Report 43

STANDING COMMITTEE ON LEGISLATION

Work Health and Safety Bill 2019

Presented by
Hon Dr Sally Talbot MLC (Chair)
August 2020
Standing Committee on Legislation

Members as at the time of this inquiry:
Hon Dr Sally Talbot MLC (Chair)  Hon Nicolas Goiran MLC (Deputy Chair)
Hon Colin de Grussa MLC  Hon Simon O’Brien MLC
Hon Matthew Swinbourn (Substitute Member for Hon Pierre Yang MLC)

Staff as at the time of this inquiry:
Ben King (Advisory Officer (Legal))  Denise Wong (Advisory Officer (Legal))
Tracey Sharpe (Committee Clerk)

Address:
Parliament House
4 Harvest Terrace, West Perth WA 6005
Telephone: 08 9222 7300
Email: lcco@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

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EXECUTIVE SUMMARY

1.1 On 21 May 2020 the Legislative Council referred the Work Health and Safety Bill 2019 (Bill) to the Standing Committee on Legislation (Committee). The Committee has been asked to consider:

- Part 2 of the Bill (duty, offence and penalty provisions)
- the policy of the Bill (modernisation, harmonisation, consolidation and deterrence)
- any government response to the 126th Report of the Standing Committee on Uniform Legislation and Statutes Review.

1.2 The Bill is based on a Model Bill that was developed by Safe Work Australia in 2011 (Model Bill). Each state jurisdiction agreed to consider the Model Bill, adapt it to their own laws and enact it. Most jurisdictions did so over the next two years.

1.3 The main task facing the Committee is to consider Part 2 of the Bill. Notably, it includes two new offences of industrial manslaughter that are not included in the Model Bill.

1.4 Under existing laws in Western Australia a death at a workplace can be criminally prosecuted under the Occupational Safety and Health Act 1984, the Mines Safety and Inspection Act 1994 and the Criminal Code. Common law civil causes of action are also available under contract and tort law.

1.5 The Australian Capital Territory has had an industrial manslaughter offence since 2004. Since then, Queensland, the Northern Territory and Victoria have enacted industrial manslaughter offences in their work health and safety Act in 2017, 2019 and 2020.

1.6 This report considers a number of aspects of the industrial manslaughter offences including:

- the exclusion of workers from being charged with industrial manslaughter
- the appropriate court in which each offence is to be heard
- the appropriate prosecutor of each offence
- whether the offences should be contained in the Criminal Code or the legislative framework for work health and safety
- whether the defences and excuses outlined in the Criminal Code are available under the proposed new regime
- the recovery of legal costs by a person that is acquitted.

1.7 Aside from the industrial manslaughter offences this report considers the following aspects of the Bill:

- the duty of care of employers would be expanded to include any ‘person conducting a business or undertaking’ (PCBU)
- a positive duty of care would be imposed on officers to undertake ongoing due diligence to ensure their PCBU is complying with its duty of care
- a duty of care on work health and safety service providers would be introduced that is not included in the Model Bill
- the maximum penalties for the three category offences of breaching a work health and safety duty of care are higher than those in the Model Bill.
## Findings and recommendations

Findings and recommendations are grouped as they appear in this document at the page number indicated:

<table>
<thead>
<tr>
<th>FINDING 1</th>
<th>Page 24</th>
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</thead>
<tbody>
<tr>
<td>Clause 18 of the Work Health and Safety Bill 2019 defines ‘reasonably practicable’ to a substantially similar standard to that currently set out in s 3 of the <em>Occupational Safety and Health Act 1984</em> and s 4 of the <em>Mines Safety and Inspection Act 1994</em>.</td>
<td></td>
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</table>

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<thead>
<tr>
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<tbody>
<tr>
<td>Clause 18(e) of the Work Health and Safety Bill 2019 is a material but justified variant to the existing standard in s 3 of the <em>Occupational Safety and Health Act 1984</em> and s 4 of the <em>Mines Safety and Inspection Act 1994</em>.</td>
<td></td>
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<thead>
<tr>
<th>FINDING 3</th>
<th>Page 29</th>
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<tbody>
<tr>
<td>The duties in cl 20–26 of the Work Health and Safety Bill 2019 have been included without significant amendment from the Model Work Health and Safety Bill 2019.</td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>FINDING 4</th>
<th>Page 29</th>
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</thead>
<tbody>
<tr>
<td>The duty in cl 26A of the Work Health and Safety Bill 2019 is not expressly included in the Model Work Health and Safety Bill. The Model Bill contains an implicit duty on those providing work health and safety services under cl 19. The inclusion of cl 26A in the Bill makes explicit the implicit duty of those providing work health and safety services under cl 19 of the Bill.</td>
<td></td>
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<thead>
<tr>
<th>FINDING 5</th>
<th>Page 29</th>
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<tbody>
<tr>
<td>There is no exemption from the provisions in cl 26A of the Work Health and Safety Bill 2019 for unions providing work health and safety services.</td>
<td></td>
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</tbody>
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<thead>
<tr>
<th>FINDING 6</th>
<th>Page 33</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clause 7(1)(i) of the Work Health and Safety Bill 2019 allows regulations to prescribe additional classes of workers to be captured by the Bill, including Part 2.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RECOMMENDATION 1</th>
<th>Page 33</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for cl 7(1)(i) of the Work Health and Safety Bill 2019 to be retained.</td>
<td></td>
</tr>
</tbody>
</table>
### FINDING 7

Consistent with cl 29 of the Model Work Health and Safety Bill, cl 29 of the Work Health and Safety Bill 2019 significantly broadens the current obligation on visitors to workplaces to comply with directions. Clause 29 of the Bill also broadens the class of persons who hold this obligation to include persons not engaged in work at a workplace, for example visitors, customers and passers-by.

### FINDING 8

The Model Work Health and Safety Bill does not include industrial manslaughter and no harmonised approach exists.

### FINDING 9

The extensive consultation process undertaken about modernising Western Australia’s work health and safety laws did not include the industrial manslaughter provisions proposed by cl 30A and 30B of the Work Health and Safety Bill 2019.

### FINDING 10

The legal test for prosecuting a crime under cl 30A of the Work Health and Safety Bill 2019 is substantially the same as that currently applied to a level 4 offence under s 19A(1) of the Occupational Safety and Health Act 1984 and s 9A(1) of the Mines Safety and Inspection Act 1994. This can be described as a subjective test of actual knowledge.

### FINDING 11

The penalties under cl 30A of the Work Health and Safety Bill 2019 are substantially higher than the current level 4 offence under s 19A(1) of the Occupational Safety and Health Act 1984 and s 9A(1) of the Mines Safety and Inspection Act 1994 however this increase is consistent with other jurisdictions that have introduced industrial manslaughter and with the Government’s stated policy objective of deterrence.

### FINDING 12

An ambiguity exists as to who can initiate a cl 30A prosecution under the Work Health and Safety Bill 2019 and the Minister for Mines, Petroleum, Energy and Industrial Relations has instructed Parliamentary Counsel’s Office to resolve the issue by re–drafting cl 230 of the Bill.

### RECOMMENDATION 2

The Minister for Mines, Petroleum, Energy and Industrial Relations advise the Legislative Council on what amendments are required to give effect to Finding 12.
FINDING 13
The offences of industrial manslaughter in cl 30A and 30B of the Work Health and Safety Bill 2019 are properly placed in the work health and safety legislation rather than the Criminal Code.

FINDING 14

FINDING 15
Although industrial manslaughter—crime under cl 30A of the Work Health and Safety Bill 2019 has been based on the current level 4 offence under s 19A(1) of the Occupational Safety and Health Act 1984 and s 9A(1) of the Mines Safety and Inspection Act 1994, under the new regime a worker cannot be charged with industrial manslaughter.

FINDING 16
A worker can be prosecuted for a category 1, 2 or 3 offence under the Work Health and Safety Bill 2019 or the Criminal Code.

FINDING 17
Clause 30B of the Work Health and Safety Bill 2019 only requires a person conducting a business or undertaking to be negligent, not criminally negligent, in order to be guilty. This aligns with the current level 3 offence in s 19A(2) of the Occupational Safety and Health Act 1984 and s 9A(2) of the Mines Safety and Inspection Act 1994.

FINDING 18
The maximum penalties under cl 30B of the Work Health and Safety Bill 2019 are significantly higher than those currently available for a level 3 offence under s 19A(2) of the Occupational Safety and Health Act and s 9A(2) of the Mines Safety and Inspection Act 1994 and introduce a sentence of imprisonment.

FINDING 19
Clause 30B of the Work Health and Safety Bill 2019 does not incorporate the subjective test of actual knowledge found in cl 30A of the Bill or the objective test of gross negligence as recommended in the Boland Report but does include an objective test of reasonable practicability.

FINDING 20
Clause 30B of the Work Health and Safety Bill 2019 does not reverse the onus of proof.
Both employee and employer stakeholder groups argued that the industrial manslaughter
offences proposed by cl 30A and 30B of the Work Health and Safety Bill 2019 should be heard in
the District Court.

Clause 31 of the Work Health and Safety Bill 2019 does not incorporate the subjective test of
recklessness found in cl 31 of the Model Work Health and Safety Bill or the objective test of gross
negligence recommended by the Boland Report but does include an objective test of reasonable
practicability.

The penalties of imprisonment are consistent between cl 31 of the Work Health and Safety Bill
2019 and cl 31 of the Model Work Health and Safety Bill but the monetary penalties are marginally
higher.

The Minister for Mines, Petroleum, Energy and Industrial Relations advise the Legislative Council
on why the penalties in cl 31 of the Work Health and Safety Bill 2019 are higher than those in cl 31
of the Model Work Health and Safety Bill.

Clause 32 of the Work Health and Safety Bill 2019 is inconsistent with cl 32 of the Model Work
Health and Safety Bill to the extent that it captures less serious injury. This is inconsistent with the
approach in other harmonised jurisdictions.

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative
Council whether it is necessary for cl 32 of the Work Health and Safety Bill 2019 to be inconsistent
with the Model Work Health and Safety Bill.

The penalties in cl 32 of the Work Health and Safety Bill 2019 are marginally higher than those in
cl 32 of the Model Work Health and Safety Bill.

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative
Council why the penalties in cl 32 of the Work Health and Safety Bill 2019 are higher than those in
cl 32 of the Model Work Health and Safety Bill.
### FINDING 26
Page 79

The penalties in cl 33 of the Work Health and Safety Bill 2019 are marginally higher than those in cl 33 of the Model Work Health and Safety Bill.

### RECOMMENDATION 6
Page 79

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council why the penalties in cl 33 of the Work Health and Safety Bill 2019 are higher than those in cl 33 of the Model Work Health and Safety Bill.

### FINDING 27
Page 80

Clauses 31–33 of the Work Health and Safety Bill 2019 do not reverse the onus of proof.

### RECOMMENDATION 7
Page 81

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for the penalties in Part 2 of the Work Health and Safety Bill 2019 to be described in dollar amounts instead of penalty units.
CHAPTER 1
Introduction

Referral
1.1 The Work Health and Safety Bill 2019 (Bill) was referred to the Standing Committee on Legislation (Committee) on 21 May 2020 with a reporting date of 11 August 2020.
1.2 The referral motion as passed was:

(1) That the Work Health and Safety Bill 2019 be discharged and referred to the Standing Committee on Legislation for consideration of Part 2 of the Bill and report no later than Tuesday, 11 August 2020;

(2) The Committee has the power to inquire into and report on the policy of the Bill; and

(3) The Committee is to consider any government response to the 126th report of the Standing Committee on Uniform Legislation and Statutes Review.¹

Procedure
1.3 Pursuant to Standing Order 163, Hon Matthew Swinbourn MLC substituted for Hon Pierre Yang MLC for the duration of the inquiry. The President of the Legislative Council reported this substitution to the House on 16 June 2020.²
1.4 The Committee called for submissions from the stakeholders listed in Appendix 1 and advertised the inquiry in The West Australian newspaper. The Committee received 64 submissions of which 63 were made public (see Appendix 1).
1.5 Public hearings were held over two days on 8 and 9 July 2020. The witnesses who appeared at these hearings are listed in Appendix 1.
1.6 The Committee extends its appreciation to those who made submissions and appeared at hearings.

Background of the Bill
1.7 The Bill is substantially based on the Model Bill that was developed by Safe Work Australia in 2011 pursuant to an agreement by the Council of Australian Governments (COAG) to harmonise work health and safety laws in Australia (Model Bill).³ Each jurisdiction agreed to consider the Model Bill, adapt it to their own laws and enact it.
1.8 The Model Bill has been implemented in every state and territory in Australia except Western Australia and Victoria, although Victoria’s legislation is already similar to the Model Bill.⁴ It has also been enacted in New Zealand.⁵

¹ Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 21 May 2020, p 3048b.
³ Council of Australian Governments, Inter–Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, Canberra, 3 July 2008.
⁵ Health and Safety at Work Act 2015 (NZ).
The Model Bill has been under consideration for a number of years. The Committee notes the following inquiries as they have relevance to the Bill:

**National Review**

In October 2008 and January 2009 a panel assembled by the Workplace Relations Ministers’ Council (WRMC) published two reports containing 232 recommendations on the optimal structure of model laws that could be adopted throughout Australia (National Review). The WRMC accepted over 90 percent of these recommendations in preparing the Model Bill.

**Ministerial Advisory Panel**

In July 2017 the Cabinet of Western Australia established a ministerial advisory panel to report on work health and safety reform in Western Australia (Ministerial Advisory Panel). The final report published in June 2018 contains 44 recommendations on adopting the Model Bill in Western Australia. This report largely informed the drafting of the Bill. However it did not contemplate industrial manslaughter.

**Boland Report**

In November 2017 Safe Work Australia appointed Marie Boland, former Executive Director of SafeWork SA to conduct an independent review of the Model Bill (Boland Report). The Boland Report found the Model Bill was largely operating as intended. However it identified areas for improvement and made 34 recommendations for reform. This included a recommendation to introduce an offence of industrial manslaughter in the Model Bill.

**126th Report of the Standing Committee on Uniform Legislation and Statutes Review**

On 12 May 2020 the Standing Committee on Uniform Legislation and Statutes Review tabled a report on the Bill and on the Safety Levies Amendment Bill 2019. It considered the impact of those two Bills on the sovereignty and law–making powers of the Parliament of Western Australia. The Committee has been asked to consider any Government response to the above report in this inquiry. This is covered in chapter 6 of this report. The Government response is included in Appendix 2.

**Part 2 of the Bill**

The Committee has been referred Part 2 of the Bill for consideration. Part 2 contains provisions dealing with duties, offences and penalties.

Part 2 is substantially consistent with the Model Bill. The main differences are summarised in Appendix 3. These include the introduction of the following new provisions:

- a duty of care for work health and safety providers (cl 26A)
- two offences of industrial manslaughter (cl 30A, 30B).

Part 2 of the Bill is comprised of five divisions as follows:

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6 The WRMC is a non–statutory body comprising Commonwealth, state and territory ministers for workplace relations and occupational health and safety.


8 Stephanie Mayman, *Modernising work health and safety laws in Western Australia*, Western Australia, 30 June 2018.


• Division 1 sets out principles that apply to all work health and safety duties in the Bill.
• Division 2 prescribes the primary duty of care of persons conducting a business or undertaking.
• Division 3 prescribes more specific duties of persons conducting a business or undertaking.
• Division 4 deals with the duties of officers, workers and other persons in the workplace.
• Division 5 contains offences and penalties in relation to work health and safety duties, including two offences of industrial manslaughter.

Policy of the Bill

1.17 The Department of Mines, Industry Relations and Safety (DMIRS) was responsible for the development of the Bill. The Committee asked the Director General of DMIRS, Mr David Smith to identify the policy objectives of the Bill:

The objectives behind, if you like, that bill was, first of all, modernisation. The OSH act [Occupational Safety and Health Act 1984] and the mine safety act [Mines Safety and Inspection Act 1994] are both 36 and 26 years old respectively ... The second objective was harmonisations ... [and] the national model work health and safety bill form the basis of this bill. Providing the benefits of harmonisation across jurisdictions was a justification for this bill as well. Third is the consolidation. So all workplaces in Western Australia’s jurisdiction will be covered by the Work Health and Safety Bill, which will have separate regulations for mines, petroleum and general workplaces. They are the general policy justifications.11

1.18 In addition to modernisation, harmonisation and consolidation the second reading speech included an additional policy objective; it is one of deterrence:

In introducing this bill, I want to acknowledge the loss and suffering of many families who have lost loved ones in workplace accidents. The community expects that every worker comes home safely after each shift. Having a strong deterrence in this legislation completely accords with these expectations.12

Consideration of fundamental legislative principles

1.19 As with previous inquiries, the Committee’s method of scrutinising the Bill included an assessment of whether its provisions are consistent with fundamental legislative principles (FLPs).13

1.20 FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.14 They fall under two broad headings:

• Does the Bill have sufficient regard for the rights and liberties of individuals? (FLP 1–11)
• Does the Bill have sufficient regard to the institution of Parliament? (FLP 12–16).

1.21 The Committee has routinely used FLPs as a convenient and informal framework for scrutinising proposed legislation since 2004. They are not enshrined in Western Australian

11 David Smith, Director General, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, pp 1–2.
12 Hon Sue Ellery MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 20 February 2020, p 912e.
13 The FLPs are set out in Appendix 4.
14 The FLPs are based on principles set out in the Legislative Standards Act 1992 (Qld), though other Parliaments often rely on similar principles.
law, and for some bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs but whether a bill has sufficient regard to them.

1.22 The Committee has considered FLP 4 and FLP 11 in relation to the Bill. That is, whether:

- ambiguity exists as to who can initiate a prosecution for industrial manslaughter—crime proposed by cl 30A and whether cl 230 (which contains provisions on the prosecution of offences) has been drafted in a sufficiently clear way as contemplated by FLP 11. The Minister for Mines, Petroleum, Energy and Industrial Relations has instructed Parliamentary Counsel’s Office to resolve the issue by re–drafting cl 230.

- the offence of industrial manslaughter—simple proposed by cl 30B and the category offences proposed by cl 31–3 reverses the onus of proof in criminal proceedings without adequate justification as contemplated by FLP 4. The Committee concluded these clauses did not offend FLP 4.

**Structure of the report**

1.23 The Committee’s scrutiny of the Bill in this report begins in chapter 2 with a brief explanation of existing work health and safety laws.

1.24 Chapter 3 considers the duties of care proposed by the Bill. These include the duties of persons conducting a business or undertaking, officers, workers and other persons at a workplace.

1.25 Chapter 4 deals with the two industrial manslaughter offences proposed by the Bill including an examination of the consultation process that preceded the drafting of the provisions. In doing so it considers the following issues in relation to each proposed offence:

- elements of the offence
- legal test
- maximum penalties
- the exclusion of workers from being charged with industrial manslaughter
- the appropriate court in which each offence is to be heard
- the appropriate prosecutor of each offence
- whether the offences should be contained in the *Criminal Code* or the legislative framework for work health and safety
- whether the defences and excuses outlined in the *Criminal Code* are available under the proposed new regime
- the recovery of legal costs by a person that is acquitted.

1.26 Chapter 5 considers the three Category Offences for breaching a duty of care under the Bill (Category Offences). The main issues considered in this chapter are:

- whether the Category Offences are strict liability offences
- whether the Category Offences reverse the onus of proof
- the maximum penalties proposed for the Category Offences.

1.27 Chapter 6 considers the Government response to the 126th Report of the Standing Committee on Uniform Legislation and Statutes Review.

1.28 Chapter 7 summarises the Committee’s findings on whether the Bill has achieved the four policy objectives of modernisation, harmonisation, consolidation and deterrence.
CHAPTER 2
Current laws

Introduction

2.1 Under existing laws in Western Australia, workplace deaths and injuries can be criminally prosecuted under the:
- offence provisions in the Occupational Safety and Health Act 1984
- offence provisions in the Mines Safety and Inspection Act 1994
- Criminal Code.

2.2 This chapter begins by examining the operation of these existing laws. It then briefly considers:
- common law manslaughter
- civil law causes of action under contract and tort law
- work health and safety standards of Commonwealth agencies, their officers and workers.

2.3 Lastly, this chapter discusses existing industrial manslaughter offences in Australia and overseas.

Work health and safety legislation in WA

2.4 Work health and safety laws in Western Australia are primarily set out in the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994. Both of these Acts are typical examples of Robens–style legislation that has been popular in Australia since the 1970s (see Appendix 5 for more background).15

2.5 If passed, the Bill will replace the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994. In doing so it will become the primary legislation for work health and safety in Western Australia across all industries. This supports the policy objective of consolidating work health and safety laws in Western Australia.

Duties of care

2.6 The Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994 establish broad statutory duties of care on all parties in the workplace. These duties can be broadly summarised as follows:
- employers must provide and maintain a work environment in which the employees are not exposed to hazards16
- employees must take reasonable care to ensure their own safety and the safety of others17

15 The Robens Report, named after Lord Alfred Robens, was tabled in the House of Commons in the United Kingdom by the Committee on Health and Safety in 1972. Robens–style legislation is characterised by a tripartite structure of a main Act that is supported by more specific regulations and approved codes of conduct/practice. The Bill and the Model Bill are drafted in the Robens-style.


17 Occupational Safety and Health Act 1984, s 20; Mines Safety and Inspection Act 1994, s 10.
• self-employed people must, so far as is practicable, ensure the safety or health of other
people is not adversely affected.18

2.7 Together, these general duties form the basis for work health and safety in Western Australia.

Penalties

2.8 The Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994 both contain offences for breaching a work health and safety duty of care. A level 4 offence is the most serious offence and the only offence to carry a term of imprisonment.

2.9 In September 2018 the maximum penalties in these Acts were increased to reflect those in the 2010 version of the Model Bill; with an additional 14 percent increase to account for inflation since that time.19 This resulted in Western Australia having the highest maximum penalties for health and safety offences in Australia.20 The current maximum penalties for each offence are set out in Table 1.

Table 1. Current maximum penalties under work health and safety laws21

<table>
<thead>
<tr>
<th>Accused</th>
<th>Level 2—general duty offence</th>
<th>Level 3—causing serious harm or death</th>
<th>Level 4—gross negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees</td>
<td>$40 000 for a first offence and $50 000 for a subsequent offence</td>
<td>$80 000 for a first offence and $100 000 for a subsequent offence</td>
<td>$100 000 for a first offence and $120 000 for a subsequent offence</td>
</tr>
<tr>
<td>Employer—Individuals</td>
<td>$250 000 for a first offence and $350 000 for a subsequent offence</td>
<td>$400 000 for a first offence and $500 000 for a subsequent offence</td>
<td>5 years' imprisonment and a fine of $550 000 for a first offence or $680 000 for a subsequent offence</td>
</tr>
<tr>
<td>Employer—Body corporate</td>
<td>$1 500 000 for a first offence and $1 800 000 for a subsequent offence</td>
<td>$2 000 000 for a first offence and $2 500 000 for a subsequent offence</td>
<td>$2 700 000 for a first offence and $3 500 000 for a subsequent offence</td>
</tr>
</tbody>
</table>

[Source: Occupational Safety and Health Act 1984; Mines Safety and Inspection Act 1994]

2.10 Details about the prosecutions and convictions for level 1–4 offences under the Occupational Safety and Health Act 1984 in each of the past ten years are set out in Table 2–4 below. Table 2 shows the number of prosecutions that have been initiated. Table 3 shows the number of prosecutions that have resulted in a conviction. Table 4 contains the average penalties imposed for those convictions.

18 Occupational Safety and Health Act 1984, s 21; Mines Safety and Inspection Act 1994, s 11.
19 Occupational Safety and Health Amendment Act 2018, s 4; Mines Safety and Inspection Amendment Act 2018, s 4.
21 The Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994 also contain a level 1 offence however this is not applicable to breaches of the statutory duties of care in those Acts.
**Table 2. Number of prosecutions initiated**

<table>
<thead>
<tr>
<th>Year</th>
<th>Level 1</th>
<th>Level 2</th>
<th>Level 3</th>
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<td>0</td>
<td>11</td>
</tr>
<tr>
<td>2014/2015</td>
<td>0</td>
<td>7</td>
<td>11</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>2015/2016</td>
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<td>5</td>
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<td>9</td>
</tr>
<tr>
<td>2016/2017</td>
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<td>8</td>
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<tr>
<td>2017/2018</td>
<td>1</td>
<td>2</td>
<td>9</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>2018/2019</td>
<td>2</td>
<td>2</td>
<td>8</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>2019/2020</td>
<td>2</td>
<td>2</td>
<td>8</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>36</td>
<td>66</td>
<td>108</td>
<td>8</td>
<td>218</td>
</tr>
</tbody>
</table>

[Source: Tabled Paper 2 tabled by David Smith, Director General, Department Mines, Industry Regulation and Safety during hearing held 9 July 2020]

**Table 3. Number of prosecutions resulting in conviction**

<table>
<thead>
<tr>
<th>Year</th>
<th>Level 1</th>
<th>Level 2</th>
<th>Level 3</th>
<th>Level 4</th>
<th>Total</th>
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<tbody>
<tr>
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<td>20</td>
</tr>
<tr>
<td>2011/2012</td>
<td>23</td>
<td>20</td>
<td>20</td>
<td>0</td>
<td>63</td>
</tr>
<tr>
<td>2012/2013</td>
<td>3</td>
<td>8</td>
<td>11</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>2013/2014</td>
<td>0</td>
<td>5</td>
<td>9</td>
<td>0</td>
<td>14</td>
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<tr>
<td>2014/2015</td>
<td>0</td>
<td>7</td>
<td>6</td>
<td>0</td>
<td>13</td>
</tr>
<tr>
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<td>0</td>
<td>7</td>
<td>8</td>
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<td>15</td>
</tr>
<tr>
<td>2016/2017</td>
<td>0</td>
<td>2</td>
<td>8</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>2017/2018</td>
<td>0</td>
<td>2</td>
<td>7</td>
<td>0</td>
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</tr>
<tr>
<td>2018/2019</td>
<td>0</td>
<td>2</td>
<td>7</td>
<td>0</td>
<td>9</td>
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<tr>
<td>2019/2020</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>29</td>
<td>61</td>
<td>90</td>
<td>0</td>
<td>180</td>
</tr>
</tbody>
</table>

[Source: Tabled Paper 2 tabled by David Smith, Director General, Department Mines, Industry Regulation and Safety during hearing held 9 July 2020]

**Table 4. Average penalties imposed**

<table>
<thead>
<tr>
<th>Year</th>
<th>Level 1</th>
<th>Level 2</th>
<th>Level 3</th>
<th>Level 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010/2011</td>
<td>$2 000</td>
<td>$19 250</td>
<td>$35 929</td>
<td>0</td>
</tr>
<tr>
<td>2011/2012</td>
<td>$709</td>
<td>$13 488</td>
<td>$68 125</td>
<td>0</td>
</tr>
<tr>
<td>2012/2013</td>
<td>$3 333</td>
<td>$26 815</td>
<td>$52 818</td>
<td>0</td>
</tr>
<tr>
<td>2013/2014</td>
<td>0</td>
<td>$31 200</td>
<td>$35 888</td>
<td>0</td>
</tr>
<tr>
<td>Year</td>
<td>Level 1</td>
<td>Level 2</td>
<td>Level 3</td>
<td>Level 4</td>
</tr>
<tr>
<td>----------</td>
<td>---------</td>
<td>-----------</td>
<td>-----------</td>
<td>---------</td>
</tr>
<tr>
<td>2014/2015</td>
<td>0</td>
<td>$21 250</td>
<td>$66 135</td>
<td>0</td>
</tr>
<tr>
<td>2015/2016</td>
<td>0</td>
<td>$17 785</td>
<td>$63 406</td>
<td>0</td>
</tr>
<tr>
<td>2016/2017</td>
<td>0</td>
<td>$35 000</td>
<td>$39 525</td>
<td>0</td>
</tr>
<tr>
<td>2017/2018</td>
<td>0</td>
<td>$30 000</td>
<td>$90 715</td>
<td>0</td>
</tr>
<tr>
<td>2018/2019</td>
<td>0</td>
<td>$13 000</td>
<td>$50 845</td>
<td>0</td>
</tr>
<tr>
<td>2019/2020</td>
<td>$32 000</td>
<td>$41 500</td>
<td>$110 000</td>
<td>0</td>
</tr>
</tbody>
</table>

(Source: Tabled Paper 2 tabled by David Smith, Director General, Department Mines, Industry Regulation and Safety during hearing held 9 July 2020)

2.11 Prior to the commencement of this inquiry there were no successful prosecutions of a level 4 offence. The reason for the lack of convictions of level 4 offences may be due to the requirement to prove the defendant had knowledge of the risk involved. The Boland Report found this was the case in relation to the prosecution of category 1 offences under the Model Bill which also requires proof of the accused’s subjective knowledge.

