

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

RE: Industrial Manslaughter

As NSW's peak business organisation, Business NSW has almost 50,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium, and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state, and federal level.

We welcome the opportunity to provide feedback on how to best introduce a new industrial manslaughter offence. New South Wales has been described as the last mainland state without an industrial manslaughter offence. This isn't strictly true. There is no industrial manslaughter offence contained in NSW's Work Health and Safety (WHS) laws, but the common law of NSW already contains an offence of involuntary manslaughter by criminal negligence.

The NSW common law rules relating to manslaughter are far-reaching in that they extend to duties owed under statute as well as those owed under common law. They also apply to deaths in a workplace.

However, in 2015, the NSW Court of Criminal Appeal held that, as a matter of statutory interpretation and in contrast to other statutory duties, WHS duties are not covered by NSW's criminal legal system.

This is a gap that the NSW government has decided to fill.

However, unlike most other Australian jurisdictions, NSW's criminal legal system is based on common law.

This means that any NSW industrial manslaughter offence must be NSW-specific and not simply created by cherry-picking aspects of the offences created by the other jurisdictions.

To do otherwise is likely to have unintended consequences for NSW's criminal legal system.

Again, Business NSW appreciates the opportunity to provide feedback to this inquiry and would welcome the opportunity to discuss any of these findings in more detail when appropriate.

Yours Sincerely,

David Harding



Executive Director
Business NSW

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Given the contents of the consultation paper dated February 2024, the title of the proposed NSW WHS offence should be '*Gross negligence or reckless conduct causing death*' instead of '*industrial manslaughter*'.

Recommendation 2 (Question 1)

Business NSW strongly supports option 1, namely the use of the existing definitions within the NSW WHS Act (as opposed to the introduction of new definition/s of who may commit an industrial manslaughter offence).

Recommendation 3 (Question 2):

As the principles contained in the NSW WHS Act state that:

- duties are not transferable,
- a person can have more than one duty by virtue of being in more than one class of duty, and
- more than one person can concurrently have the same duty,

it follows that the new offence should be:

- owed by all who owe a health and safety duty, and
- protect all who are protected by the imposition of health and safety duties as contained in Part 2 of the NSW WHS Act.

Recommendation 4 (Questions 3 & 4):

The elements of the proposed offence should mirror those of section 31 of the NSW WHS Act with the inclusion of a 'causing death' element, importing the causation principles currently being used in the NSW criminal legal system for the common law offences of murder and manslaughter.

Recommendation 5 (Question 4)

That care be taken to adhere to the causation principles currently being used in the NSW criminal legal system for the common law offences of murder and manslaughter where criminal responsibility for workplace deaths is being attributed to individuals under the NSW WHS Act.

Recommendation 6 (Question 4)

That care be taken to ensure that, when attributing criminal liability to corporate employers, that smaller corporate employers are not treated unfairly and disproportionately when compared with large corporate employers.

Recommendation 7 (Questions 6 & 7)

Given that the holding of a coronial inquiry is already accommodated for by the period of limitations contained in the NSW WHS Act, that the NSW Government consider adopting a whole of government approach to overcoming procedural barriers where workplace deaths occur.

Consideration could be given to mandating:

- the involvement of the NSW Police when investigating a workplace death (including a requirement that NSW Police submit a report for each death investigated),
- the holding of a coronial inquiry into all workplace deaths,
- the deferral of a WHS prosecution until after the coroner has made their findings into the workplace death,
- providing a brief to the DPP following the outcome of a coronial inquiry, and
- notifying both the accused and the family of the deceased worker at prescribed stages during the entire process.

Recommendation 8 (Questions 6 & 7)

That consultation on the suitability of section 232 of the NSW WHS Act in its application to the proposed offence be deferred until it is known whether or not the offence will apply to deaths that occur well after the date of the alleged conduct which resulted in the death.

Recommendation 9 (Question 6)

That common law principles used in NSW's criminal legal system be adhered to in deciding whether or not to include alternative verdicts.

Recommendation 10 (Question 5):

Given that penalties under the NSW WHS Act have only recently been changed, any discussion of further amending these penalties be withdrawn from the consultation.

