

26 June 2020

Hon Dr Sally Talbot MLC
Chair, Standing Committee on Legislation
Legislative Council Committee Office
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Dear Dr Talbot

INDUSTRY SUBMISSION

Inquiry into the Work Health And Safety Bill 2019

The Western Australian Fishing Industry Council (WAFIC) is the peak industry representative body for the commercial fishing, pearling and aquaculture industries. The GVA of these industries exceeds \$1bn per annum and directly employs 4,000 people, mainly in regional Western Australia.

The WAFIC is extremely concerned about the proposed new offences as set out in Part 2 of the *Work Health and Safety Bill 2019* currently before the Legislative Council.

Our concerns are set out in the attached submission to the Inquiry into the Work Health and Safety Bill 2019.

The signatories below represent the major commercial fishing sectors and associations who also support the attached submission.

Should you have any queries or wish to discuss this submission, please contact me.
Yours sincerely

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Chief Executive Officer

Felicity Horn
Executive Officer
Shark Bay Prawn Trawler Operators'
Association of WA

Matt Benson
Chair
Southern Seafood Producers (WA)
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Executive Officer
Pearl Producers Association

Matt Taylor
Chief Executive Officer
Western Rock Lobster Council

INDUSTRY SUBMISSION

to

**Standing Committee on Legislation
Inquiry into the Work Health and Safety Bill 2019**

from

Western Australian Fishing Industry Council (Inc)



WAFIC

WESTERN AUSTRALIAN
FISHING INDUSTRY
COUNCIL INC

**SHARK
BAY
WILD**

Australia's Wildest Seafood
SHARK BAY PRAWN
TRAWLER OPERATORS'
ASSOCIATION INC.

A C W A



AQUACULTURE COUNCIL
OF WESTERN AUSTRALIA



**PEARL PRODUCERS
ASSOCIATION**
Australian South Sea Pearls



Supplying West Australians
sustainable seafood since 1830.



Western
**ROCK
LOBSTER**

Opening Comments

This is a very important Inquiry, particularly given the Government's lack of consultation with industry on the proposals set out in Part 2 of the *Work Health and Safety Bill 2019* (**Bill**) prior to its introduction to Parliament.

The commercial fishing, pearling and aquaculture industries in WA are made up of a diverse range of operations, and operators, including a significant number of regionally based, family companies and involves persons who would themselves be classed as 'workers' under section 7 of the Bill.

WAFIC plays an important role in promoting good workplace safety practice and supports industry standards and training including direct on-the-job training and through the provision of tailored, industry-specific personal and professional development. Creating and maintaining safe workplaces is a critical aspect of work conducted by industry across sectors. It is a given that workplaces must be kept as safe as possible, and the expectation that all persons working within a workplace is educated on safety, cognizant of safety risks, and has an active role to play in ensuring the health and safety of both themselves and all of those around them.

However safety is not a one size fits all. Measures to improve and retain safety standards and protect the community must be tailored and must be practical. This is because the risks across industries, just like the risks across businesses and workplaces, are varied and must be considered on a case-by-case basis.

Issues

The commercial fishing, pearling and aquaculture industries hold concerns about the proposed offences in Part 2 of the Bill and the lack of focus on safety and safety risk management in the rationale behind the introduction of new industrial manslaughter provisions in sections 30A and 30B, or in the proposed change to the serious harm and death provisions under section 31.¹

These concerns are compounded by the failure of Government to consult on the proposal to introduce new industrial manslaughter offences to replace the existing ones in the *Occupational Health and Safety Act 1984* (**OSH Act**) prior to its introduction to Parliament.

The Government appears focused on punitive responses to fatalities after they have occurred evidenced by the Explanatory Memorandum to the Bill² referring to the Government's decision to 'introduce offense of industrial manslaughter to ensure that deaths at the workplace, caused by the conduct of PCBU's [person conducting a business or undertaking], are met with substantial penalties.' There is no mention of a demonstrable need for change to the law or current deficiencies (of which we consider there is none), or evidence that the introduction of the new offences will have a positive impact on safety (again, we consider this will not be the case).

The Government's media release following the announcement of its intention to introduce new industrial manslaughter laws at the State Labor Conference in August 2019³ refers to the main features of the legislation as being the introduction of two new offences of industrial manslaughter. The media release refers to the rationale for the new laws as being 'a result of significant public concern and from recommendations of two recent Federal reviews – the Boland review and the recent Senate Standing Committee on Education and Employment report.'

¹ As set out Explanatory Memorandum for the Bill, the Second Reading Speech and the Government's media release.

² Explanatory Memorandum – Work Health and Safety Bill 2019, [https://www.parliament.wa.gov.au/Parliament/Bills.nsf/8F320741B83643A8482584BF000CF89B/\\$File/EM%2B155-1.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/8F320741B83643A8482584BF000CF89B/$File/EM%2B155-1.pdf)

³ Government of Western Australia, 'New workplace safety laws and more safety initiatives to better protect workers' (24 August 2019) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/08/New-workplace-safety-laws-and-more-safety-initiatives-to-better-protect-workers.aspx>

However these points do not add up:

- The reviews were based on the national OSH laws, which do not apply in Western Australia;
- The reviews did not include consultation with Western Australia (again because it is not part of the national system);
- The Minister's own State-based Ministerial Advisory Panel appointed to 'advise on the development of a single harmonised and amalgamated Work Health and Safety Act....[to] be aligned with the legislation in other Australian jurisdictions'⁴ made a total of 44 recommendations - none of which included any changes to the current industrial manslaughter laws.

