

> Families Left Behind

TAKING ACTION FOR WORKPLACE SAFETY REFORM

Legislative Council

4235

Tabled 17 September 2020

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CONTENTS PAGE

FAMILIES LEFT BEHIND P3

NAME OF LOVED ONES P4 - P11

FACT SHEET P12

OUR PERSPECTIVE P13

RESPONSE TO OBJECTIONS FOR
INDUSTRIAL MANSLAUGHTER LAWS P14

FAMILIES LEFT BEHIND

We are a group of families who have suffered the immeasurable loss of a sudden and unjustifiable death of a loved one killed at work.

Joined together by the Federal Senate Inquiry into Industrial Deaths in 2018 we have continued to share our stories of loss, injustice and the devastating cruelty of a system which did not value the lives of our loved ones.

We do this because for too long industrial deaths have gone unpunished and innocent and precious lives continue to be taken at the hands of negligent employers. Meanwhile the long list of families left behind are left to pick up the pieces of our broken lives, and somehow expected to live with the fact that our loved one's life was treated as if it were meaningless by our legal system.

We do not accept this. Not for ourselves and not for the future families who will inevitably stand in our shoes. None of us will see justice for our loved ones, our time has passed, but what we can do is fight for a better future so that others do not have to weep the loss of a love one killed at work, and have the soul-destroying experience of an injustice.

We are on a quest to see that all life is valued and treated equally by our legal system, for justice to be duly served and to put industry on notice about the gravity of its responsibility to provide a safer workplace.

We do this in honour of Desmond, Luke, Jarrod, Jayden, Chris, Lee, Wesley and Robert. And these are the stories of the families left behind.



Name of Loved One: Desmond Kelsh

Age: 47

Attributed to Patricia Kelsh



Nature of Injury:

Crushed by concrete and steel from building collapse.

What happened:

Des was working on a tilt up construction panel in Myaree in 2002 when the building's strength gave way and he was taken to the ground and crushed by concrete and steel. He died on site.

Nature of the Safety Breach:

The main supports of the first building had been dismantled and it could not take the weight of the roof. The panels were green and inadequate. The adjoining building was designed to take the weight of the roof in support, but various flaws accumulated and cost my husband his life.

Prosecution:

WorkSafe prosecuted builder Sven Tobiassen on four charges, including failing to provide a safe workplace. The developer and project management company escaped liability. Process: The magistrate dismissed all charges, but WorkSafe successfully appealed against the decision and Mr Tobiassen was found guilty of failing to provide a safe workplace.

Proceedings:

The developer and project manager were acquitted. The builder was fined six years after Des' death following a successful appeal.

Penalty:

The builder was fined \$35,000. The maximum penalty at the time was \$200,000.

Why Industrial Manslaughter is important:

Without punishment, there is no deterrent to prevent other families from experiencing our nightmare, no system in place to protect our general population who go into work each day and deserve to come home each day knowing their workplace is as safe as possible. Manslaughter laws will act as a deterrent and make possible a great reduction, if not eliminate entirely, death through work safety failures.

Loved ones left behind:

12-year-old Son Cormac, 8-year-old daughter Lucy, brother Chisty, sisters Geraldine, Elizabeth and Ruby and wife Patricia.

Closing remark:

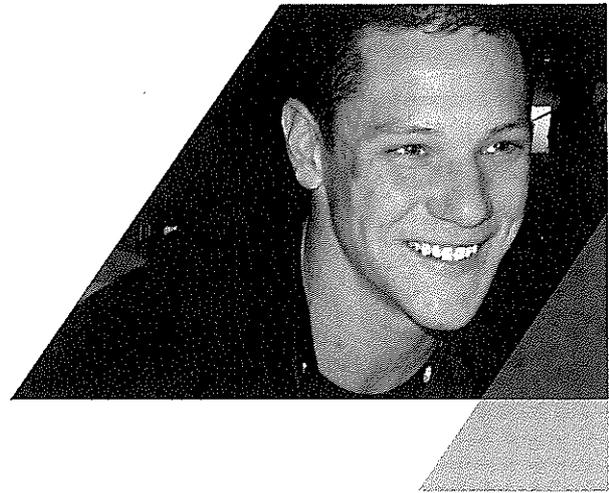
On a personal level, nothing can change for us, Des will never home. Our lives changed that fateful day and remain changed. I am asking that Desmond's life matters and the lives of all who never made it home after a day's work matter. I lost my husband and best friend; I will miss Desmond for the rest of my life.



