Disclaimer

While the Department of Justice and Community Safety has attempted to make the information in this paper as accurate as possible, the information is provided in good faith without any express or implied warranty.

The proposed laws and information included in this paper are a starting point only, and are provided to facilitate discussion. The paper does not reflect the views of the Victorian Government, the Attorney-General, or any member of the Implementation Taskforce.

With the benefit of your submissions, and other stakeholder consultation, the department will provide advice to the Attorney-General on a new workplace manslaughter criminal offence.

How to make a submission

If you wish to comment on the matters raised in this paper in writing, please email or send your submission to:

If you have any questions regarding the submission process, call

Confidentiality:

This consultation paper is confidential. You may circulate the paper within your organisation in order to prepare a written submission. Please contact

Please note:

Unless marked ‘private and confidential’ all correspondence and submissions may be made available to members of the Implementation Taskforce.

Even if a submission is marked ‘private and confidential’, it is still subject to the Freedom of Information Act 1982.
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1. Introduction

1.1 Context

Over 100 people have been killed at work in Victoria in the last five years. Each death has a traumatic and lasting impact on the families, friends and workmates of those killed. The community expects workplaces to safeguard the lives of workers and the public, and a legal framework to support these outcomes.

To that end, in May 2018, the Victorian Government committed to introduce workplace manslaughter laws in Victoria. This consultation paper contains proposed model laws as a starting point for discussion with key stakeholders. It also contains background information, a comparison with other jurisdictions, and information on each of the key issues. Feedback from stakeholders will inform the development of proposed model laws for Cabinet consideration. The government intends to introduce these new laws in 2019.

1.2 Consultation process

To ensure these important reforms are informed by the experience of affected stakeholders, the department will consult in the following two streams:

<table>
<thead>
<tr>
<th>Implementation Taskforce</th>
<th>Other stakeholders</th>
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<tr>
<td><strong>Chair</strong></td>
<td><strong>Justice sector stakeholders</strong></td>
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<tr>
<td>• Natalie Hutchins MP</td>
<td>• Supreme Court of Victoria</td>
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<tr>
<td><strong>Employer representatives</strong></td>
<td>• Country Court of Victoria</td>
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<tr>
<td>• Master Builders, CEO, Rebecca Casson</td>
<td>• Magistrates’ Court of Victoria</td>
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<td>• Australian Industry Group, Head (Vic), Tim Piper</td>
<td>• Coroners Court of Victoria</td>
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<tr>
<td>• Victorian Chamber of Commerce and Industry, Chief Executive, Mark Stone</td>
<td>• Office of Public Prosecutions</td>
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<td>• Victorian Farmers Federation, CEO, Steve Sheridan</td>
<td>• Victoria Legal Aid</td>
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<tr>
<td>• Housing Industry Association, Executive Director (Vic), Fiona Nield</td>
<td>• Victoria Police</td>
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<td><strong>Employee representatives</strong></td>
<td>• Victorian Bar</td>
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<tr>
<td>• Victorian Trades Hall Council, Secretary, Luke Hilakari</td>
<td>• Law Institute of Victoria</td>
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<tr>
<td>• Construction, Forestry, Maritime, Mining and Energy Union, Assistant Secretary, Shaun Reardon</td>
<td><strong>Legal advisory group</strong></td>
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<td>• Australian Workers Union, State Secretary, Ben Davis</td>
<td>• Safety Institute of Australia</td>
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<tr>
<td>• Electrical Trades Union, State Secretary, Troy Gray</td>
<td>• Maurice Blackburn</td>
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<tr>
<td>• National Union of Workers, Victorian Secretary, Susan Allison</td>
<td>• Slater and Gordon</td>
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<td><strong>Fatalities and Serious Incidents Reference Group representatives (Reference Group)</strong></td>
<td>• Ryan Carlisle Thomas</td>
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<tr>
<td><em>The following members sit on the Taskforce in their own right, and will also facilitate input from the Reference Group:</em></td>
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Each stream will receive a copy of this consultation paper along with additional information to assist discussion and provision of feedback around key issues. The feedback received will inform the detail of the proposed laws and implementation plan. The discussion points in this consultation paper are a guide only, and feedback is sought on any issues relevant to you.

