Parliamentary Committees



Work Health and Safety and Other Legislation Amendment Bill 2017

Report No. 46, 55th Parliament
Finance and Administration Committee
October 2017

Finance and Administration Committee

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Acknowledgements

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ALA	Australian Lawyers Alliance
AMIC	Australian Meat Industry Council
ASMC	Australian Sugar Milling Council
AWU	Australian Workers' Union
BAQ	Bar Association of Queensland
BSCAA	Building Service Contractors Association of Australia
CCF	Civil Contractors Federation
CCIQ	Chamber of Commerce and Industry Queensland
CFMEU	Construction, Forestry, Mining and Energy Union
Criminal Code	*Criminal Code Act 1899*
DPP	Director of Public Prosecutions
ES Act	*Electrical Safety Act 2002*
FLP	Fundamental legislative principle
HIA	Housing Industry Association
HSR	Health and safety representative
IEU	Independent Education Union
Independent Reviewer/ Reviewer	Mr Tim Lyons, Independent Reviewer, Best practice review of Workplace Health and Safety Queensland
MBQ	Master Builders Queensland
MEA	Master Electricians Australia
NECA	National Electrical and Communications Association
PCA	Property Council of Australia
PCBU	Person conducting a business or undertaking
PIN	Provisional improvement notice
PPR Act	*Police Powers and Responsibilities Act 2000*

QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society
QNMU	Queensland Nurses and Midwives' Union
QPU	Queensland Police Union of Employees
QTU	Queensland Teachers' Union
RCSA	Recruitment & Consulting Services Association
SRWA Act	*Safety in Recreation Water Activities Act 2011*
Regulator	Regulator, Workplace Health and Safety Queensland
The Review	Best practice review of Workplace Health and Safety Queensland
TRG	Tripartite Reference Group
UFFUQ	United Fire Fighters Union Queensland
WHS	Work Health and Safety
WHS Act	*Work Health and Safety Act 2011*
WHS Board	Work Health and Safety Board
WHS Regulation	*Work Health and Safety Regulation 2011*
WHSO	Workplace Health and Safety Officer
WHSQ	Workplace Health and Safety Queensland

Chair's foreword

There is strong agreement in the committee that workers should be able to go to work and return safely to their families. This sentiment was also shared by submitters and witnesses who assisted the committee during this inquiry.

The Bill was introduced following recommendations from the independent Best Practice review of Workplace Health and Safety Queensland, undertaken by Tim Lyons. Mr Lyons' review made 58 recommendations to strengthen work health and safety in Queensland and keep Queensland workers safe. The Bill will implement all but two of the 21 legislative based recommendations – with the remaining two under further consideration.

It is therefore with regret that I note the committee was unable to reach consensus on this important Bill. The government members of the committee support the introduction of a new offence of industrial manslaughter in Queensland and the Bill's strengthening of work health and safety in Queensland through, for example, the introduction of a separate WHS Prosecutor.

The department clearly spelled out the issues with respect to large corporations avoiding responsibility for workplace death by hiding behind complex corporate structures. We consider this legislation will stop that and will see those responsible for high level decisions around unsafe work practices being held accountable.

The department advised that recent tragedies highlighted the need to ensure that the current work health and safety framework is robust, operates as an effective deterrent to non-compliance and is responsive to emerging issues. We believe that the penalties in the Bill will act as a strong deterrent for businesses and senior officers to ensure their workplace practices are safe.

Representatives of unions also strongly support the provisions in the Bill as they provide practical and workable solutions which recognise and address the serious issues around negligence in the workplace causing death. They consider the introduction of industrial manslaughter will incentivise businesses with poor practices to improve. We have included in the committee's report the issues raised by the CFMEU with respect to the application of the Bill to the construction industry and expect that these will be considered further prior to the House considering the Bill.

The importance of work health and safety was brought into sharp focus for the members of the committee when it heard from families who had lost loved ones in workplace incidents. These families fully support the introduction of the measures contained in this Bill, particularly the industrial manslaughter provisions. One of the witnesses noted that the business community may consider the creation of the industrial manslaughter offence as punitive, however, it will only be punitive if employers fall below the standards we, as a community, expect of them.

There are a range of reasons provided by stakeholders as to why the Bill should not pass. We have carefully considered each and strongly reject the notion that the health and safety of workers – of spouses and partners, parents, children, brothers, sisters – should play second fiddle to economic considerations.

In summary, the government members of the committee welcome these measures and urge the House to pass this important legislation to support Queensland workers and their families.

Peter Russo MP
Chair

1 Introduction

1.1 Role of the committee

The Finance and Administration Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Premier, Cabinet and the Arts
- Treasury and Trade and Investment, and
- Employment, Industrial Relations, Racing and Multicultural Affairs.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 22 August 2017, the Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, Hon. Grace Grace MP, introduced the Work Health and Safety and Other Legislation Amendment Bill 2017 into the House. The Bill was referred to the Finance and Administration Committee for reporting to the Legislative Assembly by 5 October 2017.

During its examination of the Bill, the committee:

- invited submissions from stakeholders and subscribers (see **Appendix A**)
- sought and received a written briefing and a written response to matters raised in submissions from the department, and
- held a public briefing with the Office of Industrial Relations on 6 September 2017, and a public hearing on 25 September 2017 to hear from stakeholders (see **Appendix B**).

All published documentation regarding the committee's inquiry is available on the committee's website.[2]

1.3 Policy objectives of the Work Health and Safety and Other Legislation Amendment Bill 2017

The objectives of the Bill are to:

- introduce an offence of industrial manslaughter into the *Work Health and Safety Act 2011, Electrical Safety Act 2002*, and the *Safety in Recreational Water Activities Act 2011.*
- establish an independent statutory office for work health and safety prosecutions
- address issue resolution matters by expanding the jurisdiction of the Queensland Industrial Relations Commission (QIRC) to include hearing and determining work health and safety disputes
- restore the status of codes of practice as existed under the *Workplace Health and Safety Act 1995*

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 See http://www.parliament.qld.gov.au/work-of-committees/committees/FAC

- prohibit enforceable undertakings being accepted for contraventions, or alleged contraventions, of the *Work Health and Safety Act 2011* that involve a fatality
- reintroduce the ability for a person conducting a business or undertaking (PCBU) to appoint a workplace health and safety officer, and
- enhance support for, and the role of hazards and risks in the workplace

1.4 Consultation on the Bill

1.4.1 Best Practice Review of Workplace Health and Safety Queensland

The explanatory notes state that consultation was undertaken by the Independent Reviewer, Mr Tim Lyons, who was appointed in March 2017 to undertake the Best Practice Review of Workplace Health and Safety Queensland (the Review).[3]

The committee sought further information from Mr Lyons about his background and independence:

> ***Mr Lyons****: I was appointed by the minister, Grace Grace, to conduct this review and I did that as a contractor to the Queensland government and completed the review in the time frame the minister had requested, which was quite an ambitious time frame. In terms of my own background, I have been involved professionally in workplace relations issues for approaching 25 years. That includes a long period with the National Union of Workers at a state and national level, including responsibility for the oil and gas industry coverage that the union had which involved extensive involvement with what are called major hazardous facilities and the regulation of those. In addition to that I spent eight years as the assistant secretary of the Australian Council of Trade Unions during which time I was responsible for, among other things, legislation and policy. I have had very extensive experience with workplace relations in general, but workplace health and safety in particular over a long period.*
>
> ***Mr STEVENS****: Thank you. If you could explain to me, after that CV if you like, where the word 'independent' comes into the matter?*
>
> ***Mr Lyons****: I was independent in the sense that I was reviewing the operation of Workplace Health and Safety Queensland and I am not an employee of Workplace Health and Safety Queensland.*[4]

The terms of reference for the Review required consideration of:[5]

- the appropriateness of Workplace Health and Safety Queensland's (WHSQ) Compliance and Enforcement Policy;
- the effectiveness of WHSQ's compliance regime, enforcement activities, and dispute resolution processes;
- WHSQ's effectiveness in relation to providing compliance information and promoting work health and safety awareness and education;
- the appropriateness and effectiveness of the administration of public safety matters by WHSQ; and
- any further measures that can be taken to discourage unsafe work practices, including the introduction of a new offence of gross negligence causing death as well as increasing existing penalties for work-related deaths and serious injuries.

The Review established the Tripartite Reference Group (TRG) which was to support the Reviewer and provide commentary and advice on the matters to be considered as part of the Review. The TRG met

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3 Explanatory notes, p 6.

4 Public hearing transcript, Brisbane, 25 September 2017, p. 23

5 Departmental written briefing, 31 August 2017, p 1.

on four occasions: 5 April 2017, 4 May 2017, 9 June 2017 and 14 July 2017, and consisted of representatives from the following organisations:

- AiGroup
- Master Builders Queensland
- Queensland Council of Unions
- Australian Workers' Union
- Queensland Tourism Industry Council, and
- Technical Experts from CQ University and the University of Queensland.

In April 2017, the Review published an issues paper which posed 58 discussion questions and held consultations with key worker, employer and industry representatives, relevant government agencies and statutory office holders.[6] The Review received written submissions from 26 individuals and organisations.[7]

The Reviewer provided the final report to the government on 3 July 2017 in which he made 58 recommendations where he considers Queensland's WHS framework could either be operationally or legislatively improved.[8] The Bill would implement a number of the legislative recommendations, including: the introduction of a new offence of industrial manslaughter, the establishment of a statutory office for WHS prosecutions, and transferring jurisdiction for the review of reviewable decisions under the *Work Health and Safety Act 2011* (Qld) (WHS Act), from the Queensland Civil and Administrative Tribunal (QCAT), to the QIRC.

The Queensland Government has agreed, either in full or in part, with 56 of the recommendations and has referred two recommendations to the Work Health and Safety Board (WHS Board) for further consideration.[9]

1.4.2 Department consultation

With respect to the Department's consultation on the Bill, the explanatory notes state:[10]

> *The Office of Best Practice Regulation within the Queensland Productivity Commission was consulted on the amendments in the Bill and advised that a regulatory impact statement was not required.*
>
> *The Office of the Queensland Parliamentary Counsel, the Parliamentary Liaison Officer, and the Department of Premier and Cabinet have also been consulted.*
>
> *The Department of Justice and Attorney-General has been consulted about the proposed new industrial manslaughter offence and the establishment of the independent statutory office for the Work Health and Safety Prosecutor.*
>
> *The QIRC has been consulted regarding the expansion of its jurisdiction to include hearing and determining issues resolution disputes.*

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6 The Review, p 17.

7 The Report, p 146.

8 Departmental written briefing, 31 August 2017, p 3.

9 Departmental written briefing, 31 August 2017, p 3. The two recommendations referred to the WHS Board are around the payment of work health and safety penalties by insurance companies (recommendation 47) and consideration of the decision in *Australian Building and Construction Commissioner v Powell* and its impact on health and safety representatives (HSRs) right to seek assistance (recommendation 52)

10 Explanatory notes, p 6.

During the public hearing, the Department responded to Mr Stevens' query around whether the department had attempted to quantify or estimate the cost of implementing the legislation, any effect on job opportunities or costs to industry:[11]

> *We did not undertake any specific work in relation to that. With the recommendations that have been made, they essentially adopt provisions that were in operation previously, particularly things such as voluntary WHSOs so that that again will be a capacity for businesses to employ a health and safety officer if they so wish and, as we have made clear in the documents to the committee, there is already a lot of organisations that would have somebody undertaking that task. Similarly with codes of practice, they establish minimums so that is a recognition of those requirements there on industry. I do not think in terms of looking at the range of provisions in the bill that there were any that we felt would require an analysis of that nature.*
>
> *…*
>
> *The costs are already there for industry to undertake that. For instance, if they wanted to have a WHSO for argument's sake that would be a benefit to the business in terms of ensuring the safety of its workforce and, as I say, with things like the codes of practice there is a requirement to comply with those as a minimum at the moment. So they would probably be the key areas. The other one is health and safety reps which again provides some support to businesses in terms of ensuring that they have good health and safety outcomes.*[12]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives and consideration of information provided by the department and submitters, the committee was unable to reach an agreement on whether the bill should be passed.

[11] Public hearing transcript, Brisbane, 25 September 2017, p 31.

[12] Public hearing transcript, Brisbane, 25 September 2017, p 31.

2 Examination of the Work Health and Safety and Other Legislation Amendment Bill 2017

This section discusses issues raised during the committee's examination of the Bill.

2.1 Industrial manslaughter

The Bill proposes to establish an offence of industrial manslaughter under the WHS Act. Amendments are also proposed in the *Electrical Safety Act 2002* (Qld) (ES Act) and the *Safety in Recreation Water Activities Act 2011* (Qld) (SRWA Act) to mirror the industrial manslaughter provisions proposed for the WHS Act.[13]

Proposed sections 34A to 34D provide for the offence of industrial manslaughter in the WHS Act.[14]

The explanatory notes state that the offence applies to both a 'senior officer' and an 'employer' where their negligent conduct causes the death of worker. The existing standard of proof for criminal negligence will apply under the Bill for both offences. The maximum penalty would be 20 years imprisonment for an individual or $10 million for a body corporate.[15]

The provisions implement recommendation 46 of the Review,[16] which found:

> *…there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect.*[17]

2.1.1 Issues raised in submissions – the need for the introduction of a separate offence

Support for the introduction of an industrial manslaughter offence

A number of stakeholders[18] supported the introduction of industrial manslaughter as an offence under the WHS Act, noting the work undertaken in the Review and other research with regard to fatalities in the workplace. In this respect, the Queensland Council of Unions (QCU) stated:

> *The rationale for the enactment of an offence of industrial manslaughter includes the inability to apply the existing offence of manslaughter, as it applies in the criminal code, to corporations (Australian Capital Territory Legislative Assembly 2003; Clough 2007; Hall and Johnstone 2005). The existence of the offence of industrial manslaughter recognises the seriousness of negligence causing death in a workplace setting. Industrial manslaughter, by having application to corporations, has the capacity to make corporations liable for the actions or inactions that cause fatalities (Australian Capital Territory Legislative Assembly 2003). The QCU submission relies upon literature that compares workplace deaths with the road toll. That literature (Bailey et al 2015) contrasts the concerted effort to 'de-conventionalise' road deaths, particularly those associated with drink driving, through a rigid application of penal sanctions. By contrast workplace fatalities do not have the same level of priority. It is considered that the inclusion of*

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13 Hereafter, references to the proposed industrial manslaughter provisions in the WHS Act, are also a reference to the proposed industrial manslaughter provisions in the ES Act and the SRWA Act.

