



21 September 2017

Committee Secretary
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

By email: FAC@parliament.qld.gov.au

Dear Committee Secretary,

Re: Work Health and Safety and Other Legislation Amendment Bill 2017 (Qld)

Thank you, on behalf of the Bar Association of Queensland ('the **Association**'), for the invitation to make a submission in relation to the *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) ('the **Queensland Bill**').

For the purposes of this submission, the Association's concerns have been focused on the Queensland Bill's proposed introduction of two 'industrial manslaughter' offences in the *Work Health and Safety Act 2011* ('the **Act**'); section 34C and 34D ('the **proposed offences**').

The Association supports appropriate measures to increase the safety of Queensland workplaces in an effort to prevent tragic work-related fatalities.

However, the Association is opposed to the introduction of the proposed offences.

Background

The Queensland Bill has been introduced to implement the recommendations of the Best Practice Review of the Workplace Health and Safety Queensland Final Report ('the **Best Practice Review**'), published on 3 July 2017.¹

The terms of reference for the Best Practice Review specifically required the review to consider whether a new offence of gross negligence causing death (also known as industrial manslaughter) should be introduced.

Recommendation 46 of the Best Practice Review is for the Queensland Government to create two offences of negligence causing death, 'industrial manslaughter',² in order to fill a 'gap in the current offence framework ... deal with the worst examples of failures causing fatalities ... and to provide a deterrent effect'.³

The Best Practice Review stated that employer representatives and legal professional groups favoured retaining the status quo and that employer representatives did not support the introduction of a new offence on the basis that:

- The current penalty and offences framework is sufficient;
- There is no identified gap between the current Category 1 offence and manslaughter under the Criminal Code; and,

¹ Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) 1.

² Mr Tim Lyons, *Best Practice Review of the Workplace Health and Safety Queensland Final Report* (3 July 2017) 114.

³ *Ibid* 113.

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- The current category 1 offence is largely untested.

The Best Practice Review did not address these matters in any detail when forming their recommendation.

In response to this recommendation, the proposed offences seek to make it a criminal offence, punishable by a maximum penalty of 20 years imprisonment for an individual or 100,000 penalty units for a body corporate (equating to \$12,615,000),⁴ where:

1. the conduct⁵ of a person conducting business or an undertaking ('PCBU'),⁶ or senior officer,⁷ causes⁸ the death of a worker in the course of carrying out work for the business or undertaking; and
2. the PCBU,⁹ or senior officer,¹⁰ is '*negligent about causing the death of the worker*'.

The proposed offences appear to be based on Australian Capital Territory legislation.

Sections 49C and 49D of the *Crimes Act 1900* (ACT) ('the **ACT Crimes Act**'), was introduced by the *Crimes (Industrial Manslaughter) Amendment Bill 2002* (Act) and commenced on 1 March 2004.¹¹

Except for the Australian Capital Territory, no other Australian jurisdiction has an equivalent to the proposed offences.

The existing legislation

The Best Practice Review was undertaken in response to the tragic fatalities which occurred at Eagle Farm Race Course and Dreamworld on 6 October 2016 and 25 October 2016 respectively¹², although the latter incident did not involve the death of any "worker".

The reviewer states that these incidents '*raised concerns about the effectiveness of current offences and penalties under the Work Health and Safety Act 2011*'.¹³

The Act is based on the Model Work Health and Safety Act ('the **Model Act**'), which was also adopted by the Australian Capital Territory, New South Wales, Northern Territory, South Australia and Tasmania in 2011.

In the National Review into the Model Laws, it is noted (emphasis added):

'Providing for a breach of a duty of care to be a criminal offence is an essential element of modern OHS legislation, and is consistent with the graduated approach to securing compliance with the laws. Broadly put, it reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a sanction for placing another person's health and safety at risk'.¹⁴

⁴ One penalty unit is \$126.15 as of 1 July 2017 pursuant to *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2017* (Qld) s 4.

