

# UNIONS NT

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**ABN: 48 929 504 093**

8<sup>th</sup> October 2019

Mr. Tony Sievers MLA  
NT Government  
Parliament House  
Darwin  
NT 0800

Dear Mr Sievers,

On behalf of the Unions NT Council we would like to provide a submission regarding the Industrial Manslaughter legislation introduced to the Parliament last month.

First and most importantly we need Industrial Manslaughter (IM) laws in the Territory to help arrest the terrible track record that sees a worker 3 times more likely to die at work than any other State or Territory. These are terrible stats but the most important part is to now get the legislation right. In getting the legislation right we have engaged with several unions and been provided legal advice from law firms and the ACTU legal team. The following outlines our concerns and suggested changes with a more formal and annotated document attached also.

Secondly, and significantly, the Northern Territory (NT) draft laws apply to 'a person', which would capture workers and others as well as the person conducting a business or undertaking (PCBU) – this is not desirable.

As it stands there is a lack of clarity around the Senior officer or PCBU role within the legislation and we recommend removing the term '**a person**' which could capture a worker or volunteer and replace it with senior officer or executive(PCBU).

Industrial Manslaughter offences should be limited to the PCBU's and senior / executive officers. The Qld laws extend the offence to 'senior officers' – which are executives who make decisions affecting *all or a substantial part* of the business's functions. Volunteers are exempted from the NT laws, unless they are workers or others with duties under the NT WHS Act. The Qld Act exempts all volunteers. Unions NT want this new IM law only applying to PCBU's and executives / senior officers as is the intent of the legislation.

We also contend that the 'intentional' element of the legislation should be removed and fall in line with other laws that are similar like Manslaughter in the NT Criminal Code s. 160, which states that –

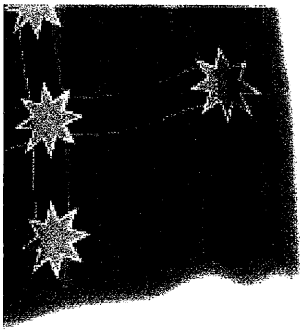
## **160 Manslaughter**

A person is guilty of the offence of manslaughter if:

- (a) the person engages in conduct; and
- (b) that conduct causes the death of another person; and
- (c) the person is reckless or negligent as to causing the death of that or any other person by the conduct.

## **161 Punishment for manslaughter**

A person who is guilty of the offence of manslaughter is liable to imprisonment for life.



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Conduct that is intentional is not in the Manslaughter laws and should NOT be in the Industrial Manslaughter laws. The fault elements within manslaughter and the draft Industrial manslaughter legislation are clearly defined as reckless or negligent and therefore covered.

For the draft offence of Industrial Manslaughter in the NT, a prosecutor has to prove that the duty-holder acted **intentionally** (see s 34B(b) and s 34C(a)). WHS offences are usually offences of strict liability (i.e. intention is irrelevant).

The Qld Industrial Manslaughter laws don't require proof of intention – proof that the duty holder was negligent and has substantially contributed to the death is sufficient. We strongly request the intention element be removed.

Recklessness or negligence are the fault elements required to satisfy the charge. Only murder under section 156 of the NT Criminal OCde requires intention to cause death or serious injury and we believe this is a clear oversight that should be remedied by removing the 'intentional' word from the legislation.

Thirdly, Process for prosecutions need re-considering. Proceedings for Industrial Manslaughter can only be brought under the NT draft Act with the consent of the DPP – this is different to Qld where prosecutions in Qld (including for IM) can be brought by the WHS prosecutor, as long as DPP guidelines are considered.

There is also a 'right to request an IM prosecution' procedure in the NT draft Act, which is similar to the Qld laws but not as strong – in both jurisdictions, you can ask the regulator why if there has been no prosecution for 6 months and the regulator must respond within 3 months.


Under the Qld laws, the regulator **must** refer to the DPP for an opinion on the merits if a request is made re IM and the DPP must respond in 1 month. Under the NT laws, the regulator **may** refer a request to the DPP, and the DPP must respond in 25 days.

