

VOID

voice of industrial death



VOID - VOICE OF INDUSTRIAL DEATH

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Senate Education and Employment Committees
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SUPPLEMENTARY REMARKS FOR THE SENATE INQUIRY INTO INDUSTRIAL DEATHS IN AUSTRALIA

This supplementary document is really to summarise the content of VOID's submission to the inquiry. It also includes a correction and some brief clarifications in relation to evidence given during the inquiry.

CORRECTION TO SUBMISSION

After re-reading some of the explanatory material relating to the Work Health and Safety Act, it appears there is an oversight in paragraph 74 of our submission.

This relates to the provision detailing the officer's duties under s 27(3). The claim that an officer's liability appeared to be limited to that which would apply to an individual under the Category 3 offence is not correct. While the language in that subsection does meander, the explanatory material provided by Safework Australia did clarify that this is limited to *other* duties and not those that fall under divisions 2, 3 or 4.

That said, we think Karen Wheelright's comments regarding an officer's liability to a category 1 offence (also quoted in paragraph 74) remains a valid concern. The offence at s 31(1)(b), expressly calls for a 'person' who owes a duty to an individual but the model WHSA only extends a duty of due diligence to the officer. This is not a direct duty to a worker.

In our opinion, the level of culpability under the category 1 offence is just not clear enough beyond directing liability at the primary duty holder, the PCBU - and we know the Act also expressly excludes an officer and a worker as being a PCBU.

THE SUBMISSION SYNOPSIS

The main message was one of careful and deliberate consideration to be given to how we deal with industrial deaths in Australia with a very specific focus on the family and how the justice system interacts with them. The submission was not a professional document, but it did provide extensive references throughout to support and emphasise some important points.

The need for independent support for families

A significant issue we hoped to raise was to highlight the research that identified the psychological harm inflicted on many affected families in the aftermath of a workplace fatality.

It is important the committee recognises that these families often experience procedural difficulties well removed from the normal peripheries of grief. That is, the various levels of systems and controls may work to impede the normal grieving process. We utilised the excellent study conducted by a team of respected researchers at the University of Sydney headed up by Associate Professor Dr Lynda Matthews.

The importance of *independent* support cannot be overstated here. Getting support to families at the earliest opportunity is paramount to helping them in being better prepared and clearer on their rights as well as providing emotional support.

Civil justice - Improving accountability

The civil process is an important part of the justice system and might even deliver the sole measure of accountability where the state prosecutor or regulator is either unwilling or unable to. Our argument is that because of the higher standard of proof and evidentiary limitation imposed by the criminal jurisdiction, a tort action in negligence or breach of statutory duty may be the only remedial tool left to ensure unsafe work practices ultimately meet justice where the criminal system fails.

While not an adequate substitute for public prosecutions, our position is that a workplace fatality should not be constrained by no-fault compensation schemes and should be able to exit the scheme by choice. Where a death was caused by negligence, a family should be entitled to a fair and reasonable evaluation of economic and non-economic losses. Our position is that financial dependency should not be a limiting factor. Jurisdictions vary significantly here but generally, most are deficient in their entitlements when compared with an injury. They are pension schemes rather than a system of fair compensation and that is neither fair nor appropriate.

A fusion of justice

Our submission also touched on the importance of a fact-finding exercise such as the type conducted by a coronial inquest. Inquests tend to disclose a great deal more of the factual material and therefore look more closely at the underlying circumstances that causes a workplace death. When we consider the importance of prevention, a public inquest seems like such a critical tool to take the finer detail of causation to the public. We would like to see some consideration given to

further research that could bring about a fusion of legal processes to investigate the cause of a workplace death.

Industrial Manslaughter

This topic represents the greatest proportion of our submission. The issues raised by us were not tendered to question whether such a law should be enacted, but rather, how it should happen.

Our submission made a point of looking at why industrial manslaughter has presented so many problems in common law jurisdictions and why, even where such a law did exist, as it has in the Australian Capital Territory for some 15 years, it remained dormant. That was why, we believed it important to look at some of the historic context into safety legislation and the elements of the offences that flowed from it.

We have had offences in our safety laws across Australia threatening imprisonment for decades. A little digging into their history makes it clear they were generally put there for their deterrent value, or at the very least, enacted by a parliament that failed to consider their workability.

On a personal level, and as a mother who has been left childless as a direct consequence of such failed policy (in that it failed to stop anyone taking incredible risks with my young son's life), I would like to reiterate this point. Laws should, first and foremost, be drafted with a purpose to operating in the real world. It should not become the job of grieving families to highlight the inadequacies of these laws. The sole function of Parliament is, firstly, to draft functionable rules and secondly, to ensure the language in those rules do not present regulators and prosecutors with impossible evidentiary hurdles.