14 See clause 4 of the Bill; see also clauses 9 to 11, 13, 55, 57 to 60, 62, 64 and 65 for other amendments relating to the introduction of an industrial manslaughter offence.

15 Explanatory notes, p 2.

16 The Review, p 114.

17 The Review, p 113.

18 See submissions from United Voice, QNMU, QCU, IEU, UFFUQ, CFMEU, QTU, AWU and QPU.

an offence of industrial manslaughter should go some way to 'de-conventionalise' workplace fatalities.[19]

The Construction, Forestry, Mining and Energy Union (CFMEU) stated:

The introduction of an offence of industrial manslaughter is needed in Queensland to demonstrate the significance of workplace health and safety as a matter of public policy, and to bring about cultural change with regard to workplace health and safety practices insofar as workplace deaths are currently not being adequately prevented under law.[20]

Sufficient existing legislative framework and lack of justification for new offence

Some submitters state the industrial manslaughter provisions are unnecessary and duplicative, create additional red tape, and shift the focus from improving health, safety and the primary duty of care to punitive action. In this respect, submitters argue that the current legislative framework is sufficient to address fatalities in the workplace, including the manslaughter provisions in the Criminal Code and the offences and penalties regime within the WHS Act which breaks down offences into three categories; Category 1 being the highest offence. [21]

The Bar Association of Queensland (BAQ) noted that section 31 of the WHS Act does not currently require a risk of death or serious injury to be realised (i.e. death or serious injury to occur) as the Category 1 offence is committed if they:

- have a health and safety duty and
- without reasonable excuse they recklessly engage in conduct
- which exposes an individual who is owed that duty to a risk of death or serious injury or illness.[22]

BAQ considers that it is difficult to conclude that the existing offences and penalties are insufficient where actions or omissions allegedly involving negligence result in fatalities. The existing offences have not been utilised by prosecutors to any degree to provide any such assessment.[23]

In raising concerns about the necessity for the introduction of the offence of industrial manslaughter, Master Builders Queensland (MBQ) submitted:

The current legislation takes a graduated enforcement approach to breaches of the legislation. There is a range of enforcement options, which provides the regulator with the flexibility to match their responses to the facts of the case. These enforcement options include provisional improvement notices, prohibition notices, non-disturbance notices, enforceable undertakings as well as the three categories of penalties…

The current categories (1,2 and 3) have been in the WHS legislation since 2011, in addition there has been a shift from a system based on causation, to one based on presence of a risk, thus implicating more people (being those responsible for risk) in a prosecution…

In addition to the offences under the WHS Act, there are several criminal duties under the Criminal Code that could be used to prosecute persons for workplace deaths or serious incidents, and which result in a criminal charge and potential gaol time. These provisions include (but may not be limited to, depending on the facts of the case):

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19 Submission 9, QCU, p 2.

20 Submission 22, CFMEU, p 7.

21 Stakeholders who raised this issue in their submissions include AMIC, ABQ, AiGroup, NECA, CCIQ, HIA, MEA, ACCI, CCF, QLS and AgForce. Submission 5, MBQ, p 2; submission 14, RCSA, p 2; submission 16, ACCI, p 2.

22 Submission 28, BAQ, p 3.

23 Submission 28, BAQ, p 9.

- *Section 289 Duty of persons in charge of dangerous things.*
- *Section 286 Duty of a person who has care of a child.*
- *Section 328 Negligent acts causing harm.*
- *Section 328A Dangerous operation of a vehicle.*

It must be noted also, that Manslaughter under the Criminal Code is a charge against any person, therefore a director of a company, a "senior officer", a supervisor, or a worker can be held to account for a death irrespective of the introduction of Industrial Manslaughter.

Finally in addition to the offences outlined above, in 2011 officers of a company were allocated a duty in their own right and must exercise due diligence to ensure that the person conducting the business or undertaking complies with their duties and obligations.

Master Builders' view is that a positive duty which makes company officers culpable for failing to meet their corporate governance responsibilities by preventing corporate misconduct is a more effective approach to work health and safety regulation than introducing an Industrial Manslaughter offence.[24]

With regard to the existing category of offences under the WHS Act, AiGroup stated that the current penalties for offences were adequate and a maximum jail term of 20 years would not create a greater deterrence for a senior officer than the current maximum of 5 years for a Category 1 offence.[25]

BAQ noted that the explanatory notes to the Bill state that the intention is that a Category 1 offence be the most serious work health and safety offence, and as such the "worst examples of failures causing fatalities could be prosecuted for a Reckless conduct – Category 1 offence pursuant to section 31 of the Act".[26]

Given the existing framework, the National Electrical and Communications Association (NECA) noted that the additional industrial manslaughter provisions could create confusion and likely allow for jurisdiction shopping such that multiple attempts could be made to prosecute a person under the different legislative provisions.[27] The Queensland Law Society (QLS) raised similar concerns, stating it is "unwise to overcomplicate statute book offences that cover the same acts and omissions" and that if there is evidence people are not being held culpable, "a review of the duty holders and duties should be undertaken".[28]

The department stated that although individuals and corporations are currently liable to be prosecuted for manslaughter under the *Criminal Code Act 1899* (Qld) (Criminal Code), limitations exist in the current regime that impede larger organisations from being successfully prosecuted and held accountable for negligent behaviour that results in a worker's death.

In particular, the courts have interpreted the current manslaughter provision under the Criminal Code as requiring an act or omission to have been performed by someone with the authority to act as the corporation. For example, an individual director or employee must be identified as the "directing mind and will" of the corporation.

This generally requires proof of fault by a top-level manager or director which is difficult to establish in the case of large corporations with elaborate corporate structures (e.g. a corporation with a Board of Managers), where offences are generally more visible at the middle-management level where decisions may more clearly be made by an individual. This ultimately

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24 Submission 5, MBQ, pp 4-5.

25 Submission 6, AiGroup, p 8.

26 Submission 28, BAQ, pp 3, 9.

27 Submission 8, NECA, p 2.

28 Submission 23, QLS, p 2.

means that manslaughter prosecutions under the Criminal Code are only successful against small businesses and that prosecutions against large corporations are unlikely to succeed.

Placing the offence in the WHS Act overcomes this issue by enabling the conduct of employees, agents and officers to be attributed to the organisation. This addresses the current limitations under the Criminal Code by reducing the barriers to attributing criminal liability to these organisations and enables the actions of individuals to be taken as actions of the organisation.

Establishing a standalone offence also sends a clear message to duty holders that companies, and the senior officers working for them, will be held accountable for neglecting safety management. It will also provide an alternative avenue for recourse where Police decide not to pursue charges under the Criminal Code.[29]

With respect to the comments around the option of commencing a prosecution under the Criminal Code or the WHS Act, the department advised that a senior officer, as defined by the proposed industrial manslaughter provisions, could potentially be charged with either manslaughter under section 303 of the Criminal Code or industrial manslaughter under the WHS Act and noted:[30]

While there is some cross over, in this regard, it is envisioned that where a senior officer's conduct is considered to have caused the death of a worker, the senior officer may be prosecuted for industrial manslaughter unless Queensland Police decide to instead progress manslaughter charges.

Justification for amendments

Some stakeholders stated that the amendments are not justified, not least based upon current trends indicating a reduction in the number of work-related fatalities, that no justification had been provided for the amendments, and that the existing legislation has not been thoroughly tested.

In terms of improvements a number of stakeholders referred to the Safe Work Australia report, *Work-related traumatic injury fatalities, Australia 2015*, which showed that there was a 44 per cent decrease in recorded worker fatalities between 2007 and 2015 (from 3.0 fatalities per 100,000 workers in 2007, to 1.6 per 100,000 workers in 2015).[31] However, the CFMEU, referring to the same data, noted that the rate of deaths in the building and construction industry was approximately 34 per cent higher than the all-industry rate. Additionally, that the data was:

…under-representative of the true incidence of work-related deaths in the building and construction industry. For instance, these data do not include deaths that are attributed to disease and other "natural causes" that arise from, or are a consequence of, work-related illness or injury (e.g. asbestos-related disease). They do not record some fatalities that are related to traffic incidents because of the way these deaths are coded and may be missed. They do not include suicides that occur outside the workplace, but that are attributable to work-related stress, bullying and harassment.[32]

Stakeholders also noted that no evidence had been presented to show that, if it were implemented and executed effectively, the existing legislative framework would fail to deliver better safety outcomes.[33]

MBQ state that before further offences and penalties are adopted, improvements to areas such as training and education of WHSQ inspectors, delivery of more safety and compliance, and education

29 Department response to submissions, pp 13-14.

30 Department response to submissions, p 16.

31 Submission 3, AMIC, p 5; submission 5, MBQ, p 3; submission 6, AiGroup, p 5; submission 13, MEA, p 3; submission 16, ACCI, p 2.

32 Submission 22, CFMEU, p 6.

33 Submission 5, MBQ, p 4. See also submissions made by AgForce and the QLS.

campaigns, should be made.[34] QLS also suggested that WHSQ be provided with greater resources "so that further engagement and training can be undertaken and so that investigation and prosecutions can be increased where necessary".[35]

Related to this, stakeholders questioned how the current framework could be considered to not operate effectively in circumstances where it has not been fully tested, specifically with regard to Category 1 offences under the WHS Act.[36]

Submitters noted that the proposed amendments to the WHS Act are modelled on the industrial manslaughter provisions that were introduced into the *Crimes Act 1900* (ACT), despite there having been no prosecutions under those provisions since they were introduced in March 2004.[37]

BAQ consider that the Bill is "seeking to create offences similar to those which have essentially been overshadowed by the Category 1 offence in the Australian Capital Territory and are already in place in Queensland."[38]

The department recognised that success in implementing the *Australian Work Health and Safety Strategy 2012-2022* has resulted in an overall reduction in serious work-related injury rates in Queensland of 21.6 per cent for the five years to 2015-16 and fatalities of 38.1 per cent. However, recent tragedies highlighted the need to ensure the current work health and safety framework is robust, operates as an effective deterrent to non-compliance, and is responsive to emerging issues.

> *In response to these incidents, the 'Best Practice Review of Workplace Health and Safety Queensland' (the Review) considered whether a new offence of industrial manslaughter should be introduced. In considering the issue, the Review found that:*
>
> - *a new offence is appropriate and necessary for dealing with, "…the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect"; and*
> - *the new offence addresses a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code do not provide for individual conduct to be imputed to the organisation.*
>
> *The proposed offence also:*
>
> - *sends a clear message to duty holders about societal expectations around safety in the workplace and that companies, and the senior officers working for them, must do all that they can to ensure the safety of workers at their workplace;*
> - *is likely to have the positive effect of raising the safety standard expected from corporations and their senior officers and increase proactive work health and safety management;*
> - *will encourage work health and safety to be managed as a cultural priority within businesses;*
> - *will provide an alternative avenue for recourse where the police decide not to pursue charges under the Criminal Code;*
> - *will allow sentencing judges to have the appropriate scope to adequately deal with the worst examples of corporate or individual behaviour; and*

34 Submission 5, MBQ, pp 3-4.

35 Submission 23, QLS, p 1.

36 Submission 4, MBQ, p 4; submission 11, CCIQ, p 1; submission 18, CCF, p 4; submission 28, BAQ, p 4.

37 Submission 11, CCIQ, p 2; submission 12, HIA, p 5.

38 Submission 28, BAQ, p 8.

- *will extend corporate criminal responsibility to cases where a corporation's unwritten rules, policies, work practices or conduct tacitly authorise non-compliance or fail to create a culture of compliance consistent with its responsibilities and duties of care*.[39]

Impact on national harmonisation of work health and safety legislative frameworks

Stakeholders noted the current WHS Act was implemented as part of a national harmonisation process and the impact that the proposed amendments in the Bill (generally) will have on that process.[40] Most jurisdictions across Australia have implemented the model Work Health and Safety legislation developed in 2011, including Queensland, with some minor variations made for consistency with relevant jurisdictional requirements.[41] Section 3 of the WHS Act states that the main object of the Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.[42]

With respect to deviation from national harmonisation, stakeholders are concerned that the proposed amendments would impact negatively on Queensland. The Chamber of Commerce and Industry Queensland (CCIQ) stated that:

> *The purpose of harmonisation is to ensure the businesses who operate across different states have a clear understanding of their rights, duties and obligations in relation to health and safety. Creating disharmony about obligations, entrenching a clear delineation between employers and everyone else moves away from the goal of shared responsibility for safety, risks creating a blame culture and is very unlikely to improve occupational health and safety outcomes at an enterprise level.*[43]

The Australian Meat Industry Council (AMIC) stated that the introduction of industrial manslaughter into the WHS Act (as well as other amendments) "would impose a much higher bar for safety compliance in Queensland than other harmonised jurisdictions".[44]

MBQ stated:

> *Such a move will decrease the state's attractiveness to businesses, not only because we are no longer harmonised but due to the potential for duplicate offences under WHS legislation and Criminal legislation if a death occurs, unlike any state in the country. This coupled with a clear shift towards hard compliance without the requisite balance of increasing education and awareness, is likely to impact over time the competitiveness, profitability and productivity of Queensland businesses.*[45]

It was also noted by NECA that there would be a significant new burden on businesses operating across interstate borders.[46]

As to how changes to the model laws are managed, the Housing Association of Australia (HIA) noted that the model legislation continues to be considered as part of the Safe Work Australia processes.[47]

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39 Department response to submissions, p 14.

