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Work Health and Safety Amendment (Review) Bill 2019

Report 49

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Portfolio Committee No. 1 - Premier and Finance

Work Health and Safety Amendment (Review) Bill 2019

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Terms of reference

That:

- (a) the provisions of the Work Health and Safety Amendment (Review) Bill 2019 be referred to Portfolio Committee No. 1 – Premier and Finance for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) the committee report by Tuesday 24 March 2020, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

The terms of reference were referred to the committee by the Legislative Council on 19 November 2019.¹

¹ *Minutes*, NSW Legislative Council, 19 November 2019, Item 5, p 713.

Committee details

Committee members

The Hon Tara Moriarty MLC	Australian Labor Party	<i>Chair</i>
The Hon Robert Borsak MLC	Shooters Fishers and Farmers Party	<i>Deputy Chair</i>
The Hon Anthony D'Adam MLC*	Australian Labor Party	
The Hon Ben Franklin MLC	The Nationals	
The Hon Taylor Martin MLC	Liberal Party	
The Hon Adam Searle MLC	Australian Labor Party	
Mr David Shoebridge MLC **	The Greens	
The Hon Natalie Ward MLC	Liberal Party	

* The Hon Anthony D'Adam MLC is a participating member from 20 November 2019 for the duration of the inquiry

** Mr David Shoebridge MLC is substituting for Ms Abigail Boyd MLC from 20 November 2019 for the duration of the inquiry

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Chair's foreword

The Work Health and Safety Amendment (Review) Bill 2019 was referred to Portfolio Committee No. 1 – Premier and Finance by Legislative Council for inquiry and report.

This bill amends the *Work Health and Safety Act 2011* to expedite implementation in New South Wales of 12 proposals based on recommendations of a national review of the model Work Health and Safety Act (the Boland Review). The amendments, aimed at further improving safety in the workplace, include:

- acknowledging that workplace deaths may be prosecuted as manslaughter under the *Crimes Act 1900*;
- making it easier to prosecute the most serious work health and safety offences with the addition of "gross negligence" as a fault element;
- increasing the penalties for the most serious work health and safety offences; and
- extending the time within which a person can request that a regulator bring a prosecution in relation to a workplace incident involving risk of death or serious injury or illness from 12 months to 18 months.

During the short inquiry, the committee considered a number of concerns that were raised by stakeholders relating to these changes. The committee acknowledges stakeholder concerns raised in this inquiry and notes that there were differing views of inquiry participants particularly on the topic of whether a provision for industrial manslaughter should be included in the bill.

The committee recommended that the Legislative Council proceed to consider the Work Health and Safety Amendment (Review) Bill 2019 and consider amendments in the committee stage that address stakeholder concerns raised in this inquiry.

We have also specifically requested that the that the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review, in relation to amending the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

It is acknowledged that the committee heard evidence and prepared its report on the first print of the bill, prior to the bill being amended in the Legislative Assembly on 26 February 2020. It is noted that the amendment agreed to in the Legislative Assembly is not related to the issues raised by stakeholders in this inquiry.

On behalf of the committee, I would like to thank all who participated in the inquiry, and who provided submissions and attended the public hearing at short notice. I would also like to thank the secretariat for their assistance, and committee members for their considered contributions to this process.

Finally, I present the report to the House and call on members to seriously consider stakeholder views in this report and prioritise the safety of workers, so that when people go to work they can return home safely to their loved ones.



Hon Tara Moriarty MLC
Committee Chair

Finding and recommendations

- Finding 1** **20**
The committee acknowledges that a majority of stakeholders are supportive of the Work Health and Safety Amendment (Review) Bill 2019.
- Recommendation 1** **20**
That the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review.
- Recommendation 2** **21**
That the Legislative Council proceed to consider the Work Health and Safety Amendment (Review) Bill 2019 and where appropriate consider amendments in the committee stage that address stakeholder concerns raised in this inquiry.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 19 November 2019.

The committee received 12 submissions and conducted an online questionnaire which received six responses.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, report on the online questionnaire, tabled documents and answers to questions on notice.

Procedural issues

The committee heard evidence and prepared its report on the first print of the bill, prior to the bill being amended in the Legislative Assembly on 26 February 2020. It is noted that the amendment agreed to in the Legislative Assembly is not related to the issues raised by stakeholders in this inquiry.

Chapter 1 Overview

This chapter provides an overview of the Work Health and Safety Amendment (Review) Bill 2019.

Reference

- 1.1 The Work Health and Safety Amendment (Review) Bill 2019 was introduced into the Legislative Assembly on 12 November 2019 by the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation. The Minister gave his second reading speech in the Legislative Assembly on 12 November 2019 before debate was adjourned.²
- 1.2 The Legislative Council Selection of Bills Committee recommended on 19 November 2019 that the provisions of the Work Health and Safety Amendment (Review) Bill 2019 be referred to Portfolio Committee No. 1 – Premier and Finance for inquiry, and that the committee report by Tuesday 24 March 2020.³
- 1.3 On 19 November 2019, the Legislative Council referred the bill to Portfolio Committee No. 1 – Premier and Finance on the motion of the Hon Natasha Maclaren-Jones MLC, Chair of the Selection of Bills Committee.⁴

Background and purpose of the bill

- 1.4 This bill amends the *Work Health and Safety Act 2011* 'to expedite implementation in New South Wales of 12 proposals based on recommendations of a national review of the model Work Health and Safety Act, on which the New South Wales Act is based.'⁵ The amendments include:
 - acknowledging that workplace deaths may be prosecuted as manslaughter under the *Crimes Act 1900*;
 - making it easier to prosecute the most serious work health and safety offences with the addition of "gross negligence" as a fault element;
 - increasing the penalties for the most serious work health and safety offences; and
 - extending the time within which a person can request that a regulator bring a prosecution in relation to a workplace incident involving risk of death or serious injury or illness from 12 months to 18 months.⁶
- 1.5 In his second reading speech, the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, stated:

² *Votes and Proceedings*, NSW Legislative Assembly, 12 November 2019, Item 29, p 404.

³ Selection of Bills Committee, NSW Legislative Council, *Report No. 28 - 19 November 2019* (2019), p 2.

⁴ *Minutes*, NSW Legislative Council, 19 November 2019, Item 5, p 713.

⁵ The Hon Kevin Anderson MP, Second Reading speech: Work Health and Safety Amendment (Review) Bill 2019, 12 November 2019.

⁶ The Hon Kevin Anderson MP, Second Reading speech: Work Health and Safety Amendment (Review) Bill 2019, 12 November 2019.

The amendments strike an appropriate balance between the objective of maintaining nationally consistent work health and safety regulation, and the Government's goal of reducing risks to workers' safety in New South Wales. The amendments will address the ongoing issue of workplace deaths, strengthen support for the families of workplace victims, streamline investigations, and give workers and businesses greater clarity on aspects of the Work Health and Safety Act. These amendments will not affect the nature of the existing obligations of businesses to protect workers and others from risks to their health and safety.⁷

Overview of the bill's provisions

- 1.6** The object of the bill, as set out in the explanatory note, is to amend the *Work Health and Safety Act 2011* (the Act) and the regulations under the Act to:
- a. implement proposals based on recommendations made by the 2018 *Review of the model Work Health and Safety laws: Final report* (Boland Review); and
 - b. make minor amendments to the Act recommended by the *Work Health and Safety Act 2001 Statutory Review Report* (the Statutory Review) in relation to the application of the Act to dangerous goods and high risk plant.⁸
- 1.7** The key provisions of the bill are found in Schedule 1: clauses 1-25 are amendments based on recommendations made by the Boland Review; and clauses 22-24 are amendments based on recommendations of the Statutory Review.
- 1.8** The amendments in Schedule 1:
- clarify that under the Act a person may be both a worker for a person conducting a business or undertaking and a person conducting a business or undertaking who owes duties to workers;⁹
 - insert a note into Part 2 of the Act that makes it clear that, in addition to the offences and penalties in relation to the health and safety duties imposed by Part 2, in certain circumstances the death of a person at work may also constitute manslaughter under the *Crimes Act 1900* and may be prosecuted under that Act;¹⁰
 - amend section 31 of the Act, which makes it an offence for a person owing a health and safety duty to engage in conduct that is reckless in exposing an individual owed that duty to a risk of death or serious injury or illness, to include an alternative fault element of gross negligence (clause 4 is a consequential amendment to the heading of the section);¹¹
 - amend section 72 of the Act to clarify that health and safety representatives are entitled to choose their course of training, and that the person conducting the business or

⁷ The Hon Kevin Anderson MP, Second Reading speech: Work Health and Safety Amendment (Review) Bill 2019, 12 November 2019.

⁸ Work Health and Safety Amendment (Review) Bill 2019, First Print, Explanatory Note, p 1.

⁹ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clauses 1 and 2.

¹⁰ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 3.