While feedback will be taken into account to inform the policy and detail of the legislation, the government commitment to the Victorian community, outlined below, is non-negotiable.
2. Background

2.1 Government election commitment

The Government election commitment included the following details:

1. introduction of a criminal offence in the Occupational, Health and Safety Act 2004 (OHS Act) that would apply when an employer’s negligent conduct causes the death of an employee or member of the public
2. employers would face maximum fines of around $16 million and individuals responsible for negligently causing death would face a maximum sentence of 20 years imprisonment
3. the offence would not apply to officers who are ‘volunteers’
4. WorkSafe would be responsible for prosecuting employers and would be given additional powers and resources to support this role.

These aspects of the proposed laws will form part of the new offence, and are not subject to change.

2.2 Senate Inquiry Report

In October 2018, the Education and Employment References Committee of the Commonwealth Senate published the report ‘They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia’ (Senate Inquiry Report).

Recommendation 13 of the Senate Inquiry Report stated that Safe Work Australia should work with all governments to introduce a nationally consistent industrial manslaughter offence, using the Queensland laws as a starting point.

2.3 Model Work Health and Safety Laws

In 2011, Safe Work Australia developed a single set of model work health and safety (WHS) laws to be implemented across Australia. Victoria has not implemented the model laws.

In 2018, Safe Work Australia reviewed the model laws and recommended the introduction of a model industrial manslaughter offence consistent with the recommendation of the Senate Inquiry Report. The offence would provide for ‘gross negligence’ causing death.

The review cited the following issues with the Queensland model:

1. The Queensland model broadens the range of individuals whose negligent conduct may be attributed to a corporation, but falls short of targeting organisational aspects of a corporation’s conduct. The proposed model in this paper seeks to address this issue.
2. The Queensland model introduces a concept of ‘senior officer’, which differs from the definition of ‘officer’ which generally applies to the model WHS laws. The report considered that the current definition of ‘officer’ should continue to be relied on for any new offence under the model laws. The proposed model in this paper uses ‘officer’.
3. The Queensland model is relevant to the death of a ‘worker’ and does not extend to third parties to the work relationship (e.g. members of the public). The proposed model in this paper applies more broadly.

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1 The election commitment is outlined in the media releases ‘Workplace Manslaughter Laws To Protect Victorians’ (26 May 2018) and ‘Ensuring Every Worker Makes It Home Safe’ (1 March 2019), and the fact sheet ‘Supporting Workplace Safety & Fairness at Work’.
3. Proposed Victorian legislative model—starting point

3.1 Using the Queensland model as a starting point

The department is using the Queensland model as a starting point, with amendments to ensure the model works well in Victoria.

Queensland introduced an industrial manslaughter offence in 2017 with maximum penalties of 20 years imprisonment for a ‘senior officer’ and $10 million for a body corporate. It is the most contemporary example of a workplace manslaughter offence. It covers a ‘person conducting a business of undertaking’, or a ‘senior officer’, negligently causing the death of a worker. There have been no prosecutions to date. The Queensland model is set out at Appendix A.

For comparison, Appendix B discusses the workplace manslaughter models in the ACT and the UK.

3.2 Overview of the proposed laws

The proposed laws are set out in full on the next page. In summary, the offence would apply where:

- a ‘person’ (e.g. an employer) owes a duty under the OHS Act to ensure the health and safety of another person (the victim)
- the person, or an ‘officer’ of the person, engages in conduct relating to the person’s business
- the conduct causes the victim’s death, and
- the conduct is negligent.

Duties under the OHS Act

The offence would apply to the death of anyone who is owed an existing duty under the OHS Act. These duties include maintaining a safe work environment for employees, and ensuring that persons other than employees (e.g. members of the public) are not exposed to risks to health or safety. The offence would not change these duties.

Organisations that would be captured (section 4.1)

The offence would apply to a ‘person’ under the OHS Act. This is a broad definition which covers employers and self-employed persons, including bodies corporate, unincorporated bodies, associations and partnerships. The offence would cover conduct by the person, either directly or through the acts of any of the person’s employees, agents or officers.

Individual senior officers that would be captured (section 4.2)

‘Officers’ would include directors or secretaries (of corporations), partners (of partnerships), office holders (of unincorporated associations), persons who participate in the making of decisions that affect a substantial part of the organisation’s business, and persons who have the capacity to significantly affect the organisation’s financial standing. The offence would not apply to volunteers.

Conduct that is ‘negligent’ (section 4.3)

Conduct would be ‘negligent’ if it involves a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and it involves a high risk of death or serious injury. This test looks at what a reasonable person would have done in the circumstances.

