

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

## **JOINT INDUSTRY SUBMISSION**

### **Inquiry into the Work Health and Safety Bill 2019**

This submission is provided by a Joint Industry Group, made up of a broad representation from the Western Australian business community. The members of the Joint Industry Group are listed below as co-signatories to the submission (25 co-signatories in total).

The Joint Industry Group holds extreme concerns about the proposed new offences set out in Part 2 of the *Work Health and Safety Bill 2019* currently before the Legislative Council. These concerns are explained in detail in the attached Joint Industry Submission to the Inquiry, and relate to:

- The level of understanding of, and the intended manner of addressing, safety risks in workplaces (Safety);
- The failure to recognise safety culture as a driver of positive safety outcomes (Safety Culture);
- The exclusionary nature of the offences which breaks the chain of safety culture (Exclusion of Workers);
- The low threshold for an offence to be made out under the section 30B 'simple offence' and the far-reaching capture of the offence (Elements to Prove);
- Jurisdictional issues around who should bring a charge and where that charge should be heard (Court Jurisdiction and Prosecutor);
- Concerns around admissibility of evidence and the impact on common law rights in a criminal trial (Privilege against Self-incrimination);
- The impact on a broad range of stakeholders across industry and on those reliant on the ongoing viability of industry (Impact on Industry and the Community); and
- The failure to identify and/or consider, through consultation or otherwise, the large range of potential consequences of the Bill (Unintended Consequences).

Should you have any queries or wish to discuss this Joint Industry Submission, please contact the group's nominated representative, Master Builders WA (9476 9800 or [mba@mbawa.com](mailto:mba@mbawa.com)).

Yours sincerely

***The undersigned***

**JOINT INDUSTRY SUBMISSION**

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

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## Submission

1. The Joint Industry Group wishes to thank the Standing Committee on Legislation for the opportunity to provide a submission into the Inquiry into the Work Health and Safety Bill 2019 (**Inquiry**).
2. This is a very important consultation, 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. The Joint Group has previously expressed to the Premier its strong concern and disappointment at the failure to consult prior to the introduction of the proposed industrial manslaughter provisions in Part 2 of the Bill.

## Joint Industry Group

3. The Joint Industry Group represents a broad group of industry representative organisations and member businesses covering the agriculture, livestock, transport, machinery, health, building and construction, electrical, communications, fishing, pearling and aquaculture, liquor, restaurant, hotels, hospitality and property sectors. This Submission is co-signed by 25 members of the Joint Industry Group across these sectors.
4. The Joint Industry Group comprises a diverse range of members ranging from large State, national and international companies, right through to sole traders, and every type of business structure in between. The members are based both in metropolitan and regional locations throughout Western Australia. The group comprises employers as well as persons who would themselves be classed as 'workers' under section 7 of the Bill. It also represents a significant portion of the 220,000 small businesses operating in Western Australia.
5. Members of the group play an important role in promoting good safety practice, supporting industry standards and training their respective industries, including on safety matters, through providing direct on-the-job training and through the provision of tailored, industry-specific personal and professional development.
6. The Joint Industry Group has embedded within it occupational safety and health (**OSH**) professionals and advisors, who specialise in assisting workplaces and those who work within them to achieve safe methods of working and foster a positive approach to safety.
7. A number of members of the group are not-for-profit or charitable associations, reliant on the contribution of volunteers at least in part to carry out their functions.
8. The group includes Registered Training Organisations (**RTOs**) and Group Training Organisations (**GTOs**). The GTOs directly employ apprentices across a range of industries that make up a significant portion of the State's 27,395 apprentices and trainees currently in-training<sup>1</sup> in apprenticeships and traineeships with industry.
9. This Submission is therefore a general one based across a broad range of industry sectors and representing a significant number of the State's businesses and workforce. Whilst the

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<sup>1</sup> As at 31 December 2019. Refer to National Centre for Vocational Education and Research, 'Apprentices and trainees 2019: December quarter – Western Australia (11 June 2020) <https://www.ncver.edu.au/research-and-statistics/publications/all-publications/apprentices-and-trainees-2019-december-quarter-australia/apprentices-and-trainees-2019-december-quarter-western-australia>

group is drawn from a broad demographic of occupations, all points raised in this Submission can be applied equally across this range of industries. Accordingly, the Submission demonstrates the views held by a large cross-section of the business community.

## Strong Concern

10. The Joint Industry Group holds strong concerns about the proposed offences in Part 2 of the Bill. The offences themselves are set out in sections 30A, 30B and 31 of the Bill are. Instead of being focused on safety measures to improve safety, the focus on punitive measures and the resulting cultural shift that the Joint Industry Group believes will occur as a result of those provisions, will severely and adversely impact safety on the whole in businesses across Western Australia.
11. In particular, the Joint Industry Group is concerned about the following aspects of the proposals in the Bill:
  - a. The level of understanding of, and the intended manner of addressing, safety risks in workplaces (**Safety**);
  - b. The failure to recognise safety culture as a driver of positive safety outcomes (**Safety Culture**);
  - c. The exclusionary nature of the offences which breaks the chain of safety culture (**Exclusion of Workers**);
  - d. The low threshold for an offence to be made out under the section 30B 'simple offence' and the far-reaching capture of the offence (**Elements to Prove**);
  - e. Jurisdictional issues around who should bring a charge and where that charge should be heard (**Court Jurisdiction and Prosecutor**);
  - f. Concerns around admissibility of evidence and the impact on common law rights in a criminal trial (**Privilege against Self-incrimination**);
  - g. The impact on a broad range of stakeholders across industry and on those reliant on the ongoing viability of industry (**Impact on Industry and the Community**); and
  - h. The failure to identify and/or consider, through consultation or otherwise, the large range of potential consequences of the Bill (**Unintended Consequences**).