¹¹ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clauses 4 and 5.

undertaking and the health and safety representatives will consult each other about, and agree on, the reasonable costs associated with the training;¹²

- amend section 112 of the Act to clarify that in civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct, the District Court may make an order declaring that a person has engaged in conduct of that type;¹³
- insert a proposed section 155B into the Act to provide for matters in relation to the service of notices, under section 155, on persons who may be able to give information, provide documents or to give evidence to the regulator in relation to a possible contravention of the Act or for other purposes specified in section 155;¹⁴
- amend section 171 of the Act to provide that after an inspector has entered a workplace, the inspector or another inspector can exercise the investigative powers in section 171 for up to 30 days without having to re-enter the workplace;¹⁵
- insert a proposed section 171A into the Act to provide for matters in relation to the giving of notices, under section 171;¹⁶
- amend section 231 of the Act to extend the time within which a person can ask the regulator to start a prosecution in relation to a workplace incident involving a risk of death or serious injury or illness from 12 months to 18 months;¹⁷
- insert a new subsection into section 231 of the Act, which requires the regulator to provide updates on the progress of an investigation to a person who has made a request, every 3 months after receiving the request until a decision is made as to whether a prosecution will be brought;¹⁸
- insert proposed Division 2A into Part 13 of the Act, providing for penalties for offences in the Act to be expressed as penalty units rather than monetary amounts and related consequential amendments;¹⁹
- amend section 271 of the Act to clarify that information, including personal or health information, can be shared with work health and safety regulators in other Australian jurisdictions if it is relevant to a workplace incident being investigated in that jurisdiction;²⁰
- insert proposed sections 272A and 272B into the Act. Proposed section 272A creates an offence for entering into, providing or benefiting from insurance or other arrangements, including indemnity arrangements, in relation to the payment of penalties for offences

¹² Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clauses 6-10.

¹³ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 11.

¹⁴ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 12.

¹⁵ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 13.

¹⁶ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 14.

¹⁷ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 16.

¹⁸ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 17.

¹⁹ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clauses 18, 15 and 21.

²⁰ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 19.

under the Act. Proposed section 272B makes officers of a body corporate liable for offences committed against proposed section 272A by the body corporate;²¹

- insert a new clause 27 into Schedule 4, consequent on the amendment made by Schedule 1[20]. Clause 27 is a transitional provision that provides that a person does not commit an offence against proposed section 272A for providing insurance or a grant of indemnity, or for taking the benefit of such insurance or arrangement, if the insurance or indemnity was in force before the commencement and any payment made under the insurance or indemnity is not in relation to a penalty for an incident that occurred after the commencement; and²²
- amend Schedule 1 of the Act to make minor amendments recommended by the Statutory Review in relation to the application of the Act to dangerous goods and high risk plant.²³

1.9 Schedules 2 and 3 provide consequential amendments to *Work Health and Safety Act 2011* and the Work Health and Safety Regulation 2017, so that the penalty provisions change from dollar amounts for fines to penalty units.²⁴

Prosecutions under the *Work Health and Safety Act 2011* including fatalities

1.10 For context to the inquiry, below is a table presenting statistics on prosecutions under the *Work Health and Safety Act 2011* including fatalities, extrapolated from NSW Government evidence to this inquiry.

Table 1 Statistics on prosecutions under the *Work Health and Safety Act 2011* including fatalities²⁵

No. all matters	Matters commenced/successful	Fatality matters commenced	No. of charges for fatality matters commenced/successful
FY 2015	33/67	8	14/7
FY 2016	50/33	5	5/4
FY 2017	36/29	9	14/10
FY 2018	48/36	9	21/6
FY 2019	61/31	12	22/4
FY 2020 (half year)	39/39	9	20/1

²¹ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 20.

²² Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clause 25.

²³ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 1, clauses 22-24.

²⁴ Work Health and Safety Amendment (Review) Bill 2019, First Print, Schedule 2 and Schedule 3.

²⁵ Answers to questions on notice, NSW Government, p3 and Tab B. Notes: Successful means a conviction before the courts; Figures reflect prosecutions commenced and successful outcomes in a particular financial year. However, the figures in a single financial year do not necessarily relate to the same prosecutions due to the time taken for matters to proceed through court processes; FY 2020: Figures only cover first half of year from 1 July 2019 to 31 December 2019.

Chapter 2 Key issues

Most stakeholders indicated their overall support for the Work Health and Safety Amendment (Review) Bill 2019 to implement proposals based on recommendations made by the national 2018 *Review of the model Work Health and Safety laws* conducted by Ms Marie Boland (the Boland Review) and to make minor amendments recommended by the Work Health and Safety Act 2011 Statutory Review Report.

Stakeholders raised a number of concerns about aspects of the bill, including timing of the bill prior to completion of the 2018 Boland Review; exclusion of an industrial manslaughter provision and enhanced Category 1 offence provisions. Issues relating to the health safety representative training arrangements, the omission of psychological health provisions and the prohibition of insurance for work health and safety (WHS) fines were also raised by stakeholders during the inquiry.

Timing of the bill prior to completion of the 2018 Boland Review

- 2.1** There were concerns from some stakeholders that the bill was pre-emptive of the national reform process.
- 2.2** The NSW Government advised of the following timeline for the national 2018 Boland *Review of the model Work Health and Safety laws*:
- the 2018 Boland Review report was released by Safe Work Australia in February 2019;
 - the Consultation Regulation Impact Statement [RIS] was released in June 2019;
 - SafeWork NSW and the Resources Regulator made a joint New South Wales work health and safety regulators' submission to the Consultation RIS in August 2019;
 - Safe Work Australia has provided the Decision RIS to work health and safety Ministers for their consideration;
 - work health and safety Ministers will meet later this year to discuss and vote on recommendations; and
 - the implementation of decisions made by work health and safety Ministers will not commence until at least the second half of 2020.²⁶
- 2.3** The government indicated that the department will participate in this work as the New South Wales representatives to Safe Work Australia.²⁷

Stakeholder views

- 2.4** The Housing Industry Association raised a number of concerns with the bill, and recommended that it not proceed until the outcomes of the national review process were finalised:

²⁶ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Divisions, Department of Customer Service, 10 February 2020, pp 36 -37.

²⁷ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Divisions, Department of Customer Service, 10 February 2020, pp 36 -37.

HIA has a number of concerns with the Bill and it is unfortunate that the Bill was introduced without any prior consultation. It is also disappointing that the Bill has been introduced without any regulatory impact assessment being undertaken at the State level, or, despite its deficiencies, waiting for the results of the Consultation RIS and the national review process. This approach represents a lost opportunity to not only achieve a full understanding of the post-implementation issues associated with the Model WHS Laws on the residential building industry, but also a lost opportunity to develop practical options for reform. To that end, HIA recommends that this Bill progress no further until the outcomes of the national review process are known.²⁸

- 2.5** Similarly, the Australian Industry Group (Ai Group), strong supporters of harmonisation of WHS laws across the nation, indicated that its 'preferred position is that jurisdictions seek national consensus on fundamental changes to the model laws before enacting unilaterally.'²⁹ In addition the Ai Group stated that:

... if the Bill is enacted before consensus emerges in respect of the proposals it contains, NSW should be open to amending the WHS Act further if necessary to reflect such consensus, even if this means some changes to wording, if not meaning.³⁰

NSW Government response

- 2.6** The NSW Government asserted that 'early action is necessary' and does not affect the government's commitment to harmonisation:

The NSW Government is supportive of this national process but is mindful that it will take time ... early action is necessary so that workers and others in NSW do not continue to be affected by those issues identified by the 2018 national review while the national process is underway. Moving forward with the Bill ahead of the national process does not affect the NSW Government's commitment to harmonisation. The NSW Government continues to engage in discussions in the national process.³¹

- 2.7** The government advised that '[s]hould the amendments in NSW differ substantially from the approach that is subsequently taken to the model WHS laws, the NSW Government will have the opportunity to consider these differences. This means in the long term that NSW will remain aligned with the spirit and intent of the national framework.'³²

- 2.8** The NSW Government reiterated that it is committed to the harmonisation of the WHS regulatory framework:

The NSW Government is committed to a harmonised WHS regulatory framework. The harmonised framework has had many benefits for NSW businesses, particularly enabling those that operate across NSW borders to apply a consistent approach to WHS issues regardless of their location.³³

²⁸ Submission 3, Housing Industry Association, p 4.

²⁹ Submission 6, Australian Industry Group, p 4.

³⁰ Submission 6, Australian Industry Group, p 4.

³¹ Submission 1, NSW Government, p 5.

³² Submission 1, NSW Government, p 5.

³³ Submission 1, NSW Government, p 5.

Exclusion of an industrial manslaughter provision

- 2.9** The 2018 Boland Review recommended that a new offence of industrial manslaughter be included in the model WHS laws. In the executive summary, Ms Marie Boland provided the reasoning behind this recommendation:

I am recommending a new offence of industrial manslaughter be included in the model WHS laws. The growing public debate about including an offence of industrial manslaughter in the model WHS laws was reflected in consultations for this Review. I consider that this new offence is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death. It is also required to address the limitations of the criminal law when dealing with breaches of WHS duties. More broadly, the ACT and Queensland have already introduced industrial manslaughter provisions, with other jurisdictions considering it, and so this new offence also aims to enhance and maintain harmonisation of the WHS laws.³⁴

- 2.10** Currently, the bill does not have an industrial manslaughter provision but provides for the addition of a note to be inserted at Part 2, Division 5 of the *Work Health and Safety Act 2011* (the Act) 'to clarify that in certain circumstances, the death of a person at work may constitute manslaughter under the *Crimes Act 1900* and may be prosecuted under that Act with a maximum penalty of up to 25 years imprisonment.³⁵
- 2.11** The exclusion or inclusion of an industrial manslaughter provision was the most contentious issue of the bill. Stakeholders had divergent views as outlined in the below section.

Stakeholders supporting an industrial manslaughter provision

- 2.12** The most moving evidence on the topic of industrial manslaughter was that from Mrs and Mr Cassaniti, whose son Christopher died on a Sydney construction site in 2019. Mrs Patrizia Cassaniti called for the introduction of an industrial manslaughter offence in New South Wales:

The biggest game changer here that must not only be considered but must be actioned is introducing industrial manslaughter into New South Wales. Most States in Australia have this law introduced already and it is proving to be effective in preventing accidents and incidents from happening. How is it even possible that a cat is more important than my son? And an interstate worker is more important than a worker in New South Wales? I do not get that, I do not get that at all. Other States have taken action and New South Wales should too.³⁶

- 2.13** To support the introduction of industrial manslaughter Mrs Cassaniti also called for education on this issue:

You cannot just put in a law a say, "Here you go, there's a law." People need to be educated and it needs to be shown to the chief executive officers, the directors and those at the supervisory level that there is this law in place. And that gets done by, obviously, letting them know that these things are in place. That is what is happening

³⁴ *Review of the model Work Health and Safety laws*, Final report, December 2018, p 10.