40 See Submission 3, AMIC, submission 5, MBQ, Submission 6, AiGroup, Submission 11, CCIQ, Submission 12, HIA, Submission 14, RCSA, Submission 15, PCA, submission 16, ACCI, submission 18, CCF.

41 Safe Work Australia, *Model WHS laws*, https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws, 10 July 2017. Victoria and Western Australia have not implemented the model legislation.

42 Section 3, Object, WHS Act 2011.

43 Submission 11, CCIQ, p 4.

44 Submission 3, AMIC, p 5

45 Submission 5, MBQ, p 7.

46 Submission 8, NECA, p 2.

47 Submission 12, HIA, p 3.

In this respect, relevant Ministers agreed to conduct a review of the national system in 2018.[48] CCIQ raised concerns that amendments are being proposed to the WHS Act despite the pending review.[49] Australian Chamber of Commerce and Industry (ACCI) also supported deficiencies being addressed as part of the 2018 review, including to support consistency in approach.[50]

The department advised that the proposed amendments implement the findings of the Review and address a gap in the existing regime as it applies, and is enforceable, to corporations. While harmonisation is desirable, it is prudent for this gap in the current regime to be addressed and not be left open until such time as a proposal to amend the model WHS laws can be progressed:[51]

> *A review of the national model work health and safety laws is due to commence in 2018. It is understood that this review will consider the model offence and penalty regime, and it is intended that Queensland will pursue mirror amendments to the model laws to ensure consistency and harmonisation is maintained.*

2.1.2 Issues raised in submissions – Construction of the proposed industrial manslaughter

Industrial manslaughter in the WHS Act and consequential impacts

Some stakeholders raised concerns that the proposed industrial manslaughter provisions have been included in amendments to the WHS Act rather than the Criminal Code, and as a result, the defences and protections that are afforded to people accused of an offence under the Criminal Code may not extend to industrial manslaughter.[52]

This concern was not shared by the BAQ which noted that the defences in the Criminal Code would apply to the proposed industrial manslaughter offences. The BAQ noted that section 33A of the WHS Act provides that for an offence against sections 32 and 33 of the WHS Act (Category 2 and 3 offences) the defences set out in the Criminal Code sections 23(1) and 24, are limited by the duties imposed on the person under Part 2, Divisions 1 to 4 of the WHS Act. The Bill would not amend the WHS Act to limit the defences contained in the Criminal Code with respect to the proposed industrial manslaughter offence.[53]

With respect to including the offence in the WHS Act, AiGroup noted that the intention of the Bill is to "create an ability to prosecute the corporation for manslaughter"[54] and refers to the existing imputation provisions in the WHS Act which:

> *…allow the corporation to be prosecuted for manslaughter with high financial penalties, rather than it being limited to an individual. However, we note that the current imputation provisions reference proof of* knowledge, intention or recklessness*. We have not identified any amendments in the Bill that would amend this to include* negligence.[55]

Similarly, Master Electricians Australia (MEA) stated:

> *The Bill creates a new criminal charge outside of the Criminal Code. The justification of this as per the briefing given by departmental officers states that the Bill will assist with successful prosecution of Senior Officers and PCBUs of large complex organisations; a circumstance that has allegedly proved difficult to prosecute under the Criminal Code. Effectively, the Department's*

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48 Safe Work Australia, *Model WHS laws*, https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws, 10 July 2017.

49 Submission 11, CCIQ, pp 4-5.

50 Submission 16, ACCI, p 2.

51 Department response to submissions, p 15.

52 See submissions provided by AiGroup, HIA, MEA and QLS.

53 Public hearing transcript, Brisbane, 25 September 2017, p 11.

54 Submission 6, AiGroup, p 14.

55 Submission 6, AiGroup, p 14. See section 244, Imputing conduct to bodies corporate, WHS Act.

proposed Bill is enforcing the harshest punishment available on a person without the full protection of the current criminal justice system.[56]

MEA noted that the right to remain silent and against self-incrimination, and a range of other protections including in relation to the conduct of investigations and questioning of witnesses, which apply under the Criminal Code, and related acts such as the *Police Powers and Responsibilities Act 2000* (PPR Act), have not been included as part of the proposed industrial manslaughter provisions.[57] A person will commit an offence if they refuse to provide information or evidence to a WHS inspector despite that doing so could incriminate the person. While noting that there is a protection in respect to any compelled evidence being inadmissible in civil or criminal proceedings, the MEA remains concerned that this is not the same privilege against self-incrimination afforded under the Criminal Code.[58]

The department advised that the defences contained in Chapter 5 of the Criminal Code will apply to the new offence, for example ignorance of the law (section 22), acts or omissions that occur independently of the exercise of a persons will (section 23), mistake of fact (section 24), extraordinary emergencies (section 25), insanity (section 27), etc.[59]

A key difference between defences for industrial manslaughter and manslaughter under the Criminal Code, based on current drafting, is that where an offence of manslaughter under the Criminal Code is based on criminal negligence, the section 23 defence relating to an accident is not available. This exclusion in the Criminal Code reflects the fact that the duties owed are of such weight and importance that they cannot be negated by reliance on accident.[60]

In response to the issues raised by MEA, the department responded:

Under the Police Powers and Responsibilities Act 2000 (PPR Act), a person is entitled to remain silent when questioned by police (the right to silence) unless required to answer the questions by or under an Act (s397 PPR Act). Police officers are also obliged warn persons who they seek to interview that any evidence the person gives may be used in evidence against them in legal proceedings. Where police seek to question a person in respect of an indictable offence they must be cautioned that anything they say may be used as evidence against them (s431).

In contrast, under the WHS Act, persons who refuse to provide answers to inspectors when asked (e.g. under s171) commit an offence, unless they can provide a reasonable excuse for their refusal. They must provide answers even if they believe they will incriminate themselves by doing so. However, any information a person gives to an inspector under Part 9 of the WHS Act cannot later be used in evidence against them in criminal or civil proceedings. The abrogation of the privilege against self-incrimination seeks both to ensure there are strong powers to compel the provision of information to secure work, health and safety, and also to protect the rights of persons under the criminal law. The abrogation of the privilege against self-incrimination focusses on determining the facts leading to the breach of work health and safety. This is because identifying the cause of the breach enhances the public interest by preventing future injuries and loss of life caused by unsafe work practices.

Further an inspector must warn a person that they must answer the question even if they might incriminate themselves. Where an inspector fails to give this warning, and the person does not answer the question, then the person does not commit an offence. [61]

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56 Submission 13, MEA, p 4.

57 Submission 13, MEA, pp 4-8.

58 See section 172 of the WHS Act.

59 Department response to submissions, p 17.

60 Department response to submissions, p 17.

61 Department response to submissions, p 17.

Definitions and penalties - negligence and reckless conduct

Concerns were raised by stakeholders about the how the offences of industrial manslaughter and of reckless conduct under existing section 31 of the WHS Act will interact, both with regard to the definitions of negligence and reckless conduct, and the penalties under the respective offences.

AiGroup stated that a Category 1 offence is not sufficiently distinguished from the proposed industrial manslaughter offence given the similarity in definitions, noting the potential impact when matters are being heard before the courts. Identifying that the only apparent difference between the offences appears to be to the penalties and because of a death, AiGroup recommend the provision be updated to refer to 'reckless conduct causing death'.[62]

With respect to the penalties for the offences, AiGroup also stated:

> *The current reckless endangerment offence requires there to have been recklessness in disregard of actual knowledge that it is likely that death or serious injury may result.*
>
> *The proposed offence based on negligence does not require the knowledge of the type or degree that is required to prove the reckless endangerment offence. Despite the lower level of proof, it will carry a higher penalty.*
>
> *Hence, the provisions will introduce a lower level offence with a higher level penalty; justified by calling it industrial manslaughter.*[63]

The Australian Lawyers' Alliance (ALA) raised a concern around the apparent disparity between the gravity of the offence and penalty with respect to industrial manslaughter and reckless conduct:

> *Whilst community expectations demand serious criminal sanction for both types of conduct referred to above* [recklessness and industrial manslaughter]*, in our view, the objective gravity of reckless conduct is arguably something greater than the objective gravity of negligent conduct. As a result the potential imbalance that would otherwise be created by not amending the recklessness offence is addressed by increasing the penalty where an actual death or serious injury or illness is caused by the reckless conduct.*[64]

Consequently, ALA recommend that section 31 be amended to provide for a 20 year jail term where a death or serious injury occurs; the five year jail term should be retained where the risk of death or serious injury is created (but not realised).[65]

Stakeholders also raised concerns about the meaning and intention of 'negligence' as referenced in the industrial manslaughter provision, noting that it has not been clarified in the Bill despite the longstanding principle under the criminal law.[66] QLS noted that the department suggested that these offences will only capture cases involving "considerable" or "serious" negligence but the threshold as drafted in the Bill is simply 'negligence' and thus the defects in the drafting of the offences need to be seriously considered.[67]

With respect to the effectiveness of the proposed industrial manslaughter provisions in achieving the stated objectives, MEA stated:

> *The Minister's parliamentary speech informed the House that the aim was to ensure those at the top of a corporate structure were held accountable. Minister Grace referred to the tragedy of Dreamworld during her speech.* [The department] *briefing indicated that "complex structure(s)"*

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62 Submission 6, AiGroup, pp 8-9.

63 Submission 6, AiGroup, p 9.

64 Submission 20, ALA, p 4.

65 Submission 20, ALA, pp 3-4.

66 Submission 12, HIA, p 8.

67 Submission 23, QLS, p 3.

> *were the target. MEA can find no provisions in this Bill where complex legal structures are addressed.* [The department] *gave evidence that the Bill will enable them to prosecute in circumstances where criminal manslaughter was unable to achieve a conviction. However, we say that the proposed clause goes no further than the current criminal statute in definition. The WHS Bill clause specifically states:*
>
> > *(b) the person's conduct causes the death of the worker; and*
>
> [The department] *has made no submissions and the Bill's explanatory memorandum does not detail how the current difficulties of prosecuting manslaughter are addressed by the Industrial Manslaughter clause and insertion into the Act. It is our submission that the word "causes" in the WHS Bill will present the same barriers to prosecution that criminal manslaughter presents.*[68]

The department advised that the key difference between the current Category 1 offence of reckless conduct and the proposed industrial manslaughter offence is the culpability of the offender.

> *Under the current framework, an offence is committed whether or not harm occurred. In effect, despite the outcome, a duty holder can be prosecuted for merely exposing an individual to a risk of death or serious injury. This reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable for placing another person's health and safety at risk.*
>
> *For a Category 1 offence, which is the most serious of the current offences, this means that where a person recklessly (i.e. a rash or careless act or omission) exposes an individual to death or serious injury, the person can be prosecuted in spite of the outcome of that exposure.*
>
> *Conversely, the proposed industrial manslaughter offence is focused entirely on the outcome and is applicable to circumstances where a worker dies in the course of carrying out work for the business or undertaking, or is injured in the course of that work and later dies as a result of that injury. In these circumstances, the person's conduct must cause the death of the worker and the person must be negligent about causing the death by their conduct.*
>
> *The existing standard of criminal negligence will apply to this offence. This means that a person will be found negligent where their conduct so far departs from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.*[69]

2.1.3 Issues raised in submissions - The scope of the proposed industrial manslaughter offence

Stakeholders raised a number of concerns around the scope of the industrial manslaughter provisions.

Limited to death of a worker

The first concern raised relates to the limitation of the proposed provisions to the death of a worker. In this respect, AgForce note that:

> *…the Minister has announced this reform as being a response to the Dreamworld fatalities however, our reading of the new industrial manslaughter provisions is that it will only apply when workers die, as opposed to members of the public.*[70]

This issue was also raised by the CFMEU which recommended that the proposed industrial manslaughter provisions be changed to comprehend negligently causing death of 'other persons', commensurate with section 19(2) of the WHS Act (which sets out the primary duty of care of a PCBU).[71]

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68 Submission 13, MEA, p 8.