The existing Criminal Code applies to workplace fatalities. In combination with the OSH Act, Western Australia already has industrial manslaughter laws in place that can be used to prosecute persons responsible for deaths in the workplace. The penalties for those existing offences under the OSH Act were increased less than 12 months prior to the Government's announcement of its intention to introduce new industrial manslaughter laws increasing the monetary penalties to those higher than prescribed by the national Model WHS law, and increasing prison terms from 2 years to 5 years.⁵ Now the Government considers the existing penalties under the OSH Act to not be high enough with no explanation.

WAFIC supports the notion that safety culture is at the heart of ensuring workplace safety on the ground. Nurturing a positive safety 'culture' is considered the critical element in OSH practice to achieve safe ways of working. The Explanatory Memorandum and the Government's August 2019 media release focus on new industrial manslaughter offences instead of on safety culture as being at the heart of ensuring workplace safety. The exclusionary nature of the proposed offences breaks accepted safety culture and damages the operational approach that safety is everyone's responsibility. Through the application of unequal laws, the offences create two different classes of persons and different expectations of liability and responsibility, breaking the safety chain and negatively impacting on safety culture.

The proposed laws appears to represent a significant shift away from the cooperative approach which has seen the reduction of workplace fatalities by 62 per cent nationally since 2007.⁶ WAFIC acknowledges that there is more work to be done to further improve safety statistics and improve the serious injury and fatality rate in Western Australia and across the country but we do not agree with the contention that safety culture is improved or nurtured through heavy penalties.

The Australian Capital Territory and United Kingdom where industrial manslaughter provisions more akin to those posed by section 30A are in place demonstrate that such provisions have not improved safety in the way that would justify the proposed offences. For example:

- The ACT has had industrial manslaughter of this type in place since 2004, however the ACT serious injury claim rates are higher than the national average (6.5 claims per million hours worked compared to the national average of 5.6), and higher than Western Australia's rate of 5.5 claims per million hours worked.⁷
- The United Kingdom has had industrial manslaughter laws with significant penalties on corporations arising out of a gross breach of their duty of care since 2008. However, since the introduction of the law, workplace fatalities in the UK have remained relatively flat, and

⁴ Ministerial Advisory Panel, 'Modernising work health and safety laws in Western Australia, June 2008, Foreword.

⁵ Maximum penalty for a Level 4 Penalty Offence under the OSH Act.

⁶ Safe Work Australia (2019) *Work-related injury fatalities – Key WHS statistics Australia 2019*, <https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2019>.

⁷ Safe Work Australia (2019) *Work-related injury fatalities – Key WHS statistics Australia 2019*, <https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2019>.

longer term, the largest improvements in the UK fatality statistics occurred prior to the Act taking effect.

WAFIC supports the concerns of many industries 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. Section 30B appears to capture all fatalities and to successfully make a prosecution under section 30B, all that is required to be proven is for the person to have a health and safety duty as a PCBU (or for that PCBU to have the duty in the case of an officer), to fail to comply with the duty, and for that failure to cause the death of an individual. 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. The same threshold is applied in the drafting of section 31.

Compare this to section 19A of the existing OSH Act where an employer must breach their duties in 'circumstances of gross negligence' for the level 4 penalty to apply. Where gross negligence does not apply, a level 3 penalty is applicable, which applies a lower monetary penalty but critically, does not include a jail term.

Other jurisdictions with industrial manslaughter in place across Australia⁸ require some form of negligence or substantively reckless conduct (eg recklessness or criminal negligence, negligent conduct, or intentional engagement in conduct). The Boland Review, referred to by the Government as justification for the proposed new laws, actually called for industrial manslaughter based on gross negligence, a much higher threshold than that proposed in the Bill.⁹

Businesses are not entirely free of all risk. An offence that attributes personal liability for such a broad range of risks, that cannot be fully mitigated, places considerable burden on employers and their senior officers to the extent that it become both impractical for businesses and individuals to take on that risk, and unfair to hold them accountable for it.

Based on the fundamental issues arising with the drafting and scope of the section 30B offence, and the fact that such changes would render it akin to the section 30A offence, section 30B should be removed entirely from the Bill.

Feedback from members is that if the proposed new industrial manslaughter provisions become law, they will negatively impact on our family based industry operations, business viability, job security, training and entry-level opportunities across sectors and communities. If the proposed laws were intended to target large companies there does not appear to have been proper consideration or appreciation of the impact on small business and the flow on effect throughout the community.

The lack consultation on these new provisions prior to the introduction of the Bill into Parliament has failed to understand the unintended consequences of the Bill and its impact.

Conclusion

The introduction of new offences under section 30B, one of which operates with a lower bar of culpability than the current law, without demonstrable need, without any evidence in support of the effectiveness, and so close to changes to the penalties under the current OSH Act provisions,

⁸ Namely ACT, Qld, NT and Vic.

⁹ Marie Boland, *Review of the model Work Health and Safety laws: Final Report*, December 2018, <https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report>

raises considerable questions around whether the proposal meets good legislative reform practice or meets community expectations.

The commercial fishing industry is extremely concerned that the industrial manslaughter offences will act against the very outcome that needs to be achieved – improvements in safety. This is clearly not in the interests of workers, workplace safety, or in the public interest.

WAFIC strongly opposes the introduction of the proposed new industrial manslaughter provisions set out in the Bill away from reactive punitive responses to proactive measures that are demonstrated to be effective.

Improvement in safety practice and ultimately safety outcomes requires a dedicated cultural change management process. It is essential for Government and the regulator to engage meaningfully with industry if safety gains are to be achieved.