

**The Australian Manufacturing Workers' Union –  
WA Branch**



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

**26 June 2020**

Standing Committee on Legislation  
18-32 Parliament Place  
WEST PERTH WA 6005

Dear Committee Chair,

Please find enclosed the AMWU's submission to the Legislation Committee's inquiry into the *Work Health and Safety Bill 2019*.

The AMWU represents over 6,000 members in Western Australia. We cover workers across a diverse range of industries, including construction, mining, print and design, engineering and every form of manufacturing. It is our unfortunate experience that when safety is not properly observed and followed in these industries that the consequences are significant or fatal for our members.

The AMWU has a long history of participation on the Commission of Occupational Safety and Health (COSH), the Construction Industry Safety Advisory Committee (CISAC), the Mining Industry Advisory Committee (MIAC) and the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA). Our submission is informed by our considerable experience on government safety bodies, and by our representation of our members over many years. Our submission is also made on behalf of our OSH delegates who work tirelessly on the ground to improve safety outcomes at their workplaces to ensure their workmates go home safe and unharmed.

We have had the opportunity to view the UnionsWA's submission to this inquiry. The AMWU supports and adopts the positions advanced by UnionsWA.

We would be pleased to appear before the Committee in person to provide further submissions on any matter relevant to this inquiry's terms of reference.

Yours sincerely,

**Steve McCartney**  
**State Secretary**  
Australian Manufacturing Workers' Union  
West Australian Branch

**Glenn McLaren**  
**Assistant State Secretary**  
Australian Manufacturing Workers' Union  
West Australian Branch

## 1. INTRODUCTION: ROAD TO MODERNISATION

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It is widely accepted today that there is a need for the government to have a role in occupational safety and health (OHS) and enacting legislation for the following reasons:

- It is the only way of providing consistent, widespread and enforceable protection to individuals in the workplace;
- It provides a deterrent effect on companies who wouldn't voluntarily prioritise OSH; and
- It indicates to the community and industry of minimum standards to be upheld.

At the time it was introduced, the *Occupational Safety and Health Act 1984* (WA) (the OSH Act) made significant advances in OHS in WA, by consolidating a number of industry specific OHS acts and introducing for the first time mechanisms such as elected safety representatives and safety committees. However there has been no major legislative reform in this area since the OSH Act was introduced. Workplaces and workplace practices have changed considerably over the last 36 years.

In 2008, the Council of Australian Governments (COAG) committed to creating a harmonised legislative framework for occupational health and safety that could be adopted across Australia.<sup>1</sup> The harmonisation process was overseen by the National Review into Model Occupational Health and Safety Laws (the National Review),<sup>2</sup> which was conducted by three independent experts. The National Review conducted significant and lengthy consultation with regulators, industry representatives, OSH professionals, legal professionals and union and employer organisations.

One of the outcomes of the harmonisation process was the creation of Safe Work Australia, a tripartite government statutory body in 2008. Over the course of 2008-2009, Safe Work Australia developed the model Work Health and Safety (WHS) Bill with extensive public consultation. Supplementary model WHS Regulations and model codes of practice soon followed.

Since the first iteration of the model WHS Bill was published in 2011 every Australian state and territory barring Victoria and Western Australia have adopted the harmonised legislation framework. The model WHS laws were updated in 2016.

The model WHS laws and occupational safety and health in Australia have been the subject of several recent reports, including:

- '*Best Practice Review of Workplace Health and Safety Queensland*' Final Report, review by Tim Lyons commissioned by the Queensland Government following the fatalities at Dreamworld and Eagle Farm construction site (Lyons Review);<sup>3</sup>

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<sup>1</sup> Model Work Health and Safety Bill, Explanatory Memorandum, Safe Work Australia, <<https://www.safeworkaustralia.gov.au/system/files/documents/1705/model-whs-act-explanatory-memorandum-1august2016.pdf>>

<sup>2</sup> The National Review was split up into two reports. The first report was released in October 2008 and the second report was released in January 2009 <<https://www.ag.gov.au/industrial-relations/publications/national-review-model-occupational-health-and-safety-laws-first-report>> <<https://www.ag.gov.au/industrial-relations/publications/national-review-model-occupational-health-and-safety-laws-second-report>>.

