



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

**Inquiry into the Work Health and
Safety (National Uniform
Legislation) Amendment Bill
2019**

November 2019

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Chair's Preface

The Committee's inquiry into the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 attracted submissions from trade unions, peak business organisations and legal organisations which expressed a range of viewpoints, both in support of and opposed to the introduction of industrial manslaughter laws.

The primary purpose of the Bill is to create an industrial manslaughter offence provision within the Work Health and Safety (National Uniform Legislation) Act 2011 which was recommended by an independent review into workplace health and safety in the Northern Territory. The review recommended two separate offences be created, however, the offence provision has been drafted to capture both individuals and bodies corporate.

The submissions indicated that there was some confusion about the policy intent of the Bill in regard to who could be charged with industrial manslaughter. Many submitters considered that the offence should only apply to senior officers and bodies corporate and recommended the offence provision be amended to exclude workers.

As the Department of the Attorney-General and Justice explained, workers can already be prosecuted for breaching a health and safety duty that results in the death of an individual under the manslaughter offence within the Criminal Code, however, there is no penalty for bodies corporate as life imprisonment cannot be converted to a financial penalty.

The creation of an industrial manslaughter offence within the Work Health and Safety (National Uniform Legislation) Act 2011 will ensure that all individuals and bodies corporate can be held accountable for recklessly or negligently breaching a health and safety duty if that breach causes the death of an individual to whom a duty is owed.

It is a community expectation that workplaces are safe and risks are mitigated to prevent injury to and death of workers and all individuals to whom a health and safety duty is owed. The introduction of an industrial manslaughter offence reflects these views and attracts serious penalties for those who are found to be responsible for industrial manslaughter.

The Committee has recommended that the Assembly pass the Bill with 3 amendments. One amendment is to require the regulator to obtain the consent of the Director of Public Prosecutions for any prosecution under the Act in relation to a death caused by a breach of a health and safety duty. Another amendment is to allow a person who has requested a prosecution for a health and safety breach that caused a death to have matter referred to the Director of Public Prosecutions in the event that the regulator has advised a prosecution will not be brought.

The Committee has also recommended that the government investigates and adopts appropriate industry codes of practice to provide better guidance to employers and workers about safe work practices and the requirements to comply with their duties and obligations.

On behalf of the Committee, I thank the organisations that made submissions and appeared at the public hearings and the Department of the Attorney-General and Justice for their advice and clarification on issues raised in the submissions. I also thank the Department of the Legislative Assembly and my fellow Committee Members for their support in the examination of the Bill.

A handwritten signature in black ink that reads "Tony Sievers". The signature is written in a cursive style and is underlined with a single horizontal line.

Tony Sievers MLA

Chair

Committee Members

	Tony Sievers MLA Member for Brennan	
	Party:	Territory Labor
	Committee Membership	
	Standing:	House, Public Accounts
	Sessional:	Economic Policy Scrutiny
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	Parliamentary Position	Government Whip
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	Standing:	Public Accounts, Standing Orders, Members' Interests
	Sessional:	Economic Policy Scrutiny Social Policy Scrutiny
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	Party:	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition
	Committee Membership	
	Standing:	Privileges
	Sessional:	Economic Policy Scrutiny Social Policy Scrutiny
	Lawrence Costa MLA Member for Arafura	
	Party:	Territory Labor
	Committee Membership	
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	Sessional:	Economic Policy Scrutiny
	Jeff Collins MLA Member for Fong Lim	
	Party:	Independent
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From 21 October 2019, the Member for Daly, Mr Gary Higgins MLA, substituted for the Member for Spillett, Mrs Lia Finocchiaro MLA.		

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Acknowledgments

The Committee acknowledges the organisations that provided written submissions and appeared at the public hearings and the Department of the Attorney-General and Justice for its advice on the Bill.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 with the proposed amendments set out in Recommendations 2, 3 and 4.

Recommendation 2

The Committee recommends that the Bill be amended to insert a definition of 'causes the death' that is consistent with section 149C of the Criminal Code.

Recommendation 3

The Committee recommends that the Bill be amended to require the regulator to seek the consent of the Director of Public Prosecutions for any prosecution under the Act in relation to a death caused by a breach of a health and safety duty in relation to that incident.