2.12 On 14 July 2020 the first conviction of a level 4 offence was recorded when Resource Recovery Solutions, a business involved in waste recycling pleaded guilty to the charge over an incident where a worker’s arm was severed when he was dragged between a conveyor belt and a roller. There was no guarding around the crush points of the belt. A director of the company has also been charged however he has plead not–guilty to the offence. At the time of writing this report the court is yet to determine the outcome of the case against the director or impose a penalty for the conviction against the business.

**Criminal Code**

2.13 The following provisions of the Criminal Code are potentially available to prosecute a death at a workplace:

- **Unlawful homicide:**

  Any person who unlawfully kills another is guilty of a crime which, according to the circumstances of the case, may be murder or manslaughter.

- **Manslaughter:**

  If a person unlawfully kills another person under such circumstances as not to constitute murder, the person is guilty of manslaughter and is liable to imprisonment for life.

- **Duty of a person in charge of a dangerous thing:**

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22 Stephen Catania, Coordinator, Political and Industrial, Construction, Forestry, Maritime, Mining and Energy Union, transcript of evidence, 9 July 2020, p 11.


24 Darren Kavanagh, WorkSafe Commissioner Western Australia, WorkSafe Western Australia, letter, 8 July 2020, p 4.


26 Criminal Code, s 277.

27 ibid., s 280.
It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.  

- **Duty to do certain acts:**

  When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

- **Death from bodily injury that might have been avoided or prevented:**

  When a person causes a bodily injury to another from which death results, it is immaterial that the injury might have been avoided by proper precaution on the part of the person injured, or that his death from that injury might have been prevented by proper care or treatment.

2.14 Robert Laing, former Australian Industrial Relations Commissioner made the following comment on these provisions in the 2002 statutory review of the Occupational Safety and Health Act 1984:

The issue is not so much that provisions exist but that there does not appear to have been a capacity or inclination to act on them. It seems reasonable to suggest that it could be because there are now other legislative instruments which deal with occupational safety and health; in particular the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994. While it also appears that the Criminal Code may still be applicable to small to medium size workplaces where the person/s responsible are proximate to the work, that is unlikely to be the case in modern businesses where those who issue the instructions about the work are often considerably removed from the actual workplace and are not directly involved in the workplace events.

2.15 The limitations in prosecuting a business for manslaughter were acknowledged in the best practice review of the Queensland work health and safety laws in 2017:

The rationale for addressing industrial manslaughter as a new and separate offence in the ACT was based on the view that the existing manslaughter provisions in criminal law could only be applied to individuals rather than to corporations. This meant that, before a corporation could be found criminally responsible, an individual director or employee must be identified as the directing mind and will of the corporation and have, in effect, committed the offence. This generally required proof of fault by a top–level manager or director that is difficult to establish in the case of large corporations, where offences are generally only visible at the middle–management level.

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28 ibid., s 266.
29 ibid., s 267.
30 ibid., s 274.
32 Tim Lyons, Best Practice Review of Workplace Health and Safety Queensland, Queensland, 3 July 2017, p 111.
2.16 This was also acknowledged by Mr Andrew Cotgreave, a Senior Policy Advisor at DMIRS in the context of manslaughter:

Normal manslaughter in the Criminal Code is very good at targeting the behaviour of individuals, but it is actually quite difficult to then extend that out to work out how the behaviour of a body corporate may have causally led to the death of a person. As I have said before, manslaughter in the Criminal Code is difficult to apply to bodies corporate.33

2.17 Mr Cotgreave also gave evidence that workers can be prosecuted under this offence:

we still have manslaughter in the Criminal Code for employees or workers ... There are a number of cases where the police have prosecuted for manslaughter a worker who, as a result of their work, has causally led to the death of someone.34

2.18 The Committee asked for these cases to be provided on notice and received details of two cases where a worker had been charged.35 One case, which is currently underway, relates to a charge of dangerous driving that was upgraded to manslaughter. The second case involved a worker who was sentenced to 4 years imprisonment on two counts of dangerous driving occasioning death.36

2.19 Following the public hearings and noting that the Director of Public Prosecutions for Western Australia (DPP) had declined to make a submission to the inquiry, the Committee asked the DPP, Amanda Forrester SC to comment on the DPP’s current inclination to prosecute workplace deaths under the Criminal Code:

I am strongly of the view that the Criminal Code provisions are appropriate for any unlawful death. However, I have no information to suggest that any workplace death has ever been charged under the Criminal Code, or that anyone has sought to do so. I also have no information to suggest that any agency has ever sought advice from the ODPP in order to ascertain whether such a prosecution was viable.37

**Common law manslaughter**

2.20 Common law manslaughter is not available in Western Australia and Queensland owing to the abrogation of the common law by codification of the criminal law.38

**Common law—civil**

2.21 In addition to this statutory framework, employers and businesses also have common law obligations under contract and tort law.

2.22 Under contract law, the High Court of Australia has taken the view that employers have an implied duty not to expose their workers to unnecessary risks. This duty was first established

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33 Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, p 7.
34 ibid., p 8.
35 David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 2 asked at hearing held 9 July 2020, dated 16 July 2020, p 1.
36 *Kershaw v The State of Western Australia* [2014] WASCA 111.
37 Amanda Forrester SC, Director of Public Prosecutions for Western Australia, Office of the Director of Public Prosecutions for Western Australia, Letter, 31 July 2020, p 1. See Appendix 6 for the Committee’s correspondence with the Director of Public Prosecutions.
38 *Criminal Code*, ss 2 and 4.
in a case that involved a worker in Western Australia.\textsuperscript{39} It forms the basis for work health and safety duties of care today:

The common law duty implied into an employment contract and placing an obligation on employers to take care of their employees is mirrored in the legislation. It endorses a general duty on employers, but the legislation, although bearing many similarities, is not limited to the employer duty the common law imposes.\textsuperscript{40}

2.23 Under tort law, businesses owe a non-delegable duty of care to ensure that reasonable care and skill is taken for the safety of people and property.\textsuperscript{41} A business that breaches this duty may be found liable in an action for negligence. Unlike the implied contractual duty described above, claims for negligence are not limited to workers and can be brought on by a visitor to a worksite or anyone else who has a relationship ‘which generates a special responsibility or duty to see that care is taken’.\textsuperscript{42}

**Commonwealth legislation**

2.24 Work health and safety standards of Commonwealth agencies, their officers and workers are set out in the *Work Health and Safety Act 2011* (Cth). This Act covers the rights of workers who are employed by the Commonwealth Government and those who are covered by the Comcare system.\textsuperscript{43} Examples include the public service and the Australian Defence Force. The Bill will not affect the operation of these laws.

**Industrial manslaughter—other jurisdictions**

2.25 Part 2 of the Bill creates two new offences of industrial manslaughter. The offence of industrial manslaughter currently exists in other jurisdictions. This section considers the approaches taken to industrial manslaughter in Australia and overseas.

2.26 Industrial manslaughter has been in place as legislation in the Australian Capital Territory since 2004. More recently it has been enacted in Queensland in 2017, the Northern Territory in 2019 and Victoria in 2020.\textsuperscript{44}

\textsuperscript{39} *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18.

\textsuperscript{40} Natalie van der Waarden, *Employment Law an outline*, LexisNexis Butterworths, New South Wales, 2010, p 220.

\textsuperscript{41} *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57; (1937) 3 All ER 628; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

\textsuperscript{42} *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

\textsuperscript{43} *Work Health and Safety Act 2011* (Cth), s 12.

\textsuperscript{44} *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld); *Work Health and Safety (National Uniform Legislation) Amendment Act 2019* (NT); *Safety Legislation Amendment (Workplace Manslaughter and other matters) Bill 2019* (Vic).
2.27 The Australian Capital Territory was the first jurisdiction to introduce industrial manslaughter in March 2004.\textsuperscript{45} It has two offences, one that applies to employers and one for senior officers. In both cases an offence will be committed where:

- a worker dies in the course of employment
- the person’s conduct causes their death
- the person is reckless or negligent about causing serious harm.\textsuperscript{46}

2.28 The offences are contained in the \textit{Crimes Act 1900 (ACT)} instead of the relevant work health and safety legislation as has been proposed by the Bill. However it should be noted that in 2018 the ACT Minister for Workplace Safety and Industrial Relations supported the inclusion of an industrial manslaughter provision in the Model Bill based on the approach taken in Queensland.\textsuperscript{47}

2.29 A conviction for industrial manslaughter has never been made in the Australian Capital Territory. Although a prosecution was commenced over a death in February 2020, WorkSafe ACT ultimately accepted a plea of guilty to a category 1 offence.

2.30 That case involved a worker operating a crane in excess of its rated capacity when it overturned and landed on another worker. The Supreme Court of the Australian Capital Territory ordered a 12 month suspended sentence of imprisonment.\textsuperscript{48}

\section*{Queensland}

2.31 In 2017 Queensland introduced two offences of industrial manslaughter into its work health and safety legislation.\textsuperscript{49} It has an offence that applies to persons conducting a business or

\begin{itemize}
\item \textit{Crimes (Industrial Manslaughter) Act 2003 (ACT).}
\item \textit{Crimes Act 1900 (ACT), ss 49C–D.}
\item Hon Rachel Stephen-Smith MLA, ACT Minister for Workplace Safety and Industrial Relations, \textit{Submission to Senate Inquiry into the Prevention, Investigation and Prosecution of Industrial Deaths in Australia}, 6 June 2018, p 2.
\item \textit{R v Watts} [2020] ACTSC 91. This sentence was discounted from a starting point of 20 months imprisonment to take account of the accused’s plea of guilty and assistance to prosecutors in related proceedings involving his employer and the principal contractor.
\item \textit{Work Health and Safety and Other Legislation Amendment Act 2017 (Qld).}
\end{itemize}
undertaking and an offence for senior officers of a company.\textsuperscript{50} In both cases an offence will be committed where:

- a worker dies in the course of carrying out work
- the person’s conduct causes their death
- the person is negligent about causing the death of the worker.

2.32 These laws were implemented in accordance with a best practice review of workplace health and safety following deaths at Dreamworld and an Eagle Farm worksite in 2016.\textsuperscript{51} Dreamworld’s parent company plead guilty to three category 2 offences under s 32 of the \textit{Work Health Safety Act 2011} (Qld) on 29 July 2020.\textsuperscript{52}

2.33 The first sentence under Queensland’s industrial manslaughter laws was handed down on 11 June 2020.\textsuperscript{53} The case involved a worker who died when struck by a forklift which was being reversed by another worker. The driver of the forklift was looking forward while reversing.

2.34 Upon investigation it was revealed that the driver of the forklift did not hold a licence and the business had no safety systems in place. One of the directors said that he verbally advised his staff to be safe and to look after themselves. He also said he was not aware of the requirement to have a WorkCover policy or to report the incident to Work Health Safety Queensland. The company was fined $3 million and each director received a suspended term of imprisonment of 10 months.

\textbf{Northern Territory}

2.35 The Northern Territory introduced an offence of industrial manslaughter in November 2019.\textsuperscript{54} The offence applies to persons conducting a business or undertaking and company officers.\textsuperscript{55} An offence will be committed where:

- a person owes a duty of care
- the person intentionally engages in conduct that breaches their duty of care
- the conduct causes the death of an individual
- the person is reckless or negligent in their breach of their statutory duty.

2.36 The offence is contained in the work health and safety legislation.

2.37 The maximum penalties are life imprisonment for an individual or a fine of $10.205 million for a body corporate. Where a court sentences an offender to life imprisonment they must fix a non-parole period not less than eight months.\textsuperscript{56} However the court may refuse to fix a non-parole period at all if it considers that the nature of the offence, the past history of the

\textsuperscript{50} \textit{Work Health and Safety Act 2011} (Qld), s 34C–D.
\textsuperscript{51} Tim Lyons, \textit{Best Practice Review of Workplace Health and Safety Queensland}, Queensland, 3 July 2017, recommendation 46.
\textsuperscript{53} \textit{R v Brisbane Auto Recycling Pty Ltd & Ors} [2020] QDC 113.
\textsuperscript{54} \textit{Work Health and Safety (National Uniform Legislation) Amendment Act 2019} (NT).
\textsuperscript{55} \textit{Work Health and Safety Act 2011} (NT), s 34B.
\textsuperscript{56} \textit{Sentencing Act 1995} (NT), s 54.
offender or the circumstances of the particular case make the fixing of such a period inappropriate.\(^{57}\)

2.38 These laws were implemented in accordance with a best practice review of workplace health and safety in the Northern Territory.\(^{58}\) This review was undertaken by Tim Lyons, who was also responsible for the best practice review in Queensland in 2017.

2.39 No convictions have been recorded for this offence.

**Victoria**

2.40 Victoria introduced two offences of workplace manslaughter in 2019.\(^{59}\) They commenced on 1 July 2020.

2.41 One offence applies to a person conducting a business or undertaking while the other applies to officers of a company.\(^{60}\) In each case an offence will be committed where:
- a person engages in conduct that is negligent
- the conduct constitutes a breach of a statutory duty
- the conduct causes the death of a person.

2.42 Maximum penalties are 25 years imprisonment for an individual or $16.5 million for a body corporate.\(^{61}\)

2.43 No convictions have been recorded for this offence.

**South Australia, New South Wales, Tasmania**

2.44 There are no industrial manslaughter laws being considered in South Australia, New South Wales or Tasmania.

2.45 The New South Wales Government has actively rejected introducing offences of industrial manslaughter. Minister for Better Regulation, Hon Kevin Anderson MP, gave the following explanation:

> We’ve been watching the approach that has been taken in other jurisdictions, and to be frank, it’s one thing implementing laws that sound tough, but if you can’t bring a successful prosecution then it’s little more than a catchy title on a page.\(^{62}\)

2.46 Instead, workplace deaths in New South Wales are prosecuted under common law manslaughter. This position was made clear by including the following note in the *Work Health and Safety Act 2011* (NSW) on 10 June 2020:

> In certain circumstances, the death of a person at work may also constitute manslaughter under the Crimes Act 1900 and may be prosecuted under that Act. See section 18 of the Crimes Act 1900, which provides for the offence of

\(^{57}\) ibid., s 53.


\(^{59}\) *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019* (Vic).

\(^{60}\) ibid., s 39G.

\(^{61}\) *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic).

manslaughter, and section 24 of that Act, which provides that the offence of manslaughter is punishable by imprisonment for 25 years.  

2.47 Two cases in which common law manslaughter was used to prosecute workplace deaths are summarised below:

- **R v Lavender**: Three boys entered a mine site where the accused was employed as a front end loader driver. The accused drove his loader at the boys who ran into nearby bush. He pursued them intentionally and ran over one of the boys. He was convicted of involuntary manslaughter and sentenced to 4 years’ imprisonment.  
- **R v Moore**: The accused was the sole director of a bricklaying company. A bricklayer who was employed by the accused was constructing a wall when it collapsed and fell on him. He died as a result. The Court of Criminal Appeal in New South Wales found the accused owed a duty of care to the deceased. Commentators have speculated that a retrial will not be conducted.

### Summary of penalties for industrial manslaughter in Australia

2.48 The maximum penalties for industrial manslaughter in Australia are summarised in Table 5.

#### Table 5. Maximum penalties for industrial manslaughter in Australia

<table>
<thead>
<tr>
<th>State</th>
<th>Imprisonment</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>20 years</td>
<td>$1.62 million</td>
</tr>
<tr>
<td>QLD</td>
<td>20 years</td>
<td>$10 million</td>
</tr>
<tr>
<td>VIC</td>
<td>25 years</td>
<td>$16.5 million</td>
</tr>
<tr>
<td>NT</td>
<td>Life imprisonment (see paragraph 2.37)</td>
<td>$10.205 million</td>
</tr>
<tr>
<td>WA (proposed cl 30A offence)</td>
<td>20 years</td>
<td>$10 million (companies) $5 million (individuals)</td>
</tr>
<tr>
<td>WA (proposed cl 30B offence)</td>
<td>10 years</td>
<td>$5 million (companies) $2.5 million (individuals)</td>
</tr>
<tr>
<td>NSW</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>TAS</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>SA</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

[Source: Industrial manslaughter provisions for each jurisdiction as noted above]

### New Zealand

2.49 New Zealand enacted work health and safety laws based on the Model Bill in 2015. These laws were introduced in accordance with the recommendations of the Independent Taskforce on Workplace Health and Safety and the Royal Commission on the Pike River Coal

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63 Work Health and Safety Amendment (Review) Act 2020 (NSW), s 3.  
67 Health and Safety Reform Bill 2014 (NZ).
Mine Tragedy.\textsuperscript{68} The Pike River Coal Mine Tragedy occurred in November 2010 when 29 people were killed in an underground methane explosion at the Pike River Coal Mine.

2.50 There are no industrial manslaughter offences in New Zealand. Workplace deaths can only be prosecuted under the category offences in the \textit{Health and Safety at Work Act 2015} (NZ).

**United Kingdom**

2.51 The United Kingdom enacted an offence of industrial manslaughter in 2007.\textsuperscript{69} It is referred to as ‘corporate manslaughter’ in England, Wales and Northern Ireland and ‘corporate homicide’ in Scotland.\textsuperscript{70} This offence can be used to prosecute an organisation which causes the death of a person.

2.52 Unlike in Australia the offence cannot be used to prosecute an individual.\textsuperscript{71} The offence only applies to specified organisations. This may include a corporation, government department, police force, partnership or trade union.\textsuperscript{72}

2.53 An offence of corporate manslaughter will be committed where:

- an organisation causes a person’s death
- the organisation owed a duty of care to that person
- the organisation’s conduct amounts to a gross breach of the relevant duty of care
- the way in which the organisation’s activities are managed or organised by its senior management is a substantial element in the breach.

2.54 A gross breach of a duty of care is defined as conduct that:

\begin{quote}
Falls far below what can reasonably be expected of the organisation in the circumstances.\textsuperscript{73}
\end{quote}

2.55 Penalties for an organisation that is found guilty of corporate manslaughter include fines, remedial orders and publicity orders.

2.56 The sentencing guidelines require the court to assess the organisation’s level of culpability before determining a fine based on the organisation’s annual turnover. This figure is used as a starting point which is adjusted for aggravating and mitigating circumstances. The recommended starting points are set out in Table 6:

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Culpability} & \textbf{Starting point} & \textbf{Category range} \\
\hline
\textit{Micro organisation (turnover up to £2 million)} & & \\
\hline
Higher & £450 000 & £270 000–800 000 \\
Lower & £300 000 & £180 000–540 000 \\
\hline
\textit{Small organisation (turnover £2 million to £10 million)} & & \\
\hline
\end{tabular}
\caption{Sentencing guidelines for corporate manslaughter in the United Kingdom}
\end{table}


\textsuperscript{69} \textit{Corporate Manslaughter and Corporate Homicide Act 2007} (UK).

\textsuperscript{70} ibid., s 1(5).

\textsuperscript{71} ibid., s 18.

\textsuperscript{72} ibid., ss 1, 11(1).

\textsuperscript{73} ibid., s 1(4)(b).
<table>
<thead>
<tr>
<th>Culpability</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher</td>
<td>£800 000</td>
<td>£540 000–2 800 000</td>
</tr>
<tr>
<td>Lower</td>
<td>£540 000</td>
<td>£350 000–2 000 000</td>
</tr>
<tr>
<td><strong>Medium organisation (turnover £10 million to £50 million)</strong></td>
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<tr>
<td>Higher</td>
<td>£3 000 000</td>
<td>£1 800 000–7 500 000</td>
</tr>
<tr>
<td>Lower</td>
<td>£2 000 000</td>
<td>£1 200 000–5 000 000</td>
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<tr>
<td><strong>Large organisation (turnover more than £50 million)</strong></td>
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<tr>
<td>Higher</td>
<td>£7 500 000</td>
<td>£4 800 000–20 000 000</td>
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<tr>
<td>Lower</td>
<td>£5 000 000</td>
<td>£3 000 000–12 500 000</td>
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<tr>
<td><strong>Very large organisation</strong></td>
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<tr>
<td>Higher</td>
<td></td>
<td>Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.</td>
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<td>Lower</td>
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CHAPTER 3
Duties of care

Introduction

3.1 The Bill includes a number of broad overarching duties of care. This concept comes from the Robens–model of work health and safety legislation that is currently used in all jurisdictions in Australia and is also reflected in the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*.

3.2 The most significant changes proposed by the Bill in relation to work health and safety duties are to:

- expand the duty of care of employers to include any ‘person conducting a business or undertaking’ (PCBU)
- introduce a new duty of care for work health and safety service providers that is not in the Model Bill (cl 26A)
- require officers to undertake ongoing due diligence to ensure the PCBU is complying with its duties of care.

3.3 This chapter explains the duties of care set out in Part 2 of the Bill in the following order:

- the primary duty of care of a PCBU (cl 19)
- other duties of PCBUs who are involved in activities such as manufacturing, designing or importing plant, substances or structures (cl 20–26A)
- the duty of officers (cl 27)
- the duty of workers (cl 28)
- the duty of other persons at the workplace (cl 29).

Meaning of ‘person conducting a business or undertaking’ (cl 5)

3.4 Clause 5 does not fall within Part 2 of the Bill and the Committee makes no recommendations in relation to this clause. However it is a defined term frequently referred to in Part 2 of the Bill and as such is discussed below.

Modern working arrangements

3.5 The broad concept of a PCBU was introduced to cover modern working arrangements. This was done in accordance with the following recommendation of the National Review:

> We recommend that the model Act place the primary duty of care on those who conduct a business or undertaking to all persons who may be put at risk from the conduct of the business or undertaking. The objective of doing so is to move away from the emphasis on the employment relationship as the determiner of the primary duty, to provide greater health and safety protection for all persons involved in, or affected by, work activity.74

3.6 In his submission the Minister for Mines, Petroleum, Energy and Industrial Relations, Hon Bill Johnston MLA, noted the concept of a PCBU:

has proven a particularly prescient recommendation given the recent and rapid rise of entities in the ‘gig’ economy, which challenges the master/servant concept that underlies the employer/employee relationship.\(^{75}\)

3.7 The term gig economy refers to businesses that use online platforms that pair workers with jobs. This business model often avoids, among other things, undertaking the traditional employer’s responsibilities to pay employee entitlements. Well known examples in Australia include Uber, Deliveroo, Ola and Airbnb.

3.8 The law in this area is evolving. For example, in considering the classification of a worker under the *Fair Work Act 2009* (Cth) the Fair Work Commission recently found an Uber driver in one case was an independent contractor while a Foodora food delivery worker in another case was an employee.\(^ {76}\) This meant that the Foodora employee was entitled to claim unfair dismissal while the Uber driver was not.

3.9 In the case involving the Uber driver, Deputy President Gostencnik of the Fair Work Commission noted the relevant test for determining the classification of a worker had been developed before the rise of the gig economy:

> It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances.\(^ {77}\)

3.10 Although these cases were determined in the context of unfair dismissal it should be noted that independent contractors are entitled to the same rights as employees under the existing work health and safety laws. Both the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994* stipulate that the duty owed to an independent contractor must not be different from that owed to an employee.\(^ {78}\)

3.11 Under the Bill, independent contractors are included in the definition of a worker.\(^ {79}\) This means that they are covered under the primary duty of care proposed by the Bill.\(^ {80}\)

3.12 Although the Bill does not appear to introduce new protections for gig economy workers, it does adopt a broader approach to working relationships. In this way, the concept of a PCBU supports the policy objective of modernising Western Australian work health and safety laws.

**Definition of ‘person conducting a business or undertaking’**

3.13 A PCBU can be viewed as the organising entity that has control over workers. A PCBU includes employers, unincorporated bodies, partnerships, joint ventures, contractors, franchisors and the Crown. It does not include local government members or volunteer associations that do not have employees. The explanatory memorandum advises that the following domestic activities are not intended to be PCBUs:

- individuals who carry out domestic work in and around their own home (e.g. domestic chores etc);

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76 *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Klooger v Foodora Pty Ltd* [2018] FWC 6836.
77 *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610, [66].
78 *Occupational Safety and Health Act 1984*, s 23D; *Mines Safety and Inspection Act 1994*, s 15A.
80 *ibid.*, cl 19.
• individual householders who engage persons other than employees for home maintenance and repairs in that capacity (e.g. tradespersons to undertake repairs); and
• individual householders who organise one–off events such as dinner parties, garage sales, lemonade stalls etc.81

3.14 The Bill provides the following definition of PCBU:

5. Meaning of person conducting a business or undertaking

(1) For the purposes of this Act, a person conducts a business or undertaking—

(a) whether the person conducts the business or undertaking alone or with others; and

(b) whether or not the business or undertaking is conducted for profit or gain.

(2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.

(3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.

(4) An individual does not conduct a business or undertaking to the extent that the individual is engaged solely as a worker in, or as an officer of, that business or undertaking.

(5) A local government member does not conduct a business or undertaking.

(6) The regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.

(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.

(8) In this section—

volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.82

Henry VIII clause

3.15 Clause 5(6) of the Bill resembles a Henry VIII clause as it enables the regulations to amend the definition of a PCBU.83 This provision has been included without amendment from the Model Bill.

3.16 Such provisions are objectionable because they result in the loss of the public scrutiny and accountability for policy decisions that would usually occur when an Act is scrutinised by Parliament. In this way, matters of policy can effectively be determined by the executive.

82 Work Health and Safety Bill 2019, cl 5.
3.17 The explanatory memorandum gives the following explanation for this provision:

Subclause 5(7) [sic] allows the regulations to exclude prescribed persons from application of the Bill, or part of the Bill.

The duties and obligations under the Bill are placed with PCBUs. While this concept has been used since 2011/12 in most Australian jurisdictions it is a relatively new concept in Western Australia. An exemption contemplated by subclause 5(7) [sic] may be required to remove unintended consequences associated with this concept and to ensure that the scope of the Bill does not inappropriately extend beyond WHS matters. For example, regulations could be made to exempt:

- prescribed agents from supplier duties under the Bill (the duties would instead fall to the principal), and
- prescribed ‘strata title’ bodies corporate from PCBU duties under the Bill.\(^84\)

3.18 In the Committee’s view cl 5(6) does not operate as a Henry VIII clause because it does not amend the definition of a PCBU. It does however allow prescribed persons to be excluded from application of the Bill, including the provisions in Part 2.

**Principles (cl 14—16)**

3.19 The duties of care in the Bill apply to different groups of people based on their contribution to the safety of a workplace. Each group is required to perform their duties to different standards as shown in Figure 2 on the following page. This reflects the understanding that each group has a different level of ability to control work health and safety risks.

3.20 The following principles apply to all duties under the Bill:

- a duty cannot be transferred to another person\(^85\)
- a person can have more than one duty by virtue of being in more than one class of duty holder\(^86\)
- more than one person can concurrently have the same duty.\(^87\)

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\(^85\) Work Health and Safety Bill 2019, cl 14.

\(^86\) ibid., cl 15.

\(^87\) ibid., cl 16.
Reasonably practicable (cl 18)

3.21 The primary duty of care requires a PCBU to ensure the health and safety of others ‘so far as is reasonably practicable’. This standard also applies to the other duties of PCBUs in cl 20–26A of the Bill.

3.22 Requiring PCBUs to do what is reasonably practicable is intended to moderate the liability of duty holders.\(^{88}\) It means the duty imposed on a PCBU is not an absolute duty.\(^{89}\)

3.23 Clause 18 of the Bill, which has been adopted without amendment from the Model Bill, provides the following definition:

18. What is reasonably practicable in ensuring health and safety?

In this Act—

reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the hazard or the risk; and

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\(^{89}\) Chugg v Pacific Dunlop Ltd [1990] HCA 41; (1990) 170 CLR 249, 251.
(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.90

3.24 Subsection (c) includes objective and subjective elements of the knowledge that is required to be proven about the risk of injury and the means of eliminating it. The Court of Appeal of Western Australia interpreted this aspect of the current laws in the following way:

It is that possessed by persons generally who are engaged in the relevant field of activity and not merely the actual knowledge in fact possessed by a specific employer in the particular circumstances.91

3.25 The National Review noted that requiring PCBU to do all that is reasonably practicable is a high standard:

The standard of ‘reasonably practicable’ is a high one, requiring the duty holder to consider all of the circumstances and take measures that are commensurate to the likelihood and seriousness of the harm which may result from the relevant activities, and relieved only by consideration of what is not possible or what is clearly unreasonable in the circumstances.92

3.26 It has also been noted that:

If the prosecutor fails to satisfy the court that there was something that was reasonably practicable that the duty holder did not do, then the offence cannot be proven. In practice, this is not a heavy burden for the prosecutor to meet.93

3.27 The definition of reasonably practicable proposed by the Bill is substantially similar to the standard currently required by the corresponding duty in the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994.94 The main difference is that cl 18(e) of the Bill explicitly requires an assessment of risk before considering the costs of minimising the risks.

