



Australian Government

Australian Government response to the
Senate Education and Employment References Committee
report:

They never came home—the framework surrounding the
prevention, investigation and prosecution of industrial deaths
in Australia

December 2018

Government Response

They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia

Acknowledgement

The Australian Government would like to thank all those who assisted in this inquiry, in particular, the families and friends of deceased workers for their contributions to the inquiry and the courage and poise they have shown in retelling their deeply personal experiences.

Commitment

The Government will work with all states and territories and across Commonwealth agencies to address the issues identified by witnesses to the inquiry.

In the short term, the Government will drive improvements in the support for families bereaved by a workplace death by proposing that Safe Work Australia (SWA) establish a best practice model for centralised, timely and high quality family liaison, and transparent services provided by trained and sensitive professionals.

Over the medium term, the Government will work with all jurisdictions to improve current practice in relation to workplace deaths to ensure duty holders are encouraged to be diligent about workplace safety and to improve the quality of investigations and prosecution outcomes by carefully examining enforcement, investigation and prosecution functions.

Concurrently, the Government will consider the application of existing Commonwealth work health and safety (WHS) and criminal laws, and call on states and territories to do the same, to identify how best to achieve both justice for families and appropriate penalties for those who should be held accountable. The Hon Kelly O'Dwyer, Minister for Jobs and Industrial Relations and Minister for Women, will write to state and territory Ministers responsible for WHS (collectively known as the WHS Ministers) seeking their support for this initiative and the involvement of SWA in accordance with the Senate Education and Employment References Committee's (the Committee's) recommendations.

Finally, the Government will advocate for a mechanism to enable families to provide information about their needs, and what is and what is not working in their jurisdiction.

Addressing what are clear failings across all jurisdictions will take time and will require the cooperation of all states and territories to ensure that the loss of a life in one jurisdiction is treated and valued in the same way as in other jurisdictions. To achieve national consistency, and in line with the Committee's recommendations, the Government will work through the existing SWA framework.

The Government has also had the benefit of meeting with some families and hearing their views and advice on what would have helped them. Many of their requests and expectations are very reasonable and could be met through governments simply sharing information and joining up their own services. Others will require additional effort, training and resourcing and the Government again calls on states and territories to consider, as it will, the recommendations contained in this report as a priority.

The Government will continue to consult with families as work progresses with states and territories to improve the application of the existing framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.

Introduction

On 26 March 2018, the Senate referred the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia to the Committee for inquiry.

On 17 October 2018, the Committee delivered its final report, 'They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia' (the Report).

The Report made 34 recommendations which seek to address issues that were identified in the way in which industrial deaths are investigated and prosecuted in Australia. The majority of the 34 recommendations are directed to SWA to work with the Commonwealth, states and territories to amend the WHS legislative framework. SWA is a tripartite body constituted by representatives of the Commonwealth, states and territories and two members each from employer bodies and trade unions. Further details on both the WHS framework and SWA's role are given below. About one third of the recommendations aim to improve support provided to bereaved families to navigate these and other processes that follow on in the aftermath of a workplace death.

Based on the evidence provided to the inquiry, the Government recognises that there are problems in how the WHS framework is being implemented. As was made clear during the inquiry, all workplace deaths have an enormous impact on families and friends, as well as employers, government and the wider community. Even though workplace deaths are declining, one worker killed is one too many and the Government is committed to ensuring that every worker returns home safely after a day at work.

Evidence to the inquiry shows that there is significant room for improvement in how WHS laws are enforced in practice, both in terms of preventative action and investigation following a workplace death. The Government will work with states and territories, who have a crucial role in the implementation of the enforcement, investigation and prosecution of WHS laws in driving improvements in their application. Proper, robust and defensible investigations alone will lead to more successful prosecutions with appropriate penalties.

Many of the recommendations call on SWA to address critical issues identified with the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia. The Government recognises, respects and agrees with the intent of the recommendations. However, it is concerned that some of the actual measures and the mechanism identified will not achieve the intended outcome. It is particularly concerned that the people most affected, workers and their families, will not get what they are seeking which is justice.

Family representatives have indicated to Government that their primary concern is making the system work so that investigations into workplace deaths are competent and thorough and, where the evidence indicates a duty holder has failed, there is a prosecution and appropriate penalties for those responsible. The Government will focus on this outcome in addressing the issues identified in the Report.

The Government will write to states and territories to take the recommendations through the relevant intergovernmental forums to ensure all governments are fully involved and accountable for these important issues.

The national framework of WHS laws

By way of context, it is important to note that the model WHS laws were developed by SWA following the 2008 National Review into Occupational Health and Safety Laws and pursuant to a commitment by the Commonwealth, state and territory governments to harmonise WHS legislation and regulation across Australia¹. This commitment was formalised in July 2008 through the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA²).

On 1 January 2012, the model WHS laws commenced in the Commonwealth, New South Wales, Queensland, the Northern Territory and the Australian Capital Territory. The model WHS laws commenced in Tasmania and in South Australian on 1 January 2013. Western Australia and Victoria are yet to implement the model WHS framework, however in both those jurisdictions WHS is governed by a system of laws, regulations, and compliance similar to the model WHS laws.