12. Each of these concerns is discussed below.

## Safety

13. 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.
14. 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.

15. It is with that in mind that the group expresses strong concern about the lack of focus on safety and safety risk management in the rationale behind the introduction of these provisions.<sup>2</sup> Safety risks and management do not feature strongly in either the rationale given for 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. The Government evidently is instead focused on punitive responses to fatalities after they have occurred.

16. For example:

- a. The Explanatory Memorandum to the Bill<sup>3</sup> refers 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.'*

The Explanatory Memorandum discusses the two new offences and associated penalties, including when the offences will be brought, and refers to other jurisdictions (with different OSH laws and frameworks) that have introduced industrial manslaughter. 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).

- b. The Minister's Second Reading Speech in the Legislative Assembly<sup>4</sup> focused on penalties as a deterrence, noting the new prohibition of insurance against fines for a work health and safety offence, and raising the devastating loss of life in workplaces as a rationale for the proposed laws. The Joint Industry Group entirely agree it is not acceptable for a death to occur at a workplace. However, there is no evidence to support the proposed 'deterrent' measure as leading to a reduction in workplace deaths.

This focus through the new industrial manslaughter provisions on punishment rather than safety outcomes misses the point of safety practice and effective risk management. The Minister refers to systems of work being *'subject to catastrophic failures due to poor design, bad behavior, improper choice of tools or a combination of factors'* and the need to *'be alert to the hazards and risks and make conscious, intelligent choices to deal with them'*, however the proposed laws and the expected effect of the laws runs contrary to approaches to improve these aspects and effectively address risks. The laws simply would not *'encourage a culture in which the newest apprentice has no fear of approaching his CEO and telling him or her to wear a hardhat'* as postulated in the Second Reading Speech. The laws will, with respect, have the opposite effect for the reasons set out below.

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<sup>2</sup> As set out Explanatory Memorandum for the Bill, the Second Reading Speech and the Government's media release.

<sup>3</sup> 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)

<sup>4</sup> Bill Johnston, Second Reading Speech, Work Health and Safety Bill 2019, Legislative Assembly, 27 November 2019, Hansard p9423b-9425a [https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/AD1974D2A7FF0653482584CB0011DB7D/\\$FILE/A40%20S1%2020191127%20p9423b-9425a.pdf](https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/AD1974D2A7FF0653482584CB0011DB7D/$FILE/A40%20S1%2020191127%20p9423b-9425a.pdf)



- c. The Government's media release following the announcement of its intention to introduce new industrial manslaughter laws at the State Labor Conference in August 2019<sup>5</sup> 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.*'

The media release fails to mention that those were national reviews based on the national OSH laws, which do not apply in Western Australia; that the reviews did not include consultation with Western Australia (again because it is not part of the national system); or that the Minister's own State-based Ministerial Advisory Panel appointed in our own jurisdiction 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'<sup>6</sup> made a total of 44 recommendations, none of which included any changes to the current industrial manslaughter laws.

17. The effect of this focus on punishment after the fact in the Bill is compounded by the failure 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)*. It must be noted that the Criminal Code also 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.
18. Not only does the existing law already provide avenues for industrial manslaughter prosecutions to be brought, but 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. That is, in October 2018, significant penalty increases took effect, 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.<sup>7</sup>
19. Notwithstanding these recent penalty changes, the Government considers the existing penalties under the OSH Act to not be high enough, hence its focus on increasing penalties and the ability to bring prosecutions for workplace deaths. This is largely driven by the Minister's discussions with the families who have lost loved ones in workplace accidents.<sup>8</sup>
20. What is missing entirely from this approach is what is needed to create and maintain safe workplaces across industries, businesses and locations.
21. Without engaging in meaningful discussion around safety itself, and how workplaces are best placed to achieve and improve safety outcomes, the Government's proposal misses

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<sup>5</sup> 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>

<sup>6</sup> Ministerial Advisory Panel, 'Modernising work health and safety laws in Western Australia, June 2008, Foreword.

<sup>7</sup> Maximum penalty for a Level 4 Penalty Offence under the OSH Act.

<sup>8</sup> Refer to Bill Johnston, Second Reading Speech, Work Health and Safety Bill 2019, Legislative Assembly, 27 November 2019, Hansard p9423b.

the critical substance needed to actually achieve safe workplaces. That is, what is needed to stop deaths from happening in the first place.

22. The focus on punitive responses also fails to acknowledge the fact that safety risks are ongoing and must be continually managed. It is not entirely possible to remove all risks from the workplace, particularly in industries that carry higher risks due to the nature of the work conducted and the practices required to undertake that work.
23. Whilst industry continues to strive to achieve the goal of zero fatalities, this will not be achieved through changes to the existing law. Rather, a focus on safety practice is essential.

