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Mr Tony Sievers
Chair
Economic Policy Scrutiny Committee
GPO Box 3721
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Via email: SPSC@nt.gov.au

Dear Mr Sievers

Thank you for your letter dated 22 October 2019 in regards to the Inquiry into the Work Health and Safety (National Uniform Legislation) Amendments Bill 2019, that the Social Policy Scrutiny Committee is conducting.

Please find attached the response to the questions raised by the Economic Policy Scrutiny Committee in your letter.

Don't hesitate to contact my office on 89365610 if you require any further information.

Yours sincerely

Natasha

NATASHA FYLES

29 OCT 2019

NORTHERN TERRITORY GOVERNMENT

RESPONSE OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO THE ECONOMIC POLICY SCRUTINY COMMITTEE

Questions on the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (Serial 103)

QUESTION 1:

Industrial manslaughter offence within the Work Health and Safety (National Uniform Legislation) Act 2011

Concerns have been raised about the effect of including the industrial manslaughter offence, which includes a maximum penalty of life imprisonment, within work health and safety legislation rather than in the Criminal Code (see attached advice). The objectives of work health and safety legislation are to protect workers through positive obligations designed to eliminate or minimise risks to workers' health and safety, whereas criminal law is traditionally focused on the punishment of conduct that gives rise to specific outcomes.

QUESTION 1a:

Does including the offence of industrial manslaughter within work health and safety legislation change the meaning of 'reckless' and 'negligent' compared to their meaning in the manslaughter offence in the Criminal Code?

ANSWER:

No. Section 12A of the *Work Health and Safety (National Uniform Legislation) Act 2011* ('the WHS Act') operates to apply Part IIAA of the Criminal Code to its offence provisions. Recklessness and negligence are fault elements defined in Part IIAA of the Criminal Code (sections 43AK and 43AL). Accordingly, these terms have the same meaning in both Acts.

QUESTION 1b:

Is there work health and safety case law that changes the standards applied to the terms 'reckless' and 'negligent' in the context of work health and safety legislation?

ANSWER:

No. These terms are defined by statute.

QUESTION 1c:

What was the rationale for including the offence in the Work Health and Safety (National Uniform Legislation) Act 2011 as opposed to the Criminal Code?

ANSWER:

There were three reasons. Firstly, it was the recommendation of the Lyons Review that it be inserted in the WHS Act. Secondly, the WHS Act binds the Crown (see section 10). The Criminal Code does not bind the Crown generally, and placing the offence in that Act would have created an anomaly. Industrial Manslaughter is intended to be an offence for which the Crown can be found liable. Thirdly, the Office of Parliamentary Counsel advised that placement of the industrial manslaughter offence provisions within the WHS Act was preferable from a drafting perspective. For example, health and safety duties are referenced in three of the four elements of the industrial manslaughter offence. These health and safety duties are defined creatures of the WHS Act. Another example is the alternative verdict provision which makes existing Category 1 and Category 2 offences under the WHS Act the only available alternative verdicts to industrial manslaughter. Placing the offence in the WHS Act avoids voluminous cross-referencing provisions.

QUESTION 2:

Proposed subsection 34B(1)(a) – Who can commit industrial manslaughter

The Lyons Review recommended two separate industrial manslaughter offences be created for a 'senior officer' and an 'employer'. The Committee understands from the explanatory speech and public briefing from the Department that the single offence provision that has been drafted is intended to apply to body corporates and senior officers.

Many submitters commented that the drafting of proposed s. 34B(1)(a) does not limit the offence of industrial manslaughter to senior officers and body corporates, but covers all people that have a health and safety duty including workers/employees. A number of submitters have recommended that amendments be made to limit this offence to senior officers and body corporates.

QUESTION 2a:

Does the drafting of the offence provision include any person that has a health and safety duty, such as workers and employees?

ANSWER:

Yes.

QUESTION 2b:

Is the offence provision intended to include all individuals that have a health and safety duty, or be limited to senior officers and body corporates?

ANSWER:

The offence is intended to apply to anyone who is under a health and safety duty pursuant to the WHS Act. The Criminal Code offence of manslaughter (section 160) is already applicable to all persons subject to a health and safety duty under the WHS Act (including workers and the other categories above). However, the lack of a corporate penalty option for manslaughter in the Criminal Code meant the offence could not meaningfully be charged against corporate persons in relation to their existing duties, only against individuals. Creating the offence of industrial manslaughter will rectify that legal anomaly.