SUBMISSION

1. Introducing a WHS offence that won't interfere with the common law

1.1 Given that:

- unlike most other Australian jurisdictions, NSW's criminal legal system is based on well-understood and long-established common law principles (as opposed to being codified into statute),
- the offence of involuntary manslaughter by criminal negligence already exists at common law in the NSW criminal legal system,
- that common law offence can be based on:
 - common law duties (such as the general duty of care, the non-delegable duty owed by an employer to an employee, the duty of care that a person in the workplace who exercises direction and control over a contractor), and
 - some statutory duties, but
 - none of the duties contained in the NSW WHS Act¹, and
- the consultation paper proposes to include within the industrial manslaughter offence concepts that are only associated with the NSW common law crime of murder,

to avoid confusion, a name for the proposed offence needs to signal that it is clearly confined to the scope of the NSW WHS Act and not overlap with or have unintended consequences for NSW's common law criminal legal system.

1.2 The introduction of a WHS offence relating to workplace deaths needs to be carefully considered and drafted to ensure it sits firmly within the NSW WHS legislative framework and doesn't unintentionally affect existing, well-established common law principles used in NSW's criminal legal system.

1.3 We note that, at the Ministerial roundtable held on Wednesday 20 March 2024, the Hon. Adam Searle explained that the policy intent of such an offence should be to address the fact that an overwhelming proportion of workplace deaths in NSW have been caused by employers (typically larger corporate employers) having unsafe work systems in circumstances where the workplace could have been made much safer if the employer had taken additional simple and cost-effective precautions, such as ensuring that equipment was regularly maintained. This accords with Business NSW's view.

¹ *Regina v Moore* [2015] NSWCCA 316 (15 December 2015)

Recommendation 1

Given the contents of the consultation paper dated February 2024, the title of the proposed NSW WHS offence should be '*Gross negligence or reckless conduct causing death*' instead of '*industrial manslaughter*'.

2. Using definitions from the Queensland legislation or other definitions

- 2.1 Given that NSW's criminal legal system is based on common law, comparing the elements and features of industrial manslaughter offences that have been introduced in other jurisdictions (most of which have a codified system) will be of limited utility to the creation of a NSW-specific offence.
- 2.2 In relation to the proposition to adopt the contents of Queensland's industrial manslaughter offence, it should be noted that:
 - they were extensively criticised by Marie Boland² in her final report, and
 - if adopted in NSW (and as mentioned by Marie Boland) the wording used in the Queensland offence is likely to create an unnecessary and unreasonable level of confusion among duty holders as they not only alter WHS concepts but alter concepts commonly understood in other areas of the law (such as the *Corporations Act 2001*).
- 2.3 To ensure consistency and clarity and to avoid confusion on the part of duty holders, the existing definitions within the NSW WHS Act should be used.

Recommendation 2 (Question 1)

Business NSW strongly supports option 1, namely the use of the existing definitions within the NSW WHS Act (as opposed to the introduction of new definition/s of who may commit an industrial manslaughter offence).

² *Review of the model Work Health and Safety laws, Final report*, December 2018, Chapter 6.

3. Having an offence that respects the value placed on a person's life

3.1 The objects of the NSW WHS Act are set out in section 3 and include:

(1) *The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by-*

(a) *protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant...*

(2) *In furthering subsection (1) (a), regards must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances and plant as is reasonably practicable.*

3.2 These objects are achieved through the imposition of duties on PCBU's (persons conducting a business or undertaking), officers, workers and others at the workplace coupled with the principles that apply to duties.

3.3 In NSW, the offence of involuntary manslaughter exists as a reflection of the value that the common law places on life.

3.4 The consultation paper does **not** provide any substantive reason why it would be acceptable to create an offence which, in effect, values a worker's life over that of others present in the workplace. Such an offence would not only run contrary to the value common law places on life but would fall outside the objects of the NSW WHS Act.

Recommendation 3 (Question 2)

As the principles contained in the NSW WHS Act state that:

- duties are not transferable,
- a person can have more than one duty by virtue of being in more than one class of duty, and
- more than one person can concurrently have the same duty,

it follows that the new offence should be:

- owed by all who owe a health and safety duty, and
- protect all who are protected by the imposition of health and safety duties as contained in Part 2 of the NSW WHS Act.