³⁵ Submission 1, NSW Government, p 8.

³⁶ Evidence, Mrs Patrizia Cassaniti, Parent of Christopher Cassaniti, 10 February 2020, p 3.

in the other States. So a lot of professionals who know about the IM [industrial manslaughter] laws get called into workplaces and talk to chief executive officers and let them know of those consequences and what they have in place that makes their sites unsafe, what they need to change to make sure that they are safe, so that they do not end up in jail. Once an IM law is introduced education must follow. It must go through the TAFEs.³⁷

- 2.14** The unions that participated in this inquiry strongly supported the proposal to include industrial manslaughter in the bill due to its deterrent impact, as a reflection of society expectations on workplace safety, to support uniformity across jurisdictions and as a way to ensure the regulator is more responsive to workplace deaths.
- 2.15** For example, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) supported the introduction of industrial manslaughter to ensure uniformity across jurisdictions, as it exists in Victoria and Queensland. The CFMMEU indicated that it is doubtful that the New South Wales approach of including a notation in the Act will 'bring about the organisational and cultural changes necessary to bring the required focus on the prosecution of industrial deaths in New South Wales.'³⁸
- 2.16** The Australian Manufacturing Workers' Union (AMWU) recommended that the bill include 'a provision introducing the offence of industrial manslaughter similar to the legislative provisions introduced in Victoria.'³⁹ The AMWU supported the inclusion of such a provision to 'join with other States and Territories to create an offence of Industrial Manslaughter to properly address instances of gross negligence by corporations that lead to workplace deaths.'⁴⁰ In addition, the AMWU believed that the threat of a criminal prosecution for manslaughter under the Crimes Act is not as strong a deterrent if it was to be included in the WHS Act:

Given the stronger and broader obligations placed on employers by the WHS Act, the AMWU believes that offences that deal with workplace deaths are best dealt with through offences in the WHS Act. Those with the responsibility for making decisions – whether they are officers of the company, senior managers of the company or trustees of a trust – should also be required to face the consequences if the actions they took, or failed to take, resulted in the death of a worker.⁴¹

- 2.17** The New South Wales Teachers Federation contended that the NSW Government should go further than inserting a note in the Act:

Federation supports the government's intent to deliver justice for the families of victims of workplace deaths. However the proposed amendment makes no substantial change to existing law in this area. It merely inserts a note in the Act that references the existing provision in the Crimes Act. What is of great concern to workers and the community is that workplace fatalities can be currently prosecuted under the Crimes Act but they are not. That is a problem that needs the government's urgent attention more than a new note in the Act. Federation notes that in the Minister's second reading speech no reference was made to the terminology "industrial manslaughter" nor "workplace

³⁷ Evidence, Mrs Patrizia Cassaniti, Parent of Christopher Cassaniti, 10 February 2020, p 11.

³⁸ Submission 5, Construction, Forestry, Maritime, Mining and Energy Union, p 3.

³⁹ Submission 8, Australian Manufacturing Workers' Union, p 3.

⁴⁰ Submission 8, Australian Manufacturing Workers' Union, p 3.

⁴¹ Submission 8, Australian Manufacturing Workers' Union, p 5.

manslaughter". The use of such terms assists in deterrence and ensures that work health and safety is given serious priority at an organisational level.⁴²

- 2.18** Unions NSW suggested that, if a note was to be placed in the Act about the application of the *Crimes Act 1900* for manslaughter in the workplace, then the response to workplace fatalities needs to change so that both police and SafeWork NSW attend these fatalities:

The Crimes Act 1900 does operate within the workplace and Unions NSW would support the prosecution of fatalities involving negligent behaviour under the current manslaughter provisions, however we question why this does not currently happen when there is no legal impediment to this occurring now.

Our experience suggests that this may not occur because police do not generally attend workplace incidents leading to fatalities. Instead it is viewed the role of The Regulator SafeWork NSW to attend these. It is our view that if the inclusion of the note at clause 3 schedule 1 is to be effective, both the Regulator and the police must attend any fatality occurring as a result of work.⁴³

- 2.19** Ms Natasha Flores, Industrial Officer, Unions NSW, elaborated on this issue:

Our concern, of course, is that the Crimes Act has not been utilised and putting a note in the legislation—I do not know whether that will actually go far enough. If it is utilised, there are so many questions as to how it will be utilised.

One of the concerns that we have is the crossover or, I guess, the lack of interaction between the regulator—SafeWork NSW—and the police, and the different approaches that are taken. Generally speaking, if there is a death at a workplace, a fatality at a workplace, then the regulator—SafeWork NSW—will respond to that. If there is a death outside the workplace, the police respond to that.⁴⁴

- 2.20** When asked to reason why there had been no successful prosecutions of industrial manslaughter in other jurisdictions or under previous occupational health and safety legislation in New South Wales, unions indicated that it was an issue of resourcing of the regulator. Mr Mark Morey, Secretary, Unions NSW, stated:

There are very limited prosecutions, you are right, because the infrastructure under a claim for industrial manslaughter is not in place to ensure that people are actually properly prosecuted. The waters get muddied, the investigations are not properly carried out and so the case is never put together. It just dissipates over a long period of time.⁴⁵

- 2.21** Mr Morey argued that if industrial manslaughter is introduced the regulator needs to be appropriately resourced to implement it effectively:

There are two points. One is sending a clear message, which is what industrial manslaughter does, that we will not tolerate it. But if that is just left out there as a piece of legislation that hangs by itself without appropriately resourced people to implement it, collect the information and make an adequate prosecution, then no-one is ever going

⁴² Submission 10, New South Wales Teachers Federation, pp 1-2.

⁴³ Submission 12, Unions NSW, pp 4-5.

⁴⁴ Evidence, Ms Natasha Flores, Industrial Officer, Unions NSW, 10 February 2020, p 15.

⁴⁵ Evidence, Mr Mark Morey, Secretary, Unions NSW, 10 February 2020, p 18.

to be prosecuted. I know the legislation has been changed in a number of jurisdictions recently, so we will see how that plays out. But, prior to that, there has not been a proper push to ensure that people who are grossly negligent in a workplace and kill a worker are held to account. That infrastructure is not there. SafeWork NSW has not done that. Previously WorkCover failed to do that. That is the point that Ms Flores also makes. When someone is killed at work it is not a police matter, it is just work. There should be proper resources put into actually resourcing an investigation and holding appropriate people accountable. That is not what is happening.⁴⁶

- 2.22** Mr Ben Kruse, Legal and Industrial Officer, CFMMEU, reiterated that an industrial manslaughter provision sends a strong deterrent message to employers but must be supported with adequate resourcing of the regulator:

The simple fact is that at the moment without an offence of industrial manslaughter on the statute books employers will not believe that there is any risk of them being prosecuted. Certainly the feedback that we have got from our members and from branches in other States where such legislation has been introduced is that it sends a very strong deterrent message. To finish the answer, Mr Morey raised a very crucial issue, that is, it is also a matter of resourcing. Certainly in New South Wales there is not a specialist prosecutorial branch that is actually doing anything in this area...⁴⁷

Stakeholders not supporting an industrial manslaughter provision

- 2.23** Industry stakeholders were opposed to the inclusion of an industrial manslaughter provision in the bill. For example, both the NSW Business Chamber and the Ai Group did not support the introduction of an industrial manslaughter provision in the bill.⁴⁸

- 2.24** Similarly, the Australian Chamber of Commerce and Industry (ACCI), supports the NSW Government approach of inserting a note in the Act to refer to the *Crimes Act 1900*, but opposes the inclusion of industrial manslaughter in the bill:

ACCI would also like to take this opportunity to reinforce our opposition to the inclusion of dedicated industrial manslaughter offences in the work health and safety legislation.

Industrial accidents, including those leading to fatalities, should remain subject to the existing risk-based regulation framework. Manslaughter prosecutions should only come into play in relation to workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of bespoke or dedicated new offences of industrial manslaughter.⁴⁹

- 2.25** In evidence, Mr Mark Goodsell, Head of the Australian Industry Group, spoke to the use of industrial manslaughter provision as a deterrent suggesting that current penalties already act as a deterrent:

⁴⁶ Evidence, Mr Mark Morey, Secretary, Unions NSW, 10 February 2020, p 18.

⁴⁷ Evidence, Mr Ben Kruse, Legal and Industrial Officer, CFMMEU, 10 February 2020, p 19.

⁴⁸ Submission 4, NSW Business Chamber, p 1 and Submission 6, Australian Industry Group, p 5.

⁴⁹ Submission 7, Australian Chamber of Commerce and Industry, p 1.

What appears to be at the root of the industrial manslaughter push is the assertion that five years in jail is not a big threat. I do not know of any of our members who feel that the threat of five years jail is not a significant threat. A lot of the debate has proceeded in the media and by people who ought to be more informed, that there is somehow is not the capability to jail managers and directors when there is. Indeed, not only under manslaughter, in Victoria there has been a category one jailing in recent years and in Queensland they have been two category one penalties involving jail terms but I understand they are both on bail pending appeal.