69 Department response to submissions, p 16.

70 Submission 24, AgForce, p 3.

71 Submission 22, CFMEU, p 8.

> *We also submit that a further amendment needs to be made to the offences themselves with regard to industrial manslaughter. On the current wording, industrial manslaughter cannot occur with regard to other persons as other work health and safety contraventions might. You need to be a worker. That is important, yes. The deaths of workers that are caused by negligence should be properly accounted for under the bill. However, there should also be a further provision whereby the negligence of a PCBU that causes the death of another person should also be comprehended within the offence.*[72]

Mr Lyons, the Independent Reviewer noted that this issue was considered as part of the Review:

> ***Mr Lyons:*** *It is because of the specific nature of the workplace relationship and the obligation to maintain a safe workplace that is maintained within this act. There needs to be some care taken to ensure that there is not too much scope creep, I think, in the application of workplace health and safety laws more generally. I have made a series of recommendations more generally about public safety, including suggesting the government consider creating a public safety ombudsman that would be able to deal with some of those questions.*
>
> *What I recommended to the government is to create a carefully calibrated and targeted offence which protects workers in the context of the obligation of their employers to maintain a safe workplace. It is a matter of targeting the offence to what appeared to be the potential wrong.*
>
> ***Mr POWER:*** *We heard that if, say, for instance, in the building industry a scaffold is done by a subcontractor at the cheapest price with direction and then it falls not on a worker but instead out on the street on someone passing by, that would be more limited in scope in the ability to prosecute the body corporation.*
>
> ***Mr Lyons:*** *Without wanting to necessarily give legal advice, I think that sort of circumstance would currently result in the ability for there to be a prosecution under existing provisions of the Workplace Health and Safety Act, including up to category 1 depending on what the circumstances were. Of course, the general criminal law of Queensland, including criminal negligence, would continue to apply.*[73]

The department advised that, in accordance with the recommendations of the Review, the offences have been drafted to apply to conduct that negligently causes the death of a worker. This is consistent with the scope of the industrial manslaughter offences in the *Crimes Act 1900* (ACT) which was used to model equivalent offences in Queensland.[74]

Sub-contracting situations

The CFMEU is concerned about the requirement that the negligent conduct of a PCBU causing or significantly contributing to the death or serious injury leading to the death of a worker occur while the worker is carrying out work for the business or undertaking. The CFMEU noted that this requirement can be contrasted with the requirements under section 31 relating to reckless conduct of the WHS Act, "which does not require that the person, to whom a duty is owed, actually performs work for the duty holder."[75] Accordingly, the CFMEU considers that this renders the proposed offence "ill-adapted to the building and construction industry, which is characterised by networks of principal contractors and numerous subcontractors working alongside each other at any given worksite." [76]

> *In such circumstances, it is conceivable (indeed likely) that a given PCBU may negligently cause the death of a worker who carries out work for another business or undertaking. This is a serious*

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72 Public hearing transcript, Brisbane, 25 September 2017, p 4.

73 Public hearing transcript, Brisbane, 25 September 2017, p 24.

74 Department response to submissions, p 19.

75 Submission 22, CFMEU, p 8. CFMEU recognises that a worker section 7 of the WHS Act includes an employee of a contractor or subcontractor.

76 Submission 22, CFMEU, p 8.

shortcoming of the Bill, and which is inconsistent with Recommendation 46 of the Best Practice Review of Workplace Health and Safety Queensland Final Report.[77]

Other stakeholders also raised questions about how the industrial manslaughter provisions will apply to complex relationships between different PCBUs and workers on a worksite. The Building Service Contractors Association of Australia (BSCAA) stated:

There is no consideration in the legislation for employers who by definition are not in control of the physical aspects of their workplace(s). Our members occupy workplaces with cleaning, security and other staff where those sites are completely under the control of the owner or operator of that workplace. Our members have zero control. The legislation simply takes no account of this fact. No matter how much care our members take, ultimately they are in the hands of their customers when it comes to the physical aspects of a workplace... We respectfully request that a statutory defence be introduced that excuses an employer from a charge of industrial manslaughter where that employer has no control over the physical aspects of the workplace.[78]

Finally, concerns were raised by stakeholders with regard to causation, and indirect culpability. ACCI stated:

The application of a charge of manslaughter against an individual has traditionally, under Australian law, referred to the direct criminal and culpable involvement in the death of another person. This proposal seeks to change that relationship and could result in charges against persons who may be totally removed from direct culpability.[79]

HIA was concerned that a PCBU or senior officer could be held liable where their conduct 'substantially contributes to' a fatality, indicating that their conduct need not be the only cause of the fatality. In this respect, HIA submitted that there must be a clear and direct causal chain between the actions or omissions of the employer and the death of the workers.[80] Further, HIA noted that it is unclear what it practically means for a PCBU or senior officer to be liable where an 'injury later results in death', particularly where an illness is acquired.[81]

In responding to the issues raised by submitters regarding causation and culpability, the department advised:

The provisions have been drafted to apply to various circumstances, including where there are multiple PCBUs on site, e.g. a head contractor and multiple subcontractors. In this situation, where a person is fatally injured as a result of the actions or omissions of one PCBU (not necessarily the one who has engaged their services), and the actions and omissions of the head contractor PCBU also caused the death, the charge of industrial manslaughter could conceivable be brought against both PCBUs.[82]

…

The industrial manslaughter offences only apply where a person's, or senior officers', negligent conduct causes the death of a worker. This means that the prosecution would have to prove that a person's conduct substantially contributed to the death (with 'substantially contributing' being an existing standard for criminal negligence).

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77 Submission 22, CFMEU, p 8.

78 Submission 7, BSCAA, p 2. See also, submission 14, RCSA, p 1.

79 Submission 16, ACCI, p 2.

80 Submission 12, HIA, p 8.

81 Submission 12, HIA, p 8.

82 Department response to submissions, p 19.

This is a matter of causation where common sense is to be applied to the facts to attribute legal responsibility. For example, if a senior officer implements a safety regime and has checks and balances in place to ensure the safety regime is being followed they are unlikely to be liable for a fatality that occurs due to a supervisor allowing unsafe work practices to occur that are contrary to the safety regime. Conversely, if there is a known safety risk and the senior officer elects not to implement safety measures due to budget reasons, they may be liable if the unmanaged safety risk results in a fatality.[83]

Drafting of the industrial manslaughter offence compared to existing offences

AiGroup and other stakeholders noted the different approach to the drafting of the industrial manslaughter provisions, compared to other offence provisions under the WHS Act.[84] AiGroup noted that the current approach in the WHS Act was:

…settled at the end of an exhaustive national review and public comment and debate on the previous OHS laws, and have been adopted by most Australian jurisdictions.

A very clear decision was made to link the offences to the level of risk involved (i.e. the potential for death or serious injury), not the actual outcome. This is consistent with the principles of risk management which ask managers to assess likelihood and possibility of outcome, not actual outcome; to focus on outcome doesn't make sense in a proactive scheme.[85]

The BAQ noted the explanatory notes state that the same standard of proof as criminal negligence will be applied to the industrial manslaughter provisions, and raised a concern that the proposed industrial manslaughter provisions do not include the requirement that there be a breach of a duty of care. In this respect, the BAQ note:

- the existing offences under the WHS Act are founded upon a breach of a duty (as established under the WHS Act),[86] and
- criminal negligence is "founded in an offender breaching a duty" (the duties are established under chapter 27 of the Criminal Code) and refer to the Supreme and District Court Benchbook which states, with respect to providing directions, that the first requirement to establish criminal negligence is that a person owed a duty of care.[87]

The department advised that industrial manslaughter will be a crime and the existing standard of criminal negligence will apply:[88]

This means that a person will be found negligent where their conduct so far departs from the standard of care expected to avoid danger to life, health and safety, and the conduct substantially contributed to the death.

This standard does not need to be clarified in the Bill as the offence is already proposed to be referenced as a crime.

The definitions of an executive officer and a senior officer

Stakeholders expressed concerns with the proposed definitions for an executive officer and a senior officer under the industrial manslaughter provisions. QLS noted its concern around the introduction of additional definitions for officers such as "executive officer'' when these terms have already been defined, and interpreted, under the *Corporations Act 2001* (Cth):

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83 Department response to submissions, p 18.

84 Submission 6, AiGroup, p 12. See also submission 16, ACCI, p 2.

85 Submission 6, AiGroup, p 12.

86 Submission 28, BAQ, p 3.

87 Submission 28, BAQ, pp 4-5.

88 Department response to submissions, p 17.

> *The term "executive officer'' is defined to mean "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."*
>
> *The Society is also concerned this 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. If there is concern to ensure that de facto executive officers are caught up in the scope of this legislation, then this could be resolved by making this an inclusive definition (i.e. "executive officer of a corporation includes a person who is concerned with, or takes part in the corporation's management... ").*[89]

The Civil Contractors' Federation (CFF) stated that while 'officer' is defined with specific duties within the WHS Act, 'senior officer' in the Bill is not specific and can be represented by a broader group:

> *Unfortunately, there is potential for the amendments to be applied to local, state and private hospital boards of directors, their senior clinicians and doctors; Directors-General, Deputy Directors-General and senior executives of government departments and Boards of private and independent schools and principals.*[90]

AiGroup noted that the current penalties within the WHS laws apply to all individuals, without delineating between senior managers and officers. In creating a delineation, the proposed provisions could result in persons defined as senior officers, but who do not have a direct involvement in day to day activities of a business, resigning from their positions or seeking to enter into elaborate arrangements to "distance themselves from taking on responsibilities for health and safety" which may make them appear to be officers or senior officers.[91]

The department advised that the concepts of 'officer' (as currently defined in the WHS Act) and 'senior officer' (as defined in the proposed new industrial manslaughter offences) are distinct and should not be considered concurrently:

> *The current 'officer' definition in the WHS Act relates to a class of duty holder of which a specific work health and safety duty relates. In this instance the duty to exercise due diligence (see section 27 of the WHS Act). What this means, is that anyone captured by the definition of officer has a duty to exercise due diligence to ensure that a person conducting a business or undertaking complies with their duty or obligation. Failure to comply with this duty may then result in prosecution for a Category 1, 2 or 3 offence depending on the level of breach.*
>
> *Conversely, a 'senior officer' may commit industrial manslaughter irrelevant of whether they have a safety duty under the WHS Act and whether they have failed that duty. All that must be proven is that the senior officer's own negligent conduct caused the death of a worker. For example, the senior officer allows unsafe work practices to be undertaken to save money.*
>
> *Essentially, while senior officers will in some cases, also be officers under the WHS Act, the duties owed and culpability of individuals captured by these two categories differ depending on whether the offence committed relates to a breach of duty under the WHS Act or whether the individual's negligent conduct, more broadly, caused the death of a worker.*
>
> *The use of the term 'senior officer' for the industrial manslaughter offence is also intended to capture individuals of the highest levels in an organisation, those who can decide and influence safety management and culture at their workplace. The rationale for capturing these higher level officers is to encourage work health and safety to be managed as a cultural priority within*

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89 Submission 23, QLS, pp 1-2. See also submission 5, MBQ, p 8; submission 6, AiGroup, pp 11-12; and submission 12, HIA, p 8.

90 Submission 18, CCF, p 4. See also submission 13, MEA, p 8.

91 Submission 6, AiGroup, pp 10-11. See also submission 11, CCIQ, p 2.

organisations and ensure that safety standards are managed and supported from the top down.[92]

In response to the issues raised by AiGroup, the department advised that a senior officer, as defined by the proposed industrial manslaughter provisions, could potentially be charged with either manslaughter under section 303 of the Criminal Code or industrial manslaughter under the WHS Act. While there is some cross over, in this regard, it is envisioned that where a senior officer's conduct is considered to have caused the death of a worker, the senior officer may be prosecuted for industrial manslaughter unless Queensland Police decide to instead progress manslaughter charges.[93]

2.2 Independent statutory office for prosecutions (WHS Prosecutor)

The Review found there was a need to strengthen the governance framework around the prosecutions system to ensure public confidence and that overall prosecutions were below a level that indicated the existing approach to prosecution was not appropriately robust.[94] With respect to public perceptions, the Review stated:

…the proper administration of justice requires that prosecutions be conducted independently of government, and even a perception that they are not can be significantly damaging. The Review believes there is some inherent conflict in the regulator being responsible for both engagement and capacity building functions as well as prosecution decisions. Structural separation of some aspects of enforcement from other functions will improve the operation of the system as a whole.[95]

Accordingly, the Review recommended the creation of an independent prosecutorial function. The Bill would implement this recommendation through the establishment of an independent statutory office for prosecutions of work health and safety offences to be headed by a WHS Prosecutor.[96]

The explanatory notes state that the Bill would transfer the current functions of the regulator under the WHS Act, to conduct and defend proceedings before a court or tribunal to the WHS prosecutor. However, indictable offences (Category 1 offences and the proposed industrial manslaughter provisions) will still be referred for prosecution to the Director of Public Prosecution (DPP) for decision and action. Additionally, the WHS Prosecutor is required to refer to the guidelines issued by the DPP in deciding whether to prosecute a matter.[97]

The Review also recommended that consideration be given to making analogous amendments to the ES Act and SRWA Act to transfer prosecutions under those Acts to the WHS Prosecutor.[98] While amendments have been proposed under the Bill with regard to the SRWA Act,[99] the department advised that the Regulator will administratively delegate prosecutions under the ES Act to the WHS Prosecutor.[100] No reasons were provided to the committee for this decision.

92 Department response to submissions, pp 15-16.

93 Department response to submissions, p 16.

94 The Review, pp 73, 74. See recommendation 31.

95 The Review, p 73.

96 Refer clause 42

97 Explanatory notes, p 2.

98 See recommendation 32 of the Review.

99 See clause 64 of the Bill.

100 Department response to additional questions, p 7.

2.2.1 Issues raised in submissions

Most submitters[101] who commented on this aspect of the Bill supported the establishment of a separate prosecution function because it would result in the separation of the responsibilities and powers of prosecution from other functions within WHSQ.[102] In this respect, the Independent Education Union (IEU) state:

> *It is our view that having an independent authority to manage prosecutions will remove any hint of external interference or inattention to work health and safety matters, as is sometimes currently perceived, and will ensure the strongest level of governance. This independence will offer greater capacity for Queenslanders to be confident in the processes that protect them when they are in workplaces.*[103]

Some concerns were raised however, with respect to the necessity for a separate statutory office, the extent of the powers of the WHS prosecutor, the interaction between the WHS Prosecutor and the Regulator, the independence of the office, limitations on employment provisions, and the effect of the proposed transitional provisions.

