
Victoria's new workplace manslaughter laws: it's all in the messaging

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On 1 July 2020, Victoria became the fourth Australian jurisdiction to introduce workplace manslaughter laws.¹ The laws are a fulfilment of an Andrews Labor Government election commitment, and follow a sustained union campaign. The laws create no new occupational health and safety (OHS) duties — if you were complying with your OHS responsibilities before their introduction, you will still be in compliance with them after their introduction. What the laws do is create new and severe penalties if certain existing OHS duties are breached in circumstances involving negligent conduct that causes a person's death.²

This article provides an overview and explanation of Victoria's new workplace manslaughter laws.

The article begins in Pt 1 by explaining the rationale for the new laws, and how they are intended to improve workplace health and safety outcomes. Part 2 then explains the laws, to whom they will apply and how. Part 3 then discusses how WorkSafe Victoria is expected to enforce the new laws, and what duty-holders can expect. The article then concludes in Pt 4 with some observations about whether the new laws will have their desired effect.

Part 1 — The rationale for Victoria's new workplace manslaughter laws

The Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019 (Vic) (the Act) introduces a new Pt 5A entitled "Workplace manslaughter" into Occupational Health and Safety Act 2004 (Vic) (OHS Act). The objects of the new Part are set out in s 39A, as follows:

- (a) to prevent workplace deaths; and
- (b) to deter persons who owe certain duties under Part 3 from breaching those duties; and
- (c) to reflect the severity of conduct that places life at risk in the workplace.

Idea behind the laws

The idea behind the laws is that they will be the impetus for employers and other duty-holders to review their workplace safety arrangements to ensure they are compliant and, if they are unsure or hesitant about

implementing a safety measure to address a workplace risk (possibly because of its cost), the magnitude of the new penalties (and the social stigma and reputational damage that will attach to them) will sway the cost-benefit analysis in favour of acting to eliminate or mitigate the risk. Thus, the new laws are designed not only to prevent workplace deaths, but to improve workplace health and safety generally. This is their functional purpose.

Expressive purpose

The new laws also have an expressive purpose. The new laws give voice to the frustration felt within government, the union movement, the community and most acutely, the families of persons killed at work, that the penalties imposed on duty-holders whose negligence has caused a workplace death have been woefully inadequate. As Attorney-General Hennessy said in her Second Reading Speech on the Bill that would become the Act, it reflects the "feeling of injustice when negligence goes unpunished" and "sends a strong message to employers that putting lives at risk in the workplace will not be tolerated".³

Workplace Incidents Consultative Committee

In this regard, the new Act also creates a Workplace Incidents Consultative Committee (the Committee) to provide a voice to injured workers and the families of victims of workplace fatalities and serious injuries.⁴ The Committee will provide advice to the Minister about:

- how best to support the needs of seriously injured workers, their families, and the families of persons killed at work and
- the development, review and improvement of policies, practices, strategies and systems relating to OHS generally, and workplace incidents involving death or serious injury or illness in particular

The creation of the Committee sometimes is overlooked in discussion on the new laws. However, its creation and presence may have a significant impact on how WorkSafe Victoria operationalises and enforces the new laws, something to which the article will turn to in Pt 3.

Part 2 — The new workplace manslaughter laws

Workplace manslaughter offence

The workplace manslaughter offence is found in the new s 39G of the Act. It provides that a “person” or an “officer of an applicable entity” (who is not a volunteer) must not engage in conduct that:

- (a) is negligent; and
- (b) constitutes a breach of an applicable duty that the entity owes to another person; and
- (c) causes the death of that other person.⁵

Penalties

The penalties that apply to a breach are significant. In the case of a natural person, 25 years’ imprisonment;⁶ and in the case of a body corporate, 100,000 penalty units which currently equate to \$16.5 million.⁷ This is a significant increase on the highest penalties previously available under the OHS Act, being 5 years’ imprisonment for individuals convicted of reckless endangerment, and a maximum fine for corporations of \$3,304,400 (20,000 penalty units). There also is the greater social stigma and reputational damage that attaches to being convicted of manslaughter, as opposed to a breach of duty of care under the OHS Act.