We request further explanation of these two differences

Also, of note is that the Victorian and Western Australian government are currently drafting WHS Industrial Manslaughter legislation and we strongly suggest these two states are engaged to enhance the draft legislation and ensure that the laws are right when introduced and the intent of the laws intact with workers and workers safety at the forefront.

Finally, we welcome an opportunity to present to the scrutiny committee should this be afforded to Unions NT and affiliates and look forward to working with you and ensuring the legislation is done right the first time.

Yours Sincerely,



Joel Bowden  
General Secretary  
Unions NT

## 1. INTRODUCTION

**Unions NT and Affiliates** welcomes this opportunity to make a submission to the Northern Territory Legislative Assembly's Economic Policy Scrutiny Committee on the Bill to amend the Work Health and Safety (National Uniform Legislation) Act 2011 (WHS Act) regarding industrial manslaughter. It is refreshing to see the NT leading the way as only one (1) of three (3) jurisdiction to have such laws implemented.

Stakeholders have had 8 years to understand and implement the intent of WHS Act in their workplaces.

Statistically, a worker in the NT, tragically, is three (3) times more likely per capita to be killed at work than any other jurisdiction<sup>1</sup>.

*Enough is enough*, if a person kills someone at work or later injuries or illness endured causes death they will be held to account.

## 2. COMMENTS ON THE BILL

### 34B A person commits the offence of industrial manslaughter

The Bill captures every person that has a safety duty in the WHS Act<sup>2</sup>. There are provisions in the Criminal Code to capture workers and volunteers for manslaughter. To include workers in this instrument, Unions NT and Affiliates, believe it will compromise workers and volunteers and allow Persons Conducting Business or Undertaking (PCBU), Body Corporates and Senior Officers to pass blame to the worker.

Phoenixing and company insolvency are tools used by companies to avoid prosecution. This needs to be stopped. The proposed Bill fails to clearly articulate that it is an offence of Industrial Manslaughter of the WHS Act and the actions are a criminal.

The WHS Act, the Regulations, and Codes of Practice are instruments used by all duty holders. To expect workers and volunteers to have intermate knowledge of the criminal code is not conceivable.

For the offence of Industrial Manslaughter in the NT, a prosecutor has to prove that the duty-holder acted intentionally. WHS offences are usually offences of strict liability (i.e. intention is irrelevant). The Queensland's Industrial Manslaughter laws don't require proof of intention – proof that the duty holder was negligent and has substantially contributed to the death is enough.

#### Recommendation 1: 34B (b)

Delete;

intentionally

#### 1.1. 34B (d) insert all after individual;

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<sup>1</sup> 2017 Safe Work Australia- Work-related Traumatic Injury Fatalities, Australia.

<sup>2</sup> WHS Act 2011-Part 2 section 28 & 29 and Part 5 section 83 & 84.

, or if later an individual or individuals die from an illness or injury caused by a substance or thing.

1.2. 34B insert;

*(e) an offence of this section (34B) is a crime.*

1.3. 34B (3) insert all after A;

*worker or*

Delete;

*unless the duty is under section 28 or 29.*

Insert;

*unless the person is a worker under section 7 (3).<sup>3</sup>*

### **Enforceable Undertakings**

The Bill removes the ability of the regulator accepting an enforceable undertaking (EU) presented by stakeholders. An EU does not constitute an admission of guilt were a Category 1 and 2 offence do<sup>4</sup>.

Notwithstanding, NT WorkSafe **has not** prosecuted a single individual or body corporate for a Category 1 offence<sup>5</sup>. This then forces the regulator to prosecute at the lesser offence of a Category 2 enabling an EU to be accepted. For these reasons, one (1) of the recommendations made by Marie Boland and supported by Tim Lyons: *2018 Review of the model Work Health and Safety Laws (Recommendation 23a: Enhance Category 1 offence)* reads *Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.* This is a more progressive way to deal with Category 1 offences and is easier to achieve a conviction than its current posture **Reckless conduct**.

