

30 May 2018

Senator Gavin Marshall
Chair
Senate Education and Employment Reference Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: eec.sen@aph.gov.au

Dear Senator

The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia

1. Thank you for the opportunity to provide a submission to the Senate Education and Employment Reference Committee (**the Committee**) regarding its review into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia (**the Review**).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section, the Queensland Bar Association and the Queensland Law Society in the preparation of this submission.
3. The Law Council has limited its comments to the issue of industrial manslaughter offences and the harmonisation of workplace safety legislation between the states, territories and Commonwealth (Term of Reference (a)) and jurisdictional issues surrounding workplace investigations which cross state and territory boundaries (Term of Reference (b)).
4. The Law Council is a strong advocate for consistent and effective work health and safety (**WHS**) laws that promote safety and prevent workplace injuries. Nationally consistent laws based on the Model WHS Laws were developed in 2011 by Safe Work Australia and have been enacted with only minor changes by the Commonwealth, New South Wales, the Northern Territory, and Tasmania. Queensland and the Australian Capital Territory (**ACT**) also have Acts that reflect the Model WHS Laws, although, in a manner that is not consistent with those laws, those jurisdictions also have industrial manslaughter offences, as described below.

5. The Law Council is not convinced that a specific industrial manslaughter offence needs to be introduced into the Model WHS Laws, given existing criminal law and WHS offences (which already include offences that can give rise to jail sentences for those who recklessly cause death at a workplace). The Law Council is of the strong view that no such provisions be introduced other than in a consistent manner across the jurisdictions that have adopted the WHS Model Laws, which would necessarily require a consultation process and agreement from those jurisdictions. Different tests for liability and different penalties have a tendency to produce an inconsistency with a key component of the rule of law: that the law should be applied to all people equally.¹ There is a need for the harmonisation of both WHS and the general criminal law to ensure that like cases are treated alike irrespective of jurisdictional boundaries.
6. As noted, existing state, territory and federal law allow for the possibility of senior officials of a corporation to be held criminally responsible for workplace deaths. A summary of the existing provisions of WHS laws and criminal law provisions that may apply to sanction persons responsible for a fatality occurring at or in the course of work is at **Attachment A**.
7. The current common law and legislative framework addresses fatalities in the workplace. This framework includes for example manslaughter by gross negligence to which employers may be subject and also offences under WHS legislation. Cases involving gross negligence are rightly prosecuted under the general law. If recklessness is proved, this is capable of constituting manslaughter under the relevant Crimes Act. In the Law Council's view, persons who can affect the health and safety of workers and others ought to be held to that general law standard.
8. Offences involving failure to take all reasonably practicable steps (equivalent to negligence) leading to death or injury are appropriately punished under WHS laws.
9. Generally, the rationale behind the introduction of specific industrial manslaughter offences relates to concerns regarding the inability to apply the existing offences of manslaughter to corporations.²
10. A corporation may be liable for an offence where the elements of the offence have been performed on behalf of the corporation by the board of directors, its managing director or any other person to whom the board functions have been delegated.³ This includes a person acting as the company and whose mind directing his or her acts is the mind of the company.⁴ That is, generally it is only someone who is the directing mind and will of a corporation whose conduct can be attributed to the corporation, such as a managing director or chief executive. A difficulty may arise in establishing criminal negligence

¹ Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011), Principle 2.

² <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1870.pdf>

³ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170. Approved by the High Court in *Hamilton v Whitehead* (1988) 82 ALR 626.

⁴ *Ibid.*

where the decision and conduct is made by supervisors or managers if they are not 'officers' of the corporation as defined.

