

OCCUPATIONAL SAFETY AND HEALTH AMENDMENT BILL 2010

INTRODUCED BY
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EXPLANATORY MEMORANDUM

Overview of the Bill

The purpose of the Bill is to introduce important amendments to the *Occupational Safety and Health Act 1984* (WA) (the 'OSH Act') and the *Criminal Code* (WA) to increase the safety of workplaces in Western Australia.

To this end, the Bill:

- a) introduces the offence of Industrial Manslaughter;
- b) increases the penalties for offences under the OSH Act;
- c) introduces a new offence where an employee is exposed by an employer to a substantial risk of death or serious bodily harm;
- d) introduces a requirement that 'dangerous incidents' are reported;
- e) introduces a requirement to preserve the site of an incident until an inspector arrives or directs otherwise;
- f) introduces procedural amendments to give standing to 'interested persons' to bring prosecutions under the OSH Act;
- g) introduces new and alternative sentencing options for offences under the Act;
- h) introduces the option of enforceable undertakings for corporations; and
- i) amends the definition of 'consultation' in the workplace.

For the purposes of this EM the term "Model Bill" refers to the *Model Work Health and Safety Bill* developed by Safe Work Australia as amended in May 2010.

Part 1 - Preliminary

Clause 1

This clause contains the title of the Bill. This clause also provides for the Bill to come into operation on the 28th day after which it receives the Royal Assent.

Part 2 – *Occupational Safety and Health Act* amended

Clause 2

This clause provides that amendments in this Part are to the *Occupational Safety and Health Act 1984* (WA).

Clause 3 – Section 3 Amended

This clause inserts three definitions into the OSH Act.

Circumstances of gross negligence relates to the amendments in clause 5.

It is employees themselves that are best placed to identify particular hazards or dangerous practices in the workplace. The new definition of ‘consult’ is inserted to:

- a) ensure that employees are given the reasonable opportunity to contribute information and express views where required in the OSH Act;
- b) ensure that their views are considered in the decision-making process; and
- c) to give guidance to employers as to what is an appropriate level of consultation.

OSH undertaking relates to the amendments in clause 16.

Clause 4 – Section 3A amended

The table in this clause outlines the proposed amendments to increase the penalties for level one, level two and level three offences for employers under the OSH Act. These figures are commensurate with the recommended penalties in the Model Bill. The clause also introduces a 25% loading on penalties for subsequent offences.

Clause 5 – Section 18AB inserted

This clause introduces a new offence where an employer negligently or recklessly exposes an employee to a substantial risk of death or serious bodily harm. Where a person contravenes one of the offences listed in sub-clause (1), that person may also be liable for an offence under this provision.

This clause fills a gap in the OSH Act. Although the OSH Act covers the situation where an employee dies or is injured, the OSH Act does not protect employees that are exposed by an employer to a substantial risk of death or serious bodily harm.

The offence applies to both employees and employers with appropriate penalties for each, set out in sub-clause (3).

Sub-clause (4) provides that where a person is charged with an offence under section 19A, 20A, 21A, 21C, 22A, 23AA, 23B or 23H, that person may instead be convicted of an offence under this clause.

Clause 6 – Section 20A amended

The table in this clause sets out the amendments to increase penalties for offences committed by employees under section 20(1) or 20(3) of the OSH Act. The increases in penalties are commensurate with the penalty levels recommended in the Model Bill.

Clause 7 – Section 23IA inserted

This new clause 23IA is inserted to add three definitions relevant to clause 9 of the Bill.

The first two paragraphs of this clause replicate the wording of section 23I(1) of the OSH Act, and applies those definitions of ‘business of a self-employed person’ and ‘business of an employer’ to the whole Division.

The definition of ‘dangerous incident’ is modelled on clause 37 of the *Model Bill*. The only amendment to the wording in clause 37 of the *Model Bill* is the alteration of sub-clause (j). The words ‘engulfment, including but not limited to’ were inserted in front of the proposed *Model Bill* text.

Clause 8 – Section 23I amended

This clause deletes sub-section 23I(1). These definitions have been moved to new clause 23IA: see above explanation at clause 7.

Clause 9 – Section 23JA inserted

There is currently a gap in the OSH Act for instances in which a dangerous incident exposes an employee or any other person to a serious risk to safety or health, but when that exposure does not necessarily result in a death, injury or disease. This clause inserts clause 23JA to introduce an offence for failing to notify the Commissioner of such a dangerous incident.

A ‘dangerous incident’ for this purpose has been defined in inserted clause 23IA to include a range of situations; for example, an uncontrolled explosion or the partial collapse of a structure. Clause 23JA applies to employers and self-employed persons and their relevant workplace or residence, as defined in new clause 23IA and section 23G(2) of the OSH Act.