Name of Loved One: Luke Murrie

Age: 22

Attributed to Mark and Janice Murrie



Nature of Injury:

Struck in the head.

What Happened:

Luke was working as a construction worker at his workplace in Malaga in 2007 when he and another worker, both inexperienced, were instructed to do a lift of a pack in an unsafe manner. The pack fell apart during the lift and was thrown into the air. Luke was struck in the head by one of the 375-kilogram sections.

Nature of the safety breach:

The load was slung with a chain on each corner and not encapsulated as it should have been. Luke and the other worker were instructed to do the lift in an unsafe manner.

Prosecution:

The company and both directors were charged by WorkSafe with being neglectful in not ensuring a safe workplace.

Process:

There was an 8-10-day trial, after which the company and two directors were found guilty. The directors appealed the result and the fines were drastically lowered, with the company fine dropping from \$90,000 to \$45,000 and from \$45,000 each to \$10,000 for the directors. The directors appealed again, but WorkSafe appealed the reduction in fines and the original penalties were upheld.

Proceedings:

The entire process took three years and three months, followed by a series of appeals.

Penalty:

The company was fined \$90,000 and the directors were fined \$45,000 each.

Why is Industrial Manslaughter is important:

The directors were condoning the lifting being done in an unsafe manner. It was quicker, therefore cheaper. Luke is dead to save them money. If the directors knew they faced the prospect of Industrial Manslaughter and going to jail, they would have made changes to the lifting and would have created a safe workplace. It is that simple.

Loved ones left behind:

Parents, Mark and Janice Murrie and older Brother Heath Murrie.

Closing remark:

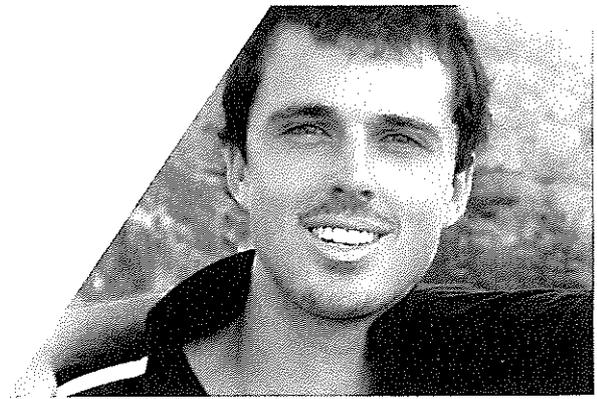
We lost our son at the age of 22. We must live the rest of our lives knowing we will never see him again. The pain and suffering are indescribable. Our hope is that by bringing these laws in they will act as a deterrent so no other family will ever have to deal with the loss of a loved one. All workers have the right to return home safely after work. Industrial Manslaughter, the thought of going to jail for not providing a safe workplace and killing a worker will make the workplace decision makers, all the way to the top, stop and think and make the workplace safe for everyone.



Name of Loved One: Jarrod Hampton

Age: 22

Attributed to Tony and Robyn Hampton



Nature of Injury:

Drowned.

What Happened:

Jarrold was working as a drift diver for Paspaley Pearling in April 2012, when he surfaced midway during a dive and alerted the boat he was in distress. It took the crew approximately 20 minutes to retrieve him from the water.

Nature of the Safety Breach:

The company had no rescue procedure, a requirement of their own Code of Practice. Their attempts to save Jarrod were chaotic, disorganised and ultimately fatal.

Prosecution:

Paspaley Pearling was charged with not providing a safe place of work.

Process:

Paspaley Pearling pleaded guilty to the charge 13 months after charges were laid.

Proceedings:

Paspaley was fined in October 2015, three years after Jarrod's death. The report of the coronial findings into his death was released in February 2018.