11. The Law Council considers that this concern does not of itself justify the creation of specific industrial manslaughter offences. Inadequacies in the implementation of current criminal offences or WHS laws can be remedied by clear guidelines and adequate training and resources for effective prosecution and enforcement. If there is evidence to suggest that those who are culpable within a business are unable to be prosecuted, then a review of duty holders and duties should be undertaken with a view to the potential for amendment that would not be limited to situations involving fatalities.⁵
12. The Law Council has concerns with the two sets of industrial manslaughter provisions that currently exist, in Queensland and the ACT.
13. The industrial manslaughter offences introduced in Queensland under the *Work Health and Safety Act 2011* (Qld), *Electrical Safety Act 2002* (Qld) and *Safety in Recreational Water Activities Act 2011* (Qld) are not consistent with traditional criminal law principles and create a discrepancy in the criminal law framework.
14. The offences in Queensland, do not account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will of a defendant, and do not afford other defences which would otherwise be available under the *Criminal Code Act 1899* (Qld) for other homicide-based offences.⁶ The absence of such defences, combined with the low standard of proof of negligence and the high maximum penalties (20 years imprisonment for an individual or 100, 000 penalty units for a body corporate) has the potential to result in unjust unintended consequences.
15. The ACT *Crimes Act 1900* (ACT) includes an industrial manslaughter offence which commenced on 1 March 2004, and predates the Model WHS Laws. The Explanatory Memorandum to the Bill amending the *Crimes Act 1900* (ACT) states that the industrial manslaughter offences were established to provide improved protection of the health and safety of workers.⁷
16. In many ways it is inconsistent with the Model WH Laws. The offence under the *Crimes Act 1900* (ACT) applies to employers (a narrower scope of person than a "person conducting a business or undertaking" who can be liable for an industrial manslaughter offence under the Queensland legislation). Although this offence can be applied to "corporate" employers, the scope of this offence is limited by an employment relationship, as defined. As such, this offence provision has a more limited application (when compared to the industrial manslaughter offences introduced in Queensland, which are not limited by an employment relationship), but has the broader defences which apply under the *Crimes Act 1900* (ACT) (which are not available in respect of the

⁵ The Law Council adopts this position from the Queensland Law Society's Submission re the Work Health and Safety and Other Legislation Amendment Bill 2017 21 September, 2.

⁶ Ibid.

⁷ Crimes (Industrial Manslaughter) Amendment Bill 2002 Explanatory Memorandum.

offences introduced in Queensland). Further, the maximum penalties differ (with the maximum penalty being only 2,000 penalty units and / or 20 years imprisonment).

17. The maximum penalty for breach of the industrial manslaughter offence under the ACT Crimes Act by a corporation (\$1.5m), is half the maximum penalty for breach of a category 1 offence of the ACT *Work Health and Safety Act 2011* (\$3m), the latter reflecting the Model WHS Laws. In most circumstances either offence would be available to a prosecutor where an employer's conduct caused the death of a work and the employer had been reckless as to the harm that would be caused to an employee. In those circumstances it is perhaps unsurprising that the industrial manslaughter offence in the ACT is yet to be used.
18. It is understood that in respect of recently commenced proceedings before the ACT Magistrates Court arising from a fatality at the Canberra Hospital the prosecutor has elected to charge a person with the offence of general manslaughter (section 15 of the Crimes Act) – not industrial manslaughter.
19. On the basis of the above, the Law Council does not support the introduction of specific industrial manslaughter offences in the form set out in Queensland legislation, or the ACT legislation. Any such offence should only be introduced if it can be said that the current and relatively recent laws (made in 2011) are inadequate. The Law Council is not convinced that they are, noting the significant penalties for breach of Category 1 offences, including the potential for jail.
20. In addition, the Law Council notes that the Model WHS Laws already provide potential for penalties much higher than the penalties that have been handed down by Courts to date. In those circumstances questions of whether higher penalties ought be imposed in circumstances involving multiple fatalities are perhaps a matter for sentencing by the courts.

Should you have any queries, please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division

Yours sincerely

Morry Bailes
President

ATTACHMENT A

Summary of the existing provisions criminal offence provisions and work health and safety (WHS) laws that may apply to sanction persons responsible for a fatality occurring at or in the course of work

Criminal offence provisions

The Australian Capital Territory (**ACT**) is the only jurisdiction that has specific offences of industrial manslaughter under its *Crimes Act 1900* (ACT). Queensland has also inserted an industrial manslaughter offences under the relevant *Work Health and Safety Act 2011* (Qld) (as well as the *Electrical Safety Act 2002* (Qld) and *Safety in Recreational Water Activities Act 2011* (Qld)), discussed below.

All other jurisdictions have general manslaughter offences, with varying maximum penalties.⁸ The offence of gross negligence manslaughter exists under common law.⁹ It has been noted that it is the crime most likely to be used to prosecute employers responsible for work-related deaths.¹⁰

ACT

In the ACT, an employer or senior officer of an employer commits an offence if:

- (a) a worker of the employer:
 - i. dies in the course of employment by, or providing services to, or in relation to, the employer; or
 - ii. is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the employer's conduct causes the death of the worker; and
- (c) the employer is:
 - iii. reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
 - iv. negligent about causing the death of the worker, or any other worker of the employer, by the conduct.¹¹

The maximum penalties for the offence is 2,000 penalty units, imprisonment for 20 years or both. A penalty unit is \$150 for an offence committed by an individual, or \$750 for an offence

⁸ *Crimes Act 1900* (ACT) s 15(1); *Legislation Act 2001* (ACT) s 133; *Crimes Act 1900* (NSW) ss 18(1)(b), 24; *Criminal Code Act* (NT) s 161; *Criminal Code 1899* (Qld) s 303(1); Manslaughter is a common law offence in South Australia, the maximum penalty is life imprisonment (*Criminal Law Consolidation Act 1935* (SA) s 13); *Criminal Code 1924* (Tas) 159; *Crimes Act 1958* (Vic) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 280.