Recommendation 4

The Committee recommends that the Bill be amended to allow a person who has been advised by the regulator that a prosecution will not be brought in relation to a death to require that the matter be considered by the Director of Public Prosecutions provided the Director has not previously considered the matter.

Recommendation 5

The Committee recommends that the government investigates and adopts the appropriate codes of practice to provide all people with a health and safety duty with clear guidance on safe work practices and the requirements to comply with their duties and obligations.

1 Introduction

Introduction of the Bill

- 1.1 The Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Acting Attorney-General and Minister for Justice, the Hon Gerry McCarthy MLA, on 19 September 2019. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 26 November 2019.¹

Conduct of the Inquiry

- 1.2 On 19 September 2019, the Committee called for submissions by 8 October 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.
- 1.3 The Bill and associated explanatory materials were forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c). The Committee received 14 submissions to its inquiry, held a public briefing with the Department of the Attorney-General and Justice (the Department) on 24 September 2019 and public hearings with stakeholders on 18 November 2019.

Outcome of Committee's Consideration

- 1.4 Sessional Order 13(4)(c) requires that the Committee after examining the Bill determine:
- (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
 - (iv) whether the bill has sufficient regard to the institution of Parliament.
- 1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2, 3 and 4.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 with the proposed amendments set out in Recommendations 2, 3 and 4.

¹ Hon Gerry McCarthy, Acting Attorney-General and Minister for Justice, *Draft Daily Hansard*, 19 September 2019, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754523>.

Report Structure

- 1.6 Chapter 2 provides an overview of the background to the Bill and its purpose.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

- 2.1 In May 2018, the Northern Territory Government announced a review of workplace health and safety in the Northern Territory. Tim Lyons was appointed as the independent reviewer and the *Best Practice Review of Workplace Health and Safety in the Northern Territory* (Lyons Review) was provided to the government in January 2019. In July 2019, the government announced that 23 of the 27 recommendations were supported or supported in principle and it would implement these through a three phase plan.²
- 2.2 The Lyons Review recommended the creation of two industrial manslaughter offences within the *Work Health and Safety (National Uniform Legislation) Act 2011* (WHS Act). Recommendation 19 stated:
- That two new offences be created in the WHS Act to be called 'Industrial Manslaughter' in line with the following objectives:
- 19.1. create a 'senior officer' offence and an 'employer offence' where conduct negligently or recklessly causes death of a worker;
- 19.2. apply the existing standard in NT law for criminal negligence;
- 19.3. ensure that prosecution decisions in relation to these offences by the new Director of Work Health and Safety Prosecutions is subject to DPP approval as for Category 1 offences and that the DPP may take over any prosecutions under these sections; and
- 19.4. provide for the same maximum custodial sentence for an individual as available for manslaughter under the Criminal Code (life imprisonment) and a fine of up to 65,000 penalty units (\$10,075,000) for a body corporate.³
- 2.3 To date, only the ACT and Queensland have created industrial manslaughter offences, with Queensland commencing its first industrial manslaughter prosecution in October 2019. Victoria introduced a Bill in October 2019 to create workplace manslaughter offences and Western Australia has signalled their intent to introduce similar offences. The Commonwealth is opposed to industrial manslaughter legislation and, in 2004, passed legislation to exclude Commonwealth employers and employees from state and territory industrial manslaughter laws.
- 2.4 In 2018, there were two separate reviews of national work health and safety laws. The Senate Standing Committee on Education and Employment's *Inquiry into industrial deaths in Australia* recommended that Safe Work Australia work with the Commonwealth, state and territory governments to introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point.
- 2.5 Marie Boland was commissioned by Safe Work Australia to review the model WHS laws. The December 2018 final report recommended that the model WHS Act be amended to provide for a new offence of industrial manslaughter for gross negligence

² Hon Natasha Fyles, Attorney-General and Minister for Justice, Media Release, 31 July 2019
<http://newsroom.nt.gov.au/mediaRelease/31291>

³ T Lyons, *Best Practice Review of Workplace Health and Safety in the Northern Territory*, January 2019, p. 8.

causing death committed by a 'person conducting a business or undertaking' or an 'officer' as defined in section 4 of the model Act.