Conduct that ‘causes’ death (section 4.4)

Whether the conduct ‘causes’ death will be determined on the facts of each case. The question is whether the conduct contributed significantly to the death. This could cover conduct that causes an injury or illness to the victim, who later dies from that injury or illness.
3.3 Proposed legislation

The offence would be inserted into the OHS Act. This model is a starting point for discussion of key policy issues. The final form of the laws will be informed by stakeholder feedback and the drafting expertise of the Office of the Chief Parliamentary Counsel.

Definitions

conduct means an act or omission to perform an act.

Conduct is negligent if it involves a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct.

officer of a body corporate, unincorporated body or association or partnership has the meaning given by section 9 of the Corporations Act.

person includes a body corporate, unincorporated body or association and a partnership.

Drafting note: ‘officer’ and ‘person’ are already defined in the OHS Act.

1 Offence—Workplace manslaughter

(1) Subject to section 2, a person (A) commits an offence if—

(a) A owes a duty to another person (B) under Part 3 of the OHS Act; and
(b) A engages in conduct in respect of an undertaking of A; and
(c) A’s conduct causes the death of B; and
(d) A’s conduct is negligent.

Penalty: Imprisonment for 20 years for a natural person;
100,000 penalty units for a person who is not a natural person.

(2) Subject to section 2, an officer of a person (A) commits an offence if—

(a) A owes a duty to another person (B) under Part 3 of the OHS Act; and
(b) the officer engages in conduct in respect of an undertaking of A; and
(c) the officer’s conduct causes the death of B; and
(d) the officer’s conduct is negligent.

Penalty: Imprisonment for 20 years.

2 Exceptions

(1) A volunteer does not commit an offence under this Part.

(2) Duties owed by employees under section 25 of the OHS Act are excluded from this Part.

3 No time limit to commence proceedings

Section 132 of the OHS Act does not apply to this Part.

Drafting note: Section 132 provides that proceedings for an indictable offence under the Act must be brought within 2 years of the offence coming to the attention of WorkSafe at the latest

4 Prosecuting the Crown

For the avoidance of doubt, the Director of Public Prosecutions may, on behalf of the Crown, prosecute the Crown for an offence under this Part.

5 Liability of officers of bodies corporate under section 144

If an offence against section 1(1) is committed by a body corporate, an officer of the body corporate who is guilty of an offence under section 144(1) of the OHS Act is liable to a fine not exceeding [10,000] penalty units.

Drafting note: Section 144 provides for liability of officers where a body corporate’s contravention of the OHS Act is attributable to the officer failing to take reasonable care. It requires a lower standard than criminal negligence. This section does not limit an officer’s liability under section 1(2).

6 Territorial nexus

(1) It is immaterial that some of the conduct constituting an offence against this Part occurred outside Victoria, so long as the death occurred in Victoria.

(2) If some or all of the conduct that constitutes an offence against this Part, other than the death, occurred in Victoria, it is immaterial that the death occurred outside Victoria.
4. Key issues

4.1 Organisational liability

The main category of ‘persons’ captured by the offence would be employers and self-employed persons who owe a duty under the OHS Act. This could include any kind of organisation or corporate structure. The offence would apply to the person’s conduct, either directly (through their culture, policies or work practices that implicitly encourage non-compliance with duties of safety), or through the act or acts of any of the person’s employees, agents or officers (including a combination of acts).

Allowing for direct liability of bodies corporates and other entities

The offence would apply to ‘a person’, defined in the OHS Act to include a body corporate, unincorporated body or association and a partnership. It covers employers (including the Crown\(^2\)) and self-employed persons. The conduct must relate to the undertaking (i.e. the business activities) of the person.

The person must owe a duty under Part 3 of the OHS Act

To ensure an appropriate link to the person’s business activities, and in line with general principles of criminal negligence, a duty must be owed under Part 3 of the OHS Act.\(^3\) This would ensure that the offence only applies to persons already covered by the OHS Act. This would include, for example, employers and self-employed persons. In particular, an employer must, so far as is reasonably practicable:

- provide and maintain for their employees a working environment that is safe and without risks to health
- ensure that persons other than employees (e.g. members of the public) are not exposed to risks to their health or safety arising from the conduct of their undertaking.

Employees are excluded from section 1 of the proposed offence, which is intended to capture organisational liability. In addition to employers and self-employed persons, employees also owe duties under Part 3 of the OHS Act. The proposed offence is not intended to apply to employees. This is in line with the Queensland model, which does not apply to employees. This exclusion would not impact on section 2 of the proposed offence, which applies to officers.