Under the harmonised approach to WHS regulation in Australia, states and territories have responsibility for ensuring the health and safety of the majority of Australian workers. The scope of the Australian Government's direct control is limited to Commonwealth workers and those working at Commonwealth workplaces.

Nevertheless, the Government is committed to supporting and considering the development of measures that will result in improved safety outcomes for all Australian workers and will work proactively through SWA to achieve this end as outlined above.

Safe Work Australia

SWA was established in 2009 as the national body responsible for developing the model WHS laws. SWA is a tripartite body comprising 15 members, including representatives of all jurisdictions, industry associations and trade unions. The Commonwealth is a member of SWA.

The *Safe Work Australia Act 2008* sets out SWA's role and functions in relation to WHS and workers' compensation. It also provides that the WHS Ministers have some oversight of SWA's activities. For example, the WHS Ministers consider whether to approve the model WHS legislative framework developed by Safe Work Australia for adoption by the Commonwealth, states and territories.

SWA has no power over jurisdictions' decisions on whether to adopt the model WHS laws, this is the sole responsibility of each jurisdiction. Each jurisdiction is responsible for adopting the model WHS laws and has its own regulator to monitor and enforce compliance with its WHS laws. SWA does, however, provide an appropriate forum for all jurisdictions to consider a national approach for WHS policies and practices. In terms of carrying forward recommendations, SWA will be limited in what roles and functions it can perform and its decisions will be subject to requisite support of SWA members and, in relation to any amendments to the model WHS laws, the agreement of the WHS Ministers.

However, SWA's role, as set out in the National Compliance and Enforcement Policy (NCEP), includes developing policy dealing with compliance and enforcement of the model WHS laws and to ensure a nationally consistent approach is taken by WHS regulators in each jurisdiction.

¹ WRMC Response to Recommendations of the National Review into Model OHS Laws, May 2009, p. 1

² See Part 1 of the IGA

Recommendation 1

The committee recommends that Safe Work Australia expand the work-related traumatic injury fatalities data set to capture data on deaths resulting from industrial diseases.

The Government **supports** this recommendation **in principle**.

As part of its commitment to WHS nationally, the Government has already taken steps, through the COAG Health Council, to consider whether a national register of dust-related diseases should be developed in Australia. The Government has also requested that SWA prioritise work on prevention in this area.

In relation to existing datasets, SWA currently compiles, analyses and reports on a range of WHS and workers' compensation data to provide a national picture of work-related injuries, fatalities and diseases.

While SWA is the appropriate body to undertake this work, the Traumatic Injury Fatalities (TIF) data set is not well placed to incorporate data on deaths resulting from industrial diseases. The TIF data set is solely intended to capture data on workers who are fatally injured at a workplace.

The Government recognises the intent of the recommendation, however, the practical difficulties in obtaining such data should be noted. Because many occupational diseases have long latency periods (time between exposure and onset or diagnosis of disease) and many potential causes or risk factors, including lifestyle and non-occupational factors, it is usually very hard to quantify the impact of work factors on the occurrence of disease. This is a problem worldwide.

For this reason, SWA has taken the approach of trying to understand current workplace exposures to disease-causing hazards as a way of estimating the work contribution to the burden of disease and to identify groups of workers who may be currently at risk of developing a work-related disease later in life. This approach allows SWA to modify or develop policy based on current exposures rather than current disease incidence, which may reflect the WHS practices of the past.

SWA uses several research approaches to obtain information about workplace exposures to disease-causing hazards, including national surveys, case studies, specific industry and hazard-based surveys, focus groups as well as exposure measurement projects.

Workplace exposure standards are an essential component in minimising occupational disease through their use in workplace risk mitigation programs. They assist in minimising the risk of adverse health effects by establishing measurable limits for businesses to aim below, and are legally enforceable in all jurisdictions in Australia.

The decision as to whether SWA will capture this data would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 2

The committee recommends that Safe Work Australia maintain a public list of amendments that jurisdictions make to the model WHS laws.

The Government **supports** this recommendation.

A list of jurisdictional amendments to the model WHS laws would be a useful resource for the Commonwealth, states and territories and businesses operating across jurisdictions, and could be made publicly available on SWA's website.

The decision as to whether SWA will collate and publish this work would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 3

(paragraph 3.32)

The committee recommends that Safe Work Australia work with WHS regulators in each jurisdiction to collect and publish a dataset which provides annually updated and detailed information on the prosecution of industrial deaths, including:

- the date of the prosecution;
- the nature of the entity prosecuted;
- the type of issue giving rise to the prosecution;
- the provision of the legislation under which the prosecution was taken;
- the plea entered by the defendant; and
- the sentence imposed by the court.

(paragraph 3.33)

The committee also recommends that this data set be provided to:

- relevant Commonwealth and State and Territory government agencies so that it can be taken into account in the awarding of government contracts; and
- relevant Commonwealth agencies for the purpose of applications for a self-insurance licence under the *Safety, Rehabilitation and Compensation Act 1988*.

(paragraph 3.34)

The committee further recommends that corporations that repeatedly breach WHS obligations and cause death or serious injury should not be awarded Commonwealth, State or Territory government contracts.

The Government **supports** recommendation 3, paragraph 3.32.

While some jurisdictions already publish information on prosecutions, the Government sees benefit in consolidating data on WHS prosecutions and penalties across Australia into a national database.