Purpose of the Bill

2.6 As noted in the Explanatory Statement, the purpose of the Bill is to:

- establish a new criminal offence of industrial manslaughter which applies to both individuals and corporate entities;
- require the regulator to obtain the consent of the Director of Public Prosecutions (DPP) to initiate industrial manslaughter proceedings;
- amend the existing process for requesting a prosecution to include industrial manslaughter and to promote greater transparency;
- enable existing Category 1 and 2 offences under the Act to be the alternative offence verdicts to an industrial manslaughter charge.⁴

2.7 The purpose of the Bill was further explained to the Committee at the public briefing:

In the Northern Territory, there is already an offence of manslaughter at section 160 of the Criminal Code. Our version of manslaughter includes negligent manslaughter. Negligent manslaughter means that someone can be convicted when they breach a duty at law. A classic example is that there can be prosecutions of parents for negligence in relation to their parental duties.

It can, however, also be used to prosecute individuals in relation to breaches of their duties under the work health and safety legislation...

Because of that, our law, in fact, already covers negligent manslaughter with respect to individuals. The reason why it doesn't cover body corporates currently is because there is only a penalty of life imprisonment. Life imprisonment is not a penalty that can apply to a body corporate. In most cases, the *Sentencing Act* provides that you can convert penalties of imprisonment into financial penalties, but it says you cannot do that for life imprisonment.

In effect, if you were to prosecute a body corporate at the moment, you could run the charges and convict them, but then there is no penalty you could logically apply. So, we identified that the gap between what we have now and what this [Lyons Review] recommendation requires, in fact, is about covering off on body corporates primarily.⁵

⁴ Explanatory Statement, Work Health and Safety (National Uniform Legislation) Amendment Bill 2019, p. 1, <https://parliament.nt.gov.au/committees/EPSC/103-2019>

⁵ Department of the Attorney-General and Justice, Committee Transcript, 24 September 2019, p. 4.

3 Examination of the Bill

Introduction

- 3.1 The submissions received can be broadly grouped into trade unions, peak business organisations and legal organisations. Generally speaking, the trade unions and legal organisations were supportive of the creation of an industrial manslaughter offence, however recommended amendments to the drafting of the offence provision.
- 3.2 In contrast, peak business organisations did not support the creation of the offence, commenting that there is no evidence that an industrial manslaughter offence would improve workplace health and safety. They also expressed concerns that the proposed amendments would further diminish national uniformity and considered that cross jurisdictional inconsistency in WHS laws adds complexity for companies that operate in multiple jurisdictions.
- 3.3 A number of submitters also commented that while some consultation occurred during the Lyons Review, no consultation was undertaken during the drafting of the Bill. Submitters also commented that the drafting of the offence provision varies significantly to the recommendation made in the Lyons Review and appears to be inconsistent with the policy intent.

Industrial manslaughter offences in Australia

- 3.4 In 2008, the Council of Australian Governments entered into the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* to harmonise work health and safety laws across Australia and develop a nationally uniform legislative framework. The model WHS laws were developed in 2011 and have been implemented in all jurisdictions, including the Commonwealth, with the exception of Western Australia and Victoria. However, when adopting the model laws, jurisdictions included some variations from the model and some have made subsequent amendments. Consequently, WHS laws across Australia are not uniform.
- 3.5 The ACT offence provisions were created in the *Crimes Act 1900* in 2003 and commenced in 2004. Part 2A of the Act creates two separate industrial manslaughter offences, an 'employer' and a 'senior officer' offence. An employer or senior officer commits industrial manslaughter if a worker dies in the course of employment, or is injured and later dies; the conduct of the employer or senior officer causes the death of the worker; and the employer or senior officer is reckless about causing serious harm to the worker by the conduct; or negligent about causing the death of the worker by the conduct. A note within Part 2A states that the general offence of manslaughter under section 15 of the *Crimes Act 1900* applies to everyone, including workers.
- 3.6 The Queensland industrial manslaughter offences were created in Part 2A of the *Work Health and Safety Act 2011* in 2017. There are separate offences for a 'person conducting a business or undertaking' (PCBU) and a 'senior officer' who commits industrial manslaughter if a worker dies in the course of carrying out work; or is injured in the course of carrying out the work and later dies; and the PCBU or senior officer's

conduct causes the death of the worker; and the PCBU or senior officer is negligent about causing the death of the worker by the conduct.