Sub-clause (2) provides that employers or self-employed persons must notify the Commissioner in the prescribed form of a dangerous incident either immediately or as otherwise provided by regulations. Sub-clause (4) provides that an employer or self-employed person must keep a record of each dangerous incident for at least 5 years from the day that notice of the incident is given to the Commissioner.

This clause is intended to ensure that incidents are duly notified and investigated, increasing accountability and safety in the workplace.

Clause 10 – Section 23J amended

This clause amends section 23J of the OSH Act to bring the OSH Act section titles in line with the amendments.

Clause 11 – Section 23KA inserted

This clause inserts clause 23KA to introduce an obligation on employers or self-employed persons to preserve incident sites until the arrival or direction of a WorkSafe inspector. This clause covers incidents under section 23I of the OSH Act and clause 23JA of the Bill.

This clause does not intend to prevent the actions outlined in sub-clause (4), such as assisting injured persons or undertaking measures to minimise the risk of further deaths or injury on the site.

Clause 12 – Section 52 amended

This clause amends section 52(1) of the OSH Act to give standing to ‘interested persons’ to bring prosecutions under the OSH Act. ‘Interested persons’ is defined in

clause 13 below. Where interested persons seek to institute proceedings for alleged offences of provision noted in section 18A(1) or section 18AB, they are required to follow the procedure inserted by clause 13, explained below.

This clause does not intend to limit the functions of the Director of Public Prosecutions, which is made explicit by deleting section 52(3) and inserting sub-clause (2).

This clause establishes the foundations for the amendments in clause 12, explained below.

Clause 13 – Sections 53A and 53B inserted

This clause inserts two new clauses concerning the procedure for prosecution.

Clause 53A

Sub-clause 53A(1) inserts two definitions. An ‘interested person’ includes persons who have been affected physically by the alleged offence, their union or their close relatives, or close relatives of a person who has died because of an alleged offence. A ‘close relative’ refers to immediate family members.

Sub-clause 53A(2) provides for where an interested person reasonably considers that a person has committed an offence in any of the provisions noted in section 18A(1) or section 18AB, and no prosecution has been brought in respect of that alleged offence, the interested person may make a written request to the Commissioner that a prosecution be brought. This request must be submitted no later than 12 months after the alleged offence occurred.

Sub-clause 53A(3) provides that the Commissioner is to inform the interested person whether the investigation is complete and whether prosecution has been, or will be, brought and written reasons for that decision.

Sub-clause 53A(4) states that if the interested person is informed that a prosecution will not be brought, and writes to inform the Commissioner and alleged offender that he or she considers that the prosecution should be brought, the interested person can initiate legal proceedings.

This clause applies to the failure to act as well as to positive acts.

Clause 53B

This clause sets out the limitation periods for which proceedings for an offence under the OSH Act may be brought.

This clause provides that proceedings may be brought:

- within three years after the offence first comes to the notice of the Commissioner;
- within two years after a finding by an inquest, coronial or other official investigation;
- within six months of the contravention or withdrawal of an OSH undertaking.

Sub-clause 53(2) provides that an offence may be brought after the applicable limitation period for certain offences if fresh evidence is discovered and the court is satisfied that this evidence could not be discovered within the original limitation period.

Clause 14 - Section 54 amended

This clause amends section 54A by increasing the penalties for ‘continuing offences’ under the OSH Act.

Clause 15 – Part VII Division 2A inserted

This clause inserts a division to provide the courts with a broad range of sentencing options for offences. The intention of this clause is to reduce the possible weaknesses of particular sentencing options by allowing courts to award a combination of orders to achieve the desired occupation, safety and health changes in the workplace. These penalties can be awarded in addition to penalties listed under the OSH Act. The inserted clauses are based upon the recommended provisions in Part 13 Division 2 of the Model Bill.

This clause seeks to introduce the following sentencing options:

- CI 55BC** **Adverse publicity orders** that require offenders to publicise the order, offence, its consequences, the penalty imposed and any other related matter. These orders can be sought by the prosecution or awarded on the court’s discretion. If the offender refuses to comply with the order, the Commissioner can apply to the court for permission to give effect to the order, such as publicise the information.
- CI 55BD** **Orders for restoration** that require the offender to take steps to remedy any matter caused by the commission of the offence, as long as the remedy is within the court’s power to order.
- CI 55BE** **Occupational Safety and Health project orders** that require the offender to undertake a specified project for the general improvement of occupational safety and health within a specific time period and with certain conditions.
- CI 55BF** **Occupational Safety and Health undertaking** that releases the offender on the offender giving an undertaking with specified conditions. This undertaking will specify a period of court adjournment, during which time the offender cannot commit any offence against the OSH Act. If the court is satisfied after the adjournment period that the offender has observed the conditions of the undertaking, the court may discharge the offender without further hearing.
- CI 55BG** **Injunctions** to prohibit a person from continuing to contravene the OSH Act.