Penalty:

Paspaley Pearling was fined \$60,000. The maximum fine for this offence was \$200,000, but the Broome magistrate reduced the fine payable by 70 per cent on the basis that the company was "a good corporate citizen" and it made an "early guilty plea".

Why Industrial Manslaughter is important:

Lives matter. If society diminishes the value of an individual as a loved family member, a human being of untold potential, a person with a right to live a full, rich life or a trusted employee deserving of a safe working environment, then it diminishes itself in the areas of human compassion and justice. Penalties must reflect the value we put on lives. The Occupational Health & Safety Act was passed in 1984, 36 years later one person dies almost every week at work. Corporations and businesses large and small will only invest in real workplace safety when facing real consequences if they don't. Industrial Manslaughter must be the headline offence, but other penalties also must be increased to a level where they become a real deterrent to complacency and force employers to take the safety of their workers seriously.

Loved ones left behind:

Parents Robyn and Tony, brothers Jake and Travis, girlfriend Nicki, a large extended family and many friends.

Closing remark:

Sadly, I believe most people will only appreciate the importance of this issue if it happens close to home, and no one wants that.



Name of Loved One: Jayden Zappelli

Age: 18

Attributed to Greg Zappelli



Nature of Injury:

Electrocution.

What happened:

Jayden was doing work experience to secure an apprenticeship and was sent into a roof space to pull a cable that had not been isolated in 2013.

Nature of the safety breach:

Jayden was only allowed to pass tools and dig trenches, not electrical work. He could not test a circuit to know it was isolated and had to trust others, but it had been tested incorrectly. He was being used for jobs he was not allowed to perform. The power should have been totally shutdown as outlined in a WorkSafe guide to working on roofs and in ceiling spaces which had been distributed to all electricians.

Prosecution:

The company JCW Electrical was charged with failing to provide and maintain a working environment in which employees were not exposed to hazards. The supervising electrician Dale Mortley was charged with failing to take reasonable care to avoid adversely affecting the safety and health of his colleague, causing death.

Process:

Energy Safety conducted an initial investigation then handed it on to WorkSafe. Both parties pleaded guilty.

Proceedings:

Concluded two years after Jayden's death after six months of court proceedings, including four adjournments by the defendants before they were told to return with a plea.

Penalty:

JCW Electrical was fined \$38,000, and Dale Mortley was fined \$6,800, from a maximum of \$200,000. Penalties and legal fees were paid by indemnity insurance organised by Master Electricians.

Why Industrial Manslaughter is important:

Any death in the workplace is avoidable if safety processes are put in place by the company and adhered to by workers. In too many cases, companies will roll the dice with workers' lives by not having safety at the forefront of their business, choosing profits over worker safety. This was the case in my son Jayden's case. If companies fail in their duty of care to workers, then why should they not be charged with Industrial Manslaughter. Companies that do what is right, need not fear these Industrial Manslaughter laws.

Loved ones left behind:

Parents, sister, grandparents, aunts and uncles, cousins, mates and team-mates.

Closing remark:

Jayden has lost potentially 70 years of his life and all that comes with that.

I have lost my son. I loved being his dad, we did everything together. I was looking forward to times together with him as an adult. Everything is different now, it's just trying to survive in this world, whilst living with a broken heart and mind. When a death is avoidable it is hard to accept. Some will argue against Industrial Manslaughter laws, I say to them which family member would you be prepared to lose because an employer does not care about their safety at work? Had safety been in place at the company where Jayden was doing work experience, we would still have our son in our lives. We, the Families Left Behind, will continue to fight for these law changes, so that no other person, family or friends have to endure the journey that we have travelled. Jayden, we love and miss you every day mate.



Name of Loved One: Chris Patrick
Age: 27

Attributed to Christiana Paterson



Nature of Injury:

Severe head injury and severe chest injuries.

What happened:

Chris was working as a surveyor on land at Karratha Airport that was being prepared for a future carpark in partnership with a grader driver who was operating a heavy earth-moving machine to level the ground. The grader driver reversed over Chris, trapping him under the machine.