Independence of the WHS Prosecutor

While supporting the separation of prosecutions from other functions, HIA note that it would be quicker and more economic to simply establish a separate prosecution division within WHSQ.[104]

In terms of the powers of the WHS prosecutor, the QLS stated:

> *The Society has serious concerns with the drafting of section 28(2)* [Schedule 2, Part 4]*: "Also, the WHS prosecutor has the power to do all things necessary or convenient to be done in performing his or her functions". This provision gives unlimited and unfettered power to the WHS prosecutor without any provision governing the exercise of this power.*
>
> *This provision could clearly and very foreseeably lead to serious and unfettered misuse of power by the WHS prosecutor without consequence, which is not justified by the purposes of the Act.*
>
> *The Society similarly has concerns that the WHS prosecutor would not be under Ministerial control in performing their functions and exercising their powers. The Society considers that the WHS prosecutor must be subject to the same checks and balances to which other prosecuting bodies are subject.*[105]

The CFMEU raised concerns around the removal of a person appointed as a WHS Prosecutor:

> *…which provides that the Minister may recommend that the Governor in Council remove the Director of Workplace Health and Safety Prosecutions. Under that subsection, it is sufficient for the Minister to be "satisfied" that the Director has been "guilty of misconduct", is "incapable of performing his or her duties", or "has neglected his or her duties or performed them incompetent". These are especially subjective criteria, and do not require that the removal of the Director can only be done in truly exceptional circumstances as the case should be. Subsection 38(4) should be amended to provide much more stringent tests for the removal of the Director; in its current form, it may lead to inappropriate Ministerial interference.*[106]

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101 See submissions from United Voice, QNMU, MBQ, QCU, CCIQ, HIA, IEU, UFFUQ, CFMEU and Agforce. Note some submissions also included suggestions as to how the independent body should operate practically.

102 Submission 5, MBQ, p 7. See also submission 9, QCU, pp 4-5; submission 11, CCIQ, p 3; submission 24, AgForce, p 3.

103 Submission 17, IEU, p 5.

104 Submission 12, HIA, p 11.

105 Submission 23, QLS, p 5.

106 Submission 22, CFMEU, p 13.

The department advised:

> *Currently, "Prosecution Services" exists as a discrete unit within WHSQ. As discussed in the Best Practice Review, the proper administration of justice requires that prosecution be conducted independently of government. The recommendation of the Review was the establishment of an independent statutory office to provide a more transparent, effective and consistent decision making process for prosecutions.*
>
> *The Bill establishes an independent statutory office to exercise the prosecution functions under the* Work Health and Safety Act 2011*. The WHS prosecutor is to be appointed by the Governor in Council for a five year renewable term so that the term of the role is independent of political cycles.*
>
> *The Bill requires the WHS prosecutor to follow the Director of Public Prosecutions Guidelines (DPP Guidelines) when making decisions about whether to initiate a prosecution. The DPP Guidelines outline well-established and detailed criteria to ensure that decisions are consistent and transparent.*
>
> *The Bill includes a number of other amendments to ensure the ongoing independence and effectiveness of the WHS prosecutor. The Bill provides that the WHS prosecutor is not under the control or direction of the Minister in performing their functions and exercising their powers. There are limitations on other employment the WHS prosecutor may engage in to ensure no conflict of interest will arise. The WHS prosecutor is automatically removed from office if they are convicted of an indictable offence or become insolvent and can be removed from office if they are guilty of misconduct or are negligent or incapable of performing their duties.*[107]

With respect to the issues raised by the CFMEU around the removal of a person appointed as a WHS Prosecutor, the department advised that these provisions are modelled on the existing provisions found in the *Director of Child Protection Litigation Act 2016* and noted similar provisions in the *Director of Public Prosecutions Act 1984*.[108]

Interaction between the WHS Prosecutor and the Regulator

The Review made a number of findings regarding WHSQ:[109]

- *While WHSQ performs many of its functions well, there is need for a significant re-balancing of organisational priorities to ensure the expectations of Queenslanders about safety at work are met. There is a need to re-focus operations on the core functions of WHSQ as a labour inspectorate.*
- *There is a need, expressed in clear terms by both unions and employees for a greater level of visibility in workplaces by inspectors.*
- *While considerable improvements have been made, particularly following criticisms from the Queensland Ombudsman, there is an ongoing need to improve the human capital, systems and processes of WHSQ, particularly in relation to the inspectorate, investigations and prosecutions. Unfortunately, implementation of some improved systems around the auditing of enforcement activity resulted in many inspectors becoming reluctant to issue compliance notices, leading to a very large and inappropriate drop off in enforcement activity.*
- *In moving to increase its use of engagement, educative and capacity building strategies, WHSQ "overshot" and has placed insufficient emphasis on "hard" compliance and enforcement. This requires a re-balancing. There is an ongoing need to ensure that the balance between "directing compliance" and "encouraging and assisting compliance" is*

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107 Department response to submissions, p 23.

108 Department response to submissions, p 24.

109 See the Review, pp 6-7.

appropriate. This is not a once off exercise, but a matter that requires ongoing monitoring and adjustment.

- *While there is no evidence of regulatory capture or of political interference in prosecutions or other regulatory decisions, there is a need to ensure that the reality and perception of independence is maintained and delineation of functions is clear. Some structural separation of the WHSQ's operations into three streams 1. Prosecutions & Investigations, 2. Inspectorate, and 3. Capacity Building/ Engagement is appropriate.*
- *There has been inadequate emphasis placed on the role Health and Safety Representatives play, and an urgent need to develop a program to support them in their statutory role.*
- *Partly as a result of budget cuts (in particular in 2012-13) there has been increasing pressure on WHSQ in its role delivering a State-wide program of sufficient breadth and depth. This is a particular challenge in Queensland, given the mix of economic activity and the decentralised population. Reliance on legacy IT systems and machinery of government changes has delayed or restricted the ability of WHSQ to deploy best-practice tools including for on the ground inspectors.*

A number of submitters and witnesses also noted inadequacies in the way in which workplace health and safety matters are currently investigated. The CFMEU recommended cultural and personnel changes in the WHSQ offices in order to effect the cultural changes required to implement the changes in the Bill:

> *I point now to Workplace Health and Safety Queensland. There are some good people there but, certainly, there needs to be a serious cultural change. They have the responsibility to protect all workers in all industries across Queensland and they have been asleep at the wheel. There is no doubt in my mind that, with some serious changes in personnel and individuals in that department, accompanied with an important bill like this—albeit there are parts that need to be amended—we will see a cultural change. We have some serious questions to ask as well about the people who are going to oversee the implementation of this bill and the enforcement of any new legislation. There needs to be a wholesale change in the workplace health and safety department.*[110]

The committee heard from families of young men who had died at work. A common theme raised by the families was a lack of prosecution, due in no small part, to poor procedures, a lack of compliance enforcement and sub-standard investigations into workplace deaths undertaken by WHSQ and the police.

With respect to the investigation of his son's death, Mr Kennedy told the committee:

> *To date there has been a clear message sent to our family and other affected families that indicates that an industrial death is of less importance than other deaths investigated by the Queensland Police Service. Dale's incident was attended by two workplace health and safety officers, one ESO principal inspector, two ESO senior inspectors, a regional inspector and four Queensland police officers, including a forensic officer, yet important facts were disregarded and there was no thorough investigation. The Queensland police should have overseen this investigation. The ESO have admitted they questioned their initial testing the day after Dale's death and visited the college some nine days later to check results. Why was a crime scene not established and a thorough investigation conducted? The college building was opened for business some four hours after Dale's death. The file from the principal ESO inspector, who clearly demonstrated a lack of investigative skills, was the determining factor for the Director of Public Prosecutions. Subsequently, we fully support the need to establish an independent statutory office for work health and safety prosecutions and to mandate the use of Director of Public*

[110] Public hearing transcript, Brisbane, 25 September 2017, p 3.

Prosecutions guidelines to begin a prosecution. A single death needs to be treated as seriously as multiple deaths. Each death needs to carry its own penalty.[111]

Mrs Newport told the committee about the death of her son, Glenn, at his work from heat stress:

In August 2013, Glenn's case was investigated by the south-west region and a recommendation was made by that region that no further action was recommended. A preliminary file review of the case dated 24 July 2014 by the principal legal officer of compliance identified that the initial investigation by Queensland Workplace Health and Safety inspectors was poorly carried out. Significant issues were not addressed. It was recommended that a further investigation was necessary. However, no action was taken to address any of those issues. Glenn's case was reviewed and decided to be complete by the director of legal and prosecution services on 21 December 2014. Again, Glenn's case was cited in the Queensland Ombudsman's The workplace death investigations report dated September 2015. This review was severely critical of Queensland Workplace Health and Safety's inadequate evidence gathering and inaction in regard to addressing issues raised in the internal review.

Following the outcome of the coroner's inquest, our family met with the director of legal and prosecution services on 11 July to discuss the issues that had emerged at the inquest in regard to the original investigation. A reinvestigation was approved, which, despite the time lapse, uncovered further evidence that was not forthcoming at the inquest. The investigator felt that there was enough evidence to show in a court of law that the company had not done all it could to ensure the health and safety of its workers and that the medical contractor had failed in its duty of care. Again, the director of legal and prosecution services has stymied any further action in this case for, in his opinion, they might lose the case considering the legislation now in place and that the company involved has the procedures in place to manage heat stress situations. Yes, they have the procedures, but no-one followed them. It appears that not a lot of the staff even knew they existed. We have a situation that, as long as you have a safety manual in the office, you are covered if the proverbial hits the fan, especially if you have deep pockets, as these companies do, to spend unlimited amounts on lawyers and barristers to prevent prosecution. The companies can just keep on risking workers' lives. Is this how justice should work? Is this how these cases should be decided? One person's decision on his interpretation of the so-called investigation facts? Forget about what is right and wrong.[112]

QLS also raised concerns about the responsibility for a proceeding being transferred to the WHS Prosecutor if a matter has not been finalised after the commencement of the Act under the transitional provisions, noting that this will create uncertainty and unnecessarily increase costs. QLS submit that the transitional provisions should not involve a new procedure being applied retrospectively.[113]

AiGroup noted that the provisions are unclear as to how the Office of the WHS Prosecutor and the Regulator will interact. While the Bill establishes that the WHS Prosecutor may ask the regulator for information and the regulator has a duty to disclose that information, it is silent on whether the investigation duties will continue to sit with the regulator or transfer to the WHS Prosecutor.*[114]*

AiGroup also questioned the restriction on a WHS Prosecutor being able to work for a PCBU who has been charged with an offence or consulting on WHS matters with a PCBU at proposed section 36 (Schedule 2, Part 4). They note that if certain types of work are to be restricted (as opposed to any

111 Public hearing transcript, Brisbane, 25 September 2017, p 26.

112 Public hearing transcript, Brisbane, 25 September 2017, p 28.

113 Submission 23, QLS, p 4.

114 Submission 6, AiGroup, p 28.

outside work), it should extend to work with others including a union or plaintiff lawyer firm, as well as advising family members of a worker who has died or been injured.[115]

With respect to the responsibility for investigation duties and the inspectorate, the department advised:

> *The WHS prosecutor will head up an independent statutory office, sitting outside the organisational structure of OIR. Guidelines are required to be issued and published by the WHS prosecutor that set out the procedures for referrals of matters by the regulator to the WHS prosecutor. The guidelines are also to include procedures for offences including the roles of the WHS prosecutor and the regulator.*
>
> *The regulator will continue to be responsible for all work health and safety compliance activities, including all investigations into serious matters and fatalities. Once an investigation has been completed the matter will be handed over to the WHS prosecutor who will decide on and commence any proceedings for an offence under the* Work Health and Safety Act 2011*. The WHS prosecutor will also undertake any proceedings for offences under the Electrical Safety Act 2002 and the Safety in Recreational Water Activities Act 2011.*
>
> *The Bill contains provisions for information sharing to ensure the WHS prosecutor is able to obtain all necessary information on a matter from the regulator right up until the proceeding is decided or ends.*[116]

The committee asked the department why the Minister has been granted the discretion to allow the WHS prosecutor to work with a PCBU charged with an offence and/or to consult with a PCBU with respect to work health and safety matters.

The department advised:

> *To ensure the independence and integrity of the WHS Prosecutor there can be no real or perceived conflict of interest with their role. Section 36 in Clause 51 provides that a decision about other employment rests with the Minister so that the decision is independent of the WHS Prosecutor to ensure there is no conflict of interest. It is inconceivable that the Minister would allow the WHS Prosecutor to work with a person charged with an offence under the* Work Health and Safety Act 2011*. In making a decision on consultancy work for a PCBU the Minister would need to be satisfied that there is no real or perceived conflict of interest.*[117]

Other issues

The Queensland Nurses and Midwives' Union (QNMU) and the CFMEU advocate for the right of unions to bring prosecutions on behalf of workers where WHSQ decide not to prosecute for a work health and safety matter.[118]

The department advised that this issue was raised during the Review and the final report acknowledged the position of particular stakeholders and determined that a better course is to ensure a more independent and robust prosecution approach through the establishment of an independent statutory office to exercise all functions in relation to prosecutions.

