

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**TABLING STATEMENT  
FOR THE  
GOVERNMENT RESPONSE TO THE  
STANDING COMMITTEE ON LEGAL AFFAIRS**

**INQUIRY INTO  
THE CRIMES (INDUSTRIAL MANSLAUGHTER)  
AMENDMENT BILL 2002**

Report No. 6 of the Standing Committee on Legal Affairs  
September 2003

**Minister for Industrial Relations  
18 December 2003**

On 12 December 2002, the Crimes (Industrial Manslaughter) Amendment Bill 2002 was introduced into the Legislative Assembly and referred to the Standing Committee on Legal Affairs for a report.

The Bill's intent is to ensure that employers can be held responsible where their criminally reckless or negligent conduct causes the death of a worker. The Bill will enable a more effective application of the law of manslaughter to corporate employers whose conduct is grossly negligent or who take unjustifiable risks with the lives of their workers.

The Bill also provides that senior officers of businesses, corporations, government entities, and Government Ministers can be prosecuted (as natural persons) for industrial manslaughter where they cause the death of a worker. The Bill will introduce new financial penalties of up to \$5 million for corporations.

The Bill is a very important part of the Government's occupational health and safety compliance and enforcement strategy. Referral to the Committee has given the community an opportunity to comment on its provisions.

The Committee released its report on 17 September 2003. The report details the findings of the Committee's inquiry into the Bill. The report makes six recommendations. The Government has accepted the major recommendation of that report (to proceed with the Bill) and agrees in principle with the intent of the Committee's recommendations.

The Government notes that the Committee was satisfied that concerns that the provisions of the Bill weakened the criminal standards of proof in relation to manslaughter (hence, exposing persons unfairly to prosecution) are unfounded and that there is no weakening of standards or watering down of the elements of the manslaughter offence.

The Government also notes that the Committee addressed concerns that natural persons as "senior officers" could be prosecuted under the provisions of the Bill for the conduct of an employer - a form of "vicarious liability". The Committee noted correctly "that for a natural person to be convicted of industrial manslaughter they must be charged on the basis of their own actions or omissions and negligence or recklessness causing death [and that this] must be proved beyond reasonable doubt. The conviction of a corporation would not, automatically, result in the guilt of any particular officer of the corporation".

The Government would like to thank the Committee members for their work on this complex and important issue.

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AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT RESPONSE  
TO THE  
STANDING COMMITTEE ON LEGAL AFFAIRS:  
REPORT No 6 – CRIMES (INDUSTRIAL  
MANSLAUGHTER) AMENDMENT BILL 2002**

**Minister for Industrial Relations  
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## Overview

On 12 December 2002, the Crimes (Industrial Manslaughter) Amendment Bill 2002 was introduced into the Legislative Assembly. In order to provide Members and the community with an opportunity to contribute their views on the legislation, the [then] Minister for Industrial Relations, Simon Corbell MLA, requested that the Assembly refer the Bill to the Standing Committee on Legal Affairs for an inquiry.

The Bill's intent is to ensure that employers can be held responsible where their criminally reckless or negligent conduct causes the death of a worker. The Bill will enable a more effective application of the law of manslaughter to corporate employers whose conduct is grossly negligent or who take unjustifiable risks with the lives of their workers.

The Bill also provides that senior officers of businesses, corporations, government entities, and Government Ministers can be prosecuted (as natural persons) for industrial manslaughter where they cause the death of a worker. The Bill will introduce new financial penalties of up to \$5 million for corporations.

The Committee released its report on 17 September 2003. The report details the findings of the Committee's inquiry into the Bill. The report makes six recommendations. The Committee, by a majority, recommended that the Bill proceed (Recommendation 3). The Committee made five other recommendations which were unanimously supported. These relate to areas in the Bill which in the Committee's view could be improved should it proceed.

### RECOMMENDATION 1

**The Committee recommends that Section 49B(1) and (2) be amended to make it clear that their application is limited to relevant responsibilities and undertakings of the employer or senior officer in those capacities.**

### Government Response

#### **Agreed in-principle, although amendments are not considered necessary**

The Government agrees with the intentions of the Committee's recommendation that the sections be limited to relevant responsibilities and undertakings of the employer or senior officer in those capacities. In the Government's view, however, amending sections 49B(1) and 49B(2) is not necessary for this to be achieved.

Sections 49B(1) and 49B(2) provide that conduct, for the purposes of the new industrial manslaughter offences, includes an omission to act by the employer or a senior officer of the employer if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker.

Sections 49B(1) and 49B(2) further provide that the danger must arise from an act of the employer or senior officer, from anything in the employer's or senior officer's possession or control, or from any undertaking of the employer or senior officer.

The Committee notes that these provisions seem very generally expressed and it would be desirable to limit their application to the employer's or senior officer's responsibilities and undertakings as employers and senior officers.