When an organisation may be liable

The proposed laws make it clear that there can be direct criminal liability, even if one individual is not solely responsible for the negligent conduct.

Historically, a corporation could only be found liable where the conduct could be attributed to an individual of sufficient authority within the organisation. This is referred to as the ‘identification doctrine’\(^4\) or the ‘directing mind and will’ theory of corporate liability. This doctrine does not work effectively in modern, decentralised corporate structures. More recently, courts have indicated that determining how a corporation acts, or fails to act, for the purposes of an offence is a question of statutory interpretation.\(^5\) The question is whether the legislation was intended to apply to a corporation and how it was intended to apply. The Victorian Court of Appeal has endorsed this approach.\(^6\)

\(^2\) Section 6(2) of the OHS Act provides that the Crown is a body corporate for the purposes of the Act. Therefore the Crown would be subject to the offence.

\(^3\) Section 145 of the OHS Act provides that where a duty in the Act falls on an unincorporated association or a partnership, that duty falls on each officer of the partnership or unincorporated association. Section 145 limits the officers’ liability to where the commission of the offence is attributable to the officer failing to take reasonable care. This section would apply in respect of section 1 of the proposed offence.

\(^4\) Tesco Supermarkets Ltd v Natrass [1972] AC 153 (which has been applied in Australia).

\(^5\) R v CICG Pty Ltd [2006] VSCA 181, [30]; Meridian Global Funds Management Asia Limited v Securities Commission [1995] 2 AC 500, [7].

\(^6\) See, e.g., Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors [2014] VSCA 75. In R v CICG Pty Ltd [2006] VSCA 181, [30], the Court found that an offence under section 21 of the OHS Act applies direct liability on an employer corporation.
The proposed laws would allow for direct liability of a body corporate (or other entity) without pinpointing individual fault. Whether a death occurs because of one person’s negligence or because of the negligence of many people, the question remains the same: was the body corporate negligent? This would provide for corporate criminal responsibility where an organisation’s unwritten rules, policies, work practices or conduct implicitly authorise non-compliance, or fail to create a culture of compliance, with its responsibilities and duties, and a death results from this negligent conduct.

The OHS Act already applies direct liability on a body corporate for its conduct. Section 143 of the OHS Act provides that the conduct of the body corporate includes conduct engaged on its behalf by an employee, agent or officer acting within the actual or apparent scope of their employment, or within their actual or apparent authority. The proposed laws do not intend to limit section 143.

Territorial nexus

This provision would ensure that acts outside of Victoria are captured in some circumstances. This section is based on similar wording used in other offences in the Crimes Act 1958. This is intended to capture, for example, where an individual dies on a worksite in Victoria due to the negligence of an organisation, and the negligence is partly due to the organisation’s occupational health and safety policies which were drafted in a different jurisdiction (e.g. in the jurisdiction in which the organisation is headquartered).

Interaction with the Corporations Act 2001 (Cth)

Corporations law would apply as it does in relation to other corporate offences. Some entities have adopted particular legal structures in order to avoid responsibility for their actions. Sanctions under the Corporations Act 2001 (Cth) are relevant to some of those entities. For example, section 206B of that Act disqualifies a person from acting as a company director if they are convicted of an indictable offence that concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation, or concerns an act that has the capacity to affect significantly the corporation’s financial standing. A workplace manslaughter conviction would fall under this regime in some cases.Phoenix activity — when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts — is also illegal.

For consideration

1. The proposed model is limited to persons who owe a duty under Part 3 of the OHS Act (other than employees). Does the proposed model capture all relevant persons? If this element were removed, would the offence apply too broadly?
2. Are any business structures not covered by the proposed laws?
3. Should the proposed laws include express guidance as to how negligence may be established for an organisation?

4.2 Individual liability

The proposed laws apply to ‘officers’, consistent with OHS Act obligations and definitions. ‘Officer’ includes people at the highest level of the organisation (e.g. directors). It also includes 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, regardless of their position within the organisation.