> *Public expectation is that those making prosecutorial decisions are held accountable through the courts and Parliament. The integrity of prosecutorial discretion is critical to the credibility of*

115 Submission 6, AiGroup, p 29.

116 Department response to submissions, pp 23-24.

117 Department response to additional questions, p 6.

118 Submission 4, QNMU, pp 3-5. See also public hearing transcript, Brisbane, 25 September 2017, pp 2, 5 and 6. Note: This would align with section 230 of the *Work Health and Safety Act 2011* (NSW).

enforcement decisions and therefore to deterrence, and this discretion may be diluted if it spread beyond the Crown.[119]

Committee comment

The government members of the committee support the creation of an independent prosecution function. The government members consider that, as recommended in the review, this separate function will strengthen the governance framework around the prosecutions system and ensure public confidence in robust enforcement of work health and safety breaches.

While the WHS Prosecutor will conduct and defend proceedings before a court or tribunal, the government members of the committee notes the bill provides safeguards which require:

a. the WHS Prosecutor must refer to the guidelines issued by the DPP in deciding whether to prosecute a matter

b. that indictable offences (Category 1 offences and the proposed industrial manslaughter provisions) to be referred for prosecution to the DPP for decision and action.

The non-government members of the committee do not support the creation of a separate prosecution function as proposed in the Bill.

2.3 Issue resolution

The Bill would implement recommendation 39 of the Review to transfer the jurisdiction of reviewable decisions, currently within the jurisdiction of QCAT, and specific categories of disputes to the QIRC.[120]

In this respect, the explanatory notes state:

To ensure the role of inspectors in disputes is maintained and to encourage disputes to be resolved between the parties, and preferably at the workplace as is intended under the WHS Act, the Bill prescribes that disputes cannot be lodged with the QIRC until 24 hours after an inspector is requested to assist with resolving a dispute and the dispute remains unresolved.

The QIRC will be able to exercise all its powers (including conciliation, requiring the production of documents or compulsory attendance and the issuing of orders) in settling the dispute and will have the power to dismiss a matter without conducting a hearing or conference where it believes the matter is frivolous, vexatious or lacks substance.[121]

The Review did not recommend the transferral of jurisdiction for reviewable decisions set out in the *Work Health and Safety Regulation 2011* (Qld) (WHS Regulation) to the QIRC on the basis that they are more administrative in nature and QCAT is the better body to hear such matters.[122]

The Review recommended that notification of a dispute could be provided by a 'relevant registered organisation' (among other identified notifiers), however, clause 32 (proposed section 102A) refers to a 'relevant union'.

2.3.1 Issues raised in submissions

Some stakeholders support the proposed transfer of reviewable decisions and identified dispute categories to the QIRC.[123] The reasons for this support provided in submissions included that, given its powers for conciliation, etc. it is a more practical jurisdiction to hear and settle work place disputes.[124]

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119 Department response to submissions, pp 24-25.

120 The Review, recommendation no. 39, p 89.

121 Explanatory notes, pp 2-3.

122 The Review, p 88.

123 See submissions made by United Voice, AMIC, QNMU, AiGroup, QCU, IEU, UFFUQ, CFMEU, QLS, AWU and QPU.

124 Submission 1, United Voice, p 5; submission 17, IEU, p 5; submission 4, QNMU, pp 5-6.

Additionally some submitters consider that the external review processes currently in place provide inconsistent outcomes.[125]

Transfer of jurisdiction from QCAT to QIRC

Some submitters query the necessity to transfer the jurisdiction from QCAT to the QIRC:

- the transfer of jurisdiction from QCAT to the QIRC is not necessary as QCAT has not been ineffective in addressing WHS issues.[126]
- current number of inspector decisions do not indicate that the system is broken, that any party has been disadvantaged or that QCAT does not have the experience or resources to deal with disputes.[127]
- the lack of experience and capacity of the QIRC to take on the expanded jurisdiction, which could lead to further delays and one submitter suggested a better use of resources would be to expand the capacity of QCAT to hear such matters rather than impose the new jurisdiction on the QIRC[128]
- there may be possible jurisdictional conflicts, including in relation to industrial matters with the Federal Fair Work Act[129]

The department responded to the issues outlined above and stated:[130]

> *The QIRC is considered to be the most appropriate body to hear work health and safety disputes, and certain reviewable decisions, due to its role as Queensland's specialist workplace tribunal and its expertise in dealing with workplace disputes. It currently has jurisdiction to hear some work health and safety matters, including disputes regarding the right of entry of work health and safety entry permit holders and workers' compensation appeals.*
>
> *The transfer of reviewable decisions under the WHS Act 2011 from QCAT to the QIRC and expansion of the QIRC's jurisdiction to hear and determine a number of other categories of disputes is not likely to have a significant impact on the workload of the QIRC. QCAT hears a limited number of work health and safety related cases each year and since 2012 has only heard 14 matters in relation to their external review functions under the work health and safety laws. WHSQ's records indicate that no reviews have been sought in relation to any improvement or prohibition notices issued in relation to the cessation of work over the last three calendar years. Similarly, no reviews of notices were sought in relation to requests for assistance regarding work health and safety issues during 2016.*
>
> *It is also anticipated that QIRC's expertise in workplace matters will allow it to perform the proposed new dispute resolution functions in a timely manner.*
>
> *Master Builders Queensland and Master Electricians Australia submitted that the expansion of QIRC's jurisdiction would interfere with the rights of national system employers under the Fair Work Act 2009 as the QIRC may engage in settling disputes that are predominantly industrial issues. The jurisdiction of the QIRC to hear and determine additional disputes under the WHS Act will be restricted to a consideration of the relevant WHS matters and will not extend to industrial matters that form part of the private sector IR framework under the Fair Work Act 2009.*

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125 Submission 17, IEU, p 5; submission 12, HIA, p 10.

126 Submission 5, MBQ, p 9. See also submission 11, CCIQ, p 3; submission 12, HIA, p 10; submission 18, CCF, p 5; submission 13, MEA, p 11.

127 Submission 5, MBQ, p 8; submission 7, BSCAA, p 2; submission 18, CCF, pp 5-6.

128 Submission 7, BSCAA, p 2.

129 Submission 7, BSCAA, p 2.

130 Department response to submissions, pp 30-31.

The QIRC is a specialist workplace tribunal that already has jurisdiction to deal with disputes about some work health and safety matters. Other work health and safety jurisdictions, including the Commonwealth, NSW, South Australia and Western Australia, also confer power to conduct external review of reviewable decisions on their industrial relations commission or tribunal body.

Potential escalation of unnecessary matters to QIRC

The CFMEU considers that proposed section 14A will lead to the unnecessary escalation of matters that are not substantive such as right of entry disputes which will place a disproportionate strain on QIRC resources and promote litigiousness rather than resolve genuine disputes.[131]

The department advised that the QIRC already has the power to deal with a dispute about the exercise of a right of entry under section 142 of the WHS Act, but has received very few requests to exercise this power. The amendments will give inspectors who are appointed on request of the parties to assist in resolving the dispute, the power to make a decision on one of the relevant factors, with the intention that the matter be resolved in a timely manner at the workplace level. It is appropriate for the QIRC to be able to review a decision made by an inspector in relation to a dispute in order to effectively deal with the dispute.

Definition of 'relevant union'

AiGroup suggest that the definition of a 'relevant union' should be limited to unions that have a member in the particular workplace.[132] The department advised that, as drafted, the provisions will allow a union who has members or eligible members at workplace where a dispute is occurring to give the industrial registrar notice of the dispute.[133]

Requirement to wait for 24 hours before notifying QIRC of dispute

Proposed section 102B states that a notice of dispute may be submitted to the industrial registrar (with the QIRC) by any parties to a dispute at least 24 hours after a party to the dispute asks the regulator to appoint an inspector (under another provision of Part 5). The notice must state certain matters, and be published on the QIRC website. A relevant union may notify the registrar that the union wants to participate in the dispute resolution process.[134]

The committee heard differing views on the requirement to wait 24 hours before the QIRC can be notified of a matter. The QCU and IEU consider that a party should not be required to wait 24 hours where the matter is urgent.[135] Other submitters consider 24 hours does not allow sufficient time to resolve disputes before they are escalated and the time should be extended.[136]

The department advised:

The Office of Industrial Relations' experience is that matters referred to the Regulator for resolution are generally resolved within hours of the parties involving the Regulator.

On receiving a request for assistance, an inspector will make contact with the parties involved to determine the issue and confirm they have taken reasonable steps to resolve the dispute. The inspector will also provide preliminary assistance to the parties to assist in resolving the issue. This may be done without visiting the workplace.

131 Submission 22, CFMEU, pp 12-13.

132 Submission 6, AiGroup, pp 26-27.

133 Department response to submissions, p 30.

134 Refer to Clause 32.

135 Submission 9, QCU, pp 5-6 & 10; submission 17, IEU, pp 5-6.

136 Submission 3, AMIC, p 6; submission 5, MBQ, p 8; submission 11, CCIQ, pp 3-4; submission 16, ACCI, p 3; submission 18, CCF, pp 5-6.

If the issue is not resolved, an inspector will visit the workplace as soon as practicable. The time taken to arrive at a workplace is dependent on the geographical location and proximity to inspector resources, however this would normally occur within one hour of the request.

Including a 24 hour time period provides certainty to parties that disputes will not be unduly delayed and provides a timely avenue of recourse where parties are dissatisfied with the action or inaction taken by an inspector.[137]

With respect to the suggestion for immediate referral or urgent matters, the department stated:

An immediate referral of a matter to the QIRC would undermine the role of inspectors to attempt to resolve the issue in the first instance. The requirement that a dispute not be notified to the QIRC until at least 24 hours after assistance from an inspector is requested and the dispute remains unresolved recognises the intention of the Work Health and Safety Act 2011 *(WHS Act) for disputes to be resolved as quickly and effective as possible between the parties and preferably at the workplace level. Further it is unlikely that the QIRC would consider a matter without firstly considering what action has been taken by the regulator to address the issue.*[138]

Other matters

Other submitter comments on these proposed amendments were that it is irrational to remove the current internal review process for WHS disputes,[139] and that the amendments undermine good WHS practices and the role of an inspector.[140]

The department responded: [141]

In undertaking the Best Practice Review of WHSQ, the Reviewer considered the merit of including an internal review process for disputes under the proposed new Part 5, Division 7A, but recommended that it not be included. As the nature of the disputes to be referred to the QIRC under this new Division will usually concern potential safety issues, it was considered necessary to allow quick resolution of these matters to avoid undue delay through timely procedural processes.

To allay stakeholder concerns that the removal of internal review procedures in relation to these disputes may result in vexatious or frivolous claims, the Bill enables the QIRC to dismiss a matter without conducting a hearing or conference where it believes the matter is frivolous, vexatious, misconceived or lacks substance.

…

The amendments are intended to reinforce the role of WHSQ inspectors to attempt to resolve disputes as quickly as possible at a workplace level, before disputes are eligible for external review. This is consistent with the current process under the WHS Act where the use of inspectors' compliance powers are subject to external review if a matter remains unresolved between relevant parties. The amendments will also provide a more timely process for dispute resolution on key work health and safety matters, given the QIRC is a specialist workplace tribunal which already has jurisdiction to hear some work health and safety disputes.

2.4 Right of entry

The Bill would enable inspectors to make a determination on the matters where work health and safety right of entry issues cannot be resolved (after reasonable efforts have been made) and remain in

137 Department response to submissions, pp 28-29.

138 Department response to submissions, p 29.

139 Submission 12, HIA, p 10.

140 Submission 5, MBQ, p 8; submission 18, CCF, pp 5-6.

141 Department response to submissions, p 29.

dispute by the relevant parties. This includes whether there is a valid right to enter and the WHS issues that have given rise to the parties for entry.[142] The department noted that this amendment has been made to enable inspectors to decide right of entry disputes.[143]

2.4.1 Issues raised in submissions

United Voice, AMIC and QNMU support the amendment to allow inspectors to make a determination on the matters where WHS right of entry issues cannot be resolved (after reasonable efforts have been made) and remain in dispute by workplace parties.[144]

> *Allowing inspectors to make a determination on these matters supports resolution of right of entry for workplace health and safety matters as quickly as possible at the workplace and possibly without the need for escalation to a tribunal.*[145]

The Queensland Teachers' Union (QTU) stated:

> *…issues pertaining to right of entry should not rest with the inspectorate that is responsible for inspecting potential health and safety issues, but rather with the QIRC. It is important that right of entry issues are separate and distinct from the inspectorate to ensure there is no perception of potential conflicts of interest by the parties involved in the right of entry dispute.*[146]

Conversely, the CFMEU did not support decisions made by inspectors being reviewable by the QIRC (at proposed section 142A, clause 36):

> *Vesting that kind of jurisdiction in the QIRC will only see right of entry matters, which are non-substantive, being escalated. This will place a disproportionate strain on the resources of the QIRC, and will simply promote litigiousness within the jurisdiction rather than resolve genuine disputes in order to bring about work health and safety best practice.*[147]

AiGroup consider the additional power to allow an inspector to determine a dispute relating to a right of entry as inappropriate. It noted that some matters may be dealt with by an inspector, however, where a permit holder may be abusing their powers of entry for example, the PCBU should be able to challenge this at a higher level than an individual inspector. If progressed, the provision should include allowing an inspector who determines a permit holder does not have a right of entry to direct them to desist from pursuing access, without this the role of the inspector in determining these issues would be unbalanced.[148]

The department advised that the:

> *QIRC already has the power to deal with a dispute about the exercise of a right of entry under section 142 of the WHS Act, but has received very few requests to exercise this power. The amendments will give inspectors who are appointed on request of the parties to assist in resolving the dispute, the power to make a decision on one of the relevant factors, with the intention that the matter be resolved in a timely manner at the workplace level. It is appropriate for the QIRC to be able to review a decision made by an inspector in relation to a dispute in order to effectively deal with the dispute.*[149]

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142 Department response to submissions, p 31.

