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24 February 2016

Ms Sue Sedivy
Executive Officer
Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation
House of Assembly, Parliament House,
North Tce, Adelaide SA 5000

Dear Sue,

Re: Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015

We refer to the recent notice inviting submissions to the Committee on the abovementioned Bill. SISA is pleased to provide the Committee with its views.

In broad, we see the Bill as entirely redundant in that it would not add to the effectiveness of the current work health and safety laws of the State, and in particular, the deterrence to negligent conduct provided by the already severe penalties set out in the *Work Health & Safety Act 2014* (WHSA).

The Bill seeks to inflict even harsher punishment that ceases to be deterrence and more closely resembles revenge. Prison terms of 20 years and personal fines of $1 000 000 cannot be described any other way. They are manifestly excessive and more closely equate to the penalty one might expect for murder.

We will briefly express further comments in line with the Committee's terms of reference.

1. *Examine the potential penalties in Criminal Law and Work Health and Safety Law applicable to workplace fatalities.*

   We observe that the WHSA is itself criminal law with its own structure of offences and penalties, including both civil and criminal remedies. The potential penalties are set out in section 31 of the WHSA, with the worst level of offending, a category 1 offence, attracting the following maximum penalties:

   - In the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—$600 000 or 5 years imprisonment or both; or
   - In the case of an offence committed by a body corporate—$3 000 000.

   We are not sure what a comparison with the penalties afforded in other parts of the criminal law would reveal. A breach of a safety duty, whether it be based on simple ignorance or reckless indifference, is a matter defined by, and penalised under, the WHSA. Comparing such breaches to other types of crime by equating the penalties

might require review of a range of sentencing guidelines of various courts and might not afford any greater clarity to the Committee.

In our view, the existing maximum penalty for a category 1 offence under the WHSA is ample deterrence and ought not be disturbed.

2. *Explore how culpable employers in other jurisdictions are held accountable for industrial deaths.*

The criminal penalty provisions of the WHSA are the same as those of other States and Territories that adopted the model WHS legislation, including the Commonwealth. When the WHSA was passed in South Australia, it involved a considerable escalation of the penalties that had applied under the repealed OHS&W Act.

The exception is the Australian Capital Territory which, having adopted the model WHS legislation, later amended its *Crimes Act 1900* to include industrial manslaughter along similar lines to those proposed by this Bill. See Part 2A of that Act for further detail. We do not see the existence of similar provisions in a single small jurisdiction like the ACT as any justification for the SA Bill.

Only two jurisdictions did not adopt the model WHS Bill.

In Victoria, which has not to date enacted the model WHS Bill the penalty for reckless endangerment is up to 5 years' imprisonment and a large fine expressed in penalty units (see section 32 of the *Occupational Health and Safety Act 2004* (Vic)). This is closely aligned with the current SA arrangements.

In Western Australia, which also has not enacted the model legislation, the highest category of offence is category 4, which attracts the following penalties

- for a first offence, to a fine of $250 000 and imprisonment for 2 years; and
- for a subsequent offence, to a fine of $312 500 and imprisonment for 2 years;

or in the case of a body corporate—

- for a first offence, to a fine of $500 000; and
- for a subsequent offence, to a fine of $625 000.

(See section 3A of the *Occupational Safety and Health Act 1984* (WA)).

The existing South Australian penalties are well in excess of those imposed by the WA legislation.

3. *Identify the range of penalties that may be applied to employers where a workplace accident results in the death of a worker.*

The WHSA does not specifically discern conduct resulting in death *per se*. It contemplates conduct that exposes an individual to whom a duty is owed to a *risk* of death or serious injury or illness. To this extent, the Act permits the maximum penalty to be applied even if a person does not die as a result of a breach of a duty. The trigger for a category 1 offence is reckless indifference to a safety duty. To this extent the WHSA casts a wider net than the scheme proposed by the Bill, notwithstanding the severity of the penalties set out in the Bill.

In terms of the actual range of penalties for exposing a person to risk of death or injury, they are set out under offence categories 1 and 2 under section 31 of the WHSA.

4. *Report and recommend a response to the* Work Health and Safety (Industrial Manslaughter) Amendment Bill*.*

   We submit that the Committee should recommend that the *Work Health and Safety (Industrial Manslaughter) Amendment Bill* be rejected in its entirety on the following grounds:

   a. The penalties already set out in the *Work Health & Safety Act 2014* are:

      i. more than adequate as both a deterrent and as a punishment

      ii. commensurate with penalties set out in other jurisdictions with the exception of the ACT and, in the case of WA, are far more severe.

   b. The Bill seeks an emotive and vengeful response to workplace tragedy and would do nothing to restore the lives of those affected by such tragic events.

We would be more than happy to expand on these comments should the Committee deem that necessary.

Yours sincerely,

Robin Shaw
Manager