

18 March 2024

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

Via email: whspolicy@customerservice.com.au

Dear SafeWork NSW

NSW industrial manslaughter laws

Thank you for the opportunity to provide a submission on the introduction of an industrial manslaughter offence within the NSW *Work Health and Safety Act 2011* (**NSW WHS Act**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 51,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

The AICD strongly supports robust and effective laws that ensure the health and safety of employees in the workplace, noting that laws in this area must be fair, balanced and consistent. Aside from legal obligations and ethical expectations, it is critical that directors and officers pay particular attention to the health and safety of employees and others within the workplace. This is reflected in the AICD's educational curriculum and resources for directors.

1. Executive Summary

The AICD has not supported the introduction of industrial manslaughter laws into Australia's WHS framework in previous consultations given existing criminal law offences provide an avenue for manslaughter prosecutions in relation to workplace fatalities. However, the AICD supports the objective of harmonisation of WHS regimes across the States, Territories and the Commonwealth, as recommended by the Boland Review of the Model WHS Laws. Inconsistency between jurisdictions creates unnecessary costs and complexity.

In this submission we have focused our response on key aspects of the proposed industrial manslaughter offence in the NSW WHS Act, noting the particular need for consistency across the States and Territories. Our key points include:

- Support for the use of existing definitions within the model *Work Health and Safety Act 2001* (**Model WHS Act**) for the purposes of determining who can commit an offence of industrial manslaughter under the NSW WHS Act.
- Support for the industrial manslaughter offence applying when a duty holder's conduct causes the death of other persons at the workplace as well as workers.
- Support for a legal test and fault threshold of 'gross negligence causing death' on the part of a duty holder, in line with the recommendation of the Boland Review of the Model WHS Laws and consistent with the majority of jurisdictions that have legislated an industrial manslaughter offence.
- Support for industrial manslaughter penalties that align with the industrial manslaughter offence penalties under the Model WHS Act.

We provide further detail on these points below.

2. Key elements of the offence

a) Who can commit the offence of industrial manslaughter

The AICD supports the use of existing definitions within the Model WHS Act for the purposes of determining who can commit an offence of industrial manslaughter.

This would include: 1) a person who has a health and safety duty; and 2) a person who is a Person Conducting a Business or Undertaking (**PCBU**) or an 'officer' of a PCBU, defined by reference to the meaning of 'officer' within the *Corporations Act 2001 (Cth)* (**Corporations Act**).

As noted in the consultation paper, the majority of jurisdictions in Australia utilise the Model WHS Act definitions. In our view, consistency across jurisdictions is critical. Creating new or alternative definitions for the purposes of the NSW industrial manslaughter offence would introduce unnecessary complexity, particularly for entities that operate across different States and Territories.

b) Who is covered by the industrial manslaughter offence

The AICD supports the industrial manslaughter offence applying when a duty holder's conduct causes the death of a *worker* or an *individual* to whom the duty is owed in the workplace.

This is consistent with the duty of care owed by a PCBU to 'other persons', who may be put at risk from work carried out by a business or undertaking, under the Model WHS Act.¹ We also note that the Boland Review of the Model WHS Laws recommended that an industrial manslaughter offence include the death of other persons at the workplace as well as workers.²

c) What test should be used to establish industrial manslaughter

¹ Section 19(2) of the model WHS Act.

² Recommendation 23(b) in M Boland, *Review of the model Work Health and Safety laws - Final Report*, December 2018, available [here](#).

The AICD supports the legal test recommended by the Boland Review of the Model WHS Laws for the NSW industrial manslaughter offence.³ That is, the offence should provide a fault threshold of 'gross negligence causing death'.⁴

A 'gross negligence' fault element would be consistent with the Model WHS Act and the majority of jurisdictions that have legislated an industrial manslaughter offence, including most recently the Commonwealth laws.

The Boland Review of the Model WHS Laws acknowledged that:⁵

"By adding a threshold for prosecution of gross negligence, a prosecutor can prosecute an offender for failing to conduct themselves safely or provide a safe environment for others, without having to establish this failure as being intentional. Instead it requires proof of 'such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment'."

In other words, a standard of 'gross negligence' appropriately sets the bar higher than mere negligence, but still lower than that of 'recklessness' - where recklessness involves a person engaging in conduct that causes the death of an individual (i) knowing that the conduct is likely to cause the death of an individual; and (ii) in disregard of that likelihood.

d) Penalties

The AICD supports penalties for the NSW industrial manslaughter offence aligning with the penalties under the Model WHS Act. For individuals, this includes a maximum 20 years imprisonment – which has been adopted by the majority of jurisdictions.

3. Next steps

We hope our submission will be of assistance to SafeWork NSW. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au, or Laura Bacon, Senior Policy Adviser, at lbacon@aicd.com.au.

Yours sincerely,



Louise Petschler

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³ The Model WHS laws comprise of the Model Work Health and Safety Act, Model Work Health and Safety Regulations, and model Codes of Practice.

⁴ Recommendation 23(b) in M Boland, *Review of the model Work Health and Safety laws - Final Report*, December 2018, available [here](#).

⁵ *Ibid*, p. 119.