So this idea that you cannot go to jail when in fact you can and that is happening in the last few years. That deterrent we think is significant.⁵⁰

2.26 Mr Goodsell proposed more work should be done on intervention and prevention:

Well you need to be doing much more intervention earlier on. This is why we make the point in our submission about what we think is the unused provisions in relation to due diligence. That is where the regulators now under the harmonisation model really have the capacity to get in and start testing the thinking of those who run organisations, well before they have even near misses.⁵¹

2.27 Mr Goodsell concluded that '[o]ur contention is that if they do all the other elements, you do not need the offence based on outcome. It already exists in the criminal law and that is where it should stay... The idea of gross negligence was included in there [the bill] but as an alternative to industrial manslaughter, not as an addition.'⁵²

NSW Government response

2.28 In terms of other jurisdictions the NSW Government advised that Queensland and the ACT have industrial manslaughter offences in place. Other jurisdictions such as Western Australia, Victoria and the Northern Territory have introduced or passed bills with industrial manslaughter offences. It noted that all apply or propose different models of the offence, with some placing these offences in the WHS framework while others appear in their respective general criminal legislation.⁵³

2.29 Specifically on the ACT and Queensland jurisdictions, the government advised that:

The ACT has had an industrial manslaughter offence since 2004. No prosecutions have been made under the offence in the ACT. Queensland's industrial manslaughter offence was introduced in 2017. One prosecution is underway in Queensland but is not yet finalised. In NSW, an industrial manslaughter type offence called 'reckless conduct causing death at a workplace' was introduced in 2005 and repealed in 2011. It was never prosecuted.⁵⁴

⁵⁰ Evidence, Mr Mark Goodsell, Head of the Australian Industry Group, 10 February 2020, p 28.

⁵¹ Evidence, Mr Mark Goodsell, Head of the Australian Industry Group, 10 February 2020, p 28.

⁵² Evidence, Mr Mark Goodsell, Head of the Australian Industry Group, 10 February 2020, p 30.

⁵³ Submission 1, NSW Government, p 7.

⁵⁴ Submission 1, NSW Government, p 7.

2.30 Ms Snell, Deputy General Counsel, Legal Services Group, Department of Customer Services commented on the industrial manslaughter provisions in other jurisdictions and their differences:

There is a distinction between in which framework it might sit—whether it is a criminal legislative framework or a work health safety framework. There is a distinction between who might be prosecuted. There is a distinction between who is protected. The Queensland offence applies to protection of workers but not necessarily to others, whereas I understand the Victorian model extends further. So there is that nuance. The other thing is what would be the evidentiary threshold. Some have negligence; some have both recklessness and negligence.⁵⁵

2.31 According to the NSW Government, there is no evidence of successful prosecutions of an industrial manslaughter offence. The government also asserted there is no evidence from other Australian jurisdictions that industrial manslaughter has deterred non-compliance with WHS laws or prevented risks that can lead to deaths or serious injuries in the workplace.⁵⁶

2.32 The government contended that the proposal to insert the note in the Act 'recognises that a manslaughter offence already exists, can be applied to workplace deaths and demonstrates that it is unnecessary to look to another statute for this offence.'⁵⁷

2.33 It suggested that this approach 'would also reduce any potential duplication between the Crimes Act and the WHS law and confusion that may arise from this. The clarification will make it clear to businesses, employers, workers and the broader community that anyone who causes the death of a worker or other person in a workplace through negligence potentially faces serious criminal sanctions.'⁵⁸

2.34 On the issue of deterrence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, put forward that it is difficult to attribute a particular provision to a reduction in injury or deaths:

I guess there is always this big difficulty with cause and effect in being able to show that a particular provision had a result of a lessening of numbers of injuries or numbers of adverse outcomes. It is very hard for us to make a conclusion that the deterrent effect of a particular provision has worked or not worked, so it is a bit hard to opine on that. Even if it was the case that the numbers of fatalities in the jurisdictions where there was an industrial manslaughter provision had declined, it would not necessarily follow that there was a cause and effect there. It is very hard to make that conclusion.⁵⁹

2.35 In addition, Ms Webb highlighted that the WHS framework is risk-based not outcome-based, meaning the focus is on reducing the risk to workers, not waiting on an adverse outcome before taking action:

⁵⁵ Evidence, Ms Mary Snell, Deputy General Counsel, Legal Services Group, Department of Customer Services, 10 February 2020, p 44.

⁵⁶ Submission 1, NSW Government, p 7.

⁵⁷ Submission 1, NSW Government, p 8.

⁵⁸ Submission 1, NSW Government, p 8.

⁵⁹ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 44.

... the work health and safety provisions and the framework are all risk-based. The idea is that, no matter what the outcome is, if someone has engaged in conduct that could have caused some injury or fatality, then they are liable to be prosecuted. With manslaughter you could have a circumstance where an employer has done something just as bad, has caused a fatality in one case, has caused catastrophic injury to a person who is dependent on the State for years and years and their family carries a great burden, but because the person did not actually die it is not a manslaughter provision.⁶⁰

2.36 Ms Snell further explained that '[t]he advantage of a risk-based offence is that it addresses the risks; it need not wait for an injury or a death to occur before a party can be held liable for the culpability for that conduct.'⁶¹

2.37 Ultimately, Ms Webb, on behalf of the government, gave the opinion that it was not clear that prosecuting under work health and safety legislation for industrial manslaughter would actually result in a different outcome by the time the court considers the case:

I cannot give you the definitive view about the Government's process and I think we would also recognise that the national process is continuing on. We have said we will engage in that as well. I do think that the penalties—particularly if we can improve the category 1 experience—could be quite high. I am just not clear that prosecuting someone under work health and safety legislation and prosecuting them for industrial manslaughter would actually result in a whole different outcome by the time the court considers the case.⁶²

Committee comment

2.38 The committee notes the divergent views of stakeholders on this issue.

2.39 We express our deep sympathies to Mrs and Mr Cassaniti for the loss of their son and acknowledge the continuing work of the family to improve the safety of workers with an aim that no other family go through the anguish and sorrow that they have in losing their son Christopher.

2.40 The committee notes a divergence of views on the issue of the appropriateness of introducing an offence of industrial manslaughter. Additionally, amongst those supporting such an offence, at this stage, there seems no clear agreement upon the model to be adopted. The committee is therefore of the view that stakeholders should continue to engage in this issue.

2.41 Those discussions should not delay the passage of this bill, which introduces an number of positive amendments to work health and safety legislation, including the addition of the fault element of “gross negligence” to category 1 offences, the increase in penalties for serious work health and safety offences and the extending of time for the commencement of a prosecution from 12 to 18 months.

⁶⁰ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 39.

⁶¹ Evidence, Ms Mary Snell, Deputy General Counsel, Legal Services Group, Department of Customer Services, 10 February 2020, p 41.

⁶² Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 40.

Enhancement of Category 1 offence

2.42 The bill amends section 31 of the Act to make it easier to prosecute the most serious WHS offence, that is the Category 1 offence. Currently, in the Act Category 1 offences rely on the need to prove 'recklessness'. The amendment will include a fault element of 'gross negligence'.⁶³

2.43 The NSW Government indicated that it is extremely difficult to prove 'recklessness' as there must be evidence that a person had an actual knowledge of a risk and consciously disregarded it. It advised that:

The 2018 National Review Report found that WHS regulators have been hampered in their ability to bring Category 1 prosecutions due to its evidentiary threshold. In NSW since the WHS Act came into effect, there has only been one prosecution for a Category 1 offence brought by the Resources Regulator. Instead, prosecutions are generally brought as Category 2 offences, which attract a lower penalty, and which involve fault elements that are more readily able to be proved.⁶⁴

2.44 According to the NSW Government, this amendment will make it easier for WHS regulators to prosecute grossly negligent duty holders who expose workers and others in the workplace to a risk of death or serious injury:

In common law, a person is grossly negligent when their behaviour falls so far short of what is reasonable and involves such a high risk of death or serious injury that it requires criminal punishment. It is intended that the existing common law will provide guidance to the courts on interpreting the amended provision.

This amendment will make it easier for WHS regulators to prosecute grossly negligent duty holders who expose workers and others in the workplace to a risk of death or serious injury/illness. As with the current Category 1 offence provision, it will be available regardless of whether a person is fatally injured or not.⁶⁵

2.45 In evidence, Ms Snell explained that gross negligence is 'considered to be a lesser threshold than recklessness in that it will have an objective state of mind test. Our experience has been that the recklessness threshold was difficult to meet. So that is the intent of the new threshold, to open up the potential for more prosecutions and more investigations to get evidence to the threshold.'⁶⁶

Stakeholder views

2.46 Some stakeholders, such as the Australian Workers' Union (AWU), have raised concern that this amendment, as worded, extends the liability for gross negligence to any duty holder not just persons conducting a business or undertaking (PCBU).⁶⁷

⁶³ Submission 1, NSW Government, pp 6-7.

⁶⁴ Submission 1, NSW Government, pp 6-7.

⁶⁵ Submission 1, NSW Government, pp 6-7.

⁶⁶ Evidence, Ms Mary Snell, Deputy General Counsel, Legal Services Group, Department of Customer Services, 10 February 2020, p 37.

⁶⁷ Submission 9, Australian Workers' Union, p 3.

2.47 In evidence, Mr Alistair Sage, Senior Legal Officer, AWU, commented that the amendments to Category 1 could lead to workers with no supervisory duties being liable. He stated that there is:

... the possibility that a worker with no supervisory duties and no autonomy to influence safety procedures on a site could be charged with a category one offence in negligence, not for recklessness. In our view that is a misstep and goes beyond the intention of the Boland review, which was to make it simpler to ensure that persons conducting a business or undertaking [PCBU] and managers and senior officers of those PCBUs could be found liable in negligence. For that reason we have proposed that a change should be made to that part of the bill to ensure that low-paid workers, in particular those without any ability to influence the safety systems, cannot be imprisoned for up to five years for their role in a safety incident and that should be reserved to officers of a PCBU or the PCBU itself.⁶⁸

2.48 The AWU suggested that 'the best way to reform the current provisions of the WHS Act would be to create a second type of Category 1 offence with which only PCBUs and officers can be charged.'⁶⁹ It suggested that:

(a) The Bill as worded would involve a substantial enlargement of the scope of the criminal law in its application to low-paid workers who lack the ability to influence safety management decisions and who only engage in negligent conduct.