Proposed laws apply to senior officers

The OHS Act defines the term ‘officer’ for the purpose of a body corporate, partnership and unincorporated association with reference to section 9 of the Corporations Act, which defines ‘officer’ to include:

- a director or secretary of the corporation
• a person who makes or participates in the making of decisions that affect the whole or a substantial part of the corporation’s business, and
• a person who has the capacity to affect significantly the body corporate’s financial standing.
• in respect to an entity that is neither an individual or a corporation:
  – a partner in a partnership
  – an office holder of an unincorporated association, or
  – a person who makes or participates in making, decisions that affect the whole, or a substantial part of the business or who has the capacity to affect significantly the entity’s financial standing.

The definition of ‘officer’ in the proposed laws is similar in scope to the definition of ‘senior officer’ that applies to Queensland’s workplace manslaughter offence, being:
• if the person is a corporation—a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer; or
• otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.

**For consideration**

Is the definition of ‘officer’ appropriate? Is there any reason the offence should not apply to the same officers who are subject to other requirements in the OHS Act?

### 4.3 Fault element—negligence

*The offence would apply to ‘negligent’ conduct, in line with the government commitment. Conduct is ‘negligent’ if it involves a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and it involves a high risk of death or serious injury. This test looks at what a reasonable person would have done in the circumstances.*

**Identifying conduct**

The first step in determining whether conduct is negligent is identifying the conduct.

For individuals, it is a matter of identifying the conduct of the officer in question.

For organisations, the proposed model seeks to overcome the difficulties inherent in the ‘identification doctrine’, and allow for direct liability of an organisation. The organisation’s negligence may arise in different ways such as the accumulation of conduct by different individuals, or based on the unwritten rules, policies, or work practices of the organisation. This is discussed in more detail at 4.1.

**Conduct that is negligent**

The test of criminal negligence is well developed in the common law, and applies to the offence of manslaughter by negligence. The test is whether the conduct involves a great falling short of the standard of care that a reasonable person would have exercised in the circumstances and involves a high risk of death or serious injury resulting from the relevant conduct. It is important that the same test applies to the proposed offence for consistency, and because of the serious consequences of being found guilty of the offence. To avoid any uncertainty in applying this test to an organisation (which is not currently covered by common law), the proposed laws adopt the common law test by including the same definition of negligence.

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4.4 Causation

Whether the conduct ‘causes’ death would depend on the facts of each case. The question is whether the conduct contributed significantly to the death. In some circumstances, this could cover conduct that causes an injury or illness to the victim, who later dies from that injury or illness.

Unlike the Queensland model, the proposed laws do not state that the offence applies if a person is injured and later dies. It is unnecessary to spell this out as it is captured by general principles of causation. The proposal refers to acts causing death, which is the wording used in other criminal homicide offences and is well established. This is intended to mirror the intent of the Queensland model.

Case law provides that for an act to cause a result, the act must be one that an ordinary person would hold, as a matter of common sense, to be a cause of the result. The mere fact that A’s conduct contributed causally to a result, or was a necessary cause of the result, is not sufficient; it must have ‘contributed significantly’ to that result or have been a ‘substantial and operating cause’.

However, the accused’s conduct does not need to be the sole cause of the result. A person can be criminally liable for something that has multiple causes, even if they are not responsible for all of those causes. Likewise, their conduct does not need to be the direct or immediate cause of the result. It would still be possible to cause death if the conduct caused an injury or illness, which later caused death, for example, where the negligent conduct caused a head trauma to an individual, who later died from that head trauma.

4.5 Application to members of the public and labour hire workers

The government commitment stated that the offence would extend to deaths of members of the public. This is reflected in the proposed offence.

The proposed model covers individuals to whom a duty is owed under Part 3 of the OHS Act. These duties differ depending on who owes the duty. For example, an employer owes a duty to employees to ensure a working environment is safe and without risks to health, whereas an employer’s duty to other persons is a duty to ensure that the person is not exposed to risks to their health and safety.

The government has committed to ensuring that deaths of members of the public are captured by the offence, to ensure that organisations may be held to account where their negligence leads to the death of a member of the public. This is consistent with the duties owed by employers to members of the public under Part 3 of the OHS Act.

There is a risk that this approach may exclude labour hire workers, as there are known ambiguities relating to how the Part 3 duties apply to these workers. These concerns were highlighted in the 2016 report of the Victorian Inquiry into the Labour Hire Industry and Insecure Work. If an organisation does not employ someone under a contract of employment (for example, ride share operators or organisations that exclusively use contractors or labour hire personnel), employer–employee duties under Part 3 may not apply in all scenarios. However, other duties would still apply, such as duties owed by ‘self-employed persons’ (who are persons, other than employers, who work for gain or reward otherwise than under a contract of employment or training) or duties owed by employers to ‘other persons’.