⁵ Defined as 'an act or omission to perform an act' in *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) s 34A(1).

⁶ *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) s 34C(1)(a), s 34C(1)(b). PCBU is defined *Work Health and Safety Act 2011* (Qld) s 5.

⁷ *Work Health and Safety and Other Legislation Amendment Bill 2017* (Qld) s 34D(1)(a), s 34D(1)(b). Senior officer is defined in s 34A(1).

⁸ *Ibid* s 34A(2) provides '*for this part, a person's conduct causes death if it substantially contributes to the death*'.

⁹ *Ibid* s 34C(1)(c).

¹⁰ *Ibid* s 34D(1)(c).

¹¹ *Crimes (Industrial Manslaughter) Amendment Act 2003* (Act) s 2.

¹² Mr Tim Lyons, *Best Practice Review of the Workplace Health and Safety Queensland Final Report* (3 July 2017) 17.

¹³ *Ibid*.

¹⁴ Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (October 2008) 122.

It was recommended that (emphasis added):

*'... duties of care are imposed on those who are involved in, material affect, or are materially affected by, the performance of work.'*¹⁵

This recommendation was implemented by imposing duties as set out in Divisions 2, 3 and 4 of Part 2 of the Act.¹⁶

Importantly, an offence under the Act is founded upon a breach of duty.

Pursuant to section 31 of the Act, a person commits an offence ('a **category 1 offence**') if the person:

1. has a health and safety duty (Divisions 2, 3 and 4 of Part 2 stipulate the various duties);¹⁷ and
2. without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
3. is reckless as to the risk to an individual of death or serious injury or illness.¹⁸

Section 31(3) makes the category 1 offence a crime under the *Criminal Code Act 1899* (Qld) ('the **Criminal Code**').

The Explanatory Notes to the *Work Health and Safety Bill 2011* (Qld) provide (emphasis added):

*'Category 1 offences involve reckless conduct ... that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse.'*¹⁹

It is further noted (emphasis added):

*'... a Category 1 offence, as defined in clause 31, is the most serious work health and safety offence.'*²⁰

Thus, it is clear that the category 1 offence was intended to be, and remains, the most serious work health and safety offence in Queensland.

Further, recklessness must only be proven in relation to the risk of death, serious injury or serious illness. There is no requirement that the risk of death or serious injury actually materialise, such as is required in the proposed offences.

If the offence is committed by an individual person, the maximum penalty is 6,000 penalty units (equating to \$756,900),²¹ or 5 years imprisonment.

If the offence is committed by a body corporate, the maximum penalty is 30,000 penalty units (equating to \$3,784,500).²²

¹⁵ Ibid 23.

¹⁶ See *Work Health and Safety Act 2011* (Qld) Divisions 2, 3 and 4 of Part 2.

¹⁷ A 'health and safety duty' is defined in *Work Health and Safety Act 2001* (Qld) s 30 as 'a duty imposed under division 2, 3 or 4'.

¹⁸ *Work Health and Safety Act 2011* (Qld) s 31.

¹⁹ Explanatory Notes, *Work Health and Safety Bill 2011* (Qld) 35.

²⁰ Ibid 97.

²¹ One penalty unit is \$126.15 as of 1 July 2017 pursuant to *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2017* (Qld) s 4.

²² Ibid.

Despite there being a total of 239 notified work-related fatalities (including both bystanders and workers) from 2012 to 2016,²³ there has only been [REDACTED] for a category 1 offence in Queensland. [REDACTED]

It is clear that prosecutors have the ability to hold corporations accountable for a serious breach of the Act with a category 1 offence [REDACTED].

The lack of category 1 offence prosecutions is instructive.

It is not the case that category 1 offences are instituted but have failed.

Nor is it the case that category 1 offences have been successfully prosecuted with a view that the sentences imposed were inadequate.

Accordingly, it is difficult to conclude that the current offences and penalties under the Act are ineffective when category 1 offences have not been prosecuted until recently [REDACTED]

The Criminal Code

Criminal negligence is founded in an offender breaching a duty.