The Government notes that SWA is already scoping the development of a national WHS prosecutions database.

This database would encourage research and analysis into whether the harmonised laws are leading to nationally consistent prosecutions and penalties.

Any database would have to ensure that it does not inadvertently expose sensitive and/or suppressed details of cases subject to controls under the *Privacy Act 1988* or any other relevant Commonwealth, state or territory laws.

The decision as to whether SWA will collate and publish this information would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

The Government **notes** recommendation 3 paragraphs 3.33 and 3.34.

In relation to recommendation 3, paragraphs 3.33 and 3.34, the Government is already using its purchasing power to improve WHS in the construction industry in several ways, and encourages state and territory governments to adopt this approach.

The Government, via the Federal Safety Commissioner and the Work Health and Safety Accreditation Scheme (the Scheme), sets best practice safety standards on Commonwealth funded building projects. Companies accredited under the Scheme as head contractors have improved safety records the longer they are in the Scheme. After three years, 55 per cent of companies indicate that they have reduced their Lost Time Injury Frequency Rates and Workers Compensation Premium Rates. After six years, 65 per cent of companies indicated they have reduced their Lost Time Injury Frequency Rates and over 70 per cent have reduced their Workers Compensation Premium Rates.

The Federal Safety Commissioner has the power to suspend a company's accreditation or impose a further condition of accreditation if it breaches a condition of accreditation. The Federal Safety Commissioner may also revoke the accreditation if the company's work practices are not safe or their WHS policies or procedures (or the implementation of those policies or procedures) constitute a risk to safety. The proposed dataset in relation to workplace fatalities would be considered by the Federal Safety Commissioner when assessing a company's overall compliance with the Scheme requirements.

The Code for the Tendering and Performance of Building Work 2016 (Building Code 2016), administered by the Australian Building and Construction Commission, requires companies undertaking Commonwealth funded building work to comply with WHS laws, including WHS training requirements, asbestos safety requirements and facilitating right of entry for WHS purposes. The Building Code 2016 provides the Minister with the power to impose an exclusion sanction where a company has failed to comply with WHS laws. During the period of an exclusion sanction, the company is not permitted to tender for, or be awarded, Commonwealth funded building work.

In relation to recommendation 3, paragraph 3.33, second point, under the *Safety, Rehabilitation and Compensation Act 1988*, Comcare considers the entity's WHS record when assessing their application to self-insure under the scheme. This would include consideration of any workplace deaths of that company's workers. The proposed dataset in relation to workplace fatalities would be included in the overall WHS assessment of such applications.

The decision as to whether SWA will provide prosecution data to other government agencies would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers. The decision for this data to be taken into account in government contracting would be a matter for each jurisdiction.

Recommendation 4

The committee recommends that the Boland review consider the recommendations of this inquiry in its review into the model WHS laws.

The Government **supports** this recommendation. The SWA review of model WHS laws has had regard to the Committee's report.

Recommendation 5

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- update the model WHS framework to cover precarious and non-standard working arrangements (including labour hire) to clarify the extent, scope and nature of the primary duty of care and the obligation under the model WHS Act on duty-holders to consult with each other, as well as workers and their representatives; and
- pursue approval of these arrangements in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **notes** this recommendation, given that the broad coverage provisions of the model WHS laws already cover non-standard working arrangements including labour hire.

The model WHS laws cover new and evolving working arrangements. The definition of ‘worker’ in section 7(1) of the model WHS laws already recognises contemporary work relationships by extending beyond the traditional employer/employee relationship to include contractors, labour hire, franchisors, outworkers and volunteers.

The concept of a ‘person conducting a business or undertaking’ (PCBU) is defined in subsection 5(1) of the model WHS laws as a person conducting a business or undertaking alone or with others, whether or not for profit or gain. The model WHS laws do not define what is a ‘business or undertaking’, however the PCBU concept is intended to be flexible enough to adapt to the changing nature of work by capturing business models and new ways of working.

This concept goes beyond the traditional employer/employee relationships and covers labour hire and other ‘non-standard’ working arrangements. Under the model WHS laws, labour hire agencies and host employers are PCBUs and must do what is reasonably practicable to ensure the health and safety of on-hire workers. Labour hire firms and host organisations have clear duties to labour hire workers and must consult, co-operate and co-ordinate to ensure these duties are met, so far as is reasonably practicable.

The SWA review of model WHS laws considered the sufficiency of the definition of a PCBU in ensuring that the primary duty of care continues to be responsive to changes in the nature of work and work relationships.

Any decision about the need to amend the model WHS laws would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 6

The committee recommends that Commonwealth, State and Territory governments ensure that their WHS regulators are adequately funded and resourced to allow them to complete investigations in a timely, thorough and effective manner.

The Government **supports** this recommendation.

The Government ensures that its regulator, Comcare, is adequately funded and resourced through a combination of appropriation and legislative charging mechanisms and is able to expand or contract to meet the jurisdiction’s activity.

Comcare undertakes cost recovery to fund the functions and activities of the Safety, Rehabilitation and Compensation Commission and Comcare under the *Safety, Rehabilitation*

and Compensation Act 1988 (Cth) and the Work Health and Safety Act 2011 (Cth) (the Commonwealth WHS Act).