3.28 Safe Work Australia has prepared a guide which contains the following guidance on costs:

Where the cost of implementing control measures is grossly disproportionate to the risk, it may be that implementing them is not reasonably practicable and therefore not required. This does not mean however that the duty holder is excused from doing anything to minimise the risk so far as is reasonably practicable. A less expensive way of minimising the likelihood or degree of harm must instead be used.

...
If a PCBU cannot afford to implement a control measure that should be implemented after following the weighing up process set out in section 18 of the WHS Act, they should not engage in the activity that gives rise to that risk.\(^\text{95}\)

3.29 The Boland Report found there are mixed views on this standard with small businesses finding it difficult to understand and apply:

I found that there were mixed views on the definition of ‘reasonably practicable’, whether it was an appropriate qualifier to the primary duty and particularly its ability to be easily applied in practice. While big business supported the qualifier, valuing the flexibility it offered, small business generally expressed a preference for more prescription, which is summed up in the constant refrain throughout the Review: ‘just tell us what to do’.\(^\text{96}\)

3.30 Ultimately the Boland Report did not make any recommendations to change the standard of reasonably practicable.\(^\text{97}\)

**FINDING 1**

Clause 18 of the Work Health and Safety Bill 2019 defines ‘reasonably practicable’ to a substantially similar standard to that currently set out in s 3 of the Occupational Safety and Health Act 1984 and s 4 of the Mines Safety and Inspection Act 1994.

**FINDING 2**

Clause 18(e) of the Work Health and Safety Bill 2019 is a material but justified variant to the existing standard in s 3 of the Occupational Safety and Health Act 1984 and s 4 of the Mines Safety and Inspection Act 1994.

**Primary duty of care (cl 19)**

3.31 The main duty of care in the Bill is the ‘primary duty of care’.\(^\text{98}\) The primary duty of care requires PCBUs to ensure, so far as is reasonably practicable, the health and safety of workers and other persons affected by the business or undertaking (e.g. visitors and passers–by):

19. **Primary duty of care**

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers engaged, or caused to be engaged, by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

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\(^{95}\) Safe Work Australia, *How to determine what is reasonably practicable to meet a health and safety duty*, Canberra, 2013, s 5.13, pp 15–6.


\(^{97}\) ibid., p 50.

\(^{98}\) Work Health and Safety Bill 2019, cl 19.
(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable—

(a) the provision and maintenance of a work environment without risks to health and safety; and
(b) the provision and maintenance of safe plant and structures; and
(c) the provision and maintenance of safe systems of work; and
(d) the safe use, handling and storage of plant, structures and substances; and
(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

3.32 The primary duty of care combines a number of provisions in the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994 including:

- duties of employers
- duties of employers and self-employed persons
- duty of body corporate
- contract work arrangements
- labour arrangements in general
- labour hire arrangements
- duty of employer to maintain safe premises.

3.33 However, the primary duty of care has a wider reach than the combined effect of these provisions because it applies to the broader concept of a PCBU. This differs from the existing laws which focus on the employer–employee relationship.

**Other duties of persons conducting a business or undertaking (cl 20–26A)**

3.34 The Bill also prescribes a number of other duties on PCBUs where they undertake particular conduct in their business or undertaking. These duties are in addition to their primary duty of care. A PCBU can be charged for breaching more than one duty.99

3.35 These duties have been included without substantive amendment from the Model Bill, with the exception of cl 26A which is not contained in the Model Bill:

- duty to maintain workers’ accommodation (cl 19(4))
- duty of PCBUs involving management or control of workplaces (cl 20)
- duty of PCBUs involving management or control of fixtures, fittings or plant at workplaces (cl 21)

99 ibid., cl 15.
- duties of PCBUs that design plant, substances or structures (cl 22)
- duties of PCBUs that manufacture plant, substances or structures (cl 23)
- duties of PCBUs that import plant, substances or structures (cl 24)
- duties of PCBUs that supply plant, substances or structures (cl 25)
- duty of PCBUs that install, construct or commission plant or structures (cl 26)
- duty of PCBUs that provide services relating to work health and safety (cl 26A).

**Duty of work health and safety providers (cl 26A)**

3.36 The duty of care of work health and safety providers has been included in accordance with the recommendations of the Ministerial Advisory Panel. This duty requires work health and safety service providers to ensure they will not put the health and safety of people in the workplace at risk.

3.37 Work health and safety services are defined in the Bill as:

*WHS services*—

(a) means services that relate to work health and safety; but

(b) does not include the following—

(i) services provided under this Act by a WHS authority, a health and safety representative (or deputy) or a health and safety committee;

(ii) services provided under a corresponding WHS law by a person or body corresponding to a WHS authority, a health and safety representative (or deputy) or a health and safety committee;

(iii) emergency services provided by police officers, or other emergency services personnel, in situations where there is a serious risk to the health or safety of any individual;

(iv) services that are subject to legal professional privilege or that would be subject to legal professional privilege but for that privilege having been waived.

Note for this definition:

For the purposes of paragraph(a), the services could be, for example, providing any of the following relating to work health and safety—

(a) recommendations or other advice;

(b) testing or analysis;

(c) other information or documents, for example, a report, plan, programme, strategy, guideline or manual;

(d) a training or other educational course.101

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100 Stephanie Mayman, *Modernising work health and safety laws in Western Australia*, Western Australia, 30 June 2018, recommendation 8.

101 Work Health and Safety Bill 2019, cl 26A(1).
3.38 Some stakeholders were critical of including a specific duty for work health and safety service providers because:

- its inclusion is not consistent with the policy objective of harmonisation
- it may cause work health and safety service providers to refuse offering quick advice (for example, over the phone) for fear of breaching cl 26A.\(^{102}\)

3.39 Mr Mark Goodsell, Head of the New South Wales Branch of the Australian Industry Group made the following observation:

I think there is a real difficulty in one state doing it, because the market for work health and safety services is a national market and you run the very real risk that those services will be just provided beyond the state border because the word gets out that you just do not do it in Western Australia because that is the one place where there is an extra duty. There are some real issues about how, if it is not thought through properly, it might prevent a lot of organisations that are providing a lot of good advice in template form, which is very popular with many industries—it is not perfect, but it is strongly embraced by a lot of industries that need to take safety seriously. In the COVID emergency, in fact, we have done a lot of that advice—both industry, associations and even regulators, have been providing a lot of advice with imperfect information. We have had to because we have been dealing with a very novel situation. If this duty had been in existence in March in other states, there would have been a real fear, certainly in our organisation, in trying to help our members deal with the COVID situation because we would not necessarily have been dealing with, as I said, perfect information and we feel that this duty might have put us deeply at risk, even though that was exactly what was necessary during the COVID crisis—quick decision-making with imperfect information. As I said a few minutes ago, we are in two minds. We can understand the utility of such a duty, but I think there is a real danger for one state to do it rather than to try and process that particular duty in 26A through the harmonisation process and have it done on a national basis so there are no gaps and the market is covered. Secondly, there are issues about how you deal with template advice in some key industries. Thirdly, I do not know whether it would apply to unions, on reading it. It seems to me that it would. They purport to give a lot of work health and safety advice. It is not at all clear whether it would apply to unions. There are other exclusions, we note, but not for unions, who are big players in the work health and safety advice space.\(^{103}\)

3.40 Including a specific duty of care for work health and safety service providers was previously recommended by the National Review:

The justification for placing a duty of care on providers of OHS services is that these persons may, in providing the services, materially influence health or safety by directing or influencing things done or provided for health or safety by directing or influencing things done or provided for health or safety.\(^{104}\)

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\(^{102}\) Submission 11 from Chamber of Commerce and Industry of Western Australia, 26 June 2020, p 5; Submission 41 from the Australian Industry Group, 26 June, p 18; Catherine Greville, Head of Legal, Advocacy and Professional Services, Master Builders Association of Western Australia, Answer to question on notice 4 asked at hearing held 9 July 2020, dated 17 July 2020, pp 3–11.


However ultimately this recommendation was not endorsed by the Workplace Relations Ministers’ Council on the basis that work health and safety services are already covered by the primary duty of care and therefore unnecessary.\textsuperscript{105}

In his evidence before the Committee, Mr Andrew Cotgreave, a Senior Policy Advisor at DMIRS explained:

The purpose of clause 26A is to provide additional clarity in relation to those services. It makes the duty specific rather than implicit, it provides parameters for determining whether an activity actually does constitute a work health and safety service or not, and it provides clear exceptions—for example, for emergency workers. I have heard the same fears expressed about additional regulatory burden. My argument would be that there is a current requirement for them to provide a service that does not put people at risk and is fit for purpose.\textsuperscript{106}

Mr Cotgreave was also asked to consider the possibility of this duty encompassing work health and safety advice given by unions:

\textbf{Hon MATTHEW SWINBOURN:} I have an additional question on 26A. There was a witness earlier today that suggested that it might possibly capture unions and some of the functions that they perform. Has any consideration been given to that? Do you think it will capture unions?

\textbf{Mr COTGREAVE:} It depends. If they are providing a work health and safety service, then, potentially, yes. I mean, we would have to look at exactly how they are doing it and what structure they are using. One important thing to capture here is that it is only the provision of services from one PCBU to another. So if you are doing something internally—you are a big corporation and you provide your own training on safety and health—it is not a WHS service. It is only if it is one PCBU providing that service to another PCBU. We would have to look at exactly what the unions were doing and I would have to sit there with the clause in front of me.

\textbf{Hon MATTHEW SWINBOURN:} For example, a union might go into a workplace—their health and safety officer—and have a dialogue and provide information to a PCBU in pursuit of the interests of their members. It is a question of whether or not that kind of activity might be captured under this provision in that regard. The primary purpose of the union in that instance would be to provide assistance to its members, but if it is providing information to the PCBU, which it then relies upon, are they potentially placing themselves in an area of vulnerability under these laws?

\textbf{Mr COTGREAVE:} It is one of those hypotheticals. I would suggest no, because it does not have the character of a work health and safety service, but I suspect this is something we may need the courts—

\textbf{Hon MATTHEW SWINBOURN:} The service does not have to be for profit, does it?

\textbf{Mr COTGREAVE:} No, not at all. No, it does not. But I think you need to be providing a methodical package of information or a methodical package of products that constitute that service. Simply, under the consultation provisions, going in and talking to your member, I cannot see that that would be a work health and safety service. I am prepared to be proven wrong by the courts.


\textsuperscript{106} Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 28.
The CHAIR: If unions were providing WHS services, they would be captured by the provisions.

Mr COTGREAVE: Yes. If they provide training to people who pay them for that training, then, absolutely, they are captured.107

**FINDING 3**
The duties in cl 20–26 of the Work Health and Safety Bill 2019 have been included without significant amendment from the Model Work Health and Safety Bill 2019.

**FINDING 4**
The duty in cl 26A of the Work Health and Safety Bill 2019 is not expressly included in the Model Work Health and Safety Bill. The Model Bill contains an implicit duty on those providing work health and safety services under cl 19. The inclusion of cl 26A in the Bill makes explicit the implicit duty of those providing work health and safety services under cl 19 of the Bill.

**FINDING 5**
There is no exemption from the provisions in cl 26A of the Work Health and Safety Bill 2019 for unions providing work health and safety services.

**Duty of officers (cl 27)**

3.44 The Bill introduces a new duty of care for officers of a PCBU. This represents a significant change to the current law by introducing a positive obligation on officers to exercise due diligence to ensure their PCBU complies with its primary duty of care. Under the current law, an officer can only be held liable for an offence that occurs with their consent, connivance or neglect.108

3.45 The Boland Report found that this provision ‘was highlighted throughout the Review as one of the key successes of the model WHS laws’.109

3.46 The duty proposed by the Bill is as follows:

**27. Duty of officers**

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

...  

(4) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.110

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107 ibid., p 29.
108 Occupational Safety and Health Act 1984, s 55; Mines Safety and Inspection Act 1994, ss 99–100A.
110 Work Health and Safety Bill 2019, cl 27.
Meaning of officer (cl 7)

3.47 For the purposes of this duty, the Bill defines an ‘officer’ to include senior staff in a business or organisation. An officer may include:

- a director or secretary of a corporation
- a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a PCBU or a public corporation
- a person who has the capacity to significantly affect a PCBU’s financial standing
- a person whose instructions or wishes the directors of a PCBU are accustomed to act in accordance with (excluding professional advisors)
- a receiver, administrator, liquidator or trustee of a PCBU
- an officer of the Crown.  

3.48 The following people are excluded from the definition of an officer:

- the Governor
- a Minister of a state, territory or the Commonwealth
- a local government member.

3.49 The definition of an officer was recently considered by the ACT Industrial Magistrates Court in relation to the Work Health and Safety Act 2011 (ACT). In that case a truck driver was electrocuted and died when his truck came into contact with overhead power lines. The head project manager was charged with failing to exercise due diligence as an officer. While the court accepted that he had operational responsibility they found he lacked sufficient seniority to affect the whole or a substantial part of the business to satisfy the definition of an officer.

Due diligence

3.50 The introduction of a positive obligation of due diligence is consistent with the following finding of the National Review:

The duty would make clear that the officer must be proactive in taking steps to ensure compliance by the company. The standard of ‘due diligence’ is well known by those who would be sufficiently directing or influencing the decisions of the company as to be defined as ‘officers’.

By making the officer liable only for his or her own acts or omissions would provide a sense of control by the officer over their personal liability and a sense of fairness. These elements are each concerns expressed in relation to the ‘attributed’ liability of an officer.

[A positive duty on officers] is more likely than the other options to ensure appropriate, proactive, steps are taken by an officer for compliance by the company with the duties of care placed on the company.
3.51 The Bill contains a list of steps that an officer must take to satisfy their duty to exercise due diligence:

*due diligence* includes taking reasonable steps—

(a) to acquire and keep up-to-date knowledge of work health and safety matters; and

(b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and

(c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and

(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).\(^{115}\)

3.52 Safe Work Australia has prepared a guide which explains that an officer can only comply with their duty by taking an active and inquisitive role in work health and safety.\(^{116}\)

3.53 Mr Mark Goodsell from the Australian Industry Group noted that requiring officers to undertake due diligence helps to address work health and safety risks before an incident occurs:

There is a very powerful tool in the harmonised legislation, and it is the due diligence duty. It is underutilised, frankly. I do not think regulators around the country really understand the power of the weapon they have to deal with this exact issue about getting into behaviour before it causes a problem. If you look at what we are trying to do with industrial manslaughter or any of the big-ticket penalties, you are trying to get into the head of the person—the head of the management or the head of people—after there has been an event. It is much better to try and get in their heads before there is an event, to try to head off an event. That is basically what due diligence does. It was relatively novel. It did exist in some jurisdictions in one form or another prior to harmonisation, but it has been pretty successful. The Boland review recorded that it is universally praised, particularly by company directors, as a powerful indicative tool of the kind of thinking and behaviour they are supposed to bring in. The beauty of it is it does not need someone to die to be enacted. It does not even need someone to be injured. It does not even need a near miss. All it needs is to have a smart regulator who can have a conversation with a management team or a board against the criteria of due diligence and work out whether, in fact, that group of people are

\(^{115}\) Work Health and Safety Bill 2019, cl 27(5).

already breaching their duty way ahead of even having an incident. I think the regulators, because of evidentiary requirements, are always perversely attracted to investigating after things have happened, but they have a very powerful tool in due diligence.117

3.54 Imposing a duty on an officer to comply with a positive duty will help to ensure compliance by the PCBU before a workplace incident occurs.118 Ultimately this will benefit workers, visitors and other persons associated with the work of the PCBU.

Duty of workers (cl 28)

3.55 Clause 28 of the Bill requires workers to take reasonable care for their own health and safety:

28. Duties of workers

While at work, a worker must—

(a) take reasonable care for the worker’s own health and safety; and

(b) take reasonable care that the worker’s acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and

(d) cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

3.56 This provision is similar to the existing duty of employees in the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994.119

Meaning of worker

3.57 The main difference proposed by the Bill is that the duty would apply more broadly than the current provisions which are limited to employees, apprentices, contractors and workers assigned by a labour hire company.120 Instead, the Bill introduces the following definition of a worker which would bring anyone who performs work within the scope of the duty:

7. Meaning of worker

(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as—

(a) an employee; or

(b) a contractor or subcontractor; or

(c) an employee of a contractor or subcontractor; or

(d) an employee of a labour hire company who has been assigned to work in the person’s business or undertaking; or

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119 Occupational Safety and Health Act 1984, s 20; Mines Safety and Inspection Act 1994, s 10.
120 Occupational Safety and Health Act 1984, ss 3 (definition of ‘employee’), 20, 23D, 23E, 23F.
(e) an outworker; or
(f) an apprentice or trainee; or
(g) a student gaining work experience; or
(h) a volunteer; or
(i) a person of a prescribed class.

(2) For the purposes of this Act, a police officer is—
(a) a worker of WA Police; and
(b) at work throughout the time when the officer is on duty or lawfully performing the functions of a police officer, but not otherwise.

(3) The person conducting the business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking.121

FINDING 6
Clause 7(1)(i) of the Work Health and Safety Bill 2019 allows regulations to prescribe additional classes of workers to be captured by the Bill, including Part 2.

RECOMMENDATION 1
The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for cl 7(1)(i) of the Work Health and Safety Bill 2019 to be retained.

Reasonable care
3.58 Workers are required to take reasonable care for their own health and safety at work. This requires an objective assessment of what a reasonable person would have done in the circumstances.

Duty of other persons at a workplace (cl 29)
3.59 The standard of reasonable care also applies to ‘other persons’ at a workplace. It is appropriate that these duty holders are required to comply with a lower standard than PCBUs because they have less influence to eliminate or reduce risks to health and safety.122

3.60 Clause 29 of the Bill requires ‘other people’ at a workplace to take reasonable care for their own health and safety. This provision is unchanged from the Model Bill.

3.61 The duty is similar to that imposed on workers however it does not include a requirement to cooperate with any reasonable policy or procedure of the PCBU:

29. Duties of other persons at the workplace

A person at a workplace (whether or not the person has another duty under this Part) must—

(a) take reasonable care for the person’s own health and safety; and
(b) take reasonable care that the person’s acts or omissions do not adversely affect the health and safety of other persons; and

121 Work Health and Safety Bill 2019, cl 7.
(c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act.

3.62 This duty covers people who are ‘at a workplace’.\textsuperscript{123} People in this category may include customers and other visitors to a workplace.

3.63 The current work health and safety law only requires visitors to workplaces to comply with certain directions.\textsuperscript{124} Imposing a duty on other people as proposed represents a significant change in the law. The benefits of introducing a duty on other people in Western Australia was previously recognised in the 2002 statutory review of the \textit{Occupational Safety and Health Act 1984}:

Employers and those in control of workplaces are usually able to oblige visitors to comply with safety and health requirements or to exclude them from the workplace. However, there appears no legal mechanism to ensure visitors comply with legitimate site safety and health requirements. It is also not always convenient or possible to remove visitors from a site. The behaviour of a workplace visitor, through a wilful act or as a result of ignorance, could compromise the safety and health of a workplace.

In the same way that the Act should apply to protect visitors to the workplace it is necessary to protect those at the workplace from the unsafe practices of visitors.\textsuperscript{125}

\textbf{FINDING 7}

Consistent with cl 29 of the Model Work Health and Safety Bill, cl 29 of the Work Health and Safety Bill 2019 significantly broadens the current obligation on visitors to workplaces to comply with directions. Clause 29 of the Bill also broadens the class of persons who hold this obligation to include persons not engaged in work at a workplace, for example visitors, customers and passers-by.

\textbf{Meaning of workplace (cl 8)}

3.64 The definition of workplace has been adopted from the Model Bill without amendment. This definition is broad and includes any place where work is carried out.

3.65 In responding to a question about the concept of ‘other persons’, Mr Cotgreave from DMIRS helpfully explained the meaning of workplace as follows:

First of all, I want to address the idea of vicinity. Vicinity is not a concept in the Work Health and Safety Bill. The concept is framed in terms of work carried out as a part of the conduct of the business or undertaking. Vicinity implies geographical proximity, but sometimes the work may be conducted elsewhere, for example. The duty relates to people such as patrons at a cinema and shoppers at a shop. In some cases, cranes have to lift loads over public footpaths, so there would be an obligation to those people as other persons.\textsuperscript{126}

\textsuperscript{123} Work Health and Safety Bill 2019, cl 29.
\textsuperscript{124} \textit{Occupational Safety and Health Act 1984}, s 57A; \textit{Mines Safety and Inspection Act 1994}, s 102A.
\textsuperscript{126} Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 14.
3.66 The Bill takes a similar approach to the existing definition in the *Occupational Safety and Health Act 1984*:

Table 7. Meaning of workplace

<table>
<thead>
<tr>
<th>Current Act</th>
<th>Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 3(1)—Terms used</td>
<td>Section 8—Meaning of workplace</td>
</tr>
<tr>
<td>...workplace means a place, whether or not in an aircraft, ship, vehicle, building or other structure, where employees or self-employed persons work or are likely to be in the course of their work.</td>
<td>(1) A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.</td>
</tr>
<tr>
<td></td>
<td>(2) In this section—</td>
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<td></td>
<td>Place includes—</td>
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<tr>
<td></td>
<td>(a) a vehicle, vessel, aircraft or other mobile structure; and</td>
</tr>
<tr>
<td></td>
<td>(b) any waters and any installation on land, on the bed of any waters or floating on any waters.</td>
</tr>
</tbody>
</table>

[Source: *Occupational Safety and Health Act 1984*, s 3(1); *Work Health and Safety Bill 2019*, s 8]
CHAPTER 4
Industrial manslaughter

Introduction

4.1 This chapter considers the two offences of industrial manslaughter proposed by cl 30A (industrial manslaughter—crime) and cl 30B (industrial manslaughter—simple) of the Bill. Only a PCBU or an officer of a PCBU can be charged with these offences. Both of these offences carry high financial penalties and the possibility of imprisonment.

4.2 Industrial manslaughter—crime requires the prosecution to prove the accused knew their conduct was likely to cause the death of an individual and acted in disregard of that likelihood. Industrial manslaughter—simple does not require proof of the accused’s subjective knowledge.

4.3 The Committee heard from a range of industry and employer representatives about their concerns regarding the introduction of the industrial manslaughter provisions. These included:

- whether the offence was one of strict liability
- what the prosecution would be required to prove including whether there was a requirement for negligence to be established
- the impact on the safety culture in workplaces.

4.4 The national work health and safety landscape within which industrial manslaughter provisions have been discussed over a number of years can be difficult to navigate. The particular difficulty here arises because industrial manslaughter has been interpreted and managed differently from state to state as can be seen in the discussions at paragraphs 2.27–2.47. While recommendations have been made to introduce industrial manslaughter into the Model Bill that has not yet occurred. No harmonised approach currently exists.

4.5 One of the fundamental legal concepts underpinning work health and safety legislation is the law of negligence:

> The cardinal principle of negligence is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage as a consequence of a breach of that duty.\(^{128}\)

4.6 It is well established that employers have an implied duty not to expose their workers to unnecessary risks.\(^{129}\) This duty of care is mirrored in work health and safety legislation in Australia including the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994*, the Model Bill and the Bill.\(^{130}\)

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\(^{128}\) *Donoghue v Stevenson* (1932) AC 562 per Lord MacMillan.

\(^{129}\) *Hamilton v Nuroof* (WA) Pty Ltd (1956) 96 CLR 18.

4.7 All of the offences under the Bill, including these industrial manslaughter provisions, are criminal offences.\textsuperscript{131} The reason that the offence under cl 30B is called industrial manslaughter—simple refers to the fact that it is to be tried as a simple offence in the Magistrates Court.

4.8 The Department of Mines, Industry Regulation and Safety (DMIRS) has advised that the offences in the Bill have been closely modelled on existing offences under the \textit{Occupational Safety and Health Act 1984} and the \textit{Mines Safety and Inspection Act 1994}. Industrial manslaughter—crime is based on the existing level 4 offence while industrial manslaughter—simple is based on the existing level 3 offence. Despite similarities in the elements of these offences the maximum penalties are significantly higher including the potential for imprisonment which was not previously a sentencing option for a level 3 offence. The merits of this approach are considered by the Committee.

4.9 This chapter begins by considering the background to the introduction of the industrial manslaughter offences, the concerns of stakeholders and the consultation process. It then deals with the following issues in relation to each offence:

- elements of the offence
- legal test
- maximum penalties
- the appropriate court in which each offence is to be heard
- the appropriate prosecutor of each offence
- whether the offences should be contained in the \textit{Criminal Code} or the legislative framework for work health and safety
- whether the defences and excuses outlined in the \textit{Criminal Code} are available under the proposed new regime
- the exclusion of workers from being charged
- the recovery of legal costs by a person that is acquitted.

\textbf{FINDING 8}

The Model Work Health and Safety Bill does not include industrial manslaughter and no harmonised approach exists.

\textbf{Background to introduction of industrial manslaughter offences}

4.10 Following deaths at Dreamworld and an Eagle Farm worksite in 2016 the government of Queensland ordered a best practice review of work health and safety laws.\textsuperscript{132} The final report, published in 2017, contained 58 recommendations including the introduction of an offence of industrial manslaughter. The review noted this could reduce the difficulties involved in prosecuting a company:

it is considered that, despite the view of some stakeholders, there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{131} \textit{Interpretation Act 1984}, s 67; \textit{Criminal Code}, s 3.
\item \textsuperscript{132} Tim Lyons, \textit{Best Practice Review of Workplace Health and Safety Queensland}, Queensland, 3 July 2017, recommendation 46.
\end{itemize}
\end{footnotesize}
necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect.\footnote{Commonwealth of Australia, Senate Education and Employment References Committee, \textit{They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia}, October 2018.}

4.11 In October 2018 the Senate Education and Employment References Committee published a report seeking to address issues in the way in which industrial deaths are investigated and prosecuted in Australia.\footnote{ibid., recommendation 13.} It recommended introducing:

- a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.\footnote{Marie Boland, \textit{Review of the model Work Health and Safety Laws}, Canberra, December 2018, recommendation 23b.}

4.12 In December 2018, the Boland Report recommended industrial manslaughter be applied where the gross negligence of a duty holder causes the death of a person.\footnote{Patel v The Queen [2012] HCA 29; 247 CLR 531.} It specifically recommended an objective standard of gross negligence as articulated by the High Court of Australia in \textit{Patel v The Queen}.\footnote{Marie Boland, \textit{Review of the model Work Health and Safety Laws}, Canberra, December 2018, recommendation 23b.}

4.13 The Boland Report also recommended the offence apply in circumstances beyond the death of a worker including the death of third parties such as clients, customers, visitors or neighbours.\footnote{Submission 7 from Patricia Kelsh; Submission 10 from Ashlea Cunico; Submission 11 from Regan Ballantine; Submission 16 from Sharon Westerman; Submission 25 from Mark and Janice Murrie; Submission 32 from Tony Hampton; Submission 35 from Greg Zappelli; and Submission 62 from Christiana Paterson.}

Views of bereaved family members

4.14 The Committee received a number of submissions from family members of people who had died while at work.\footnote{ibid., p 113.} These submissions were all in favour of introducing the industrial manslaughter offences in their current form. Many of these families supported the offences on the basis that they hoped they would have a deterrent effect on employers to improve work health and safety standards. The Committee heard from four bereaved families who provided moving testimony to this effect.

4.15 Mr Mark Murrie and Mrs Janice Murrie, the parents of Luke Murrie:

\textbf{Mr M Murrie}: You need a deterrent. Luke was killed before poor old Lee and Tony’s son, Jarrod. So, 13 years ago, the workplace was not safe then and it is still not safe now because workers are still getting killed now. So there has got to be a deterrent. They want you to stop talking on the phone when you are driving so they upped the fine. It is simple. There has to be a big stick. You have got to make the workplace safe. I would gladly pay $45 000 to get Luke back, and so would Janice. We would give everything we have to get Luke back. They paid $45 000 each and walked out of court and we are stuck without a son. It has to change, mate. It just has to change.

...
Mrs J Murrie: With Luke, it was brought out that the lift they were doing was quicker and cheaper, so that, basically, our son was killed to save money. They tried to argue that they were not aware of the fact that the lifting was wrong, although their offices overlooked the yard. They had a perfect view of what was going on. In court, we had to listen to a question asked, because they lifted the load over the fence, so they asked one of the directors, “Would it have been safer and better to have cut a hole in the fence and put a gate in so that you’d just send it through?” He sat back, crossed his arms and said, “Do you know how much that fence costs? Not cutting a hole in it.” I am sorry, but as a parent, that is how little they cared about Luke’s life.