Nature of the safety breach:

The safety process required the surveyor, Chris, to stand 15 metres out of the trimming zone, make eye contact and use a walkie talkie to give a signal to the grader driver to commence reversing before the grader driver reversed. The coronial report stated the grader driver used mirrors to check if the worksite was clear and began to reverse the machine. Site supervisors, and other workers, were not looking and the agreed walkie talkies were not used.

Prosecution:

No criminal investigation or prosecutions.

Process:

Coronial investigation was completed in 2017, three years after Chris' death. Civil action was undertaken by myself at the age of 25 and completed in 2020, six years after Chris' death.

Proceedings:

No criminal proceedings or further investigations. Civil proceedings were settled out of court in 2020.

Penalty:

No penalty to the companies involved. Compensation only received from the Insurance Commission of WA because the grader was road registered, meaning it was road users who paid. The grader driver, site supervisors, and the companies involved, walked away in 2014.

Why Industrial Manslaughter is important:

Before this accident happened, I believed justice existed, that if you were a good person, good things would happen to you, and that we, as human beings, mattered. Chris' death shattered those beliefs. The insufficiency of the investigation into Chris' death, implied that he meant nothing. If this same death happened in an already built carpark, with a different vehicle, Chris' death would have been investigated in a totally different manner. The grader driver broke the rules and the supervisor did not maintain a safe site, but they walked away. The failure to use walkie talkies was uncovered by my privately hired lawyers, not the WorkSafe investigator. You can stop shattering people's lives. Bring in Industrial Manslaughter.

Loved ones left behind:

Partner, Christiana, much loved mum and dad, Gina and Charlie, brother Tom, countless friends, and our beloved puppy Willow.

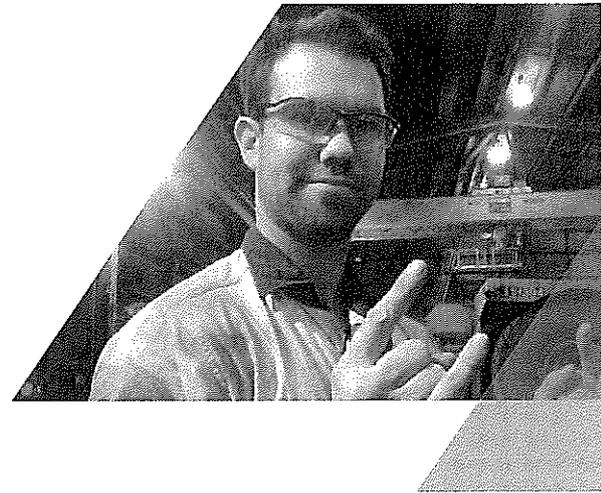
Closing remark:

I want to believe our lives mean something. That your life means something, that my life means something. I don't want anyone else to go through what I did, alone at the age of 25. You have the power to make change and to do good. Be that person.



Name of Loved One: Lee Buzzard
Age: 32

Attributed to Sharon Westerman



Nature of Injury:

Crush injury to the chest.

What happened:

Lee was working on a drill rig when the centraliser arm moved unexpectedly and crushed him.

Nature of the safety breach:

The uncontrolled movement of the arm had previously been reported five times, but the machine was not shut down from operation and the defect had not been escalated to the maintenance system. The company failed to maintain the plant in a safe manner, adhere to their own maintenance systems or update procedures and Lee walked into a death trap.

Prosecution:

No prosecutions for Lee's death.

Process:

After three years of delays, the family was told there would be no prosecution. Throughout this time the employer has been provided more access to information than family and permitted to come up with evidence which was later proven to be impossible.

Proceedings:

Civil proceedings have commenced under Lee's employer.

Penalty:

None.

Why Industrial Manslaughter is important:

Lee's case is an example of a failure of the system to protect workers by allowing continual breaches to occur. This would not happen if new Industrial Manslaughter laws were in place. Lee's death was entirely preventable if a number of breaches had been addressed earlier. Time will tell if a prosecution should have been undertaken, and whether all the relevant evidence was considered. Our family believes a prosecution should have occurred under current laws, but the new IM laws would strengthen any legal action.