CI 55BI **Training orders** that require a person to undertake or arrange for employees to undertake a specified course of training.

Persons who fail to comply with any order under this Division without reasonable excuse commits an offence liable to a level 2 penalty. Any person seeking to rely on that provision bears the evidentiary burden of showing a reasonable excuse.

Clause 16 – Part VIIA inserted

This clause inserts a Part relating to enforceable undertakings, to encourage employers to remedy occupational safety and health matters without court proceedings in certain circumstances.

Under this Part, where a person has allegedly or been found to contravene the OSH Act, the Commissioner may accept an occupational safety and health undertakings ('OSH undertaking') from the person. OSH undertakings cannot be accepted for offences with a level 4 penalty.

If an OSH undertaking is in place or has been completely discharged, no proceedings for a contravention or alleged contravention of the OSH Act may be brought. The giving of an OSH undertaking does not amount to an admission of guilt.

It is up to the discretion of the Commissioner whether or not to accept an OSH undertaking. The Commissioner must provide written notice of the Commissioner's decision and reasons for accepting or rejecting an OSH undertaking. The undertaking is enforceable from the time of the Commissioner's decision to accept it. The Commissioner must publish notice of the decision to accept an OSH undertaking on the Commissioner's website.

A person who contravenes an OSH undertaking commits an offence with a level 2 penalty. The Commissioner may apply to the court for an order for the person to comply with or to discharge the OSH undertaking. OSH undertakings may also be varied or withdrawn by the person with the written agreement of the Commissioner. The Commissioner must publish notice of such a decision.

Clause 17 – Section 60 amended

This clause amends section 60 by increasing the penalties for non-compliance with Regulations made under the OSH Act. Increasing these penalties will be consistent with increasing the other penalties under the OSH Act.

Part 3 – *The Criminal Code* amended

Clause 18 – Act amended

This clause states that Part 3 amends *The Criminal Code* of Western Australia.

Clause 19

This clause inserts a new chapter into the Criminal Code to introduce the offence of Industrial Manslaughter. These provisions intend to fill the gaps of s19(1) and s19A(1) of the OSH Act to provide for liability wherever an employee dies as a result of the negligence or recklessness of their employer or the senior officer of their employer.

Inserted clause 292A

This clause provides relevant definitions for the Industrial Manslaughter provisions.

Inserted clause 292B

This clause allows for omissions to constitute conduct under the Industrial Manslaughter offences.

Inserted clause 292C

Under this clause, an employer will be liable where:

- an employee of the employer dies in the course of employment or is injured in the course of employment and later dies (course of employment includes providing services for the employer); and
- the employer's conduct causes the death of the employee; and
- the employer is found to have been reckless or negligent about causing serious harm to the employee, or any other employee of the employer, by the conduct.

An individual person convicted on indictment of an offence under this clause is liable to imprisonment for 20 years.

A corporation convicted on indictment of an offence under this clause is liable for a penalty of \$3 000 000.

Inserted clause 292D

Under this clause, a senior officer of an employer will be liable where:

- an employee of the employer dies in the course of employment or is injured in the course of employment and later dies (course of employment includes providing services for the employer); and
- the employer's conduct causes the death of the employee; and
- the employer is found to have been reckless or negligent about causing serious harm to the employee, or any other employee of the employer, by the conduct.

A person convicted on indictment of an offence under this clause is liable to imprisonment for 20 years.

Inserted clause 292E

This clause allows the court to order additional penalties to corporations convicted for industrial manslaughter. These penalties are similar to the additional penalties inserted by clause 15.

The court may order the corporation to publicise the offence, the deaths or serious injuries or consequences from their conduct and any penalties imposed because of the offence. Similarly, the court may order the corporation to take any action to notify specified persons of these matters.

The court may order the corporation to undertake a specified project for the general improvement of occupational safety and health within a specific time period.

The court may impose any time period for which to comply with these orders and any other additional requirements that it deems necessary or desirable for the enforcement of these orders. However, the court may not order any measures that would cost the corporation in excess of \$5 000 000 and the court must take the financial circumstances of the corporation as well as the nature of the burn, so far as practicable, in making an order under this part.

If the corporation fails, without reasonable excuse to comply with an order under this part, the Commissioner may apply to the court to authorise the Commissioner to do anything that is necessary or convenient to carry out the action that has not been done under the order. The court can also order the Commissioner to publicise the failure of the corporation to comply with the order. However, this clause does not prevent any contempt of court proceedings from being commenced. The intention of this clause is to increase the accountability of corporations for such a serious crime.