In relation to the states and territories, the funding of individual regulators is a matter for each jurisdiction. However, the Commonwealth calls on all jurisdictions to ensure regulators are adequately resourced to address gaps identified in various recent inquiries and reviews.

Recommendation 7

(paragraph 4.40)

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments and WHS regulators to develop and deliver standardised training modules to ensure that all investigators have the appropriate skills, experience and attitude to carry out high-quality investigations of industrial deaths and other serious breaches of WHS laws.

(paragraph 4.41)

In the absence of a joint approach, the committee encourages all Commonwealth, State and Territory governments and WHS regulators to pursue this recommendation individually.

The Government **supports** this recommendation **in principle**.

The NCEP is a key element of the model WHS laws framework and was endorsed by the WHS Ministers in August 2011. It is a high-level SWA document that sets out the principles that underpin how WHS regulators should monitor and enforce compliance with WHS laws.

The Government will write to the WHS Ministers to seek their agreement for SWA to review the NCEP with the aim of including national investigator training standards in the NCEP. The NCEP was intended to be reviewed periodically and is due for review.

SWA has no role in the delivery of training as this is a matter for each jurisdiction. A more appropriate intergovernmental forum to consider delivery would be the Heads of Workplace Safety Authorities (HWSA). HWSA Members are the senior representatives of the WHS regulators in all jurisdictions. HWSA Members have been working through the National Workplace Inspector Training Development Reference Group on a national approach to improved inspector training.

Liaison between SWA and HWSA on the appropriate standards to set for the training, and the delivery of training to investigators, would therefore be key. HWSA Members hold the relevant practical knowledge and expertise on which SWA could draw to set training standards.

Jurisdictional progress in adopting the national training standards for investigators could also be monitored by HWSA.

The decision as to whether SWA will review the NCEP for this purpose would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers

Recommendation 8

(paragraph 4.42)

The committee recommends that Safe Work Australia work with all Commonwealth, State and Territory governments and WHS regulators to:

- establish best practice guidelines for the conduct and duration of investigations of serious WHS law breaches, including workplace deaths, which include guidance on the criteria that must be satisfied if an investigation needs to be extended past the usual allocated timeframe; and
- ensure that each jurisdiction is able to fully implement these guidelines.

(paragraph 4.43)

In the absence of a joint approach, the committee encourages all Commonwealth, State and Territory governments and WHS regulators to pursue this recommendation individually.

The Government **supports** this recommendation.

The Government supports the development of best practice guidelines for investigations and will write to the WHS Ministers to seek their agreement for SWA to review the NCEP with a view to including these guidelines in the NCEP. It should be noted that SWA has no power to ensure each jurisdiction fully implements these guidelines, as this is a matter for each jurisdiction.

Jurisdictions may already have these guidelines, however, it would be up to each jurisdiction to advise SWA. It is noted that some jurisdictions have published information for businesses and families on what to expect following a death or during an investigation, and future work could seek to build on any existing material.

Liaison between SWA and HWSA in this area would be key given HWSA Members are the senior representatives of the WHS regulators in all jurisdictions and hold the relevant practical knowledge and expertise on which SWA could draw to develop best practice guidelines for inclusion in the NCEP.

The SWA review of model WHS laws considered the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors to ensure compliance with the model WHS legislation.

The decision as to whether SWA will review the NCEP for this purpose would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 9

The committee recommends that Safe Work Australia work with WHS regulators to develop a policy to formalise collaboration and evidence sharing between WHS regulators and law enforcement agencies during investigations following an industrial death.

The Government **supports** this recommendation.

This recommendation would require the agreement and cooperation of law enforcement authorities and WHS regulators across all jurisdictions. This would be a matter for each jurisdiction to pursue through, for example, a Memorandum of Understanding between the WHS regulator and law enforcement agencies in that jurisdiction. Any agreement would also be subject to the relevant laws of the Commonwealth, state or territory.

The Government will write to the WHS Ministers to seek their agreement to pursue such arrangements as a matter of priority.

Recommendation 10

The committee recommends that Safe Work Australia work with WHS regulators in each jurisdiction to develop a policy which stipulates that all industrial deaths must be investigated as potential crime scenes.

The Government **supports** this recommendation **in principle**.

The NCEP currently provides that workplace deaths and serious injuries are priority areas for investigation. It also makes it clear that regulators should exercise their powers with regard to the community's expectation that businesses and undertakings will be held accountable if they fail to comply with WHS laws. Furthermore, WHS offences are criminal offences, therefore treating the site of workplace death as a potential crime scene is consistent with WHS laws and the NCEP.

The Government will write to the WHS Ministers to seek their agreement for SWA to review the NCEP with a view to making this a requirement.

The decision for SWA to review the NCEP for this purpose would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 11

The committee recommends that Safe Work Australia pursue amendments to the model WHS laws to enable a WHS regulator or law enforcement agency in one jurisdiction to assist a second WHS regulator or law enforcement agency in a cross-border investigation, including in the sharing of evidence and other relevant information.

The Government **supports** this recommendation **in principle**.

The model WHS Act already includes provisions that allow for the sharing of information by WHS regulators, for example by a WHS regulator in one state with a WHS regulator in another state.

The SWA review of model WHS laws considered the use of regulator and inspector powers and functions across jurisdictions, and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation.