Loved ones left behind:

Mother Sharon, grandmother Mavis and brothers Evan and Kyle.

Closing remark:

The current system and legislation fail families on many levels. The current 1984 legislation is as old as my son would be today, 36, and a change needs to happen. I am supporting the Industrial Manslaughter laws so that I can help prevent another family going through what my family has experienced. Safety needs to be taken seriously and this is the only way to do it.



Name of Loved One: Wesley Ballantine

Age: 17

Attributed to Regan Ballantine



Nature of Injury:

Fell 12m to his death. Multiple skeletal injuries and brain injury.

What Happened:

Working as a trades assistant on the H&M retail fit out in the Perth CBD. Wesley fell through an open void in a glass atrium ceiling.

Nature of the Safety Breach:

Zero fall prevention safety measures were implemented. No handrails to the live edges, no covers over the open voids and no anchor points installed for a harness to connect. Wesley had no working at heights training which is mandatory.

Prosecution:

Four parties were charged almost three years after the incident. The head contractor (Valmont). The sub-contractor who employed Wesley (ICS). Individual charges against the two directors of ICS (Wesley's employer).

Process:

Charges against Valmont have been heard before the court. Charges against the sub-contractor (ICS) are not scheduled to go to trial until late 2021. This will take two years, followed by the two-year coronial inquest.

Proceedings:

Due to conclude in 2025. Eight years after Wesley's death.

Penalty:

Valmont entered a guilty plea for 'failing to ensure that persons who were not their employees were not exposed to hazards'. The magistrate imposed a fine of \$38,000, almost one fifth of the maximum penalty available.

Why is IM Important:

So that deaths in the workplace are treated equally by the legal system and justice can be duly served. Workplace deaths are governed by

laws under the OSH Act 1984 where no offence provision exists for negligent acts causing death. This gap in law means that if manslaughter is committed, offenders escape prosecution because an offence does not actually exist under the Act. Without this reform, corporate Australia will continue to be given a free pass when workplace manslaughter is committed. The inclusion of s30A and s30B industrial manslaughter in the WHS Bill 2019 is critical to delivering an equitable and comprehensive piece of legislation which addresses this legal void, delivers justice to families and puts companies on notice about the gravity of their responsibilities to provide safe workplaces.

Loved ones left behind:

Wesley was a beloved friend to many and my only child. Leaving behind, a loving God father, his best friend, his childhood sweetheart, his family and a group of young friends. He is deeply missed and there is no escape from the hole which has been left in all of our hearts from his sudden passing.

Closing Remark:

This life has asked much of me. It's asked me to forgive, to let go of anger and to bear the unbearable loss of my only child - Wes. Worse, it has asked me to overcome the degrading and soul-destroying experience of having both the custodians of Wesley's workplace and our legal system treat his life as if it were meaningless. But what it has not asked of me, is to sit on the sidelines and accept this. I simply will not. There will never be justice for Wes - I cannot fight to change the system of the past which dealt with his death. But I can help build a better one for the future, in the hope that other families will not be burdened with the suffering of an injustice and devaluation of their loved one's life.



Name of Loved One: Robert Cunico
Age: 60

Attributed to the Cunico family



Nature of Injury:

Catastrophic musculoskeletal injury and partial limb amputations.

What happened:

Robert was working as a supervisor for Civmec Construction and Engineering at the Water Corporation wastewater treatment plant at Woodman Point in April 2018. He was inspecting for leaks on the western end of an aerator pipe when air was reintroduced. The joint subsequently failed and shot 12 metres of pipe into him, trapping him between the east and west end aerator pipes.

Nature of the safety breach:

Still waiting for this to be determined.

Prosecution:

No prosecution has been made yet.

Process:

WorkSafe has been investigating for more than two years.

Proceedings:

The statute of limitations on prosecution expires in 10 months.

Penalty:

None to date.

Why Industrial Manslaughter is important:

Industrial Manslaughter is essential to set a precedence for accountability, it should no longer be accepted that the actions or inactions of companies or individuals in the workplace where serious injury or fatalities occur be left without consequence. The current legislations are not deterrent enough to encourage safe systems of work.