3.7 In contrast, the Bill proposes to create a single industrial manslaughter offence in proposed section 34B. The separate offence elements will be discussed in further detail in the following sections of this report. Proposed section 34B states:

- (1) A person commits the offence of industrial manslaughter if:
 - (a) the person has a health and safety duty; and
 - (b) the person intentionally engages in conduct; and
 - (c) the conduct breaches the health and safety duty and causes the death of an individual to whom the health and safety duty is owed; and
 - (d) the person is reckless or negligent about the conduct breaching the health and safety duty and causing the death of that individual.

Maximum penalty:

- (a) for an individual – imprisonment for life; or
 - (b) for a body corporate – 65 000 penalty units.
- (2) Strict liability applies to subsection (1)(a).
 - (3) A volunteer does not commit industrial manslaughter for a failure to comply with a health and safety duty, unless the duty is under section 28 or 29.

Note for subsection (3)

The defendant has an evidential burden in relation to the matters in subsection (3) (see section 43BU of the Criminal Code).

Statutory location of the industrial manslaughter offence

3.8 The independent legal advice received by the Committee questioned the placement of the offence provision in the WHS Act as opposed to the Criminal Code, given that 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. The Committee sought clarification on the rationale for placing the offence provision in the WHS Act and was advised by the Department:

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.⁶

- 3.9 The Committee also queried whether placing the offence in the WHS Act would alter the meaning of ‘reckless’ and ‘negligent’ compared to their meaning in the manslaughter offence in the Criminal Code and was advised:

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.⁷

Committee’s Comments

- 3.10 The Committee is satisfied with the Department’s explanation.

Who can be charged with industrial manslaughter

- 3.11 The offence of industrial manslaughter is committed by ‘a person’ who has a health and safety duty. As previously noted, the Lyons Review recommended the creation of two industrial manslaughter offences, a ‘senior officer’ offence and an ‘employer’ offence where conduct negligently or recklessly causes the death of a worker.

- 3.12 During the explanatory speech, the Acting Attorney-General stated:

I wanted to address the point that Mr Lyons’ report recommended there be two new industrial manslaughter offences, one for senior officers and one for employers, and this Bill only contains one offence. This is because the single offence has been drafted in such a way that it may be used to charge both senior officers and employers. It therefore still implements the substance of the recommendation.⁸

- 3.13 During the public briefing, the Department reiterated that the offence provision was drafted to address the fact that while a body corporate could be prosecuted for manslaughter under the Criminal Code, life imprisonment cannot be converted into financial penalties:

That is the reason why we have gone with one offence rather than two that cover CEOs and senior officers, because at the moment under manslaughter, everyone is covered who is not a body corporate—for all their duties under the work health act. So, it would be strange to have a broader offence there that applies to everyone that then only applies this new offence, which has an equivalent penalty and is, essentially, just designed to fill the gap, to only some of those people that manslaughter is applying to in any event.⁹

- 3.14 In their submissions, Unions NT, Hospitality NT and the Construction, Forestry, Maritime, Mining and Energy Union stated the offence should be limited to senior officers and a PCBU.

⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 2.

⁷ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 1.

⁸ Hon Gerry McCarthy, Acting Attorney-General and Minister for Justice, *Draft Daily Hansard*, 19 September 2019, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754523>, p. 1.

⁹ Department of the Attorney-General and Justice, Public Briefing Transcript, 24 September 2019, p. 4.

- 3.15 The Maritime Union of Australia and Hall Payne Lawyers expressed the view that the offence should not extend to workers as they can already be charged under the Criminal Code, with the latter stating:

The underlying intent in the proposal to introduce an industrial manslaughter offence was to ensure that the offence operates to include conduct of:

- (a) corporate entities causing work-related deaths; and
- (b) those persons concerned with, or taking part in, the management of the corporate entities causing work-related deaths.

The current Criminal Code offence sufficiently deals with the conduct of workers or volunteers involved in work-related deaths and, consequently, their inclusion results in an unnecessary overlap with the criminal laws of Northern Territory. It also leads to the statute exceeding its evident purpose.¹⁰

- 3.16 The Committee sought clarification on the whether the offence provision is intended to cover all people that have a health and safety duty and was advised by the Department:

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 ... 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.¹¹

Committee's Comments

- 3.17 The Committee considers that it is appropriate for the offence to apply to all people that have a health and safety duty under the Act.

Intentional conduct

- 3.18 Proposed subsection 34B(1)(b) requires that a person 'intentionally' engages in conduct that breaches a health and safety duty and causes the death of an individual to whom the duty is owed.

