

6 July 2020

Honourable Sally Talbot MLC
Chair
Standing Committee on Legislation
Parliament House
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Dear Chair

WORK HEALTH AND SAFETY BILL 2019 – INDUSTRIAL MANSLAUGHTER LAW REFORM

The Law Society has considered sections 30A and 30B of the *Work Health and Safety Bill 2019* (**WHS Bill**). The WHS Bill was introduced into the Legislative Assembly on 27 November 2019, and passed into the Legislative Council on 20 February 2020.

The following provides a summary of the views of the Society on legal issues arising from the industrial manslaughter laws proposed for Western Australia.

In summary:

1. We note that:
 - a. the introduction of a summary offence under section 30B, in addition to the serious offence under section 30A, represents a move away from, rather than toward, national harmonization of OHS legislation; and
 - b. the “breach of duty” contemplated by sections 30A and 30B is broadly defined. We recommend consideration be given to identifying specific duties which would give rise to the serious criminal sanctions contemplated by the legislation.
2. We recommend that:
 - a. in all the circumstances, the appropriate jurisdiction for a prosecution under 30A would be the District Court rather than the Magistrates Court;
 - b. further guidance ought to be given to confirm the applicability of privilege against self-incrimination in a prosecution under the new provisions;
 - c. the bill ought to expressly confirm the applicability of defences under the Criminal Code; and
 - d. consideration should be given to providing for Legal Aid funding for prosecutions under the new provisions.

Our full submission is set out below:

1. Industrial manslaughter laws exist in other States. The proposed offence under section 30B of the WHS Bill is quite different:

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- a) WA would be the only Australian jurisdiction to have the two-tier approach (i.e. introducing a crime and simple offence) – other jurisdictions have a single offence provision. The two-tier approach represents a move away, rather than a move toward, national harmonization of OHS legislation.
- b) WA's 'simple offence' does not require the prosecution to make out an element of gross negligence, willful breach or knowing breach of duty.
- c) A brief summary of the offences in other Australian States (more akin to s 30A but with variations across jurisdictions) appears in the following table:

| | • ACT | • Queensland | • Victoria | • NT |
|--------------------|--|---|---|---|
| Year IM introduced | 2004 | 2018 | 2019 | 2019 |
| Key provisions | Reckless or criminal negligence | Negligent conduct | Negligent conduct | Intentionally engages in conduct |
| Penalties | Body Corporate - \$1.62m Individual - \$320K or 20 years. | Body Corporate - \$13.3m Individual – 20 Years | Body Corporate - \$16.5m (current) Individual – 20 Years | Body Corporate – \$10m Individual - \$5m and/or 20 years |

2. The definition of "health and safety duty" does not clearly state what a health and safety duty encompasses. The definition is seemingly limited in clause 30 of the Bill, to a duty imposed under Division 2, 3 or 4 of Part 2. However, the duties imposed are defined expansively.
3. Concern arises about procedural issues in relation to prosecutions under s 30B, particularly the applicable Court and prosecution by the regulator, WorkSafe, rather than the Director of Public Prosecutions (**DPP**). Offences under s 30B may be investigated and prosecuted by the same agency, WorkSafe, raising concerns over independence and the requisite expertise of prosecuting counsel.
4. For other criminal offences carrying a penalty of this magnitude, the DPP would be the prosecutor, and the matter would be heard in the District Court, not in the Magistrates Court as proposed.
 - a) The offence in s 30B carries a very high maximum penalty, both in terms of imprisonment and applicable fines.
 - b) The former provisions for Dangerous Driving Causing Death (before amendments about 10 years ago) and consistent with s 284 had much lower penalties to be dealt with in the Magistrates Court. That is, for culpable driving of something other than a motor vehicle (section 284 of the Criminal Code):
 - i. The maximum penalty if charged with this offence and dealt with summarily in the Magistrates Court is 3 years imprisonment and a

fine of \$36,000.

- ii. On indictment, an imprisonment term of 10 years is available, however this involves a superior Court and prosecution by the DPP.
 - c) Other offences arising from death on the road (dangerous driving causing death; unlawful assault etc) were brought within the jurisdiction of the District Court some time ago.
5. There are concerns about privilege against self-incrimination and admissibility of statements to WorkSafe where a person can be charged as an individual (where their statements are not admissible) and as a PCBU (where their statements may be admissible against them). This is a concern across jurisdictions where industrial manslaughter laws have been introduced.
 6. We recommend that the legislation should expressly state the applicability of defences under the Criminal Code.
 7. Consideration ought to be given to the availability of Legal Aid for accused persons for an offence under the new provisions.

The Society would be pleased to expand on these recommendations if that would be of assistance.

Yours sincerely

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President

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