(b) A negligent worker whose conduct is so far outside the scope of a Category 2 or 3 offence may already be liable for prosecution under a provision of the *Crimes Act 1900*, including manslaughter.

(c) The Boland Report, in its recommendation, was addressing community sentiment towards inadequate penalties for businesses which endanger life.

(d) Significantly, the change could put at risk of criminal charges workers who follow habitual, unsafe directions given by managers who have the right to terminate their employment. Workers in these circumstances, if complicit in a safety breach leading to endangerment of life, should be dealt with by Category 2 or 3 offences rather than placed at risk of liberty. The severest penalty of imprisonment should be reserved for those persons with the resources and authority to influence safety decision-making and culture at a workplace (except where a *Crimes Act 1900* offence may have been committed).⁷⁰

2.49 Other stakeholders, such as the Housing Industry Association, opposed the amendment:

There is no available information on any unsuccessful prosecution due to the recklessness test. There is also nothing to support the proposition that the Regulator would avail themselves of prosecutions for category 1 offences more readily with the proposed change. However, there is evidence of successful prosecution under the current category 1 offence. It would seem an improper regulatory approach to alter a compliance framework that does seem to be working.⁷¹

⁶⁸ Evidence, Mr Alistair Sage, Senior Legal Officer, Australian Workers' Union, 10 February 2020, p 13.

⁶⁹ Submission 9, Australian Workers' Union, pp 3-4.

⁷⁰ Submission 9, Australian Workers' Union, pp 3-4.

⁷¹ Submission 3, Housing Industry Association, p 5.

- 2.50** Similarly, the Ai Group is 'not convinced that this amendment is necessary or that the limits of the effectiveness in the current legislation has been reached.'⁷²

NSW Government response

- 2.51** In response to the unintended target of workers by the proposed changes to Category 1 provisions, Ms Webb indicated that:

We all acknowledge that the framework is intended to look to those people who carry the ultimate responsibility for the safe system of work. That is certainly the way in which we approach our investigations and our enforcement activity. We have not been able to take many category 1 offences and I guess we are hoping that we might take more if the standard is changed.⁷³

- 2.52** Further to this Ms Webb advised that:

And I do not think we will change our approach of always looking to every person who might be culpable and then thinking about the appropriateness of what charge we took against the person, depending on what the fact scenario was as to who was the most culpable. That would include who was responsible for the system of work, as opposed to people who might have been there at the time that something happened. I think that is our approach and this provision will not change that overall approach. We are certainly increasing our number of prosecutions. I do not think there is any indication that we are prosecuting workers at a rate that we are not prosecuting employers.⁷⁴

Other issues raised by stakeholders

- 2.53** Stakeholders raised concerns with other aspects of the bill, some of which are briefly outlined in this section. These include:

- the health and safety representative (HSR) training arrangements;
- lack of amendments relating to psychological health; and
- prohibition of insurance for WHS fines
- hearing loss for professional and recreational shooters.

HSR training arrangements

- 2.54** The NSW Government advised that the amendment of section 72 of the Act is to clarify that HSRs can choose their course of training. While HSRs and PCBUs still need to consult about when to undertake HSR training and the reasonable costs associated with the training, it is

⁷² Submission 6, Australian Industry Group, p 6.

⁷³ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 46.

⁷⁴ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 46.

anticipated that the clarification will resolve some of the disputes which arise between PCBUs and HSRs leading to delays in completion of the HSR training.⁷⁵

- 2.55** Mr Sage, AWU, commented that while they generally support the changes to the HSR training arrangements it is not clear how a HSR could enforce their right to undertake the training:

The comment we have made in our submission is that in the context of those changes it does not appear there is a remedy available to an HSR if the employer, the PCBU, refuses to comply. At the moment the remedy is the matter is referred to the inspector and if the employer does not comply with the inspector's direction to allow them to attend training it is a civil penalty offence. The bill, as we read it, removes that and so we have a concern that it is not clear how a worker would enforce their right to have the training undertaken, except perhaps by way of relief in the Supreme Court, which I do not think anyone thinks is a good idea.⁷⁶

- 2.56** In its submission, the AWU considered a further amendment is required 'to re-insert some form of enforceability for HSR training decisions.'⁷⁷

- 2.57** The Ai Group also raised this issue with the construction of the proposed amendment to section 72:

The amendments preserve the ability of the parties to request an inspector to decide such matters but it is not clear how that will work if the HSR is fixed in their choice of trainer. What happens if the trainer does not accept the inspector's recommendation on the fee it should receive from the employer?⁷⁸

- 2.58** The NSW Business Chamber opposed the amendment to the provision which deals with the choice of HSR training 'due to the adverse effect that such a provision would have on workplace productivity. A degree of choice needs to remain with the employer, as the training chosen by the worker may not be the best fit for the particular workplace.'⁷⁹

- 2.59** The Australian Chamber of Commerce and Industry holds a similar view to the NSW Business Chamber on the choice of HSR training.⁸⁰

Lack of amendments relating to psychological health

- 2.60** Both the Police Association of NSW and the New South Wales Teachers Federation point out that the bill does not address the issue of psychological health, as was recommended in the Boland Review.⁸¹ The Police Association of NSW urges the committee to:

⁷⁵ Submission 1, NSW Government, p 10.

⁷⁶ Evidence, Mr Alistair Sage, Senior Legal Officer, Australian Workers' Union, 10 February 2020, p 13.

⁷⁷ Submission 9, Australian Workers' Union, p 5.

⁷⁸ Submission 6, Australian Industry Group, p 7.

⁷⁹ Submission 4, NSW Business Chamber, p 1.

⁸⁰ Submission 7, Australian Chamber of Commerce and Industry, Consultation Regulation Impact Statement Submission, p 50.

⁸¹ Submission 10, New South Wales Teachers Federation, p 3 and Submission 2, Police Association of NSW, p 2.

... make recommendations regarding the issues from the 2018 Review not addressed in this Bill, to ensure commitment by the NSW Parliament and NSW Government to the forms of implementation that best protect the physical and mental health and safety of workers, including police officers, in NSW.⁸²

- 2.61** In evidence, Mr Angus Skinner, Research Manager, Police Association of NSW, reiterated the importance of addressing psychological health risks for workers and the need for a commitment from the NSW Government to pursue this matter:

We appreciate that that is the case; that the Minister has selected specific components of the [Boland] review that he believes can be expedited and, therefore, introduced in this bill and that that in his view does not apply to recommendation 2 [regulations for psychological health]. We appreciate that that is the case and therefore as our first opportunity to engage with New South Wales Parliament regarding the issue of recommendation 2. We would hope that we would get a recommendation out of the Committee committing to implement fully recommendation 2. I know there has been some debate round whether the status quo or recommendation 2 is preferred.

Subsequent to that national process, and during that national process, indeed the representations by the New South Wales Government on a model that would best protect New South Wales police officers and New South Wales workers. We believe that the full implementation of recommendation 2 that extensive provisions within the regulations are on par with the significant detail and significant number of obligations in the regulations as applies to physical injury, that that is the ideal position to come out of that national process. We are seeking every opportunity available to ensure that that happens and that the New South Wales Government commits to that position.⁸³

Prohibition of insurance for WHS fines

- 2.62** The NSW Government advised that the bill's amendment to the Act 'will make it an offence for a person to enter into without reasonable excuse, provide or benefit from insurance or indemnity arrangements for liability for a monetary penalty for a WHS offence, thereby ensuring that the deterrents associated with WHS penalties are not diminished. The new offence would only apply to entry into insurance and indemnity arrangements after the date of commencement of the new provision.'⁸⁴
- 2.63** The AMWU indicated its support for the creation of the offence but called for the provision to be strengthened:

The AMWU supports the creation of an offence that prohibits the ability to have insurance policies cover penalties or indemnifies for penalties that could be levied under the WHS Act. The AMWU believes that such policies are abhorrent and are a means of discouraging meaningful compliance with the WHS Act. The wording of the provisions however, in the AMWU's opinion, needs to be strengthened. The proposed Section 272A should be one of strict liability – you either hold a policy or you do not; there

⁸² Submission 2, Police Association of NSW, p 2.

⁸³ Evidence, Mr Angus Skinner, Research Manager, Police Association of NSW, 10 February 2020, p 20.

⁸⁴ Submission 1, NSW Government, p 8.

should be no reasonable excuses for holding a policy that contains prohibited elements.⁸⁵

2.64 The Australian Chamber of Commerce and Industry is not supportive of this provision to create this offence and supports the status quo. The Chamber suggested that the recommendation on this topic in the Boland Review was not based on evidence.⁸⁶

2.65 The Ai Group also has concerns with this provision:

We do hold concerns about the level of protection that the term “without reasonable excuse” may afford companies who inadvertently hold the type of cover prohibited by the proposed s272A, particularly in the following circumstances:

1 Where the insurance policy is vague and nuanced as to the extent of cover being offered. Our examination of such documents reveals significant ambiguity, and some internal contradiction, as to whether such cover is indeed provided or not. An insurer may be found to have offered such cover in circumstances where the insured could genuinely not know that was the case.

2 Where local arms of multi-national companies are covered by such insurance as part of global insurance bundles negotiated by their parent company overseas. The Bill would make such insurance ineffective upon enactment, however we are concerned that the local arm of the company may be found to be in breach of the proposed s272A(a) despite (1) not taking out the insurance themselves and (2) not knowing that the insurance taken out on their behalf provided the offending level of cover.

