New Zealand* and the Full Court in *Hanham & Philp* were referring to and endorsing the comments of Duffy J in *Department of Labour v Street Smart Ltd* (HC Hamilton CRI-2008-419-000026 8 August 2008) at [59].

[iii] See Alan Woodfield, Andrea Menclova and Stephen Hickson (2012) 'Changing Guidelines and Health and Safety in Employment Sentences in New Zealand: An Empirical Analysis' NZAE Conference Paper 2012 for further detail.

[iv] The Independent Taskforce on Workplace Health and Safety (April 2013) Report of the Independent Taskforce on Workplace Health and Safety.

[v] New Zealand Council of Trade Unions (2014) New Zealand Council of Trade Unions submission on the Health and Safety Reform Bill. Available at: http://union.org.nz/policy/ctu-health-and-safety-reform-bill

[vi] See Part 21 of our submission on the Bill for an in-depth discussion of this duty.

[vii] A reduction of the maximum fine for these persons by 2/5s. The Bill should not be characterised as an across-the-board increase to maximum penalties. Another example is that breaches of regulations have penalties set out in the regulations (rather than being framed as a breach of the Act as currently). The proposed maximum fine for these breaches is $30,000 (see cl 221(q) of the Bill) compared to the existing maximum fine of $250,000 (under s 50(1)(c) of the Act) or an 88% decrease.

[viii] One of the most important features of the Bill is the imposition of a duty of a proactive duty of due diligence on officers of a company or undertaking. This is a personal duty to ensure that you have adequate knowledge of health and safety matters and risks as they pertain to the company and that the business or undertaking has sufficient resources and systems to ensure compliance with health and safety duties. While the definition of officer in the Model WHS Act and the proposed definition of officer under the Bill are not identical a good place to start is Safe Work Australia (2011) Interpretive

Guideline- Model Work Health and Safety Act- the Health and Safety Duty of an Officer under section 27.

[ix] A PCBU is a 'Person conducting a Business or Undertaking.' This is an important new concept in the Bill taken from the Model WHS Act. A PCBU holds the primary duty to ensure health and safety in the workplace (either solely or along with other PCBUs. The definition of a PCBU focuses on the work arrangements and the relationships to carry out the work. A PCBU may be a corporation, an association, a partnership or sole trader, for profit or not for profit. The boundaries of who constitutes a PCBU are complex and difficult to summarise concisely. A good starting point is Safe Work Australia (2011) *Interpretative Guideline Model Work Health and Safety Act the meaning of 'Person conducting a business or undertaking'* but note that the Australian and proposed New Zealand definitions are not identical.

[x] The Law Commission published a study paper in September 2013 entitled "Maximum Penalties for Criminal Offences." After detailed analysis, the paper concluded at [6.55] that:

> The way in which maximum penalties have been developed has resulted in a large number of manifestly irrational and unjustified penalties that are, relatively speaking, both too high and too low. They provide very poor guidance to the courts as to the appropriate level of punishment in the worst class of case and, to the extent they guide day to day sentencing practice, may well be resulting in injustice.

[xi] The list gives examples only and does not include all crimes which may fall in any of these categories.

[xii] The Immigration Amendment Bill (No 2) currently before the Committee proposes to extend this crime to include the exploitation of legal migrants.

[xiii] Johnstone, R and Tooma, M (2012) *Work Health and Safety Regulation in Australia: The Model Act.* Sydney, Federation Press.

[xiv] As Nadine Baier (2011) *'Fitting the Time to the Crime: Sentencing for Homicide'* (LLB (Hons) Dissertion, University of Otago) notes at 47:

> Manslaughter encompasses a wide range of offending, with a corresponding range of culpability, from full inadvertence to situations little short of murder. For example, death may result from sheer carelessness, an opportunistic or impulsive push to the ground, wounding with a weapon or from a planned and prolonged attack.

[xv] The Independent Taskforce on Workplace Health and Safety (April 2013) *Report of the Independent Taskforce on Workplace Health and Safety* at [367]-[383].

[xvi] A difference between an offence under cl 43 of the Bill and these offences is that cl 43 does not require actual harm (though actual harm will be relevant to sentencing).

[xvii] For example, were it not for the specified timeframes for laying charges under the Act and Bill, the limitation period would be 5 years for cl 42-44 offences (s 25 of the Criminal Procedure Act 2011). Restrictions relating to the definition of matter and the range of possible defendants further restrict this right.

[xviii] See Part 62 of the CTU submission on the Bill for greater detail on changes to the sentencing regime and discussion of the various factors.