Sharing of information between law enforcement agencies across jurisdictions is a matter for each jurisdiction, however the Government will write to the WHS Ministers to seek their agreement to pursue such arrangements as a matter of priority.

The decision for SWA to pursue amendments to the model WHS laws to strengthen cross-jurisdiction investigations, and the amendment of model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 12

The committee recommends that Commonwealth, State and Territory governments ensure that adequate funding and resourcing is allocated to their WHS regulators to allow for increased, more effective preventative activities in workplaces.

The Government **supports** this recommendation **in principle**.

As set out in the response to recommendation 6, the Government ensures that its regulator, Comcare, is adequately funded and resourced.

The funding of individual regulators in the states and territories is a matter for each jurisdiction.

Recommendation 13

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **notes** this recommendation.

The Government is concerned that this recommendation will not address the underlying issues identified by families impacted by workplace fatalities. The central concern arising from the inquiry is that poor investigations lead to poor outcomes.

A separate industrial manslaughter offence in the model WHS laws is unlikely to achieve justice for families who have lost a loved one in the workplace. While justice is seen to be available under laws that apply tough penalties to the death of a worker, justice is unlikely to be achieved where, based on the evidence presented to the inquiry, the enforcement of laws is an issue. To suggest that the introduction of an industrial manslaughter offence is the solution to the issue of workplace deaths in this context would be to create an unrealistic expectation.

The Government believes that a more effective approach, that would be more likely to achieve better outcomes, is to focus on addressing the critical issues that have been identified in relation to the enforcement of existing laws, in particular, the way in which investigations into workplace deaths are conducted. This is because the investigation of workplace deaths clearly impacts significantly on the likelihood (or otherwise) of a successful prosecution, whether that be for an offence under WHS laws or a criminal manslaughter offence.

The Government notes that the likelihood of an industrial manslaughter offence being used to prosecute a workplace death is also questionable based on the ACT experience. Industrial manslaughter has been an offence in the ACT since 2004 but no one has been prosecuted for this offence to date. There have, however, been prosecutions under the ACT's general manslaughter provisions. There is also no evidence that the ACT's industrial manslaughter laws have resulted in fewer workplace deaths. The number of workplace deaths in the ACT has remained constant since 2003 when industrial manslaughter offences were introduced.

It is too early to say whether Queensland's experience will be similar, given its industrial manslaughter offence only commenced in October 2017. However, part of the justification for the Queensland industrial manslaughter provisions being introduced were the tragic deaths at Dreamworld and the Eagle Farm Racecourse. In relation to the Dreamworld case, the new laws would not apply as they only apply to deaths of workers and not others in the workplace. In the Eagle Farm Racecourse case, manslaughter charges have been brought against the builder under the criminal code, which questions the need for industrial manslaughter offences.

In addition, the Government shares the concerns identified with the Queensland offence by the Queensland Law Society, in particular that the "extremely broad definition of executive

officer could mean that persons who would otherwise not be deemed to have a duty of care over an employee could be caught up in the scope of this legislation”.

Further, the Government is also concerned with issues identified by the Law Council of Australia in evidence it gave to this Senate Inquiry that:

the offences in Queensland, do not account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will of a defendant...the absence of such defences, combined with the low standard of proof of negligence and the high maximum penalties ... has the potential to result in unjust unintended consequences.

The Government’s view is that the current offences in the model WHS laws, together with current criminal manslaughter laws, are able to address workplace deaths **provided they are applied appropriately**. Where there has been a workplace death, all of those responsible can be prosecuted under the existing offences regime and the general criminal manslaughter provisions.

The model WHS laws primarily focus on the prevention of workplace deaths, serious injuries and illnesses. By contrast, industrial manslaughter laws are focused on punishment after the event and often single out employers for punishment after a workplace death. This neglects the potential involvement of a range of other parties such as other employees, manufacturers, and suppliers of plant and equipment. It also has the potential to create inequities and gaps in attributing responsibility in the event of a workplace death. This raises even more issues of justice for those accused of committing industrial manslaughter.

Given the above, the Government intends to write to the WHS Ministers to seek their agreement to consider the practical application of existing laws and investigation and prosecution arrangements within their jurisdictions. Proper, robust and defensible investigations alone will lead to more successful prosecutions with appropriate penalties.

The Government notes that the SWA review of model WHS laws considered industrial manslaughter offences in the context of examining the effectiveness of the penalties in the model WHS laws as a deterrent to poor health and safety practices.

As with other recommendations directed to SWA, the decision for SWA to undertake this work, and any amendment of the model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 14

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to include the establishment of a dedicated WHS prosecutor in each jurisdiction, similar to the model introduced in Queensland; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **notes** this recommendation.

The administrative arrangements put in place to support the prosecution of WHS offences is a matter for each jurisdiction. It is unlikely that one particular model will suit all jurisdictions and the Government notes that, for smaller jurisdictions in particular, the establishment of a dedicated WHS prosecution function may not be the best use of resources that could otherwise be applied more effectively to improve safety outcomes.

Any amendment of the model WHS laws would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 15

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to provide that a WHS regulator must in all relevant circumstances provide a published, written justification for why it chose not to bring a prosecution following an industrial death; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **notes** this recommendation.

