



THE LAW SOCIETY  
OF NEW SOUTH WALES

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21 March 2024

Industrial Manslaughter Consultation  
Policy, Strategy and Governance  
SafeWork NSW  
92-100 Donnison Street  
Gosford NSW 2250

By email: [whspolicy@customerservice.com.au](mailto:whspolicy@customerservice.com.au)

Dear Sir/Madam,

**Industrial Manslaughter Consultation paper**

Thank you for the opportunity to comment on the Industrial Manslaughter consultation paper. The Law Society's Employment Law and Criminal Law Committees contributed to this submission.

**General position**

The Law Society welcomes measures to introduce industrial manslaughter provisions. We agree that the current penalty framework in New South Wales provides an inadequate deterrent to reducing the risk of workplace deaths. Stronger penalties will send an important message that workplace safety is to be taken seriously and that failure to invest in, and manage, necessary precautions is unacceptable and should have significant consequences for those responsible.

We also support, as far as possible, consistency across jurisdictions in workplace safety law, and accordingly, would support penalties similar to those provided in the model Work Health and Safety Act (**WHS Act**) and which have been adopted in other Australian jurisdictions.

Our further comments in response to the discussion questions are set out in Annexure A to this letter.

If you have any questions about this submission, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: [sue.hunt@lawsociety.com.au](mailto:sue.hunt@lawsociety.com.au).

Yours sincerely,

**Brett McGrath**  
**President**

## ANNEXURE A

### Question 1

**Provide your opinion on using existing definitions within the WHS Act or other definition options?**

The Law Society considers Option 1 is likely to be most effective. In our view, it is appropriate that liability for manslaughter should attach to persons with a primary duty of care under the *Work Health and Safety Act 2011* (NSW) (**NSW WHS Act**), and to their officers, that is, a person who:

- has a health and safety duty;<sup>1</sup> and
- is a person conducting a business or undertaking (PCBU),<sup>2</sup> or an “officer” of a PCBU<sup>3</sup> as defined in s 9(1) of the *Corporations Act 2001* (Cth).<sup>4</sup>

We note in particular that “officer” of a PCBU is limited to persons empowered (in various capacities) to make or influence decisions that affect the whole, or a substantial part, of the business of the corporation. In our view, liability for manslaughter should not extend to workers, such as middle managers or team leaders, who, although involved in the corporation’s management, lack the authority to make or influence decisions that affect the whole, or a substantial part, of the business.

Option 1 also has the benefit of consistency with the Category 1, 2 and 3 offences in the *NSW WHS Act*.

### Question 2

**Should the industrial manslaughter offence cover workers and others in the workplace? Please explain your reasons.**

Our view is that the offence should cover those persons to whom a health and safety duty is currently owed by a PCBU and their officers. Accordingly, the offence should cover workers and other persons who are put at risk from work carried out as part of the conduct of the business or undertaking.<sup>5</sup> This would ordinarily include customers and visitors.

### Question 3

**Provide your opinion on the test that should apply to prove that industrial manslaughter has been committed?**

We would support an offence that includes the following elements:

- the person is a PCBU or their officer (as outlined in the response to Question 1);
- the person intentionally engages in the conduct;
- the conduct breaches the health and safety duty;
- the conduct is grossly negligent in the circumstances; and
- the conduct causes the death of an individual who is a worker or other person to whom the duty is owed (as outlined in the response to Question 2).

The Law Society’s view is that gross negligence is an appropriate fault element, and that recklessness should not be included as an alternative element. We note that, for the purpose of the Commonwealth Criminal Code:

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<sup>1</sup> Section 30.

<sup>2</sup> Section 19.

<sup>3</sup> Section 27.

<sup>4</sup> Section 4.

<sup>5</sup> Section 19(1), (2).

- (1) A person is reckless with respect to a circumstance if:
  - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
  - (a) he or she is aware of a substantial risk that the result will occur; and
  - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.<sup>6</sup>

By contrast:

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.<sup>7</sup>

In our view, mere awareness as to a substantial and unjustifiable risk of death is not a sufficiently high test for the commission of industrial manslaughter, given the seriousness of the offence and the severity of the penalties contemplated. It should be necessary to prove that the accused's conduct falls short of the objective standard of a reasonable person in the circumstances.

If the NSW offence were to include both recklessness and gross negligence as alternatives, we would not support a definition of "recklessness" that includes a corporation's express, tacit or implied authorisation or permission of the conduct, or where a corporate culture existed that encouraged or tolerated the conduct, as applies in the ACT. Noting that the ACT offence has not yet been prosecuted, in our view the element of corporate recklessness is likely to import a high degree of uncertainty and may be difficult to prove in practice.

If both elements were included, we also suggest the indictment should be required to allege one or the other element.

#### **Question 4**

**Are there other elements that must be proved to establish that an industrial manslaughter offence has been committed?**

We note that the leading cases of manslaughter by gross criminal negligence describe:

- an act which caused the death that was done by the accused consciously and voluntarily;
- a great falling short of the standard of care which a reasonable person would have exercised; and
- which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merits criminal punishment.<sup>8</sup>

In our view, these elements are appropriate in the context of the proposed offence.

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<sup>6</sup> Schedule, Part 2.2, s 5.4.

<sup>7</sup> Schedule, Part 2.2, s 5.5.

<sup>8</sup> *Nydam v R* [1977] VR 430; *The Queen v Lavender* (2005) 222 CLR 67.

### **Question 5**

**Should the NSW WHS penalties align with the model WHS penalties for industrial manslaughter? If no, what penalties would you consider appropriate and why?**

Yes, we would support penalties that align with the model WHS Act penalties. We consider these penalties appropriate and support the development of broadly consistent penalties across jurisdictions.

We oppose the introduction of any mandatory or minimum sentences. In our view, mandatory and minimum sentences inappropriately exclude judicial discretion, and can negatively impact guilty pleas and strain judicial resources, while having negligible deterrent impact. We are also of the view that mandatory and minimum imprisonment sentences breach Australia's international human rights obligations under the *International Covenant on Civil and Political Rights*, including articles 9(1) and 14(5).

### **Question 6**

**Do you agree that a person charged with industrial manslaughter may be convicted of a Category 1 or a Category 2 offence, as an alternate to the industrial manslaughter offence? If so, should the existing two-year statute of limitations apply to the alternate Category 1 or Category 2 offence?**

We support the availability of alternative verdicts, even those carrying significantly lower maximum penalties. This will enable judges and juries to convict of the appropriate offence in all the circumstances. We note that the charges would need to be capable of being prosecuted on indictment.

### **Question 7**

**Do you agree that the industrial manslaughter offence should not be subject to a two-year statute of limitations?**

Yes. In the experience of our members, it is not unusual for the investigation following a workplace death to take longer than two years. While appreciating the likely negative impact of a long investigation on the alleged offenders, on balance we would support measures that allow sufficient time for a thorough investigation to be conducted, and following the completion of any coronial inquest.