## Safety Culture

24. Safety culture is at the heart of ensuring workplace safety on the ground.
25. Culture can be defined as ‘the way of life, especially the general customs and beliefs, of a particular group of people at a particular time.’<sup>9</sup> With respect to safety, ‘culture’ is the approach and attitude towards keeping each other safe. It is unequivocally saying to everyone in a workplace, that safety is everyone’s responsibility, and we all have an important role to play.
26. Nurturing a positive safety ‘culture’ is considered the critical element in OSH practice to achieve safe ways of working. Safety is after all, lived on the ground, and borne out in practical strategies that address causes of safety risks. As has been stated recently,

*‘... all the safety documentation in the world is of little use unless workers are trained in matters of safety, and safe working practices are then constantly observed and enforced.’<sup>10</sup>*

27. 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.
28. This approach undermines improvements in cooperation and safety culture in workplaces built over several decades. This is particularly the case given that the laws represent a significant shift away from the cooperative approach which has seen the reduction of workplace fatalities by 62 per cent nationally since 2007.<sup>11</sup>
29. Whilst it is certainly acknowledged 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, the Joint Industry Group does not agree with the contention that the proposed laws will make that improvement.
30. Safety culture is not improved or nurtured through penalties. Rather, it requires all parties to work together collaboratively, genuinely understanding the risks faced in a particular

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<sup>9</sup> Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/culture>

<sup>10</sup> *Orr v Hunter Quarries Pty Limited* [2019] NSWDC 634, per Russell SC DCJ.

<sup>11</sup> 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>.

industry and workplace, sharing the burden and responsibility for identifying and minimizing those risks. It also requires a commitment to continuous improving through education, effective systems and proactive regulation that supports the development of a strong, impactful culture.

31. Analysis of jurisdictions with industrial manslaughter provisions more akin to those posed by section 30A show that such provisions have not improved safety in the way that would justify the proposed new industrial manslaughter offences. For example:
  - a. 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.<sup>12</sup>
  - b. 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 longer term, the largest improvements in the UK fatality statistics occurred prior to the Act taking effect.
32. Accordingly, it is simply not the case that the laws can be said to have been an effective deterrent or have led to a decline in the rates of serious injury claims.
33. On the other hand, it is considered the introduction of these new offences poses a serious risk of undermining safety gains and impacting detrimentally on current safety culture in a way that has not been considered or appreciated.
34. Based on operational safety and culture considerations, the Joint Industry Group submits that both industrial manslaughter provisions in sections 30A and 30B should be removed entirely from the Bill and the focus and funding be instead directed to practical and effective safety measures, including proactive education initiatives and worksite inspections by WorkSafe.

## **Exclusion of Workers**

35. The proposed industrial manslaughter offences in sections 30A and 30B of the Bill exclude a whole class of persons – workers.
36. It is clear from discussion of the Bill and the drafting itself that the intended purpose of these sections is to capture senior representatives (employers) rather than workers. This is set out in the use of the concept of a PCBU ('person in control of a business or undertaking') and the inclusion of personal liability for both the 'crime' (section 30A) and 'simple offence' (section 30B).
37. The exclusionary nature of the 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.

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<sup>12</sup> 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>.

38. On the other hand, it is noted that the Government considers the Criminal code to be insufficient for prosecuting employees.
39. Not only does the different treatment of employers to workers raise significant cultural issues for workplaces, it also raises fairness and equal application issues and runs contrary to accepted operational approaches.

## Elements to Prove

40. 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.
41. Section 30B appears to capture all fatalities.
42. To successfully make out 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 link is between duty itself and the death in question, rather than directly between the PCBU/officer's personal action or inaction.
43. The same threshold is applied in the drafting of section 31 which sets out a Category 1 offence for the failure to comply with a health and safety duty that causes serious harm or death. Accordingly, similar concern arises with respect to the elements to be proven under section 31 (although notably the penalties reflect the existing penalties).
44. The new proposed sections are intended to replace the existing provisions in the OSH Act which are drafted very differently and with respect to sections 30A and 30B, apply different levels of penalties to what is proposed. Under section 19A of the OSH Act, 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.
45. A comparison of the current penalties and application to those proposed under the Bill is set out below as follows:

	Fine	Imprisonment term	Threshold
<b>Current highest offence</b>	Level 4 offence: <b>Individual:</b> \$550,000 first offence \$680,000 subsequent offence <b>Body corporate:</b> \$2.7mill first offence, or \$3.5mill subsequent offence	5 years imprisonment	Gross negligence
<b>Current lesser offence</b>	Level 3 offence: <b>Individual:</b>	No jail term	Circumstances not involving gross negligence

	\$400,000 first offence, or \$500,000 for subsequent offence <b>Body corporate:</b> \$2mill first offence, or \$2.5mill subsequent offence.		
<b>Proposed s30A highest offence</b>	PCBU: <b>Individual:</b> \$5mill fine <b>Body corporate:</b> \$10mill fine	20 years imprisonment	Person engages in conduct knowing it is likely to cause death, and in disregard of that likelihood
	Officer of the PCBU: \$5mill fine	20 years imprisonment	The PCBU's conduct is attributable to any neglect on the part of the officer or is engaged in with the officer's consent or connivance AND the officer engages in the conduct knowing it is likely to cause death, and in disregard of that likelihood
<b>Proposed s30B lesser offence</b>	<b>Individual:</b> \$2.5mill fine <b>Body corporate:</b> \$5 mill fine	10 years imprisonment	No gross negligence, negligence, recklessness or knowledge

