Work Health and Safety (National Uniform Legislation) Amendment Bill 2019

Ms FYLES (Attorney-General and Justice): I would also like to thank the members of the Economic Policy Scrutiny Committee for their careful consideration of this bill, and their report tabled in this Assembly on Tuesday. I note particularly the work of the Chair of that Committee, the Member for Brennan.

The government was pleased to see a high-level of participation in the committee process from unions, industry groups, and legal experts in workplace health and safety. We have carefully considered feedback that was received through the course of the committee's public consultation process, and I will be moving some amendments to the bill during the consideration in detail stage.

These amendments reflect and implement the committee's three recommendations that were about legislative change. I will also move one additional amendment which we have also chosen to make in response to an issue highlighted in a number of the submissions received by the committee.

Today we will be passing a law to make Territorians safer in the workplace. The new industrial manslaughter offence created by this bill fixes a gap in the law. I will take a moment to address the questions received from the Member for Nelson and the Leader of the Opposition.

The Member for Daly remarked that the offence at section 31 of the *Work Health Act*, the category one offence, required negligence. I want to correct that. The element required for that offence is recklessness.

Why is the *Work Health Act* not in the Criminal Code? The *Work Health 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 *Work Health Act.* Another example is the alternative verdict provision making existing provisions under the *Work Health Act* the only available alternative verdicts to industrial manslaughter. Placing the offence in the *Work Health Act* avoids confusing cross-referencing positions. It was a recommendation of the Lyons review to place in the *Work Health Act*. The *Work Health Act* binds the Crown; the Criminal Code does not bind the Crown generally. They are the reasons that Department of the Attorney-General and Justice provided me so if you have further questions I would be happy to address them in the consideration in detail stage.

You asked a question about why ministers and elected members of local government are exempt. Exemption for elected members of local government is again an existing part of the *Work Health Act.* These persons are answerable to their electorate. They are not in positions that generally handle operational decisions so that preserves the constitutional principle of responsible government. That is the advice that I have received. That is not a new distinction, it is the situation for offences in the *Work Health Act.*

The Member for Katherine and the Member for Nelson touched upon their desire to see more efforts to get uniformity in relation to industrial manslaughter. I note that Victoria's parliament passed this legislation yesterday so we were busy debating another important bill. You have seen various jurisdictions—Queensland and the ACT, and I understand Western Australia have announced that they are looking at this.

It is a recognition right across Australia that this offence is necessary. We are very keen to participate in those national discussions to ensure industrial manslaughter to all Australians

but we are simply not going to sit around and wait for the federal government who have shown no interest in this. I hope that address those members' questions.

We carefully considered the feedback received during the committee's public consultation process and we have those amendments before the House today. The existing criminal offences in the *Work Health and Safety (National Uniform Legislation) Act 2011*—which, to be simpler in the speech, I will refer to as the Work Health Act—apply to individuals, bodies corporate and the Crown. These offence can apply where there is a breach of health and safety duty. If the breach involves serious criminal negligence and causes death, the existing offence of manslaughter in the *Criminal Code Act* can also apply, but it only applies to individuals. Many Territorians work every day for employers which have a corporate structure, but there is currently one law for small businesses run by individuals and another one run for corporations. The corporate structure for business should not control whether the business can be liable for manslaughter for killing someone in the workplace. The new industrial manslaughter offence will apply equally to all Territory workplaces, whether they are run by individuals, bodies corporate or the Crown.

The bill also includes some related amendments to support the proper working of the new offence, including making relevant alternative verdicts available, clearly defining the roles of the regulator and the DPP in relation to the new offence, and ensuring transparency for decisions to prosecute workplace deaths.

The public response to this bill has convinced us, more than ever, of the need to make this change. Not only is the offence of industrial manslaughter welcomed by workers and their representatives, it has also been very apparent from the submissions that many people were unaware that manslaughter can already apply to some kinds of workplace deaths. It is also apparent that, on work sites, the Work Health Act is read not only as a legal document but also as something like a guiding policy that emphasises to workers and employers what is important and what their responsibilities are.

Having an offence of industrial manslaughter in the Work Health Act not only fixes a legal gap, it sends a clear and important message to employers and the community that we value safe workplaces and expect businesses to be run in a way that ensures workers come home to their families and loved ones.

It is also apparent that there are some members of the community who are confused about what the law means. We make sure that we explain this and that information is available. If you are a person or business who wants more information about the law and how it might affect you, Worksafe NT is the place to contact.

This law does not change anyone's duties in the workplace. We have been contacted by training providers who are concerned that they will need to update workplace health and safety training in a significant way. There should be nothing about workplace health and safety training that changes, because after the bill passes everyone will have exactly the same duties that they already have, which are set out in Part 2 of the Work Health Act.