The Criminal Code sets out a number of duties.

A person can be held to have caused the death of another person by their omission to perform a duty relating to the preservation of human life contained in sections 285, 286, 288 and 289 of the Criminal Code.

Chapter 27 of the Criminal Code prescribes the following duties relating to the preservation of human life:

1. every person who has charge of another who is unable to provide himself or herself with the necessities of life due to age, sickness, unsoundness of mind, detention or any other cause, has a duty to provide the necessaries of life;²⁷
2. every person who has care of a child under 16 years of age has a duty to provide the necessaries of life, take reasonable precautions to avoid danger to the child's life and take reasonable action to remove the child from danger;²⁸
3. every person who undertakes to administer surgical or medical treatment to another person has a duty to have reasonable skill and to use reasonable care in doing so;²⁹ and,

²³ Mr Tim Lyons, *Best Practice Review of the Workplace Health and Safety Queensland Final Report* (3 July 2017) 96-97.

²⁷ *Criminal Code Act 1899* (Qld) sch 1 s 285.

²⁸ *Ibid* s 286.

²⁹ *Ibid* s 288

4. every person in charge of dangerous things has a duty to use reasonable care and take reasonable precautions to avoid such danger.³⁰

The Supreme and District Court Benchbook sets out the following standard direction in relation to criminal negligence:

To establish that the defendant is guilty of [manslaughter or other offence] through criminal negligence, the prosecution must therefore prove, beyond reasonable doubt, that the defendant

1. *owed the prescribed duty of care;*
2. *omitted to perform that duty; and*
3. *thereby caused the [death or other event].*

These three matters require elaboration.

First, was the duty owed by the defendant?

You may be satisfied beyond reasonable doubt that the defendant had such a thing, namely (insert description) [in his charge or] under his control when (viz insert material time), and that it was of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of a person may be endangered. If so, turn to consider the second issue: whether the defendant is shown beyond reasonable doubt to have omitted to perform his duty to use reasonable care to avoid danger to life, safety or health. And in considering whether he omitted to perform such a duty when, if you find it to be so, he (describe material act or omission), have regard to such things as the nature and extent of the risk to life, safety or health of which the defendant was aware or should reasonably have foreseen.

... ..
... the prosecution must prove its case beyond reasonable doubt.

Secondly, the lack of care which suffices to establish liability in a civil case is not enough here. A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict, you must be satisfied beyond reasonable doubt that his conduct in (describe act or omission), if you find that act or omission proved, so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety, as to amount to conduct deserving of punishment.

Since we are in a criminal court, we are concerned with whether there was a departure from those standards which is serious enough for the State to intervene and punish the person on the basis that he behaved with so little regard for the safety of others that he deserves to be punished as a criminal, not merely made to pay compensation.

The notion of criminal negligence involves a large or serious departure from reasonable standards of conduct, by which is meant the standard of conduct that a reasonable member of the community would use in the same circumstances. It must go substantially beyond a case where payment of compensation is adequate punishment. It must be in a category of behavior where the only adequate punishment is for his lack of care to be branded as criminal and for him to be punished by the State for it.

Before you can convict on the basis of criminal negligence, you must be satisfied that there has been a very serious departure from reasonable standards of care. Because it involves an assessment of what standard of care a reasonable member of the community

³⁰ Ibid s 289

would use in similar circumstances and the seriousness of the degree of departure from it by the accused, it is for you, as representatives of the community in this trial, to make up your minds whether you are satisfied beyond reasonable doubt that his conduct was criminally negligent or whether it falls short of the degree of deviation from proper standards necessary to prove criminal negligence.

If you are satisfied beyond reasonable doubt that the defendant was criminally negligent, next consider whether you are satisfied beyond reasonable doubt, that criminal negligence caused the (death or other event).³¹

... ..