To me, if we have been given a sentence of never seeing our son again—I do not want to see anyone go to jail; I want to see the deterrent that had they stopped and thought for an instant that he could have been killed and they knew that what they were doing was wrong, then he would be home now.¹⁴⁰

4.16 Mr Tony Hampton, father of Jarrod Hampton:

Without a deterrent, people and companies like this will go on and on and on until there is a suitable deterrent in place. We ask that you do pass this bill in full and hand over to the judiciary the ability to make judgements and bring justice on behalf of people who have died at work. Diluting this bill is not the answer to anything. I can guarantee you that anyone who is arguing against this bill or arguing to dilute this bill has never been affected by a workplace death themselves. If they had, they would be completely on the other side of this argument.¹⁴¹

4.17 Ms Sharon Westerman, mother of Lee Buzzard:

Hon MATTHEW SWINBOURN: What do you say to those people who say that this sort of law is just about blaming people, that it is not really positive, that it is not about a deterrent and those sorts of things?

Ms WESTERMAN: I cannot understand that at all, because you put things in the context of other laws in society—road laws and those sorts of things—and people accept that. If someone accidentally, I suppose, if you want to call it that, runs someone over, they are going to get charged with something. If they are texting on their mobile phone and they did not mean to run someone over, they get charged with something. Not only that, that can stay open for 20 years—if the police want it to—and be prosecuted. These are the sorts of things that are so inconsistent. This seems to be like it is in a bubble of its own; you get killed on a worksite and it is a whole different story. It should not be like that. Someone still died, and the effects of that just go on and on because of the failure of this law.¹⁴²

4.18 Ms Regan Ballantine, mother of Wesley Ballantine:

The industrial manslaughter laws proposed in the Work Health and Safety Bill seek to do two things. Firstly, to improve safety outcomes by sending a message to industry about the gravity of their health and safety duties, and to have a penalty significant enough that it acts as a deterrent to poor conduct. Secondly, it is the very forgotten consideration in this debate around industrial manslaughter, which is the opportunity for real justice to be served. I do not advocate in any way, shape or form that all workplace deaths warrant a prosecution. It is a sad but acceptable

¹⁴⁰ Mark Murrie and Janice Murrie, transcript of evidence, 8 July 2020, p 6.
¹⁴¹ Tony Hampton, transcript of evidence, 8 July 2020, p 2.
¹⁴² Sharon Westerman, transcript of evidence, 8 July 2020, p 2.
fact of life that people are killed in unforeseeable accidents. Had my son been killed in an accident, the sane and spiritually sound thing to do, albeit very reluctantly, would be to accept that nature had been unkind to him. What I cannot accept is that manslaughtering offenders can escape prosecution because of a glaring gap in the law, which our legislature, year after year, decade after decade, fails to address, continuing to protect the self-serving interests of industry and leaving the families left behind to pick up the broken pieces of their life and endure the utter cruelty of being dealt an injustice.  

4.19 In addition, the Committee received a submission from Ms Partricia Kelsh, wife of Desmond Kelsh saying:

Without punishment, there is no deterrent to prevent other families experiencing our nightmare, and no system in place to protect our population who go to work each day and deserve to come home knowing their workplace is as safe as possible. Manslaughter laws will act as a deterrent and make possible a great reduction if not elimination of death through work fails.  

Divided responses of other stakeholders

4.20 The attitudes of stakeholders to the proposed industrial manslaughter offences were largely divided between employee representative organisations and industry groups. Employee groups were supportive of the offences. Industry groups expressed concern about the repercussions that these offences would have on businesses and the potential to discourage open and collaborative work health and safety culture.

4.21 For example, one stakeholder was concerned that the industrial manslaughter offences would have a ‘chilling effect’ on collaborative efforts to improve work health and safety culture and systems.  

145 Described in another way, some stakeholders are concerned that the proposed provisions (in particular, the simple offence prescribed in cl 30B) will undermine positive and proactive approaches to improving work health and safety.  

Some of these concerns are set out below:

- **Murrin Murrin Operations Pty Ltd:**
  
  the introduction of the industrial manslaughter regime and Category 1 offence as proposed could significantly detract from the constructive safety culture that underpins best practice in the mining industry and have far-reaching implications for modern safety management in Western Australia.

- **Civil Contractors Federation:**
  
  Safer workplaces are created through a strong workplace safety performance and culture. A strong culture is not created through harsh penalties ...  

- **Gold Fields Australia Pty Ltd:**
  
Regan Ballantine, transcript of evidence, 8 July 2020, p 2.

144 Submission 7 from Patricia Kelsh, 25 June 2020, p 1.


146 For example Submission 4 from ABN Group, 25 June 2020, p 2; Submission 14 from Housing Industry Association, 26 June 2020, p 6; Submission 18 from James Davis, 26 June 2020, p 2; Submission 39 from Australian Hotels Association of Western Australia, 26 June 2020, p 2; and Submission 58 from Pearl Producers Association, 29 June 2020, pp 7–8.


148 Submission 40 from Civil Contractors Federation, 26 June 2020, p 2.
Recognising that one of the key objectives of the Bill is to foster cooperation and consultation ... [clause 3(1)(c)] ... , we believe that this punitive approach may hinder our efforts to foster the core practices of speaking up, robust investigation and root–case analysis, and the sharing of information and learnings.\footnote{Submission 52 from Gold Fields Australia Pty Ltd, 26 June 2020, p 2.}

- **Joint Industry Group (signed by 25 co–signatories):**

  It is notable that neither the Explanatory Memorandum, nor the Government’s August 2019 media release, focus on safety culture as being at the heart of ensuring workplace safety or at all. As noted above, the focus of the new offences is instead on holding people responsible for any workplace deaths through prosecuting them under two new offences of industrial manslaughter, as set out in sections 30A and 30B of the Bill.\footnote{Submission 54 from Joint Industry Group, 26 June 2020, p 10.}

- **Master Builders Association of Western Australia:**

  We have seen Industrial Manslaughter engender excessive legalism and a ‘blame’ culture where employers and workers focus on defending themselves rather than working cooperatively to achieve safety outcomes. This shifts the focus to paper–based legal defences for incidents, thereby discouraging reporting and proactive analysis of incidents.\footnote{Submission 56 from Master Builders Association of Western Australia, 26 June 2020, pp 13–4.}

- **The Pastoralists and Graziers Association of Western Australia:**

  The PGA is deeply concerned with the proposed offences set out in sections 30A, 30B and 31 of the Bill, as they focus on punitive measures rather than safety measures to improve safety. The PGA believes that this will undermine the current collaborative and partnership approach to improving safety in workplaces and encourage a more adversarial culture that will not deliver improved safety outcomes.\footnote{Submission 55 from Pastoralists and Graziers Association of Western Australia, 26 June 2020, p 5.}

4.22 However, despite the general divided response from stakeholders some industry groups were supportive of the offence industrial manslaughter—crime proposed under cl 30A.\footnote{Submission 12 from Newmont Mining Service Pty Ltd, 25 June 2020, p 1; Submission 30 from Woodside Energy Ltd, 26 June 2020, p 1; Submission 31 from Roy Hill Holdings Ltd, 26 June 2020, p 1; Submission 42 from Australian Institute of Company Directors, 26 June 2020, p 1; and Submission 60 from Association of Mining and Exploration Companies, 26 June 2020, p 3.} For example, Newmont Mining made the following comment:

  Notwithstanding our general support for the legislation, Newmont Australia shares some concerns raised by industry bodies including the Chamber of Minerals and Energy Western Australia, of which Newmont Australia is a member, regarding the potential effect of the operation of s 30B of the Bill, the proposed ‘simple offence’ of industrial manslaughter. In raising this concern, Newmont Australia notes that we do not oppose support [sic] the creation of the offence of industrial manslaughter, set out in s 30A of the Bill, and consider this drafting to be appropriate given the seriousness of the offence.\footnote{Submission 12 from Newmont Mining Service Pty Ltd, 25 June 2020, p 1.}

4.23 In September 2019, when plans for the Bill were announced, Construction Director of the Master Builders Association of Western Australia Kim Richardson questioned the deterrent effect of the laws to reduce work place incidents:
There has been a steady downward trend in work–related injuries and fatalities since 2007. Both workers and employers are better served by keeping the focus on practical safety instead of a new round of legislative change.155

4.24 State Secretary of the Construction, Forestry, Maritime, Mining and Energy Union, Mick Buchan responded in support of industrial manslaughter:

Safety costs money. And while the penalties for breaches are purely financial, decisions will be made on a purely financial basis.156

4.25 Table 8 shows the number of work related traumatic injury fatalities across all jurisdictions from 2012 to 2018.

Table 8. Work related traumatic injury fatalities in Australia 2012–2018

<table>
<thead>
<tr>
<th>State</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
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<td>QLD</td>
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<td>172</td>
<td>168</td>
<td>162</td>
<td>168</td>
<td>131</td>
</tr>
</tbody>
</table>


4.26 The Committee asked DMIRS whether any research had been undertaken to establish that industrial manslaughter laws have an impact on the prevalence of workplace fatalities. DMIRS explained that:

I could not point you at any particular research. It is very difficult to establish a causal relationship between a particular offence and particular outcomes, particularly in the short term, other than evidence that was provided during those reports we mentioned. There has been some research done, not on industrial manslaughter but on the impact of offences on large businesses and small businesses. Safe Work Australia did a report on that. I am not aware that there is any research particularly narrowing in on industrial manslaughter and its impact on fatalities.

Most of the Australian jurisdictions that are adopting or have adopted industrial manslaughter into their work health and safety laws have not had them in long enough to see an impact yet.157

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156 ibid.

157 Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, p 6.
During the public hearing with UnionsWA, the Construction, Forestry, Maritime, Mining and Energy Union and the Australian Manufacturing Workers Union, the Committee asked those attending to respond to some of the concerns expressed by industry groups:

**Hon MATTHEW SWINBOURN:** What do you say to those that say that industrial manslaughter, and, obviously, these penalties, will not act as an effective deterrent at all? One of the major planks of the arguments that are put forward against these things is that they will not serve as a deterrent. Do you have a response to that?

**Mr BENKESER:** From my point of view, why is there so much opposition to them if they are not going to provide a deterrence?

**Mr WHITTLE:** I think, looking to the lived experience of other states that have implemented industrial manslaughter within their work, health and safety laws, they are still in early days in some of those places. I think a number of the unintended consequences of an industrial manslaughter provision that are claimed in this state that might occur has not occurred in those other states where they have implemented the industrial manslaughter provisions. Anecdotal evidence, because it is still relatively early days from those states, through the national union movement and back to the WA movement, is that those laws have proven effective in high-risk industries in sharpening safety practices in a variety of places.

**Hon MATTHEW SWINBOURN:** But, Mr Whittle, one of the claims that is constantly put forward to us is that industrial manslaughter will destroy safety culture in workplaces in this state.

**Mr WHITTLE:** That is not the experience of the states that have implemented those provisions.

**Hon MATTHEW SWINBOURN:** And they also claim that they have been ineffective in those other jurisdictions—for example, in the ACT. Do you dispute those assertions that have been made?

**Mr WHITTLE:** I think that the ACT is a different example, given that theirs is contained in the Criminal Code. I believe that in the evidence from the ACT government to the Senate inquiry, they may have speculated that if they had their time again, they might introduce it into the work, health and safety bill in that state in order to provide that deterrent.

...  

**Mr WHITTLE:** But, more broadly on your question, those assertions are not what the experiences have been of workers on the ground in those states.\(^{158}\)

The evidence from the ACT Government to the Senate inquiry referred to by Mr Whittle above is as follows:

The ACT Government recognises that the industrial manslaughter provisions drafted in 2004 may not be the most contemporary legislative model for dealing with industrial manslaughter.

The ACT Government therefore supports the inclusion of an industrial manslaughter provision in model work health and safety (WHS) laws that is based

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158 Hon Matthew Swinbourn MLC; Robert Benkesser, Head Safety Officer, Construction, Forestry, Maritime, Mining and Energy Union; and Owen Whittle, Acting Secretary, UnionsWA, transcript of evidence, 9 July 2020, pp 19–20.
on Queensland legislation. The Territory has advocated this position in the review of model work health and safety legislation which is currently underway.\(^{159}\)

4.29 Although many stakeholders who are opposed to the Bill recommend rejecting cl 30A, 30B and 31 of the Bill, it became apparent over the course of the public hearings that those opposed to the Bill are primarily concerned about cl 30B. In particular, these groups are concerned about the threshold for an offence to be made out under cl 30B. This is discussed further in paragraphs 4.80–4.100.

**Consultation**

4.30 A number of stakeholders have been critical of the consultation process regarding the proposed industrial manslaughter offences. In particular, their concerns were that the proposed offences were not canvassed by the Ministerial Advisory Panel. These concerns were articulated as follows:

4.31 Mr Christopher Rodwell, Chief Executive Officer of the Chamber of Commerce and Industry of Western Australia:

CCIWA has long supported the principle of harmonisation of the state’s workplace health and safety laws to provide consistency and alignment with the commonwealth and other jurisdictions, and we commend the government for taking steps to harmonise our safety laws with the rest of the country, and note that the government commenced this process through consultation with employers, unions and other stakeholders, initially through the ministerial advisory panel and public consultation on its recommendations.

However, we are deeply concerned that, after the initial consultation, the government ceased taking a collaborative approach to this reform. Instead, the bill was introduced with significant inclusions on which there was no consultation with employers and is being promulgated in a divisive manner that seeks to demonise employers. In the debate on this bill, Minister Johnston stated that these laws are for workers. With respect, they are not; these are laws for workplaces and need to reflect that employers and workers are partners working together to improve safety, in which all parties have rights and responsibilities.\(^{160}\)

4.32 Ms Catherine Greville, Head of Legal, Advocacy and Professional Services, Master Builders Association of Western Australia:

In terms of the lack of consultation, I agree with my colleague here. The key point is that there is no consultation that has occurred since the government’s announcement in August 2019 and the release of the bill on 27 November 2019, and that, indeed, it has been a difficult process to seek to consult and engage with the government since then.\(^{161}\)

4.33 Mr Douglas Hall, Policy Officer, Pastoralists and Graziers Association of Western Australia:

Through our organisation’s participation in those two groups [the Agriculture Industry Safety Group and the Agriculture Working Group], we have been privy to the roll out of the review process of the bill and, certainly, the consultation on the model bill and proposed amendments and the model regulations and proposed

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\(^{159}\) Hon Rachel Stephen-Smith MLA, ACT Minister for Workplace Safety and Industrial Relations, *Submission to Senate Inquiry into the Prevention, Investigation and Prosecution of Industrial Deaths in Australia*, 6 June 2018, p 2.

\(^{160}\) Christopher Rodwell, Chief Executive Officer, Chamber of Commerce and Industry of Western Australia, transcript of evidence, 8 July 2020, p 3.

\(^{161}\) Catherine Greville, Head of Legal, Advocacy and Professional Services, Master Builders Association of Western Australia, transcript of evidence, 8 July 2020, pp5–6.
amendments that came from the ministerial advisory panel. So despite some things that have been said over the last day that industry is scrambling to have a say, we have actually been, like many other industry groups, involved in that whole process. What caught us somewhat unawares was what happened on 24 August last year at the Labor Party conference, when the Premier announced there would be these industrial manslaughter provisions added to the bill. Subsequent to that, industry groups like ourselves have made attempts to engage in consultation with the government, and that has been somewhat challenging.\(^\text{162}\)

4.34 DMIRS gave the following answers when asked about the consultation process for industrial manslaughter prior to its implementation in the Bill:

**Hon SIMON O'BRIEN:** The ministerial advisory panel they set up to advise on putting forward this legislation, they did not consider or make recommendations about industrial manslaughter, did they?

**Mr COTGREAVE:** No, they did not.

**Hon SIMON O'BRIEN:** Okay. The first I think the sector knew about it publicly, that there would be a bill with industrial manslaughter provisions in it, was in August 2019 when it was announced by government. Is that the case?

**Mr COTGREAVE:** Sorry, I would have to take that question on notice; I do not know the exact dates. I cannot confirm the date it was announced; I do not have that with me.

**Hon SIMON O'BRIEN:** That is the evidence that we have received. I think it was 24 August —

**The CHAIR:** I do not think it is controversial.

**Hon SIMON O'BRIEN:** It is not controversial, but it was about 24 August last year, I think. Since then, we understand from evidence that we have received, so I just think it is surprising that the MAP was not asked to comment on it, did not comment on it. It did not go back to an MAP for consultation from government, but three months or so after the announcement was made, the bill was produced without any further consultation in that period from announcement to the bill hitting the deck. Was that a deliberate decision not to do that?

**Mr SMITH:** If I may, the concept of industrial manslaughter has been around, as in those references I made earlier, in different reports.

**Hon SIMON O'BRIEN:** Yes, sure. It has been discussed for a long time, we understand, from evidence that we have received, so I just think it is surprising that the MAP was not asked to comment on it, did not comment on it. It did not go back to an MAP for consultation from government, but three months or so after the announcement was made, the bill was produced without any further consultation in that period from announcement to the bill hitting the deck. Was that a deliberate decision not to do that?

**Mr COTGREAVE:** My understanding is that the minister’s office did conduct consultation, but I am not familiar with what occurred there. Certainly, from my involvement, there was no consultation with exterior stakeholders.

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\(^{162}\) Douglas Hall, Policy Officer, Pastoralists and Graziers Association of Western Australia, transcript of evidence, 8 July 2020, p 2.
Hon Simon O’Brien: Yes. Well, that would seem to be the case from everything we have heard.\textsuperscript{163}

\begin{center}
\textbf{FINDING 9}
\end{center}

The extensive consultation process undertaken about modernising Western Australia’s work health and safety laws did not include the industrial manslaughter provisions proposed by cl 30A and 30B of the Work Health and Safety Bill 2019.

\textbf{Industrial manslaughter—crime (cl 30A)}

4.35 Clause 30A is the more serious of the two industrial manslaughter offences proposed by the Bill. It can be used to prosecute a PCBU or an officer.

4.36 Clause 30A is set out in full below:

\begin{quote}
\textbf{30A. Industrial manslaughter—crime}
\end{quote}

(1) A person commits a crime if—

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and

(b) the PCBU engages in conduct that causes the death of an individual; and

(c) the PCBU’s conduct constitutes a failure to comply with the person’s health and safety duty

(d) the person engages in conduct—

(i) knowing that the conduct is likely to cause the death of an individual; and

(ii) in disregard of that likelihood.

Penalty for this subsection:

(a) for an individual, imprisonment for 20 years and a fine of $5\,000\,000;

(b) for a body corporate, a fine of $10\,000\,000.

(2) A person charged with a crime under subsection (1) may be convicted of an offence under section 30B(1).

(3) An officer of a person (the PCBU) commits a crime if—

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and

(b) the PCBU engages in conduct that causes the death of an individual; and

(c) the PCBU’s conduct constitutes a failure to comply with the PCBU’s health and safety duty; and

(d) the PCBU’s conduct—

(i) is attributable to any neglect on the part of the officer; or

(ii) is engaged in with the officer’s consent or connivance; and

\textsuperscript{163} Andrew Cotgreave, Senior Policy Advisor; David Smith, Director General, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, pp 2–3.
(e) the officer engages in the officer’s conduct referred to in paragraph (d)(i) or (ii)—

(i) knowing that the PCBU’s conduct is likely to cause the death of an individual; and

(ii) in disregard of that likelihood.

(4) A person charged with a crime under subsection (3) may be convicted of an offence under section 30B(3).

Elements of the offence

4.37 In order to successfully prosecute a PCBU for an offence under cl 30A the prosecution must prove beyond reasonable doubt that:

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and

(b) the PCBU engages in conduct that causes the death of an individual; and

(c) the PCBU’s conduct constitutes a failure to comply with the person’s health and safety duty; and

(d) the person engages in conduct—

(i) knowing that the conduct is likely to cause the death of an individual; and

(ii) in disregard of that likelihood.

4.38 The requirement to prove knowledge beyond reasonable doubt is a high threshold and prosecutions will likely be reserved for egregious crimes. The prosecution must prove the accused actually knew the conduct was likely to cause a death. This is a subjective standard.

4.39 In order to successfully prosecute an officer of a PCBU for an offence under cl 30A the prosecution must prove beyond reasonable doubt that:

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and

(b) the PCBU engages in conduct that causes the death of an individual; and

(c) the PCBU’s conduct constitutes a failure to comply with the PCBU’s health and safety duty; and

(d) the PCBU’s conduct—

(i) is attributable to any neglect on the part of the officer; or

(ii) is engaged in with the officer’s consent or connivance; and

(e) the officer engages in the officer’s conduct referred to in paragraph (d)(i) or (ii)—

(i) knowing that the PCBU’s conduct is likely to cause the death of an individual; and

(ii) in disregard of that likelihood.

4.40 The requirement to prove neglect, consent or connivance of an officer comes from the existing work health and safety legislation. This was confirmed by DMIRS:

164 Occupational Safety and Health Act 1984, s 55; Mines Safety and Inspection Act 1994, ss 99–100A.
Section 55 of the OSH Act which deals with offences by bodies corporate, was the model for the additional elements for officers in clause 30A and 30B.\(^{165}\)

4.41 The Committee asked DMIRS to explain what sort of behaviour would satisfy these elements and whether ‘neglect’ amounts to civil negligence. Mr Andrew Cotgreave from DMIRS gave the following answer:

It is a complex legal question and the answers arise from case law. The question notably only refers to (3)(d)(i) and (ii) and does not refer to subsection (3)(e), which is the requirement that the officer also engages in the officer’s conduct referred to in paragraph (3)(d)(i) and (ii) knowing that the PCBU’s conduct is likely to cause the death of an individual and acts in disregard of that likelihood. It is difficult to respond to the question in a broad hypothetical way as the courts will determine if the behaviour meets these elements based on the evidence provided. The behaviour would need to have been conducted in the knowledge of likelihood of death and in conscious disregard of that fact. I have some quotations from case law here, with your indulgence. Whether neglect amounts to civil neglect will depend on the particular case but it is not a given. In Fry v Keating [[2013] WASCA 109] ... it states —

The word ‘neglect’ is an ordinary word and is not a term of art ... it presupposes the existence of some obligation on the part of the person charged. Expert evidence may be admissible as to industry practice (depending on the circumstances), but, even if it were admitted, the court would not be bound by it or constrained from making its own adjudication on whether there had been ‘neglect’ ...

That case sites a few other cases —

[T]he circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer’s state of mind was such as to amount to consent, connivance or neglect.

That is where that phrase comes from. Citing another case —

... the word ‘neglect’ in its natural meaning presupposes the existence of some obligation or duty on the part of the person charged with neglect.

... in considering ... whether there has been neglect within the meaning of section 37(1) —

I do not know what that reference is —

on the part of a particular director or other particular officer charged, the search must be to discover whether the accused has failed to take some steps to prevent the commission of an offence by the corporation to which he belongs if the taking of those steps either expressly falls or should be held to fall within the scope of the functions of the office which he holds ... the functions of the office of a person charged with a contravention ... will be a highly relevant consideration for any Judge or jury and the question whether there was on his part, as the holder of his particular office, a failure to take a step which he could and should have taken will fall to be answered in light of the whole circumstances of the case including his

\(^{165}\) David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 6 asked at hearing held 9 July 2020, dated 16 July 2020, p 2.
state of knowledge of the need for action, or the existence of a state of fact requiring action to be taken of which he ought to have been aware.\textsuperscript{166}

**Legal test**

4.42 The submission prepared by the Minister for Mines, Petroleum, Energy and Industrial Relations, Hon Bill Johnston MLA, notes the requirement to prove a breach of a duty of care is an important aspect of the proposed offence:

The industrial manslaughter offences, and lesser offences, are located in Part 2 – Health and Safety Duties of the WHS Bill and must be read in that context. Duties of care are specified in Division 1 of Part 2 and includes the primary duty of care for PCUs.

The facts and circumstances of a particular incident will determine whether a PCU has a duty of care, and it would be generally expected that a PCU will be fully aware of hazards posed by the type of work being conducted. It is inconceivable to envisage a set of circumstances where a worker wilfully disregards instructions or safe systems of work that establish a prima facie case against the PCU for contravention of a health and safety duty.\textsuperscript{167}

4.43 Table 9, which was contained in the submission from the Minister for Mines, Petroleum, Energy and Industrial Relations provides a comparison of the elements in cl 30A and the existing level 4 offence in the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*:

**Table 9. Comparison of elements: level 4 offence and cl 30A**

<table>
<thead>
<tr>
<th>Level 4 offence</th>
<th>cl 30A</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>19A(1) If an employer contravenes section 19(1) in circumstances of gross negligence, the employer commits an offence and is liable to a level 4 penalty.</td>
<td>(1) A person commits a crime if</td>
<td>Bolded section of 19A(1) is the equivalent noting the Level 4 penalty is not an indictable offence in the OSH Act.</td>
</tr>
<tr>
<td>18A(2) A contravention of a provision mentioned in subsection (1) is committed in circumstances of gross negligence if</td>
<td>(a) the person has a health and safety duty as a person conducting a business or undertaking; and</td>
<td>Subsection 18A(2)(1) provides all of the duties under which a level 4 penalty can apply</td>
</tr>
<tr>
<td>18A(2)(b) the contravention did in fact cause the death of, or serious harm to, such a person</td>
<td>(b) the person engages in conduct that causes the death of an individual; and</td>
<td>Under the WHS Bill, serious harm is covered under Category 1.</td>
</tr>
</tbody>
</table>

\textsuperscript{166} Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, pp 16–7.

<table>
<thead>
<tr>
<th>Level 4 offence</th>
<th>cl 30A</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>19A(1) If an employer contravenes section 19(1) in circumstances of gross negligence, the employer commits an offence and is liable to a level 4 penalty.</strong></td>
<td>(c) the conduct constitutes a failure to comply with the person’s health and safety duty; and</td>
<td>Bolded section of 19A(1) refers to the duties of care in the OSH Act.</td>
</tr>
<tr>
<td><strong>19A(1) If an employer contravenes section 19(1) in circumstances of gross negligence, the employer commits an offence and is liable to a level 4 penalty.</strong></td>
<td>(d) the person engages in the conduct</td>
<td>Offences in the OSH/MSI Acts are structured differently, and include elements of gross negligence which are separately defined in 18A. These elements are present in 30A but are co-located rather than being separately defined. This also avoids interpretative issues that have arisen between the defined phrase used and the elements included.</td>
</tr>
<tr>
<td><strong>18A(2)(a)(i) [the offender] knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed</strong></td>
<td>(i) knowing that the conduct is likely to cause the death of an individual; and</td>
<td></td>
</tr>
<tr>
<td><strong>18A(2)(a)(ii) acted or failed to act in disregard of that likelihood;</strong></td>
<td>(ii) in disregard of that likelihood</td>
<td></td>
</tr>
</tbody>
</table>

[Source: Submission 48 from Minister for Mines, Petroleum, Energy and Industrial Relations, Hon Bill Johnston MLA, 29 June 2020, Appendix B]

4.44 The requirement to prove the PCBU knew the conduct was likely to cause the death of an individual is similar to the standard of ‘recklessness’ required for a category 1 offence under the Model Bill. In its review the Boland Report found this standard has proven difficult to satisfy given the requirement to establish subjective knowledge.168 This is consistent with the experience in Western Australia where there has only ever been one conviction of a level 4 offence which similarly requires the prosecution to prove a conscious choice to take an unjustified risk.

4.45 During the hearing with DMIRS, Mr Cotgreave explained the intention behind cl 30A was to increase the maximum penalty while keeping the legal test substantively the same as a level 4 offence under the existing work health and safety offences:

> I guess the design philosophy is evident in the final draft that you see, 30A and 30B. I know there has been some discussion on these being novel clauses, but, in the end, the two-tiered approach that was selected is modelled very closely on the current provisions of the Occupational Safety and Health and the Mines Safety and Inspection Acts. So clause 30A, “Industrial manslaughter—crime”, is modelled on our level 4 in those acts, and 30B is modelled on our level 3. The design

168 Marie Boland, Review of the model Work Health and Safety laws, Canberra, December 2018, p 119.
4.46 In effect what has occurred is that the concept of gross negligence as defined in the current legislation has been absorbed into cl 30A through the requirement for subjective knowledge rather than using the term gross negligence:

On one level, gross negligence is baked into 30A—that is gross negligence as it is understood in Western Australia. That is the definition we have had for a long time.\(^{170}\)

4.47 Implementing a test that is based on the existing offences does not support the policy objective of harmonising work health and safety laws. This would result in uncertainty for PCBUs or workers who operate in multiple jurisdictions as they will be faced with different statutory tests and lines of legal authority. However it should also be noted that none of the industrial manslaughter provisions that have been enacted in Australia so far are drafted in an identical way.