The Government notes that subsections 49B(1) and 49B(2) are limited to an employer's or senior officer's responsibilities and undertaking as employers or senior officers. Paragraphs (a) - (c) of these subsections need to be read in context with the opening words of the subsections. As presently drafted, section 49B provides that an employer or senior officer is liable for omissions if his or her failure to act relates to a duty that the employer or senior officer owes to the worker, as the worker's employer or senior officer. Discussions with legal policy officers in the Department of Justice and Community Safety confirm this view.

In addition, section 49B closely follows paragraph 5.1.7(c) as recommended by the Model Criminal Code Officers' Committee (MCCOC) in its draft report on Chapter 5 of the Model Criminal Code (Offences Against the Person). The Government does not consider that there is a case for departure from criminal code policy in this circumstance.

## **RECOMMENDATION 2**

**The Committee recommends that paragraphs 49C(c)(i) and (ii) and 49D(c) (i) and (ii) be reviewed to clarify the meaning of the phrase 'or any other worker of the employer'.**

### **Government Response**

#### **Agreed in-principle**

The Government agrees with the intentions of the Committee's recommendation that an employer's or senior officer's reckless or negligent conduct towards another worker that has no bearing on the death of the worker who died should not give rise to the offences. In the Government's view, no amendment to paragraphs 49C(c)(i) and (ii) or to 49D(c) (i) and (ii) is necessary to achieve this.

Sections 49C and 49D provide for the employer and senior officer offences. Under the provisions, an employer (s49C(c)), or a senior officer of an employer (s49D(c)), commits an offence if the employer is reckless [paragraph (i)] or negligent [paragraph (ii)] about causing harm to the worker, or any other worker of the employer, by the conduct.

The Committee states at paragraph 2.94 of its report that the purpose of the subsections is "clearly to deal with the situation where the person directly affected by the recklessness of the employer [or senior officer] is not the actual victim but where the death is clearly as a result of the recklessness". The Committee goes on to state that "as it is currently written it could be interpreted to mean that recklessness not related to the actual death could be taken as evidence of culpability". At paragraph 2.95 of its report, the Committee states that "[t]he employer's [or senior officer's] negligence or recklessness toward other employees, in circumstances unrelated to the death, while it may be evidence of a pattern of behaviour, should not be taken as evidence of the employer's commission of a specific offence".

When interpreting subsections 49C(c)(i) and 49D(c)(i), it is crucial to take into account paragraph (b). Paragraph (b) of each section states that an employer or senior officer

commits an offence if the employer's or senior officer's conduct causes the death of the worker. It is that conduct that is referred to in the phrase "by the conduct" in paragraph (c).

In the view of the Government, if the employer's or senior officer's negligence or recklessness is "unrelated to the death" the employer cannot be liable. This is because paragraph (b) requires the employer's conduct to cause the death, and paragraph (c) requires the employer or senior officer to be reckless or negligent "by the conduct". The Government also notes that the reference in paragraph (c) to "the conduct" can only be a reference to the conduct that caused the death. Reckless or negligent conduct towards another worker that has no bearing on the death of the worker who died would not qualify. Discussions with legal policy officers in the Department of Justice and Community Safety confirm the Government's views on these matters.

The Government also points to the definition of 'cause' in this context - that is, the reckless or negligent conduct must substantially contribute to the death. Clearly, there will be cases where an employer's or senior officer's reckless or negligent conduct towards one worker or group of workers will not have substantially contributed to the death of the deceased worker.

In addition, it is noted that paragraphs 49C(b) and (c) and 49D(b) and (c) closely follow sections 5.1.10 (Manslaughter) and 5.1.11 (Dangerous conduct causing death) as recommended by the Model Criminal Code Officers' Committee (MCCOC) in its draft report on Chapter 5 of the Model Criminal Code (Offences Against the Person). As with Recommendation 1, the Government does not consider that there is a case for departure from criminal code policy in this circumstance.

### **RECOMMENDATION 3**

**The Committee, by a majority, recommends that this Bill be proceeded with.**

#### **Government Response**

**Agreed**

The Government welcomes the support of the majority of the Committee and will proceed with the Bill in a timely manner.

### **RECOMMENDATION 4**

**The Committee recommends that the ACT Government advise the Assembly as to why agencies, such as charities, voluntary associations and community groups have been included.**

#### **Government Response**

**Agreed**

Recommendation 4 concerns the broad definition of "employer" and recommends that the ACT Government advise the Assembly as to why agencies, such as charities, voluntary

associations and community groups have been included in the definition of employer. The Committee also stated in its Report that when similar legislation was considered in Victoria, not-for-profit organisations were excluded.

The Government notes that “employer” as defined in the Bill can be an incorporated entity, a government entity or an unincorporated entity. Employers have well-established duties of care to protect the safety of their workers at common law, under occupational health and safety legislation and under existing manslaughter laws in the ACT.