For consideration

Are the duties under Part 3 of the OHS Act sufficient to cover all appropriate circumstances, including conduct relating to the death of a labour hire worker? Are there any other categories of persons to which such duties should be extended (e.g. work experience students)?

\(^8\) Royall v R (1991) 172 CLR 378.
4.6 Exceptions and defences

The offence would exclude volunteers. Other exceptions are not proposed. Criminal negligence is a high threshold and the offence should generally apply where that threshold is met. There may be unique situations where prosecution would not be in the public interest, and prosecutorial discretion would apply.

The requirement for conduct to be criminally negligent is sufficient to ensure that the offence will only apply to actions that are not performed with due regard to the safety of other persons. Current prosecutorial guidelines will also ensure that prosecutions will only proceed where it is in the public interest to do so.

For these reasons, and consistent with similarly serious offences in Victoria, broad exceptions or defences have not been included in the proposed laws.

Volunteers excluded from individual liability

In line with the government’s commitment, the proposed model would not apply to volunteers, being individuals acting as officers on a voluntary basis (e.g. voluntary committee/board members). This is designed to ensure that voluntary participation at the officer level is not discouraged, and is consistent with the current operation of the OHS Act (see sections 144 and 145) as well as the Queensland model.

Other exceptions

In its submission in respect of the Senate Inquiry Report (referenced at 2.2), the Victorian union movement, in advocating for the introduction of a workplace manslaughter offence, recommended that any offence provide for exceptions for:

• emergency services employees operating in good faith, and
• family-run small businesses where the deceased is a family member of the business owner/operator.

The Queensland model does not provide these exceptions.

Family-run small businesses

The proposed laws do not include an exception for family-run small businesses. By way of example, on a family-run farm, if due to the negligence of the family, a family member dies while working on the farm, it would not be appropriate in all situations to prosecute another family member for workplace manslaughter. However, that is not in itself a reason to provide an exception. There is a risk that a blanket exception would exclude situations which should be captured. For example, if a family hires their nephew and their nephew’s friend to work on the farm, would the family only owe a duty to the nephew’s friend? These kinds of unique scenarios arise in other areas of criminal law (including the current offence of manslaughter by negligence) and prosecutorial discretion would apply as a safeguard where necessary.

Specific industries

The Queensland model expressly excludes the mining industry. Mining in Queensland is governed under separate pieces of legislation. It is not proposed that the Victorian model will exempt specific industries.

For consideration

Should any further exceptions apply to the proposed laws (e.g. emergency services)?
4.7 Penalties

The proposed offence includes a penalty of around $16 million for organisations and 20 years imprisonment for individuals. In addition to this, other penalties under the OHS Act may apply.

Fine

In line with the government’s election commitment, the proposed offence includes a penalty of 100,000 penalty units for a person who is not a natural person (e.g. a corporation). This currently amounts to $16,119,000 (from 1 July 2018 to 30 June 2019) and is indexed each year. The Sentencing Act 1991 requires a court to take into account the financial capacity of a company when determining a fine.

Imprisonment

In line with the government’s election commitment, and other manslaughter offences, the proposed offence includes a penalty of imprisonment for 20 years for a natural person.

Additional penalties

In addition to the penalties outlined in the proposed laws, the additional sanctions in the OHS Act and the Corporations Act would also apply. The normal penalty for a corporation is a fine. However, a fine may be of limited effect in some situations, e.g. if the corporation has no assets, liquidates, or is a non-profit. Further sentencing options include:

- Disqualification provisions — under s 206B of the Corporations Act, there are circumstances where a person convicted of an indictable offence that has the capacity to affect significantly the corporation’s financial standing can be disqualified from acting as a director of a company.
- Adverse publicity orders — Under s 135 of the OHS Act, where a person is guilty of an offence under the OHS Act, the court may make an order requiring the offender to publicise the offence, its consequences, the penalty imposed and any other related matter
- Orders to undertake improvement projects — Under s 136 of the OHS Act, where a person is guilty of an offence under the OHS Act, the court may make an order requiring the person to undertake a specified project regarding the general improvement of occupational health, safety and welfare within the period specified in the order.
- If alternative sentencing options are available, the definition of ‘sentence’ in section 3 of the Criminal Procedure Act 2009 may need to be amended to explicitly refer to the relevant sections of the OHS Act.