This is important because if laws are drafted with no further ambition than to act as a deterrent, then they fail those who have lost a life at the hands of serious safety breaches. They have not only failed to deter, they will fail the family connected to each tragedy. These laws offer little more than false hope.

Enforceability and Sentencing Guidelines

Data by SafeWork Australia in 2016 reveals a dramatic drop in prosecutions along with a sharp increase in educational workplace engagements. This is a reflection that the current penalty regime is not being enforced – even though this is a risk-based regime designed to address danger before someone dies and that frequently it will take a fatality before investigations are triggered.

It is recognised today that tougher laws do not deter crime without a greater plan. General deterrence is most effective when the wrongdoer's odds of being caught and punished outweighs the benefit they seek. The point here in our submission, was to ensure any discussions on Industrial Manslaughter do not overshadow the more pressing need to reconsider current enforcement policies and sentencing guidelines.

INDUSTRIAL MANSLAUGHTER

Considering some of the evidence given to date, we would like to clarify some points.

Criminal Code or Work Health and Safety Offence?

Ultimately, our submission was to suggest that a crime as serious as Industrial Manslaughter should sit inside a criminal code - because that is where serious crime seems to best fit.

In most jurisdictions (if not all), causing death by dangerous driving is considered a serious crime with a level of negligence or recklessness that is highly culpable. This offence sits inside a criminal code. There is no uncertainty as to the level of criminality.

On the other hand, an offence of causing death by careless or negligent driving generally sits inside a regulatory statute. As an example, most jurisdictions have a road traffic or road safety statute and that is invariably where risk-based offending is found in relation to road users.

Both have offences where the standard of proof is beyond reasonable doubt, but the levels of culpability and the penalties are markedly different. In South Australia, a first offence of causing death by dangerous driving is subject to 10 years imprisonment under s 19A of the *Criminal Law Consolidation Act 1935* (SA). Whereas causing death by negligent driving (or carelessness – the language varies across jurisdictions) is an aggravated offence subject to 12 months imprisonment: s 45(1) *Road Traffic Act 1961* (SA).

We understand there is some debate as to the criminality of the model WHSA offences, but it does seem to be a more logical observation to suggest they are technical or regulatory crimes that sit inside a regulatory statute where risk-based offences often do.

Curiously, the category 1 offence is identified as an 'indictable offence' under the model safety legislation suggesting a higher level of culpability than the other offences. Oddly enough, the more serious manslaughter offence is then defined in a broad characterisation as a 'crime' – which we know casts a wide net.

Frankly, these uncertainties are frustrating as they provide fodder to cashed up corporates and their lawyers. It is for that reason, they are hard to rationalise for families likely to be caught up in them.

Harmonisation

Another issue that presents where Industrial Manslaughter falls inside the model safety legislation, is that it directly impacts the primary purpose of the legislation. Section 3 defines that purpose and it is clearly stated to be about harmonisation.

Queensland has a single house of Parliament and perhaps an easier path to pushing legislation through. The rest of us must deal with a house of review.

The point - the criminal codes around Australia are not subject to harmonisation.

Officers, workers - and the senior officer

The 'officer' as defined under the model WHSA has a clear and positive duty of due diligence and that is in line with common law and corporations law principles.

With the introduction of new players into the Queensland model under the new manslaughter provisions, an 'executive officer' and 'senior officer' present some overlap with the existing interpretations of an 'officer' and a 'worker'.

The statutory legal duties of the parties under the original model legislation were clear. The Queensland model creates uncertainty.

Uncertainties in law seem to have two main consequences. It either sits dormant and underutilised by prosecutors or runs the risk of lengthy and expensive legal arguments. The sum effect of that is that there will be some poor family to be dragged through years of appeals until these issues are clarified.

It was also suggested in evidence during the inquiries visit to the ACT and Victoria that the identification of the 'senior manager' by the corporate manslaughter legislation in the UK had in some way managed to pierce the corporate veil. We might just add that the motivation for this addition to their law was really attributed to shielding the corporation from liability.

From the website of the Crown Prosecution Service (UK)

"The senior management element was included in the legislation in order to ensure that an organisation would not be held liable for management failures occurring solely at a relatively junior level. It was recognised that it would not be fair to hold the corporation as a whole responsible for the offence which was due to failures solely at a low level in the organisation."

Some have raised concerns about this in the context of junior level managers being made easy scapegoats where many directions are given verbally. It is for that reason we are asking for some caution and further consideration by drafters to avoid unintended consequences.

We thank the committee for the opportunity to play a part in the inquiry and trust our input has been of some assistance.

Yours sincerely,

Andrea Madeley LLB (Hons)
Founder and Advocate