Loved ones left behind:

My father leaves behind his wife of 35 years, three children and five grandchildren.

Closing remark:

Losing a loved one in the most tragic circumstances can never ever be put into words, I implore you to put yourselves in our shoes and for one moment ask yourself, would you find the current laws to be enough? It is an abject failure of our system and more so a basic human right to return home safe from work. The cost of doing business should never be inclusive of losing a life in the process. Most businesses sadly value production over safety and are afforded the luxury of doing so through poorly executed laws and legislations.



FACT SHEET

Background to WHS Bill

The WHS Bill 2019 (WHS Bill) currently before the Legislative Council seeks to harmonise WA laws with the rest of Australia and modernise our outdated OSH Act 1984 (OSH Act).

The main object of the Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.

Industrial Manslaughter Explained

The WHS Bill includes manslaughter provisions – Industrial Manslaughter s30A and s30B (IM 30A – IM 30B).

The purpose of the category offence provisions IM 30A and IM 30B is to define the degree of culpability on a spectrum. We see this principle reflected in the category offence provisions which exist for murder, manslaughter and serious driving offences.

Importantly the offences attach a tariff which reflects the community expectations for the severity of the crime.

s.30A Industrial Manslaughter – as a crime

- Category offence provision for gross negligence.
- Where a duty holder disregards their safety obligations, knowing that serious harm or death will occur and in doing so, causes the death of a worker.
- Max penalty – 20 years' imprisonment or \$10m fine.
- Element of *mens rea* needed for a prosecution – contingent upon the subjective test of being able to prove the offender's 'knowing mind'.
- Likened to a reckless driving charge where an offender is driving 180km/h down the wrong side of the freeway and causes death. There is the element of conscious choice to approach a risk in spite of the obvious risk of death or injury.

s.30B Industrial Manslaughter – simple offence

- Category offence provision for negligence.
- Where a duty holder caused the death of a worker by breaching safety obligations and 'ought to have known' that serious harm or death could be caused by the failure to observe these duties.
- Max penalty – 10 years' imprisonment or \$5m fine.
- For one-punch offenders or drink driving offenders who kill people on the road, there is no requirement to prove the 'state of mind' of the offender. Rather that the offender breached a duty of care and 'ought to have known' that in doing so harm or death may occur.
- Industrial manslaughter 30B seeks to replicate these principals and offences which already exist in the *Criminal Code 1913* (Criminal Code), by creating an offence in the legislation which governs workplace deaths.

Industrial Manslaughter Laws in Other States

Four of Australia's eight states and territories have IM as an offence (ACT, QLD, VIC and NT).



OUR PERSPECTIVE

Jurisdiction of Workplace Deaths and Prosecutions

Contrary to common belief, the police do not conduct the in-depth investigation into a workplace death.

WorkSafe maintains jurisdiction over workplace deaths and undertakes investigations and prosecutions within its powers under the OSH Act. No offence provision exists in this legislation for negligent acts causing death (manslaughter) which means corporate offenders escape prosecution.

Even if manslaughter is committed, WorkSafe does not have power to investigate or prosecute for breaches under the *Criminal Code 1913* (Criminal Code) where manslaughter offences reside.

Sadly, deaths which occur in the workplace are not treated with the same level of investigation and prosecution as a person who dies outside of the workplace.

The WHS Bill with the inclusion of IM provisions seeks to address this glaring gap in the law to ensure that all deaths are treated equally by the law.

Likened this to the recent issue with corporate offenders escaping prosecution for wage theft. Although criminal behaviour, no offence provision exists.

Accidents vs Negligence

Accidental death versus negligence causing death should not be confused.

A passenger who is killed in a road crash caused by a driver seeking to avoid a kangaroo is an accidental death caused by unforeseeable circumstances.

A person drink driving and killing their passenger in a road incident is negligence (IM 30B) due to the risk associated with drink driving being known to the offender. A person driving 180km/h down the wrong side of the freeway is gross negligence (IM 30A) due to the element of intentional choice to expose others to a risk.