Limiting industrial manslaughter to employers, senior officers or bodies corporate would not diminish the liability of individual workers for manslaughter under the Criminal Code; it would just create a more confusing legal scheme, where workers may be under the misapprehension (as perhaps indicated by this question) that they are not criminally liable for negligent manslaughter in breach of their current duties. It would also make for additional complexities where the defendant may have acted in multiple capacities – eg. as a senior officer and a worker.

QUESTION 3:

Proposed subsection 34B(1)(b) – Intentionally

A number of submitters expressed concerns that a person needs to 'intentionally' engage in conduct and recommended the word 'intentionally' be removed from proposed s. 34B(1)(b). Hall Payne Lawyers (sub. 10, pp. 3-4) outlined scenarios where they consider that the inclusion of 'intentionally' may prevent prosecution.

QUESTION 3a:

Given s. 43AM(1) of the of the Criminal Code Act 1983, is there any difference in effect between s 160(a) of the Criminal Code Act 1983 and proposed s. 34B(1)(b) in the Bill?

ANSWER:

No, there is no difference. Section 43AM(1) of the Criminal Code provides a "default" fault element of intention where an offence provision fails to expressly provide a fault element for a physical element that consists only of conduct. The element of 'intention' is therefore 'read into' section 160(a) of the Criminal Code (manslaughter), as was made clear by the Northern Territory Court of Criminal Appeal in *Ladd v R* [2009] NTCCA 6. As the new offence is intended to be equivalent to the existing manslaughter offence in terms of the threshold of criminal liability, the element of intention is also a requirement of the new offence.

The reason why the new offence explicitly states that intention is a requirement (rather than relying on the default provision) is that this is the currently preferred drafting style. It is preferred because it makes it easier for all persons (including those not expert in criminal law) to appreciate which fault elements apply to particular physical elements. The proposal to remove 'intentionally' from proposed section 34B(1)(b) would have no legal effect, but it may lead to persons misunderstanding when they will be criminally liable.

QUESTION 3b:

If there is no difference in effect, why is different wording used? If there is a difference, what is the reason for that difference?

ANSWER:

See above.

QUESTION 3c:

What would be the effect of removing the word 'intentionally' from proposed s. 34B(1)(b)?

ANSWER:

See above.

QUESTIONS 4 & 5:

Proposed subsection 34B(1)(c) – Death of an individual to whom a health and safety duty is owed

The explanatory speech suggests that the policy intent of the offence provision is to apply to the death of a worker due to hazardous workplace practices or serious negligence on the part of the employer. The drafting of proposed s. 34B(1)(c) does not appear to limit the death of an individual to a worker.

QUESTION 4a:

What was the policy intent regarding who is covered under this provision?

ANSWER:

The objective of the Bill is to implement recommendation 19 of the Lyons Review in a manner that is consistent with and fits well with existing Territory law. As explained in the Department's answer to Question 2, the existing Territory offence of manslaughter already applies to all breaches of a WHS Act duty that involves criminal negligence and causes death. These duties are not limited to workers. If the new offence is limited to workers, it would create an anomaly where negligent manslaughter of non-workers would need to be charged under section 160 of the Criminal Code, and workers would be charged under the new provision, creating an unnecessarily complex scheme, particularly where there are multiple deaths and the potential of alternative changes under Category 1 and Category 2 offences.

QUESTION 4b:

Could proposed s. 34B(1)(c) include workers, visitors, customers, or a passer-by?

ANSWER:

Yes. The rationale for their inclusion is discussed above.

QUESTION 5:

Hall Payne Lawyers (sub. 10, p. 4) noted that the phrase 'causes the death' is not defined in the Bill or the Act, in contrast to the Queensland and ACT legislation, and have recommended including the wording 'For this section, a person's conduct causes death if it substantially contributes to the death.'

a. *Why has the phrase 'causes the death' not be defined in the Bill or the Act?*

b. *What would the effect be of included the wording recommended by Hall Payne Lawyers?*

ANSWER:

The Department supports this suggestion. The wording proposed by Hall Payne Lawyers mirrors the provision at section 149C of the Criminal Code, which applies to manslaughter at section 160 of the Criminal Code. An amendment to clarify the meaning of 'causes the death' in these terms would ensure that the meaning of the new offence aligns more precisely with the meaning of section 160.