<sup>3</sup> 'Best Practice Review of Workplace Health and Safety Queensland' Final Report, 3 July 2017, <[https://www.worksafe.qld.gov.au/data/assets/pdf\\_file/0016/143521/best-practice-review-of-whsq-final-report.pdf](https://www.worksafe.qld.gov.au/data/assets/pdf_file/0016/143521/best-practice-review-of-whsq-final-report.pdf)>.

- *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, the October 2018 inquiry by the Senate Standing Committees on Education and Employment (Senate Committee Report).
- *Review of the model Work Health and Safety laws, Final Report*, Safe Work Australia December 2018 review of the model WHS, conducted by independent reviewer Marie Boland (the Boland Review).

On 12 July 2017, the McGowan Government announced that WA would begin the process of developing modernized work health and safety laws for Western Australia. The McGowan Government stated that the new laws would be based on the model WHS Bill and would provide the primary legislation for workplace safety and health across Western Australia.<sup>4</sup>

Part of the WA modernisation process was establishing the Ministerial Advisory Panel (MAP) to provide recommendations to the Minister on WA WHS legislative reforms. Following a detailed review and consultation with stakeholders, on 30 June 2018 MAP released *Modernising work health and safety laws in Western Australia: Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia* (MAP Report).<sup>5</sup> The MAP Report largely recommended that the provisions of the model WHS Bill be adopted, except where an improvement was identified or the OSH Act provided greater protections.

Following a further public consultation period, the WA WHS Bill was tabled in the Legislative Assembly in November 2019.

The AMWU's support of the WA modernization process has always been predicated on the new legislation providing a better and more comprehensive standard of OSH regulation than the OSH Act. The WA WHS Bill does this.

The below table details the clauses in Part 2, and whether they are notably different<sup>6</sup> to the corresponding section in the model WHS Bill:

WA WHS Bill Section	Notable changes from Model WHS Bill?
<b>Division 1 - Introductory</b>	
13. Principles that apply to duties	No.
14. Duties not transferable	No.
15. Person may have more than 1 duty	No.
16. More than 1 person can have a duty	No.

<sup>4</sup> "New Work Health and Safety Bill to protect workers", Media statement Hon Bill Johnston MLA, Minister for Mines and Petroleum; Energy; Industrial Relations, <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2017/07/New-Work-Health-and-Safety-Bill-to-protect-workers-.aspx>>

<sup>5</sup> <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/whs\\_act\\_consultation.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/whs_act_consultation.pdf)>

<sup>6</sup> 'Notable differences' refers to changes greater than spelling or syntax changes that do not substantially change the meaning of the clause.

17.	Management of risks	No.
18.	What is reasonably practicable in ensuring health and safety	No.
<b>Division 2 – Primary duty of care</b>		
19.	Primary duty of care	Inclusion of the note: “Health means physical and psychological health – see section 4”. See page 6 for AMWU comment.
<b>Division 3 – Further duties of persons conducting businesses or undertakings</b>		
20.	Duty of persons conducting businesses or undertakings involving management or control of workplaces	No.
21.	Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings or plant at workplaces	No.
22.	Duties of persons conducting businesses or undertakings that design plant, substances or structures	No.
23.	Duties of persons conducting businesses or undertakings that manufacture plant, substances or structures	No.
24.	Duties of persons conducting businesses or undertakings that import plant, substances or structures	No.
25.	Duties of persons conducting businesses or undertakings that supply plant, substances or structures	No.
26.	Duty of persons conducting businesses or undertakings that install, construct or commission plant or structures	No.
26A.	Duty of persons conducting businesses or undertakings that provide services relating to work health and safety	Yes. See page 7 for AMWU comment.
<b>Division 4 – Duty of officers, workers and other persons</b>		
27.	Duty of officers	No.
28.	Duties of workers	No.
29.	Duties of other persons at the workplace	No.
<b>Division 5 – Offences and penalties</b>		
30.	Terms used	No.

30A. Industrial manslaughter – crime	Yes. See page 8.
30B. Industrial manslaughter – simple offence	
31. Failure to comply with health and safety duty – Category 1	
32. Failure to comply with health and safety duty – Category 2	
33. Failure to comply with health and safety duty – Category 3	No.
34. Volunteers and unincorporated associations	

The AMWU submission will address the three areas where the WA WHS Bill differs from the model WHS Bill: psychological health, duty on providers of work health and safety providers and penalties.