*As early as the 08 August 2019, Woolworths submitted the enforceable undertaking after being charged with one breach of Section 32 of the Work Health and Safety (National Uniform Legislation) Act 2011 for failing to comply with a health and safety duty for death of a Maningrida man, who was run over by a prime mover in the Woolworths Ltd, Hibiscus Shopping Centre loading dock in 2016. The undertaking worth \$1.6 million was committed to upgrading the infrastructure of back*

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<sup>3</sup> WHS Act 2011 7 Meaning of worker (3) The person conducting the business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking.

<sup>4</sup> WHS Act 2011-Part 11 Enforceable undertakings- section 216 *Regulator may accept WHS undertakings* (3) The giving of a WHS undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.

Division 6 Right to cease or direct cessation of unsafe work- section 84 Right of worker to cease unsafe work-

A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.

<sup>5</sup> WHS Act 2011-Part 11 Enforceable undertakings- section 216 *Regulator may accept WHS undertakings* (2) A WHS undertaking cannot be accepted for a contravention or alleged contravention that is a Category 1 offence.

docks at all Woolworths stores across the Territory to enhance traffic management controls above what is required by law.

The Victorian based transport and warehouse company who was contracted had been fined \$154,000 on the 26<sup>th</sup> March 2019 in the Darwin Local Court. Glen Cameron Nominees Pty Ltd pleaded guilty to one breach of Section 32 of the Work Health and Safety (National Uniform Legislation) Act for failing to comply with a health and safety duty.

Tuesday 26 March 2019 a skipper for a Darwin shipping company has been convicted and fined \$20,000 in the Darwin Local Court after the death of 37-year-old deckhand Daniel Bradshaw.

Nick Mitchell, who was the skipper of the Sammy Express, pleaded guilty on Tuesday 26 March 2019 to one breach of Section 32 of the Work Health and Safety (National Uniform Legislation) Act 2011, for failing to comply with a health and safety duty. Mr Mitchell is the first worker to be charged under the Northern Territory's current work health and safety laws.

Conlon Murphy Pty Ltd, trading as Barge Express was also charged over the death of Daniel Bradshaw and was fined \$190,000 after pleading guilty earlier this year.

25 June 2018, NT WorkSafe has accepted an enforceable undertaking from an Australian fishing company Austral Fisheries Pty Ltd and will withdraw charges against the company related to death of a deckhand in 2013.

Following investigation, NT WorkSafe charged Austral Fisheries Pty Ltd with a breach of Section 32 of the Work Health and Safety (National Uniform Legislation) Act 2011 over a 2013 incident which saw a deck hand electrocuted when a wave breached the deck while he was using an electric angle grinder. The grinder was plugged into an electrical socket that was not protected by a residual current device. Austral Fisheries Pty Ltd has entered into a legally-binding agreement to spend \$967,700 on activities to improve the health and safety of its workers, the NT fishing industry and provide benefits to the wider community.

These are current examples where EUs have been used where a death of a worker is accepted and even when found guilty of an offence the punitive costs are outrageously disproportionate and well below community expectations.

## Recommendation 2: WHS Act 2011 Divisions 5 Offences and penalties

### 31 Reckless conduct – Category 1

insert;

*Negligent or*

#### 2.1. 31 Reckless conduct – Category 1 subsection (1) (c)

Insert all after;

The person is reckless

Insert;

*or negligent*

### 3. CONCLUSION

If a person whom has a duty are not found guilty of Industrial Manslaughter, but are reckless or negligent to their Duty they **should** be prosecuted with alternative charges in a Court of Law. This is well supported by Unions and is long overdue.

The current Laws are obviously not working. It is well below community expectations that a loved one, a mother, a father, a son, a daughter, a friend or college will never return home from work let alone someone not being held to account. The deterrent of going to jail for life and an everlasting guilty verdict will save lives.