Features of the new offence

There are a number of features of the new offence worthy of explanation and elucidation.

Breach of applicable duty

First, the offence only applies to a breach of an “applicable duty”. That is, establishing a breach of an existing duty under the OHS Act is an element of the offence. Applicable duty is defined to mean a duty imposed by a provision of Pt 3 of the OHS Act, with some limited exceptions.⁸ The duty-holders at risk of prosecution are summarised in the table below.

| Who may be prosecuted ⁹ | Who may not be prosecuted |
|--|--|
| Employers Self-employed persons Persons who manage or control workplaces Designers of plant, buildings or structures Manufacturers of plant or substances Suppliers of plant or substances Persons who install, erect or commission plant Officers of these organisations | Employees who are not officers Volunteers even if they are officers |

The intention behind the new provisions is that only persons with the power and resources to improve safety will be subject to workplace manslaughter laws.¹⁰ Employees who are not officers (and who therefore do not have the power and resources to improve health and safety) are excluded. Also excluded are volunteers, consistent with their treatment under the OHS Act generally. Both the Second Reading Speech and Explanatory Memorandum state that nothing in the Bill prevents employees or volunteers from being prosecuted under the Crimes Act 1958 (Vic) or for common law manslaughter, where appropriate.¹¹ However, the reform is premised (in part) on the fact that such prosecutions have not been occurring. We should not expect this to change in the future, especially if the new laws themselves reinforce the perception that prosecutions for deaths that occur at the workplace are now a matter for OHS law, and not the general criminal law.

Negligent conduct and causation

Second, for liability to attach, the conduct breaching the duty must be negligent and must cause the death of another person. Let us unpack this further, and look at each of its elements.

- “Conduct” is defined to include both acts and omissions.¹² With respect to omissions, a person cannot avoid liability by arguing the negligent conduct occurred before the commencement of the provisions where an opportunity to correct the negligent conduct also arose after their commencement.¹³ Thus, an organisation’s failure to act after the commencement of the provisions to remedy an unsafe work policy introduced before their commencement would be relevant conduct for the purposes of prosecution. The provision also is intended to capture conduct occurring outside Victoria that causes a fatality in Victoria, and vice-versa.¹⁴
- Conduct will be negligent if it involves: (a) a great falling short of the standard of care that would have been taken by a reasonable person in the circumstances in which the conduct was engaged in; and (b) a high risk of death or serious injury or illness.¹⁵ The definition is based on the common law standard of criminal negligence, which is higher than the civil standard of negligence.
- The new provisions make clear that the liability of a body corporate is not dependent on the conduct or state of mind of senior officers of the organisation. What matters is the conduct engaged in by the body corporate itself.¹⁶ The Second Reading Speech and Explanatory Memorandum note that

an organisation's liability may arise directly where its unwritten rules, policies, work practices or conduct fail to create a culture of compliance with its responsibilities and duties, or indirectly through the actions or omissions of its employees whom the organisation is not adequate in managing, controlling or supervising.¹⁷

- The reference to “culture of compliance” is important. It is a concept that recently has gained prominence in corporate regulatory circles, largely because of its centrality to many of the recommendations of the Banking Royal Commission. Yet it is difficult to define and prescribe.¹⁸ There is a vast literature on “safety culture” across a variety of industries. It will be interesting to see how WorkSafe Victoria (and the courts) evolve the concept in the context of the new workplace manslaughter laws.
- The negligent conduct must cause the death of another person. The intention is that the common law test for causation apply. That is, the negligent conduct must have “contributed significantly” to the death or have been a “substantial and operating cause”.¹⁹ The Explanatory Memorandum states that, “[i]n appropriate circumstances, this could capture conduct causing a person to be injured or contract an illness (including a mental illness) that later causes the person's death”.²⁰ Thus, it is possible for the workplace manslaughter laws to be applied to prosecute an employer whose criminal negligence causes a person to develop an illness that causes their death, or which permits systemic workplace bullying and harassment that leads a person to commit suicide.
- “Other person” is not limited to employees and other workers. It applies to the death of any person to whom an applicable duty is owed. Some provisions are explicit about the person to whom a duty is owed (eg, s 21 that states that employers owe duties to employees). However, not all provisions are as explicit. For other provisions, to whom a duty is owed is a matter of implication. The Explanatory Memorandum gives as an example s 26 of the OHS Act. It creates a duty to provide a safe workplace but does not explicitly name a class of persons to whom the duty is owed. The implication, however, is that the workplace is to be kept safe for those who use or attend it, which may include customers and members of the public.²¹