A breach of duty as set out in the Criminal Code can result in a finding of manslaughter, which carries a maximum penalty of life imprisonment.³²

The Australian Capital Territory experience

The Best Practice Review placed significant weight on the industrial manslaughter provisions in the Australian Capital Territory.

Sections 49C and sections 49D of the ACT Crimes Act create the offence provisions:

Section 49C – Industrial manslaughter—employer offence

An employer commits an offence if—

- (a) *a worker of the employer—*
 - (i) *dies in the course of employment by, or providing services to, or in relation to, the employer; or*
 - (ii) *is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and*
- (b) *the employer's conduct causes the death of the worker; and*
- (c) *the employer is—*
 - (i) *reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or*
 - (ii) *negligent about causing the death of the worker, or any other worker of the employer, by the conduct.*

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

Section 49D – Industrial manslaughter—senior officer offence

A senior officer of an employer commits an offence if—

- (a) *a worker of the employer—*
 - (i) *dies in the course of employment by, or providing services to, or in relation to, the employer; or*
 - (ii) *is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and*
- (b) *the senior officer's conduct causes the death of the worker; and*

³¹ *Queensland Courts, Benchbook – Criminal negligence s 289 (March 2017)*
http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86097/sd-bb-9j-criminal-negligence-s-280.pdf.

³² *Criminal Code Act 1899 (Qld) sch 1 s 310.*

(c) *the senior officer is—*

- (i) *reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or*
- (ii) *negligent about causing the death of the worker, or any other worker of the employer, by the conduct.*

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

Note The general offence of manslaughter in s 15 applies to everyone, including workers.

The proposed Queensland industrial manslaughter provisions do not refer to “reckless”. Perhaps, that is because the Act already legislates against reckless conduct by a category 1 offence.

Notably sections 49C and 49D of the ACT Crimes Act carry a maximum penalty of 2,000 penalty units for a body corporate³⁴ (equating to \$1,500,000).³⁵ Such a maximum is significantly less than the maximum penalty proposed by the Queensland Bill. The Queensland Bill proposes a maximum fine more than ten times the present maximum penalty in the ACT Crimes Act.

Section 49B of the ACT Crimes Act sets out the omissions of employer and senior officers:

Section 49B – Omissions of employers and senior officers

(1) An employer’s omission to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—

- (a) an act of the employer; or*
- (b) anything in the employer’s possession or control; or*
- (c) any undertaking of the employer.*

(2) An omission of a senior officer of an employer to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—

- (a) an act of the senior officer; or*
- (b) anything in the senior officer’s possession or control; or*
- (c) any undertaking of the senior officer.*

(3) For this section, if, apart from an agreement between a person and someone else, something would have been in the person’s control, the agreement must be disregarded and the thing must be taken to be in the person’s control.

Importantly, consistent with the prosecution of criminal negligence, such omissions are founded by an omission to perform “the duty”.

The Queensland Bill has not replicated section 49B of the ACT Crimes Act.

Unlike the ACT Crimes Act, the Queensland Bill sets out an industrial manslaughter offence without any reference to a statutory duty.

In 2011, the Australian Capital Territory adopted the Model Laws through the introduction of the *Work Health and Safety Act 2011* (Act) (‘the ACT WH&S Act’). The ACT WH&S Act is in similar terms to the Queensland Act.

In the Explanatory Statement to the *Work Health and Safety Bill 2011* (ACT), it is stated (emphasis added):

³⁴ *Crimes Act 1900* (Qld) s 49C, 49D.

³⁵ One penalty unit for a corporation is \$750.00 pursuant to section 133(2) of the *Legislation Act 2001* (Act).

'The maximum penalties set in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence'.³⁶

In relation to a category 1 offence the Explanatory Memorandum states:

'a Category 1 offence, as defined in clause 31, is the most serious work health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable cause'.³⁷

The penalty for the category 1 offence in the ACT WH&S Act is \$3,000,000 for a body corporate.³⁸

This is double the penalty which exists in the industrial manslaughter offences under the ACT Crimes Act.