Any consideration of this recommendation should take account of resource implications, and it will be important to ensure that scarce resources are not unhelpfully diverted away from measures that will improve safety outcomes.

The SWA review of model WHS laws considered the appropriateness of existing laws, including penalties and offences. Any relevant recommendations arising from the review will be considered through the SWA framework, subject to the requisite support of SWA Members and the WHS Ministers.

This recommendation would also require agreement of the Directors of Public Prosecution in all jurisdictions.

Recommendation 16

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to provide that a WHS regulator must in all circumstances provide a published, written justification for why a coronial inquest following an industrial death was not conducted; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **supports** this recommendation **in principle**.

Noting that Coronial inquests are bound by their own legislation, including any confidentiality obligations, the Government supports an increase in the transparency and accountability of authorities involved in the prosecution and coronial investigations into workplace deaths. Implementation of this recommendation will be subject to consultation with Coroners' offices in all states and territories (the Commonwealth does not have a coronial function).

The Government will, however, write to the WHS Ministers to seek their agreement for SWA to work with the relevant authorities to give effect to the intent of this recommendation.

The decision for SWA to perform this work, and any amendment of the model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 17

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to provide for unions, injured workers and their families to bring prosecutions; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **does not support** this recommendation.

The criminal prosecution process is complex, requiring a sound understanding of the relevant laws, procedural requirements and court proceedings. The ability to bring a prosecution quite rightly sits with those best qualified and who have the authority within the legal system to conduct a prosecution.

Currently the model WHS laws limit who is able to bring a prosecution. To extend this authority to others as recommended would set a new precedent. In addition, there are a number of difficulties associated with prosecutions being brought by parties other than WHS regulators in their relevant jurisdictions. For example, the duties of a prosecutor to a court and the defendant are onerous and require specialisation.

Further, a private prosecution brought by a family will not be able to be brought with the same resources and capacity available to, for instance, a WHS regulator or Director of Public Prosecutions. Considerations of public policy must also be taken into account, as union-instituted prosecutions may not necessarily lead to overall improvements in WHS compliance in cases where PCBUs may not have developed relationships and constructive communication channels with the union initiating the prosecution. There is a general principle that other parties are unlikely to have the necessary resources or skills to bring a prosecution before the courts. Additionally, there is a risk of a conflict of interest arising in that proceedings might be initiated, not to advance safety outcomes, but to advance industrial or other interests.

The issue of who should have standing to bring proceedings under the model WHS laws was considered in detail in the 2008 National Review into Model Occupational Health and Safety Laws. Prior to harmonisation, there was not a consistent approach to the question of standing between jurisdictions and careful consideration was given to this issue. The decision was made that the model WHS laws would reserve the right to bring a prosecution for a criminal offence to the regulator. This had the benefit of ensuring that the resources, expertise and accountability of the Crown are always applied to prosecution decisions and proceedings and it facilitates the graduated enforcement that is considered an essential for securing compliance with the model WHS laws.

The Government considers that other recommendations regarding improved transparency and accountability during the investigative and prosecution processes would more effectively improve safety outcomes and reduce workplace fatalities.

The SWA review of model WHS laws considered the issue of who has standing to bring proceedings under the model WHS laws.

The decision for SWA to consider this proposal, and any amendment of the model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 18

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to revise the definition of 'officer' to better reflect the capacity of the person to significantly affect health and safety outcomes; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **notes** this recommendation.

Under the model WHS laws, officers have a duty to exercise due diligence to ensure their organisation (PCBU) complies with its duties of care.

The definition of an 'officer' is set out in section 4 of the model WHS laws and, in broad terms, means an individual who makes, or participates in making, decisions that affect the whole, or a substantial part of, a business or undertaking (for example, a director of a company, a chief executive officer or a chief financial officer).

The definition also picks up the meaning of an 'officer' in section 9 of the *Corporations Act 2001* (Cth). This is a definition familiar to, and readily understood by, corporations (who should have already identified their 'officers' for the purposes of that legislation).

The current definition allocates responsibility to the most senior people in an organisation who have the authority to make and resource key strategic decisions and, as such, can directly influence health and safety outcomes.

The Government believes this is in keeping with the original intention of the model WHS laws, made clear below:

The role of an officer in the governance of a corporation is clearly different from the role of providing information upon which the decision makers will act, or implementing the decisions. There is a clear difference between making decisions that provide for the governance of the entity, and making decisions on action to be taken in relation to an item of work or specific activity. The definition of officer should not blur the line between these different roles.³

It would, in our view, be inappropriate for a person who is not sufficiently empowered to affect the key decisions of a corporation to be subject to an onerous duty relating to the making of those decisions.⁴

The Government is concerned that any move to change and potentially broaden the definition of officer, in a similar way to the 'senior officer' role introduced with Queensland's industrial manslaughter laws, could have a negative outcome and carries a significant risk of capturing people who are not in fact at fault and exposing them to the possibility of imprisonment.

The SWA review of model WHS laws considered the duty of an officer under the model WHS laws.

The decision for SWA to consider amending the definition of an officer, and any amendment to this definition, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

³ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009, p134.

⁴ Ibid.

Recommendation 19

The committee recommends that section 232 of the model WHS Act be amended to broaden the limitation period for prosecutions of industrial manslaughter.