Prosecution for IM 30B involves a substantial level of evidence that the fatality was preventable.

Cost of Doing Business / Deterrence

Currently in WA, the penalty for a worker killed costs less to an organisation than the cost of safety compliance. We cannot allow workplace fatalities to continue to be seen as the cost of doing business.

A disincentive must exist to deter poor conduct. We see this principle applied with the planned increase in fines (\$1000 penalty and four demerit points) for mobile phone use whilst driving.

For the employers, where the satisfaction of sending their workforce home and the end of the workday is not enough of a motivation to comply with safety obligations, perhaps the threat of a custodial sentence for failing to do so will be.

Comprehensive Policy

Families are vocal advocates of comprehensive policy which looks at Prevention, Penalty and Prosecution (PPP Strategy). We support calls for greater resources to be given to WorkSafe to drive education and compliance before safety hazards arise but are also of the view that the opportunity to prosecute offenders must also exist.

IM laws do not profess to be the silver bullet which will prevent all workplace deaths. However, the reforms are a big first step towards delivering a piece of legislation which addresses a significant legal void, delivers justice to families, whilst putting companies on notice about the gravity of their responsibilities to provide safe workplaces and comply with occupational health and safety regulations.

PPP Strategy has been implemented to address the issues of drink driving and illicit drug use. We need to see this same principle applied to corporate Australia.



RESPONSE TO OBJECTIONS FOR INDUSTRIAL MANSLAUGHTER LAWS

Concerns of Small Business

Objection: Cost of mounting defence disproportionately affects small business who can't afford the legal fees.

- Professional Indemnity insurance covers the cost of a defence. Further under the OSH Act it is legal to have insurance policies to cover any fines associated with a conviction. The WHS Bill will abolish this practice.
- Fines will not disproportionately affect small business as magistrates use a sliding scale to weigh the fine imposed against the size of the organisation.

Concerns of Farmers

Objection: Farms are largely operated as family farms which carry inherent risks, giving rise to concerns that if a negligent incident occurred a member of the deceased's family could be prosecuted for their death.

- For a prosecution to be pursued the Worksafe Prosecution Policy stipulates that the 'public interest' test be met. Consideration is made in the context of the known facts and surrounding circumstances of the case to determine whether it is in the public interest to pursue a prosecution. Therefore mitigating the likelihood that a family member would be prosecuted for their loved one's death.
- According to SafeWork the farming industry is the worst offender in the safety space, ranking number one for industry-related workplace deaths. We are of the view that the farming industry would be better served refocusing its attention on cleaning up its industry than seeking to oppose laws which impose penalties for criminal offenders.

Concerns of Industry

Objection: IM will foster a culture of blame and work against safety culture which promotes education and collaboration.

- It is disappointing that industry would say that a new offence provision would foster a culture of blame, we are of the view that industry should be seeking to exceed the minimum requirements for safety compliances, not find excuses to avoid accountability.
- Education, advice and compliance activity is failing to produce safe workplaces so enforcement is necessary. For enforcement to work, we must ensure there is a comprehensive range of health and safety offences

Objection: There is no evidence to show that there will be reduce workplace deaths.

- There is no evidence to suggest that the IM laws will not improve safety outcomes. What we can be certain of is the laws will deliver an opportunity for real justice.

Objection: Laws may deliver unintended consequences.

- Industrial manslaughter has been in place in Canada, the UK, Queensland, ACT, Victoria and the Northern Territory and we are yet to see any unintended consequences.

Objection: Government failed to consult industry.

- The development of the WHS Bill 2019 has been an extensive process involving all stakeholders that began in June 2017 and ended with the introduction of the WHS Bill in late 2019. During the consultation IM was raised as a major theme of submissions including those from families and others lobbying for the change.
- Many of the industry group have failed to participate in the nationwide consultation.
- The only consultation which has failed to occur is the one between these groups and the families who have been impacted by a workplace death and have the real-life experience of dealing with a dysfunctional and unjust legal system.

Without this industrial manslaughter reform, corporate Australia will continue to be given a free pass when acts of workplace manslaughter are committed.