143 Department response to additional questions, p 8.

144 Submission 1, United Voice, p 4; submission 3, AMIC, p 6; submission 4, QNMU, pp 6-7.

145 Submission 1, United Voice, p 4.

146 Submission 25, QTU, p 4.

147 Submission 22, CFMEU, p 12.

148 Submission 6, AiGroup, p 28.

149 Department response to submissions, p 30.

The department stated that if a PCBU is concerned that a permit holder is abusing their powers of entry and is not satisfied with the actions of the inspector appointed to assist in resolving the dispute, they remain entitled to raise it as a dispute with the QIRC, under section 142 of the WHS Act. It noted that the power given to inspectors under the new section 141A to direct a PCBU to allow a permit holder entry recognises the difficulties for permit holders (who have a valid and lawful right to enter) to physically gain access to secured workplaces in the absence of clear directions.[150]

2.5 Codes of practice

The Review noted that:

> *Codes of practice are practical guides that assist duty holders to achieve the standards of health, safety and welfare required under the WHS Act 2011 and the WHS Regulation 2011. Codes of practice apply to anyone who has a duty of care in the circumstances described in the code and, in most cases, following a code of practice will achieve compliance with health and safety duties in relation to the subject matter of the code*.[151]

Duty holders can use codes of practice in proceedings as evidence of whether or not they have complied with their obligations, or as evidence of what is known about a hazard or risk and how to control it, or to determine what is reasonable in the circumstances. The WHS Act provides that compliance will be demonstrated where a duty holder provides a standard of health and safety to an equal or higher standard than that in the code of practice.[152]

The Review noted that, under the now repealed *Workplace Health and Safety Act 1995*, adherence with the codes of practice was mandatory and a person discharged their health and safety duty only by:

a. adopting and following a stated way that manages exposure to the risk; or
b. doing all of the following—(i) adopting and following another way that gives the same level of protection against the risk; (ii) taking reasonable precautions; and (iii) exercising proper diligence.[153]

The explanatory notes state that the Bill would clarify:

> *…the status of codes of practice by restoring the previous requirements in section 26(3) of the repealed* Workplace Health and Safety Act 1995 *(WHS Act 1995) to require, where relevant, the safety measures in a code of practice to be followed unless equal to or better than measures can be demonstrated. To ensure the content of the codes of practice remain relevant and up to date the Bill requires codes of practice to be reviewed every five years.*[154]

2.5.1 Issues raised in submissions

Mandatory codes of practice will stifle innovation and will be too rigid for businesses

Some submitters consider that the requirement that the codes of practice be mandatory will stifle innovation in Queensland's industries and will lead to businesses failing to implement better health and safety practices.[155]

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150 Department response to submissions, p 31.

151 The Review, p 20.

152 WHS Act, s. 275

153 The Review, p 22.

154 Explanatory notes, p 3.

155 Submission 5, MBQ, p 8; submission 11, CCIQ, p 4; submission 13, MEA, p 11; submission 14, RCSA, p 2; submission 18, CCF, p 6.

A number of submitters consider that the codes of practice will not allow abrogation where PCBUs are unable to follow prescribed code procedures.[156]

The department advised that the codes of practice will outline minimum standards for managing work health and safety risks under the WHS Act. In order to ensure that business innovations can be taken into account when determining compliance with health and safety duties, PCBUs will still be able to adopt measures that would provide the same or a higher level of protection against a risk. The department will regularly update codes of practice in consultation with relevant stakeholders to respond to industry needs and reflect current practice. In addition, the amendment at Clause 12 will ensure that codes are updated at least every 5 years, which will ensure codes reflect new technologies and industry practices.[157]

National consistency

AMIC considers that the focus should be on codes of practice produced by Safe Work Australia to have consistency across the country.[158] The department advised that Queensland has maintained a number of its own codes of practice in the absence of specific codes at a national level and noted that relying on national guidance material creates a risk of regulatory gaps and inconsistencies. The government will restore the role codes of practice play in preventing work-related injuries by retaining and updating existing codes of practice.[159]

Review of codes of practice

The explanatory notes state:[160]

> *To ensure the content of codes of practice remain relevant and up to date the Bill requires codes of practice to be reviewed every five years.*

Accordingly, submitters commented on the proposal in the Bill for review of the codes.

In its written briefing to the committee, the department stated:[161]

> *To ensure the content of codes of practice remain relevant and up to date the Bill provides for codes of practice to expire five years after they were approved to allow for more timely review of codes.*

The committee notes that clause 12 of the Bill would amend section 274 of the WHS Act to provide that a code of practice expires five years after it is approved. There is no requirement contained in the Bill for codes to be reviewed after five years.

Submitters called for reviews to be undertaken in consultation with stakeholders and that the department be properly resourced to undertake thorough and appropriate reviews.[162] MBQ recommended that the Regulator develop a policy for reviewing codes of practice, including a standard format for each review, timeframes and the process for appointing participants to the review.[163]

The department advised that when it reviews codes of practice it ensures all stakeholders are consulted, including worker and employer representatives, appropriate experts and industry

156 Submission 3, AMIC, p 7; submission 5, MBQ, p 8; submission 11, CCIQ, p 4; submission 13, MEA, p 10; submission 18, CCF, p 6; submission 24, AgForce, p 3.

157 Department response to submissions, p 35.

158 Submission 3, AMIC, p 7.

159 Department response to submissions, p 35.

160 Explanatory notes, p 3.

161 Department written briefing, pp 5-6.

162 Submission 4, QNMU, p 7; submission 5, MBQ, p 9; submission 24, AgForce, p 3.

163 Submission 5, MBQ, p 9.

professionals, and establishes a clear framework and process for the review to provide clarity and transparency to stakeholders.

> *The Office of Industrial Relations will also ensure future reviews of codes of practice are staggered so that a large number of codes are not being reviewed at the same time. This will ensure:*
>
> - *reviews are conducted in a timely manner;*
> - *there are appropriate departmental resources to undertake reviews; and*
> - *there is limited burden on stakeholders involved in consultation on each review.*[164]

Reverse onus of proof

A number of submitters are concerned that clause 14 would impose a reverse onus of proof on employers regarding compliance with a code of practice.[165]

The department advised:

> *The amendment at Clause 14 will not impose a reverse onus of proof on employers. The amendment will enable Workplace Health and Safety Queensland inspectors to issue an improvement* notice *where they reasonably believe a person has failed to comply with a code of practice in the absence of alternative safety measures. It would be up to an inspector to make a determination that the person conducting a business or undertaking has not complied with an element of a code of practice or an alternative measure that provides an equal or higher protection against a risk. If an employer disagrees with the issuing of a notice by an inspector, they are entitled to seek a review of this decision under the* Work Health and Safety Act 2011.[166]

Legal issues

HIA considers the provisions are inconsistent with the purpose of the codes of practice to provide practical guidance on how to achieve compliance with laws or regulations and with the 'reasonably practicable' element of the WHS Act.[167]

The department advised that the provisions do not change the purpose of codes of practice to provide practical guidance on achieving compliance with the WHS Act. Clause 14 would establish codes of practice as the minimum standards for managing health and safety risks in a particular industry while allowing businesses to achieve compliance with their legislative duties through alternative measures if they provide an equal or higher level of protection against a risk.[168]

AMIC stated that the codes of practice do not have the same legal force as the WHS Act or regulations and failing to comply with them should not be grounds for mounting a prosecution.[169]

The department advised:[170]

> *Under the* Work Health and Safety Act 2011*, a prosecution can be commenced against a person or corporation for alleged reckless conduct (category 1 offence), for a failure to comply with a health and safety duty that exposes an individual to a risk of death or serious injury or illness (category 2 offence), or a failure to comply with a health and safety duty (category 3 offence).*

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164 Department response to submissions, pp 35-36.

165 Submission 5, MBQ, p 8; submission 11, CCIQ, p 4; submission 13, MEA, p 10; submission 14, RCSA, p 2; submission 18, CCF, p 6.

166 Department response to submissions, p 36.

167 Submission 12, HIA, pp 11-12.

168 Department response to submissions, p 36.

169 Submission 3, AMIC, p 7.

170 Department response to submissions, p 37.

The amendment at Clause 14 inserts a duty on persons conducting a business or undertaking to comply with a code or manage hazards and risks in a way that is different to a code but provides a standard of health and safety that is equivalent to or higher than the standard required under the code. From an enforcement perspective, the regulator will need to determine the most appropriate tool to use in response to a breach of this duty by considering all of the circumstances and the seriousness of the conduct involved. It is envisaged that inspectors may issue an improvement notice for a contravention of this duty in the first instance.

Any decision to initiate a prosecution must be made in accordance with the Director of Public Prosecutions Guidelines, including whether there is sufficient evidence and a prosecution is in the public interest.

It is also noted that codes of practice continue to be admissible in prosecutions as evidence of whether or not a duty or obligation under the Work Health and Safety Act 2011 *has been complied with.*

2.6 Enforceable undertakings

Enforceable undertakings operate as an alternative to a court-imposed sanction for a contravention, without the recording of a conviction or a finding of guilt against a person.[171] WHSQ can accept an enforceable undertaking under section 216(1) of the WHS Act where a contravention, or alleged contravention, of the WHS Act has occurred. Section 216(2) of the WHS Act precludes an enforceable undertaking for a contravention of reckless conduct, Category 1 offence.

The review noted that enforceable undertakings are:

… written, legally binding agreements where a person agrees to take certain specified actions to rectify an alleged breach of the law or improve their performance through the implementation of initiatives that are designed to deliver tangible benefits for workers, industry, and the community. Enforceable undertakings operate as an alternative to court imposed sanctions and, where appropriate, are considered to achieve long term sustainable improvements and provide significant benefits, not only to the immediate workplace and workers, but to the industry as a whole.

Enforceable undertakings were introduced by WHSQ in 2004 as a way to achieve sustainable health and safety outcomes as opposed to providing an immediate sanction for non-compliance through the courts. In particular, enforceable undertakings enable WHSQ to apply a graduated approach to compliance and enforcement by allowing restorative efforts to be customised while also reserving the right to pursue enforcement action in the event of failure to comply with the undertaking.[172]

The review considered that the current enforceable undertakings framework should be amended to provide a clear position on the treatment of fatalities. The Review noted that Victoria allowed enforceable undertakings where a fatality occurred where exceptional circumstances exist. It considered that approach would not reflect the seriousness of incidents involving a fatality and that approach would lead to a costly and timely process which is historically proven to rarely be approved in Victoria. Accordingly, the review recommended that the WHS Act be amended to expressly prohibit enforceable undertakings for contraventions or alleged contraventions of the WHS Act that relate to circumstances involving a fatality.[173]

Clause 7 of the Bill would implement recommendation 37 of the review and amend section 216 of the WHS Act to provide that a WHS undertaking cannot be accepted for a contravention or alleged

171 Department response to submissions, p 40.

172 The Review, p 75.

173 The Review, p 79.

contravention that involves a fatality, including industrial manslaughter, Category 1 offences and Category 2 offences where a death occurs. [174]

The Review also recommended that consideration be given to making similar amendments to the enforceable undertaking requirements in the ES Act and the SRWA Act.[175] This has been done to provisions in the ES Act and SRWA Act that mirror section 216. However, a consequential amendment to section 222 of the WHS Act (see clause 8) that reflects the amendment at section 216, has not been mirrored in the ES Act at section 54A.

2.6.1 Issues raised in submissions

Limit of Regulators discretion to consider the merits of each circumstance

Some submitters considered that the amendment removing the regulator's discretion, particularly as regards a Category 2 offence involving a fatality, would limit flexibility for cases that may reasonably benefit from an enforceable undertaking, based on the individual circumstances.[176]

In particular, AgForce considers that the proposed amendment is not suitable for the agricultural industries, which are largely family farms and as such accidents can often include family members. AgForce notes that the proposed amendments will reduce the options of WHSQ to prosecute which is unacceptable, and as such it cannot support this amendment and urges that the department be allowed to deal with these situations in a more flexible manner by removing this provision or providing for these situations in a written policy.[177]

A number of submitters consider that the Regulator should retain discretion to consider each case on its merits.[178]

The department advised:[179]

> *Undoubtedly, they are an effective enforcement tool in achieving long term, sustainable health and safety improvements when used in appropriate circumstances.*
>
> *However, for matters involving a fatality, public perception dictates that there should be a prosecution or punishment. The acceptance of an enforceable undertaking in circumstances involving a fatality does not adequately reflect the seriousness of the incident.*
>
> *EUs will remain an invaluable enforcement option for fostering safety improvement in circumstances where a fatality has not occurred.*
>
> *In removing the regulator's discretion, there may be a very small number of matters where an EU may be appropriate but not available. However, the cost and time associated with preparing an EU application dictates that there is a need for clear expectations around circumstances where an application is likely to be approved. Given the historical record of the regulator to reject applications that relate to circumstances involving a fatality there is merit in expressly prohibiting such circumstances in an effort to avoid costly applications and the regulator's decision being challenge through judicial review. Prohibiting the acceptance of EUs in circumstances involving a fatality serves to give greater clarity and certainty to duty holders and the community about circumstances when an EU may be accepted.*

174 Explanatory notes, p 3.

175 The Review, recommendation 37(d), p 80.

176 See submission 3, AMIC; submission 5, MBQ; submission 14, RCSA; submission 18, CCF; submission 23, QLS.

177 Submission 24, AgForce, p 4.

178 See submission 6, AiGroup; submission 11, CCIQ; submission 12, HIA; submission 13, MEA; submission 14, RCSA; submission 18, CCF; submission 23, QLS.