⁹ Manslaughter by gross negligence is committed where the accused owes a legal duty of care to the deceased and causes the death of the deceased by an intentional act or omission in circumstances which involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merits criminal punishment. The common law defence of honest and reasonable mistake does not apply. See *R v Lavender* [2005] HCA 37 [60]; endorsing *Nydam v R* [1977] VR 430, 445. A very high degree of negligence is necessary. See *Andrews v DPP* [1937] AC 576.

¹⁰ Richard Johnstone, 'Work health and safety and the criminal law in Australia' (2013) 11:2 *Policy and Practice in Health and Safety* 25, 30.

¹¹ *Crimes Act 1900* (ACT) ss 49C-49D.

committed by a corporation.¹² This equates to \$300,000 for an offence committed by an individual, and \$1.5 million for an offence committed by a corporation.

WHS legislation

Model WHS legislation (Commonwealth, ACT, Queensland, New South Wales, Northern Territory and South Australia)

Model WHS legislation has been implemented under Commonwealth laws and in all states and territories except Victoria and Western Australia.¹³

The most serious offence under the Model WHS legislation is reckless conduct (a category 1 offence). A person commits reckless conduct if:

- (d) the person has a health and safety duty; and
- (e) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- (f) the person is reckless as to the risk to an individual of death or serious injury or illness.¹⁴

The maximum penalty for the offence of reckless conduct attracts a maximum penalty in each jurisdiction equivalent to the following:

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) — 3,000 penalty units (\$300,000), imprisonment for 5 years or both; or
- (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking — 6,000 penalty units (\$600,000), imprisonment for 5 years or both; or
- (c) in the case of an offence committed by a body corporate — 30,000 penalty units (\$3,000,000).¹⁵

Victoria

In Victoria a person commits an offence if they recklessly engage in conduct that places or may place another person who is at a workplace in danger of serious injury.¹⁶ The maximum penalty for an individual person is 5 years imprisonment or a fine not exceeding 1,800 penalty units.¹⁷ The maximum penalty for a body corporate is a fine not exceeding 20,000

¹² *Legislation Act 2001* (ACT) s 133.

¹³ For further information see <https://www.safeworkaustralia.gov.au/law-and-regulation/law-your-state>.

¹⁴ *Work Health and Safety Act 2011* (Cth) s 31(1); *Work Health and Safety Act 2011* (ACT) s 31(1); *Work Health and Safety Act 2011* (NSW) s 31(1); *Work Health and Safety (National Uniform Legislation) Act 2016* (NT) s 31(1); *Work Health and Safety Act 2011* (Qld) s 31(1); *Work Health and Safety Act 2012* (SA) s 31(1); *Work Health and Safety Act 2012* (Tas) s 31(1);

¹⁵ *Ibid.*

¹⁶ *Occupational Health and Safety Act 2004* (Vic) s 32.

¹⁷ *Ibid* s 32(a).

penalty units.¹⁸ One penalty unit is \$158.57,¹⁹ meaning a fine for an individual would be \$285,426, and for a corporation would be \$3,171,400.

Western Australia

Western Australian legislation includes offences relating to breaches of a number of duties, including the duty to not expose employees to hazards, and provide and maintain workplaces so that employees are not exposed to hazards.²⁰ Employers commit an offence where they breach their duties in circumstances of gross negligence²¹ and are liable to a level 4 penalty.²² For individuals, this is a fine of \$250,000 and imprisonment for 2 years for a first offence, and a fine of \$312,500 and imprisonment for 2 years for a subsequent offence.²³ For a body corporate this is a fine of \$500,000 for a first offence and a fine of \$625,000 for a subsequent offence.²⁴

An employer who also breaches a duty and causes the death of, or serious harm to an employee, is liable to a level 3 penalty.²⁵ For individuals this is a fine of \$200,000 for a first offence and a fine of \$250,000 for a subsequent offence.²⁶ For a body corporate this is a fine of \$400,000 for a first offence, and a fine of \$500,000 for a second offence.²⁷ Similar offences and penalties extend to employers and self-employed persons,²⁸ body corporates,²⁹ and persons who have control of workplaces.³⁰