The department’s intention is that these penalties would only act as additional penalties to the primary sentence.

Limiting the application of section 144 of the OHS Act

Section 144 of the OHS Act provides for liability of officers where a body corporate’s contravention of the OHS Act is attributable to the officer failing to take reasonable care. This is a lower standard than criminal negligence. Usually the penalty under section 144 would be the same as the head offence (in this case, 100,000 penalty units). However, this is arguably too high in the context of the proposed offence where the individual has not met the standard of criminal negligence. A more appropriate penalty should be instituted. The department has suggested 10,000 penalty units. It is important to note that this section does not limit an officer’s direct liability under the proposed laws (which would apply criminal negligence as the fault element).
4.8 Procedure

The department will work with relevant agencies to ensure that the offence can be investigated and prosecuted effectively.

Who may commence proceedings, and when proceedings may commence

WorkSafe currently leads the investigation into workplace fatalities. In accordance with section 130 of the OHS Act, WorkSafe, its inspectors and the DPP can bring proceedings for an offence under the OHS Act.

Currently, where an offence is considered to have been committed against the OHS Act, WorkSafe charges that person on summons. If the person fails to answer a summons, then a warrant for their arrest would be issued. Where the offence is an indictable offence, the DPP takes over the prosecution after the accused has been committed for trial.

Section 132 of the OHS Act requires proceedings to be brought within two years of WorkSafe being notified of the breach. This limitation will be removed for workplace manslaughter given the possible complexity of cases involving a death, and to be consistent with other homicide offences for which there is no statute of limitations.

Investigation powers and use of evidence

The OHS Act provides WorkSafe inspectors with coercive powers to investigate breaches of the Act. In exercising these powers, the privilege against self-incrimination for individuals is partially removed. This means that an individual cannot refuse to provide a document requested by an inspector, even if it incriminates them of an offence. This is different from Victoria Police’s investigation powers under the Crimes Act 1958 for an investigation for common law manslaughter, where the privilege against self-incrimination is still in place. There is a risk that prosecutions using evidence obtained using coercive powers would not be able to rely on such evidence, and in some circumstances may not be able to proceed.

For consideration

Consider how investigation and prosecution of workplace manslaughter would operate to ensure effective prosecutions, consistency with similar serious offences, and due process.
### Appendix A—Queensland model

**Work Health and Safety Act 2011 (Qld)**

#### 34A Definitions for part

(1) In this part—

- **Conduct** means an act or omission to perform an act.
- **Executive officer**, of a corporation, means a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.
- **Senior officer**, of a person conducting a business or undertaking, means—
  (a) if the person is a corporation—an executive officer of the corporation; or
  (b) otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.

(2) For this part, a person’s conduct causes death if it substantially contributes to the death.

(3) For this part, a reference to a worker carrying out work for a business or undertaking includes a reference to a worker who is at a workplace to carry out work for the business or undertaking, including during a work break.

**Note**—In relation to the numbering of this part, see the note to section 3.

#### 34B Exceptions

(1) A volunteer does not commit an offence under this part.

(2) Despite section 34(2), a senior officer of an unincorporated association (other than a volunteer) may commit an offence under this part.

(3) The Criminal Code, section 23 does not apply to an offence under this part.

#### 34C Industrial manslaughter—person conducting business or undertaking

(1) A person conducting a business or undertaking commits an offence if—

- (a) a worker—
  (i) dies in the course of carrying out work for the business or undertaking; or
  (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and

- (b) the person’s conduct causes the death of the worker; and

- (c) the person is negligent about causing the death of the worker by the conduct.

Maximum penalty—

- (a) for an individual—20 years imprisonment; or
- (b) for a body corporate—100,000 penalty units.

**Note**—See section 244 or 251 in relation to imputing to a body corporate or public authority particular conduct of employees, agents or officers of the body corporate or public authority.

(2) An offence against subsection (1) is a crime.

#### 34D Industrial manslaughter—senior officer

(1) A senior officer of a person who carries out a business or undertaking commits an offence if—

- (a) a worker—
  (i) dies in the course of carrying out work for the business or undertaking; or
  (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and

- (b) the senior officer’s conduct causes the death of the worker; and

- (c) the senior officer is negligent about causing the death of the worker by the conduct.

Maximum penalty—20 years imprisonment.