QUESTIONS 6, 7 & 8:

Proposed subsection 34B(1)(d) – Reckless or negligent

QUESTION 6:

A number of submitters were concerned about the effect of including 'reckless or' in proposed s. 34B(1)(d). Maurice Blackburn (sub. 5, pp. 3-4) raised concerns that the drafting runs the risk of modifying the meaning of negligent to a higher standard.

a. *Does 'reckless or negligent' mean standard negligence, or could the phrase be interpreted to result in a different meaning, such as the 'gross negligence'?*

ANSWER:

'Recklessness' and 'negligence' are separate concepts, both with specific statutory meanings defined by Part IIAA of the Criminal Code. 'Negligence' in proposed section 34B does not mean negligence to the civil standard. It means negligence to the criminal standard specified in Criminal Code. The meaning of these terms is therefore identical to the meaning of the terms in section 160 (manslaughter) of the Criminal Code. This is intentional.

The use of 'reckless or negligent' does not change the meaning of either of these terms. It simply allows the prosecution to choose whether it frames its case in terms of recklessness, negligence, or both fault elements. The alternative fault elements of 'recklessness or negligence' have been present in section 160 of the Criminal Code for some time and has not had the effect suggested. The Queensland Criminal Code referred to by Maurice Blackburn does not have a statutory definition of negligence and so there may be ambiguity in that jurisdiction in relation to its meaning. The same issue does not arise in the Territory.

QUESTION 7:

*Proposed s. 34B(1)(d) requires that 'the person is reckless or negligent about the conduct breaching the health and safety duty **and** causing the death of that individual' (emphasis added).*

a. *Does this mean that for a person to be found guilty of industrial manslaughter, the fault element of reckless or negligent needs to be proven for the conduct breaching the health and safety duty, as well as the person being negligent or reckless about causing the death of that individual?*

ANSWER:

Yes. Being negligent or reckless about causing death is what makes this offence manslaughter. The fact that negligence or recklessness involves breaching a health and safety duty is what makes it industrial manslaughter, as opposed to general manslaughter under section 160 of the Criminal Code.

For a prosecution of section 160 of the Criminal Code, breach of a duty is a question inherently wrapped into whether the person was negligent about causing the death. You cannot be negligent at large—you can only be negligent in relation to your legal duties. In the case of industrial manslaughter, the intention was to limit the application of the offence to the duties set out in the WHS Act, so this kind of duty is specified by the new offence.

Similarly, the concept of recklessness requires the jury to evaluate whether the person is aware of a substantial risk that the result will happen, and having regard to the circumstances known to the person, it is unjustifiable to take the risk. This technically does not require a duty to be breached, but if a workplace duty was not breached, then the more appropriate charge would be regular manslaughter (or murder, or another charge, depending on the circumstances).

In practical terms, the offence operates where a death is caused by the conduct that breached the duty, so it is hard to envision a scenario where the person was negligent or reckless about the death but not about breaching the duty. Whether a duty was applicable is a question of law and a person cannot plead ignorance of the law. Hence, the requirement that the person was negligent or reckless about breaching the duty is more of a technical requirement to charge the right kind of manslaughter, rather than a significant additional hurdle for the prosecution to meet.

QUESTION 8:

The independent legal advice provided to the Committee raised concerns about the absence of the term 'risk' in the industrial manslaughter offence provision. The legal advice questioned whether a person could be guilty of industrial manslaughter even where they are not aware of the relevant risk and where there was a freak accident that was traceable to negligent conduct.

a. *Could a person be guilty of industrial manslaughter in the scenario outlined above?*

ANSWER:

A person cannot be guilty of reckless manslaughter unless they are aware of a substantial risk that death will occur (see section 43AK of the Criminal Code).

A person can be guilty of negligent manslaughter if they have not personally turned their mind to the risk involved, but only where their conduct involves:

- such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- such a high risk that death will occur,

that the conduct merits criminal punishment for industrial manslaughter (see section 43AL of the Criminal Code).

