

AIHS Submission: Mineral and Energy Resources and Other Legislation Amendment Bill 2020

Committee Secretary
State Development, Natural Resources & Agricultural Industry Development Committee
Parliament House
George Street
Brisbane QLD 4000

(by email: sdnraidc@parliament.qld.gov.au)

Dear Committee Secretary and Committee Members

As Chief Executive of the AIHS, I am pleased to make this submission on behalf of the Institute. I acknowledge the input of Institute members, particularly the Chair of our Queensland Branch, Mr Brett Jones and Chair of our College of Fellows, Mr Kym Bills. The AIHS has reviewed the aspects of the Bill and its detailed Explanatory Notes related to the scope of our members and stakeholders.

Fundamentally, the AIHS supports the introduction of the Resources Safety and Health Queensland legislation, as outlined in our submission in October 2019. This support is founded upon:

- the (partial) alignment of the critical regulatory frameworks for coal mining, mining and quarrying, petroleum and gas and explosives;
- the stated function of the new regulator (ref: Part 1 Div 2 s10);
- the delivery of some of the 68 recommendations of the Coal Workers Pneumoconiosis (CWP) select committee, particularly those designed to improve health and safety governance; and
- the framework for working with the (newly formed) WHS Prosecutor in Queensland.

However, some key aspects of the Mineral and Energy Resources and Other Legislation Amendment Bill 2020 related to the introduction of Industrial Manslaughter (IM) are of concern, lacking in flexibility such as in relation to the mandatory appointment of some statutory office holders, or could be potentially be improved by referring to legislation currently being developed or reviewed in the other major mining petroleum states, WA and NSW.

Industrial Manslaughter and inconsistency across jurisdictions

The overarching policy of the AIHS with respect to industrial manslaughter (IM) is that it should be consistent and uniform across Australia. In particular, if it is to be included within WHS legislation, it should be harmonised so as to be consistent with jurisdictional undertakings in the 2008 COAG *Inter Governmental Agreement for Regulatory and Operational Reform in Occupational Health & Safety*. This requires:

- Consistency across jurisdictions: if IM is to be introduced, it should be consistently introduced around the country with the same scope, application, legal tests, available defences and maximum penalties;
- Consistency and alignment with the balance of the OHS legislative framework: the AIHS does not support higher penalties in the context of lower standards of proof; and
- Consistency with the general proposition that the law should apply to people equally: so that the same rights and powers exist in relation to the investigation and prosecution of IM offences that would apply in the context of manslaughter offences under the general criminal law – including provisions for accidents.

The Bill Explanatory Notes state that *'the current offences...are insufficient where actions or omissions involving criminal negligence...result in worker fatalities'*. However, the absence of prosecutions in Queensland under the existing legislation (*WHS Act*), prior to the introduction of Industrial Manslaughter, do not suggest that the penalties were too low – they just were not being applied. The AIHS also notes the absence of a consistent position from the stakeholders consulted in relation to Queensland's Bill with industry stakeholders *'either not supporting or raising concerns with some of the details of the proposal'* (p.17).

Disparities among other Australian jurisdictions in relation to Industrial Manslaughter continue, like Queensland, to depart from 2008 COAG harmonisation commitments, longstanding AIHS policy and the 2018 Boland Review:

ACT: IM laws in place via criminal law (not *WHS Act*);

NT: IM laws passed in effect 1/2/20 – potential life imprisonment

VIC – IM legislated and operational when proclaimed or by 1/7/21

NSW: clarifying that criminal manslaughter laws apply to industrial manslaughter (not via *WHS*) and adding gross negligence to recklessness for category 1 *WHS* offences

WA: IM laws part of *WHS* legislation and regulation package

SA: no IM laws proposed

TAS: no IM laws proposed

Commonwealth: no IM laws proposed

Queensland has an opportunity to collaborate with the two other major mining and petroleum extraction states, WA and NSW, to minimise inconsistency and achieve greater harmonisation. WA is in the process of legislating and NSW is in the process of undertaking a five-year review of its laws.

Appointment Requirements for Statutory Office Holders

The Queensland Bill includes a number of statutory office holder positions (including Site Senior Executives and Ventilation Officers). The Bill proposes that these roles must be held by an employee of that mine on the reasoning that a contract employee could be fearful of their continuance if they were to report a legitimate health and safety issue. The AIHS does not support this position because it is too simplistic. For example, there may be more pressure on a mine employee with a family settled in an adjacent town than on a more mobile contractor, especially if the mine culture is poor and senior management preferences production and profit ahead of health and safety.