The above concerns could be avoided if s272A(a) were deleted and the provision relied only on rendering the insurance unlawful to offer or take the benefit of. We do not believe this would weaken the intent or effect of the provision.⁸⁷

Hearing loss for professional and recreational shooters

2.66 Evidence was received concerning hearing loss for professional and recreational shooters and the request for additional noise suppression options. There is clearly a work safety and health issue here.⁸⁸

NSW Government response

2.67 The NSW Government was not asked to respond to stakeholders' specific concerns on the issues above at the hearing. However, Ms Webb did indicate that the NSW Government 'would completely engage in the process of the discussion that is to happen with the Boland review' including on those recommendations of the review that are not part of this bill.⁸⁹

⁸⁵ Submission 8, Australian Manufacturing Workers' Union, p 6.

⁸⁶ Submission 7, Australian Chamber of Commerce and Industry, Consultation Regulation Impact Statement Submission, p 44.

⁸⁷ Submission 6, Australian Industry Group, pp 10-11.

⁸⁸ Submission 11, Federation of Hunting Clubs.

⁸⁹ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service, 10 February 2020, p 47.

- 2.68** In its submission on the issue of prohibiting insurance for WHS fines the NSW Government stated that '[i]f duty holders can escape the consequences of their actions through the availability of insurance or other indemnity arrangements that cover WHS penalties, the deterrent powers of the WHS Act could be seriously undermined. The 2018 National Review Report and the Senate Report strongly condemned the availability of such insurance.'⁹⁰

Committee comment

- 2.69** The committee acknowledges that overall the majority of stakeholders are supportive of the Work Health and Safety Amendment (Review) Bill 2019.
-

Finding 1

The committee acknowledges that a majority of stakeholders are supportive of the Work Health and Safety Amendment (Review) Bill 2019.

- 2.70** We note the issue of the timing of the bill but support the move to expedite certain reforms borne out of the national review and we acknowledge that the NSW Government has given an undertaking that it will continue to fully participate in the national review process. We strongly encourage the NSW Government to take on board stakeholder views in this inquiry, including those relating to psychological health risks, as part of its participation in the national process.
- 2.71** The committee agrees with the submission made by the NSW Police Association, that the regulations made pursuant to the Act should be amended to provide better protection for the physical and mental health and safety of workers in NSW. As was noted in an earlier report of a Legislative Council inquiry into allegations of bullying at WorkCover (as SafeWork was then known), the work safety laws and the regulator are focused mainly on the risks and the occurrence of physical injuries and the system does not have the requisite sensitivity to properly identify the risks of psycho-social stressors and injury or to address them in a way that ensures the wellbeing of workers.
- 2.72** Accordingly, we recommend that the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review:

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.⁹¹

Recommendation 1

That the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review.

⁹⁰ Submission 1, NSW Government, p 8.

⁹¹ *Review of the model Work Health and Safety laws*, Final report, December 2018.

Recommendation 2

That the Legislative Council proceed to consider the Work Health and Safety Amendment (Review) Bill 2019 and where appropriate consider amendments in the committee stage that address stakeholder concerns raised in this inquiry.

Appendix 1 Submissions

No.	Author
1	NSW Government
2	Police Association of NSW
3	Housing Industry Association
4	NSW Business Chamber
5	CFMMEU
6	Australian Industry Group (Ai)
7	Australian Chamber of Commerce and Industry
8	Australian Manufacturing Workers' Union
9	The Australian Workers' Union
10	New South Wales Teachers Federation
11	Federation of Hunting Clubs Inc
12	Unions NSW

Appendix 2 Witnesses at hearing

Date	Name	Position and Organisation
Monday 10 February 2020 Macquarie Room Parliament House, Sydney	Mrs Patrizia Cassaniti	Mother of Christopher Cassaniti
	Mr Robert Cassaniti	Father of Christopher Cassaniti
	Mr David Henry	Work, Health and Safety Officer, Australian Manufacturing Workers Union
	Mr Alastair Sage	Senior Legal Officer, Australian Workers Union
	Mr Ben Kruse	Legal and Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU)
	Mr Tony King	President, Police Association of NSW
	Mr Angus Skinner	Research Manager, Police Association of NSW
	Mr Mark Morey	Secretary, Unions NSW
	Ms Natasha Flores	Industrial Officer (WHS/WC) Unions NSW
	Mr Mark Goodsell	Head – NSW, Australian Industry Group
	Mr Stephen Larsson	Federation of Hunting Clubs
	Ms Rose Webb	Deputy Secretary, Better Regulation Division Department of Customer Service
	Ms Mary Snell	Deputy General Counsel, Legal Services Group Department of Customer Service

Appendix 3 Minutes

Minutes no. 12

Thursday 5 December 2019

Portfolio Committee No. 1 - Premier and Finance

Room 1136, Parliament House, Sydney, at 3.00 pm

1. Members present

Ms Moriarty, *Chair*

Mr Martin (by teleconference)

Mr Searle

2. Apologies

Mr Franklin

Mr Borsak, Deputy Chair

Mr Shoebridge

Mrs Ward

3. Correspondence

The committee noted the following item of correspondence:

Received

- 20 November 2011 – Email from Ms Abigail Boyd MLC to the secretariat, advising that Mr David Shoebridge MLC will substitute for Ms Boyd for the duration of the inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019.

4. Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019

4.1 Terms of reference

The committee noted the following terms of reference referred by the House on Tuesday 19 November 2019:

That:

- (a) the provisions of the Work Health and Safety Amendment (Review) Bill 2019 be referred to Portfolio Committee No. 1 – Premier and Finance for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) the committee report by Tuesday 24 March 2020, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

4.2 Proposed timeline

Resolved, on the motion of Mr Searle: That the committee adopt the following timeline for the administration of the inquiry:

- Tuesday 4 February 2020 – Submissions close
- Monday 10 February 2020 – 1 full day hearing
- Thursday 12 March 2020 – circulation of Chair's draft report (please note this is 7 days before the proposed deliberative as per the new sessional order)

- Thursday 19 March 2020 (10.00 am) – report deliberative
- Tuesday 24 March 2020 – report tabled.

4.3 Timing of Chair's draft report

The committee noted that as per a new sessional order, the Chair's draft report must be circulated to members 'at least 7 calendar days prior to the date scheduled for the report deliberative, unless the committee decides otherwise'.

4.4 Stakeholder list

Resolved, on the motion of Mr Searle: That the following stakeholders be invited to make a submission and to appear as a witness at the hearing:

Government

- SafeWork Australia
- SafeWork NSW
- State Insurance Regulatory Authority (SIRA)
- Insurance & Care NSW (icare)
- Department of Customer Service
- NSW State Coroner

Legal organisations

- Australian Lawyers Alliance
- Law Society of New South Wales
- NSW Bar Association

Unions and associations

- Australian Council of Trade Unions
- Australian Constructors Association
- Australian Federation of Employers and Industries
- Australian Industry Group
- Australian Manufacturing Workers' Union
- Australian Medical Association (NSW)
- Australian Nursing and Midwifery Federation New South Wales Branch
- Australian Rehabilitation Providers Association (ARPA)
- Australian Road Transport Industrial Organisation NSW Branch
- Construction Forestry Maritime Mining Energy Union, Construction & General Division, NSW Branch
- Construction Forestry Maritime Mining Energy Union, Mining & Energy Division, National Branch
- Fire Brigade Employees' Union of New South Wales
- Group Training Association of NSW & ACT
- Hearing Care Industry Association
- Master Builders Association of NSW
- Motor Traders' Association of New South Wales (MTANSW)
- NSW Farmers Association
- New South Wales Nurses' and Midwives Association
- NSW Teachers Federation
- NSW Self Insurers Association

- Police Association of New South Wales
- Public Service Association
- Transport Workers Union NSW
- United Services Union
- Unions NSW.

4.5 Submissions and online questionnaire

Resolved, on the motion of Mr Searle that:

- the committee call for public submissions
- the committee use an online questionnaire to capture individuals' views, and that the draft questions be as follows:
 - What is your position on the bill? Select one of these options: support, oppose, neutral/undecided
 - In relation to the previous question, please explain your position on the bill (500 word text box)
 - Do you have any other comments on the bill? (250 word text box)
- the committee accept proformas
- the media release announcing the establishment of the inquiry and the committee's website and emails to stakeholders note that there will be an online questionnaire to capture individuals' views.

4.6 Advertising

The committee noted that the inquiry will be advertised via social media, stakeholder emails and a media release distributed to all media outlets in New South Wales.

4.7 Questions on notice and supplementary questions

Resolved on the motion of Mr Searle: That:

- members provide any supplementary questions to the secretariat within 1 day of receiving the transcript of evidence
- witnesses be required to provide answers to questions on notice/supplementary questions within 7 days.

4.8 Provision of documents to participating member

Resolved, on the motion of Mr Searle: That Mr D'Adam, who has advised the committee that he intends to participate for the duration of the inquiry into provisions of the Work Health and Safety Amendment (Review) Bill 2019, be provided with copies of inquiry documents including meeting papers, unpublished submissions and the Chair's draft report.

5. Adjournment

The committee adjourned at 3.13 pm, until Monday 10 February 2020, Macquarie Room (public hearing).

Rebecca Main
Committee Clerk

Minutes no. 13

Wednesday 5 February 2020

Portfolio Committee No. 1 - Premier and Finance

Room 813C, Parliament House, Sydney, at 3.55 pm

1. Members present

Ms Moriarty, *Chair*

Mr Borsak, *Deputy Chair*

Ms Boyd

Mr Franklin

Mr Martin

Mr Searle

Mrs Ward

2. Draft minutes

Resolved, on the motion of Mr Borsak: That draft minutes no. 11 be confirmed.