Queensland

Queensland has inserted an industrial manslaughter offence into new Part 2A of the *Work Health and Safety Act 2011* (Qld). A person conducting a business or undertaking commits an offence if:

- (a) a worker dies in the course of carrying out work for the business or undertaking;
or
- (b) a worker is injured in the course of carrying out work for the business or undertaking and later dies; and
- (c) the person's conduct causes the death of the worker; and
- (d) the person is negligent about causing the death of the worker by the conduct.³¹

There is a similar offence for industrial manslaughter which applies to senior officers of a person conducting a business or undertaking.³²

The maximum penalty for an offence under section 34C of the *Work Health and Safety Act 2011* (Qld) is 20 years imprisonment for an individual or 100,000 penalty units for a body

¹⁸ Ibid s 32(b).

¹⁹ Victoria, Government Gazette No. G13, 30/3/2017.

²⁰ *Occupation Safety and Health Act 1984* (WA) s 19(1).

²¹ Ibid s 19A(1).

²² Ibid.

²³ Ibid s 3A(4)(a).

²⁴ Ibid s 3A(4)(b).

²⁵ Ibid s 19A(2).

²⁶ Ibid s 3A(3)(a).

²⁷ Ibid s 3A(3)(b).

²⁸ Ibid s 21A.

²⁹ Ibid s 21C.

³⁰ Ibid s 22A.

³¹ *Work Health and Safety Act 2011* (Qld) s 34C.

³² Ibid s 34D.

corporate. For the purposes of the *Work Health and Safety Act 2011* (Qld), a penalty unit is \$100.³³ This equates to maximum penalty of \$10 million for an offence.

The terms and penalties set out in Part 2A of the *Work Health and Safety Act 2011* (Qld) are similarly inserted in the following Queensland legislation:

- *Electrical Safety Act 2002* (Qld), Part 2B; and
- *Safety in Recreational Water Activities Act 2011* (Qld), Part 2A.

³³ *Penalties and Sentences Act 1992* (Qld) s 5(d).

	Model Work Health and Safety Act, s 31(1) reckless conduct offence?	Work Health and Safety Act or equivalent max penalties	Industrial manslaughter criminal offence?	Industrial manslaughter max penalty	General manslaughter offence max penalty
Cth	Yes	\$300,000 or 5 years imprisonment for an individual, \$600,000 or 5 years imprisonment for an individual as a person or officer conducting a business or undertaking, \$3 million for a body corporate	No	N/A	
ACT	Yes	As above	Yes – <i>Crimes Act 1900</i> (ACT) ss 49C-49D – industrial manslaughter employer and senior officer offences	2 000 penalty units (\$300,000 for an individual, \$1.5 million for a corporation), imprisonment 20 years or both	20 years imprisonment or 28 years imprisonment (aggravated offence)
NSW	Yes	As above	No	N/A	25 years imprisonment
NT	Yes	As above	No	N/A	Life imprisonment
Qld	Yes	As above	Yes – <i>Work Health and Safety Act 2011</i> (Qld) s 34C – industrial manslaughter – person conducting business or undertaking and s 34D – industrial manslaughter – senior officer	20 years imprisonment for an individual or 100 000 penalty units for a body corporate (\$10 million)	Life imprisonment
SA	Yes	As above	No	N/A	Life imprisonment
Tas	Yes	As above	No	N/A	21 years imprisonment, or by fine, or both.
Vic	No – has <i>Occupational Health and Safety Act 2004</i> (Vic) s 32 offence –	1,800 penalty units (\$285,426) or 5 years imprisonment for an individual,	No	N/A	20 years imprisonment

	duty not to recklessly endanger persons at workplaces	20,000 penalty units for a body corporate (\$3,171.400)			
WA	No – has <i>Occupation Safety and Health Act 1984</i> (WA) offences relating to breaches of duties in circumstances of gross negligence or breaches that cause death of, or serious harm to an employee, by employers, body corporates and persons who have control of workplaces	<p>Gross negligence offences</p> <p><i>For individuals:</i> \$250,000 fine and imprisonment for 2 years for a first offence, \$312,500 fine and imprisonment for 2 years for a subsequent offence</p> <p><i>For body corporates:</i> \$500,000 fine for a first offence, \$625,000 fine for a subsequent offence</p> <p>Breach of duty causing death or serious harm to an employee</p> <p><i>For individuals:</i> \$200,000 fine for a first offence, \$250,000 for a subsequent offence</p> <p><i>For body corporates:</i></p> <p>\$400,000 fine for a first offence</p> <p>\$500,000 for a subsequent offence</p>	No	N/A	Life imprisonment