- 3.19 A number of submitters expressed concern about the inclusion of the word 'intentionally', with Unions NT stating:

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

¹⁰ Hall Payne Lawyers, Submission No. 10, p. 3.

¹¹ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 3.

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 Code 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.¹²

3.20 Hall Payne Lawyers questioned whether the inclusion of 'intentionally' will prevent prosecution of reckless or negligent conduct that: was not engaged in intentionally; could have included reckless or negligent conduct that was not intentional; may not include omissions; and nonetheless resulted in death.

3.21 In their submissions, Maurice Blackburn Lawyers, Unions NT, Hall Payne Lawyers and the Australian Manufacturing Workers' Union recommended the word 'intentionally' be removed from proposed subsection 34B(1)(b).

3.22 Section 43AM(1) of the Criminal Code states:

If a law that creates 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.

3.23 Given section 43AM(1), the Committee sought clarification on why 'intentionally' had been included in proposed section 34B(1)(b), when it is not explicitly stated in the Criminal Code manslaughter provision, and whether there was any difference in the conduct fault element for the two offences:

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.¹³

¹² Unions NT, Submission No. 7, p. 2.

¹³ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 3.

Committee's Comments

- 3.24 The Committee is satisfied with the Department's explanation and considers that the provision has been drafted in a manner that makes it clear that the fault element of intention applies to the offence.

Death of an individual

- 3.25 Proposed subsection 34B(1)(c) refers to conduct that breaches a health and safety duty and 'causes the death of an individual to whom the health and safety duty is owed'. The Queensland and ACT offence provisions are both limited to the death of a worker. During the explanatory speech, the Acting Attorney-General stated:

This Bill creates a new offence of industrial manslaughter which applies to individuals and corporate entities where hazardous workplace practices or serious negligence on the part of an employer causes the death of a worker.¹⁴

- 3.26 Hall Payne Lawyers commented that the drafting of the provision includes workers, and in some circumstances, other people who may be at risk and are owed a health and safety duty. Hall Payne Lawyers support the inclusion of people who are not workers but are owed a health and safety duty.

- 3.27 Maurice Blackburn Lawyers and the Australian Manufacturing Workers' Union stated that consideration should be given to ensuring that industrial manslaughter provisions apply to others who are affected by the actions of PCBUs such as passers-by, visitors, customers and other members of the public who can die due to the negligence of PCBUs.

- 3.28 The Committee sought clarification on the policy objective of the Bill and was advised that it is not intended to be limited to the death of workers:

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... 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.¹⁵

Committee's Comments

- 3.29 The Committee considers it appropriate that the offence provision applies to all people to whom a health and safety duty is owed.

¹⁴ Hon Gerry McCarthy, Acting Attorney-General and Minister for Justice, *Draft Daily Hansard*, 19 September 2019, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754523>, p. 1.

¹⁵ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 4.

Definition of ‘causes the death’

3.30 Hall Payne Lawyers noted that the phrase ‘causes the death’ is not defined in the Bill or the Act. The Queensland and ACT industrial manslaughter provisions define this phrase as ‘a person’s conduct causes death if it substantially contributes to the death.’ Hall Payne Lawyers recommend this definition be included in the Bill.

3.31 The Committee was advised by the Department that it supports the inclusion of the proposed definition, noting that it:

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 160.¹⁶

Recommendation 2

The Committee recommends that the Bill be amended to insert a definition of ‘causes the death’ that is consistent with section 149C of the Criminal Code.

Reckless or negligent

3.32 Proposed subsection 34B(1)(d) requires that the person committing industrial manslaughter is ‘reckless or negligent about the conduct breaching the health and safety duty and causing the death of that individual.’ During the public briefing, the Department discussed the fault elements of this provision:

It applies the standard for criminal negligence. It also includes recklessness. Recklessness is a higher standard. It is harder prove. It is probably not going to be what you would rely on. The prosecution will probably frame its case in terms of negligence, but the reason it is in there is because that is how manslaughter is framed and there are very well established case law about what that means. It just ensures consistency there across the two offences so that we do not have body corporates at a different standard to individuals.