**FINDING 10**

The legal test for prosecuting a crime under cl 30A of the Work Health and Safety Bill 2019 is substantially the same as that currently applied to a level 4 offence under s 19A(1) of the Occupational Safety and Health Act 1984 and s 9A(1) of the Mines Safety and Inspection Act 1994. This can be described as a subjective test of actual knowledge.

**Maximum penalties**

4.48 The maximum penalties under cl 30A are higher than those currently available under a level 4 offence. Table 10 shows a comparison of the maximum penalties:

<table>
<thead>
<tr>
<th>Level 4 offence</th>
<th>cl 30A</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Individual</strong>—</td>
<td></td>
</tr>
<tr>
<td>(i) for a first offence, to a fine of $550 000 and imprisonment for 5 years; and</td>
<td>Individual—</td>
</tr>
<tr>
<td>(ii) for a subsequent offence, to a fine of $680 000 and imprisonment for 5 years</td>
<td>imprisonment for 20 years and a fine of $5 000 000</td>
</tr>
<tr>
<td><strong>Body corporate</strong>—</td>
<td>Body corporate—</td>
</tr>
<tr>
<td>(i) for a first offence, to a fine of $2 700 000; and</td>
<td>a fine of $10 000 000.</td>
</tr>
<tr>
<td>(ii) for a subsequent offence, to a fine of $3 500 000.</td>
<td></td>
</tr>
</tbody>
</table>

[Source: Occupational Safety and Health Act 1984, s 3A(4); Work Health and Safety Bill, cl 30A]

4.49 The courts must have regard to the applicable maximum penalties when considering the appropriate sentence for an offender:

Careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the

\(^{169}\) Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 5.

\(^{170}\) ibid., p 15.
time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.\(^171\)

**FINDING 11**

The penalties under cl 30A of the Work Health and Safety Bill 2019 are substantially higher than the current level 4 offence under s 19A(1) of the *Occupational Safety and Health Act 1984* and s 9A(1) of the *Mines Safety and Inspection Act 1994* however this increase is consistent with other jurisdictions that have introduced industrial manslaughter and with the Government’s stated policy objective of deterrence.

**Jurisdiction—District Court**

4.50 Offences under cl 30A will be heard in the District Court and prosecuted by the Director of Public Prosecutions.\(^172\) Workplace deaths in Western Australia are currently prosecuted in the Magistrates Court under a level 3 or level 4 work health and safety offence.

4.51 Although civil claims for damages in respect of the death or personal injury of a person can be brought in the District Court, this court does not deal with criminal prosecutions involving the death of a person. These are usually dealt with in the Supreme Court which has jurisdiction for murder, manslaughter, attempt to unlawfully kill and assisted suicide.\(^173\)

4.52 A substantial number of stakeholders supported industrial manslaughter under cl 30A being prosecuted in the superior courts with no stakeholders proposing that it be heard in the Magistrates Court.\(^174\)

**Prosecution—Director of Public Prosecutions**

4.53 Offences under cl 30A will be prosecuted by the Director of Public Prosecutions. Equivalent offences are currently prosecuted by WorkSafe.

4.54 Criminal prosecutions in the District Court and the Supreme Court can only be prosecuted by the Director of Public Prosecutions for Western Australia or the Commonwealth Director of Public Prosecutions.\(^175\)

4.55 Mr Cotgreave from DMIRS noted the following when asked to comment on whether WorkSafe has the necessary skillset to prosecute industrial manslaughter:

> At present, and the structure was intended to be the same in the Work Health and Safety Bill. Currently, we have the independent WorkSafe Western Australia Commissioner responsible for approving prosecutions under the OSH act. The role and systems to support it are going to continue to operate under the Work Health and Safety Bill, although that statutory appointee will be called the WorkSafe

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\(^{171}\) *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].

\(^{172}\) *Work Health and Safety Bill 2019, Explanatory Memorandum*, Legislative Council, paragraph 137; *Interpretation Act 1984* s 67; *Criminal Procedure Act 2004*, Part 3, Division 4; *District Court of Western Australia Act 1969*, s 42.

\(^{173}\) *Supreme Court Act 1935*, s 16; *District Court Act 1969*, s 42.

\(^{174}\) Stephen Catania, Coordinator, Political and Industrial, Construction, Forestry, Maritime, Mining and Energy Union, transcript of evidence, 9 July 2020, pp 5–6; Glenn McLaren, Assistant State Secretary, Australian Manufacturing Workers Union, transcript of evidence, 9 July 2020, p 6; Doug Hall, Pastoralists and Graziers Association, Answer to question on notice 1A asked at hearing held 9 July 2020, dated 17 July 2020, p 1; Paul Moss, Principal Workplace Relations Advocate, Chamber of Commerce and Industry of Western Australia, transcript of evidence, 9 July 2020, p 7; Catherine Greville, Head of Legal Advocacy and Professional Services, Master Builders Association of Western Australia, transcript of evidence, 9 July 2020, p 7.

\(^{175}\) *Work Health and Safety Bill 2019, Explanatory Memorandum*, Legislative Council, paragraph 137; *Work Health and Safety Bill 2019*, s 230; *Criminal Code* s 1 (definition of ‘indictment’); *Director of Public Prosecutions Act 1991*, s 11; *Director of Public Prosecutions Act* (Cth), s 9.
Commissioner. Currently, inspectors conduct investigations and provide a brief to the DMIRS legal team. The decision to prosecute is made by DMIRS lawyers based on the guidelines we have already talked about, issued by the DPP, which include that public interest test. The prosecutions are conducted by experienced lawyers from the DMIRS legal team or the State Solicitor’s Office. As to how other jurisdictions manage it, I do not know precisely, but I can tell you that the model bill anticipates that prosecutions will be launched by inspectors. That is an amendment that was made to the model clause for Western Australia to reflect that we actually have our proceedings conducted by lawyers.\textsuperscript{176}

4.56 The Committee also asked DMIRS whether the Government is satisfied that the intersection between cl 30A and cl 230 (which contains provisions on the prosecution of offences) is such that there is no capacity for the regulator to bring about proceedings under cl 30A:

Proceedings for a clause 30A offence would be commenced by a person appointed by DMIRS in the Magistrate’s Court consistent with section 20 of the Criminal Procedure Act 2004. As 30A is an indictable offence, the DPP would then assume carriage of the case which would proceed to the District Court to be heard.

I acknowledge there is ambiguity in [clause 230] and thank the Committee for identifying the matter. The Minister has instructed DMIRS to work with Parliamentary Counsel’s Office to provide advice that resolves this issue.\textsuperscript{177}

\begin{tabular}{|c|}
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\textbf{FINDING 12} \\
An ambiguity exists as to who can initiate a cl 30A prosecution under the Work Health and Safety Bill 2019 and the Minister for Mines, Petroleum, Energy and Industrial Relations has instructed Parliamentary Counsel’s Office to resolve the issue by re–drafting cl 230 of the Bill. \\
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\textbf{RECOMMENDATION 2} \\
The Minister for Mines, Petroleum, Energy and Industrial Relations advise the Legislative Council on what amendments are required to give effect to Finding 12. \\
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\end{tabular}

\begin{tabular}{|c|}
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\textbf{Appropriate legislative framework} \\
4.57 The two industrial manslaughter offences are proposed to be included in the legislative framework for work health and safety. This follows the approach taken in Queensland, the Northern Territory and Victoria. In the Australian Capital Territory the offence of industrial manslaughter is in the legislative framework for criminal laws.\textsuperscript{178} \\
4.58 The approach of including industrial manslaughter in the work health and safety legislation was first taken in Queensland in accordance with the recommendation of the best practice review conducted in 2017:

In terms of the design and statutory location of the offence, as previously stated, the Review considers the offence would be best placed in the WHS Act 2011 on the basis that it would send a clear message to PCBU’s about the standard of safety required and the expectation on senior management to proactively manage health and safety risks. Additionally, the provisions under the WHS Act 2011 relating to the imputation of an individual’s conduct to a corporation will ensure

\begin{footnotes}
\item[176] Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 24. \\
\item[177] David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 7 asked at hearing held 9 July 2020, dated 16 July 2020, p 3. \\
\item[178] Crimes Act 1900 (ACT). Also see paragraph 4.28.
\end{footnotes}
corporations are liable and reduce barriers to attributing criminal liability to a corporation in instances involving the most serious health and safety breaches. It is appropriate to provide for a maximum custodial sentence that matches the equivalent offence in the Crimes Act and for a greatly increased maximum fine for a body corporate. These measures will allow sentencing judges to have the appropriate scope to adequately deal with the worst examples of corporate or individual behaviour.179

This approach has been followed in Western Australia. The Committee notes the Bill similarly contains a provision imputing conduct to a body corporate.180

FINDING 13
The offences of industrial manslaughter in cl 30A and 30B of the Work Health and Safety Bill 2019 are properly placed in the work health and safety legislation rather than the Criminal Code.

Excuses under Criminal Code

A number of submissions expressed concerns that:

- the defences and excuses under Chapter V of the Criminal Code would not be available to persons accused of an offence under Part 2 of the Bill181
- it is unclear whether those defences or excuses would be available.182

These concerns may have been triggered because the offences are proposed to be located outside of the Criminal Code.

Section 36 of the Criminal Code provides:

**Application of Chapter V**

The provisions of this Chapter apply to all persons charged with any offence against the statute law of Western Australia.

The term ‘statute law’ is not defined in the Criminal Code or the Interpretation Act 1984 but the courts have interpreted s 36 to mean that the Chapter V defences and excuses apply to all statutory offences in Western Australia.183

Like all statutory provisions, the effect of s 36 may be excluded by express words or by implication. However the intention to exclude must be very clear.184 This was considered in a case where the Queensland Legislature attempted to exclude criminal code excuses from the Health Act 1937 (Qld):

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179 Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland*, Queensland, 3 July 2017, p 113. Also see paragraph 2.15–2.16.

180 Work Health and Safety Bill 2019, cl 244–244H.


182 For example, Submission 9 from Murrin Murrin Operations Pty Ltd, 25 June 2020, p 3; Submission 18 from James Davis, 26 June 2020, p 1; Submission 31 from Roy Hill Holdings Ltd, 26 June 2020, p 2; Submission 37 from The Chamber of Minerals and Energy of Western Australia, 26 June 2020, pp 7 and 8; Submission 39 from Australian Hotels Association of Western Australia, 26 June 2020, p 2; Submission 47 from South32 Worsley Alumina Pty Ltd, 26 June 2020, p 1; Submission 56 from Master Builders Association of Western Australia, 26 June 2020, p 27; Submission 58 from Pearl Producers Association, 29 June 2020, p 8; Submission 60 from Association of Mining and Exploration Companies, 26 June 2020, p 3; and Submission 64 from The Law Society of Western Australia, 6 July 2020, p 3.


184 *Brimblecomb v Duncan* [1958] Qd R 8, 12.
In my opinion, the statutory freedom from criminal responsibility conferred by s 36 and s 23 of the Criminal Code cannot be destroyed except by express enactment of the legislature or by language in a later statute so clear and unequivocal in its meaning that one must necessarily conclude from it that the Legislature intended to destroy that freedom.\textsuperscript{185}

4.65 The Committee asked DMIRS to identify which defences under the \textit{Criminal Code} would:

- be available in any prosecution of offences under the Bill
- not apply
- apply in a modified way.

4.66 The response from DMIRS was clear:

The defences contained in the \textit{Criminal Code} apply to prosecutions under the WHS Bill. Pursuant to section 36 of the \textit{Criminal Code}, the defences in that Chapter apply to all persons charged with any offence against the statute law of Western Australia. There is nothing in the WHS Bill which expressly excludes the application of the defences in the \textit{Criminal Code}.\textsuperscript{186}

4.67 In the Committee’s view, the Bill does not exclude the application of the defences and excuses in Chapter V of the \textit{Criminal Code}.

4.68 A number of stakeholders raised concerns about the abrogation of the protection against self–incrimination arising under cl 172. The Committee notes that this falls outside of the terms of reference of this inquiry.

\textbf{FINDING 14}


\textbf{Recovery of costs}

4.69 A successful party to a criminal prosecution for an indictable offence is generally not entitled to apply to recover their legal costs.\textsuperscript{187} This means that there is no general entitlement to costs for a person who is acquitted of the offence under cl 30A. This was confirmed by DMIRS:

There is no general entitlement to costs for either party in relation crimes dealt with on indictment, such as the industrial manslaughter offence under 30A.\textsuperscript{188}

\textbf{Exclusion of workers from offence}

4.70 Some stakeholders questioned why workers were excluded from being prosecuted for industrial manslaughter. Ms Catherine Greville from the Master Builders Association of Western Australia argued this diminished the culture of shared responsibility for work health and safety:

Now, we certainly accept that employers are often very well placed in relation to safety, but we cannot ignore the fact that employees also play a very important

\textsuperscript{185} \textit{Hunt v Maloney} [1959] Qd R 164, 177. Also see Mack J at 183.

\textsuperscript{186} David Smith, Director General, Department of Mines, Industry Regulation and Safety, letter, 16 July 2020, Attachment, p 3.


\textsuperscript{188} David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 11 asked at hearing held 9 July 2020, dated 16 July 2020, pp 4–5.
role in the chain of safety and what happens in safety practice on the ground. The concerns here are that if safety is to be maximised, we need consistent messaging. We need everyone to understand and behave in a way that puts safety as everyone’s responsibility.

Now, by creating, essentially, two tiers, and two different classes based on what might apply to you as an employer versus what might apply to you as an employee, that, in our view, does not support that concept that safety is everybody’s responsibility and it is a shared responsibility. This was a key tenet in discussions that happened in relation to the introduction of industrial manslaughter in Victoria, because it can be said that the law should be proportionate and fair and workable, but when it comes to safety, our strong view—and this is informed by our safety experts on the ground—is that people will do what they need to do. We have worked towards a culture where everyone understands that safety is—we are on that journey now—lived by everyone, and it is everyone’s responsibility. Simply to separate that out and create an employer versus employee aspect, that is where our concern comes from. It does go back to safety practice and safety on the ground. That is what our members are living and that is what a lot of our experience is drawn from. That is our key concern with that. We should not be having two different approaches.\textsuperscript{189}

4.71 The Committee notes that employees are not currently excluded from level 2, 3 (the equivalent of industrial manslaughter—simple offence) or 4 offences (the equivalent of industrial manslaughter—crime) under the existing work health and safety laws.\textsuperscript{190} However, the maximum penalties for employees who commit such offences are substantially lower than for employers (see Table 1).

4.72 The Committee asked DMIRS whether it would cause any problems to the structure of the Bill if clauses 30A and 30B were amended to extend liability to workers. It provided the following response:

Yes. Such a change is inconsistent with the underlying objective of the WHS Bill in particular, and occupational safety and health legislation in general.

The offences in Division 5 of Part 2 must be read in conjunction with the duties in Division 2 of Part 2. The primary duty of care is imposed on the PCBU who is the organising entity with the duty to implement safe systems of work. The primary duty of care is expansive, including matters ranging from training to the safe handling and storage of plant, structures and substances.

The duty of workers is much more limited to the range of actions they are able to undertake as an individual, including taking reasonable care for their own health and safety, and complying with any reasonable instruction given by the PCBU.

It is important that a statutory penalty is commensurate with the scope of the duties that may be contravened. PCBUs set the safe systems of work in place and workers must comply with those systems. The inclusion of workers in the industrial manslaughter offences would expose individuals, with limited agency in the matter, to charges equivalent to PCBUs that have direct control of the safety

\textsuperscript{189} Catherine Greville, Head of Legal, Advocacy and Professional Services, Master Builders Association of Western Australia, transcript of evidence, 9 July 2020, p 14.

\textsuperscript{190} Occupational Safety and Health Act 1984, ss, 20, 20A; Mines Safety and Inspection Act 1994, ss 9, 9A.
behaviour of their entire business or undertaking and the duty to establish and implement safe systems of work.\textsuperscript{191}

4.73 The Committee notes that while workers cannot be charged with industrial manslaughter under the proposed new regime, any person who causes death or serious harm by failing to comply with their duty of care, including a worker, can be prosecuted for a category 1 offence or under the \textit{Criminal Code}\.\textsuperscript{192} A category 1 offence carries a maximum term of 5 years’ imprisonment and a fine of $3 500 000 for an individual. It is also possible to prosecute a person who exposes an individual to a risk of death for a category 2 offence.\textsuperscript{193} This offence carries a maximum penalty of $170 000 for an individual. See chapter 5 for further discussion of the Category Offences.

\textbf{FINDING 15}

Although industrial manslaughter—crime under cl 30A of the Work Health and Safety Bill 2019 has been based on the current level 4 offence under s 19A(1) of the \textit{Occupational Safety and Health Act 1984} and s 9A(1) of the \textit{Mines Safety and Inspection Act 1994}, under the new regime a worker cannot be charged with industrial manslaughter.

\textbf{FINDING 16}

A worker can be prosecuted for a category 1, 2 or 3 offence under the Work Health and Safety Bill 2019 or the \textit{Criminal Code}.

\textbf{Industrial manslaughter—simple offence (cl 30B)}

4.74 The elements of the simple offence are similar to those of industrial manslaughter—crime. The key difference for the simple offence is that it does not require the prosecution to prove a PCBU engaged in conduct knowing it was likely to cause the death of an individual.

4.75 The title ‘simple offence’ refers to the fact that this offence will be heard in the Magistrates Court.\textsuperscript{194}

4.76 Clause 30B is set out in full below:

\textbf{30B. Industrial manslaughter—simple offence}

(1) A person commits an offence if—

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and

(b) the PCBU fails to comply with that duty; and

(c) the failure causes the death of an individual.

Penalty for this subsection:

(a) for an individual, imprisonment for 10 years and a fine of $2 500 000;

(b) for a body corporate, a fine of $5 000 000.

\textsuperscript{191} David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 3 asked at hearing held 9 July 2020, dated 16 July 2020, pp 1–2.

\textsuperscript{192} Work Health and Safety Bill 2019, cl 31(2); \textit{Criminal Code}, ss 266, 267, 274, 277, 280.

\textsuperscript{193} Work Health and Safety Bill 2019, cl 32.

\textsuperscript{194} \textit{ibid}., Schedule 2, Division 6, cl 32 and 33.
(2) A person charged with an offence under subsection (1) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.

(3) An officer of a person (the PCBU) commits an offence if—

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and
(b) the PCBU fails to comply with that duty; and
(c) the failure causes the death of an individual; and
(d) the PCBU’s conduct that constitutes the failure—
   (i) is attributable to any neglect on the part of the officer; or
   (ii) is engaged in with the officer’s consent or connivance.

Penalty for this subsection: imprisonment for 10 years and a fine of $2 500 000.

(4) A person charged with an offence under subsection (3) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.

Elements of the offence

4.77 In order to successfully prosecute a PCBU for an offence under cl 30B the prosecution must prove beyond reasonable doubt that:

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and
(b) the PCBU fails to comply with that duty; and
(c) the failure causes the death of an individual.

4.78 In order to successfully prosecute an officer of a PCBU for an offence under cl 30B the prosecution must prove beyond reasonable doubt that:

(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and
(b) the PCBU fails to comply with that duty; and
(c) the failure causes the death of an individual; and
(d) the PCBU’s conduct that constitutes the failure—
   (i) is attributable to any neglect on the part of the officer; or
   (ii) is engaged in with the officer’s consent or connivance.

4.79 All elements of cl 30B must be established beyond reasonable doubt by the prosecution.\textsuperscript{195}

Legal test

4.80 In his submission, the Minister for Petroleum, Mines, Energy and Industrial Relations, Hon Bill Johnston MLA discussed the elements of the offence as follows:

In Western Australia, establishing the offence without determining intent is referred to as simple negligence, and this approach is directly reflected in proposed clause 30B of the WHS Bill 2019 [as it relates to PCBUs]. Clause 30B was

\textsuperscript{195} \textit{Laing O’Rourke (BMC) Pty Ltd v Kirwin} [2011] WASCA 117, [37]–[39].
directly modelled on the level 3 offence for employers in the current OSH and MSI Acts which is supported by substantial case law.

Concerns have been raised that the new industrial manslaughter provisions are novel and might have unforeseen legal implications. While there are some negligible differences in the construction of the comparable offences, the existing and proposed offences are substantively the same. Only the penalties that apply have been increased to reflect community expectations regarding the seriousness of contraventions resulting in the death of a worker.196

4.81 This submission was supplemented by Table 11 which provides a comparison of the elements in cl 30B and the existing level 3 offence in the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994:

Table 11. Comparison of elements: level 3 offence and cl 30B

<table>
<thead>
<tr>
<th>Level 3 offence</th>
<th>cl 30B</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>See final paragraph in this column</td>
<td>(1) A person commits an offence if</td>
<td>This is the equivalent of the final paragraph in 19(2) of the OSH Act and is the phraseology that establishes the offence.</td>
</tr>
<tr>
<td>(2) If—</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) an employer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i) contravenes section 19(1); and</td>
<td>(a) the person has a health and safety duty as a person conducting a business or undertaking; and (b) the person fails to comply with that duty; and</td>
<td>PCBUs may have health and safety duties other than in clause 19 (e.g. as the manufacturer of plant). These duties are predominantly in the regulations for the OSH Act so the reference in the WHS Bill 2019 is more generic.</td>
</tr>
<tr>
<td>(ii) by the contravention causes the death of, or serious harm to, an employee; and Note that SOB only covers death.</td>
<td>(c) the failure causes the death of an individual.</td>
<td>Serious harm is a Category 1 offence for PCBUs.</td>
</tr>
<tr>
<td>(b) subsection (1) does not apply,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>the employer commits an offence and is liable to a Level 3 penalty.</td>
<td>See 30B(1).</td>
<td>Establishes the offence.</td>
</tr>
</tbody>
</table>

[Source: Submission 48 from Minister for Mines, Petroleum, Energy and Industrial Relations, Hon Bill Johnston MLA, 29 June 2020, Appendix B]

4.82 The Committee notes that a period of imprisonment is not available for a level 3 offence under the existing laws however cl 30B carries a maximum term of imprisonment up to 10 years.

4.83 As with the offence of cl 30A, breaching a duty of care is a core element of the offence.

**No requirement for knowledge**

4.84 Unlike cl 30A there is no requirement under cl 30B to prove that the accused knew the conduct in question was likely to cause the death of an individual. The standard in cl 30B is an objective one and requires the accused to have done all that was reasonably practicable in the circumstances.

4.85 The following explanation provided by Mr Cotgreave is helpful here:

Yes. Again, it is important to remember the context of these offences; they sit in part 2. Part 2 imposes duties of care. Those duties of care are moderated by what is reasonably practicable. They are not absolute duties. It is not just the elements of the individual offences you have to look at, you have to go back and the prosecution will need to establish: Does the person have a duty? Has the person contravened that duty? Is there a causal link between that contravention and the death?  

4.86 The Committee heard concerns from witnesses that a prosecution under cl 30B could proceed without establishing fault on the part of the accused. The following exchange provides DMIRS’ response to these concerns:

**Hon MATTHEW SWINBOURN:** One of the things that was put to us earlier today was there is great fear that people will be charged and convicted where they are at no fault after the death of a worker. How do you respond to a suggestion that someone, a PCBU, or a person who is not at fault, but there has been a death, is likely to be charged and convicted under these provisions—the likelihood of that kind of scenario?

**Mr COTGREAVE:** We do, again, cover that off later, but I will cover it now because I think it is quite topical for this question. Fault is not really an element in safety and health. What you have under the current law and under this proposed law is duties of care. The issue then is: have you satisfied those duties of care? I know in some of the questions, and I suppose some of the submissions might have raised this idea: could a PCBU be charged if they did not know anything about the events leading up to the fatality? What we would be looking at under these provisions is: did the PCBU implement safe systems of work that were appropriate to the hazards involved? If they have done that, if they have done everything right, then that first element of those offences—have they contravened the safety and health duty—cannot be established.

**Hon MATTHEW SWINBOURN:** Can I just interrupt? Even if they have made some error, it is only if that is the cause of the death that it is then the responsibility is driven home. So, an inadvertent failure within the duty of care that has no causative connection with the death is not going to result in a conviction.

**Mr COTGREAVE:** My understanding from discussions with our prosecution staff is, yes, they have to establish causation. If, however, an employer or a PCBU implemented an unsafe system of work—so, a system of work that was not appropriate to control the hazard—that PCBU could be on holiday overseas when...

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197 Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 10.
a fatality happened and know nothing about the events leading up, if that worker was diligently following their instructions in terms of that unsafe system of work and there was a fatality as a result, then, yes, there is a possibility of establishing a primafacie case in those circumstances, assuming that we have evidence.

Hon MATTHEW SWINBOURN: That still has to come back to what is reasonably practical. If the safe system of work was something that was put in place that was reasonably practical given the information that was then available and only in hindsight the fault was found, again, that is not likely to lead to a conviction because it would be difficult to say they actually breached their duty.

Mr COTGREAVE: It would.

Hon MATTHEW SWINBOURN: Because we are not looking at the actual outcome in terms of death to say, “Well, someone died, therefore, someone is at fault”; we are saying there is a whole process and then the death comes in as the consequence of that.

Mr COTGREAVE: Essentially, yes. As I said, you have to go back to those health and safety duties and see if, in the first place, do they have a duty and then have they contravened that duty.  

4.87 There are concerns among some stakeholders that cl 30B proposes a lower test than the provisions enacted in other jurisdictions. This was articulated in a joint industry group submission signed by 25 co–signatories as follows:

The Joint Industry Group is concerned about the low threshold for the prosecution to prove the elements set out in section 30B, which on the face of it does not require gross negligence, negligence, recklessness, or with respect to section 30B(1), does not require direct knowledge. This threshold is considerably low when compared to other criminal offences and the industrial manslaughter provisions in other jurisdictions. Conversely, the penalties associated with the offences are considerably high.

... 

Whilst required to be proven beyond reasonable doubt, the elements for the section 30B ‘simple offence’ are of a low magnitude, and open up liability for such a broad range of facts and circumstances, that it is difficult to think of any deaths in a workplace that they would not cover.

4.88 However, while cl 30B does not include the word ‘negligent’ it does import a test of negligence by requiring the prosecution to prove the PCBU has breached their primary duty of care. That is, it requires the prosecution to prove the following elements of negligence:

- the PCBU owes a duty of care
- the PCBU breached that duty of care
- the breach caused the death of an individual.

4.89 The concerns expressed around the test of negligence seem to be asking: what is the degree of breach that is required to establish a conviction under cl 30B?

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198 ibid., pp 11–2.
199 Submission 54 from Joint Industry Group, 26 June 2020, pp 12–4.
In 2017, the best practice review of work health and safety laws conducted in Queensland recommended criminal negligence apply to industrial manslaughter.\textsuperscript{201}

Later, in 2018 the Boland Report recommended that industrial manslaughter should be included in the Model Bill covering acts of ‘gross negligence’. In particular, it recommends using the following definition of gross negligence applied by the High Court of Australia in \textit{Patel v The Queen}:

\begin{quote}
such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.\textsuperscript{202}
\end{quote}

This standard of gross negligence discussed by Boland involves an objective assessment of the accused’s knowledge. It is different to the definition of gross negligence in the current work health and safety laws in Western Australia which requires the prosecution to prove the accused’s subjective knowledge of the risks involved.\textsuperscript{203}

This common law definition has been given statutory effect in the Australian Capital Territory, the Northern Territory and Victoria.\textsuperscript{204} This ensures that the industrial manslaughter provisions in those jurisdictions require the prosecution to prove gross negligence as recommended by the Boland Report.

As explained by Mr Cotgreave, to successfully prosecute an accused person under cl 30B it is necessary to establish that a breach of a duty of care under the Bill has occurred (noting the duty is moderated by what is reasonably practicable):

\begin{quote}
It is focused purely on the elements of gross negligence, so it just highlights the elements across the two different sections. On one level, gross negligence is baked into 30A—that is gross negligence as it is understood in Western Australia. That is the definition we have had for a long time. The second question relates to the Boland report. I guess one of the problems we have with this particular recommendation, which I think was made in relationship partly to industrial manslaughter and partly to category 1 recklessness, if you actually look at the words that Ms Boland used, and I am quoting here—it is also in the minister’s submission—By adding a threshold for prosecution of gross negligence, a prosecutor can prosecute an offender for failing to conduct themselves safely or provide a safe environment for others—And this is the key—without having to establish this failure as being intentional. While the report uses the phrase “gross negligence”, the recommendation says that it should be without having to establish intent. That is how 30B was crafted.\textsuperscript{205}
\end{quote}

The standard of gross negligence as recommended by the Boland Report has not been applied to the offences of industrial manslaughter proposed by the Bill. This is addressed by the submission from the Minister for Petroleum, Mines, Energy and Industrial Relations, Hon Bill Johnston MLA as follows:

\begin{quote}
The Boland Report included a number of proposals about elements of the new offences. However, those recommendations were not made in the context of Western Australia’s criminal justice system, in particular our codified criminal law.
\end{quote}

\textsuperscript{201} Tim Lyons, \textit{Best Practice Review of the Workplace Health and Safety Queensland}, 3 July 2017, recommendation 46.

