

# UNDERSTANDING VICTORIA'S NEW WORKPLACE MANSLAUGHTER LAWS

## Frequently Asked Questions

### Q. What are the laws and what do they mean for me?

On 1 July 2020 new criminal offences of workplace manslaughter came into operation as part of the *Occupational Health and Safety Act 2004 (Vic)* (OHS Act). The stated purpose of these new offences is to prevent workplace deaths, to deter certain duty holders under the OHS Act from breaching their duties and to reflect the severity of conduct that places life at risk in the workplace. The amendments do not vary the duties that were imposed by the OHS Act immediately prior to 1 July. However, they dramatically increase the potential consequences for non-compliance.

### Q. Who can commit a workplace manslaughter offence in Victoria?

1. Any person who owes a duty under Part 3 of the OHS Act *other than* the duty imposed on employees under section 25 (duties of employees) and section 32 (reckless endangerment). This includes:
  - Employers (whether incorporated or not and whether self-employed or not)
  - Persons who have, to any extent, management or control of any workplace
  - Designers of plant to be used at a workplace
  - Designers of buildings and structures to be used as a workplace
  - Manufacturers and suppliers of plant and substances to be used at a workplace
  - Persons who erect, install or commission plant to be used at a workplace
2. Any officer of a company, unincorporated body, unincorporated association or partnership. This includes:
  - Company Directors
  - Company Secretaries
  - Persons (regardless of their title) who make decisions, or who participate in making decisions, that affect the whole or a substantial part of the business.

It is important to note that volunteers cannot commit a workplace manslaughter offence.

### Q. If someone is charged with workplace manslaughter, what does the prosecution need to prove beyond reasonable doubt?

1. In a prosecution against a **Part 3 duty holder**, the prosecution must prove that:
  - a. The accused's conduct was negligent (i.e. acts or omissions involving a great falling short of the standard of care that would be taken by a reasonable person, where there is a high risk of death, serious injury or illness); and
  - b. The accused breached a duty owed under the OHS Act to another person ('Person B'); and

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- c. The accused's conduct contributed significantly or was a substantial and operating cause of Person B's death.
2. In a prosecution against an **officer**, the prosecution must prove that:
  - a. The accused's conduct was negligent (i.e. acts or omissions involving a great falling short of the standard of care that would be taken by a reasonable person, where there is a high risk of death, serious injury or illness); and
  - b. The accused's conduct breached a duty that the entity owed under the OHS Act to another person ('Person B'); and
  - c. The accused's conduct contributed significantly or was a substantial and operating cause of Person B's death.

## Q. What penalties can be imposed if someone is found guilty of workplace manslaughter?

The maximum penalty for an officer is 25 years' imprisonment. The maximum penalty for a body corporate is 100,000 penalty units which, as of today, equals \$16,522,000.

## Q. Can someone be charged with workplace manslaughter for a death that occurred before 1 July 2020?

No. The provisions only apply to deaths that occur on and from 1 July 2020. However, if conduct that occurred before 1 July 2020 was relevant to the cause of the person's death, it will likely be possible to use that in evidence.

If a fatality occurred prior to 1 July 2020, it is possible that someone could be charged under the Act with other offences (such as reckless endangerment under s32 of the OHS Act).

## Q. Why are employees and volunteers excluded?

The purpose of the workplace manslaughter offences is to hold those with the power and resources to improve safety to account. Employees who are not officers do not have a sufficient level of power or resources to improve safety standards. Employees can be prosecuted for other offences including duty as employees (to take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace) and reckless endangerment. Volunteers are excluded from both offences, so that people are not discouraged from volunteering.

## Q. If I am complying with existing OHS legislation do I now need to do anything differently?

If you are already complying with your OHS duties, you are doing the right thing and you will not need to do anything differently. If you are not complying, the consequences for not thinking about workplace risk can now be much more severe. The differences will come from how non-compliance is treated and the penalties for workplace manslaughter will be harsher than the previous legislation.

## Q. Can you still be charged for other penalties as well as workplace manslaughter?

WorkSafe can decide to prosecute for other breaches of the OHS Act or other laws, not just workplace manslaughter. After a WorkSafe investigation, they will decide whether to take enforcement action. For example, they may decide to prosecute or issue a letter of caution. In some circumstances, WorkSafe inspectors could issue improvement and prohibition notices or fines. Fines for breaches under the OHS can be up to just over \$3 million

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for corporations and about \$285,426 for individuals. One must also bear in mind any possible WorkCover claims by the deceased's dependants.