Members and others known to the Institute undertake important statutory office holder roles for meaningful and industry-supporting reasons, including but not limited to:

- Consultant members providing expert services;
- Sole trader members who provide services to mines that are unable to sustain a full-time workforce, or are unable to attract full time employees to their mines; and
- Expert providers who are able to provide expertise beyond that able to be sustained by the industry.

The AIHS also understands that while many larger mines have succession/back-up plans for Site Senior Executives, there are inadequate qualified professionals, and inadequate new entrants with the necessary skills, to fulfil the demand for Ventilation Officers.

In our view the proposed amendments to s57 and s61A regarding temporary absences of Site Senior Executives and Ventilation Officers lack logic and fairness. Fair Work Australia instruments regarding parental, compassionate and personal leave are unable to be fulfilled under this proposal – whereby a suitably-qualified worker (whether contracted or otherwise) could not backfill a role while the appointed person takes their necessary leave without their position being filled full time so that they cannot return to their substantive role. This needs to be reviewed as a matter of urgency, including the ability of the market to sustain the employment needs of ventilation officers in particular.

The AIHS has a strong ethical code and practice¹, as do most professional member associations, and is currently expanding explanatory material and training in relation to ethical practice. It is the position of the AIHS that the ethical role of a health and safety professional extends beyond the boundaries of employment arrangements.

The AIHS respectfully presents the following matters for consideration on behalf of our members, and as a stakeholder representative of the health and safety profession:

- **With respect to the proposed introduction of Industrial Manslaughter, that the principles contained within the Institute's paper submitted to the Victorian Government (Appendix 1) and more recent disparities among jurisdictions are carefully considered in the context of the industry feedback received;**
- **Statutory positions within the proposed legislative framework, including but not limited to Site Senior Executives and Ventilation Officers, should not in all cases be required to be fulfilled by full-time employees of the mine; and**
- **The current legislation and its scope are considered in light of the legislative package currently in the WA Parliament and the current five-year review of the NSW mine and petroleum safety laws.**

The Committee may wish to further review these matters.

For any desired follow-up, please contact me at ceo@aihs.org.au or 03 8336 1995.

Yours sincerely



David Clarke
Chief Executive

26 February 2020

About the AIHS

The Australian Institute of Health and Safety (AIHS) is the national association for people who work in generalist health and safety (practitioner and professional) roles, and for leaders in health and safety more generally². We have many members in the resources industry, including in Queensland. On 1 July 2019 our name changed from the Safety Institute of Australia to emphasise the importance of occupational health as well as safety. For more than 70 years we have worked towards our vision of safe and healthy people in productive workplaces and communities. The AIHS is constituted as a not-for-profit company under Corporations Law. Our Patron is the Governor-General of Australia. The AIHS is mainly funded by member contributions and has a Chief Executive and small paid secretariat based in Melbourne. Most of its work is undertaken by volunteers who Chair and contribute to State Branch Committees or operate nationally through the AIHS Board and committees.

¹ <https://www.aihs.org.au/member-portal/code-ethics-and-complaints>

² See <https://www.aihs.org.au/about>

APPENDIX 1: SIA (former name of AIHS) Submission to Victorian Consultative Paper on Workplace Manslaughter.

Workplace Manslaughter Consultation Paper – SIA Submission Executive Summary

We thank you for your invitation to provide the Safety Institute of Australia feedback on the draft proposed laws for workplace manslaughter contained within the Department of Justice and Community Safety Workplace Manslaughter Consultation Paper (**Consultation Paper**).

The overarching policy of the SIA with respect to workplace manslaughter (**WM**) or industrial manslaughter (**IM**) is that it should be uniform across Australia. In particular, if it is to be included within WHS/OHS legislation, it should be harmonised to be consistent with jurisdictional undertakings in the 2008 COAG "Inter Governmental Agreement for Regulatory and Operational Reform in Occupational Health & Safety".

The core of our submission is that careful consideration must be given to consistency in the introduction of WM. That consistency is required in a number of respects. The following are the key points of the SIA's submission in response to the Consultation Paper. There is a need for:

- *Consistency across jurisdictions:* if WM is to be introduced, it should be consistently introduced around the country with the same scope, application, legal tests, available defences and maximum penalties; and
- *Consistency and alignment with the balance of the OHS legislative framework:* the SIA does not support higher penalties in the context of lower standards of proof; and
- *Consistency with the general proposition that the law should apply to people equally:* so that the same rights and powers exist in relation to the investigation and prosecution of WM offences that would apply in the context of manslaughter offences under the general criminal law.