3. Correspondence

The committee noted the following item of correspondence:

Received

- 20 November 2011 – Email from Ms Abigail Boyd MLC to the secretariat, advising that Mr David Shoebridge MLC will substitute for Ms Boyd for the duration of the inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019.

4. ***

5. ***

6. Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019

6.1 Hearing on Monday 10 February 2020

Resolved, on the motion of Mr Searle: That:

- the committee invite Mr and Mrs Cassaniti to give evidence at the commencement of the hearing;
- the hearing begin at 9.30 am, finish at 4.00 pm and include two panel discussions of 1¼ hour duration, one each for unions and industry representatives;
- the committee invite organisations that have lodged a submission or indicated that they intend to lodge a submission, to give evidence at the hearing
- the committee hear from the NSW Government last at the hearing.

7. Adjournment

The committee adjourned at 4.25 pm, until 9:15 am Monday 10 February 2020, Macquarie Room, Parliament House (*Work Health and Safety Amendment (Review) Bill 2019 hearing*).

Stewart Smith/Rebecca Main
Committee Clerk

Minutes no. 14

Monday 10 February 2020

Portfolio Committee No. 1 - Premier and Finance

Macquarie Room, Parliament House, Sydney, at 9.24 am

1. Members presentMs Moriarty, *Chair*Mr Borsak, *Deputy Chair* (until 12.15 pm)

Mr Shoebridge (until 10.49 am)

Mr Khan (substituting for Mr Franklin)

Mr Martin

Mr Searle

Mrs Ward

Mr D'Adam (participating)

2. Draft minutes

Resolved on the motion of Mr Searle: That draft minutes no. 13 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 30 January 2020 – Letter from the Hon Natasha Maclaren-Jones MLC, Government, Whip to the secretariat, advising that the Hon Trevor Khan MLC will substitute for the Hon Ben Franklin for the inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019 hearing on 10 February 2020 and deliberative on 19 February 2020.
- 6 February 2020 – Email from Ms Jennifer Low, Director, WHS & Workers' Compensation Policy, Australian Chamber of Commerce, advising the Australian Chamber of Commerce is unable to attend the Work Health and Safety Amendment (Review) Bill 2019 hearing on 10 February 2020.
- 7 February 2020 – Email from Mr Alastair McConnachie, Deputy Executive Director, NSW Bar Association to secretariat, advising the Bar Association is not in a position to appear at the Work Health and Safety Amendment (Review) Bill 2019 hearing on 10 February 2020.
- 7 February 2020 – Email from Ms Elizabeth Greenwood, Policy Manager, NSW Business Chamber, advising the NSW Business Chamber will not give evidence at the Work Health and Safety Amendment (Review) Bill 2019 hearing on 10 February 2020.

4. Inquiry into Budget Estimates 2019-2020 – procedural resolutions – further hearings

Resolved, on the motion of Mr Searle: That the portfolios under the same Minister be examined concurrently.

5. Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019**5.1 Public submissions**

The committee noted that submissions nos 1-12 were published by the committee clerk under the authorisation of the resolution appointing the committee.

5.2 Allocation of question time

Resolved on the motion of Mr Searle: that the allocation of questions alternate between the opposition, crossbench and government members in that order, with call for follow-on questions at the Chair's discretion.

5.3 NSW Government witnesses

Resolved on the motion of Mrs Ward: that the committee hear from the NSW Government witnesses at 2.15 pm.

5.4 Evidence from Mr and Mrs Cassaniti

The Chair advised that Mr and Mrs Cassaniti have requested to show a video to members.

Mr Khan moved: that the committee proceed to take evidence from Mr and Mrs Cassaniti *in camera*.

Mr Searle moved that the motion of Mr Khan be amended by omitting 'take evidence from Mr and Mrs Cassaniti *in camera*' and inserting instead 'view the video from Mr and Mrs Cassaniti *in camera* and take all other evidence from Mr and Mrs Cassaniti in public'.

Amendment of Mr Searle put.

The committee divided.

Ayes: Mr Borsak, Ms Moriarty, Mr Searle, Mr Shoebridge.

Noes: Mr Khan, Mr Martin, Mrs Ward.

Question, as amended, resolved in the affirmative.

Mr Khan's question lapses.

Mr Shoebridge moved: that the committee proceed to take evidence from Mr and Mrs Cassaniti in public.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Shoebridge.

Noes: Mr Khan, Mr Martin, Ms Moriarty, Mr Searle, Mrs Ward.

Question resolved in the negative.

Resolved on the motion of Mr Khan: that the family of Mr and Mrs Cassaniti remain during the evidence given *in camera*.

5.5 In-camera hearing

The committee proceeded to take *in camera* evidence.

The following witnesses were sworn:

- Mrs Patrizia Cassaniti
- Mr Robert Cassaniti

Persons present other than the committee: Rebecca Main, Shelly Savage, Angeline Chung, family members of Mr and Mrs Cassaniti and Hansard reporters.

Resolved on the motion of Mr Searle: that the hearing resume in public.

5.6 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were examined:

- Mrs Patrizia Cassaniti
- Mr Robert Cassaniti

Mrs Cassaniti tabled the following:

- Document entitled "23 Deaths at work: a paper on the death toll at work in Victoria during 2018" by OHS Intros

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr David Henry, National WHS Officer, Australian Manufacturing Workers' Union
- Mr Alistair Sage, Senior Legal Officer, Australian Workers' Union
- Mr Ben Kruse, Legal and Industrial Officer, CFMMEU
- President, Police Association of NSW
- Mr Angus Skinner, Research Manager, Police Association of NSW
- Mr Mark Morey, Secretary, Unions NSW
- Ms Natasha Flores, Industrial Officer (WHS/WC), Unions, NSW

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Mark Goodsell, Head – NSW Australian Industry Group

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Stephen Larsson, Federation of Hunting Clubs

Mr Larsson tabled the following documents:

- NSW Government publication – Code of Practice – Managing noise and preventing hearing loss at work – August 2019
- Daily Mail Australia – article 18 April 2019 – *Daylight doorstep execution attempt: Masked gunman fires shots at a family man before fleeing in a stolen Mercedes in 'gang-related' attack*

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service
- Ms Mary Snell, Deputy General Counsel, Legal Services Group, Department of Customer Service

Ms Webb tabled the following document:

- NSW Government – NSW Work Health and Safety Regulators – Response to Safe Work Australia's Consultation Regulation Impact Statement – Recommendations of the 2018 Review of the Model Work Health and Safety Laws

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

6. Post hearing decisions

Resolved, on the motion of Mr Khan: That:

- answers to questions on notice be returned within 7 days;
- the secretariat ascertain if Mr and Mrs Cassaniti would prefer that their video evidence remain confidential; and
- the committee accept and publish the following documents tendered during the public hearing:
 - Document entitled "23 Deaths at work: a paper on the death toll at work in Victoria during 2018" by OHS Intros, tendered by Mrs Cassaniti
 - NSW Government publication – Code of Practice – Managing noise and preventing hearing loss at work – August 2019, tendered by Mr Stephen Larsson, Federation of Hunting Clubs
 - Daily Mail Australia – article 18 April 2019 – *Daylight doorstep execution attempt: Masked gunman fires shots at a family man before fleeing in a stolen Mercedes in 'gang-related' attack*, tendered by Mr Stephen Larsson, Federation of Hunting Clubs
 - NSW Government – NSW Work Health and Safety Regulators – Response to Safe Work Australia's Consultation Regulation Impact Statement – Recommendations of the 2018 Review of the Model Work Health and Safety Laws, tendered by Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service

7. Adjournment

The committee adjourned at 3.02 pm, until Tuesday 3 March 2020, Jubilee Room, Parliament House (Special Minister of State, Public Service and Employee Relations, Aboriginal Affairs and the Arts hearing).

Rebecca Main
Committee Clerk

Draft minutes no. 21

Thursday 19 March 2020

Portfolio Committee No. 1 – Premier and Finance

McKell Room, Parliament House, 10.03 am

1. Members present

Ms Moriarty, *Chair*

Mr Borsak, *Deputy Chair*

Mr Shoebridge

Mr Khan (substituting for Mr Franklin)

Mr Martin

Mr Searle

Mrs Ward

2. Apologies

Mr D'Adam

3. Previous minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 14 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 10 February 2020 – Email from Mrs Patricia Cassaniti to secretariat requesting the video shown to the committee on 10 February 2020 remain confidential.

Sent

- 10 February 2020 – Email from secretariat to Mrs Patricia Cassaniti seeking her preference regarding the publication status of the video shown to the committee on 10 February 2020.

5. Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019

5.1 Video evidence from Mrs and Mr Cassaniti

Resolved, on the motion of Mr Searle: That the video shown by Mrs Cassaniti to the committee on 10 February 2020 remain confidential.

5.2 Answers to questions on notice

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from the Department of Customer Service received on 21 February 2020.

5.3 Consideration of Chair's draft report

The Chair submitted her draft report entitled *Work Health and Safety Amendment (Review) Bill 2019*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Searle: That paragraph 2.14 be amended by omitting 'broadly support' and insert instead 'strongly supported'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.31 be amended by omitting 'There is also' and inserting instead 'The government also asserted there is'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.37 be amended by omitting 'advised' and inserting instead 'on behalf of the government gave the opinion'.