Clearly the Australian Capital Territory legislature intended the WH&S Act category 1 offence apply to the most egregious examples of offence.

The Australian Capital Territory adopted the category 1 offence in 2011, irrespective of the industrial manslaughter offences already existing in the ACT Crimes Act.

Like Queensland, the category 1 offence in the Australian Capital Territory was intended to be, and remains, the most serious work health and safety offence.

The Queensland Bill is thus seeking to create offences similar to those which have essentially been overshadowed by the category 1 offence in the Australian Capital Territory and are already in place in Queensland.

It is noted that the proposed offences, claim to fill a '*gap in the current offence framework*',³⁹ and are based on provisions in the ACT Crimes Act which were implemented before the creation of a category 1 offence.

Further, there have been no completed prosecutions pursuant to sections 49C and 49D of the ACT Crimes Act.

The 'gaps' in the existing offences

Respectfully, it is unclear what the advantage would be of seeking a prosecution of an offender under the proposed offences, as opposed to under the existing offences (but for maximum penalties, which the Association acknowledges are sought to be increased by the proposed offences).

The review recommends an offence of industrial manslaughter but notes that manslaughter is usually a result of a careless, reckless⁴⁰ or negligent act.

A category 1 offence already establishes an offence for body corporates based on reckless conduct.

In *R v BBD* [2007] 1 Qd 478 at [50] Philip McMurdo J stated that juries should not be directed to find recklessness pursuant to the Criminal Code:

³⁶ Explanatory Statement, *Work Health and Safety Bill 2001* (Act) 102.

³⁷ *Ibid.*

³⁸ *Work Health and Safety Act 2011* (Act) s 31(1)(c).

³⁹ Mr Tim Lyons, *Best Practice Review of the Workplace Health and Safety Queensland Final Report* (3 July 2017) 113.

⁴⁰ The term "reckless" ought not to be used when giving a direction in respect of criminal negligence – see *R v BBD* [2007] 1 Qd 478.

'In Queensland, where recklessness is not an express element of an offence it is unnecessary and undesirable to direct the jury that they must find recklessness. What is essential is that a jury understands that the prosecution must prove that the defendant's default was so serious that it should be regarded as a crime and deserving of punishment'.

However, a category 1 offence has 'reckless' as an express element and a jury should be so directed.

Conclusion

The Association has concerns with the proposed industrial manslaughter offences.

Criminal negligence is founded upon a breach of a duty.

Pursuant to the Criminal Code, to establish that the defendant is guilty of manslaughter through criminal negligence, the prosecution must therefore prove, beyond reasonable doubt, that the defendant owed the prescribed duty of care.

The Act also make it very clear that the existing offences are based upon persons having a health and safety duty imposed under the Act.

The industrial manslaughter offence in the Australian Capital Territory has reference to a duty.

However, this new offence makes no reference to any prescribed health and safety duty.

Further, it is noted that the proposed industrial manslaughter offences, claim to fill a 'gap in the current offence framework',⁴¹ but are based on provisions in the ACT Crimes Act which were implemented before the creation of a category 1 offence.

The Review states that a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect.

It is clear that corporations can presently be held responsible for failures causing fatalities at the workplace in Queensland.

The worst examples of failures causing fatalities could be prosecuted for a Reckless conduct – category 1 offence pursuant to section 31 of the Act.

Accordingly, it is difficult to conclude that the existing offences and penalties are insufficient where actions or omissions allegedly involving negligence result in fatalities. The existing offences have not been utilised by prosecutors to any degree to provide any such assessment. One prosecution does not provide the requisite data on this point.

Further the deterrent effect of the current provisions cannot be held to be insufficient based on one prosecution [REDACTED]

⁴¹ Mr Tim Lyons, *Best Practice Review of the Workplace Health and Safety Queensland Final Report* (3 July 2017) 113.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Chris Hughes', with a long horizontal flourish extending to the right.

Christopher Hughes QC
President