The Government **supports** this recommendation **in principle**. Noting that the response to Recommendation 13 addresses the issue of industrial manslaughter, the recommendation to extend the limitation period for prosecutions generally, has merit and the Government would support further consideration of this and the alignment of limitation periods.

Any amendment of the model WHS laws would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 20

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- develop national sentencing guidelines, with direction from the UK experience, and look to undertake consultation with relevant stakeholders about the matter; and
- review the levels of monetary penalties in the model WHS legislation with consideration to whether there should be increased penalties for larger businesses or repeat offenders.

The Government **supports** this recommendation **in principle**.

The evidence presented to the inquiry has highlighted the potential benefit of increasing monetary penalties for breaches of WHS laws, noting the practical difficulties involved in design and implementation. The Government also supports a review of the monetary penalties in the model WHS laws given the penalties have not increased since introduction.

When the Commonwealth WHS Act came into effect in 2011, the penalty for a Category 1 offence was \$3,000,000 for a body corporate, an amount that has not changed since the introduction of the legislation. However, it is calculated that a Commonwealth Category 1 penalty for a body corporate would now be around \$5,727,000 if the penalty was instead expressed as penalty units and indexed to the Commonwealth penalty unit value. This represents a 90.9 per cent increase over the 2011 penalty amount.

The SWA review of model WHS laws considered the value of implementing sentencing guidelines for WHS offences and the effectiveness of the existing penalties in acting as a deterrent to poor WHS practices.

The decision for SWA to develop sentencing guidelines and review penalty levels, and any amendment of the model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 21

The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:

- amend the model WHS laws to make it unlawful to insure against a fine, investigation costs or defence costs where they apply to an alleged breach of WHS legislation; and
- pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.

The Government **supports** this recommendation **in principle** in relation to insurance for fines and penalties.

The penalties for breaches of WHS duties are intended to deter poor safety performance by organisations, their decision-makers, and workers. This deterrent effect is significantly undermined if organisations believe they are able to insure and be indemnified against WHS penalties. These policies are also contrary to a best practice WHS approach, and there is a lack of clarity surrounding the legal effect of these policies.

The SWA review of model WHS laws considered the availability of insurance products which cover the cost of WHS penalties and their impact on the effectiveness of the model WHS laws.

The decision for SWA to examine this issue, and any amendment of the model WHS laws, would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Recommendation 22

The committee recommends that the Commonwealth Government work to implement its announced reforms to combat phoenixing, such as the Director Identification Number scheme, as swiftly as possible.

The Government **supports** this recommendation.

A number of reforms to combat phoenixing are being progressed through the Phoenix Taskforce comprising 32 Federal, State and Territory government agencies, including the Australian Taxation Office, the Australian Securities & Investments Commission, the Department of Jobs and Small Business, and the Fair Work Ombudsman. The Phoenix Taskforce provides a whole-of-government approach to combatting illegal phoenix activity.

As part of the 2018-19 Budget, the Government announced a comprehensive package of reforms, which focus on deterring and disrupting those who engage in illegal phoenix activity. Public consultation on the draft legislation for this package of reforms occurred from 16 August to 27 September 2018. The Government will introduce legislation as soon as possible.

The Government is also introducing a Director Identification Number (DIN) to enable better tracking of directors and to prevent the use of fictitious identities. The DIN is being progressed as part of the Modernising Business Registers project. On 1 October 2018, the Government released its consultation exposure draft legislation for DINs. Consultation closed on 26 October 2018. The Government will introduce legislation as soon as possible.

Recommendation 23

The committee recommends that Safe Work Australia engage with WHS regulators and emergency services providers in each jurisdiction to develop clear guidelines for the notification of families of an industrial death, with a focus on timeliness and the manner in which the notification is made.

Recommendation 24

The committee recommends that Safe Work Australia collaborate with WHS regulators in each jurisdiction to review, improve and formalise their practices to make the investigation processes as transparent as possible to impacted families, including by providing written guidance on the formal stages of the investigation, regular updates on the progress of an investigation, the reasons for decisions and the future direction of the investigation.

Recommendation 25

The committee recommends that Safe Work Australia collaborate with the governments and WHS regulators in each jurisdiction to provide for dedicated liaison officers to supply information to families about the process of investigations, prosecutions and other formal processes following an industrial death.

Recommendation 26

The committee recommends that Safe Work Australia look to establish a forum for families to submit and publish impact statements in order to give them a voice and outlet for their experiences in the processes that follow an industrial death.

Recommendation 27

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to establish advisory committees designed to give advice and make recommendations to the relevant minister about the information and support needs of persons who have been affected directly or indirectly by a workplace incident that involves a death, serious injury or serious illness.

Recommendation 28

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to identify and formalise family outreach mechanisms to ensure that all impacted families receive information about the formal processes that follow an industrial death and the associated support that is available to them.

Recommendation 29

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to create and maintain a centralised web portal which links to all relevant resources that impacted families may need in the aftermath of an industrial death.

The Government **strongly supports** these recommendations.

On the day the Committee tabled its report, the Hon Kelly O'Dwyer, Minister for Jobs and Industrial Relations and Minister for Women, as well as other Government Ministers, met with some of the families who have been personally affected by the workplace death of a loved one. The Minister is committed to seeing that lessons learnt from their traumatic experiences result in improvements to the framework surrounding the prevention, investigations and prosecution of industrial deaths in Australia.