Industrial Manslaughter Context for SIA Policy

The helpful October 2018 report by the Senate Education and Employment References Committee "They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia" includes many recommendations worthy of consideration and implementation including the necessary resourcing of Work Health and Safety (**WHS**) regulators. Recommendation 13 is that "Safe Work Australia work with Commonwealth, State and Territory governments to: introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process."³

³ On this point, we note that Federal ALP policy is to "work with state and territory governments to implement a harmonised industrial manslaughter offence".

In the context of our submission, the early approach taken by the ACT to include IM in its criminal law rather than in its Work Health and Safety Act could perhaps be regarded as an interim step ahead of achieving national agreement on including IM in the model WHS Act.⁴ Irrespective of the legislative vehicle, we believe that it is critical that the scope and the required proof to establish the offence of industrial or workplace criminal manslaughter be carefully considered and calibrated.

An important insight into IM was recently provided by the SA Coroner in his 1 November 2018 Findings in the Inquest into the workplace death of Mr Jorge Castillo-Riff⁵. Coroner Johns cites that in its submission, the CFMEU pressed him to consider that there be both a new offence of industrial manslaughter in the *Work Health and Safety Act 2012* (SA) and that Inquests into workplace deaths should be mandatory. His Honour states at paragraphs 36.1 and 36.2 of his Findings that there is a serious tension between these goals. In particular, the ability to hold a timely inquest would likely be undermined by a criminal industrial manslaughter prosecution. Coroner Johns states that already parties to an inquest tend to adopt defensive litigious strategies and that this would be exacerbated by a new IM offence. Such a new offence could prevent a Coronial Court from compelling answers to get to the bottom of what happened and why in order to prevent similar deaths in the future.⁶ With WM/IM offences in play, there will be a corresponding 'lawyering up' of all individuals and organisations related to fatal incidents and a lack of information sharing between parties as there will be competing interests. Getting the balance right is not simple. The WHS legislative Review by Marie Boland dated December 2018⁷ (**Model WHS Laws Review**) unsurprisingly did not address the specific points made by the SA Coroner. However, Ms Boland recommended with respect to a workplace death that: *“a new offence of industrial manslaughter be included in the model WHS laws ... where there is a gross deviation from a reasonable standard of care”*.

Commonwealth departmental advice was reportedly not supportive of IM and instead suggested broadening the existing Category 1 offence in Model WHS Laws jurisdictions. On this, Ms Boland recommended a further amendment to the WHS laws *“to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death”*.

Taken together, the Boland recommendations would very substantially increase offences and penalties under WHS law with respect to a workplace death or risk thereof. Even with the term 'gross' or 'grossly' required in the offences, the justification for both changes needs to be balanced against potential negative consequences from their introduction. Such consequences could be poorer future health and safety outcomes (e.g. as suggested by the SA Coroner) or reduced productivity (e.g. because capable well-meaning people may not agree to serve as directors and other 'officers'). Unbalanced change could militate against the SIA's vision of safe and healthy workers in productive workplaces. Review by Ministers in the COAG framework and substantial work is required before legislating the recommendations.

⁴ Indeed, it appears the ACT Government itself takes that position. In his evidence to the Senate Inquiry, the Executive Director of Workplace Safety and Industrial Relations for the ACT Government stated that the current ACT criminal provisions pre-date the concept of the PCBU. He suggested that framing a WM offence inside the model WHS Act would provide wider application of the offence to WHS duty holders. See Evidence to Senate Education and Employment Reference Committee, Parliament of Australia, Canberra, 7 August 2018, 47 (Michael Young, Executive Director, Workplace Safety and Industrial Relations, ACT Government).

⁵ *Inquest into death of Jorge Alberto Castillo-Riffo* (2018) South Australian Coronial Inquest, 88–89 <<http://www.courts.sa.gov.au/CoronersFindings/Lists/Coroners%20Findings/Attachments/776/CASTILLO-RIFFO%20Jorge%20Alberto.docx>>.

⁶ Those observations also relate to organisational learning for improved health and safety outcomes in terms of prevention of future incidents outside of the context of coronial inquests.

⁷ Safe Work Australia, *Review of the Model WHS Laws* (25 February 2019). <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws>>.

While we are strongly of the view that IM/WM should be harmonised and uniform across Australia, we also take the opportunity to make the following specific comments regarding the proposed drafting and approach to WM outlined within the Consultation Paper.