(2) An offence against subsection (1) is a crime.
Appendix B—Jurisdictional comparison

Australian Capital Territory

The ACT enacted an industrial manslaughter offence in 2004 with a maximum penalty of 20 years imprisonment or a $420,000 fine, as part of a comprehensive range of measures to improve workplace health and safety standards in the ACT.

The offence applies to employers, employees, independent contractors, outworkers, apprentices, and trainees or volunteers. Senior officers can be prosecuted where it is proven that their negligence or recklessness led to the death or serious injury of an employee under their supervision. The standard is criminal negligence or recklessness. The legislation does not include additional OHS requirements or liability for accidents that could not be anticipated.

Acknowledging the increasing complexity of modern organisational structures, it is unnecessary to identify an individual who could be deemed to be the ‘directing mind and will of a corporation’. This was intended to make it easier to hold the company, as an entity, responsible if found guilty.

There have been no prosecutions of this offence in the ACT.

England and Wales

The Corporate Manslaughter and Corporate Homicide Act 2007 (UK) commenced on 6 April 2008. The Act abolished killing by gross negligence manslaughter in respect of corporations and abandoned the identification doctrine, so that a corporation cannot be attributed with liability for that crime. In its place, the Act created the offence of corporate manslaughter to enable the courts to get away from the identification doctrine to an offence that would impose direct personal liability on a corporation where there has been a gross management failure which caused a person’s death.

The offence enables the conduct of all the management within a corporation to be taken into account when ascertaining whether there were systemic failures in respect of safety that cause a death.

The offence does not apply to individuals (e.g. company directors or managers) and an individual cannot be convicted of aiding, abetting, counselling or procuring the commission of the offence. There are no penalties of imprisonment available.

The elements of the offence are as follows:

- First, the organisation owes a duty of care to the victim.
- Secondly, the way the activities are managed or organised amount to a gross breach of that duty.
- Thirdly, a substantial element of the breach must result from the way in which the activities are managed or organised by the senior management.
- Fourthly, the death must be caused by the way in which the activities are managed or organised.

The second element—a gross breach of the duty—is one that falls far below the standard expected in the circumstances. This is where the offence is an improvement on the identification doctrine because all levels of management (not just controlling officers) can be investigated to ascertain whether there has been a systemic failure in the management of safety resulting in a gross breach of duty.

However, the third element—a substantial element of the breach must result from the way in which the activities are managed or organised by the senior management—appears to restrict the ambit of the offence as it seems to be similar to the identification doctrine and could lead to organisations attempting to avoid liability by delegating health and safety to middle managers.

The requirement to show causative senior management failure has meant that convictions under the Act have been of small- and medium-sized organisations where this element of the offence is much easier to establish. It is difficult to know what is required for gross senior management failings in large organisations.
Exemptions

There are a number of exceptions from liability relating to the actions of public bodies. These are broadly cases which involve either wider questions of public policy or public emergencies. The following are exempt altogether from liability:

- decisions of a public authority in relation to issues of public policy (such as the allocation of public resources)
- the exercise of exclusive public functions under Crown prerogative or statute
- the undertaking of statutory inspections
- military operations in which members of the armed forces come under attack, or training of a hazardous nature, and
- police operations for dealing with terrorism, civil unrest or serious disorder in which officers come under attack.

Many of these exemptions reflect a distinction already recognised in the law of negligence between policy and operational matters, and that issue may overlap with the question of whether a duty of care arises. The exemption applies equally to policy decisions by central and local government. Specialist advice may be sought in respect of a decision to prosecute a public authority which potentially involves such considerations.

In other cases, there are limitations on the extent of the liabilities of certain public organisations. These cases include:

- other policing operations
- responses by the emergency services to emergency circumstances (but not exempting the provision of medical treatment)
- the duties of local authorities relating to child protection, and
- duties relating to the provision of probation services.

Sentencing and effectiveness of the UK model

To assist with sentencing, the Sentencing Guidelines Council issued a steps based definitive guideline, effective from 1 February 2016, for sentencing the offence of corporate manslaughter. The recommendations of the guideline are based on the size and turnover of the organisations with an offence range of £180,000 to a £20 million with an unlimited maximum.

The Act has been criticised for being ineffective. Since the Act commenced over a decade ago, there have been only around 26 successful prosecutions for corporate manslaughter, and all these organisations are small- or medium-sized corporations. The population of England and Wales is around 60 million people — far greater than that of Victoria. The first successful prosecution was in 2011 (three years after the implementation of the offence).