The AMWU submission proceeds on the basis that the model WHS Bill is accepted by stake holders across government, employer, and employee associations, and so will not comment on the sections of the WA WHS Bill that are substantially similar to the model WHS Bill. Should the Committee wish to hear from the AMWU on specific sections that have not been addressed in this submission, we would be pleased to provide further written or oral submission.

## 2. PSYCHOLOGICAL HEALTH

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There has been increasing acceptance of psychological health and the role it plays in occupational health and safety. For our members – particularly workers on compressed rosters, in remote areas and/or in dangerous work – good mental health in the workplace is as important as the right personal protective equipment.

The AMWU has long been a part of the push for better mechanisms to address psychosocial hazards in the workplace. We notably advocated for the Legislative Assembly Education and Health Standing Committee's inquiry into the impact of FIFO Work practices on mental health, and their report tabled on 18 June 2015.<sup>7</sup> We also participated extensively in the drafting process of the first code of practice for FIFO mental health (FIFO Mental Health Code).<sup>8</sup>

The AMWU notes that Safe Work Australia does have guidance material on work-related psychological health,<sup>9</sup> and that there has been discussion regarding a national code of practice for the prevention of psychological injuries since 2010.

We support the definition of "health" in the model WHS laws, which sets out that it means physical and psychological health. This definition has been picked up by the WA WHS Bill and has been reinforced as a note in section 19.

However, despite growing recognition of psychosocial hazards and their impact not only on workers, the community and the economy,<sup>10</sup> there is a lack of enforceable measures around minimising the risks to psychological health.

An updated set of WA WHS regulations are yet to be drafted, though the consultation process has started. The model WHS Regulations do not cover psychological health. In light of this, we strongly advocate that the WA WHS Regulations should include:

- Risk controls minimising exposure to psychosocial hazards generally; and
- The risk management approach, controls and response strategies from the FIFO Mental Health Code.

Both are necessary as the neither the WA WHS Bill nor the model WHS bill set a standard for managing psychological health; simply the definition of health.

It has been the AMWU's consistent position that the FIFO Mental Health Code has been a significant first step in addressing the mental health issues that are concentrated in FIFO work, but that there

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<sup>77</sup> <

[https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(InqByName\)/Inquiry+into+mental+health+impact+s+of+FIFO+work+arrangements#Report](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(InqByName)/Inquiry+into+mental+health+impact+s+of+FIFO+work+arrangements#Report)> .

<sup>8</sup> 'Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors', Department of Mines, Industry Regulation and Safety, < [http://www.dmp.wa.gov.au/Documents/Safety/MSH\\_MHW\\_FIFO\\_COP.pdf](http://www.dmp.wa.gov.au/Documents/Safety/MSH_MHW_FIFO_COP.pdf)>.

<sup>9</sup> 'Work-related psychological health and safety: a systematic approach to meeting your duties', Safe Work Australia, < [https://www.safeworkaustralia.gov.au/system/files/documents/1806/work-related\\_psychological\\_health\\_and\\_safety\\_guide.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1806/work-related_psychological_health_and_safety_guide.pdf)>.

<sup>10</sup> A Safe Work Australia study found that workplaces with a low Psychosocial Safety Climate cost the Australian economy approximately \$6 billion per annum: 'Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism', November 2016, < <https://www.safeworkaustralia.gov.au/system/files/documents/1705/psychosocial-safety-climate-and-better-productivity-in-australian-workplaces-nov-2016.pdf>>.

should be regulations around FIFO mental health. It has been the AMWU's unfortunate experience that due to the non-enforceable nature of codes of practice, the FIFO Mental Health Code has been largely ignored by relevant employers.

We recently experienced this at the onset of the COVID-19 pandemic, where several mining and resource companies changed the rosters of workers at extremely short notice. Examples of rosters that were introduced include:

- Eight days working for Company A followed by six days working for Company B, continuously for 3-6 months.
- A 2/4/2 roster, whereby the employee isolates for two weeks in a hotel or camp for two weeks, works on site for four weeks, then has two weeks rest at home. This effectively means the affected workers were away from their families for six weeks.
- A 4/4 roster, whereby the employee works for four weeks straight with no rostered day off or fatigue day in the middle of the swing then four weeks off. Though this is an even-time roster, the length of the 'on' period is significant and has negative repercussions for fatigue management.