Manslaughter in relation to previous Victorian OHS reviews

It is important to reflect upon the consideration given to WM in previous Victorian OHS legislative reviews. In his 2004 review of the Victorian OHS Act, Chris Maxwell QC had rejected the introduction of an offence of manslaughter or equivalent lesser offence for serious injury. Mr Maxwell QC said:

"It follows from the nature of OHS Act offences that no question of manslaughter can arise under OHS Act. Manslaughter is a concept known only to the criminal law, as are the offences of negligently or recklessly causing serious injury ... there can be a punishable breach of an OHS duty whether or not that breach had any direct consequence in the form of injury or death. No question of causation arises. Instead, the fact that somebody is injured or dies is relevant only —

(a) as evidence of the existence of the risk to health and safety which the duty-holder (ex hypothesi) failed to take adequate measures to prevent; and

(b) in providing some indication (perhaps) of the 'severity of the hazard or risk' and, therefore, as a pointer to what the duty-holder ought reasonably to have done.

The Victorian Government announced early in 2003 that it had decided not to introduce an offence of industrial manslaughter. For the reasons I have given, that issue simply does not arise in the context of the present review."⁸

Rather, Mr Maxwell QC recommended that the OHS Act be amended to provide a possible custodial sentence in relation to breaches of the general duty which involve a high level of culpability.⁹ Section 32 of the OHS Act implements the custodial sentence for serious offences recommended by the Maxwell Report (below we discuss the need to consider whether amendment to section 32 of the OHS Act is necessary in light of WM). As can be seen in this brief overview, the intent behind the inclusion of an offence such as that in section 32 was as an alternative offence to a WM offence.

Victoria's Workplace Manslaughter (WM) Consultation Paper

Victoria's Consultation Paper on which SIA's feedback was sought states that the elements of the Victorian Government's election commitment are not subject to change. This does not appear controversial as regards not applying to officers who are 'volunteers' and in providing WorkSafe with additional powers and resources to support its role with respect to workplace deaths.

The SIA also hopes that a new criminal offence in Victoria's 2004 OHS Act would not of itself preclude harmonisation under the model WHS Act framework. Congruent with SIA's primary policy view advocating harmonisation of WHS laws and their enforcement, we support the use of the current definition of 'officer' in relation to IM/WM as the Consultation Paper proposes.

Categories of persons to whom the duty is owed

In light of the existing Queensland IM legislation, the proposed extension of Victorian IM/WM legislation to include third parties such as members of the public is not supported unless agreed by other jurisdictions via Safe Work Australia.

⁸ See Chris Maxwell, *Occupational Health and Safety Act Review* (2004) 355-356 (**Maxwell Report**).

⁹ Maxwell Report, 376.

Fault element

The Victorian Government election commitment is drafted on the basis of a negligence test for the WM offence.

An offence of 'negligently causing death' could be perceived as setting a lower bar than in Queensland¹⁰ or the ACT or as recommended in the Boland Review Report despite Victoria's intention to replicate existing criminal manslaughter provisions. Again, we urge the use of common language in WHS/OHS legislative provisions that all jurisdictions agree to adopt or in the interim consideration of amending criminal manslaughter provisions if they do not adequately cover IM/WM.

Notwithstanding our issues with the particular legal test adopted, the SIA is in favour of the codification of the common law test for the legal standard for the WM offence (that is, incorporating the test as being defined in the legislation itself) and welcomes this approach in the Consultation Paper. We note that the definition adopted appears to be in keeping with the Model WHS Laws Review recommendation for the standard of gross negligence to be applied to a category one offence in Model WHS Laws jurisdictions.¹¹

In the event that the negligence test remains the approach adopted for WM, we are of the view that the words or 'serious illness' should be incorporated in the definition of conduct that is considered negligent in addition to 'serious injury'.

Negligence vs recklessness: how the WM offence will sit with the balance of the legislative regime

There is a need to consider the provisions in light of the balance of the legislative framework in the *Occupational Health and Safety Act 2004 (Vic) (OHS Act)*.

Adopting the Queensland model of utilising a negligence test for the proposed WM offence in Victoria risks repeating the perverse position realised in Queensland whereby there are higher penalties for a lower standard of offence within the OHS Act. Under section 32 of the OHS Act, a person commits an offence if they recklessly engage in conduct that places or may place another person who is at the workplace in danger of serious injury. That offence comes with potential penalties of a fine of up to \$3,171,400 for corporations and \$285,426 and/or five years imprisonment for individuals.

Recklessness involves a more egregious course of conduct (given the need to establish foresight and indifference¹²) than negligence's conduct test of falling short of expected standards. And yet, the negligence test will come with a monetary penalty over 5 times the maximum penalty for reckless conduct endangering a person at a workplace.