It was flagged with us whether it would cause concerns because then you have to prove recklessness and negligence. That is not the case. It is recklessness or negligence. Recklessness is a subjective standard. It seems unlikely that you would ever be subjectively doing industrial manslaughter and not negligently doing it, but it is a theoretical possibility and for consistency we have included it.¹⁷

3.33 The Queensland legislation requires that the PCBU or senior officer is negligent about causing the death of a worker by the conduct¹⁸, whereas the ACT legislation requires that the employer or senior officer is reckless about causing serious harm to the worker by the conduct or negligent about causing the death of the worker by the conduct.¹⁹

3.34 Hall Payne Lawyers support this provision, however, a number of submitters expressed concern about the effect of including ‘reckless or’ in this provision, with Maurice Blackburn Lawyers raising concerns that the drafting runs the risk of

¹⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 5.

¹⁷ Department of the Attorney-General and Justice, Committee Transcript, 24 September 2019, p. 5.

¹⁸ Sections 34C(c) and 34D(c) *Work Health Safety Act 2011* (Qld)

¹⁹ Sections 49C(c) and 49D(c) *Crimes Act 1900* (ACT)

modifying the meaning of negligent to a higher standard or changing the meaning to gross negligence.

3.35 The Committee referred these concerns to the Department and was advised:

'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.

Committee's Comments

3.36 The Committee is satisfied with the Department's explanation.

Consent to prosecution

3.37 Proposed section 34D stipulates that the regulator may only bring proceedings for industrial manslaughter with the consent of the DPP. Hall Payne Lawyers support this provision.

3.38 Unions NT noted that the Queensland legislation does not require the consent of the DPP to bring proceedings for industrial manslaughter, the WHS prosecutor is only required to have regard for DPP guidelines. Unions NT stated the provision requiring DPP consent should be reconsidered.

3.39 The Minerals Council of Australia NT stated that industrial manslaughter offences should be prosecuted by the DPP as opposed to health and safety regulators. The Department advised the Committee:

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.²⁰

Committee's Comments

3.40 The Committee supports the requirement for the DPP to consent to a prosecution for industrial manslaughter. The Committee notes that if the regulator brings a prosecution for a breach of a health and safety duty that causes a death and the

²⁰ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 8.

prosecution is for a Category 1 or Category 2 offence, the principle of double jeopardy would prevent the DPP from bringing a prosecution for industrial manslaughter.

- 3.41 The Committee considers that the Bill could be strengthened by requiring the regulator to seek the consent of the DPP before prosecuting for a Category 1 or Category 2 offence that involves a death. This will ensure that the DPP is satisfied that either the matter does not constitute industrial manslaughter or there is insufficient evidence to prosecute for industrial manslaughter and therefore a Category 1 or Category 2 prosecution would be more appropriate.

Recommendation 3

The Committee recommends that the Bill be amended to require the regulator to seek the consent of the Director of Public Prosecutions for any prosecution under the Act in relation to a death caused by a breach of a health and safety duty in relation to that incident.

Request for prosecution

- 3.42 Proposed section 231 allows a person to request a prosecution for an incident which constitutes a Category 1 or Category 2 offence or industrial manslaughter if no prosecution has been brought within six months of the incident and the incident has occurred within the last 12 months. The Australian Manufacturing Workers' Union expressed support for this provision in their submission.

- 3.43 The Northern Territory Cattlemen's Association expressed concern about subsection 231(1)(a) which allows a person who 'reasonably believes' that an incident has occurred to request a prosecution:

The charge of industrial manslaughter and the associated penalties is far more deserving of a thorough and vigorous process than "if someone reasonably believe." There is an enormous amount at stake for all concerned... It is simply not good enough to allow a third party like a union the ability to point the finger of guilt on to an individual without first satisfying the basic evidentiary process.²¹

- 3.44 The Committee notes that while the provision allows a person to request a prosecution, proceedings would only be brought after a thorough investigation process where there was sufficient evidence to prosecute. The request for prosecution provision already exists in the Act for Category 1 and 2 offences and there has been no suggestion or evidence provided to the Committee that the existing provision is being used to make scurrilous accusations to NT WorkSafe.
- 3.45 The Queensland legislation and the model WHS laws provide 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 a 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.

²¹ NTCA, Submission No. 6, p. 7.