4. Creating an outcomes-based WHS offence which involves death

- 4.1 Despite the NSW WHS Act containing a risk-based framework, the NSW Government is proposing to include an outcomes-based offence, the outcome being death.
- 4.2 An outcome to an offence requires the inclusion of the element of causation.
- 4.3 Brown, Farrer, Neal and Weisbrot's *Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales* (6th edition, The Federation Press) makes it clear that *'[W]e should be wary about seeking to apply principles and tests of causation developed in the context of homicide to other offences requiring a consequence to be caused.'* Logically, the converse would also apply.
- 4.4 Given the similarities between the proposed offence and the currently existing criminal law offences of murder and manslaughter (both voluntary and involuntary), and in the interests of consistency, it is important that the proposed offence adopt the criminal law concept of causation as it applies to those existing offences. That test has been described as:
- **not** being *"a question which should be approached on the basis of percentage attribution as between the act or omission of the accused and other potential causative factors. Nor does it necessarily require a comparison as to the relative causative potency of various operative causes . . ."*
 - instead *"the Court should assess the whole of the evidence, including the causative potency of the accused's act or omission, with a view to determining whether or not the link between the accused's act or omission and the relevant outcome is **sufficiently substantial or significant that the accused should be criminally liable for the outcome**. If it is, then the accused's act or omission will be a cause of the outcome even if there is another cause or contributor unrelated to the accused's act or omission, which of itself may, on the evidence before the Court, have also been sufficient to cause the outcome": [Russell v R](#) [2023] NSWCCA 272 (3 November 2023).*
- 4.5 Where death is the outcome, care must be taken to create an offence that not only adopts the criminal law concept of causation but is also an offence that clearly sits within the NSW WHS Act.

Recommendation 4 (Questions 3 & 4):

The elements of the proposed offence should mirror those of section 31 of the NSW WHS Act with the inclusion of a 'causing death' element, importing the causation principles currently being used in the NSW criminal legal system for the common law offences of murder and manslaughter.

5. Recent trends in workplace deaths

- 5.1 Given the proposed offence will be contained in the NSW WHS Act and will be an outcomes-based offence, consideration needs to be given to recent trends in relation to workplace fatalities.
- 5.2 One notable trend in relation to workplace fatalities is that of occupational diseases which have a long period of latency before the individual dies. Another is the rise in suicide. It is important to adhere to existing principles (for example, recognising a break in the chain of causation) when considering how criminal responsibility can be attributed to the accused in each of these circumstances. It may be that measures, such as the recently introduced register of workers exposed to silica dust³ could be utilised to enable this to happen.

Recommendation 5 (Question 4)

That care be taken to adhere to the causation principles currently being used in the NSW criminal legal system for the common law offences of murder and manslaughter where criminal responsibility for workplace deaths is being attributed to individuals under the NSW WHS Act.

6. Attributing criminal liability to corporations

- 6.1 Another issue to note is that of attributing criminal liability to corporations. Under the 'identification doctrine', it is much easier for a court to attribute criminal responsibility to a smaller employer as opposed to a large employer. This has been identified as being due to the "*diffused nature of decision-making*" in larger corporations⁴.
- 6.2 We note that, at the Ministerial roundtable held on Wednesday 20 March 2024, the Hon. Adam Searle explained that the policy intent of such an offence should be to address the fact that an overwhelming proportion of workplace deaths in NSW have been caused by employers (typically larger corporate employers) having unsafe work systems in circumstances where the workplace could have been made much safer if the employer had taken additional simple and cost-effective precautions, such as ensuring that equipment was regularly maintained.

Recommendation 6 (Question 4)

That care be taken to ensure that, when attributing criminal liability to corporate employers, that smaller corporate employers are not treated unfairly and disproportionately when compared with large corporate employers.

³ *Work Health and Safety Amendment Act 2023 No 34*

⁴ Brown, Farrer, Neal and Weisbrot's *Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales* (6th edition, The Federation Press), at pages 245 to 253

7. Procedural barriers

7.1 According to notes taken during the Ministerial roundtable held on Wednesday 20 March 2024, the following statements were made:

- Coronial inquests are held whenever there has been a homicide.
- Very few cases involving workplace deaths have been brought before the courts under the common law criminal legal system, and those that have been successfully brought have tended to follow the outcome of a coronial inquiry (held to inquire into the circumstances of the workplace death).
- The current practice is to wait until a WHS prosecution has been held before deciding whether to hold a coronial inquiry.
- NSW Police “tend to stay in their own lane” when an incident potentially involving criminal conduct has occurred in circumstances where other regulatory bodies are likely to be involved in the investigation process.
- Investigations into workplace deaths can be complex, and therefore lengthy.
- The DPP requires a brief before deciding whether to prosecute.
- The DPP tends not to be involved in WHS prosecutions.