46. Whilst it is acknowledged that opinions may differ on the penalties themselves, it is the application of these higher penalties whilst at the same time lowering the threshold for securing a conviction for which the penalties will be applied which is of considerable concern to the Joint Industry Group.
47. Further, under sections 30A and 30B, employers and officers of PCBU's can be prosecuted for deaths of non-workers that occur at a workplace. This is due to the use of the term 'individual' in both sections which is not defined in the Bill but has the general broader meaning of applying to any person (in contrast to the use of the term 'worker' which is defined in the Bill as being directly linked to the workplace<sup>13</sup>). A 'workplace' is defined broadly to be a place where any work is carried out for a business or undertaking, including any place where a worker goes, or is likely to be, while at work.<sup>14</sup> This means that the offences apply to deaths of any person in a workplace (whether invited or not).
48. The Joint Industry Group understands that no other jurisdiction has a two-tier offence or requires elementary thresholds as low as those proposed for in the Bill. Other jurisdictions with industrial manslaughter in place across Australia<sup>15</sup> 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.<sup>16</sup>

<sup>13</sup> Section 7 of the Bill, 'Meaning of worker.'

<sup>14</sup> Section 8 of the Bill, 'Meaning of workplace.'

<sup>15</sup> Namely ACT, Qld, NT and Vic.

<sup>16</sup> 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>

49. 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.
50. It is also difficult to imagine many scenarios where the regulator would choose to bring a charge under 30A requiring a higher threshold to be met (in terms of the necessary elements to make out), when section 30B is available and represents an easier prosecution avenue. Therefore, if section 30B were to come into force as proposed, it is expected that there would be a significant number of prosecutions brought under that section. If this were not the case, the rationale behind section 30B would be left wanting, particularly in light of the recent changes to the existing industrial manslaughter laws in October 2018.
51. As discussed above, 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.
52. Given that each prosecution will center on the facts and circumstances surrounding a particular incident, the broad capture of the elements of section 30B is considered entirely inappropriate and the section should be removed entirely.
53. The Joint Industry Group considers that the law must be sufficiently clear, and fair in its operation, so that PCBU's and their officers are not left guessing as to whether they will be held to have a duty of care or to be held liable in various circumstances.
54. For example, it is considered insufficient to rely on a broad 'context' or generic expectations for offences of such magnitude that carry prison terms and significant fines that would destroy businesses, significantly impact families and colleagues, create a substantial cost on the justice system, and leave workers out of work.
55. 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.

## **Court Jurisdiction and Prosecutor**

56. The Bill sets out two Court jurisdictions to deal with charges brought under the new offence provisions. The section 30A 'crime' is to be tried by the Director of Public Prosecutions (DPP) in the District Court, on indictment. The section 30B 'simple offence' however is to be tried by the regulator (or their appointed representative) in the Magistrates Court, as a simple offence.
57. The Joint Industry Group strongly objects to a prosecution for an offence carrying a potential jail term of up to 10 years and such significant monetary penalties being prosecuted in the Magistrates Court, and by anyone other than the DPP. Not only is the DPP specifically skilled in criminal prosecutions, having the DPP bring the prosecution provides a level of independence removed from the regulator themselves, to ensure procedural fairness and the right to a fair trial is maintained.

58. The Joint Industry Group strongly considers that the section 30B 'simple offence' should be removed from the Bill entirely.
59. If the threshold and procedural fairness aspects were to be addressed to ensure only gross negligence is captured (as per the Boland Review recommendation), the appropriate Court jurisdiction for that offence would be the District Court and the appropriate prosecutor would be the DPP.

### **Privilege against Self-incrimination**

60. Significant concern arises around privilege against self-incrimination and admissibility of statements to WorkSafe when a person is charged both as an individual (where their statements are not admissible) and as a PCBU (where their statements may be admissible against them).
61. Privilege against self-incrimination is a fundamental common law right to avoid saying or doing anything that may render a person liable to be prosecuted for a criminal offence.
62. Section 172(1) of the Bill abrogates the privilege against self-incrimination, requiring a person to answer a question or provide information or a document regardless of whether that would incriminate the person or expose them to a penalty. In such cases, where an investigator requires a person to answer a question or provide information and gives the necessary warning, it would be an offence for the person so requested not to provide the information or document.<sup>17</sup>
63. Whilst section 172(2) of the Bill qualifies that abrogation to restrict the use of the evidence against 'that individual' in civil or criminal proceedings (other than those that may arise if the evidence is false or misleading), concern remains around the admissibility of evidence against a PCBU, for which that same person may ultimately be held responsible (as a director or 'officer').
64. It is also unclear how the privilege against self-incrimination will be dealt with in cases of sole traders, where the PCBU is the sole trader themselves, running their own business.
65. Concerns around the compromised protection against self-incrimination are not unique to Western Australia – the concern also arises where industrial manslaughter laws involve a higher threshold in the offence provision than that proposed in Western Australia (more akin to section 30A). For example, the issue has caused considerable concern and raised questions in Victoria, the most recent jurisdiction to introduce new industrial manslaughter laws.<sup>18</sup>
66. The Joint Industry Group considers that the compromised protection against self-incrimination provides insufficient protection to natural persons, such as officers, who may be prosecuted for industrial manslaughter. Any proposed change to the legislation needs to ensure that investigation powers and the prosecution process maintain the accused's right to silence and privilege against self-incrimination.

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<sup>17</sup> Section 173 of the Bill.