Figure 1: Comparison of penalties for proposed WM offence and current section 32 reckless conduct offence

Section	Offence elements	Maximum penalty
Proposed WM offence	Negligent conduct causing death of a person to whom a duty is owed	Corporations: 100,000 penalty units (that is, \$16,119,000 (from 1 July 2018 to 30 June 2019 as indexed)) Individuals: 20 years imprisonment
Section 32 OHS Act	Recklessly engaging in conduct that places or could place a person at a	Corporations: 20,000 penalty units (that is, \$3,223,800 (from 1 July 2018 to 30 June 2019 as indexed))

¹⁰ Given the difference in the legislative drafting in omitting language that the offence applies if a person is injured and later dies.

¹¹ See Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report (2018) 119; Patel v The Queen (2012) 247 CLR 531*.

¹² Recklessness requires a prosecutor to prove "foresight on the part of the offender that the conduct engaged in would probably have the consequence that another person at the workplace was placed, or could be placed, in danger of serious injury" (see *Orbit Drilling Pty Ltd v R* [2012] VSCA 82, [24]) and that the offender displayed "indifference as to whether or not those consequences occur" (see *R v Nuri* [1990] RV 641, 643).

Section	Offence elements	Maximum penalty
	workplace in danger of a serious injury without lawful excuse	Individuals: 1800 penalty units (that is, \$290,142 (from 1 July 2018 to 30 June 2019 as indexed) and/or five years imprisonment

Consideration should be given to consequential amendment of penalties for breaches of section 32 of the OHS Act given that the reckless conduct provision would represent a higher threshold test than the newly introduced IM/WM offence. The SIA submits that legislative drafting includes specific provisions indicating that a duty holder cannot be charged with the offence of reckless endangerment under section 32 as well as the WM offence in relation to the same course of conduct for the avoidance of doubt regarding double jeopardy.

Causation

The Consultation Paper provides that the test at law for establishing causation is that the conduct must have "*contributed significantly to the death*" of the victim. The Consultation Paper refers to McHugh J's comments in *Royall v R* (1991) 172 CLR 378 where His Honour explained that the question of causation in criminal law is resolved by applying a common-sense test to "*determine whether the accused's act or omission was sufficiently significant to make him or her "causally responsible"*" for the offence.¹³

SIA notes that those comments should be read in light of Deane and Dawson JJ's explanation at 411. Their Honours explained that the question of whether the accused's conduct is a substantial or significant cause of death to establish causation is a question for the jury to determine. That question should be put to a jury in terms that require them to "*determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused*" by applying their common sense.¹⁴ Their Honours considered that in circumstances involving multiple possible causes of death it may be necessary to elaborate on this direction with a reference to the need for the causal connection to be "*sufficiently substantial to enable responsibility*" to be attributed.¹⁵

However, the reliance on the above common law principle of criminal causation in WM prosecutions is likely to create uncertainty for duty holders. The circumstances that may give rise to potential WM prosecutions may vary between a single and easily identifiable cause of death and multiple causes in circumstances where multiple failures (potentially involving multiple duty holders) are attributable to the death. In the context of workplace fatalities, there is usually myriad causal factors. Depending on the circumstance, the common law standard required to establish causation could vary between the act having been sufficient to cause the victim's death and having to be sufficiently substantial. Such uncertainty in the standard of causation required works against the intent of the WHS laws by retroactively punishing duty holders rather than helping them understand the required standard for proactively preventing the occurrence of workplace injuries and deaths.

To assist OHS duty holders with understanding the nature and scope of their duties, the standard of causation should be expressed in explicit terms that duty holders can comprehend. SIA is of the view that the standard of causation required for conviction of a WM offence should be that of reasonable foreseeability. While Deane and Dawson JJ in *Royall v R* concluded that questions of causation should not be determined in terms of foreseeability out of the potential to confuse juries, that conclusion was confined to the context of homicides that involved fright and self-preservation. A reasonable foreseeability standard for WM offences would accord with the tortious origins of OHS legislation and provide certainty to duty holders on the scope of conduct likely to amount to a WM offence.

¹³ *Royall v R* (1991) 172 CLR 378, 441.

¹⁴ *Royall v R* (1991) 172 CLR 378, 411.

¹⁵ *Royall v R* (1991) 172 CLR 378, 412.

Clarity regarding defences

The Consultation Paper discusses exceptions in some detail. We agree with the need for laws to be consistently applied and welcome the limited approach to exceptions adopted within the Consultation Paper. However, the Consultation Paper is relatively silent on the point of defences.

The SIA submits that duty holders need to have a clear understanding of the scope and extent of the offence and this requires explicit legislative drafting with respect to the defences that apply to the offence.