- 3.46 Unions NT and Hall Payne Lawyers considered that the Bill could be strengthened by mandating the regulator to seek the opinion of the DPP where a request for prosecution is made. The Department advised the Committee:

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.²²

Committee's Comments

- 3.47 The Committee considers that when there has been a death allegedly caused by a breach of a health and safety duty, a request for prosecution has been made and the regulator has advised that a prosecution will not be brought, the person requesting the prosecution should have the option to have the matter referred to the DPP for consideration, provided that the matter has not previously been referred to the DPP by either the regulator or a person requesting a prosecution.

Recommendation 4

The Committee recommends that the Bill be amended to allow a person who has been advised by the regulator that a prosecution will not be brought in relation to a death to require that the matter be considered by the Director of Public Prosecutions provided the Director has not previously considered the matter.

Imputing conduct to bodies corporate

- 3.48 Hall Payne Lawyers commented on provisions within the Queensland legislation regarding imputing conduct to bodies corporate and recommended that section 244 of the Act be amended to provide an expanded application of imputation consistent with the Queensland legislation.
- 3.49 The Committee questioned what the effect would be of including such provisions in the Bill and was advised:

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.

²² Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 8.

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 ... 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.²³

Committee's Comments

3.50 The Committee is satisfied with the Department's explanation.

Enforceable undertakings

- 3.51 Section 216 of the Act provides that the regulator may accept a written WHS undertaking as an alternative to a prosecution for a contravention or alleged contravention by a person for an offence that is not a Category 1 offence. A WHS undertaking is a legally binding agreement between a person and NT WorkSafe which requires the person to carry out specific activities to improve the health and safety of the workplace, the industry and broader community. A WHS undertaking will have a total minimum financial expenditure attached to it.
- 3.52 The Bill extends the Category 1 offence exclusion to prevent a WHS undertaking being accepted for an industrial manslaughter offence. Hall Payne Lawyers support this exclusion.
- 3.53 Austral Fisheries do not support preventing a WHS undertaking from being accepted as an alternative to a prosecution of industrial manslaughter. In 2018, Austral Fisheries entered into a WHS undertaking 'as an alternative to prosecution and punitive measures in response to a fatality that occurred on board one of our vessels in 2013.'²⁴ They consider that excluding industrial manslaughter offences from WHS undertakings 'unfairly restricts the opportunity of benefits under WHS undertakings to flow to workers, industry and the community' and that there is 'limited statistical evidence to demonstrate that workplace fatalities and injuries are due to insufficient punitive measures under the law.'²⁵

²³ Department of the Attorney-General and Justice, *Responses to Written Questions*, p. 5.

²⁴ Austral Fisheries, Submission No. 3, p. 1.

²⁵ Austral Fisheries, Submission No. 3, p. 2.

Committee's Comments

- 3.54 The Committee considers that given the seriousness of industrial manslaughter, and that enforceable undertakings cannot be accepted for Category 1 offences, the extension of this exclusion is appropriate.

Codes of Practice

- 3.55 At the public hearing, a number of organisations raised issues relating to codes of practice with the Committee. Sections 274 and 275 of the Act prescribe the process for the Minister to approve, vary and revoke a code of practice which requires a notice to be published in the Gazette and the regulator to make available copies of the approved codes.

- 3.56 The 'foreword' in the approved codes of practice state:

An approved code of practice is a practical guide to achieving the standards of health, safety and welfare required under the WHS Act and the Work Health and Safety (National Uniform Legislation) Regulations 2011 (the WHS Regulations).

A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the WHS Act, in relation to the subject matter of the code. Like regulations, codes of practice deal with particular issues and do not cover all hazards or risks that may arise. The health and safety duties require duty holders to consider all risks associated with work, not only those for which regulations and codes of practice exist.

Codes of practice are admissible in court proceedings under the WHS Act and Regulations. Courts may regard a code of practice as evidence of what is known about a hazard, risk or control and may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

Compliance with the WHS Act and Regulations may be achieved by following another method, such as a technical or an industry standard, if it provides an equivalent or higher standard of work health and safety than the code.

An inspector may refer to an approved code of practice when issuing an improvement or prohibition notice.

This Code of Practice has been developed by Safe Work Australia as a model code of practice under the Council of Australian Governments' *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* for adoption by the Commonwealth, state and territory governments.²⁶

- 3.57 A comparison between the approved codes of practice on the NT WorkSafe website and the model codes of practice on the Safe Work Australia website indicates that there are numerous model codes that have yet to be approved by the Minister and gazetted in the Northern Territory.