<sup>18</sup> Concerns are summarised in the Master Builders Victoria, Submission in response to the workplace manslaughter consultation paper (30 May 2019), p5. <https://www.mbav.com.au/sites/default/files/2019530%2520-%2520Workplace%2520Manslaughter%2520Submission%2520-%2520Master%2520Builders%2520Victoria%5B1%5D.pdf>



67. It is essential that individuals being investigated for possible charges to be laid under the industrial manslaughter offence(s) are afforded the same rights and protections as under general criminal laws, which includes these fundamental legal rights.
68. It is considered necessary to address this concern to ensure that accused persons are afforded natural justice and to ensure that fundamental principles of justice are not eroded through the application of the proposed new laws.

## Impact on Industry and the Community

69. The proposed new offences will have significant impacts across businesses and industries throughout the State, particularly for those working within them, both as employers and workers.
70. The overwhelming feedback to the Joint Industry Group is that if the proposed new industrial manslaughter provisions become law, they will negatively impact on industry operations, business viability, job security, training and entry-level opportunities across sectors and communities.
71. Please refer to **Attachment 1: Statements from Industry** and **Attachment 2: Supporting Letters from Industry** which capture the concerns and sentiment about the proposals directly from industry participants.
72. Of significant concern to the group is the impact of the proposed laws on small business, which is generally understood to account for a higher proportion of serious injuries and fatalities. Small business has also proven to be the subject of most convictions elsewhere.
73. Small businesses generally have the least access to resources and support, yet the directors are most likely to have a 'hands on' role in the business, often acting as both PCBU and as a worker within their own business.
74. In Western Australia, SMEs make up 97% of all WA businesses, employing approximately 500,000 workers, or 41% of the private sector workforce.<sup>19</sup>
75. Australia does not keep specific statistics on safety outcomes by employer size. It is noted that this information would be helpful as a proactive measurement tool to enhance safety initiatives and monitoring. However, we know that:
- When looking at statistics from the United Kingdom, of the 25 businesses prosecuted under the UK's *Corporate Manslaughter and Corporate Homicide Act 2007* in its first 10 years of operation, 96% (24) of the businesses convicted of an offence between 2007 and 2017 were micro, small or medium sized businesses.<sup>20</sup> Only one large company had been successfully prosecuted.
  - In the United States, the fatality rate for businesses with less than 20 employees was generally 1.5 to 3 times higher compared to businesses with 20-49 employees, and 4 to 10 times higher than those with over 1,000 employees.<sup>21</sup>

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<sup>19</sup> Small Business Development Corporation (November 2019) [Small Business in Western Australia – at a glance](#).

<sup>20</sup> [Summary of Corporate Manslaughter Cases – April 2017](#).

<sup>21</sup> Mendeloff, Nelson, Ko and Haviland (2006) [Small Business and Workplace Fatality Risk](#), p xv.



76. The fact that the proposed laws, whilst intended to target large companies, will have the biggest impact on SMEs and will flow onto create a ripple effect throughout the community, does not appear to have been properly considered or appreciated.

## Unintended Consequences

77. The Joint Industry Group is concerned by the evident lack of consideration of unintended consequences of the proposed new offences in the Bill. Without consulting either prior to the announcement of the intention to introduce these laws in August 2019, or prior to the introduction of the Bill into the Legislative Assembly on 27 November 2019, the unintended consequences of the Bill and its application and impact have simply been overlooked.

78. For example, questions arise regarding the application of the law in situations such as:

- a. The delivery of public sector services, including in front-line services that carry higher risk of injury such as essential services, healthcare, policing/law enforcement etc;
- b. The impact of the proposed laws on different industries, for example the major mining, construction and transport industries in Western Australia;
- c. The effect on farmers and regional areas with a high concentration of SMEs and agricultural risks, including the impact on farmers whose homes are also their businesses;
- d. The impact on co-directors, many of whom could be family members of the deceased;
- e. The impact on family businesses, including where family members are prosecuted (as has occurred elsewhere);
- f. The impact of mental illness and how it will be addressed under the proposed laws, including appropriate culpability and liability for tragic suicides. The potential consequences are particularly notable here given the Bill is intended to *'serve as a reminder that risks to psychological health must be considered alongside risks to physical health'*<sup>22</sup>;
- g. How the proposed laws will impact apprentices, given the laws have an impact on hiring inexperienced workers, and the anticipated reduction in the number of businesses willing to take on apprentices due to the personal risk associated;
- h. How the Group Training Organisations will operate under the proposed laws given that GTOs act as an 'employer' of apprentices placing them in different 'host' businesses;
- i. The impact of the proposed laws on job security and unemployment, particularly when a worker would be more likely to be fired arbitrarily for a minor safety breach under the laws;

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<sup>22</sup> Hon Bill Johnston MLA, Second Reading Speech, Work Health and Safety Bill 2019, Legislative Assembly, 27 November 2019, Hansard p9423b-9425a.

- j. The impact on the insurance industry, including the impact of a rise in premiums and loss of coverage;
  - k. How the proposed laws will impact on sub-contractor relationships with head contractors;
  - l. How the proposed laws will impact on the medical profession, including liability for death of a hospital patient; and
  - m. The impact on liability to members of the public who may come onto, or near, workplaces (given that sections 30A and 30B do not require the person injured to be a worker) and associated insurance issues.
79. 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, raises considerable questions around whether the proposal meets good legislative reform practice or meets community expectations.
80. Ultimately, the Joint Industry Group 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.