\textsuperscript{202} \textit{Patel v The Queen} [2012] HCA 29; 247 CLR 531.

\textsuperscript{203} \textit{Occupational Safety and Health Act} 1984, s 18A; \textit{Mines Safety and Inspection Act} 1994, s 8B.

\textsuperscript{204} \textit{Criminal Code} 2002 (ACT), s 21(a); \textit{Criminal Code Act} (NT), s 43AL; \textit{Occupational Health and Safety Act} 2004 (Vic), s 39E.

\textsuperscript{205} Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 15.
Chapter 4  Industrial manslaughter

The Boland Report’s reference to gross negligence in the recommendation is not gross negligence as it is understood in Western Australia’s judicial system. In comments on the small number of successful prosecutions for Category 1 offences in harmonised jurisdictions, the Boland Report noted (Page 119):

*By adding a threshold for prosecution of gross negligence, a prosecutor can prosecute an offender for failing to conduct themselves safely or provide a safe environment for others, without having to establish this failure as being intentional.*

4.96 The Committee notes that the Boland Report’s definition of gross negligence has not been applied in cl 30B. The Boland Report’s definition of gross negligence is more aligned with the degree of negligence required by the courts in Western Australia for offences under the *Criminal Code.* In discussing a prosecution for a level 3 offence under the *Occupational Safety and Health Act 1984* EM Heenan J made the following comment:

>No attempt is made in those sections to distinguish between negligence or failure to take measures reasonably practicable and some other form of negligence or failure to take reasonable means which involves ‘criminal negligence’ or some more serious degree of lack of care or failure.

...  
I therefore consider that the concept of ‘criminal negligence’, if meant to signify the severity of lack of care which might, on a charge of manslaughter, be necessary for conviction, is a concept foreign to the sentences applying to these prosecutions and has the tendency to be a misleading distraction.

4.97 The Committee asked DMIRS to explain why the standard of negligence as recommended by the Boland Report was not applied to the proposed industrial manslaughter offences. The response was that cl 30B has been modelled on the existing level 3 offence in order to reflect the current body of case law in Western Australia.

4.98 In the Committee’s view, cl 30B reflects a standard of negligence that does not align with the substance of the recommendations of the Boland Report. Clause 30B meets only one of the two requirements in the Boland Report recommendation being the imposition of an objective test to assess whether the accused has breached their duty of care. This is achieved by reading cl 30B with the definition of ‘reasonably practicable’ in cl 18.

4.99 The second Boland requirement is that the accused’s conduct falls so far below the standard of care which a reasonable person would have exercised in the same circumstances that a criminal punishment would be warranted. As drafted cl 30B only requires the PCBU to be negligent, not criminally negligent, in order to be guilty.

4.100 The standard of negligence proposed in the Boland Report sits between the two tiers of industrial manslaughter proposed by the Bill. This is shown in Table 12:

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208 Reilly v Tobiassen [2008] WASC 92, [15].
210 ibid., pp 5, 20.
Table 12. Degree of negligence for work health and safety offences

<table>
<thead>
<tr>
<th>Degree of negligence</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual knowledge (subjective)</td>
<td>Clause 30A industrial manslaughter&lt;br&gt;Level 4 offence*&lt;br&gt;Category 1 offence Model Bill</td>
</tr>
<tr>
<td>Gross/criminal negligence (objective)</td>
<td>Boland Report (<em>Patel v The Queen</em>&lt;br&gt;Industrial manslaughter (ACT, Vic, NT, Qld)&lt;br&gt;<em>Criminal Code</em> offences</td>
</tr>
<tr>
<td>Negligence</td>
<td>Clause 30B industrial manslaughter&lt;br&gt;Level 3 offence*</td>
</tr>
</tbody>
</table>

*These are existing offences under the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*.

**Finding 17**

Clause 30B of the Work Health and Safety Bill 2019 only requires a person conducting a business or undertaking to be negligent, not criminally negligent, in order to be guilty. This aligns with the current level 3 offence in s 19A(2) of the *Occupational Safety and Health Act 1984* and s 9A(2) of the *Mines Safety and Inspection Act 1994*.

**Maximum penalties**

4.101 The maximum penalties under cl 30B are significantly higher than those currently available under a level 3 offence. Of note is the introduction of imprisonment as a sentencing option. Table 13 shows a comparison of the maximum penalties:

Table 13. Comparison of maximum penalties: level 3 offence and cl 30A

<table>
<thead>
<tr>
<th>Level 3 offence</th>
<th>cl 30B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual—</td>
<td>Individual—</td>
</tr>
<tr>
<td>(iii) for a first offence, to a fine of $400,000; and</td>
<td>imprisonment for 10 years and a fine of $2,500,000</td>
</tr>
<tr>
<td>(iv) for a subsequent offence, to a fine of $500,000</td>
<td></td>
</tr>
<tr>
<td>Body corporate—</td>
<td></td>
</tr>
<tr>
<td>(iii) for a first offence, to a fine of $2,000,000; and</td>
<td></td>
</tr>
<tr>
<td>(iv) for a subsequent offence, to a fine of $2,500,000.</td>
<td></td>
</tr>
</tbody>
</table>

**Finding 18**

The maximum penalties under cl 30B of the Work Health and Safety Bill 2019 are significantly higher than those currently available for a level 3 offence under s 19A(2) of the *Occupational Safety and Health Act* and s 9A(2) of the *Mines Safety and Inspection Act 1994* and introduce a sentence of imprisonment.
Strict liability

4.102 The concept of strict liability has also raised concerns among industry and the community.\[211\] Strict liability is a technical concept in common law criminal jurisdictions, however in Western Australia where the criminal code encompasses the criminal law, the statutory excuses found in Chapter V of the *Criminal Code* apply unless expressly excluded.

4.103 This was raised by Hon Peter Katsambanis MLA during Consideration in Detail of the Bill in the Legislative Assembly:

**Mr P.A. KATSAMBANIS:** Okay. We will not quibble today. We will leave that for other people. It is a lower test. Essentially, it is a strict liability offence because it takes away those subjective elements contained in clause 30A(1)(d). Is that correct?

**Mr W.J. JOHNSTON:** I am advised that is not normally the description that is used, but it is not an unreasonable position to take.\[212\]

4.104 In jurisdictions with a common law system of criminal law, statutory offences that do not have an express requirement for an act or omission to be conducted with intent, knowledge, malice, recklessness or negligence (also known as *mens rea*)\[213\] may be considered a strict liability offence.\[214\] This goes against the important common law principle that:

> a person may not be criminally responsible for an offence unless his or her prohibited conduct was accompanied by a guilty mind.\[215\]

4.105 In Western Australia, which has a coded system of criminal law, the common law principle of *mens rea* does not apply. Instead, the provisions of the *Criminal Code* are taken to contain the entire law in respect of criminal responsibility.\[216\]

4.106 The potential for the simple offence of industrial manslaughter to be interpreted as a strict liability offence in common law jurisdictions is recognised by the Model Bill which contains the following jurisdictional note:

Jurisdictions may include subsections (or include a general statement provision in the Bill) clarifying where all or part of an offence attracts strict liability or absolute liability.\[217\]

4.107 For example, the work health and safety laws in New South Wales (which does not include an offence of industrial manslaughter) contains the following provision:

> Strict liability applies to each physical element of each offence under this Act unless otherwise stated in the section containing the offence.\[218\]

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\[211\] Submission 39 from Australian Hotels Association Western Australia, 26 June 2020, p 2;

\[212\] Hon Peter Katsambanis MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 February 2020, p 834b–860a, [16].


\[214\] *Halsbury’s Laws of Australia*, LexisNexis, paragraph [130–7955].


\[217\] Safe Work Australia, Model Work Health and Safety Bill, p 208.

\[218\] *Work Health and Safety Act 2011*, s 12A.
The Committee asked DMIRS to explain whether cl 30B is a strict liability offence:

**Mr COTGREAVE**: Okay. Again, I have some words from our legal team here. The following is provided. It is not a strict liability offence in the sense that strict liability offences require no mental element—mens rea—to be proven, aside from the obligation to prove that the accused was not honestly and reasonably mistaken as to belief in facts, which would render their actions innocent. All offences involving a failure to comply with a health and safety duty, including an offence pursuant to section 30B, must be read with the principles set out at part 2 division 1, sections 13 to 18. Therefore, every breach of such a health and safety duty includes a failure to take “reasonably practicable” measures. Determining what is reasonably practicable in any particular set of circumstances necessarily includes an assessment of mental elements, such as what the accused person knew, or ought reasonably to have known, about the particular hazard or the risk concerned, and ways of eliminating or minimising the risk. That is in response to part (a) of the question.

**Hon NICK GOIRAN**: Yes, but there is a difference there between an objective test and a subjective test.

**Mr COTGREAVE**: Again, I am not a lawyer. I do not know how to answer that question.\(^{219}\)

When asked why this approach was taken, DMIRS gave the following answer:

**Mr COTGREAVE**: Part (b) is why the approach was taken. We have noted previously that clause 30B was modelled on the current level 3 penalty in the OSH Act [Occupational Safety and Health Act 1984].\(^{220}\)

In this way, while cl 30B does not require the prosecution to prove the accused had an intention to commit the offence, the requirement to prove a failure to take reasonably practicable measures acts as a qualification on their liability.

Further, Chapter V of the Criminal Code provides a number of excuses and defences which are available to anyone who is charged with a statutory offence in Western Australia, including those proposed by the Bill.\(^{221}\)

It should also be noted that the absence of a requirement to prove the accused’s subjective intention is consistent with other jurisdictions. The only exception to this is the Australian Capital Territory and the Northern Territory where industrial manslaughter can be charged for negligence (an objective standard) or recklessness (a subjective standard).

**FINDING 19**

Clause 30B of the Work Health and Safety Bill 2019 does not incorporate the subjective test of actual knowledge found in cl 30A of the Bill or the objective test of gross negligence as recommended in the Boland Report but does include an objective test of reasonable practicability.

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\(^{219}\) Andrew Cotgreave, Senior Policy Officer, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, p 19.

\(^{220}\) ibid., pp 19–20.

\(^{221}\) Criminal Code 1913, s 36.
FLP 4—Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

4.113 During Consideration in Detail of the Bill in the Legislative Assembly Hon Peter Katsambanis MLA asked whether the simple offence of industrial manslaughter reverses the onus of proof:

Mr P.A. KATSAMBANIS: So there is no reversal of the onus of proof in any way, shape or form in clause 30B.

Mr W.J. Johnston: Yes. I have already said that.

Mr P.A. KATSAMBANIS: Therefore, the prosecution must prove the case beyond reasonable doubt.

Mr W.J. Johnston: For each element of the offence.

4.114 For the industrial manslaughter offences, the prosecution must prove all the elements of the offence and disprove any Chapter V excuses that are raised on the evidence. Clause 30B of the Bill does not reverse this burden of proof.

4.115 The burden of proof was addressed by the Court of Appeal of Western Australia in relation to a breach of a duty of care under the current law in the following way:

The prosecution bears the onus of proving a breach of duty in s 19(1), including the question of practicability: Ball & Sons Pty Ltd v Stewart (Unreported, WASC, Library No 8829, 24 April 1991); Chugg v Pacific Dunlop Ltd (260 – 263). A finding of breach cannot be based upon speculation. Each element must be proved by evidence: Interstruct Pty Ltd v Wakelam (110) (Wallace J, Rowland J agreeing); Ball v Stewart.

In Chugg v Pacific Dunlop Ltd (263), Dawson, Toohey and Gaudron JJ said, that where the onus was on the informant (as here):

[T]he issue is confined by the means which the informant claims were practicable in the circumstances.

Similarly, in Ball v Stewart, in relation to a charge of inadequate training, Anderson J said (6 – 7):

It is trite to say that the respondent was required to prove each element of the offence beyond reasonable doubt. The practicability of providing some level of training different from and greater than the level of training actually provided to employees is an essential element of the offence created by the subsection. See Chugg v Pacific Dunlop Ltd (1990) 95 ALR 481 at 486 et seq. Proof of that essential element required evidence.

4.116 Mr Cotgreave confirmed DMIRS’ position to the Committee that ‘the burden of proof is still always beyond reasonable doubt.’

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222 Hon Peter Katsambanis MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 February 2020, p 834b–860a, (16).

223 *Laing O’Rourke (BMC) Pty Ltd v Kirwin* [2011] WASCA 117, [37]–[9].

224 Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Regulation and Safety, transcript of evidence, 9 July 2020, p 20.
**FINDING 20**

Clause 30B of the Work Health and Safety Bill 2019 does not reverse the onus of proof.

**Jurisdiction**

4.117 The simple offence of industrial manslaughter is to be heard in the Magistrates Court. The reason for this is to facilitate a prosecution being brought by WorkSafe. The Hon Bill Johnston MLA explained:

> It has to stay in the Magistrates Court, because only the DPP can prosecute in the District Court. Therefore, unless we have tens of millions of dollars of additional resources for the DPP, we need to keep it in the Magistrates Court.

4.118 It should be noted that the maximum penalties for the simple offence of industrial manslaughter exceed those of the offences typically heard in the Magistrates Court. The simple offence can result in a maximum term of imprisonment of 10 years yet the highest term of imprisonment that can currently be imposed in the Magistrates Court is for a level 4 work health and safety offence which carries a maximum term of 5 years’ imprisonment. The highest maximum term of imprisonment that can be imposed in the Magistrates Court under the **Criminal Code** and the **Misuse of Drugs Act 1981** is only 3 years.

4.119 Stakeholders from both sides advocated for this offence being heard in a superior court (i.e. the Supreme Court or the District Court). The majority of these submissions appear to make this submission recognising the gravitas of the offence.

4.120 Mr Stephen Catania, from the Construction, Forestry, Maritime, Mining and Energy Union made the following points:

> Certainly, from the CFMMEU’s position, although we accept the approach taken here, we prefer the approach that both 30A and 30B are considered by what I would consider a court of higher jurisdiction—that being the District Court—notwithstanding what has been put within the draft bill. The primary reasons for that are, historically, the District Court deals with indictable offences. These are very serious offences. The District Court, historically, has been set up to hear those kinds of offences.

> There are issues around reporting as well. The District Court, primarily, has a higher level of reporting to consider precedent and so forth and to understand the processes and the judicial determination of a particular offence. Also, looking at the judicial make-up of the District Court, primarily that court’s judicial officers and judges have a criminal background. That being that they can certainly interpret the concepts around quasi-criminal or criminal nature, because that is something that they do on a regular basis. Historically, if you look at the make-up of the judiciary in that court, by and large, they have a criminal background. That is also, we believe, an important matter.

> The Magistrates Court, although it has historically heard matters in relation to the current OSH bill, the nature of that court is such that that court hears less serious

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227 **Criminal Code 1913** (WA), ss 146, 313; **Misuse of Drugs Act 1981** (WA), s 14.
228 Stakeholders who have raised concerns about the offence proposed by cl 30B being heard in the Magistrates Court include those who provided the following submissions in Appendix 3: Submission 18–24, 26–29, 31, 33, 36, 37, 47, 54, 56.
offences. Can I use, as an example, a statement I heard one of the family members you may have heard from yesterday, Regan Ballantine. Her matter, in relation to that offence of Wesley—I know it was not specifically heard in relation to the fatality, but in terms of the prosecution and, ultimately, the successful prosecution in relation to that incident and the safety systems around that incident. Prior to that, she was waiting in the gallery. Prior to that matter being heard, there was a traffic offence being heard. I mean, in terms of consistency, in terms of ensuring that the value and the importance is given, the Magistrates Court is, we believe, not the appropriate court to consider these matters. In addition, if we put into context the Queensland provisions, the most recent case of industrial manslaughter, there was a charge and that was also heard in the District Court. I understand that there was a fine of $3 million awarded. There was a Brisbane matter that was heard in the District Court. So, there is some consistency in terms of jurisdictions that we are after.

I suppose the point is that, notwithstanding that we accept what the bill is trying to do here, our position certainly is that the District Court for both matters, for both provisions, is the preferred jurisdiction.229

4.121 Mr Paul Moss from the Chamber of Commerce and Industry of Western Australia also supported this view:

They must also be dealt with by a court that has experience in determining matters of this level of seriousness. In our opinion, that is not the Magistrates Court. It needs to be at a more superior court level and in line with where prosecutions for manslaughter would commonly occur in the criminal system, which, in our understanding, is either the Supreme Court level or the District Court.230

4.122 In response to the Committee’s question as to what issues might arise if cl 30B was dealt with in the District Court, DMIRS advised:

Trials in the District Court will be conducted before a judge and jury. Cases will require substantially more preparation which will flow on to increased costs for all parties.231

4.123 Nevertheless cl 30B as currently framed introduces a significant penalty of imprisonment not currently present for a level 3 offence and does so without incorporating the benefits available in superior courts.

**FINDING 21**

Both employee and employer stakeholder groups argued that the industrial manslaughter offences proposed by cl 30A and 30B of the Work Health and Safety Bill 2019 should be heard in the District Court.

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229 Stephen Catania, Coordinator Political and Industrial, Construction, Forestry, Maritime, Mining and Energy Union, transcript of evidence, 9 July 2020, pp 5–6.

230 Paul Moss, Principal Workplace Relations Advocate, Chamber of Commerce and Industry of Western Australia, transcript of evidence, 9 July 2020, p 7.

231 David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 9 asked at hearing held 9 July 2020, dated 16, July 2020, p 3.
Recovery of costs

4.124 A person who is acquitted of a simple offence is generally entitled to apply to recover their legal costs.232 This means that a person who is charged but found not guilty under cl 30B may be able to recover their legal costs. This was confirmed by DMIRS:

If a prosecution is taken under section 30B of the WHS Bill for a simple offence of industrial manslaughter and the accused is found ‘not guilty’, the accused is entitled to costs. Simple offences are dealt with summarily and not on indictment.233

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233 David Smith, Director General, Department of Mines, Industry Relations and Safety, Answer to question on notice 11 asked at hearing held 9 July 2020, dated 16 July 2020, pp 4–5.
CHAPTER 5
Category 1–3 offences

Introduction

5.1 This chapter considers the three categories of offences for failure to comply with a health and safety duty in Part 2 of the Bill (Category Offences). It begins by explaining the following aspects of the Category Offences:
- elements of the offence
- legal test
- maximum penalties
- recent cases.

5.2 It then discusses a number of issues that have been identified in relation to all of the Category Offences. They are:
- whether the Category Offences are strict liability offences
- whether the Category Offences reverse the onus of proof
- whether the penalty amounts should be stated in dollar amounts or penalty units

5.3 Lastly, this chapter considers the prohibition on taking out insurance against fines imposed by a court under cl 272A. However the Committee has not made any findings on this issue since it is not in Part 2 of the Bill.

Category 1 offence (cl 31)

5.4 Category 1 is the most serious of the three Category Offences proposed by the Bill. It is the only Category Offence to carry a sentence of imprisonment.

5.5 Clause 31 is set out in full below:

31. Failure to comply with health and safety duty—Category 1

(1) A person commits a Category 1 offence if—
(a) the person has a health and safety duty as a person conducting a business or undertaking; and
(b) the person fails to comply with that duty; and
(c) the failure causes serious harm to an individual.

Penalty for this subsection:
(a) for an individual, imprisonment for 5 years and a fine of $680 000;
(b) for a body corporate, a fine of $3 500 000.

(2) A person commits a Category 1 offence if—
(a) the person has a health and safety duty otherwise than as a person conducting a business or undertaking; and
(b) the person fails to comply with that duty; and
(c) the failure causes the death of, or serious harm to, an individual.
Penalty for this subsection:

(a) for an individual, if the offence is committed by the individual as an officer of a person conducting a business or undertaking, imprisonment for 5 years and a fine of $680 000;

(b) for an individual, if paragraph (a) does not apply, imprisonment for 5 years and a fine of $340 000;

(c) for a body corporate, a fine of $3 500 000.

(3) For the purposes of subsections (1)(c) and (2)(c), the failure causes serious harm to an individual if it causes an injury or illness to the individual that—

(a) endangers, or is likely to endanger, the individual’s life; or

(b) results in, or is likely to result in, permanent injury or harm to the individual’s health.

(4) A person charged with a Category 1 offence may be convicted of a Category 2 offence or a Category 3 offence

**Elements of the offence**

5.6 Clause 31 proposes different tests for PCBUs and non–PCBUs. The elements of a category 1 offence for a PCBU are:

(a) the person has a health and safety duty as a person conducting a business or undertaking; and

(b) the person fails to comply with that duty; and

(c) the failure causes serious harm to an individual.\(^{234}\)

5.7 The elements for a category 1 offence for non–PCBUs are:

(a) the person has a health and safety duty otherwise than as a person conducting a business or undertaking; and

(b) the person fails to comply with that duty; and

(c) the failure causes the death of, or serious harm to, an individual.\(^{235}\)

5.8 For the purposes of these sections ‘serious harm’ is defined as an injury or illness that:

(a) endangers, or is likely to endanger, the individual’s life; or

(b) results in, or is likely to result in, permanent injury or harm to the individual’s health.\(^{236}\)

Psychological injuries may be included in this category.\(^{237}\)

5.9 The main difference between the tests for a PCBU and a non–PCBU is that a PCBU cannot be charged for a category 1 offence over the death of an individual while a non–PCBU can. Mr Andrew Cotgreave, a Senior Policy Advisory for DMIRS explained this is because a PCBU

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\(^{234}\) Work Health and Safety Bill 2019, cl 31(1).

\(^{235}\) ibid., cl 31(2).

\(^{236}\) ibid., cl 31(3).

\(^{237}\) ibid., cl 4 (see definition of ‘health’).
can be charged for the death of an individual under the proposed industrial manslaughter offences:

Category 1 is derived from the model clause, but, as has been noted in later questions, has been amended and has been amended predominantly because of the introduction of industrial manslaughter. Some elements of category 1 have been pulled up into industrial manslaughter, which meant amendments had to be made to category 1.

...

It is very important in the design of offences in statutes that they have a hierarchical structure, so you always have offences get lesser and lesser. There is not meant to be any overlap and there is always this hierarchy of offences. By appropriating some of that language in category 1 for the offences in 30A and 30B, what that essentially did was by doing that, category 1 became very similar to category 2. So, the approach was to differentiate category 1 and category 2. It is an actual factual outcome of death or serious injury versus risk, which relates to near misses. The intent behind that was to retain that hierarchy of offences.238

5.10 Another interesting aspect of the elements of the proposed category 1 offence is that an officer can be prosecuted for a breach of their own duty of care. This is consistent with the Model Bill. However this approach is different to the position under the current work health and safety laws and the proposed industrial manslaughter offences under which an officer can only be charged in circumstances where the relevant PCBU/body corporate has breached their own duty of care.239

**Legal test**

5.11 The category 1 offence in the Model Bill requires a standard of ‘recklessness’ that has been removed from cl 31 of the Bill. The Boland Report noted there have been few successful prosecutions for category 1 offences due to difficulties in proving recklessness. Similarly, there has only been one conviction of a level 4 offence in Western Australia which also requires the prosecution to prove a conscious choice to take an unjustified risk.

5.12 The Boland Report recommended including a standard of gross negligence for category 1 offences. It recommends using the following definition of gross negligence applied by the High Court of Australia in *Patel v The Queen*:

such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.240

5.13 This would make it easier to prosecute a case than the standard of recklessness in the Model Bill because it does not require proof that the relevant act was intentional. Instead it applies an objective standard.

5.14 Clause 31 does not include a standard of gross negligence as recommended by the Boland Report. It imports a lower test of negligence by requiring the prosecution to prove the employer has breached their duty of care according to what is reasonably practicable.

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238 Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, pp 26–7.


240 *Patel v The Queen* [2012] 247 CLR 531.
EM Heenan J made the following observation about the standard of negligence under the current offences of the *Occupational Safety and Health Act 1984*:

At least in the context of s 21 – s 23 of the Act the obligation is to take reasonable care or to take such measures as are practicable to address, remove or guard against a particular hazard or hazards in the manner prescribed by those sections. No attempt is made in those sections to distinguish between negligence or failure to take measures reasonably practicable and some other form of negligence or failure to take practicable means which involves ‘criminal negligence’ or some more serious degree of lack of care or failure. The requirements of the test of practicability have already been addressed earlier in my reasons at [110] – [125], particularly at [115] and [122], as well as being the subject of many other decisions of this court.

However, breaches of the obligations of those and other sections of the Act may, by an amendment made to the legislation in 2004, that is, since the events associated with this case, be accompanied by a circumstance of aggravation if committed in circumstances of gross negligence – see s 18A(2); 19A(2); 20A(1); 21A(1); 21C(1); 22A(1) and 23AA(1) – and therefore be liable to more severe penalties.

However, none of these provisions applies to the present prosecution and I therefore consider that the concept of ‘criminal negligence’, if meant to signify the severity of lack of care which might, on a charge of manslaughter, be necessary for conviction, is a concept foreign to the sentences applying to these prosecutions and has the tendency to be a misleading distraction. ‘Criminal negligence’ in this sense is as inapplicable to these charges as it is to charges of dangerous driving causing death or grievous bodily harm under the provisions of the *Road Traffic Act 1974* as demonstrated by cases such as *McBride v The Queen* [1966] HCA 22; (1966) 115 CLR 44, 50 (Barwick CJ); *A M Smith v The Queen* [1976] WAR 97; and *Jiminez v The Queen* [1992] HCA 14; (1992) 173 CLR 572, 579–590 (Mason CJ, Brennan, Deane, Dawson, Toohey & Gaudron JJ).

The proposed cl 31 is likely to be interpreted in this way. That is, it will not require a standard of criminal negligence.

**FINDING 22**

Clause 31 of the Work Health and Safety Bill 2019 does not incorporate the subjective test of recklessness found in cl 31 of the Model Work Health and Safety Bill or the objective test of gross negligence recommended by the Boland Report but does include an objective test of reasonable practicability.

The test proposed in cl 31 requires the prosecution to prove death or serious harm to an individual. This deviates from a category 1 offence under the Model Bill which only requires exposure to death or serious harm. However it is the same as the current requirements of a level 3 offence under the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*. This approach represents a move towards an outcome based approach instead of a risk based approach.

Other jurisdictions that have legislated for industrial manslaughter do not require actual harm as proposed by cl 31. Rather, they have retained the language in the Model Bill

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241 *Reilly v Tobiassen* [2009] WASC 92, [15]–[17].
requiring the prosecution to prove that a person has been exposed to a risk of death or serious injury.\textsuperscript{242}

**Maximum penalties**

5.19 The maximum penalties for a category 1 offence are higher than those in the Model Bill:

Table 14. *Comparison of maximum penalties: category 1 offence*

<table>
<thead>
<tr>
<th>Offender</th>
<th>Model Bill</th>
<th>Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (other than an officer or PCBU)</td>
<td>5 years’ imprisonment and $300 000</td>
<td>5 years’ imprisonment and $340 000</td>
</tr>
<tr>
<td>Officer / PCBU</td>
<td>5 years’ imprisonment and $600 000</td>
<td>5 years’ imprisonment and $680 000</td>
</tr>
<tr>
<td>Body corporate</td>
<td>$3 000 000</td>
<td>$3 500 000</td>
</tr>
</tbody>
</table>

[Source: Model Work Health and Safety Bill 2019, cl 31; Work Health and Safety Bill 2019, cl 31]

**FINDING 23**

The penalties of imprisonment are consistent between cl 31 of the Work Health and Safety Bill 2019 and cl 31 of the Model Work Health and Safety Bill but the monetary penalties are marginally higher.

**RECOMMENDATION 3**

The Minister for Mines, Petroleum, Energy and Industrial Relations advise the Legislative Council on why the penalties in cl 31 of the Work Health and Safety Bill 2019 are higher than those in cl 31 of the Model Work Health and Safety Bill.

**Recent cases**

5.20 The following cases are examples of category 1 offences that have been prosecuted in other jurisdictions. The first two cases involve offences under the work health and safety laws in Queensland and South Australia where the prosecution is required to prove the accused was reckless and merely exposed an individual to a risk of death or injury. The third case was in Victoria where the prosecution is required to prove the exposed an individual to a risk of death or injury:

- The case in Queensland involved a worker who died when he fell from an unprotected roof edge.\textsuperscript{243} The company had budgeted to implement measures for guarding the unprotected roof edge but ultimately relied on less effective controls. The company was fined $1 million and the director was sentenced to a year imprisonment, suspended for four months. This was the first conviction of a category 1 offence in Queensland. The Court of Appeal has ordered a retrial on the basis that the trial judge gave a misdirection to the jury.\textsuperscript{244}

\textsuperscript{242} Work Health and Safety Act 2011 (Qld), s 31; Work Health and Safety Act 2011 (ACT), s 31; Work Health and Safety (National Uniform Legislation) Act 2011 (NT), s 31; Occupational Health and Safety Act 2004 (Vic), s 32.