The Government will drive improvements in the support for families bereaved by a workplace death by proposing that SWA establish a best practice model for centralised, timely and high quality family liaison, and transparent services provided by trained and sensitive professionals.

To this end, the Government will write to the WHS Ministers as a priority seeking their agreement to SWA leading the consideration, and where appropriate, the implementation of these recommendations.

Recommendation 30

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to fund a support group or service that is experienced in working with people bereaved by a fatal workplace incident to support impacted families through all formal processes following an industrial death.

Recommendation 31

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to make funding available for impacted families to access a range of mental health and counselling support options, including in rural and regional areas.

Recommendation 32

The committee recommends that Safe Work Australia collaborate with the WHS regulator in each jurisdiction to develop an initiative (similar to the Coronial Legal Assistance Service in operation in Queensland) to provide for pro bono legal assistance to families during coronial inquests.

The Government **notes** these recommendations. Funding of services is a matter for each jurisdiction and each jurisdiction would need to review its existing support services.

The Government will write to the WHS Ministers to seek their agreement to prioritise work to give effect to these recommendations.

In relation to Recommendation 32, this may not be an appropriate role for SWA noting the potential for a conflict of interest to arise given that SWA Members are regulators in most jurisdictions.

Recommendation 33

The committee recommends that Safe Work Australia work with the WHS regulator in each jurisdiction to ensure that all staff with access to impacted families have adequate training in working with grieving family members.

The Government **supports** this recommendation and refers to its response to recommendations 23-29 above.

Recommendation 34

The committee recommends that Safe Work Australia collaborate with each jurisdiction to review the adequacy of workers' compensation legislation with regard to all work related deaths.

The Government **supports** this recommendation **in principle**.

The Commonwealth works with states and territories on workers' compensation matters through SWA, HWSA and the Heads of Workers' Compensation Authorities. SWA's functions include to develop, evaluate and revise national workers' compensation policies and supporting strategies. SWA is therefore well placed to collaborate with the jurisdictions to review the adequacy of workers' compensation legislation with regard to work related deaths.

The decision for SWA to review the adequacy of workers compensation legislation would be subject to SWA voting arrangements and the requisite support of SWA Members and the WHS Ministers.

Coalition Senators Additional Comments

Recommendation 1 (paragraph 1.74)

In the event it is not otherwise canvassed in the Boland Report, the Commonwealth should commission a review to examine and identify the extent to which jurisdictions are diverging from the model WHS framework and recommend strategies for the Commonwealth Government to pursue in arresting such divergence.

Recommendation 2 (paragraph 1.79)

The National Compliance and Enforcement Policy should be reviewed and reconfirmed by the States and Territories to facilitate greater cooperation between regulators across the jurisdictions and expedite workplace investigations.

Recommendation 3 (paragraph 1.90)

Only union officials who are 'fit and proper persons' should be entitled to exercise the right of entry under a permit issued by an independent government authority or judicial officer.

Recommendation 4 (paragraph 1.91)

Model WHS laws should specify those individuals with criminal records or a history of breaches of right of entry and related provisions under Commonwealth or State and Territory law should not be eligible to obtain a permit.

The Government **supports** the Coalition Senators' recommendations.

The Government will consider recommendation 1 in more detail having regard to the SWA review of model WHS laws. The Government agrees it is important to understand the extent to which jurisdictions are diverging from the model WHS framework and to pursue strategies for addressing such divergence.

The Government supports recommendation 2, and as outlined in its response to recommendation 7 of the main report, the Government will write to the WHS Ministers to seek their agreement for SWA to review the NCEP. The NCEP was intended to be reviewed periodically and is due for review.

The Government supports concerns raised by Coalition Senators in relation to right of entry permits. The Government will further consider if adjustments are needed to ensure the law is operating to manage permits being granted only to persons who are fit and proper to hold such permits.

Australian Greens Senators' Additional Comments

1.1 The Australian Greens welcome this inquiry and support the recommendations made by the Committee. The creation of a new offence of industrial manslaughter has long been Greens policy and we welcome moves by the Committee and other political parties towards this end.

1.2 As a general principle, we have a preference for a model that puts industrial manslaughter into the Crimes Act, but we also note the broad support for the 'Queensland model' and the Greens welcome moves to have this extended throughout Australia.

1.3 We would also like to see as a general principle that industrial deaths include all work related deaths, and not just traumatic fatalities, as this would more accurately reflect the impact on workers and would allow their families access to appropriate remedies. In particular, deaths caused by work related diseases and suicides should be covered.

1.4 Consideration of workers who die by suicide, particularly after poor handling of compensation claims, is also currently inadequate and should be addressed in any new reforms. Further, there is a strong case for the collection of data and statistics regarding this matter.

1.5 With respect to recommendation 32 regarding the establishment of pro bono legal assistance to families, we think this should be extended to include "and any other assistance deemed necessary", as we are aware of cases (including with Aboriginal families) where accessing inquests has been particularly difficult because of financial constraints.

The Government's position on industrial manslaughter legislation is provided at the response to Recommendation 13.

In relation to point 1.5, the Government's response is provided at Recommendation 32.