

Tabled, ~~by leave,~~  
by Mr Sharpe  
.....  
Janelle Lowe  
for Clerk of the Parliaments  
19 / 6 / 24

## Statement Of Public Interest

### Need: Why is the policy needed based on factual evidence and stakeholder input?

The *Work Health and Safety Act 2011* (**the Act**) aims to secure the health and safety of workers and workplaces through the elimination or minimisation of risks, to provide workers and others with the highest level of protection from hazards and risks, so far as is reasonably practicable.

As part of the NSW Government's commitment, announced on October 2023, the *Work Health and Safety Amendment (Industrial Manslaughter) Bill 2024* (**the Bill**) introduces an industrial manslaughter (**IM**) offence for NSW, and makes a minor consequential amendment to the *Industrial Relations Amendment Act 2023*. The Bill also implements an amendment to the model WHS legislation within the NSW WHS Act.

On 28 February 2023, the Work Health and Safety (**WHS**) Ministers nationally agreed to amend the model WHS laws to include a jurisdictional note and model penalty amounts for the offence of IM. The jurisdictional note allows states and territories to create or retain an existing offence for IM without it being viewed as a departure from the model laws.

Seven Australian jurisdictions (WA, NT, ACT, VIC, QLD, SA and the Commonwealth) have already introduced an IM offence within their own WHS laws.

The *Review of the model WHS Laws 2018* (**the Review**), published February 2019 by Safe Work Australia (**SWA**) recommended (recommendation 23b) amending the model WHS Act to provide for a new offence of industrial manslaughter, and that the offence should provide for gross negligence causing death. As a part of the Review, an extensive, national consultation process was undertaken.

The consultation identified that there is an increasing community expectation for there to be an industrial manslaughter offence in the model WHS laws. This expectation was based on the perceived deterrence effect of an industrial manslaughter provision and the desire for duty holders to be subject to serious penalties including imprisonment where there is a workplace death.

Further, the Review considered an industrial manslaughter offence is required as there are limitations to prosecuting workplace fatalities under the model WHS laws, and the general criminal manslaughter laws in each jurisdiction. The Review also considered that it would be preferable for the model WHS laws to include an industrial manslaughter offence to promote harmonisation.

Notably, inclusion of IM was also raised in Recommendation 13 of the 2018 Senate Inquiry Report, *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, published October 2018. The Senate Inquiry also undertook significant consultation as a part of the inquiry process.

Public consultation was also held with specific reference to the design of an IM offence within the context of NSW's WHS Act. Many of the issues identified within the Review and Senate Inquiry were reflected in the feedback provided.

In October 2023, amendments were introduced to align NSW WHS legislation with the model WHS laws, implementing remaining recommendations from the Review.

In November 2023, Safe Work Australia (SWA) published an additional amendment to the model WHS Act to clarify how gross negligence may be attributed to a body corporate. The amendment allows for the aggregation of conduct of more than one authorised person. The Bill amends section 244B of the Act to reflect these model amendments. As model amendments, these have been subject to tripartite consultation and consideration.

**Objectives: What is the policy's objective couched in terms of the public interest?**

The Bill seeks to amend the Act to establish an IM offence to strengthen existing laws and act as a deterrent to those persons conducting a business or undertaking (PCBU) and their officers from breaching their work health and safety duties.

It will ensure those found guilty of breaching their duties and engaging in grossly negligent conduct resulting in a death are held accountable and appropriately penalised for their conduct - providing justice for the families, friends and colleagues of those who lost loved ones at work.

Further, the Bill will also provide greater consistency amongst jurisdictions in the approach taken to industrial manslaughter and bring NSW into greater alignment with the nationally harmonised WHS laws.

Since July 2008, NSW has been a signatory to the nationally harmonised Work Health and Safety (WHS) framework, as committed under the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the IGA). All Australian jurisdictions, except for Victoria, have adopted the model WHS laws.

The amendments to section 244B and 244BA within the Bill are based on model amendments, which have been approved by WHS Ministers and are now part the national model WHS laws as of November 2023.

Harmonisation of WHS legislation has had great benefits for businesses and workers in this State. Continuing to ensure that NSW WHS legislation is aligned with the model WHS laws is in the public interest.

**Options: What alternative policies and mechanisms were considered in advance of the bill?**

The Review identified limitations of criminal law when dealing with breaches of WHS duties.