Part 3 — WorkSafe Victoria enforcement: What can duty-holders expect?

Deterrence

As noted above, the mooted efficacy of the new workplace manslaughter laws is based, in large part, on their deterrent effect. However, for deterrence to be

effective, it also must be credible. The fear of being detected and sanctioned is essential to compliance.²² Building and maintaining a credible deterrent has both a substantive and communicative element. Substantively, it requires the regulator to undertake a critical mass of successful enforcement actions; and communicatively, it requires the regulator to leverage those enforcement actions to create the perception that non-compliances is being detected and sanctioned with appropriate speed and severity.²³

WorkSafe Victoria's role and inspectors

WorkSafe Victoria therefore can be expected to be active in looking for opportunities to apply the newest weapon in its regulatory arsenal. We also should expect the new Workplace Incidents Consultative Committee to actively hold WorkSafe Victoria to account for doing so. What should not be expected, however, is a family business being prosecuted for the death of a family member. Both the Second Reading Speech and Explanatory Memorandum make clear the government's intention that further traumatising of the family would not be appropriate in such a situation.²⁴

To ensure it is able to fulfil its new mandate, WorkSafe Victoria will be employing up to 40 new inspectors over the next 4 years, and will be able to call on the assistance of Victoria Police as needed.²⁵ And in anticipation of the increased complexity of workplace manslaughter investigations, the OHS Act's 2-year time limit to bring prosecutions for OHS offences will not apply to workplace manslaughter cases. While this is consistent with other manslaughter offences, it risks lengthy investigations and justice delayed, which the old maxim tells us, is justice denied.

WorkSafe Victoria's inspectors will have available to them the fully array of WorkSafe Victoria's coercive powers under the OHS Act. These include an inspector's powers of entry, search and seizure, and to compel documents to be produced and questions to be answered.²⁶ The OHS Act's partial abrogation of the privilege against self-incrimination also will apply to investigations of potential workplace manslaughter cases. Under the OHS Act, a person is not excused from producing a document on the grounds the document may tend to incriminate the person. However, the person cannot be required to explain the information contained in the document, if that explanation would tend to incriminate them.²⁷

While WorkSafe Victoria will conduct the investigations and decide whether to prosecute (in consultation with the Office of Public Prosecutions (OPP)), the OPP will be responsible for prosecuting the new offences,

including running the committal hearing.²⁸ And unlike other OHS offences, workplace manslaughter offences cannot be heard and determined summarily in the Magistrates' Court.²⁹

Part 4 — Concluding observations

The effect of the new manslaughter laws?

Will the new workplace manslaughter provisions have their desired effect? With respect to their expressive purpose, the answer is yes. The laws send a strong message that workplace fatalities are no less serious than other fatalities, and introduce penalties that better reflect the gravity of the offence, and the culpability of the offender. Their early use should be anticipated. So too should an increase in related enforcement activity.

Will workplaces be safer?

However, the true measure of their success is whether they will make workplaces safer and result in fewer people being killed from work (their functional purpose). Will the new laws be the impetus for businesses to review their workplace risks, and the control measures in place to eliminate or mitigate them? Will the threat of significantly higher sanctions lead employers to make safety improvements about which they have been equivocating or resisting? Only time will tell.

And will their bite match their bark? Will the new laws be interpreted in accordance with the government's intention? Will prosecutors be able to satisfy the additional elements required to be proved for a breach of duty to be elevated to workplace manslaughter? Will juries convict? And will courts impose penalties at the higher end of the range? Again, only time will tell.