If passing the law motivates some businesses to do their due diligence they should have been doing anyway, then we welcome that. We know that the vast majority—and we have heard it in the House tonight—of Territory businesses do the right things. They care about their employees. We welcome those businesses making sure they are following the act.

The law does not make anyone liable for accidents beyond their control. This is an offence of manslaughter, not accidental death. It applies only to the most serious cases where the

business has intentionally engaged in conduct so risky it can be described as serious criminal negligence.

I would like to think that no one would put their workers at risk in this way. I am sure that the vast majority of Territory businesses would be horrified at the prospect of cutting corners in a way that carries a high risk of seriously injuring or killing one of their workers.

Unfortunately, not everyone does the right thing. That is why offences such as manslaughter exist and need to exist. If you are one of those many businesses doing the right thing—as we have heard in the House and I reiterate—keep doing what you are doing. But if you have been making choices that could be described as seriously, criminally negligent, and making unjustifiable choices that put people's lives at risk, now is the time to change.

According to the latest statistics published by Safe Work Australia, an average of four Territorians have died each year at work. These are people with lives, families and friends. They are people with loved ones who have questions about how and why the person they love is gone, and with reasonable expectations that their employers should have done their very best to avoid those deaths. I pay my respects to those workers, their friends and families, but the people we should also be thinking of are the people who are not on that list. They are the people who have seen their workmates have near misses, who turn up to work each day wondering which of them will be part of the Safe Work Australia statistics in 2020, 2021 or beyond.

Four people per year does not suggest that the majority of Territory businesses have been doing the wrong thing but if any of those deaths were not accidents, if only one of those deaths was reasonably preventable, that is one death too many.

Further, I am disappointed to see that the Territory has twice as many workplace fatalities per capita as the national average. Going forward, we are sending a clear message in line with community expectations that that is not acceptable. That is what this bill is about. It is the beginning of a series of reforms that the government intends to make to the law and practice around safe work in the Territory as an outcome of the Lyons review.

Recommendation 19 of that report says that the Territory should have an offence of industrial manslaughter. Today's bill is a significant step in implementing the government's response to Mr Lyons' recommendations.

To update the House, other activities being undertaken in response to the review include:

- formalising an investigations unit within NT WorkSafe inspectorate to focus on investigating serious incidents and fatalities,

- working with the Work Health and Safety Advisory Council and Workers Rehabilitation and Compensation Advisory Council to improve support offered to families of victims of workplace incidents,

- strengthening approval processes and communication around enforceable undertakings, and

- completing a review of NT WorkSafe's decision-making and development processes around the publication of safety alerts following serious incidents.

This bill before us today creates an offence of industrial manslaughter in the *Work Health Act*. The elements of the offence mirror the elements of the crime of manslaughter at section 160 of the Criminal Code, but the offence is limited to breaches of health and safety duties.

For individuals, as with manslaughter, industrial manslaughter will carry a maximum penalty of imprisonment for life. In addition, industrial manslaughter will carry a penalty that can be applied to bodies corporate or the Crown, of 65 000 penalty units, which is approximately $10m. These penalties were recommendations of the Lyons report.

The offence applies when a person intentionally engages in conduct, and that conduct is a breach of the person's health and safety duty and causes death. The person must have been either criminally reckless or criminally negligent—which is a serious kind of negligence—about causing the death. It applies to deaths of workers, but also to deaths of other people who are owed duties under the *Work Health Act*, including persons such as customers or passers-by.

The bill ensures that relevant workplace offences are available as alternative verdicts to industrial manslaughter. What this means practically is that, if after hearing a case, the Court is not convinced that the offence of industrial manslaughter has been proven but is satisfied that one of the prescribed alternative offences in the *Work Health Act* has been committed, the Court is able to find the defendant guilty of the alternative offence instead.

Similarly to the situation for category 1 offences, the bill will not allow enforceable undertakings to be used or imposed as enforcement or sentencing options where serious negligence has resulted in a workplace fatality. It requires the DPP's consent before the regulator can bring a prosecution, and it enables a member of the public to obtain an update about the status of the investigation and prosecution, and also obtain reasons why a prosecution is not being pursued.

Finally, it makes the roles of the DPP and the regulator clear in relation to the offence and provides a formal process to exchange views regarding the merits of a prosecution.

There was feedback received during the scrutiny committee process regarding the offence requiring a person to intentionally engage in conduct. I would like to briefly touch on the technicality of this. Section 12A of the *Work Health Act* operates to apply Part 2AA of the Criminal Code to its offence provisions.