\textsuperscript{244} R v Lavin [2019] QCA 109.
• The case in South Australia involved an experienced site supervisor and a worker who were prosecuted for a category 1 offence.\textsuperscript{245} The supervisor failed to intervene when the worker squirted flammable liquid onto the clothing of a 19 year old apprentice and ignited it in an act of 'high–jinx'. Minimal injury was sustained by the victim. The supervisor and the offending worker were each convicted and fined $12 000.

• The case in Victoria involved the owner of a scrap metal business who pleaded guilty to the equivalent provision of a category 1 offence under the Victorian work health and safety legislation.\textsuperscript{246} She was operating a forklift to carry a metal bin with a worker inside. The bin fell from the forklift and the worker was killed. The owner, who was 72 years old, was convicted and sentenced to six months' imprisonment and fined $10 000. She was also ordered to pay WorkSafe’s legal costs of $7 336.

**Category 2 offence (cl 32)**

5.21 A category 2 offence occurs when a person fails to comply with their health and safety duty and that failure exposes an individual to a risk of death or of injury or harm.

5.22 Clause 32 is set out in full below:

32. Failure to comply with health and safety duty—Category 2

(1) A person commits a Category 2 offence if—

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty; and

(c) the failure exposes an individual to a risk of death or of injury or harm to the individual’s health

Penalty for this subsection:

(a) for an individual, if the offence is committed by the individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking, a fine of $350 000;

(b) for an individual, if paragraph (a) does not apply, a fine of $170 000;

(c) for a body corporate, a fine of $1 800 000.

(2) A person charged with a Category 2 offence may be convicted of a Category 3 offence.

**Elements of the offence**

5.23 The elements of a category 2 offence are:

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty; and

(c) the failure exposes an individual to a risk of death or of injury or harm to the individual’s health.\textsuperscript{247}

\textsuperscript{245} Campbell v Rowe [2019] SAET 104.

\textsuperscript{246} WorkSafe Victoria v Jackson, an unreported decision of the Latrobe Valley Magistrates Court in Victoria (19 December 2018).

\textsuperscript{247} Work Health and Safety Bill 2019, cl 32.
Legal test

5.24 The submission from the Minister for Mines and Petroleum, Commerce and Industrial Relations, Hon Bill Johnston MLA notes that category 2 is ‘unmodified’ from the offence provided in the Model Bill.\(^\text{248}\) However cl 32 requires exposure to ‘a risk of death or of injury or harm to the individual’s health’ whereas the Model Bill requires exposure to ‘a risk of death or serious injury or illness’. This difference means a less serious injury could be prosecuted for a category 2 offence under the Bill than the Model Bill. All other jurisdictions that have implemented the Model Bill have applied the requirement for ‘serious illness or injury’.\(^\text{249}\)

5.25 The following explanation was provided by DMIRS:

It is very important in the design of offences in statutes that they have a hierarchical structure, so you always have offences get lesser and lesser. There is not meant to be any overlap and there is always this hierarchy of offences. By appropriating some of that language in category 1 for the offences in 30A and 30B, what that essentially did was by doing that, category 1 became very similar to category 2. So, the approach was to differentiate category 1 and category 2. It is an actual factual outcome of death or serious injury versus risk, which relates to near misses. The intent behind that was to retain that hierarchy of offences.\(^\text{250}\)

5.26 In the Model Bill ‘serious injury or illness’ is defined as requiring the person to have:

(a) immediate treatment as an in–patient in a hospital; or
(b) immediate treatment for:

(i) the amputation of any part of his or her body; or
(ii) a serious head injury; or
(iii) a serious eye injury; or
(iv) a serious burn; or
(v) the separation of his or her skin from an underlying tissue (such as degloving or scalping); or
(vi) a spinal injury; or
(vii) the loss of a bodily function; or
(viii) serious lacerations; or
(c) medical treatment within 48 hours of exposure to a substance, and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind.\(^\text{251}\)

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\(^\text{250}\) Andrew Cotgreave, Senior Policy Advisor, Department of Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, p 26.

\(^\text{251}\) Model Work Health and Safety Bill 2019, s 36.
5.27 This definition of ‘serious injury’ has also been included in the Bill however its use has been limited to Part 3 of the Bill. Part 3 contains provisions dealing with the mandatory notification of workplace incidents, injuries and illnesses.

**FINDING 24**

Clause 32 of the Work Health and Safety Bill 2019 is inconsistent with cl 32 of the Model Work Health and Safety Bill to the extent that it captures less serious injury. This is inconsistent with the approach in other harmonised jurisdictions.

**RECOMMENDATION 4**

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for cl 32 of the Work Health and Safety Bill 2019 to be inconsistent with the Model Work Health and Safety Bill.

**Maximum penalties**

5.28 The maximum penalties for a category 2 offence are higher than those in the Model Bill:

<table>
<thead>
<tr>
<th>Offender</th>
<th>Model Bill</th>
<th>Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (other than an officer or PCBU)</td>
<td>$150 000</td>
<td>$170 000</td>
</tr>
<tr>
<td>Officer / PCBU</td>
<td>$300 000</td>
<td>$350 000</td>
</tr>
<tr>
<td>Body corporate</td>
<td>$1 500 000</td>
<td>$1 800 000</td>
</tr>
</tbody>
</table>

(Source: Model Work Health and Safety Bill 2019, cl 32; Work Health and Safety Bill 2019, cl 32)

**FINDING 25**

The penalties in cl 32 of the Work Health and Safety Bill 2019 are marginally higher than those in cl 32 of the Model Work Health and Safety Bill.

**RECOMMENDATION 5**

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council why the penalties in cl 32 of the Work Health and Safety Bill 2019 are higher than those in cl 32 of the Model Work Health and Safety Bill.

**Recent case**

5.29 The following case is an example of a category 2 offence in New South Wales. The elements of the relevant provision are almost identical to those proposed by cl 32:

- A company and an individual engaged as a production officer/team leader was charged in relation to a worker who was electrocuted and died after being directed to conduct electrical work in the absence of a qualified electrician. The company was fined $900 000 and the team leader was fined $48 000.252

**Category 3 offence (cl 33)**

5.30 A category 3 offence is considered the least serious offence.

---

252 *Orr v Cudal Lime Products* [2018] NSWDC 27.
5.31 Clause 33 is set out in full below:

**33. Failure to comply with health and safety duty—Category 3**

A person commits a Category 3 offence if—

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty.

Penalty:

(a) for an individual, if the offence is committed by the individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking, a fine of $120 000;

(b) for an individual, if paragraph (a) does not apply, a fine of $55 000;

(c) for a body corporate, a fine of $570 000.

**Elements of the offence**

5.32 The elements of a category 3 offence are:

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty.\(^{253}\)

**Maximum penalty**

5.33 The maximum penalties for a category 3 offence are higher than those in the Model Bill:

Table 16. *Comparison of maximum penalties: category 3 offence*

<table>
<thead>
<tr>
<th>Offender</th>
<th>Model Bill</th>
<th>Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (other than an officer or PCBU)</td>
<td>$50 000</td>
<td>$55 000</td>
</tr>
<tr>
<td>Officer / PCBU</td>
<td>$100 000</td>
<td>$120 000</td>
</tr>
<tr>
<td>Body corporate</td>
<td>$500 000</td>
<td>$570 000</td>
</tr>
</tbody>
</table>

[Source: Model Work Health and Safety Bill 2019, cl 33; Work Health and Safety Bill 2019, cl 33]

**FINDING 26**

The penalties in cl 33 of the Work Health and Safety Bill 2019 are marginally higher than those in cl 33 of the Model Work Health and Safety Bill.

**RECOMMENDATION 6**

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council why the penalties in cl 33 of the Work Health and Safety Bill 2019 are higher than those in cl 33 of the Model Work Health and Safety Bill.

**Category Offences—global issues**

5.34 The following issues have been identified in relation to all of the Category Offences. They include:

\(^{253}\) Work Health and Safety Bill 2019, cl 33.
• whether the Category Offences are strict liability offences
• whether the Category Offences reverse the onus of proof
• whether the penalty amounts should be stated in dollar amounts or penalty units.

**Strict liability**

5.35 The Category Offences do not require the prosecution to prove an intention to commit a crime. This was acknowledged by the Boland Report:

> The physical elements of these three offences are drafted consistently with strict liability, which means no proof of mental element is required and no defence of honest and reasonable mistake is allowed.254

5.36 The existing level 1–3 offences under the *Occupational Safety and Health Act 1984* and the *Mines Safety Inspection Act 1994* also do not require proof of the accused’s intention. However a level 4 offence under the current laws is not a strict liability offence because it requires the accused to have known that their breach would be likely to cause the death of, or serious harm to, a person.255

5.37 While there is no need to prove an intention to commit an offence under the Category Offences, the liability of a duty holder is qualified by the requirement to prove a breach of a duty of care according to what was reasonably practicable in the circumstances. This is an objective test.

5.38 Strict liability is also discussed in relation to the simple offence of industrial manslaughter proposed by cl 308 in paragraphs 4.102–4.112.

**FLP 4—Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**

5.39 For the reasons discussed in paragraphs 4.113–4.116 the Category Offences do not reverse the onus of proof. The prosecution must prove all the elements of the Category Offences. They are also required to disprove any excuses that are raised under Chapter V of the *Criminal Code* beyond a reasonable doubt.

**FINDING 27**

Clauses 31–33 of the Work Health and Safety Bill 2019 do not reverse the onus of proof.

**Penalty amounts**

5.40 The fines that can be imposed for the Category Offences are described in dollar amounts rather than penalty units. The experience in other jurisdictions which have taken this approach is that the fines remain at the same level despite inflation. In contrast, the value of penalty units, where they are used, have increased across participating jurisdictions.

5.41 The Boland Report recommends that penalties be increased according to the Consumer Price Index and that the value of penalty units in the participating jurisdictions be adjusted as needed. This recommendation is designed to ensure penalties continue to retain their value as a deterrent.256

5.42 The approach to the Category Offences in other jurisdictions is set out in Table 17.

---


Table 17. *Use of penalty units or dollar amounts in Australia*

<table>
<thead>
<tr>
<th>State</th>
<th>Penalty units / dollar amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>Penalty units</td>
</tr>
<tr>
<td>QLD</td>
<td>Penalty units</td>
</tr>
<tr>
<td>SA</td>
<td>Dollar amount</td>
</tr>
<tr>
<td>NT</td>
<td>Dollar amount (however NT applies penalty units for industrial manslaughter)</td>
</tr>
<tr>
<td>TAS</td>
<td>Dollar amount</td>
</tr>
<tr>
<td>ACT</td>
<td>Dollar amount</td>
</tr>
<tr>
<td>WA</td>
<td>Dollar amount</td>
</tr>
</tbody>
</table>


**RECOMMENDATION 7**

The Minister for Mines, Petroleum, Energy and Industrial Relations explain to the Legislative Council whether it is necessary for the penalties in Part 2 of the Work Health and Safety Bill 2019 to be described in dollar amounts instead of penalty units.

**Insuring against fines**

5.43 Clause 272A of the Bill will prevent people from taking out insurance against fines issued under the Bill. The relevant section is set out below:

(1) In this section—

- *indemnify* means indemnify wholly or partly;
- *insurance policy* includes any contract of insurance.

(2) An insurance policy is of no effect to the extent that, apart from this subsection, it would indemnify a person for the person’s liability to pay a fine for an offence against this Act.

(3) A person (A) must not—

   (a) enter into, or offer to enter into, an insurance policy that purports to indemnify a person for the person’s liability to pay a fine for an offence against this Act; or
   
   (b) indemnify, or offer to indemnify, another person for the other person’s liability to pay a fine for an offence against this Act; or
   
   (c) be indemnified, or agree to be indemnified, by another person for A’s liability to pay a fine for an offence against this Act; or
   
   (d) pay to another person, or receive from another person, an indemnity for a fine for an offence against this Act.

Penalty for this subsection:

   (a) for an individual, a fine of $55,000;
   
   (b) for a body corporate, a fine of $285,000.
5.44 This implements the following recommendation of the Boland Report:

Amend the model WHS Act to make it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act
- provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and
- take the benefit of such insurance or such an indemnity.\(^{257}\)

5.45 A number of stakeholders expressed their support for these provisions while others have expressed their concerns:

- **Australian Industry Group:**
  
  There should be an ability to access insurance to support the defence of such actions and we interpret the provision as continuing to allow such cover for legal and other defence costs, and only excluding monetary penalties.\(^{258}\)

- **Australian Institute of Company Directors:**
  
  While the AICD supports strong penalties for directors and officers who fail to exercise their duties under WHS laws, we do not support the proposed blanket prohibition on insurance for fines in a WHS context.

  ... 

  The common law already adopts a carefully balanced approach to cases involving an insured seeking to claim under an insurance policy with respect to any alleged criminal liability, where the general rule is that a contract of insurance is not enforceable in respect of criminal acts.

  ... 

  The Corporations Act 2001 (Cth) (Corporations Act) also attempts to balance these considerations, prohibiting some types of recovery while enabling insurance to be obtained for other activities, such as civil penalty provisions.\(^{259}\)

- **Northern Star Resources Limited:**
  
  there should be no prohibition on companies and officers from obtaining insurance for health and safety offences and fines included in the bill; and

  the current position should be preserved that allows companies and their officers to obtain insurance for health and safety fines and costs other than those involving gross negligence.\(^{260}\)

5.46 Although this issue is closely connected to the offence provisions, it is not included in Part 2 and does not fall within the Committee's terms of reference. As such the Committee has not made any findings or recommendations on this issue.

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\(^{258}\) Submission 41 from Australian Industry Group, 26 June 2020, pp 11–2.

\(^{259}\) Submission 42 from Australian Institute of Company Directors, 26 June 2020, p 4.

\(^{260}\) Submission 50 from Northern Star Resources Limited, 26 June 2020, pp 27–8.
CHAPTER 6
Government response to Report 126 of the Uniform Legislation Committee

Inquiry Term of Reference (3)

6.1 As part of this inquiry, the Committee:

is to consider any government response to the 126th report of the Standing Committee on Uniform Legislation and Statutes Review.\(^{261}\)

6.2 Report 126 of the Standing Committee on Uniform Legislation and Statutes Review was tabled on 12 May 2020. The subject of that report was the Bill and the Safety Levies Amendment Bill 2019. The Standing Committee on Uniform Legislation and Statutes Review was confined to investigating whether the Bills impact upon the sovereignty and law-making powers of the Parliament of Western Australia.\(^{262}\)

6.3 Although the Government was not required to provide a response to Report 126 the Minister for Petroleum, Energy and Industrial Relations gave the Committee a copy of his response on 29 June 2020.\(^{263}\) That response is attached as Appendix 2 and is also available on the Committee’s website.

6.4 The Committee has considered the Minister’s response and notes that the Government:

- has agreed to amend the Bill to implement recommendations 1, 2 and 3 in Report 126
- does not respond to recommendation 4
- has agreed to amend the Bill to address recommendation 5
- does not respond to recommendation 6
- disagrees with recommendation 7
- disagrees with recommendation 8
- disagrees with recommendation 9.

6.5 The Minister’s response is now available to assist the Legislative Council’s debate of the Bill.

\(^{261}\) Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 21 May 2020, p 3048.

\(^{262}\) Western Australia, Legislative Council, Standing Orders of the Legislative Council, Schedule 1, item 6.4.

\(^{263}\) ibid., SO 191(3).
CHAPTER 7
Conclusion

Introduction
7.1 The policy objectives of the Bill are noted in chapter 1. They are modernisation, harmonisation, consolidation and deterrence.

Modernisation
7.2 The Bill seeks to modernise work health and safety laws by introducing a broad concept of PCBU to apply to modern working arrangements.
7.3 The Committee is satisfied that the policy objective of modernisation would be achieved by the Bill in this way.

Harmonisation
7.4 Part 2 of the Bill is largely consistent with the Model Bill. Apart from a number of small changes which have been recommended by previous inquiries, the main points of difference are:
   • the duty of care of work health and safety service providers (cl 26A)
   • industrial manslaughter—criminal (cl 30A)
   • industrial manslaughter—simple offence (cl 30B)
   • the legal test proposed by category 1 (cl 31)
   • category 2 requires a risk of ‘death or of injury or harm to the individual’s health’ (cl 32).
7.5 Apart from these aspects of the Bill the Committee is satisfied that the policy objective of harmonisation would be achieved.
7.6 Although these provisions deviate from the Model Bill, it should be noted that they largely reflect and clarify existing laws. For example, the duty of care provision for work health and safety service providers is intended to clarify their existing legal obligations.
7.7 In Finding 8 the Committee found that no harmonised approach exists to industrial manslaughter provisions in Australia. The model process allowed for each jurisdiction to adapt the Model Bill to its own laws which is reflected in the proposed provisions. The proposed industrial manslaughter offences in Western Australia do not apply the same legal test as found in other jurisdictions (Boland’s objective gross negligence test).

Consolidation
7.8 If passed, the Bill will replace the Occupational Safety and Health Act 1984 and the Mines Safety and Inspection Act 1994. In doing so it will become the primary legislative framework for work health and safety in Western Australia.
7.9 The Committee is satisfied that the Bill achieves the policy objective of consolidating work health and safety laws.

Deterrence
7.10 The views submitted to the Committee in relation to deterrence were largely divided between:
• Bereaved family members and employee representative organisations: These stakeholders were of the view that the proposed measures would deter unsafe work health and safety practices.

• Industry groups: These stakeholders were concerned that the proposed measures would undermine collaborative and proactive approaches to workplace health and safety. These stakeholders also questioned the effectiveness of industrial manslaughter offences to deter unsafe workplace practices based on their perceptions of the impact of industrial manslaughter laws in the Australian Capital Territory and the United Kingdom.

7.11 Essentially, Part 2 of the Bill seeks to:

• translate existing offences arising from a workplace fatality into industrial manslaughter
• make officers of PCBUs directly liable for their own conduct if that conduct causes a workplace fatality
• significantly increase the penalties for conduct causing a workplace fatality. Notably, the proposed industrial manslaughter—criminal offence increases the potential maximum term of imprisonment for a death at a workplace from 5 to 20 years' imprisonment.

7.12 Any assessment of the deterrent effect will be best made after the implementation of these measures. Clause 277 of the Bill ('Operation of Act to be reviewed every 5 years') will be crucial in this regard.

Hon Dr Sally Talbot MLC

Chair
**APPENDIX 1**

**STAKEHOLDERS, SUBMISSIONS RECEIVED AND PUBLIC HEARINGS**

Stakeholders contacted

<table>
<thead>
<tr>
<th>Number</th>
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<tr>
<td>1.</td>
<td>WorkSafe Western Australia</td>
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<td>3.</td>
<td>Office of the State Coroner</td>
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<td>4.</td>
<td>Comcare</td>
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<td>WorkCover Western Australia</td>
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<td>Fair Work Commission Western Australia</td>
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<td>Fair Work Ombudsman</td>
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<td>Supreme Court of Western Australia</td>
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<td>District Court of Western Australia</td>
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<td>Magistrates Court of Western Australia</td>
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<td>Director of Public Prosecutions for Western Australia</td>
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<td>Law Society of Western Australia</td>
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<td>Law Reform Commission of Western Australia</td>
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<td>14.</td>
<td>Small Business Development Corporation</td>
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<td>17.</td>
<td>Australian Chamber of Commerce and Industry</td>
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<td>Australian Industry Group</td>
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<td>Master Builders Association of Western Australia</td>
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<td>24.</td>
<td>Master Ladies' Hairdressers' Industrial Union of Employers of Western Australia</td>
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<td>Printing and Allied Trades Employers’ Association of Western Australia</td>
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<td>26.</td>
<td>Restaurant and Catering Industry Association of Employers of Western Australia Inc.</td>
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<td>UnionsWA</td>
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<td>Western Australian Hotels and Hospitality Association Incorporated</td>
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<td>29.</td>
<td>Association of Professional Engineers Australia</td>
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<td>Australian Council of Trade Unions</td>
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<td>31.</td>
<td>Australian Institute of Company Directors</td>
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<td>32.</td>
<td>Australian Institute of Marine and Power Engineers</td>
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<td>33.</td>
<td>Australasian Meat Industry Employees’ Union</td>
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<td>Civil Service Association of Western Australia Incorporated</td>
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<td>Finance Sector Union of Australia</td>
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<td>Independent Education Union of Australia</td>
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<td>54.</td>
<td>Maritime Union of Australia</td>
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<td>55.</td>
<td>Master Painters, Decorators and Signwriters Association of Western Australia</td>
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<td>Master Plumbers and Gasfitters Association of Western Australia</td>
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<td>Meat and Allied Trades Federation of Australia</td>
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<td>Media Entertainment and Arts Alliance</td>
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<td>Pastoralists and Graziers Association</td>
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<td>Pharmacy Guild of Australia</td>
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<td>Plumbing and Pipe Trades Employees Union</td>
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## Submissions received

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<td>6.</td>
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<td>7.</td>
<td>Patricia Kelsh</td>
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<td>Murrin Murrin Operations</td>
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<td>Ashlea Cunico</td>
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<td>Chamber of Commerce and Industry of Western Australia</td>
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<td>18.</td>
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<td>24.</td>
<td>Amanda Fox</td>
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<td>Mark and Janice Murrie</td>
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<td>Rebecca Smith</td>
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<td>Jody Munckton</td>
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<td>35.</td>
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<td>Citic Pacific Mining</td>
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<td>38.</td>
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<td>39.</td>
<td>Australian Hotels Association Western Australia</td>
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<td>40.</td>
<td>Civil Contractors Federation Western Australia</td>
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<td>41.</td>
<td>Australian Industry Group</td>
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<td>42.</td>
<td>Australian Institute of Company Directors</td>
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<td>43.</td>
<td>Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division (WA)</td>
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<td>44.</td>
<td>Australian Manufacturing Workers’ Union (WA)</td>
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<td>45.</td>
<td>Western Australian Fishing Industry Council</td>
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<td>46.</td>
<td>Community and Public Sector Union Civil Service Association of WA</td>
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<td>47.</td>
<td>South32 Worsley Alumina Pty Ltd</td>
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<td>49.</td>
<td>Australian Petroleum Production and Exploration Association</td>
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<td>50.</td>
<td>Northern Star Resources</td>
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<td>51.</td>
<td>Pilbara Resources</td>
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<td>Gold Fields Australia</td>
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<td>53.</td>
<td>Australian Institute of Health and Safety (WA)</td>
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<td>54.</td>
<td>Joint Industry Group</td>
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<td>55.</td>
<td>Pastoralists and Graziers Association</td>
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<td>56.</td>
<td>Master Builders Association of Western Australia</td>
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<td>57.</td>
<td>Eureka Lawyers</td>
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<td>58.</td>
<td>Pearl Producers Association</td>
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<td>59.</td>
<td>The State School Teachers Union of Western</td>
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<td>60.</td>
<td>Association of Mining and Exploration Companies</td>
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<td>61.</td>
<td>Western Australian Police Union</td>
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<td>62.</td>
<td>Christiana Paterson</td>
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<td>63.</td>
<td>Western Australian Local Government Association</td>
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<td>64.</td>
<td>The Law Society of Western Australia</td>
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**Public hearings**

<table>
<thead>
<tr>
<th>Date</th>
<th>Participants</th>
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<tbody>
<tr>
<td>8 July 2020</td>
<td>Mr Mark and Mrs Janice Murrie; Ms Sharon Westerman and Mr Tony Hampton</td>
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<tr>
<td>8 July 2020</td>
<td>Ms Regan Ballantine</td>
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<tr>
<td>9 July 2020</td>
<td>UnionsWA; Australian Manufacturing Workers Union; Construction, Forestry, Maritime, Mining and Energy Union</td>
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<td>9 July 2020</td>
<td>Pastoralists and Graziers WA; WAFarmers</td>
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<tr>
<td>9 July 2020</td>
<td>Chamber of Commerce and Industry of Western Australia; Master Builders Association of Western Australia; Australian Industry Group</td>
</tr>
<tr>
<td>9 July 2020</td>
<td>Department of Mines, Industry Regulation and Safety</td>
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GOVERNMENT RESPONSE TO REPORT 126 OF THE UNIFORM LEGISLATION COMMITTEE


Recommendation 1

Clause 2 of the Work Health and Safety Bill 2019 be amended to require the Work Health and Safety Act 2019, if not operational within the expiration of 10 years of receiving Royal Assent, be automatically repealed on that date.

Recommendation 2

Clause 2 of the Work Health and Safety Bill 2019 be amended to require any provision of the Work Health and Safety Act 2019 not operational within the expiration of 10 years of the Act receiving Royal Assent be automatically repealed on that date.

Recommendation 3


Response —

In preparing this Bill Parliamentary Counsel adopted the existing standard practice in preparing Clause 2. In particular, I note the provisions of the following Bills:

- Consumer Protection Legislation Amendment Bill 2013
- Courts and Tribunals (Electronic Processes Facilitation) Bill 2013
- Custodial Legislation (Officers Discipline) Amendment Bill 2013
- Associations Incorporation Bill 2014
- Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014
- Cooperatives Amendment Bill 2015
- Bail Legislation Amendment Bill 2016

All these Bills provide for a commencement provision in the same manner as the Work Health and Safety Bill 2019.

As these Bills were all introduced by the Attorney General at the time, The Hon. Michael Mischin MLC, I had assumed that the commencement arrangement for the Work Health and Safety Bill 2019 would be acceptable.

However, as there is no impact on the implementation of the Work Health and Safety Bill 2019 I have issued instructions to have amendments drafted to the Work Health and Safety Bill 2019 (WHS Bill) which implement Committee recommendations 1, 2 and 3.
Recommendation 4

The second reading speech or Explanatory Memorandum for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.

Recommendation 5

The Government find an effective alternative to the current Henry VIII clause in clause 12A and amend the Work Health and Safety Bill 2019 accordingly.

Response —

I have issued instructions to have amendments drafted to the WHS Bill which delete:

- cl. 12A – Effect of Schedule 1 and
- Schedule 1 – Application of Act to dangerous goods and high risk plant.

Recommendation 6

The second reading speech or Explanatory Memorandum for a bill should identify any clause that proposes to incorporate into Western Australian law material that is in force at a particular time but may vary from time to time, provide a rationale for it and explain its practical effect.

Recommendation 7

The Government find an effective alternative to the current incorporation mechanism in clause 274(3)(b) and amend the Work Health and Safety Bill 2019 accordingly.

Response —

Clause 274 of the WHS Bill is titled ‘Approved codes of practice’

A code of practice is not law, legislation or a regulation. An approved code of practice is guidance material and has an interpretive function. It does not impose any requirements other than those authorised by the WHS Act and WHS regulations.

Under the foreword of the model How to manage and control asbestos in the workplace code of practice (as an example), the following text is stated:

i) An approved code of practice provides practical guidance on how to achieve the standards of work health and safety required under the WHS Act and the Work Health and Safety Regulations (the WHS Regulations) and effective ways to identify and manage risks.

ii) “Compliance with the WHS Act and WHS Regulations may be achieved by following another method, if it provides an equivalent or higher standard of work health and safety than the code”.

The contents of the codes of practice will be limited by the Work Health and Safety (WHS) Act and WHS regulations and can only be approved by the Minister if the development process involved consultation between unions and employer organisations (clause 274(2)).

WA’s existing Occupational Safety and Health Act 1984 (OSH ACT) and Mines Safety Inspection Act 1996 (sections 57 and 93 respectively), include provision for codes of practice. Similar to clause 274(3), the existing laws allow a wide range of material that can be included in a code of practice.

Subsection 57(2) of the OSH Act, states:

A code of practice may consist of any code, standard, rule, specification or provision relating to occupational safety or health that is prepared by the Commission or any other body and may
incorporate by reference any other such document either as it is in force at the time the code of practice is approved or as it may from time to time thereafter be amended.

The language in subsection 57(2) of the OSH Act provides substantively the same language as that proposed as that proposed in clause 274(3) of the WHS Bill 2019.

In view of these circumstances, no amendments are proposed to the WHS Bill.

Recommendation 8

The second reading speech or Explanatory Memorandum for a bill should identify any clause that proposes to incorporate into Western Australian law material that is in force at a particular time but may vary from time to time, provide a rationale for it and explain its practical effect.

Response —

The Government has decided to amend the Explanatory Memorandum for the WHS Bill 2019 to indicate that an explanation of the rationale and practical effect of regulations made under clauses 276(3)(c) and 276(3)(d)(ii) will be provided as part of the explanatory material for those regulations.