The Department would not recommend adding the term 'risk' to the offence, when the relationship of the conduct to the risk is already quite clearly specified by section 43AK and 43AL of the Criminal Code. To do so would change the threshold for criminal liability to something different from manslaughter, as defined by section 160 of the Criminal Code.

QUESTIONS 9 & 10:

Proposed Sections 231 & 231A – Request for prosecution and Referral to Director of Public Prosecutions

QUESTION 9:

Section 231(3) of the Queensland WHS Act (and the Model Work Health and Safety Bill) provides that a person who has requested a prosecution and has been advised by the regulator that a prosecution will not be brought, can request the regulator refer the matter to the DPP for consideration. If the person makes this written request, the regulator must refer the matter to the DPP within one month and the DPP must consider the matter and advise the regulator in writing whether they consider that a prosecution should be brought. Unions NT (sub. 7, p. 2) sought an explanation on the differences between the Queensland provisions and those in the Bill.

a. *Why doesn't the Bill include a provision that allows the person who has requested a prosecution to elect for the matter to be referred to the DPP for consideration where the regulator has determined that a prosecution will not be brought?*

b. What would be the effect on the operation of the Bill if such a provision was included?

ANSWER:

Inserting the provision would require the regulator to refer matters without sufficient evidence to the DPP, and require the DPP to spend its resources evaluating matters without sufficient evidence to prosecute. Depending on how the provision was worded, this may be required for repeated requests and for old matters.

The Bill contains provisions to ensure transparency about the status of the matter, and whether a prosecution is to proceed. The Bill presumes that the regulator will act in good faith to discharge its regulatory and investigative duties. If there were concerns that the regulator was failing to prosecute in situations where prosecution was clearly warranted by law, a complaint can be made to the ICAC. These are significant safeguards against inappropriate failure to prosecute.

QUESTION 10:

The Minerals Council of Australia NT (sub. 14, p. 3) recommended that industrial manslaughter offences should only be prosecuted by the DPP as opposed to health and safety regulators.

a. Why have prosecutions for industrial manslaughter not been limited to the DPP?

ANSWER:

The provision has been drafted with a view to providing necessary administrative flexibility in the prosecution of the offence of industrial manslaughter. This flexibility allows prosecutions to be conducted by either the DPP or an appropriate person briefed by the Regulator, such as a specialist or expert prosecutor from the private bar or interstate. The prosecution can only proceed if the DPP consents.

QUESTION 11:

Imputation of conduct

Hall Payne Lawyers (sub. 10, pp. 5-6) commented on provisions within the Queensland legislation regarding imputing conduct to bodies corporate and recommended that s. 244 of the Act be amended to provide an expanded application of imputation consistent with the Queensland legislation.

a. What would be the effect of including such provisions in the Bill?

ANSWER:

This would be a deviation from the framework for criminal responsibility provided by Part IIAA of the Criminal Code. Part IIAA is modelled on and is consistent with a 'model criminal code' scheme that has also been adopted by the Commonwealth. It includes corporate criminal responsibility provisions. The corporate criminal responsibility provisions of Part IIAA currently apply to all the other offences in the WHS Act, and will apply to industrial manslaughter. Adopting Part IIAA is part of a project to provide greater consistency across the Criminal Code, and with Commonwealth offences.
If section 244 was amended as suggested, it would change the test for corporate criminal responsibility for all offences in the WHS Act. This has policy implications that go significantly beyond the objective of the Bill in creating an offence of industrial manslaughter.

Corporate criminal responsibility provisions are currently a complex, evolving area of law. Section 244 itself has met some criticism in the national review of the model WHS legislation (the Boland review referred to in materials already provided to the Committee), and may yet be further considered or amended by national agreement. The equivalent corporate criminal responsibility provisions to Part IIAA in Commonwealth legislation have currently been referred to the Australian Law Reform Commission (ALRC) for review, and we anticipate that review will provide reform recommendations in mid-2020.
The approach has therefore been to adopt the status quo with respect to corporate criminal responsibility for now. The issue will inevitably be raised for reconsideration if the reviews above and subsequent national responses indicate there is a need to amend existing corporate criminal responsibility provisions.