

EXPLANATORY STATEMENT

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

SERIAL NO. 103

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

GENERAL OUTLINE

The purpose of this Bill is to amend the *Work Health and Safety (National Uniform Legislation) Act 2011* (the Act) 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.

NOTES ON CLAUSES

Clause 1. Short Title

This is a formal clause which provides for the citation of the Bill. When passed, the Bill may be cited as the *Work Health and Safety Legislation Amendment (Industrial Manslaughter) Act 2019*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator by Gazette notice.

Clause 3. Act Amended

This is a formal clause which provides that amendments are made to the *Work Health and Safety (National Uniform Legislation) Act 2011* ('the Act').

Clause 4. Section 4 amended (Definitions)

This clause amends section 4 by effectively moving the current definition of 'health and safety duty' in section 30 to the main list of definitions in section 4. The amended section 4 will insert a new definition for the term 'industrial manslaughter' to mean the offence of industrial manslaughter under section 34B of the Act.

Clause 5. Section 30 repealed (Meaning of *health and safety duty*)

This clause repeals section 30 of the Act which previously defined the term 'health and safety duty' (see clause 4 above).

Clause 6. Part 2, Division 6 inserted

This clause inserts a new Division 6 entitled 'Industrial Manslaughter' in Part 2 of the Act. Part 2 of the Act relates to Health and Safety Duties.

The new Division 6 comprises sections 34A—34F inclusive. It establishes the new offence of industrial manslaughter and incorporates ancillary provisions in relation to it.

Division 6 commences with the new section 34A entitled: 'Meaning of alternative offence'. This section defines the term 'alternative offence' within Division 6 to mean an offence against section 31 or 32. Section 31 is the offence of 'reckless conduct' also known as a 'Category 1 offence' under the Act. Section 32 is the offence of 'failure to comply with health and safety duty' also known as a 'Category 2 offence' under the Act. Section 34A operates to confine alternative verdict options for an industrial manslaughter charge to these two offences exclusively.

New section 34B is the substantive offence provision. The elements of the offence are set out in subsection 34B(1) which provides that a person commits industrial manslaughter if:

- (a) the person is under 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 was owed; and
- (d) the person was reckless or negligent about the conduct breaching the health and safety duty and causing the death of that individual.

The maximum penalties prescribed for the offence of industrial manslaughter are:

- life imprisonment for an individual; and
- 65 000 penalty units (\$10 205 000 at the current rate of conversion) for a body corporate.

As such, industrial manslaughter is an indictable offence for both individuals and body corporates. Whether an offence is indictable turns on the penalty for the offence that may be imposed on an individual includes imprisonment for a period of more than two years, as defined by section 3 of the Criminal Code. The industrial manslaughter offence has been drafted to reflect the current manslaughter offence under section 160 of the Criminal Code. Subsection 34B(2) operates to apply strict liability to the first element of the offence as set out in subsection 34B(1)(a). Subsection 34B(3) provides a qualified exemption to volunteers from prosecution for industrial manslaughter. A volunteer is exempt from prosecution for industrial manslaughter unless the volunteer breaches a health and safety duty under section 28 (duties of workers) or 29 (duties of other persons at the workplace) of the Act.

New section 34C is entitled: 'Provisions not applicable to industrial manslaughter'. This section operates to exclude sections 12B and 239, as well as Part 11 of the Act from applying to industrial manslaughter. The excluded sections provide for general application of strict liability to the physical elements of offences under the Act and acceptance or imposition of a WHS undertaking as an enforcement or sentencing option. Due to the serious nature of the offence, these provisions do not apply to industrial manslaughter.

New section 34D is entitled: 'Consent to prosecution'. This section stipulates that the regulator may only commence industrial manslaughter proceedings with the consent of the Director of Public Prosecutions (DPP).

New section 34E is entitled: 'Verdict for alternative offence'. This section allows a Court hearing an industrial manslaughter charge to find the defendant guilty of an alternative offence (as defined by section 34A) if not satisfied, beyond reasonable doubt, that the defendant is guilty of industrial manslaughter but satisfied, beyond reasonable doubt, that the defendant is guilty of an alternative offence. Subsection 34E(2) specifically excludes section 316 of the Criminal Code from applying to industrial manslaughter. Section 316 of the Criminal Code sets out alternative offence verdicts for the general offence of manslaughter under the Criminal Code. By virtue of subsection 34E(2), these alternative verdicts are not applicable to industrial manslaughter.

New section 34F is entitled: 'Limitation period for prosecution'. Section 232 imposes general time limitation periods for initiating the prosecution of an offence under the Act. Subsection 34F(1) excludes section 232 from applying to industrial manslaughter. Accordingly, industrial manslaughter proceedings may be initiated at any time after the offence is alleged to have occurred. However, subsection 34F(2) operates to retain the statutory time limits in relation to the alternative offences making them unavailable where a prosecution for industrial manslaughter has not been commenced within the applicable limitation periods specified in section 232 of the Act.

Clause 7. Section 216 amended (Regulator may accept undertakings)

This clause inserts a new note for subsection 216(2). Subsection 216(2) already provides that a WHS undertaking cannot be accepted for a contravention or alleged contravention that constitutes a Category 1 offence. The new note to subsection 216(2) alerts that pursuant to new subsection 34C(b), WHS undertakings cannot be accepted in respect of industrial manslaughter also.