Section 43AM(1) of the Criminal Code provides that if a law where an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

In the context of the offence of manslaughter, the element of intention is therefore read into section 160(a) of the Criminal Code, as was made clear by the case 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 would be the default fault element of the new offence if it were not expressly provided. 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 on the face of the text.

Removing the word ‘intentionally’ from proposed section 34B(1)(b) would have no legal effect, but it may lead to persons misunderstanding when or in what circumstances they will be held criminally liable at law.

Similarly, during the scrutiny committee process, concerns were raised regarding the offence requiring being reckless or negligent in relation to a health and safety duty. I will touch upon this matter. 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 work health act. 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 and that the result will happen having regard to the circumstances known to the person and that 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, 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. 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.

To further clarify, ‘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 to the civil standard, it means negligence to the criminal standard specified in the 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 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 some stakeholders 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. The definitions of recklessness and negligence in the NT are clear.

I have briefly touched upon the scrutiny committee’s report and mentioned that there are committee stage amendments. The government accepted recommendation 2 of the Economic Policy Scrutiny Committee and the amendments I move will clarify that, for the purposes of the new offence, a person’s conduct causes a death if it substantially contributes to the death. We also accept recommendations 3 and 4 of the Economic Policy Scrutiny Committee report.

The Bill as introduced made it discretionary whether the regulator sought the DPP's opinion regarding a potential offence of industrial manslaughter. The amendments I will move will make it mandatory for the regulator to consult the DPP whenever the matter involves a potential offence involving a workplace death.

The purpose of this amendment is to ensure that matters involving the death have the DPP's scrutiny regarding the appropriate charge to be laid. The amendments will ensure that a referral to the DPP must be made when the regulator receives a request by a person who is concerned that no prosecution is taking place.

As per the scrutiny committee's recommendation the right to request a referral will not involve a right to repetitively require the DPP to look at matters they have already considered, but the amendment I will move will still require a referral if fresh material evidence has come to light that warrants the DPP taking another look.

Finally, I foreshadow an amendment will limit the offence of industrial manslaughter to employers and senior officers. The government has given careful thought to whether this amendment is necessary. The Lyons' recommendation was that the offence should be one that applies to employers and senior officers only—we not that Queensland, the ACT, and now the bill introduced in Victoria, and as I understand has passed, all limit their industrial manslaughter offence provisions in this way.

The reason we did not do that in the bill that was introduced is because it had little legal effect, given that all individuals with a health and safety duty, including workers, are already subject to the offence of manslaughter in the Criminal Code.

The bill as introduced meant that the *Work Health Act* would include a complete statement of the law of manslaughter as it applied in the workplace context. We thought this would assist with clarity; however, reflecting on feedback we received over the time since the bill was introduced, we are concerned that this approach has unfortunately diluted the message we are trying to send to employers and senior officers that they will be held accountable for the death of workers through serious criminal negligence.

Employers and senior officers are in the best position to make decisions as to how the business is to run safely. I have been troubled to hear there have been situations where senior officers have suggested to workers that under the new industrial manslaughter it is the workers who will really be at risk of liability if incidents are reported.

The employers and senior officers are in the best position to ensure the workplace is a safe one, to provide appropriate equipment, make decisions about priorities and expenditure and to influence the culture of workplace safety.

We are also aware that when a workplace death occurs the most obvious evidence will relate to the actions of the people present on the site at the time. To find out whether decision-making further up the chain was involved will typically take further investigation and careful consideration of a wider range of more complex evidence.

It is the nature of investigations that a regulator must make calls about which avenues of enquiry to pursue, and whether the substantial effort that may be involved in delving into the question of senior management's role is justifiable.

While I am sure the regulator uses their best judgement to scope an investigation, they carry out that role within a legislative framework. In moving this amendment, we intend to be very clear that we want the regulator to get to the bottom of the role of senior management in workplace incidents that involve a death.

This bill brings accountability to all workplaces in the Territory. It will ensure bodies corporate and the Crown are not above the law when it comes to workplace manslaughter. We all believe in the right to be able to go to work and come home safely to our families and loved ones at the end of the day.

There are a number of people—and some have been acknowledged by other members and I thank the members for the acknowledgement and appreciation. There has been a lot of hard work in the development of this bill.

I sincerely thank the legal policy and WorkSafe officers from the Department of the Attorney-General and Justice and the Office of the Parliamentary Counsel and their staff. I thank Tim Lyons and the reference group that supported the Best Practice Review into Work Health and Safety in the NT, not just for this particular recommendation, but for the diligent scrutiny and recommendations that we will work towards to improve the safety of all Territory workers.