Whilst in certain circumstances workplace deaths in NSW may be prosecuted as an offence of manslaughter under the Crimes Act 1900, the prosecution of large corporations for this form of manslaughter can be difficult. This is because it requires evidence of criminal negligence on the part of a particular individual who can be identified as the directing mind

and will of the company. This can be hard to establish particularly for large businesses where there are large numbers of staff with multiple layers of responsibility.

Under the highest tier offence under the WHS Act, Category 1 Offence, an injury or death does not need to occur before a duty holder can be prosecuted – instead the offence arises when a duty holder exposes the individuals to whom the duty is owed to the risk of death or serious injury.

The Bill addresses the need for an appropriate and targeted manslaughter offence, to deal with work related fatalities involving gross negligence, within the framework of the *Work Health and Safety Act 2011*.

The additional amendment to Section 244B of the Act is a model amendment and provides legislative clarity on the application of gross negligence within the context of offences outlined within the Act. There is no suitable alternate mechanism to provide this clarity.

**Analysis: What were the pros/cons and benefits/costs of each option considered?**

As stated above, this proposal fills a regulatory need and provides a targeted manslaughter offence, to deal with work related fatalities involving gross negligence, within the framework of the *Work Health and Safety Act 2011*.

Noting the recommendations from the Senate Inquiry and the Review, alternate regulatory options have not been considered as best practice and appropriate for implementation. An IM offence will address barriers to prosecution under general manslaughter laws and existing WHS regulatory framework (particularly corporate bodies).

Inclusion of IM will provide a deterrent to unsafe work practices, alleviate community concerns, appropriately punish those who breach their WHS duties in the most serious of instances, and strengthen harmonisation of NSW with model WHS laws and the seven other jurisdictions that have already implemented an IM offence in their own WHS laws. Harmonisation can benefit regional and rural communities from additional consistency in the WHS laws, enabling them to comply with those laws more efficiently and effectively.

The introduction of an IM offence will not increase regulatory burden as it does not impose additional WHS duties on a business..

**Pathway: What are the timetable and steps for the policy's rollout and who will administer it?**

Schedules 1 [5], [6], [7], [8] and 2 will commence on the date of assent. These are the provisions related to:

- Model WHS amendments to Sections 244B and 244BA with regard to gross negligence,
- Section 276B with regard to the statutory review of the industrial manslaughter provisions, and
- Consequential amendments to the Industrial Relations Amendment Act 2023, which commences on 1 July 2024.

All remaining provisions related to the new offence of industrial manslaughter will commence on proclamation. This is to ensure that all procedures and processes are able to be thoroughly considered, and well established, prior to the commencement of the offence.

It will allow for all affected Government agencies, including those who are responsible for the prosecution of industrial manslaughter offences to consult and engage with each other to ensure the optimal outcomes. The impacted agencies include SafeWork NSW, NSW Resources Regulator, Department of Justice & Communities and the Office of Director of Public Prosecutions. All affected agencies will work collaboratively to ensure the effective rollout of this legislative amendment.

**Consultation: Were the views of affected stakeholders sought and considered in making the policy?**

Stakeholder views were essential to the formation of the Review's recommendations and implementation and design of the Bill.

A public consultation on a proposed structure of an industrial manslaughter provision was conducted over a four-week period from 19 February to 18 March 2024. A consultation paper was published on the NSW Governments Have Your Say Website, along with a survey. There were 46 written submissions and 420 survey responses received.

Responses and written submissions were received from a wide variety of stakeholders including unions, industry associations, the public, PCBU's, government agencies, legal practitioners and family members of injured or deceased workers. Submissions were also received from workers from a variety of industries such as construction, mining, health and education.

Several consultative roundtables were also held with stakeholders. These sessions involved Unions, Industry and Legal representatives. Since this time, the Minister's Office together with the Attorney General's Office has been involved in extensive consultation concerning the draft bill with Union, Industry and Legal Stakeholders.

The NSW Resources Regulator (co-WHS Regulator in NSW), the Department of Communities and Justice, the Ministry of Health and Transport for NSW were consulted on the parameters of the Bill. The Office of the Department of Public Prosecutions has also been consulted as the Bill has been developed.

Consultation on the model amendments for section 244B occurred as part of the national process, which follows the tripartite model of policy development.