The offences in Queensland do not account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will of a defendant and do not afford other defences which would otherwise be available under the *Criminal Code Act 1899* (Qld) for other criminal offences involving homicide.¹⁶

The defences available for reckless conduct

We would also note that Victoria's current reckless conduct offence in section 32 of the OHS Act provides for a defence of 'lawful excuse'.

The offence in section 32 of the OHS Act is similar to section 22 of the *Crimes Act 1958* (Vic) which makes it an offence, without lawful excuse, to recklessly engage in conduct that places or could place a person in danger of death. That offence attracts a maximum penalty of 10 years' imprisonment. However, unlike s 22 of the *Crimes Act 1958* (Vic), section 32 merely requires risk of serious injury and not death.

Lawful excuse is an expression of wider import than lawful authority.¹⁷ However, lawful excuse must be determined on a case-by-case basis. As the Privy Council in *Wong Pooh Yin v Public Prosecutor* [1955] AC 93 said at 100:

"Their Lordships doubt if it is possible to define the expression 'lawful excuse' in a comprehensive and satisfactory manner and they do not propose to make the attempt. They agree with the Court of Appeal that it would be undesirable to do so and that each case requires to be examined on its individual facts."

"Without lawful excuse" does not mean "for an unlawful purpose".¹⁸ Conversely, a defendant could not establish lawful excuse by merely demonstrating that he or she was not engaged in unlawful conduct or conduct for an unlawful purpose.¹⁹

A person does not have a lawful excuse when the conduct proceeds from a mistake of law.²⁰ However, a defendant may be viewed as having acted with lawful excuse where the conduct proceeded from a bona fide mistake of fact and law based on reasonable grounds.²¹

Clearly, circumstances where defendants would be able to show that they had a lawful excuse for their reckless or negligent conduct are limited. Such a defence is interpreted having regard to the objects of the OHS Act²² and the safety principles.²³

The SIA submits that the language of 'without reasonable excuse' ought to be added to the proposed offence provision for WM.

Personal liability

The SIA agrees with the notion that 'officers' are the appropriate category of duty holders for individual liability

¹⁶ As was outlined in the Queensland Law Society's Submission regarding the Work Health and Safety and Other Legislation Amendment Bill 2017 21 September, 2.

¹⁷ *Wong Pooh Yin v Public Prosecutor* [1955] AC 93.

¹⁸ *Hancock v Birska* [1972] WAR 177.

¹⁹ *Director of Public Prosecution v Willie* (1999) 47 NSWLR 255.

²⁰ See *R v Reid* [1973] 3 All ER 1020.

²¹ *R v Bacon* [1977] 2 NSWLR 507.

²² See OHS Act, s 2.

²³ See OHS Act, s 4.

for IM offences with the definition of officers included by reference to the section 9 definition of 'officer' under the *Corporations Act 2001* (Cth). However, the SIA disagrees with the statement made in the Consultation Paper that a 'senior officer' duty holder is "*similar to the definition of senior officer that applies to Queensland's workplace manslaughter offence*".²⁴

We would strongly caution against a change to the proposed approach of using 'officer' under the Consultation Paper. In Queensland, a 'senior officer' is defined as 'a person concerned in the management of a corporation'. This is very different to the 'person who makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation' that is currently contained within the Corporations Act section 9 definition of an officer. We know this because there is a whole body of case law in the context of corporations law that has long held the latter to be a narrower set of persons than the former category which reflects a broader group of individuals, capturing people lower down in the organisational hierarchy.²⁵ In the event that other stakeholders advocate for consistency with the language of a 'senior officer' as incorporated in Queensland's approach the SIA would ask that the Department favour consistency with the Model WHS Laws officer definition. It would be entirely inconsistent with the Department's intent for employees to be excluded from the application of the WM provisions to adopt Queensland's 'senior officer' definition.

It should also be noted that the inclusion of the 'senior officer' duty holder for the purposes of Queensland's IM offences was a substantial departure from consistency with the Model WHS Laws (which had otherwise applied the Corporations Act definition of officer).