To the unions who so passionately advocated for stronger penalties to deter reckless business practices, that want to see a safer Territory and a reduction in those unsatisfactory statistics, I thank you for your engagement and your feedback throughout the Lyons review and the scrutiny committee review process.

To those from industry who also participated in the discussions from the review in 2018 to the scrutiny committee, I thank you.

We want good operators leading the way in the Territory; setting a high standard for others to follow. Together, we will lift workplace safety standards to generate better outcomes.

I commend this bill to the House.

Motion agreed to; bill read a second time.

Consideration in detail

Clauses 1 to 5, by leave, taken together and agreed to.

Clause 6:

Ms FYLES: I move amendment 1 that clause 6, after proposed section 34B(1)(a) be amended to insert a new paragraph (ab) to specify that, for the purposes of the offence of industrial manslaughter, a person must be a person conducting a business or undertaking, or an officer of a person conducting a business or undertaking.

This change limits the application of the offence to senior officers and employers. Similar to Victoria, the amendment uses the term ‘officer’ as that term already in the act and provides a comprehensive definition of a senior officer. The amendment uses the term, ‘person conducting a business or undertaking’ to refer to an employer and this term is already clearly defined in the act.

Amendment agreed to.

Ms FYLES: I move amendment 2, that clause 6 proposes section 34B(2) and 1A, be amended to insert the words, ‘and (ab)’. This specifies that for the purpose of this section, the provision relating to whether a person is a person conducting a business or undertaking or an officer of a person conducting a business or undertaking is a strict liability provision. This means the prosecution simply needs to prove that the person falls into one of these categories as a matter of law.

Amendment agreed to.

Ms FYLES: I move amendment 3, that clause 6, after the proposed section 34B(3), be amended to insert a new section to specify that for the purposes of this section, a person's conduct causes death if it substantially contributes to the death. The definition is consistent with the one contained in 149C of the Criminal Code Act 1983 and this amendment implements recommendation two from the Economic Policy Scrutiny Committee.

Amendment agreed to.

Ms FYLES: I move amendment 4, that clause 6 be amended to omit proposed section 34D. That section has been moved to become a new proposed section, 231B, to which I will refer in a further amendment.

Amendment agreed to.

Clause 6, as amended, agreed to.

Clause 7, by leave, agreed to.

Clause 8:

Ms FYLES (Attorney-General and Justice): I move amendment 5, that clause 8 proposed section 231A(i)–111 be amended by replacing the references at this section with new paragraphs, i, 1 and 2. The lists of types of offences to which that section now refers will be category 1, 2, or 3 offences or industrial manslaughter. This will include all serious offences which involve a failure to comply with health and safety duty which causes death. This is an amendment to the properly referenced types of offences in the act, that are relevant for the referral provisions in proposed section 231 and which will tie this section together with further amendments which will come shortly.

Amendment agreed to.

Ms FYLES (Attorney-General and Justice): I move amendment 6, that clause 8 proposed section 231A be amended to replace this section with an amended version, which makes a number of important modifications. Firstly, the new amended section, 231A(1) now requires that the regulator must seek the views of the Director of Public Prosecutions when considering prosecuting a category 1, 2, or 3 offence involving a death or industrial manslaughter when the regulator receives a request under section 231.

This differs from the previous versions of the section which makes only provided that the regulator may seek the Director of Public Prosecution's views and make consulting the Director of Public Prosecutions mandatory in certain circumstances. A new section 231(4) is also inserted which removes the need for the regulator to seek the Director of Public Prosecution's views or refer a matter in circumstances where the matter was previously considered or referred and no new facts or evidence are presented that would justify further referral.

This is a further clarifying amendment to ensure, as a result of the regulator now being required to refer a request under section 231A(1), that multiple or repeated requests are not needlessly required to be considered where there has not been any development that would justify a reconsideration or lead to a different result. I touched upon this in my closing remarks.

It reflects the Recommendation 4 of the Economic Policy Scrutiny Committee, however, clarifies that reconsideration is still required when fresh evidence has come to light.

Finally, new section 231B, which replaces the proposed section 34D is inserted and requires that a regulator obtain the consent of the DPP before prosecuting a Category 1, 2 or 3 offence

involving death or industrial manslaughter. This will include all senior officers which involve a failure to comply with health and safety duty and which cause a death.

These amendments implement Recommendations 3 and 4 of the Economic Policy Scrutiny Committee.

Amendment agreed to.

Clause 8, as amended, agreed to.

Remainder of bill, by leave, taken together and agreed to.

Bill, as amended, agreed to.

Ms FYLES (Attorney-General and Justice): Mr Deputy Speaker, I move that the bill be now read a third time.

Motion agreed to; bill read a third time.