For laws that rely on their messaging for their efficacy, the timing of their introduction is unfortunate. The COVID-19 pandemic has monopolised employers' and the community's attention. This led the Victorian Government to postpone the commencement of new environmental protection laws, which was also scheduled to commence on 1 July 2020.³⁰ On the other hand, however, a new law that reinforces an employer's duty to protect their workers, customers and members of the public from a deadly disease may be exactly what is required at this time.



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Footnotes

1. The other jurisdictions are Queensland, the Australian Capital Territory and Northern Territory (also commenced 1 July 2020). In Western Australia, there is a Bill to introduce workplace manslaughter laws. Differences exist between these laws, further complicating efforts to harmonise Australia's occupational health and safety laws.
2. This article uses the nomenclature of Victoria's Occupational Health and Safety Act 2004 (Vic) (OHS Act). Victoria is one of only two jurisdictions yet to adopt the harmonised model Work Health and Safety Act (although Western Australia is currently consulting on implementing elements of the harmonised laws). As a result, Victoria has not adopted the nomenclature of "work health and safety".
3. Vic Hansard, Legislative Assembly, 30 October 2019, p 3884 (Jill Hennessy, Attorney-General, Minister for Workplace Safety).
4. New Pt 9A (ss 126A and 126B) of the OHS Act.
5. Section 39G(1) applies to a "person" that is defined in the OHS Act to include a body corporate, unincorporated body or association and a partnership, in addition to a natural person (OHS Act, s 5). Section 39G(2) applies to officers of an applicable entity. The definition of "officer" is the same as in the Corporations Act 2001 (Cth) (OHS Act, s 5). This definition captures individuals at the highest level of the organisation with the power and resources to improve safety, including directors and people who participate in making decisions that affect a substantial part of the organisation's business, or who have the capacity to affect significantly the organisation's financial standing.
6. This was increased from 20 years by the Crimes Amendment (Manslaughter and Related Offences) Act 2020 (Vic) to keep it consistent with the penalties that apply to manslaughter under the Crimes Act 1958 (Vic).
7. A penalty unit currently is \$165.22, and will remain at that value through to 30 June 2021: Vic Gaz G16 of 23 April 2020, p 766.
8. OHS Act, s 39B.
9. Includes government entities.
10. Above n 3, p 3884.
11. Above; Explanatory Memorandum, Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (Vic), p 2.
12. OHS Act, s 39C.
13. OHS Act, s 39C(2).
14. Explanatory Memorandum, n 11, pp 8–9.
15. OHS Act, s 39E(1).
16. OHS Act, s 39E(2).
17. Above n 3, p 3884; Explanatory Memorandum, n 11, p 7.
18. See generally K Morris and M Carnell "Industrial manslaughter: do you have a culture of compliance" *OHS Professional Magazine* September 2019 p 16.

19. Explanatory Memorandum, n 11, p 8 citing *Royall v R* (1991) 172 CLR 378; 100 ALR 669; BC9102607.
20. Explanatory Memorandum, n 11, p 8
21. Explanatory Memorandum, n 11, p 5.
22. R Kagan, N Gunningham and D Thornton, “Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects” in *Explaining Compliance: Business Responses to Regulation* C Parker and V Lehmann Nielsen (eds), Edward Elgar, 2011, pp 37–58 at p 54.
23. Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law*, Routledge, 2018, pp 279–280.
24. Above n 3, p 3885; Explanatory Memorandum, n 11, pp 6–7.
25. Above n 3, p 3885.
26. OHS Act, ss 98–101.
27. OHS Act, s 154.
28. WorkSafe Victoria, Understanding Workplace Manslaughter Webinar, YouTube, 2 June 2020, www.youtube.com/watch?v=IUf5Ei3TABc.
29. This is because s 28 of the Criminal Procedure Act 2009 (Vic) does not apply to it.
30. Environment Protection Authority Victoria “New Environment Protection Act postponed to July 2021” media release (28 April 2020) www.epa.vic.gov.au/about-epa/news-media-and-updates/new-environment-protection-act-postponed-to-july-2021.