Proposed penalties

We are firmly of the belief that there should be consistent ramifications for breach of duty across the country. If Victoria implements the proposed approach, we now have a situation where maximum penalties around the country will look like this:

Figure 2: Comparison of penalties - proposed WM offences and reckless/gross negligence offences

JURISDICTION	WHICH DUTY	MAXIMUM PENALTY
Victoria	Workplace manslaughter	\$16,119,000 (as indexed) for corporations and 20 years' imprisonment for individuals
Queensland	Industrial manslaughter	\$13,055,000 (as indexed) for corporations and 20 years' imprisonment for individuals
Western Australia	Breach of employer duty: gross negligence	\$2,700,000 (for first offence) for corporations and \$550,000 and 5 years' imprisonment (first offence) for individuals
Other Model WHS Laws jurisdictions	Category 1 offence: reckless conduct	\$3,000,000 for corporations, \$600,000 and/or 5 year's imprisonment for individual PCBUs and officers and/or \$300,000 and/or 5 years' imprisonment for individuals

Penalties based on consequence and that create further inconsistencies are not good for safety as they divert attention away from achieving the objects of the OHS Act (that is, adopting a proactive approach to hazard and risk management).

In our view, there is a need for a complete penalties review, through the Safe Work Australia/COAG processes that ensures consistency across the country. We would be in favour of increasing penalties in general (as long as these also came with penalties and sentencing guidelines for courts to be adopted on a harmonised basis across the country).

²⁴ See Justice and Community Safety Victoria, 'Workplace Manslaughter: Consultation Paper' (2019) 9.

²⁵ See for example, *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331.

This would require a review of all offences to determine sensible penalty levels for each type of offence that reflect the architecture of the OHS legislative framework as a whole. Indeed, the Model WHS Laws Review made a recommendation to that effect (recommendation 22).

We would favour consistently high penalties based on exposure to risk rather than only in fatality consequences as this is more in line with the philosophy behind health and safety legislation.

Investigation powers and use of evidence

There are practical issues associated with taking a different approach to the investigation of different types of offences under the OHS Act. However, the SIA submits that coercive powers should not be available in the context of such significant 20 year potential gaol sentences. This would be consistent with established process for criminal matters.

WM offences have more in common with offences under general criminal laws than the balance of the OHS legislative regime.

The context of the policy with respect to the abrogation of the right against self-incrimination in the context of health and safety offences is that the public interest in obtaining root causes of health and safety incidents outweighs the personal interest of individuals to have the protection against self-incrimination. However, the weighing up of those conflicting interests has previously been determined in the context of far less serious consequences for the individuals concerned as accused in an OHS legislative regime that was predominately risk based.

A fundamental proposition of the rule of law is that laws should apply equally to all so that the principle of equality before the law is not infringed.

Unless there is some curtailing of coercive powers under the OHS Act, then individuals accused of WM offences will have less rights than those accused of general manslaughter offences under the Crimes Act. And yet, the potential gaol time for individuals is the same for both offences (20 years). In the SIA's submission, WM offences should be subject to the same due process as that afforded to persons charged with manslaughter under general criminal laws. This will require limitations to be imposed on the investigative powers of WorkSafe's inspectors including powers to enter premises (section 98), powers while on premises (section 99) and compulsion powers (sections 100-101, 121). These limitations will be necessary to facilitate an accused's privilege against self-incrimination during WM investigations where public policy dictates that the prosecution must prove the commission of the offence.

Of course, this will present practical challenges as WorkSafe investigations will be looking at the potential for a number of offences to be established in a single factual circumstance. Given the complexities, it may be that the most efficient way of dealing with the application of WorkSafe inspector rights and powers would be to make legislative amendments so that the current approach to coercive powers only applies to the investigation of non-fatal incidents and the right against self-incrimination is restored in the context of the investigation and prosecution of fatal incidents.

Further guidance required

The SIA submits that any reform involving WM comes with a corresponding need for compliance and enforcement guidelines to publish additional guidance for duty holders as to:

- WorkSafe's position on direct liability of a body corporate (or other entity) in terms of the types of organisational conduct that would be considered negligent in the context of the proposed WM offence;
- how information will be shared between Victoria Police and WorkSafe inspectors in the context of workplace fatalities;
- what are the types of circumstances in which each of the offences (for example, reckless endangerment vs negligence) will be applied; and
- the application of the prosecutorial discretion in WM/IM matters.

We would also advocate for further consistency in terms of guidance being provided for courts in imposing penalties and sentences across all offence categories as there is currently a lack of consistency in sentences imposed (both within Victoria and across jurisdictions nationally).

Final Observations

In relation to the particular questions in the Consultation Paper on which feedback is sought, we refer you to the preceding discussion that addresses those on which we have a policy position and the more general material below that contextualises these.

The SIA is very much open to the possibility of attending a Legal Advisory Group meeting proposed to be convened in June should this assist. Please contact SIA Chair of the College of Fellows, Kym Bills on 0419 241 496 or SIA CEO David Clarke on 03 8336 1995 should you wish to follow this up.