The clauses in the Explanatory Memorandum that have been raised as a concern by the Committee have been adopted from the national model WHS Bill without amendment. To assist in consistency of interpretation in jurisdictions that have adopted provisions of the national model WHS Bill, a model explanatory memorandum was developed by the Parliamentary Counsel’s Committee (which included WA representation) and served as the basis for the Explanatory Memorandum for the WHS Bill 2019. To retain consistency, modifications to the Explanatory Memorandum for the WHS Bill 2019 were limited to those elements that have substantively changed from the national model WHS Bill.

The desirability of including additional language providing a rationale and practical effect of these clauses has been considered in light of the Committee’s recommendation. This approach raises a significant risk of inadvertently narrowing or changing the range of matters that can be regulated to those that fit within parameters provided in the amended Explanatory Memorandum. Simply if extra words are added they must be understood to have an effect when considering the bill. The possibility of therefore changing meanings or effect are significant.

Amendments to the Explanatory Memorandum committing the Government of the day to explain the rationale and practical effect of regulations during the process of tabling them, reflect current practice and do not pose the same risk of unintended consequences.

Recommendation 9

The Government find an effective alternative to the current incorporation mechanism in clause 276(3)(d) and amend the Work Health and Safety Bill 2019 accordingly.

Response —

The Government has been unable to find an effective alternative mechanism and accordingly believes clause 276(3)(d) needs to be retained as presently drafted.

The Government’s position on the WHS Bill 2019 is to adopt provisions of the national model WHS Bill unless persuasive arguments supporting amendments were made during the process of consultation. No submissions have been identified that requested changes to clause 276(3)(d) and the regulation–making powers were not controversial.
In considering recommendation 9, the Government sought advice from State Counsel regarding the potential for clause 276(3)(d) (as well as clause 276(3)(c)) to lead to a derogation of power, and the potential consequences of deletion or modification of these clauses.

While the language of clause 276(3)(c) is broad, the provision is principally concerned with the Governor–in–Council by regulation conferring various powers on such persons which are administrative rather than legislative in nature and does not therefore derogate from Western Australia's parliamentary sovereignty.

The Committee Report at 6.70 notes:

*Although the Minister refers to existing practice, the Committee has not been able to compare what is currently in place under the OHS Act and OSH Regulations with what may be possible under the WHS Bill.*

It is important in understanding the Government's approach to recognise that existing regulation making powers under section 60 of the OSH Act are very broad:

*The Governor may make regulations prescribing all matters that are necessary or convenient to be prescribed for giving effect to the purposes of the OSH Act.*

It is the Government's view that the powers created in the regulation making powers in 276(1) are no broader in referring to:

- any matter relating to work health and safety (clause 276(1)(a)); and
- apply, adopt or incorporate any matter contained in any document formulated, issued or published by a person or body whether with or without modification or as in force at a particular time or as in force or remade from time to time... by the WHS Act (clause 276(1)(b)).

Any powers provided to the regulator, inspector, other prescribed person or body of persons must be authorised by either or under the WHS Act or by regulations and which are subject to scrutiny by Parliament and potential disallowance. This is consistent with established Parliamentary processes and the requirements of the OSH Act.

The incorporation of other documents into law is an established practice in Western Australia, particularly when the other documents use technical language that is unsuitable for legislative drafting. There are a number of examples of similar provisions currently operating in law in Western Australia that currently achieve the same outcome. For example:

- Occupational Safety and Health Amendment Regulations (No. 2) 2013 amended the OSH regulations to prescribe a reference to Assessing Fitness to Drive 2012.
- Occupational Safety and Health Amendment Regulations 2014 amended the OSH regulations to prescribe a reference to the Road Traffic (Vehicles) Act 2012 and the Road Traffic (Vehicles) regulations 2014.
- Occupational Safety and Health Amendment Regulations 2019 amended the OSH regulations to prescribe a reference to Assessing Fitness to Drive 2016 published jointly by Austroads Ltd and the National Transport Commission, as revised in 2017.
- Occupational Safety and Health Amendment Regulations (No. 2) 2019 amended the OSH regulations to prescribe a reference to the Transport (Road Passenger Services) Act 2018.

These regulations have all been subject to the scrutiny of Parliament. The same scrutiny amendment regulations will apply under the WHS Act when enacted.
Further, the Government is concerned that the deletion of either clause, to rely on the general regulation-making power, would create a risk that the general regulation making power could not be used to enact regulations similar in scope and there would be potential for future disputation in that regard.

The Government is also of the view that any proposal to amend clause 276(3)(d) (or 276(3)(c)) (for example to delete the reference to ‘from time to time’) provokes a substantial risk of unintended consequences. That is particularly so in circumstances where the clauses reflect provisions in the national model WHS Bill and it is envisaged that future regulations will in many respects be modelled on the national model WHS Regulations. Those model regulations were prepared on the basis of the contemplated regulation making powers in the model WHS Bill.

While it is presently envisaged that future regulations will generally only make provision for the application, adoption or incorporation of documents at particular points in time, it is possible that future regulations might in exceptional cases seek to make provision for the application, adoption or incorporation of particular documents “from time to time”. If so, it is envisaged that will be explicitly addressed in any such proposed regulations as well as any relevant process or mechanism for that occurring. Further as indicated previously this is neither novel nor new to OHS law in Western Australia.

It is the Government’s view that, given what is proposed in the WHS Bill is consistent with the approach to these issues under current legislation, the better course is not to generally preclude the sort of regulations contemplated. The better option is to subject a particular proposed regulation to the normal processes which would require the Government of the day to detail justification of the proposed regulation.

In this context the Government notes the rigor of and high standing in which the work the Joint Standing Committee on Delegated Legislation is held.
## DEVIATIONS FROM THE MODEL BILL

Table 18. Deviations from Part 2 of the Model Work Health and Safety Bill

[Note: bold text denotes Committee changes to the table provided by the Minister for Mines, Petroleum, Energy and Industrial Relations]

<table>
<thead>
<tr>
<th>Clause</th>
<th>Notes</th>
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<tbody>
<tr>
<td>19 Primary duty of care</td>
<td>Inclusion of a note reminding duty holders that health means physical and psychological health consistent with the definition in clause 4.</td>
</tr>
<tr>
<td>26A Duty of persons conducting businesses or undertakings that provide services relating to work health and safety</td>
<td>Does not appear in the Model Bill. This duty has been included based on recommendations of the National Review and by the Ministerial Advisory Panel.</td>
</tr>
<tr>
<td>30 Terms used</td>
<td>Inclusion of a definition of ‘conduct’ to distinguish the legal approach to conduct (an act or omission) to the more general use of the term elsewhere in the Bill.</td>
</tr>
<tr>
<td>30A Industrial manslaughter—crime</td>
<td>Does not appear in the Model Bill. Included as a result of Government consultation, and community concern, regarding penalties imposed for workplace deaths. Industrial manslaughter—crime, provides for substantial penalties and is an indictable offence that will be heard in the District Court. It is intended to deal with the more egregious workplace offences causing death, and includes fault elements. This clause is modelled on the current Level 4 offence in the OSH/MSI Acts.</td>
</tr>
<tr>
<td>30B Industrial manslaughter—simple offence</td>
<td>Does not appear in the Model Bill. Included as a result of Government consultation, and community concern, regarding penalties imposed for workplace deaths. Industrial manslaughter—simple offence, addresses workplace deaths that are causative. With the exception of offences committed by officers, there are no fault elements. Cases will be heard before a Magistrate. This clause is modelled on the current Level 3 offence in the OSH/MSI Acts.</td>
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<tr>
<td>Clause</td>
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<tr>
<td>31</td>
<td>Failure to comply with health and safety duty—Category 1&lt;br&gt;In the Model Bill, a Category 1 offence consists of the same elements regardless of the classification of the accused as a PCBU, officer or other person. In the Bill, a Category 1 offence for a PCBU is different to a Category 1 offence for officers and other persons. In the Bill, workplace deaths caused by PCBUs will be dealt with under either of the industrial manslaughter offences and subclause (1) of the Model Bill has been amended to reflect this approach. That is:&lt;ul&gt;&lt;li&gt;PCBs will be liable for a Category 1 offence if they cause ‘serious harm to an individual’: subclause (1) &lt;/li&gt;&lt;li&gt;Other persons will be liable for a Category 1 offence if they cause the ‘death of, or serious harm to, an individual’: subclause (2). For example, officers may be charged with a workplace death under clause 31 (but the standard of behaviour in this case is due diligence). &lt;/li&gt;&lt;/ul&gt;The concept of ‘recklessness’ has been removed as it is not a feature of Western Australian law. The approach taken in amending Category 1 is consistent with the substance of the related recommendation in the Boland Report. The words ‘without reasonable excuse’ have been removed. Subclause (2) from the Model Bill has been removed. It provides that ‘The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.’ The Bill provides for conviction under alternative offences.</td>
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<tr>
<td>32</td>
<td>Failure to comply with health and safety duty—Category 2&lt;br&gt;The Bill requires exposure to ‘a risk of death or of injury or harm to the individual’s health’ whereas the Model Bill requires exposure to ‘a risk of death or serious injury or illness’ (underlining added). The Bill provides for conviction under an alternative offence.</td>
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<td>34</td>
<td>Volunteers and unincorporated associations&lt;br&gt;The reference to civil penalties has been removed consequential to the removal of Part 7—Workplace entry by WHS entry permit holders.</td>
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[Source: Submission 48 from Minister for Mines, Petroleum, Energy and Industrial Relations, Hon Bill Johnston MLA, received 29 June 2020, Appendix A, pp 24-5, supplemented by the Committee’s observations]

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264 The submission notes that ‘A range of additional amendments have been made to Part Two [of the Model Work Health and Safety Bill] for consistency with the Western Australian Parliamentary drafting requirements, such as gender neutrality and preferred spelling, and to improve clarity. None of these amendments alter the substantive provision.’ These types of deviations are not listed in the table.
APPENDIX 4

FUNDAMENTAL LEGISLATIVE PRINCIPALS

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?
APPENDIX 5

LAW REFORM SINCE THE 1970S

Robens Report

5.1 Historically work health and safety laws in Australia owe much to, and are largely based on the recommendations of the Robens Report. The Robens Report, named after Lord Alfred Robens, was tabled in the House of Commons in the United Kingdom by the Committee on Health and Safety in 1972.265

5.2 The Robens Report reviewed the existing work health and safety laws in the United Kingdom. They were similar to Australian laws at the time. It found the laws were difficult to identify because the provisions were contained in multiple statutes based on specific industries, workplaces and risks.266 That is, each industry, workplace and so on had its own laws. This made application of uniform laws across different kinds of workplaces difficult. According to the Robens Report there was simply ‘too much law’.267

5.3 The Robens Report recommended streamlining work health and safety laws through the ‘creation of a more unified and integrated system’.268 It suggested consolidating work health and safety laws into a single umbrella statute which could be supported by more specific regulations and codes of practice. Under the Robens–model there is a strong preference for non–statutory forms of guidance such as codes of practice.269

5.4 The Robens Report also found the laws in the United Kingdom were overly prescriptive. They had become so in an attempt to cover all conceivable risks. The Robens Report recommended this be addressed by requiring businesses to comply with broad general duties. In this way:

Rather than directing specific activities, the Robens model requires duty holders (those involved in the undertaking of work and providing the means for work to be undertaken) to achieve safe outcomes by the means which can be adopted, and are most appropriately adopted, in the circumstances of the particular business or work activities.270

5.5 The Robens Report led to the enactment of the Health and Safety at Work Act 1974 in the United Kingdom and inspired a wave of legislative reform in Australia, New Zealand and Canada. South Australia was the first jurisdiction in Australia to enact Robens–style legislation in 1972. It was followed by Tasmania in 1977, Victoria in 1981, New South Wales in 1983, Western Australia in 1984, the Northern Territory in 1986, and the Australian Capital Territory and Queensland in 1989.271

265 House of Commons, Committee on Safety and Health at Work, Safety and Health at Work, 9 June 1972, p 6.
266 For example, Factories Act 1961 (UK); Offices, Shops and Railway Premises Act 1963 (UK); Mines and Quarries Act 1954 (UK); Agriculture (Poisonous Substances) Act 1952 (UK); Agriculture (Safety, Health and Welfare Provisions) Act 1956 (UK); Explosives Act 1857 (UK); Explosives Act 1923 (UK); Petroleum (Consolidation) Act 1928 (UK); Nuclear Installations Act 1959/69 (UK); Radioactive Substances Act 1960 (UK); Alkali, etc. Works Regulation Act 1906 (UK).
267 House of Commons, Committee on Safety and Health at Work, Safety and Health at Work, 9 June 1972, p 6.
268 ibid., paragraph 41.
269 ibid., paragraph 146–7.
271 Industrial Safety Health and Welfare Act 1972 (SA); Industrial Safety Health and Welfare Act 1977 (Tas); Industrial Safety Health and Welfare Act 1981 (Vic); Occupational Health and Safety Act 1983 (NSW); Occupational Health,
5.6 The Occupational Safety and Health Act 1984, which currently forms the basis of work health and safety laws in Western Australia, is a typical example of Robens–style legislation. Hon David Parker MLA recognised this in the second reading speech:

The policies and planned laws and organisational changes embody principles developed elsewhere—notably those enunciated by Lord Robens who in 1972 reported on the British system.272

5.7 The Occupational Safety and Health Act 1984 repealed four Acts and 21 sets of regulations. It applied to all industries with the exception of mining and petroleum.

**Harmonising work health and safety laws**

5.8 Although work health and safety laws introduced in Australia in the 1970s–80s were largely based on the recommendations of the Robens Report, each jurisdiction enacted slightly different laws. For example jurisdictions that focus more on mining required laws that address the unique requirements of that industry.273 These differences created uncertainty for workers and resulted in additional compliance costs for businesses that operate in multiple jurisdictions.

5.9 Another significant difference emerged by Queensland and New South Wales enacting a reverse onus of proof for duty of care offences. One reason to reverse the onus of proof is that a defendant will be in the best position to know if they have met their duty of care. On this basis it is appropriate for the defendant to prove that they have done so to a ‘reasonably practicable’ standard.274 However reversing the onus of proof should be approached cautiously where the offence carries significant maximum penalties.

5.10 Many years later the reverse onus of proof provisions in New South Wales were considered by the High Court of Australia in *Kirk v Industrial Relations Commission (NSW)*.275 The High Court ruled that the prosecution was required to state what measures the defendant should have taken to avoid the risk of injury. Failing to do so meant it was impossible for a defendant to establish a defence that they had acted reasonably.

5.11 Early attempts to harmonise work health and safety laws in Australia include the development of national standards and national codes of practice in the 1990s. This was overseen by the National Occupational Health and Safety Commission which identified the following areas of priority for harmonisation:

- plant
- certification of users and operations of industrial equipment
- workplace hazardous substances
- noise
- manual handling

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272 Hon David Parker MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 20 September 1984, p 1555.


• major hazardous facilities
• storage and handling of dangerous goods.\footnote{276}

However these standards and codes of practice were not enforceable unless adopted by a local parliament, and jurisdictions were inconsistent in their adoption. This resulted in further differences between jurisdictions in work health and safety laws.

5.12 The benefits of harmonisation were later recognised by the Industry Commission in 1995 (now the Productivity Commission, an advisory body to the Australian Government):

Jurisdictions place different obligations on employers, employees and suppliers ...
Such differences mean there are different levels of protection for workers doing the same job in the various jurisdictions – this in inequitable. Employers with operations in more than one state have to work with multiple OHS regimes. This means additional costs whenever systems of work are changed or staff are moved; they also raise the cost of their internal monitoring of compliance.\footnote{277}

5.13 The Productivity Commission recommended implementing nationally consistent work health and safety standards again in 2004 and again in 2006.\footnote{278} Following these recommendations, the Council of Australian Governments (COAG) directed the WRMC to develop strategies to harmonise work health and safety laws across all jurisdictions.

**Model Bill**

5.14 In February 2008, the WRMC agreed that the best way to harmonise work health and safety laws in Australia would be to develop model laws that could be implemented in each jurisdiction.\footnote{279} In April 2008, the WRMC assembled a panel to review work health and safety laws in Australia for the purpose of making recommendations on the optimal structure of model laws.

5.15 In July 2008, COAG formalised the commitment of all jurisdictions to adopt model laws by signing the *Intergovernmental Agreement for Regulatory and Operational Reform in OHS* (IGA). Under the IGA, each jurisdiction agreed to harmonise work health and safety laws by adopting model laws.

5.16 In October 2008 and January 2009, the panel assembled by the WRMC published two reports containing 232 recommendations on the optimal structure of model laws that could be adopted throughout Australia. The reports were titled the National Review into Model Occupational Health and Safety Laws Part 1 and Part 2 (National Review).\footnote{280}

5.17 In May 2009, the WRMC responded to the National Review, accepting over 90 percent of its recommendations. The WRMC then set policy parameters for developing a model work health and safety Act based on those recommendations. This included the creation of Safe


\footnote{279} Workplace Relations Ministers’ Council, *Communique*, 1 February 2008.

Work Australia, an Australian government statutory body that would work to support the development of model laws.

5.18 Safe Work Australia then developed model laws consisting of the:
- Model Work Health and Safety Bill;\textsuperscript{281}
- Model Work Health and Safety Regulations;\textsuperscript{282} and
- Model Work Health and Safety Code of Practice.\textsuperscript{283}

**Implementation of the Model Bill**

5.19 The implementation of the Model Bill has been described as representing:

> the most significant reform to occupational health and safety laws in Australia since the initial introduction of Robens–style legislation over thirty years ago.\textsuperscript{284}

5.20 On 1 January 2012, New South Wales, Queensland, the Northern Territory, the Australian Capital Territory and the Commonwealth implemented the Model Bill.\textsuperscript{285} Tasmania and South Australia followed, enacting the Model Bill on 1 January 2013.\textsuperscript{286}

5.21 Western Australia and Victoria are the only jurisdictions who have not adopted the Model Bill. The decision not to adopt the Model Bill in Victoria was announced in April 2012 by the Premier, Hon Ted Baillieu AO MLA. This decision was made on the basis of a regulatory impact statement conducted by PricewaterhouseCoopers which indicated that it would cost $3.44 billion over five years to implement the Model Bill.\textsuperscript{287} The report found that of the $3.44 billion, 78 percent of transition costs and 74 percent of ongoing costs would be borne by small businesses.\textsuperscript{288}

5.22 A similar analysis on the impact of adopting the Model Bill in Western Australia was commissioned by WorkSafe WA in 2012. This report found that the costs of implementing the Model Bill in Western Australia would outweigh the benefits:

> The evidence based indicated that it would be inappropriate to accept the whole package of proposed changes in WHS regulations—not only because the costs clearly exceed the potential benefits but because the level of net benefits to the state of Western Australia could clearly be improved by amending and fine–tuning the package of proposed changes and the content of specific proposed changes.

> Of particular relevance is the ability to reduce costs while still improving safety outcomes in workplaces. Similarly, we disregarded the notion that the package of proposed changes should be rejected as a whole. Harmonisation and standardisation does have a value and many of the changes impose little or no

\textsuperscript{281} Safe Work Australia, Model Work Health and Safety Bill, 23 June 2011.
\textsuperscript{282} Safe Work Australia, Model Work Health and Safety Regulations, 4 November 2011.
\textsuperscript{283} Safe Work Australia, Model Code of Practice, December 2011.
\textsuperscript{285} Work Health and Safety Act 2011 (NSW); Work Health and Safety Act 2011 (Qld); Work Health and Safety (National Uniform Legislation) Act 2011 (NT); Work Health and Safety Act 2011 (ACT); Work Health and Safety Act 2011 (Cth).
\textsuperscript{286} Work Health and Safety Act 2012 (Tas); Work Health and Safety Act 2012 (SA).
cost on West Australian businesses and appear likely to achieve benefits through improved health and safety performance. 289

5.23 A regulatory impact statement was also prepared in 2009 to investigate the costs and benefits of implementing model laws on a national scale. 290 This recommended implementing model laws on the basis that it ‘will confer an overall marginal to small net benefit’. 291

Work Health and Safety Bill 2014

5.24 In September 2014, the government of Western Australia under the Barnett Government tabled the Work Health and Safety Bill 2014 as a green bill for consultation purposes. This bill was largely based on the Model Bill.

Ministerial Advisory Panel

5.25 In July 2017, the Cabinet of Western Australia under the McGowan Government announced it would establish a Ministerial Advisory Panel to advise the Minister for Mines and Petroleum, Commerce and Industrial Relations, Hon Bill Johnston MLA on the development of new work health and safety laws based on the Model Bill. 292 It published a report in June 2018 containing 44 recommendations regarding amendments to the Model Bill.

5.26 The membership of the Ministerial Advisory Panel comprised the following people:

- Stephanie Mayman – Chair
- Penny Bond – Minister’s Senior Policy Adviser
- Rachael Lincoln – Chamber of Commerce and Industry of Western Australia 293
- Nicole Roocke – Chamber of Minerals and Energy of Western Australia 294
- Owen Whittle – UnionsWA
- Hon Simon Millman MLA – Member for Mount Lawley
- Lex McCulloch – Deputy Director General Safety, DMIRS 295
- Simon Ridge – Executive Director Resources Safety, DMIRS 296

5.27 Mr Andrew Cotgreave, a Senior Policy Adviser from DMIRS was appointed as a policy advisor to the Ministerial Advisory Panel and attended the majority of its meetings. He explained the process of the Ministerial Advisory Panel as follows:

Mr COTGREAVE: They were working through the model bill clause by clause, and either agreeing to the model or discussing it if there was no agreement.

291 ibid., p iv.
292 Stephanie Mayman, Modernising work health and safety laws in Western Australia, Western Australia, 30 June 2018.
293 Keith Black represented the Chamber of Commerce and Industry of Western Australia from 10 January 2018.
294 Adrienne LaBombard represented the Chamber of Minerals and Energy of Western Australia from 9 October 2017.
295 Ian Munns represented the Department of Mines, Industry Relations and Safety as Acting Deputy Director General Safety from January 2018.
296 Andrew Chaplyn represented the Department of Mines, Industry Relations and Safety as Director of Mines/Critical Risk from January 2018.
Hon SIMON O’BRIEN: Was it generally a consensus thing, though, without formal voting or a show of hands?

Mr COTGREAVE: Yes. Ninety percent of the model bill was agreed to by consensus. It was only the exceptions where individual members wanted to propose changes that they would discuss that and try to reach consensus and then vote if they could not.297

5.28 The process described by Mr Cotgreave is confirmed by the foreword to the final report which notes the majority of its recommendations were agreed by consensus.298 It also notes that where consensus was not possible, the decision to recommend change was made by majority vote with the views of the Panel members reflected in the recommendations.299

297 Andrew Cotgreave, Senior Policy Advisor, Department Mines, Industry Relations and Safety, transcript of evidence, 9 July 2020, p 5.

298 Stephanie Mayman, Modernising work health and safety laws in Western Australia, Western Australia, 30 June 2018, p 1.

299 ibid.
APPENDIX 6

CORRESPONDENCE WITH THE DIRECTOR OF PUBLIC PROSECUTIONS

STANDING COMMITTEE ON LEGISLATION

Our ref: A834861
29 July 2020

Ms Amanda Forrester SC
Director of Public Prosecutions
Level 1, International House
26 St Georges Terrace
PERTH WA 6000

Dear Ms Forrester

Inquiry into the Work Health and Safety Bill 2019

As you know from my letter dated 5 June 2020, the Standing Committee on Legislation (Committee) is undertaking an inquiry into Part 2 of the above named Bill. Part 2 contains provisions dealing with duties, offences and penalties. Notably, it includes two new offences of industrial manslaughter.

Over the course of the inquiry the Committee has received evidence that certain provisions under the Criminal Code are available to prosecute a death at a workplace (for example, ss 280, 266, 267, 274). We note however the opinion of Robert Laing in his review of the Occupational Safety and Health Act 1984 in 2002 at paragraph 518 that ‘there does not appear to have been a capacity or inclination to act on [these provisions]’.¹

Given that Mr Laing’s comments were made nearly 20 years ago the Committee would appreciate it if you would comment on the following aspects of the availability of the Criminal Code to prosecute a death at a workplace:

- Does the DPP have capacity to prosecute a death at a workplace under these provisions?
- Does the DPP have a policy in relation to the prosecution of workplace deaths?
- Is there currently any lack of capacity or inclination to act on these provisions?

If possible, we would appreciate your response by 5pm on Friday 31 July 2020. If you have any queries in relation to this request, please contact Ms Tracey Sharpe, Committee Clerk on 9222 7400, or Mr Ben King, Advisory Officer, via the Committee mailbox at lclc@parliament.wa.gov.au.

Yours sincerely

Hon Dr Sally Talbot MLC
Chair

Office of the Director

Your Ref:     AB34561
Our Ref:      ADM 2019/347
Contact:      Amanda Forrest SC
Telephone:    (08) 9425 3777
Facsimile:   (08) 9425 3666
Email:        amanda.forrest@dpw.wa.gov.au

Hon Dr Sally Talbot MLC
Chair, Standing Committee on Legislation
Legislative Council
Legislative Council Committee Office
Parliament House
4 Harvest Terrace
PERTH WA 6005
lclc@parliament.wa.gov.au

Dear Dr Talbot

Inquiry into the Work Health and Safety Bill 2019

Thank you for your letter dated 29 Jul 2020.

The Office of the Director of Public Prosecutions for the State of Western Australia (ODPP) can prosecute any case in which the elements of an offence are established.

Section 280 of the Criminal Code is the offence creating provision for manslaughter. Sections 266, 267 and 274 are facilitative provisions only.

In response to the specific questions asked:

a. It is unclear what is meant by ‘capacity’ on the part of the ODPP to prosecute a death at a workplace. On the assumption that it means ‘is the ODPP legally able’ to prosecute under these provisions, the response is that, if there is sufficient evidence, the ODPP can prosecute a charge of manslaughter wherever that occurred, including one occurring in a workplace. It is strongly arguable that it may be easier to prove a s 280 manslaughter in many cases than a charge under s 30A or 30B of the Bill (or at least as easy). In circumstances in which the maximum penalty for manslaughter under s 280 is life imprisonment, it would be desirable to prosecute under that section where possible, in my view. However, an offence under s 30A or 30B should be a statutory alternative to manslaughter. Currently, it is not.
b. The ODPP does not have any policy in relation to the prosecution of workplace deaths. However, the ODPP does not have any policy in relation to any particular type of offence. The *DPP Prosecution Policy and Guidelines 2018* applies to all prosecutions.

c. Not as a matter of principle. I am strongly of the view that the *Criminal Code* provisions are appropriate for any unlawful death. However, I have no information to suggest that any workplace death has ever been charged under the *Criminal Code*, or that anyone has sought to do so. I also have no information to suggest that any agency has ever sought advice from the ODPP in order to ascertain whether such a prosecution was viable.

In the limited consultation conducted with the ODPP regarding this Bill, issues were raised with the Department about disclosure, the quality of investigations and the quality of briefs, as well as how prosecutions could be commenced. These have not been the subject of further discussion and the Department has not sought to engage the ODPP. The ODPP will not prosecute any offence which has been inadequately investigated, or where the disclosure and/or brief materials are not provided in a satisfactory manner. Given the lack of engagement on this point on the part of the Department, the ODPP may not have the capacity or inclination to conduct such a prosecution until those matters are resolved.

The Department has also been advised that the ODPP does not generally commence prosecutions, and the ODPP will not do so in s 280 prosecutions either. The Department does not have the power to do so. Any such prosecution would need to be commenced by another authorised officer, raising questions about the willingness of the Department to refer matters to WA Police and the willingness of WA Police to conduct investigations already partially done by the Department.

It appears to be this last issue which was being addressed, at least significantly, by Mr Laing in his review report.

Yours sincerely

Amanda Forrester SC
DIRECTOR OF PUBLIC PROSECUTIONS

31 July 2020
# Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<td>Bill</td>
<td>Work Health and Safety Bill 2019</td>
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<tr>
<td>Boland Report</td>
<td>Review of the model Work Health and Safety Laws</td>
</tr>
<tr>
<td>Category Offences</td>
<td>Offences contained in cl 31–33 of the Bill</td>
</tr>
<tr>
<td>Committee</td>
<td>Standing Committee on Legislation</td>
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<td>COAG</td>
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<td>DMIRS</td>
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<td>Ministerial Advisory Panel</td>
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<td>Model Bill</td>
<td>Model Work Health and Safety Bill</td>
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<tr>
<td>National Review</td>
<td>National Review into Model Occupational Health and Safety Laws</td>
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<tr>
<td>PCBU</td>
<td>Person conducting a business or undertaking (see cl 5 of the Bill)</td>
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<tr>
<td>WRMC</td>
<td>Workplace Relations Ministers’ Council</td>
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Standing Committee on Legislation

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'4. Legislation Committee
4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 Members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'