- 3.58 The Lyons Review contains a brief discussion about codes of practice and made the recommendation:

²⁶ NT WorkSafe, *Confined Spaces: Code of Practice*, 5 February 2014, p. 2, https://worksafe.nt.gov.au/data/assets/pdf_file/0004/705937/confined-spaces-cop.pdf

That the status of Codes of Practice that existed under the Work Health Act 1995 (NT) be restored and that Codes of Practice in operation in the Northern Territory be regularly reviewed.²⁷

- 3.59 The government did not support this recommendation and identified the following as an alternative solution:

The Northern Territory will work towards adopting all model Codes of Practice that have been developed through Safe Work Australia as soon as possible. As a small jurisdiction, it is appropriate that the Northern Territory work within the national model including the national tripartite consultation process undertaken by Safe Work Australia.²⁸

- 3.60 The Committee notes that this reform has been categorised in the government's response to the Lyons Review as a phase 3 reform which has a completion timeline of 'within 5 years'.
- 3.61 Codes of practice provide clear guidance to employers and workers on safe operating procedures, particularly in high risk industries, and it is important that all people with a health and safety duty have a clear understanding of their duties and the requirements to comply with these duties.
- 3.62 Only approved codes are afforded the special status under the WHS Act of being automatically admissible as evidence in court proceedings of whether or not a duty or obligation under the Act has been complied with. The admissibility of this evidence is important given the penalties proposed under the industrial manslaughter provisions.
- 3.63 The Committee considers that ensuring codes of practice are approved and gazetted in a timely manner is critical to improving workplace health and safety in the Northern Territory.

Recommendation 5

The Committee recommends that the government investigates and adopts the appropriate codes of practice to provide all people with a health and safety duty with clear guidance on safe work practices and the requirements to comply with their duties and obligations.

²⁷ T Lyons, *Best Practice Review of Workplace Health and Safety in the Northern Territory*, January 2019, p. 9.

²⁸ Northern Territory Government, *NT Government position on the Best Practice Review of Work Health and Safety in the NT Final Report*, p. 10.

Appendix A: Submissions Received, Public Briefing and Public Hearings

Submissions Received

1. Australian Manufacturing Workers' Union
2. Maritime Union of Australia
3. Austral Fisheries
4. Northern Territory Seafood Council
5. Maurice Blackburn Lawyers
6. Northern Territory Cattlemen's Association
7. Unions NT
8. Civil Contractors Federation
9. Roussos Legal Advisory
10. Hall Payne Lawyers
11. Hospitality NT
12. Construction, Forestry, Maritime, Mining and Energy Union
13. Chamber of Commerce NT
14. Minerals Council of Australia NT

Public Briefing – 24 September 2019

- Caroline Heske: Senior Policy Lawyer, Department of the Attorney-General and Justice
- Robert Gray: Policy Lawyer, Department of the Attorney-General and Justice

Public Hearings – 18 November 2019

- Kane Lowth: Northern Territory Organiser, Construction, Forestry, Maritime, Mining and Energy Union
- Ashley Manicaros: Chief Executive Officer, Northern Territory Cattleman's Association
- Andy Burford: Branch Secretary NT, Maritime Union of Australia
- Lee Norris: National Legal Officer - Qld/NT, CFMMEU-MUA Division, Maritime Union of Australia
- David Malone: Chief Executive, Master Builders NT Limited
- Greg Bicknell: Chief Executive Officer, Chamber of Commerce NT
- Andrea Smith: Workplace Relations Manager, Chamber of Commerce NT
- Drew Wagner: Executive Director, Minerals Council of Australia NT Division
- Joel Bowden: General Secretary, Unions NT
- Adam Giuliani: WHS Project Officer, Unions NT
- Melissa Meyers: Senior Associate, Maurice Blackburn Lawyers

Note: Submissions, transcripts and answers to written questions are available at:
<https://parliament.nt.gov.au/committees/EPSC/103-2019>

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Hon Gerry McCarthy, Acting Attorney-General and Minister for Justice, *Draft Daily Hansard*, 19 September 2019, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754523>

Hon Natasha Fyles, Attorney-General and Minister for Justice, Media Release, 31 July 2019 <http://newsroom.nt.gov.au/mediaRelease/31291>

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T Lyons, *Best Practice Review of Workplace Health and Safety in the Northern Territory*, January 2019.

Work Health Safety Act 2011 (Qld)