Mr Khan moved: That:

- a) the following paragraph 2.40 be omitted: 'While the committee notes the NSW Government advice on this issue, we are of the view that the NSW Government approach of inserting a note in the WHS Act and the reliance on the *Crimes Act 1900* to prosecute workplace deaths is not enough and does not adequately implement the recommendation of the Boland Review. We believe that an industrial manslaughter provision in the bill will support harmonisation at the national level and provide the ultimate deterrent by sending a clear message to employers and the broader community that a life lost at work is no less valuable than a life lost elsewhere'.
- b) the following paragraph 2.41 be omitted: 'In addition, we note that if an industrial manslaughter provision is introduced then the regulator, SafeWork NSW, must be adequately resourced to implement the provision and support prosecutions'.
- c) the following paragraph 2.42 be omitted: 'The committee recommends that the Legislative Council amend the Work Health and Safety Amendment (Review) Bill 2019 to include a provision for industrial manslaughter'.
- d) Recommendation 1 be omitted: 'That the Legislative Council amend the Work Health and Safety Amendment (Review) Bill 2019 to include a provision for industrial manslaughter'.
- e) the following new paragraphs be inserted after paragraph 2.40: 'The committee notes a divergence of view on the issue of the appropriateness of introducing an offence of industrial manslaughter.'

Additionally, amongst those supporting such an offence, at this stage, there seems no clear agreement upon the model to be adopted. The committee is therefore of the view that stakeholders should continue to engage in this issue.

Those discussions should not delay the passage of this bill, which introduces a number of positive amendments to work health and safety legislation, including the addition of the fault element of “gross negligence” to category 1 offences, the increase in penalties for serious work health and safety offences and the extending of time for the commencement of a prosecution from 12 to 18 months’.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Khan, Mr Martin, Mrs Ward.

Noes: Ms Moriarty, Mr Searle, Mr Shoebridge.

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That following new finding be inserted after paragraph 2.69:

'Finding 1

The committee acknowledges that a majority of stakeholders are supportive of the Work Health and Safety Amendment (Review) Bill 2019’.

Resolved, on the motion of Mr Searle: That:

- a) the following new paragraph be inserted after 2.70:

‘The committee agrees with the submission made by the NSW Police Association, that the regulations made pursuant to the Act should be amended to provide better protection for the physical and mental health and safety of workers in NSW. As was noted in an earlier report of a Legislative Council inquiry into allegations of bullying at WorkCover (as SafeWork was then known), the work safety laws and the regulator are focused mainly on the risks and the occurrence of physical injuries and the system does not have the requisite sensitivity to properly identify the risks of psycho-social stressors and injury or to address them in a way that ensures the wellbeing of workers.

Accordingly, we recommend that the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review:

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks’.

- b) the following new recommendation be inserted after paragraph 2.71:

'Recommendation X

That the NSW Government urgently review, with a view to implementing, Recommendation 2 of the Boland Review’.

Resolved, on the motion of Mr Khan: That paragraph 2.71 be omitted: ‘In considering the issues raised by stakeholders on the enhanced Category 1 offence provision, HSR training arrangements and the prohibition of insurance for WHS fines, we note stakeholder views and recommend these issues be part of the debate on the bill, and where necessary, amendments to the bill be considered that address these concerns’.

Mr Searle moved: That the following new paragraph be inserted after paragraph 2.70:

‘In considering the issues raised by stakeholders on the enhanced Category 1 offence provision, HSR training arrangements and the prohibition of insurance for WHS fines, we note stakeholder views.

The Committee is persuaded by the submissions made by the AWU, outlined at paragraph 2.49, and recommend that the amendments proposed in the Bill for an enhanced Category 1 offence should be limited in scope to PCBU's and officers.

In relation to the HSR training arrangements and the prohibition of insurance for WHS fines contained in the bill, the Committee indicates its support for these aspect of the legislation.

We understand that other issues included in the Boland Review but not addressed in the current Bill remain issues of concern to many stakeholders. The Committee recommends that these issues be raised during debate on the bill and, where necessary and appropriate, amendments to the bill be considered that address those concerns'.

Question put.

The committee divided.

Ayes: Ms Moriarty, Mr Searle.

Noes: Mr Borsak, Mr Khan, Mr Martin, Mr Shoebridge, Mrs Ward.

Question resolved in the negative.

Mr Borsak moved: That:

- a) paragraph 2.54 be amended by inserting a forth dot point 'hearing loss for professional and recreational shooters'
- b) the following new heading and paragraph be inserted after paragraph 2.66:

'Hearing loss for professional and recreational shooters

Evidence was received concerning hearing loss for professional and recreational shooters and the request for additional noise suppression options. There is clearly a work safety and health issue here.'

Mr Shoebridge moved: That the motion of Mr Borsak be amended by omitting 'recreational'.

Amendment of Mr Shoebridge put.

The committee divided.

Ayes: Ms Moriarty, Mr Searle, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mr Martin, Mrs Ward.

Amendment of Mr Shoebridge resolved in the negative.

Mr Shoebridge moved: That the motion of Mr Borsak be amended by inserting at the end of the paragraph: 'This must also be weighed up against valid public safety concerns regarding gun safety and Australia's strong gun control regime'.

Amendment of Mr Shoebridge put.

The committee divided.

Ayes: Ms Moriarty, Mr Searle, Mr Shoebridge.

Noes: Mr Borsak, Mr Khan, Mr Martin, Mrs Ward.

Amendment of Mr Shoebridge resolved in the negative.

Original question of Mr Borsak put and passed.

Resolved, on the motion of Mrs Ward: That:

- a) The draft report as amended be the report of the committee and that the committee present the report to the House;

- b) The transcripts of evidence, submissions, tabled documents, answers to questions on notice, responses to the online questionnaire and summary report of these responses, and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished attachments to submissions and individual responses to the online questionnaire be kept confidential by the committee;
- d) Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- g) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- h) That the report be tabled on Tuesday 24 March 2020.

6. Adjournment

The committee adjourned at 10.44 am, *sine die*.

Rebecca Main
Committee Clerk

Appendix 4 Dissenting statements

The Hon Tara Moriarty MLC and the Hon Adam Searle MLC, Australian Labor Party

The evidence before Portfolio Committee 1 during its inquiry into the *Work Health and Safety Amendment (Review) Bill 2019* has firmed the view of the Labor members that the legislation should include provisions for industrial manslaughter.

The chief argument during the inquiry against such provisions is that where they exist elsewhere in Australia they have not been used, or have yet to be used successfully. This overlooks three key factors.

First, a key role of the law is to set clear guidelines about what is acceptable and what is not acceptable in our society. In so doing, the law provides deterrence against proscribed behaviours. The criminal law is a clear example of this, as are laws of a similar character. An analogous example is the former anti-vilification provisions in s20D of the *Anti-Discrimination Act 1977 (NSW)*, now replaced by s93Z of the *Crimes Act 1900 (NSW)*. The fact that neither provision has been used is no reason to not have them in law, given the important public policy reasons underpinning them. We view industrial manslaughter laws in the same way, although we also believe they will have practical application.

Secondly, where the provisions exist elsewhere in Australia they are either very new and have not had time to be used or, as in the ACT, they are found in the mainstream criminal law which has proven to be difficult to apply to the workplace context. This is one of the reasons we believe special laws to address the consequences of workplace deaths is needed, as well as laws that address risks to health and safety.

Thirdly, there was before the inquiry evidence that suggested the resourcing of work safety regulators was inadequate, particularly in relation to issues of workplace death. If there was to be an industrial manslaughter laws introduced in NSW, the regulator (SafeWork) must be properly resourced to implement the laws and support investigations and prosecutions.

Despite the objections of some stakeholders and the majority of the committee, we found the evidence and submissions to the inquiry in support of industrial manslaughter laws to be compelling, particularly the evidence of Mrs and Mr Cassaniti. We acknowledge their terrible loss, which nothing can remedy, and thank them for their tireless work on raising awareness and improving workplace safety through their advocacy of practical measures, including industrial manslaughter laws.

Accordingly, we favour the creation of an industrial manslaughter offence in the *Work Safety Act 2011 (NSW)* with significant fines for businesses and their senior officers, with the possibility of up to 25 years' jail for senior officers.⁹²

We believe that industrial manslaughter provisions would support harmonisation at the national level and send a clear message to employers and the broader community that a life lost at work is no less valuable than a life lost elsewhere.

⁹² Directors, holders of an executive position, any person who makes, or participates in making, decisions affecting part, or a substantial part, of the business or company.

We are also persuaded by the submissions made by the AWU, outlined at paragraph 2.48 that the amendments proposed in the bill for an enhanced Category 1 offence should be limited in scope to PCBU's and officers.

Mr David Shoebridge MLC, The Greens

Much of this report is a product of consensus among all committee members. There was however one aspect that could not be agreed and unfortunately did not find its way into the report. That was the need to support industrial manslaughter laws in NSW.

The Greens have a longstanding commitment to supporting industrial manslaughter laws in Australia. Far too many people in this country go to work and do not come home.

Over the past two decades the legal ability of unions to proactively regulate and enforce work health and safety has been diminished by a series of restrictive and ideological attacks on their right of entry. This has made workplaces less safe.

In the face of this there is an even stronger imperative to ensure that the laws that remain on the statute books in regards work health and safety are as strong as they possibly can be. We had cogent and powerful evidence from a range of unions about the desirability of clear laws defining and penalising industrial manslaughter.

We also had extremely powerful testimony from Mr and Mrs Cassaniti who told us of the heartbreak they suffered after their 18-year-old son Christopher died at work when a 15-metre scaffolding tower collapsed on him at a construction site in Macquarie Park, in Sydney. They called for tough industrial manslaughter laws so that, so far as the parliament could make possible, their heartbreak was not repeated.

As a Greens MP I cannot and will not ignore this testimony. I firmly believe we should be legislating for industrial manslaughter and I confirm my party's ongoing commitment to achieving this goal.

