

12 June 2018

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

*via email: eec.sen@aph.gov.au*

Dear Committee Secretary

**Inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia**

Thank you for the opportunity to provide a submission to the Senate Education and Employment References Committee (**Committee**) inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia (**Inquiry**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 42,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

According to Safe Work Australia statistics, between 2003 and 2016, 3,414 workers have died in work-related incidents.<sup>1</sup> Each of those deaths is a tragedy, with many more workers injured. The AICD supports all efforts by government to help eliminate the occurrence of industrial deaths and injuries entirely.

We note that there is currently a comprehensive review of the model workplace health and safety legislation being conducted by Ms Marie Boland, which is expected to report to relevant ministers by early 2019. In light of the Boland review, we would ask the Committee to proceed with caution with respect to any proposed recommendations relating to workplace safety legislation.

This submissions will focus on two matters in the Terms of Reference of the Inquiry: effectiveness and harmonisation of workplace safety legislation; and the effectiveness of penalties.

**1. Effectiveness and extent of the harmonisation of workplace safety legislation between States, Territories and the Commonwealth**

The AICD continues to support the objective of harmonisation of WHS regimes between States, Territories and the Commonwealth. Inconsistency between jurisdictions creates unnecessary costs and complexity, which can undermine the efficacy of such legislation, and is ultimately to the detriment of workers.

While complete consistency and harmonisation has never been fully realised, it remains a fundamental principle which must guide future reforms.

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<sup>1</sup> Safe Work Australia, 'Number and incidence of work-related traumatic injury fatalities by Industry 2012-2016', (19 April 2018).

For this reason, the AICD is concerned that, over the past decade, the harmonisation of WHS laws has been arguably diminished. This has partly occurred through the introduction of amendments to WHS laws in Queensland and the Australian Capital Territory (**ACT**) which do not accord with the framework established by the model WHS laws (see below). In addition, the AICD remains concerned that Victoria and Western Australia have not yet implemented the model WHS laws, despite agreeing to their implementation.

We look forward to seeing the results of the Boland review and engaging further with relevant governments on any recommendations. It is critical that any changes are appropriately framed so as to ensure that the policy intent behind the model laws is appropriately adhered to.

## **2. The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death**

The AICD supports strong and effective penalties in WHS laws, including where an employer has been convicted of an offence relating to a serious accident or death. Safety must be a shared responsibility between employers and employees based on consultation and cooperation. Safety is enhanced by practical measures which will reduce or eliminate risks, with appropriate penalties for reckless or negligent conduct.

Current penalties for reckless or negligent conduct which causes death or serious injury within Australian jurisdictions which have adopted the model WHS laws are as follows:

- A category 1 offence under the model WHS laws applies to a person who, having a health and safety duty, engages in conduct that recklessly exposes an individual to a risk of death or serious injury. A person convicted of a Category 1 offence faces a maximum penalty of \$600,000, or 5 years imprisonment, or both. The offence relates to conduct which *exposes* a risk of death or serious injury. For this reason, a death or serious injury is not required to satisfy the elements of this offence.
- A natural person can be convicted of manslaughter for a workplace-related death. Manslaughter is the unlawful killing of a person without the intention of causing the death or grievous bodily harm of the person.<sup>2</sup> Manslaughter by criminal negligence involves a person causing the death of another through an act or omission that carries with it a high risk that death or grievous bodily harm would follow. Penalties for such offences are significant - in NSW for instance, the maximum penalty for manslaughter is 25 years imprisonment.

The AICD considers that these offences, and their corresponding penalties, act as a serious and effective deterrent against negligent or reckless conduct. The relevant authorities should be encouraged to prosecute individuals where they believe such offences have been committed, rather than introducing new, potentially duplicative offences (see below).

### Industrial Manslaughter offences

The ACT and Queensland each have specific industrial manslaughter offences. These offences apply where the person's negligent or reckless conduct actually causes the death of a worker. They apply to employers and senior officers, including company directors. The AICD is aware of similar laws being considered for introduction in the Northern Territory and Victoria.

The AICD has several concerns regarding specific industrial manslaughter offences including that: a focus on punishing wrongdoing can ultimately distract from the core object of WHS laws, which is to protect workers and other persons from harm by requiring duty holders to eliminate or minimise risks; and that it undermines the efficacy of harmonised WHS laws across Australia.

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<sup>2</sup> *Nydam v R* [1977] VR 430 at 445.

The primary policy objective of industrial manslaughter offences is to achieve deterrence through the fear of criminal punishment. However, given that existing offences outlined above already carry significant criminal punishment, the AICD is not convinced that additional offences, such as industrial manslaughter laws, will create any additional deterrent effect.

In addition, the AICD is concerned that the creation of more criminal offences diverts scarce government resources and attention from more practical measures which will help prevent industrial deaths.

For instance, given the large number of industrial deaths occurring in the transport, postal and warehouse sector, the AICD strongly supports practical government programs which will help address the underlying issue. Innovative technologies are already available that can reduce instances of vehicle collisions, and government programs that encourage uptake of these technologies could reduce fatalities in this sector.<sup>3</sup> Such practical and forward-looking measures should be preferred to introducing new and unnecessary criminal offences.

Similarly, greater resources should be dedicated to government agencies responsible for workplace safety, allowing them to more closely monitor compliance, educate businesses on safe practice, and ultimately pursue convictions in appropriate cases.

The AICD is also concerned that industrial manslaughter laws generally overlap with existing manslaughter laws in Australia. For instance, the AICD views the recently enacted Queensland offence as practically identical to the ordinary manslaughter offence in the Queensland criminal code, except that the manslaughter offence in the criminal code does not apply to corporations.

To the extent that this apparent gap existed, the AICD would have supported legislative amendment to enable corporate entities to be prosecuted for manslaughter.

We note that the Queensland Law Society has voiced similar concerns, stating that the new industrial manslaughter offence was unwarranted because the *Work Health & Safety Act 2011* and the State's criminal code already provided offences, including manslaughter, to deal with such criminal wrongs in the workplace.

Finally, the Queensland industrial manslaughter offences risk an unfair conviction, as they do not provide any right of defence, reasonable excuse or relief. Indeed, an "accident" defence was originally contemplated, but was later withdrawn from the final bill.

Any industrial manslaughter offence should provide an accused with a workable and reasonably practicable defence to prevent the prospect of unfair or unreasonable criminal convictions. This should not be seen as defending unlawful conduct but rather as wishing to ensure that a fair process is followed before an individual faces serious criminal penalties such as imprisonment (in the case of Queensland, for up to 20 years).

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<sup>3</sup> David Health, Dr Michael A Regan, Professor Claes Tingvall, and Laurie Williams, 'Investing in new technology to reduce accidents and improve safety in transport', *Proceedings of the Road Safety Research, Policing and Education Conference*, (2002) Australia.

**Next steps**

We hope our comments will be of assistance to you. As noted above, the parallel Boland review of the model WHS laws is significant, and should see recommendations that will further strengthen the legislative framework across Australia in a comprehensive manner. A piecemeal, State by State approach to reform would be unhelpful, and, in the AICD's view, ultimately undermine the efficacy of WHS laws.

If you would like to discuss any aspect of this submission, please contact Matthew McGirr, Policy Adviser, on 02 8248 6600 or [mmcgirr@aicd.com.au](mailto:mmcgirr@aicd.com.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal flourish extending to the right.

**LOUISE PETSCHLER**  
General Manager, Advocacy