The AMWU recognises that many companies needed to make changes to workplace practices to ensure the safety of workers in light of the pandemic. However, these changes exposed workers to a different type of OHS risk. These rosters were contrary to the FIFO Mental Health Code's recommendation that, "...even-time and shorter rosters...are linked to better mental health and wellbeing outcomes. Rosters of greater compression can result in fatigue, which poses a risk to workers' mental health and wellbeing".<sup>11</sup> Despite this, the AMWU found the relevant companies unwilling to consult with their health and safety reps, their employees, or the union. Due to the non-enforceable nature of the Code, there were no options for workers to protect their mental health in this regard.

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<sup>11</sup> FIFO Mental Health Code, p. 12.



### 3. SECTION 26A – DUTY FOR PROVIDERS OF SERVICES RELATING TO WORK HEALTH AND SAFETY

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Section 26A of the WA WHS Bill is a new addition that is not present in the model WHS Bill. In the First Report of the National Review, the review panel recommended that the model Act should place a duty of care on any person providing OHS advice, services or products that are relied upon by other duty holders to comply with their obligations under the model Act.<sup>12</sup>

The National Review First Report noted:<sup>13</sup>

*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 and safety. That influence may be direct, or indirect through influencing downstream design of systems, workplaces or plant. The service providers may influence decisions that are critical to health and safety in relation to a specific activity, or across an organisation (e.g. advising on governance structures, safety policies or systems).*

...

*In recommending that the model Act impose a duty of care on service providers, we note that this should not require them to do more than they ought be doing under other current laws. The service providers would owe duties of care at common law and owe obligations under the Trade Practices Act 1974 and other consumer protection legislation. They would also owe a duty of care under the primary duty of care that we recommend be placed on a person conducting a business or undertaking.*

This recommendation was picked up and endorsed by the MAP Report.<sup>14</sup>

The AMWU supports the introduction of section 26A as drafted. Requiring OHS service providers to ensure care is taken in the provision of services (so far as is reasonably practicable) so that the health or safety of persons is not put at risk as a result of the services provided is a very reasonable requirement.

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<sup>12</sup> Ibid, Recommendation 37, p. 103.

<sup>13</sup> Ibid, p. 102.

<sup>14</sup> Map Report, recommendation 8, pp. 25-26.

## 4. PENALTIES

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There has been considerable public debate regarding the regulatory approach to workplace health and safety contraventions, particularly workplace fatalities. It is widely accepted across every other part of the law that conduct that causes death should be penalised strongly. This has led to an examination as to whether current OSH instruments are fit for purpose when it comes to deterring OSH contraventions.

The question of whether a dedicated industrial manslaughter provision should be introduced, and in what form, was considered by the Lyons Review. The report found:

*As previously identified, there are long standing entrenched views from stakeholders regarding the offence of industrial manslaughter which are unlikely to change or resolve the debate. It is however the view of the Review that, following consultation and research, a case supporting the introduction of an offence of negligence causing death can be made. In particular, 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 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. In May 2017, the Queensland Government provided in principle support for this view.<sup>15</sup>*

The Queensland Government subsequently introduced industrial manslaughter provisions.<sup>16</sup> The ACT and Victoria have also introduced industrial manslaughter offences.

In October 2018, the Senate Education and Employment References Committee released their inquiry findings into the prevention, investigation and prosecution of workplace fatalities in Australia. The Senate Committee recommended the introduction of a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point. The Senate Committee noted:

*The committee is of the strong view that there needs to be a nationally consistent industrial manslaughter provision introduced into the model WHS legislation.*

*While acknowledging the opposing views, the committee is persuaded by the evidence received during the inquiry illustrating that the current legislative and regulatory framework is inadequate. It is absolutely necessary for corporate entities to be held accountable for their actions, including facing prosecution for industrial manslaughter for the worst examples of corporate or individual behaviour. For those few organisations that wilfully flaunt the existing WHS arrangements and whose negligent actions result in a catastrophic outcome (the death of a worker or a bystander) the committee believes it is entirely warranted that serious consequences flow. This is particularly the case in organisations which are considered to be repeat offenders.*

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<sup>15</sup> Lyons Review, p. 113.

<sup>16</sup> *Work Health and Safety Act 2011* (QLD), Part 2A; *Electrical Safety Act 2002* (QLD), Part 2B; *Safety in Recreational Water Activities Act 2011*; Part 2A.

