

MEMORANDUM TO MEMBERS OF PARLIAMENT

WORK HEALTH AND SAFETY BILL 2019 – PROPOSED MOTION TO AMEND CLAUSE 231

There are a number of government and non-government amendments proposed to be moved to the Work Health and Safety Bill 2019.

The purpose of this memorandum is to set out the Government's rationale for proposing to move an amendment to clause 231 which would have the effect of deleting subclauses 231(3) to (7). The full text of the existing clause 231 is included as **Appendix I**.

Clause 231

The Government supports retaining subclauses 231(1) and (2) which, in summary, expressly permit a person to write to the regulator (the WorkSafe Commissioner) to ask for certain specified types of prosecutions to be brought. The regulator is required to respond to the person within three months providing certain information about the status of the matter, including, if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought.

The effect of subclauses 231(3) to (7) is that if the regulator advises a person that a prosecution for an industrial manslaughter offence a Category 1 or a Category 2 offence will not be brought, the maker of the request may then require the regulator to refer the matter to the Director of Public Prosecutions (DPP).

Within one month, the DPP must consider the matter and notify the regulator whether the DPP considers, contrary to the view of the regulator, that a prosecution should be brought. If the DPP notifies the regulator that the DPP considers that a prosecution should be brought, but the regulator declines to follow that advice, the regulator must give written reasons for so declining.

A copy of the DPP's notice must be given by the regulator to the person who made the request and the person who the applicant believes committed the offence.

Why were subclauses 231(3)-(7) included in the Bill?

The Bill is largely based on the Model Work Health and Safety Bill. Subject to some minor variations, clause 231 in the Bill mirrors clause 231 in the Model Bill.

The Model Bill's jurisdictional note for clause 231 provides:

"A jurisdiction may amend subsections (2), (3), (4), (5) and (6) [note these are equivalent to subclauses (3), (4), (5), (6) and (7) in the Bill] to reflect the role of the Director of Public Prosecutions in that jurisdiction or omit the provisions if they are inconsistent with prosecutorial policy and practice in that jurisdiction."

Following recent consultation with the DPP and the State Solicitor's Office (SSO) (including State Counsel), it has been identified that subclauses 231(3)-(7) do not reflect the role of DPP

in Western Australia. Further, the provisions are inconsistent with prosecutorial policy and practice in Western Australia. Had those concerns been identified earlier, Government would have omitted subclauses 231(3) to (7), consistent with the relevant jurisdictional note. Government no longer supports the inclusion of subclauses 231(3) to (7) in the Bill.

The primary concerns with clause 231 are set out below.

Why the Government no longer supports subclauses 231(3) to (7)

1. The DPP already has the discretion to review decisions not to prosecute

Under the *Director of Public Prosecutions Act 1991* (WA) (see sections 11, 20 and 22) and the *Criminal Procedure Act 2004* (WA), it is open to the DPP in an appropriate case to review and decide whether to recommend that a prosecution be commenced, or indeed to commence a prosecution notwithstanding that another prosecuting authority has decided not to do so.

That is of course a discretionary matter. Whether and in what circumstances it might occur would be informed by a wide range of considerations.

An investigative agency may also seek the DPP's opinion as to whether a charge should be laid (see DPP's *Statement of Prosecution Policy and Guidelines 2018* at paragraph [7]).

2. The duties and functions conferred by clause 231 are inconsistent with longstanding prosecutorial policy and practice in Western Australia and will interfere with the performance of the DPP's important, existing functions

The Office of the DPP is the State's independent prosecuting authority and its core responsibility is the prosecution of serious criminal charges. In the almost thirty years since the inception of the DPP's Office, there does not appear to have ever been a statutorily enshrined "review" function compelling the DPP to review a matter and express an opinion as to whether a prosecution should be commenced in relation to possible indictable offences, let alone possible simple offences, as clause 231, if enacted, would require.

Such a provision has the potential to interfere with the DPP's performance of her other functions and runs contrary to the current discretionary ability to express such views in appropriate cases.

This interference is compounded by the requirement under subclause 231(5) that the DPP must review the case and provide the relevant notice as to whether a prosecution should be brought within one month. To impose a fixed timeframe on an Office with finite resources serves to undermine the properly afforded discretion the DPP has in allocating the limited resources within her Office. That is, clause 231 will compel the DPP to prioritise reviews under clause 231 over other matters which may objectively demand priority. This poses risks for the due administration of the State's criminal justice system. It also raises reputational risks for the DPP's Office, should that Office either be unable to comply with the one month requirement under clause 231, or otherwise be unable to meet community expectations as to the timely and high-quality prosecution of other serious criminal matters.

3. Clause 231 is not confined to workplace deaths

Subclause 231(3) makes clear that the DPP's review function will apply to decisions not to prosecute for industrial manslaughter offences, Category 1 or Category 2 offences. Importantly, Category 1 and 2 offences do not necessarily involve a workplace fatality and, in the case of Category 2, may not involve any injury at all. Further, it is not proposed that Category 1 or 2 offences would ever be prosecuted by the DPP's Office.

As such, it would be counterproductive to have the DPP's Office review the regulator's decision to not prosecute Category 1 or 2 offences, given the DPP would not have had any experience prosecuting those matters and, should charges be laid, would not have any involvement in prosecuting the matter.

4. Clause 231(6) requires the regulator to provide to others what is, in effect, the DPP's legal advice.

This provision requires that a copy of the DPP's notice should be given to the person seeking the review and the person 'believed to have committed the offence.

If the outcome of a review is to be of any assistance to the regulator, the DPP's notice should clearly explain the reasons for the decision, and may also provide legal advice as to what might appropriately be done in order to make a prosecution more viable. If that is required to be given to others, it may jeopardise any future prosecution.

APPENDIX I - Clause 231

Procedure if prosecution is not brought

- (1) If —
 - (a) a person reasonably considers that the occurrence of an act, matter or thing constitutes an industrial manslaughter offence, a Category 1 offence or a Category 2 offence; and
 - (b) no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence,the person may make a written request to the regulator that a prosecution be brought.
- (2) Within 3 months after the day on which the regulator receives a request the regulator must —
 - (a) advise the person (in writing) —
 - (i) whether the investigation is complete; and
 - (ii) if the investigation is complete, whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought;
 - and
 - (b) advise the person who the applicant believes committed the offence of the application and of the matters set out in paragraph (a).
- (3) Subsections (4) to (7) apply if the regulator advises the person that a prosecution for an industrial manslaughter offence, a Category 1 offence or a Category 2 offence will not be brought.
- (4) The regulator must —
 - (a) advise the person that the person may ask the regulator to refer the matter to the DPP for consideration; and
 - (b) if the person makes a written request to the regulator to do so, refer the matter to the DPP within 1 month after the day of the request.
- (5) The DPP must consider the matter and notify (in writing) the regulator within 1 month after the day of the referral as to whether the DPP considers that a prosecution should be brought.
- (6) The regulator must ensure a copy of the DPP's notice is given to —
 - (a) the person who made the request; and
 - (b) the person who the applicant believes committed the offence.
- (7) If the DPP's notice states that the DPP considers that a prosecution should be brought but the regulator declines to follow that advice, the regulator must give written reasons for that decision to any person to whom a copy of the DPP's notice is given under subsection (6).
- (8) In this section a reference to the occurrence of an act, matter or thing includes a reference to a failure in relation to an act, matter or thing.