Submitted 24 May 2019

About the SIA

The Safety Institute of Australia is the national association for people who work in generalist health and safety (practitioner and professional) roles, and for leaders in health and safety more generally. For more than 70 years we have worked towards our vision of safe and healthy workers in productive workplaces. The SIA Limited is a not-for-profit company under Corporations Law. Our patron is the Governor-General.

We share a common commitment with tripartite stakeholders and our strategic partners to provide the best possible health and safety policy and practice advice for the benefit of the wider community. However, our own voice as a profession and association of health and safety experts is often distinct from union, employer, or even government views. Our focus is on the science and practice of health and safety based on best available evidence to create safer and healthier workplaces. As a result, it is not uncommon for the Institute to present a view on an issue upon which unions, employer groups, or even regulators, may not agree.

Legislative and WHS policy framework relevant to IM/WM

As a Commonwealth, we are faced with the challenge of differential legislation, and more significantly, differential application of that legislation amongst different state and territory jurisdictions. This presents a range of particular challenges especially for businesses and workers that operate on a national scale across jurisdictional boundaries. Scarce resources and focus can be diverted to managing varying compliance regimes rather than controlling hazards and managing risk.

As we move toward stronger regulation and enforcement in many areas, and the outcomes of inquiries such as into Dreamworld and franchising, and the Royal Commissions into Finance and into Aged Care, business accountability is being (as it should be) brought into sharper focus. If deaths in the workplace are not treated with appropriate seriousness because of deficiencies in the criminal law and how it is applied, the public reasonably expects this to be addressed and remedied.

As this occurs, both business and regulatory authorities are seeking greater clarity and confidence in the advice that business gets from health and safety consultants, as well as health and safety practitioners and professionals within their businesses. Certification of the profession is a process which delivers on key aspects of this need. After 35 years of the USA, Canada and the UK certifying their health and safety professions, the SIA commenced an international standard certification program²⁶ in 2016, based around the OHS professional Global Capability Framework²⁷, adopted in more than 30 countries. This program provides a strong career and professional development framework for health and safety people which ensures their focus is on lifelong learning.

The *Australian OHS Body of Knowledge*²⁸ (BoK) of which the SIA is steward, has 45 chapters summarising the practice, science and psychology of workplace health and safety, based as it is in the world's best evidence and research into health and safety practice. The SIA maintains and provides the BoK free as a public good, despite maintenance costs of about \$200,000 per annum. Initially funded by state regulators (predominantly Victoria for which we are grateful) most BoK ongoing costs are met by the SIA through its member's contributions. The BoK²⁹ underpins the work of the Australian OHS education accreditation board (AOHSEAB)³⁰, which now accredits all but one of Australia's higher education courses in OHS/WHS and is increasingly utilised internationally.

²⁶ [Health and Safety profession certification program overview](#)

²⁷ [INSHPO OHS Professional Global Capability Framework](#)

²⁸ [The OHS Body of Knowledge](#)

²⁹ More detail is provided in a 2019 article in the respected journal *Safety Science*:
<https://www.sciencedirect.com/science/article/pii/S0925753519300311?dgcid=author>

³⁰ [Australian OHS Education Accreditation Board](#)

The Australian Work Health and Safety Strategy 2012-2022 as amended in 2018³¹ has the strong support of the SIA and other stakeholders across the nation. The Strategy is managed by Safe Work Australia (SWA) through its CEO and Board utilising a tripartite committee framework comprising jurisdictions (governments/regulators), employers and unions. SWA operates with regard to a July 2008 Intergovernmental Agreement (IGA) for regulatory and operational reform in OHS signed by all jurisdictions³² under which all (including Victoria) undertook to harmonise OHS legislation. SWA's website provides background on the model Work Health and Safety (WHS) Act and Regulations and model Codes and guidance material³³. As the December 2018 Boland WHS review³⁴ has demonstrated, the efforts to harmonise legislation have been largely successful. However, the SIA believes that it is still important for Western Australia and Victoria to enact model Work Health and Safety legislation. Western Australia is moving to do this but Victoria has not made a commitment.

³¹ <https://www.safeworkaustralia.gov.au/about-us/australian-work-health-and-safety-strategy-2012-2022> In addition to WHS law, a recent International Standard adopted in Australia *ISO 45001:2018 Occupational health and safety management systems – Requirements with guidance for use* provides a helpful framework for OHS action to reduce the risk of workplace injury, disease or death.

³² See <http://www.coag.gov.au/content/intergovernmental-agreement-regulatory-and-operational-reform-occupational-health-and-safety>

³³ See <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>

³⁴ <https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report>