*These arrangements would also provide a strong and appropriate deterrent across the entire WHS regime.*

Both the Lyons Review and the Senate Committee Report were considered by the Boland Review, which explicitly called for submissions on the matter of industrial manslaughter. Following extensive consultations and a lengthy submission process, the Boland Review made the following recommendation with regards to industrial manslaughter:<sup>17</sup>

*Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:*

- *The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act.*
- *The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.*
- *A body corporate's conduct includes the conduct of body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers.*
- *The offence covers the death of an individual to whom a duty is owed.*

In the report, the Reviewer provided the following:<sup>18</sup>

*I am recommending a new offence of industrial manslaughter be included in the model WHS laws. The growing public debate about including an offence of industrial manslaughter in the model WHS laws was reflected in consultations for this Review. I consider that this new offence is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death. It is also required to address the limitations of the criminal law when dealing with breaches of WHS duties. More broadly, the ACT and Queensland have already introduced industrial manslaughter provisions, with other jurisdictions considering it, and so this new offence also aims to enhance and maintain harmonisation of the WHS laws.*

The AMWU has had members who have died on the job and members who have witnessed a co-worker die at work. As union officials, there is nothing worse than investigating a workplace fatality, and the aftermath of affected family and co-workers. Should the Committee wish to hear more on the AMWU's experience with investigating workplace fatalities, we would be pleased to make further written or oral submissions.

The AMWU submits that there is a clear public expectation and need for dedicated industrial manslaughter provisions which has been recognised by independent reviewers and three states. The AMWU supports the WA WHS Bill's new penalty structure which introduces specific industrial manslaughter offences, and notes that this new structure reflects provisions that were already partly present in the OSH Act.

#### **4.1 Penalty structure of the OSH Act**

The AMWU refers the Committee to *Appendix A* for a visual breakdown of the OSH Act penalties.

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<sup>17</sup> Boland Review, p. 16.

<sup>18</sup> Ibid, p. 10.

Under the OSH Act contraventions are classified into four different penalty levels. Both level 4 and 3 penalties deal with the following elements:

- There is a duty owed under the OSH Act;<sup>19</sup>
- There is a contravention of that duty; and
- The contravention causes the death of, or serious harm to, the person who is owed that duty.

A level 4 penalty applies where the contravention is committed in circumstances of gross negligence. Gross negligence is defined pursuant to the OSH Act s 18A as where 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 under a relevant provision, but acted or failed to act in disregard of that likelihood. The contravention must also actually cause the death of, or serious harm to, such a person.

A level 2 penalty applies where there has been a contravention of a duty owed under the OSH Act but a level 4 or 3 penalty does not apply. Lastly, level 1 penalty applies where a person breaches the OSH Act and a penalty for that breach is not already specified in the OSH Act.

#### **4.2 Penalty structure of the model WHS Bill**

The AMWU refers the committee to *Appendix B* for a visual breakdown of the model WHS Bill penalties.

The model WHS Bill is structured along three categories of offences. A person commits a category 1 offence if they meet the following three elements:<sup>20</sup>

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

A person commits a category 2 offence where: that person has a health and safety duty, they fail to comply with that duty and the failure exposes an individual to a risk of death or serious injury or illness. Lastly, category 3 applies where a person has a health and safety duty and they fail to comply with that duty.

Beyond the drafting and structural differences, there are two substantive differences in how the OSH Act and the model WHS Bill structure penalties. The first relates to how the two instruments frame the 'wrong' that they are seeking to address.

Under the OSH Act the contravention of a duty must cause death or serious harm for the most serious penalty levels to apply. If the contravention does not cause the death of, or serious harm to, a person to whom the offender owes a duty, a level 2 penalty applies. However there is no distinction in level

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<sup>19</sup> OSH Act, ss 19(1), 20(1)(3), 21(1)(2), 21B(2), 22(1), 23(1)(2)(3)(3a), 23A or 23G(2).

<sup>20</sup> Model WHS Bill, s 31.

2 penalty between a contravention that does not expose an individual (to whom a duty is owed) to risk, and a contravention that does expose an individual to risk of death or serious harm.

In contrast, the model WHS Bill focuses only on exposure to risk. Both category 1 and 2 focus on contraventions that expose a person (to whom a duty is owed) to risk of death or serious injury or illness, with recklessness elevating category 1. There is no distinction here between contraventions that do cause death and contraventions that expose a person to risk to death.