## **Q. How does the Workplace Manslaughter law apply to self-employed persons?**

It applies to self-employed persons in their capacity as employers (and Officers). It would be artificial to treat people who are self-employed only as employees given that they have the power to control the business' approach to safety.

## **Q. Can an employer be prosecuted if a worker dies from COVID-19 after being exposed on-site?**

You cannot rule it out. However, there would need to be clear evidence of negligence which caused the person's death (i.e. that they contracted COVID-19 as a result of being on site). If an employer has put protocols in place to minimise the risk of COVID-19 being contracted by workers, and processes to deal swiftly with an actual or suspected case, it would be difficult to find a basis to prosecute them.

## **Q. Can an OHS Officer/Safety Manager be charged with workplace manslaughter?**

The offence of workplace manslaughter does not apply to a volunteer or an employee, unless the employee is also an officer of an organisation. However, an employee can still be prosecuted for breaching existing duties under the OHS Act, including the duty to:

- Take reasonable care for their own health and safety, and the health and safety of others, in the workplace
- Cooperate with their employer regarding actions the employer takes to comply with OHS laws
- Not intentionally or recklessly interfere with or misuse anything provided at the workplace to support health, safety and welfare
- Not recklessly engage in conduct that may place another person at a workplace in danger of serious injury.

## **Q. Can an employer be prosecuted if an employee doesn't follow the instructions they are given or agreed procedures?**

Yes, it is possible, but there would need to be evidence of negligence. For example, if there were written instructions or an agreed procedure in place but the employer had a practice of not enforcing it or allowing employees to work in a manner contrary to it, then that could provide a basis to prosecute.

## **Q. If a death happens on site, what is the process? Would the management team be taken into custody right away?**

If WorkSafe takes charge of the investigation, a person would not be taken into custody. WorkSafe has no power to arrest or detain. If the fatality was being dealt with as a police matter (i.e. a non-OHS Act criminal offence) then the answer may be different.

In a WorkSafe-controlled investigation they will attend the scene, conduct enquiries and, at some point, release the scene (note that it is an offence to disturb the scene until WorkSafe releases it). WorkSafe inspectors will want to look at and take documents, seize items, take photos and measurements, and interview people.

It is important to note that in Victoria individuals have a privilege against self-incrimination, meaning that a person does not have to answer a question or do anything (e.g. produce a document) if doing so might

incriminate them. It is very easy for an individual to waive that protection without even knowing that they have done so. It is important that individuals get advice quickly to understand what their rights and obligations are. Non-individuals do not have the privilege against self-incrimination.

## Q. What is a Crisis Management Plan and why is it important?

A Crisis Management Plan outlines how your company will respond to a serious incident that could negatively impact your business. Creating a Crisis Management Plan allows you to consider and document what actions you need to take ahead of time. Items you should consider include:

- Who is going to liaise with WorkSafe and the police?
- Who is going to deal with union right of entry?
- Who is responsible for external communications (including dealing with media requests)?
- Who is going to be the point of contact for the deceased's family?
- How is the business going to conduct its investigation of the incident?
- Who is going to communicate with other staff?

It is important to clearly communicate these roles and responsibilities with your team. It may be a good idea to run a simulation to see if your plan works and to help get your team familiar with what they need to do.

## Q. How can Master Builders Victoria support members?

We encourage you to make the most of your membership and call us for support. We have safety management systems available for purchase, but we'd prefer that you get the right advice rather than have a system on the shelf. Our OHS team conduct OHS audits at a nominal rate for members and provide free consultations as part of the WorkSafe OHS Essentials program. The OHS Essentials Program is available to small and medium-sized businesses with a WorkSafe Insurance Policy. It is a great opportunity to learn more about your safety obligations and to receive tailored advice on managing safety in your workplace.

## QUESTIONS TO ASK YOURSELF

1. Does my business have an incident / crisis management plan?
2. When was the last time the incident / crisis management plan was reviewed?
3. Does the incident / crisis management plan need to be reviewed and updated?
4. What is my role when a safety incident occurs?
5. Who will my organisation obtain urgent legal advice and representation from if a safety incident occurs? Do I have their contact details readily available?
6. How robust is my organisation's safety management system?
7. When was the safety management system last reviewed?
8. When was the safety management system last audited to ensure that it is being implemented in a compliant manner?

9. What is the safety culture of my organisation? Is it aligned with the standard of safety compliance mandated by the OHS Act? Are there any practices which represent a tacit acceptance or endorsement of unnecessarily risky practices / conduct?
10. Does my organisation have insurance coverage which covers, at minimum, legal costs if my organisation or any of its officers are investigated by WorkSafe and/or charged with an offence under the OHS Act including workplace manslaughter?