Clause 8. Section 231 replaced

This clause repeals the current section 231 of the Act and replaces it with new sections 231 and 231A. The current section 231 sets out the process by which an interested party can request prosecution of a Category 1 or Category 2 offence under the Act. The new section 231 is entitled: 'Request for prosecution'. The new

section 231 prescribes a process by which an interested person can request the regulator prosecute certain offences, namely a Category 1 offence, Category 2 offence or industrial manslaughter. Subsection 231(1) provides that a person may request the regulator initiate criminal proceedings for a these offences if the person reasonably believes the occurrence of an act, matter or thing constitutes one of these offences and prosecution proceedings have not been commenced within six months of the occurrence constituting the alleged offence. Occurrence may include a failure in relation to an act, matter of thing by virtue of subsection 231(10).

Subsection 231(2) stipulates that a request for prosecution must be made within twelve months of the occurrence constituting the alleged offence which means the existing 6 month window of time within which to request prosecution has not changed. Subsection 231(3) sets out that a request must be made in writing to the regulator and must specify the particulars of the occurrence and the grounds for the belief that one of these offences has been committed. Subsection 231(4) clarifies that a request may seek prosecution for more than one of these offence provided it relates to the same occurrence or conduct. Subsection 231(5) requires the regulator to give written notice of a valid request for prosecution to the person who submitted the request and any person allegedly responsible for the offending conduct or occurrence. Notice must be given by the regulator within three months of receipt of a valid request for prosecution. Subsection 231(6) stipulates the content requirements for the regulator's notice. Subsection 231(7) enables the regulator to give notice via publication of the prescribed information on the regulator's website. Subsection 231(8) provides that the regulator is not required to give notice pursuant to 231(5) if the regulator has published current information as prescribed by subsection 231(6) regarding the occurrence on its website. Subsection 231(9) restrains the regulator from contradicting the views of the DPP as to the merits of a prosecution regarding an occurrence.

The new section 231A is entitled 'Referral to Director of Public Prosecutions'. Subsection 231A(1) provides that the regulator may seek the views of the DPP as to the merits of a prosecution where the regulator has received a valid request for prosecution under section 231 or the regulator reasonably believes that a death constitutes industrial manslaughter. Although the power to refer a matter to the DPP under subsection 231A(1) is a discretionary power, it should be noted that the consent of the DPP is mandatory in relation to initiation of an industrial manslaughter prosecution pursuant to section 34D. Subsection 231A(2) requires the regulator to

provide the DPP with a copy of any request for prosecution in relation to which the DPP's advice has been sought along with any information or evidence relevant to the request. Subsection 231A(3) requires the DPP to respond to the regulator's request for advice within 25 business days of receiving the documents and information prescribed in subsection 231A(2). The DPP's response must specify the DPP's view as to the merits of a prosecution and whether the DPP consents to the initiation of industrial manslaughter proceedings.

Clause 9. Repeal of Act

This is a standard clause which provides that the *Work Health and Safety Legislation Amendment (Industrial Manslaughter) Act 2019* is repealed on the day after it commences.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

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

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The purpose of this Bill is to amend the *Work Health and Safety (National Uniform Legislation) Act 2011* (the Act) to:

- establish a new criminal offence of industrial manslaughter which applies to both individuals and corporate entities;
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HUMAN RIGHTS IMPLICATIONS

Presumption of Innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to a presumption of innocence is also a fundamental principle of jurisprudence.

When 'strict liability' applies to an offence, the prosecution is only required to prove the physical elements of the offence beyond reasonable doubt in order for the defendant to be found guilty. Where strict liability applies the defence of honest and reasonable mistake of fact is available to the defendant (see section 43AX of the Criminal Code).

Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations. Strict liability can be considered an infringement upon the presumption of innocence, because the defendant can be found guilty, or an element of an offence can be proven against the defendant, without the prosecution being required to prove fault. Whether a strict liability provision impermissibly limits the right presumption of innocence will depend upon the context in which it is used, the seriousness of the offence and the policy rationale justifying its utilisation.

In this case, the new offence at section 34B(2) requires the prosecution to prove all the elements of a charge of manslaughter, similar to the existing manslaughter offence at section 160 of the Criminal Code. In addition, it requires the prosecution to also prove that the accused was subject to a health and safety duty under the Act. This additional element is a strict liability element.

The purpose of this additional element is to separate the kinds of matters that are industrial manslaughter from the existing broad offence of manslaughter in the Criminal Code. If the offence is one of industrial manslaughter, then this clarifies the alternative verdicts that are available, as well as the availability of procedural mechanisms such as requesting information about the matter from NT WorkSafe, and whether body corporates and the Crown can be liable.

Because the additional element is one of strict liability, the prosecution need only show that the accused was subject to a health and safety duty, rather than prove the accused had a particular state of mind in relation to that health and safety duty. However, to obtain a conviction, the prosecution still must show that the accused intentionally engaged in an act or omission, and that the act or omission was a negligent or reckless breach of the accused's health and safety duties that caused a person to die. The jury must be satisfied of all of these matters beyond reasonable doubt.

The Act imposes health and safety duties on all persons conducting businesses or undertakings in the NT as well as their officers and workers (per sections 19-29 inclusive of the Act). All persons conducting businesses or undertakings in the NT as well as their officers and workers are required to be aware of their health and safety duties under the Act and it is reasonable for the law to assume this is the case in the context of a workplace fatality. The application of Part IIAA of the Criminal Code to offences under the Act means that the defence of mistake of fact is available to the accused.

As such, the application of strict liability to the first element of the industrial manslaughter offence is compatible with human rights as it only reverses the onus of proof in relation to a minor element that limits the application of the offence to workplace-related death; it is imposed in pursuit of a legitimate objective; and it is reasonable and proportionate to the achievement of that objective.

CONCLUSION

This bill potentially engages the following human rights:

- Presumption of innocence, contained in Article 14(2) of the ICCPR.

However as outlined in this statement, the introduced bill is compatible with human rights as any limitations imposed are reasonable, necessary and proportionate.