The second difference is that the OSH Act provides for a level 1 penalty which applies to contraventions that do not already have a set penalty. The model WHS Act does not have an analogous provision.

There are also two substantive similarities between the two legislative instruments and how they deal with penalties. Both the OSH Act and the model WHS Bill deal with the concept of 'recklessness': the OSH Act addresses it through the gross negligence component whereas the model WHS Act includes it in category 1 offences. Both instruments also group death and serious harm/injury/illness under the same penalty or offence heads.

#### **4.3 Penalty structure under the WA WHS Bill**

The AMWU refers the Committee to *Appendix C* for a visual representation on the WA WHS Bill penalties and *Appendix D* for how the WA WHS Bill incorporates the OSH Act and model WHS Bill penalties.

It is the AMWU's view that Division 5 of the WA WHS Bill sensibly combines the advantages of the OSH Act and the model WHS Bill while addressing their shortcomings.

The WA WHS introduces five offences: industrial manslaughter (crime), industrial manslaughter (simple offence), failure to comply with health and safety duty (category 1), failure to comply with health and safety duty (category 2) and failure to comply with health and safety duty (category 3).

Under s 30A(1) of the WA WHS Bill, industrial manslaughter (crime) sets out that a person commits a crime:

- If a person has a health and safety duty as a PCBU; and
- They engage in conduct that causes the death of an individual; and
- The conduct constitutes a failure to comply with the health and safety duty; and
- The person engages in the conduct knowing that the conduct is likely to cause the death of an individual and engaged in that conduct in disregard of that likelihood.

Section 30A(3) further sets out that officers of PCBUs can be charged if:

- The PCBU has a health and safety duty as a PCBU; and
- The PCBU engages in conduct that causes the death of an individual; and
- The PCBU's conduct constitutes a failure to comply with the health and safety duty; and

- The PCBU's conduct is attributable to any neglect on the officer's part, or is engaged in with the officer's consent or connivance; and
- The officer engaged in the neglect or consented in the PCBU's conduct knowing that the PCBU's conduct is likely to cause the death of an individual and in disregard of that likelihood.

Section 30B(1) sets out that a person commits the simple offence of industrial manslaughter if:

- The person has a health and safety duty as a PCBU; and
- They fail to comply with that duty; and
- The failure causes the death of an individual.

Similar to s 30A(3), s 30B(3) sets out that officers of PCBUs commit an offence if:

- The PCBU has a health and safety duty as a PCBU; and
- The PCBU fails to comply with that duty; and
- The failure causes the death of an individual;
- The PCBU's conduct is attributable to any neglect on the officer's part, or is engaged in with the officer's consent or connivance.

Category 1 deals with contraventions of a duty under the WA WHS Bill where a failure to comply with a duty causes serious harm to an individual. Category 2 relates to a failure to comply with a health and safety duty that exposes an individual to a risk of death or of injury or harm to the individual's health, and category 3 deals with contraventions of a health and safety duty that fall outside of category 1 and 2.

The WA WHS penalty provisions picks up the category 1-3 risk structure of the model WHS Bill and combines it with aspects of penalty level four and three of the OSH Act that sanction contraventions that cause death or serious harm. However, the WA WHS modifies this combination with one significant change: it separates the parts of penalty levels 4 and 3 in the OSH Act that sanction contraventions that cause the death of an individual from contraventions that cause serious harm.

Section 30A of the WA WHS Bill largely mirror the parts of the OSH Act that address duty contraventions that cause death in circumstances of gross negligence. Both require:

- A health and safety duty;
- A contravention of the duty;
- The failure to comply with the duty causes an individual's death; and
- The offender knew that the failure to comply with the duty was likely to cause the death of an individual and acted in disregard of that likelihood.

Similarly, section 30B mirrors the parts of the OSH Act that deal with contraventions that cause death without the aggravating factor of gross negligence or recklessness.

Creating two different industrial manslaughter offences not only captures provisions that currently exist in the OSH Act, but are consistent with how we approach offences that cause death in the

criminal system. Under WA criminal law we have murder,<sup>21</sup> manslaughter,<sup>22</sup> unlawful assault causing death,<sup>23</sup> causing death by threat<sup>24</sup> and dangerous driving causing death.<sup>25</sup> These offences have different levels and circumstances of culpability, and it is appropriate that industrial manslaughter has the same nuance.