7.2 Section 232 of the NSW WHS Act prescribes the following statute of limitations period for instituting proceedings for an offence against the Act, namely:

- (1) *Proceedings for an offence against this Act may be brought within **the latest of the following periods to occur—***
- (a) *within 2 years after the offence **first comes to the notice of the regulator,***
 - (b) ***within 1 year after a coronial report was made or a coronial inquiry or inquest ended,** if it appeared from the report or the proceedings at the inquiry or inquest that an offence had been committed against this Act,*
 - (c) *if a WHS undertaking has been given in relation to the offence, within 6 months after—*
 - (i) *the WHS undertaking is contravened, or*
 - (ii) *it comes to the notice of the regulator that the WHS undertaking has been contravened, or*
 - (iii) *the regulator has agreed under section 221 to the withdrawal of the WHS undertaking.*

(2) *A proceeding for a Category 1 offence may be brought after the end of the applicable limitation period in subsection (1) if fresh evidence relevant to the offence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.*

7.3 The comments of Bathurst CJ in [*Regina v Moore*](#)⁵ about the “*inordinate delay in bringing this matter to a hearing*” should also be noted. His Honour was referring to the delay between 16 June 2003 (the date of the alleged crime) and 4 August 2014 (when the accused was charged). Much of that delay was due to procedural inefficiencies as opposed to an inability to obtain sufficient evidence upon which a prosecution could be based. The other individual involved in the same incident was charged with manslaughter on 8 December 2005.

Recommendation 7 (Questions 6 & 7)

Given that the holding of a coronial inquiry is already accommodated for by the period of limitations contained in the NSW WHS Act, that the NSW Government consider adopting a whole of government approach to overcoming procedural barriers where workplace deaths occur. Consideration could be given to mandating:

- the involvement of the NSW Police when investigating a workplace death (including a requirement that NSW Police submit a report for each death investigated),
- the holding of a coronial inquiry into all workplace deaths,
- the deferral of a WHS prosecution until after the coroner has made their findings into the workplace death,
- providing a brief to the DPP following the outcome of a coronial inquiry, and
- notifying both the accused and the family of the deceased worker at prescribed stages during the entire process.

⁵ [2015] NSWCCA 316 (15 December 2015), at

8. Whether the proposed offence should apply to apply to deaths caused by silicosis or psychological injuries

- 8.1 This limitation period was written for a risk-based regulatory framework, not an outcomes-based regulatory framework.
- 8.2 The NSW WHS Act also contains incident notification provisions for a notifiable incident (which is defined as meaning the death of a person, a serious injury or illness of a person or a dangerous incident⁶).
- 8.3 Business NSW notes that the extension of the incident notification provision to psychological injuries is currently under review by Safe Work Australia.
- 8.4 Given that long latency occupational diseases resulting in death may or may not be captured by the proposed offence, it is difficult to assess whether or not the application of section 232 to the proposed offence will be appropriate.

Recommendation 8 (Questions 6 & 7)

That consultation on the suitability of section 232 of the NSW WHS Act in its application to the proposed offence be deferred until it is known whether or not the offence will apply to deaths that occur well after the date of the alleged conduct which resulted in the death.

9. Alternative verdicts

- 9.1 The use of alternative verdicts is an important aspect to the right to a fair trial. The current law in Australia is that alternative verdicts should only occur if it is an 'obvious' alternative verdict.
- 9.2 Logically, this can only occur when the elements for an 'included offence' are expressly or impliedly included in the allegations pleaded in the indictment.
- 9.3 It follows that, in order to be in a position to enter such a verdict, all elements of the alternative offence must have been proved beyond reasonable doubt.

Recommendation 9 (Question 6)

That common law principles used in NSW's criminal legal system be adhered to in deciding whether or not to include alternative verdicts.

⁶ Section 35

10. Penalty amounts

- 10.1 Business NSW notes that the **penalty amounts** under the NSW Act were recently amended by the *Work Health and Safety Amendment Act 2023*.
- 10.2 It is unclear why there is a need to review them yet again.
- 10.3 Business NSW notes that sentencing matters such as non-parole periods do not form part of this consultation.

Recommendation 10 (Question 5):

Given that penalties under the NSW WHS Act have only recently been changed, any discussion of further amending these penalties be withdrawn from the consultation.

For more information contact:

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