The Bill does not impose additional legal obligations on employers. To be prosecuted for industrial manslaughter, an employer’s conduct must directly and substantially cause a death - i.e. it must be criminal conduct. This will require proof of recklessness or negligence to a criminal standard, rather than a civil standard. Given this, there is no rationale to support a lower standard for the duty of care owed by organisations such as charities, voluntary associations and community groups (whether incorporated or not) to their workers (whether paid or unpaid).

The Government notes that the Crimes (Workplace Deaths and Serious Injuries) Bill (Vic) did not exempt non-profit organisations where these were bodies corporate.

#### **RECOMMENDATION 5**

**The Committee recommends that the ACT Government review section 49B(3) to ensure that it does not obstruct fully informed contracting agreements entered into in good faith which attribute responsibility for workplace safety to one party to the contract.**

#### **Government Response**

##### **Agreed in-principle**

The Government agrees with the intentions of the Committee’s recommendation that “[i]n entering into the contract the parties should at the very least be required to assure themselves that the contract price, performance targets and method of providing the services do not preclude proper regard for OH&S requirements”.

The Government notes that the Committee is generally in agreement with the intent of the legislation to prevent contractual relationships from obscuring responsibilities for safety in employment relationships. The Government understands that the Committee is concerned that the drafting of the Bill could expose a principal to a legal obligation which should rest with a subcontractor.

Section 49B (Omissions of employers and senior officers) provides that conduct, for the purposes of the new industrial manslaughter offences, includes an omission to act by the employer, or a senior officer of the employer, if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker. Section 49B further provides that the danger must arise from an act of the employer or senior officer, from anything in the employer’s or senior officer’s possession or control, or from any undertaking of the employer or senior officer.

Subsection 49B(3) provides that if, apart from an agreement between a person and someone else, something would have been in the person's control, this agreement must be disregarded and the thing must be taken to be in the person's control. The intent of this section is to prevent the making of agreements to set aside a duty to avoid or prevent danger to the life, safety or health of a worker – to prevent a person from displacing a duty which is clearly his or hers.

In reviewing subsection 49B(3) in the context of these provisions, the Government also notes that unless it is proven that a principal's reckless or criminally negligent conduct substantially caused the death of a subcontractor or subcontractor's worker, a successful prosecution under the proposed offences could not be made.

The Government notes that the fault elements of "recklessness" and "negligence" are set out in the ACT Criminal Code 2002 and their meaning is clarified in the accompanying explanatory memorandum.

Subclause 20(1) of the Code explains that a person is reckless in relation to a result if he or she is aware that there is a substantial risk that the result will happen, and that having regard to the known circumstances, it is unjustifiable to take the risk.

Subclause 20(2) of the Code explains that a person is reckless in relation to a circumstance if he or she is aware that there is a substantial risk that the circumstance exists or will exist, and that having regard to the known circumstances, it is unjustifiable to take the risk.

Clause 21 of the Code provides that a person will be regarded as negligent with respect to a physical element of an offence if his or her conduct falls so far short of the standard of care that a reasonable person would have exercised in the circumstances; and involves such a high risk that the physical element exists or will exist that the conduct merits criminal punishment.

In the Government's view, these provisions clearly establish the standards of criminal culpability which are relied on in the Bill. For a principal to be exposed to be convicted in relation to the death of a subcontractor or subcontractor's worker, it would have to be proved that his or her conduct was reckless or so negligent as to merit criminal punishment. For this reason, it is the Government's view that the Committee's concerns are unfounded and it is not necessary to amend section 49B(3) of the Bill.

#### **RECOMMENDATION 6**

**The Committee recommends the definition of 'agent' be reviewed to clarify that an employer, having satisfied him or herself that a sub-contractor has the necessary skills, knowledge and experience, is entitled to rely on the contractual undertakings of a sub-contractor that a workplace will be conducted in full compliance with Occupational Health and Safety laws.**

#### **Government Response**

**Agreed in-principle**



The Government agrees with the intent of the recommendation, *viz.* that employers and principals have a responsibility to assure themselves that compliance with safety obligations will be undertaken by sub-contractors.

In the view of the Government, the issue does not, however, revolve around the definition of “agent” in the Bill. Rather, the issues are similar to those raised in relation to recommendation 5 above. Again, the Government draws attention to subsection 49B(3) which provides that if, apart from an agreement between a person and someone else, something would have been in the person’s control, this agreement must be disregarded and the thing must be taken to be in the person’s control. The intent of this section is to prevent the making of agreements to set aside a duty to avoid or prevent danger to the life, safety or health of a worker – to prevent a person from displacing a duty which is clearly his or hers.

For reasons similar to those set out in response to recommendation 5, it is the Government’s view that it is not necessary to amend the definition of agent in the Bill.