## **Conclusion**

81. For the above reasons, the Joint Industry Group strongly opposes the introduction of the proposed new industrial manslaughter provisions set out in the Bill.
82. The Joint Industry Group instead calls for proper consideration of safety risks, taking into account operational safety practice and safety culture, to best tackle the need for safety improvements across industries. This represents a complete shift in focus from reactive punitive responses to proactive measures that are demonstrated to be effective.
83. Improvement in safety practice and ultimately safety outcomes requires a dedicated cultural change management process. Industry operators, such as those making up the Joint Industry Group, have significant knowledge and expertise on safety matters and what works in an operational sense, and can be a critical resource in developing safety policy and effective risk management strategies. It is essential for Government and the regulator to engage meaningfully with industry if safety gains are to be achieved.

## **Attachment 1**

### **STATEMENTS FROM INDUSTRY**

*As an SME I am concerned that my employees will take a no care/no blame attitude toward their work and workplace should these laws come in. This will undermine the years of work that industry has put in to making itself safe and the hours that business owners spend training and educating their employees in safe work practices. Employees cannot be void of responsibility for their own care.*

**Gary Cox, Owner Castle Painting & Decorating  
President, Master Painters & Decorators Australia  
28 Years in the Painting Industry, 18 Years as a contractor**

*The Cabinet Making Industry of Western Australia is one that requires skilled people with quality machines and systems.*

*A shared responsibility exists in order to deliver a*

- Quality Product in a*
- SAFE and Timely Manner*

*In this context, our businesses are a partnership of Owners and Staff. None of the above items can be independent of the other.*

*This proposed Legislation will unfairly impose safety outcomes on the Cabinetry Industry business owners, with little or no regard for the broader issues of safety, how people work together in a business, and how to best create a culture where employees share responsibility for their own safety and that of others.*

**Ugo De Laurentis  
President  
Cabinet Makers Association of Western Australia (CMAWA)**

*As a farm owner/manager, I am alarmed at this legislation. While we develop and implement safety procedures for as many circumstances as we can reasonably expect, our employees are working with the unpredictable nature of livestock, controlled burn-offs, bushfire, extreme weather events, hazardous materials, dangerous road conditions, aircraft and machinery of all description. We take a shared responsibility in making our work as safe as possible. This legislation erodes that culture.*

*Farmers and farm employees are also the rural bushfire service. That is a responsibility that we all accept as part of what we do and where we live. This legislation is likely to put rural communities in danger as rural employers may not allow their employees to attend bushfires as the risk of prosecution is deemed too great.*

*Added to all of this is the likelihood of rising insurance premiums possibly to the extent of a business being deemed uninsurable.*

**Digby Stretch, Owner Manager - Stretch Enterprises (grain and livestock farmer)  
Vice-President, Pastoralists & Graziers Association of Western Australia  
Ex-Chief fire control officer, Shire of Kojonup  
40 years in farming**

*I don't know what the government is trying to achieve here. This is just not good for safety. It gets down to the idea that large corporates can throw a legal team at it, our small and mid-size operators cannot afford that. 90% of our industry is small to mid-size businesses. Where is the consideration of what actually helps those businesses to achieve safety? There is an essential cultural approach to safety, which is hard to describe and articulate in documentation but is what is lived on site every day. It is that which keeps people safe.*

**Cam Dumesny**  
**CEO**  
**Western Roads Federation**

*This Bill is an extremely dangerous one. Slipping it through without consultation for one is not a responsible Government attitude. This is not yet widely known by business owners (certainly small business) and certainly once passed and widely known is a severe deterrent for anyone to go into business and create employment. There are already plenty of deterrents to go there.*

**Julie Boschetti, Latitude Fisheries Pty Ltd, Geraldton**  
**50 years commercial fishing**

*Safety is a fundamental tenant in the culture of every organisation. Safety is the responsibility of everyone in the organisation and is led by management. The reinforcement of this obligation should be the focus of any legislation. We believe any punitive measures should be limited to areas where gross disregard of this obligation exists.*

**Peter Moore**  
**CEO**  
**Construction Contractors Association of Western Australia**

*Other jurisdictions that have Industrial manslaughter laws in force characterise industrial manslaughter in more realistic terms, where in the context of the breach of a duty, includes language like "without reasonable excuse" and provides clear direction of the prosecution to prove a breach of a duty occurred "without reasonable excuse." The WA proposals have penalties as tough as criminal negligence but thresholds considerably lower, including the omission of any reasonable excuse and convictions on the balance of probabilities. The characterisation of industrial manslaughter in this Bill, rather than providing clarity and bringing "WA in line with the national model"; makes industrial manslaughter complicated, unclear and 'out on a limb' with the rest of the country.*

**Aaron Irving**  
**Executive Officer**  
**Pearl Producers Association**

*Industrial Relations Minister Bill Johnston said the changes would bring WA in line with the national model and help reduce costs and unnecessary duplication of processes. Is it about saving lives or saving costs? Premier McGowan said 'prison time sends a powerful message, but we don't want it to come to that'. Do the current IM laws not suffice??*

**Rock lobster fisher, Lancelin**  
**45 years commercial fishing**

*Duty of care is a two-way street. The employer has an obligation to provide a safe working environment and the employee has an obligation to work responsibly within that environment.*

**Geoff Diver, Fremantle**  
**Fishing industry consultant on safety**

*How can you have director/supervisor responsible for every person's action on site? You engage competent people to undertake areas of work they are deemed competent to perform. How is it then realistically fair or practical to impose a section like 30B, particularly in the health profession?*