It is important to note that manslaughter provisions in the Criminal Code are not appropriate for application to workplace settings. The proposed industrial manslaughter offences include provisions that are targeted at piercing through the 'corporate veil' that traditionally shields directors and senior officers of companies, but who are nonetheless culpable in workplace fatalities.

The AMWU submits that restructuring category 1 so that it focuses on serious harm will allow for more proportionate sentencing outcomes. Under the OSH Act deaths and serious harm were classified under the same penalty heads of level 4 and 3. Contraventions that cause death rightly receive higher penalties than contraventions that cause serious harm. Classifying the two under the same heads however mean that increasing the penalty quantum will not always translate down to serious harm, due to the scaling presence of contraventions that cause death. Restructuring category 1 sends a clear signal to the judiciary what the expected penalty is.

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<sup>21</sup> Criminal Code Act 1913 (WA), s 279.

<sup>22</sup> Ibid, s 280.

<sup>23</sup> Ibid, s 281.

<sup>24</sup> Ibid, s 272,

<sup>25</sup> *Road Traffic Act 1974* (WA), s 59.

## Appendix A: OSH Act Penalties

### Level 4 Penalty Offence (Gross Negligence)

#### Elements:

1. There is a duty owed under the OSH Act;
2. There is a contravention of that duty;
3. 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 under that provision, but acted or failed to act in disregard of that likelihood (gross negligence component); and
4. The contravention did in fact cause the death of, or serious harm to, a person to whom the duty is owed.

#### Penalty:

- For an individual, first offence - \$550,000 and imprisonment for 5 years.
- For an individual, subsequent offence - \$680,000 and imprisonment for 5 years.
- For a body corporate, first offence - \$2,700,000.
- For a body corporate, subsequent offence - \$3,500,000.

### Level 3 Penalty Offence

#### Elements:

1. There is a duty owed under the OSH Act;
2. There is a contravention of that duty; and
3. The contravention causes the death of, or serious harm to a person to whom the duty is owed.

#### Penalty:

- For an individual, first offence - \$400,000.
- For an individual, subsequent offence - \$500,000.
- For a body corporate, first offence - \$2,000,000.
- For a body corporate, subsequent offence - \$2,500,000.

### Level 2 Penalty Offence

#### Elements:

1. There is a duty owed under the OSH Act;
2. There is a contravention of that duty; and
3. A level four or three penalty does not apply.

#### Penalty:

- For an individual, first offence - \$250,000.
- For an individual, subsequent offence - \$350,000.
- For a body corporate, first offence - \$1,500,000.
- For a body corporate, subsequent offence - \$1,800,000.

### Level 1 Penalty Offence

#### Elements:

1. Where a person commits an offence against the OSH Act for which a penalty is not otherwise provided.

#### Penalty:

- For an employee, first offence - \$50,000.
- For an employee, subsequent offence - \$60,000.
- For an individual other than as an employee, first offence - \$100,000.
- For an individual other than as an employee, subsequent offence - \$120,000.
- For a body corporate, first offence - \$450,000.
- For a body corporate, subsequent offence - \$570,000.



## Appendix B: Model WHS Bill Penalties

### Reckless conduct – Category 1 Section 31

#### Elements:

1. Person has a health and safety duty;
2. The person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and; and
3. The person is reckless as to the risk to an individual or death or serious injury or illness.

#### Penalty:

- Where the offence is committed by an individual (other than as a PCBU or as an officer or a PCBU) – 5 years imprisonment and/or \$300,000 fine.
- Where the offence is committed by an individual as a PCBU or as an officer of a PCBU – 5 years imprisonment and/or \$600,000.
- Where the offence is committed by a body corporate - \$3,000,000 fine.

### Failure to comply with health and safety duty – Category 2 Section 32

#### Elements:

1. Person has a health and safety duty;
2. The person fails to comply with that duty; and
3. The failure exposes an individual to a risk of death or of serious injury or illness.

#### Penalty:

- Where the offence is committed by an individual (other than as a PCBU or as an officer or a PCBU) –\$150,000 fine.
- Where the offence is committed by an individual as a PCBU or as an officer of a PCBU –\$300,000.
- Where the offence is committed by a body corporate - \$1,500,000 fine.