**Qualified pharmacist and business owner**

*I am concerned about the proposed Industrial Manslaughter laws, in particular 30B. The test for whether a 'Simple Offence' has occurred involving the death of a worker on your property is simply whether or not the Employer had a health and safety duty and failed to comply, there is a much lower threshold of proof required. There has been minimal industry consultation and the proposed laws are an affront to safety and general legal and justice principles, with no evidence of improving safety on farms.*

**Farm Owner, Fourth generation farming enterprise, Northern Wheatbelt WA**

## **Attachment 2**

### **SUPPORTING LETTERS FROM INDUSTRY**

The following letters from industry associations are attached to, and form part of, this Joint Industry Submission:

1. Association of Wall & Ceiling Industries
2. Electrical & Communications Association WA; National Electrical and Communications Association WA (joint letter)
3. Liquor Stores Association of Western Australia
4. Master Electricians Australia
5. Pharmacy Guild of Australia (WA Branch)
6. Property Council of Australia

## Submission on Work and Safety Bill 2019

As the peak industry association representing Wall and Ceiling manufacturers and installers in WA, The Association of Wall and Ceiling Industries WA (AWCIWA) are concerned about the severe impact and unintended consequences this bill will have on the wall and ceiling industry.

As an industry Association, AWCIWA strongly supports and encourages our members and the greater wall and ceiling industry in WA to have effective occupational health and safety programs in place to reduce and minimise workplace injuries and accidents.

It is our position that the introduction of these industrial manslaughter provisions set out in Part 2 of the *Work Health and Safety Bill 2019* (WHS Bill) will have a detrimental effect on employer, employees, apprentices, stakeholders and our industry at large. The AWCIWA is extremely concerned that this bill will

- Severely impact employment of apprentices, creating a contraction in skilled labour in our trade; The lack of skilled labour in our trade will lead to less qualified tradespeople on site
- Unqualified tradespeople will not have had any formal training through their apprenticeship and will therefore miss out on the valuable WHS training that assists in changing the culture of the workplace
- More unskilled labour will lead to more workplace accidents
- Less reporting from employers of all workplace accidents in fear of retribution/fines
- Illegitimate employment procedures – Employers will avoid directly employing tradespeople and only use them as sub-contractors – this will encourage more sham contracting.
- Sham contracting leads to less skilled workers, workers compensation premiums not being paid, superannuation not being paid, taxes not being paid.
- Concerns that larger well-funded building and construction organisations will abdicate all responsibility and “pass the buck” (or the liability) onto the contractor. Further to this, the larger well-funded construction organisation will intimidate and coerce a contractor into holding all responsibility rather than the appropriate PCBU being held accountable.

As prefaced in this Statement from Industry, AWCIWA strongly advocate for effective WHS programs in the workplace, we believe this should be achieved by supportive and well-funded training and education to promote a cultural change in the workplace. This should start with school students before they undertake a career choice and should be the responsibility of all workers, without end. It is unlikely the introduction of these laws will change poor workplace behaviour; our concern is that it will simply pass the buck.

An alternate to this proposed law that would benefit both our members and the industry would be the introduction of some form of mandatory registration. At present there is no minimum requirement to become a ceiling fixer. Increasing the skill level of the tradesperson will have a flow on effect to safety on the worksite.

The AWCIWA support this joint submission.

Rachel McMahon – President AWCIWA



I, Carl Copeland, provide this statement as;

- the CEO of the *Electrical and Communications Association of WA Inc* ("ECA WA") and
- the Chapter Secretary of the *National Electrical Contractors Association WA Chapter* ("NECA WA").

NECA WA is an employer association registered under the *Fair Work (Registered Organisations) Act* and ECA WA is a Not for Profit organisation registered under the *Associations Incorporation Act* in WA and is also registered as a Charity with the ACNC.

These two organisations have substantially the same membership, which consist of approximately 1500 Electrical Contractors in WA, mostly small to medium enterprises ("SMEs").

ECA WA is also a;

- Registered Training Organisation ('RTO') trading as the *College of Electrical Training* and
- Group Training Organisation ('GTO') trading as *Electrical Group Training* who is currently placing approximately 500 electrical Apprentices with Host Employers in the Electrical and Communications Industry.

As GTO, *Electrical Group Training* remains the employer of the Apprentices but enters into a Host Employer Agreement where after Apprentices are placed with Host Employers to work under the supervision of the Host Employers.

We have concerns about the proposed Industrial Manslaughter ('IM') provisions in *Work Health and Safety Bill 2019* and we support the Joint Industry Submission.

We have particular concern about the proposed:

#### 1 - Exclusion of Workers:

Safety has always been a joint responsibility and excluding workers is not only unfair but sends the complete wrong message in our view.

For example; the supervision of Apprentices in the electrical Industry are regulated by the *Electricity (Licencing) Regulations*. A PCBU (Electrical Contractor conducting business as a sole trader) may decide to act as a Host Employer and take on an Apprentice. He may direct the Apprentice to accompany one of his employees (a qualified electrician) to a job site where the Apprentice will work under the supervision of the electrician. Should the electrician fail in his duty to adequately supervise the Apprentice as a result of which the Apprentice suffers a fatal injury, the electrician may be prosecuted for a breach of OSH legislation and the Regulations but not the IM provision in the Bill. The question is why not?