### Failure to comply with health and safety duty – Category 3 Section 33

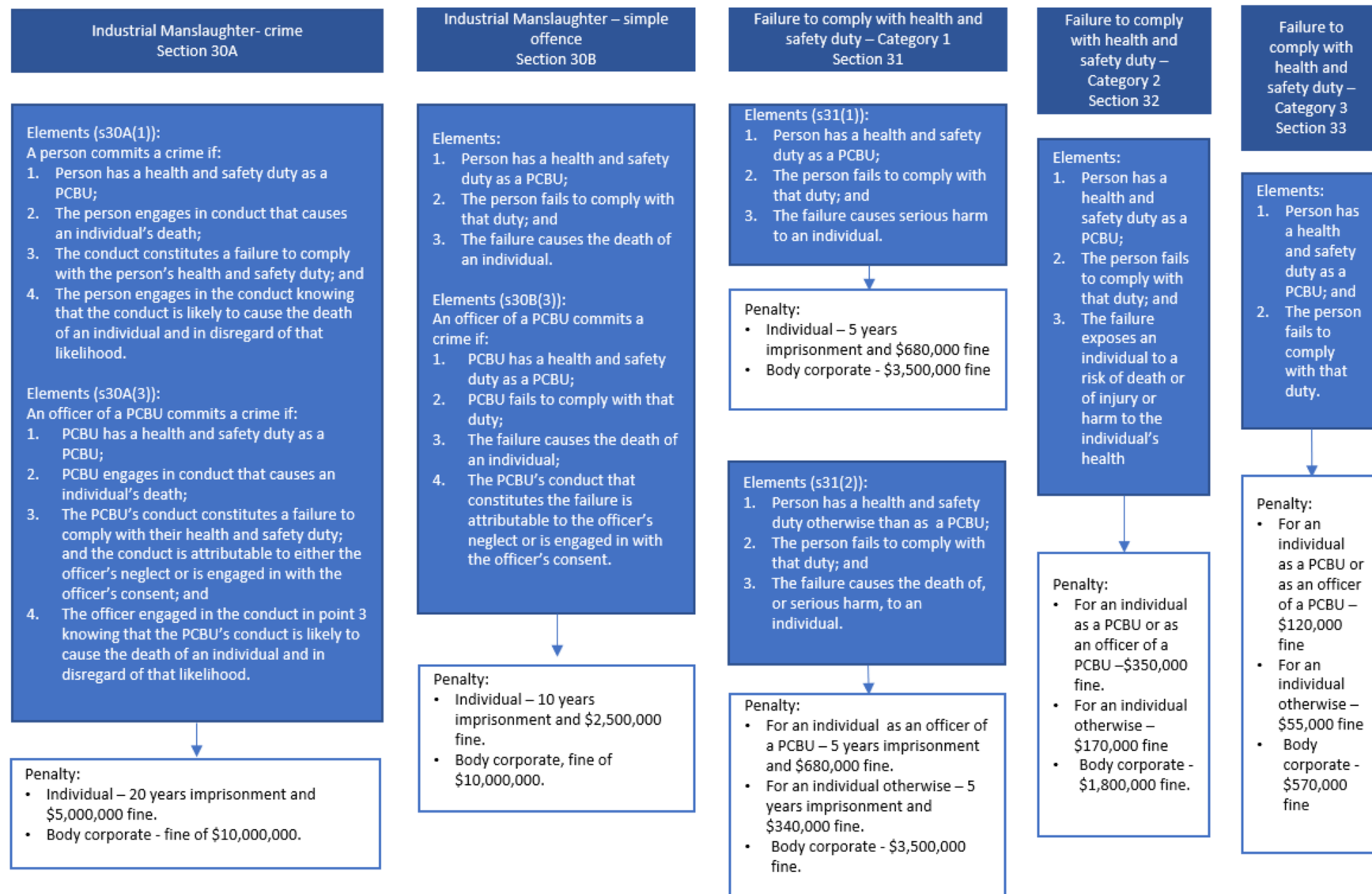
#### Elements:

1. Person has a health and safety duty; and
2. The person fails to comply with that duty.

#### Penalty:

- Where the offence is committed by an individual (other than as a PCBU or as an officer or a PCBU) –\$50,000 fine.
- Where the offence is committed by an individual as a PCBU or as an officer of a PCBU –\$100,000.
- Where the offence is committed by a body corporate - \$500,000 fine.

## Appendix C: WA WHS Bill Penalties



## Appendix D: How the WA WHS Bill combines both the OSH Act and the model WHS Bill