## 2 - Elements to Prove:

The lower standard of proof in Section 30B and the exclusion of the need for knowledge, intent, lack of action, recklessness or negligence is in our view totally unacceptable. In the example given above, the PCBU is liable under the IM provision if there was a breach of duty and could face prison time although he was not personally negligent. He may have had all the processes and procedures regarding the supervision requirements of Apprentices in place but, under Section 30B, that does not matter.

Such a provision is not only totally unfair in our view but will almost certainly discourage PCBU's from taking on Apprentices as Host Employers because the risk would be too high.

ECA WA as a GTO is struggling as it is to encourage more SMEs to take on Apprentices through Electrical Group Training. The Apprentice numbers are likely to drop significantly if Section 30B becomes law. ECA WA as GTO will find it much harder to place Apprentices with Host Employer PCBU's as they would be reluctant to take on the extra risk and exposure.

Furthermore, pursuant to Host Employer Agreements, a GTO place Apprentices with Host Employers to work under the supervision of the Host Employers. The fact that no negligence is required under the proposed Section 30B before a GTO could be held liable is in our view totally unacceptable.

ECA WA (as a Charity and GTO) is managed by a Board (or Management Committee) consisting of people who are all Electrical Contractors who serve on the Board in a voluntary capacity. If unfair IM provisions such as Section 30B become law, which creates potential liability and exposure to prison time for such Board members, such Charities and GTOs will find it hard to convince Electrical Contractors to serve as unremunerated Board members.



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CEO of ECA WA



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Chapter Secretary of NECA WA

Cathryn Greville  
Master Builders Association  
3 35-37 Havelock St  
West Perth  
WA 6005

25/06/20

Dear Kathryn

**RE: Industrial Manslaughter Bill**

This letter confirms the Liquor Stores Association of Western Australia will join the **Joint Industry Submission** as a co-signatory opposing the proposed “Industrial Manslaughter legislation” or “Inquiry into the Work Health and Safety Bill 2019”

The LSAWA highly values a person’s right to work and the right to come home from their workplace and is a staunch advocate of proper work, health, and safety measures.

Notwithstanding, after extensive talks with stakeholders it is the view of the LSAWA, that the State Government’s lack of consultation, coupled with the extreme penalties associated in the proposed Bill, the impact on small businesses, employers and staff could be far more reaching than intended.

Moreover in light of the significant updated penalties to the WA workplace laws in 2018, the LSAWA feels these laws are yet to be given time to be fully tried and tested and as a result it is the preference of the LSAWA that these laws be given more time to have the appropriate impact on unruly workplace events, before any further changes to our state workplace laws take effect.

Sincerely

Peter Peck  
CEO LSAWA

24th 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

### **Inquiry into the Work Health and Safety Bill 2019**

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is [www.masterelectricians.com.au](http://www.masterelectricians.com.au)

MEA wishes to support the submission made by Master Builders Association.

As a national peak body, MEA represent electrical contractors in an industry where the average size of businesses is 5-7 full time employees and are predominately sole traders. We hold grave concerns regarding

- the current drafting of the bill particularly sections 30 a and b.
- the level of proof being set at a much lower level than what has been passed in any other jurisdiction in the country and
- the involvement of the regulator at a prosecutorial level, where in other jurisdictions this has been separated away from the investigating department

MEA agrees that these are a dangerous precedent with many unintended consequences not only for small employers but all employers within Western Australia.

MEA supports the MBA submission and there call for change in the legislation as a matter of urgency.



**Jason O'Dwyer**  
**National Manager**  
**Policy and Advocacy**

## STATEMENT FROM PHARMACEUTICAL INDUSTRY

*As an SME I am concerned that my employees will take a no care/no blame attitude toward their work and workplace should these laws come in. This will undermine the years of work that industry has put in to making itself safe and the hours that business owners spend training and educating their employees in safe work practices. Employees cannot be void of responsibility for their own care.*

Signed ..... *Andrew Ngeow* .....

Dated ..... *23/6/2020* .....

**Andrew Ngeow, Proprietor of Pharmacy 777 Centrepoint Midland, Pharmacy 777 Nollamara, Pharmacy 777 Shoalwater and Pharmacy 777 South Lake**

**President, the Pharmacy Guild of Australia (WA Branch)**

**26 Years in the Community Pharmacy Industry, 21 years as a Proprietor**

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**Property industry statement supporting the Joint Industry Submission on the *Work Health and Safety Bill 2019* inquiry**

The drafting of the Bill in its current form increases the risk to the many people who work in property, including facilities managers, leasing agents, professional consultants, shopping centre managers and retirement village managers. Working alongside their colleagues to service clients, residents and visitors, they strive to create a culture where everyone is safe each day. The Industrial Manslaughter provisions in this Bill will serve as a disincentive for everyday workers to share in the responsibility for safety.

It is of high concern to the property industry that these laws could be used to prosecute people and organisations for deaths of non-employees or deaths that are not related to a workplace accident, but that occur at a workplace. Generally speaking, deaths that occur at a workplace itself by definition have to occur on property. Under the current drafting of this Bill, this could mean that any form of death in an office building, retail centre, factory, warehouse, retirement village or housing development could lead to prosecution.

Therefore, it is reasonably foreseeable that this would result in people with no knowledge or involvement in an offence being held liable. This is unreasonable and fails to account for the significant penalties that already exist for the tragic circumstances where deaths result from workplace accidents.

Sandra Brewer  
WA Executive Director  
Property Council of Australia