179 Department response to submissions, p 40.

The prohibition on enforceable undertakings should be extended

The CFMEU and the IEU consider that the prohibition in the WHSQ accepting enforceable undertakings should be extended further.[180] CFMEU does not support the use of enforceable undertakings by WHSQ because:

- They are yet another means by which WHSQ currently avoids its duties to properly regulate work health and safety by way of enforcement and compliance.
- Rectification of work health and safety hazards is a duty under the WHS Act. Undertakings, whereby agreements are entered into for the contravener to rectify unsafe work or practices, are therefore worthless with regard to health and safety outcomes. The outcomes are that WHSQ can avoid the work associated with issuing a proper sanction, and that contraveners can readily escape sanction and are not something the regulator should aspire to.
- Whilst the CFMEU supports clause 5 of the Bill insofar as it expands current prohibitions on WHSQ accepting undertakings with regard to offences that involve a fatality (including Industrial Manslaughter), there is no reason why the Bill should not extend the prohibitions further. [181]

Additionally, the CFMEU notes the recommendation of the Review that guidelines provide a general exception for enforceable undertakings where:

- the applicant has a recent prior conviction connected to a work-related fatality,
- the applicant has more than two prior convictions arising from separate investigations, or
- where the application relates to an incident involving a very serious injury.

The CFMEU recommends that the prohibitions specified in recommendation 37(b) of the Review report should be prescribed under legislation, rather than under administrative guidelines. This may be done by way of adding further paragraphs under the proposed subsection 216(2), with consequential amendments to subsection 222(3).[182]

The department noted that the recommendation of the Reviewer was accepted and the current guidelines reflect this recommendation.[183] The department did not directly respond to the recommendation of the CFMEU that the prohibitions be included in the legislation rather than guidelines.

2.7 Workplace Health and Safety Officers and Health and Safety Representatives

The Bill proposes a range of amendments to matters relating to Health and Safety Representatives (HSRs), as well as re-introducing Workplace Health and Safety Officers (WHSOs), a role that existed under the previous *Workplace Health and Safety Act 1995*.

This includes:

- mandating training for HSRs
- requiring PCBUs to provide an update list of HSRs and copies of provisional improvement notices (PINs) issued by HSRs to the Regulator
- allowing the discretionary appointment of WHSOs, and

180 Submission 17, IEU, p 6; submission 22, CFMEU, p 10.

181 Submission 22, CFMEU, p 10.

182 Submission 22, CFMEU, p 10.

183 Department response to submissions, p 40.

- permitting the appointment of a WHSO or HSR to be used as evidence that a duty holder has taken steps to mitigate health and safety risks in a workplace.[184]

The amendments implement recommendations 50 to 54 of the Review.[185]

2.7.1 Issues raised in submissions

Mandatory training of HSRs

The proposal to require mandatory training was supported by stakeholders,[186] although concerns were raised not least that the training provided be appropriate and provide a benefit to the workplace.[187]

The committee asked the department what 'so far as reasonably practicable' means with respect to a PCBU needing to ensure a HSR completes prescribed training under section 72(1).

The department advised:

> *Under the existing provision access to training by a health and safety representative (HSR) is not mandatory but voluntary. A person conducting a business or undertaking (PCBU) must allow access to training on request by a HSR but is not required to direct a HSR to undertake training. Under the Bill, it is intended that training for a HSR becomes mandatory. It is recognised, however, that a PCBU will not always be able to ensure that training has occurred. The addition of 'so far as is reasonably practicable' provides for instances where training is not able to be undertaken for a reason outside the control of the PCBU. For example, if the HSR falls ill and is unable to complete the training within six months of election as required.*[188]

A PCBU is required to provide a copy of an up to date list of HSRs to the Regulator

QNMU supported the provision of information about HSRs to the Regulator on the basis that it will "close the gap between WHSQ and HSRs and allow for easy dissemination of information and promotion of advice and support to HSRs."[189]

Conversely, MBQ state with respect to the provision of information about HSRs to the Regulator:

> *The current legislation requires that the PCBU display list of Health and Safety Representatives at the workplace. This has not always been practical on construction sites due to the number of PCBUs present on one project and the transient nature of the industry resulting in regular changes to the appointed HSR. Requiring the PCBU to provide a list of HSRs to the Regulator will be a similarly futile process and is simply an unnecessary increase in red tape.*[190]

MBQ also noted concerns about how the information will be collected and for what purpose it will be used, noting a potential duplication of information as all HSRs will be required to undergo training under the proposed amendments, there will be a training record of HSRs in the industry.[191]

The department acknowledged the concerns raised with regard to the requirement to provide the Regulator with a list of HSR. However, with reference to the Review, noted:

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184 Explanatory notes, pp 4-5.

185 The Review, pp 125-126, 129.

186 Submissions in support of the amendment were received from United Voice, QNMU, MBQ, AiGroup, QCU, CCIQ, HIA, IEU, UFFUQ, CFMEU, QLS and Agforce.

187 Submission 1, United Voice, p 5; submission 4, QNMU, p 8; submission 5, MBQ, p 10; submission 6, AiGroup, p 18; submission 11, CCIQ, p 4; submission 12, HIA, p 11.

188 Department response to additional questions, p 11.

189 Submission 4, QNMU, p 8. See also submission 22, CFMEU, p 10.

190 Submission 5, MBQ, p 9.

191 Submission 5, MBQ, p 10. See also submission 6, AiGroup, pp 19-20; submission 12, HIA, p 11. See footnote 196 for the department's response to this matter, addressed with the concern about PIN information.

…as the Best Practice reviewer pointed out, without a current list of HSRs, the regulator is unable to provide information and resources to HSRs on safety issues. In addition, there are specific requirements under the WHS Act for inspectors to make contact with HSRs on visiting a workplace and to offer the opportunity for the HSR to accompany the inspector and to discuss WHS issues in relation to the HSR's work group. Therefore, inspectors need to be able to identify the relevant HSRs before visiting a workplace to carry out their compliance functions and make contact with them on entry. This means access to current HSR lists are essential to enable the inspector to carry out their activities. While the specific problem raised by MBQ about the transient nature of the workforce on construction sites is recognised, under section 74 of the WHS Act, a PCBU must display a current list of HSRs at the workplace which could be sent to the regulator simultaneously. The OIR will consider how technology can best be used to make it as easy as possible for a PCBU to provide a list of elected HSRs to the Regulator.[192]

A PCBU is required to provide copies of any PINs issued by a HSR to the Regulator

With respect to the provision of PINs to the Regulator, QNMU state:

…the ability for HSRs to issue PINs and direct unsafe work to cease is a critical function of the HSR. The requirement of the PCBU to forward to the regulator a copy of all PINs issued by the HSR is also supported. In our view, WHSQ should receive a copy of all PINs at the time they are issued. As these incidents are only progressed to WHSQ when the matter is unresolved, a more comprehensive reporting system would reflect the true extent of workplace hazards and incidents. There is a need for increased statistical information on PINs which could be used as an evidence base for WHSQ.[193]

CFMEU also supports the provision of PIN information to the regulator, however, notes that the Bill does not currently include that information.[194]

MBQ does not support the provision of information about PINs issued by HSRs to the Regulator and considers it unnecessary red-tape which achieves no practical safety outcomes. MBQ also queries how this information will be collected (online or otherwise) and for what purpose the information will be used.[195]

In response to the concerns raised, the department advised:

…the regulator should report on how information on HSRs and provisional improvement notices (PINs) are used for WHS purposes, and what has been achieved, the new provision to require a PCBU to provide a copy of PINs to the regulator will assist in the event that the PIN is subject to review. This requirement will provide the regulator with an additional information source on the WHS issues at the workplace in addition to the notices issued by inspectors. Since a HSR can only issue a PIN in response to a contravention of the Act, it is evidence of a WHS issue at the workplace and needs to be recorded by the regulator.[196]

With regard to the concern raised by the CFMEU and other stakeholders that the Bill does not currently include the requirement for a PCBU to provide the regulator with copies of PINs issued by HSRs, the department advised that the drafting oversight will be addressed.[197]

192 Department response to submissions, p 45.

193 Submission 4, QNMU, p 8.

194 Submission 22, CFMEU, p 11. See also submission 5, MBQ, p 10; submission 6, AiGroup, p 21.

195 Submission 5, MBQ, p 10. See also submission 6, AiGroup, pp 20-21.

196 Department response to submissions, p 45.

197 Department advice to the committee, 13 September 2017.

Reintroduction of non-mandatory WHSOs

With respect to the reintroduction of WHSOs a number of stakeholders supported the amendment.[198] In this respect, IEU stated:

> *It is our view that the function of Workplace Health and Safety Officers (WHSO) proved critical in ensuring proper implementation and monitoring of WHS systems and we believe that the removal of this requirement had a detrimental effect in workplaces across the state. Indeed, many employers in our sector retained the position after the commencement of the current Act because they found it a valuable role and because it proved to be an effective means of improving knowledge and understanding of WHS issues within the workplace.*[199]

Other stakeholders did not support the reintroduction of the WHSO. CCF stated:

> *…the introduction of non-mandatory Workplace Health and Safety Officers (WHSOs) could influence a workplace culture oriented toward all responsibility falling on the designated WHSO. Such an attitude is a primary cause of workplace accidents and this measure will not improve WH&S conditions. In addition, civil contractors who have consistently worked to develop WH&S regimes would probably not increase attentional red tape by appointing a WHSO. As such, CCF QLD does not support the reintroduction of non-mandatory Workplace Health and Safety Officers.*[200]

MBQ stated:

> *We see little to no value in having such a requirement as most businesses who have the work load and business size to warrant such a role already engage designated health and safety managers, and would be unlikely to voluntarily appoint these people as WHSOs due to the additional red-tape attached to having such a role.*
>
> *In a time when safety culture is important and when industry is trying to encourage all persons at the workplace to take responsibility for safety, having a dedicated WHSO can lead to worker attitude of "we have a WHSO, so safety is his/her problem, not mine". Again, this prescriptive proposal may not actually achieve better safety outcomes, but rather shift the responsibility for safety to one person within the company.*[201]

The department recognised that existence of WHS managers and advisors operating in companies, indicating that is the reason the role of WHSO was made non-mandatory. However, also noted that:

> *"The role of a WHSO is not superfluous in today's safety environment as indicated by MBQ, AiG, CCF and CCIQ, as the WHSO can provide important direction and support for those workplaces struggling to manage WHS issues."*[202]

The committee asked the department what role the WHSO will fulfil that is currently missing and whether there has been an increase in work health and safety incidents since WHSOs were removed as a result of not having WHSOs.

The department advised:

> *Reintroduction of a legislated Work Health and Safety Officer (WHSO) role will encourage persons conducting a business or undertaking (PCBU) to have a designated safety resource to support management in improving work health and safety performance across the organisation.*

198 Stakeholders who support the amendment include United Voice, QNMU, QCU and IEU.

199 Submission 17, IEU, p 7.

200 Submission 18, CCF, p 6. See also submission 11, CCIQ, p 5.

201 Submission 5, MBQ, p 10. See also submission 6, AiGroup, pp 21-23; submission 12, HIA, p 10.

202 Department response to submissions, p 46.

The functions of WHSOs include informing the PCBU about work health and safety (WHS) matters in the organisation; conducting inspections, identifying and reporting on hazards and risks; investigating WHS incidents; establishing educational programs and assisting WHS inspectors. WHSOs also complete, at specified intervals, an assessment of WHS hazards and risks at the workplace and provide an assessment report for the PCBU, which includes recommendations about managing the risks.

PCBUs will benefit from having an appointed officer with WHS training, expertise and authority. Employee associations will also benefit as it clarifies lines of communication and ensures that they can quickly locate and liaise with WHS specialists at the workplace. WHSOs will also support improved communication with the WHS inspectorate.[203]

Further:

There are too many factors influencing WHS outcomes to draw any conclusions on the specific impact of not having a legislated WHSO role since 2012, however a significant body of research indicates that WHSOs have proven to be an effective means of improving knowledge and understanding about WHS at workplaces. In Workplace Health and Safety Officers: A Queensland Success Story*, Vanderkruk found the appointment of WHS Officers leads to more effective risk management, added awareness and control of hazardous substances and manual handling procedures, greater employee consultation and involvement, and more WHS induction training of new employees. A study by Horstmanshof et al. (2002) found that a large majority of workers and management felt that WHSOs were:*

- *well prepared to deal with OHS hazards and incidents;*
- *trained well;*
- *supported by management;*
- *influential in WHS issues; and*
- *developed effective solutions to WHS problems.*

Stakeholder feedback during the Best Practice Review indicated that industry would benefit from reintroduction of the WHSO role.[204]

Appointment of a HSR or WHSO as an evidentiary aid

Concerns were raised about the introduction of section 273A which states that the fact a PCBU has appointed a WHSO or HSR can be used as evidence of whether or not a duty or obligation under the WHS Act has been complied with where an offence is alleged.

CFMEU did not support the proposed section noting:

Ordinarily, admissibility of evidence is governed by the rules of evidence, including those contained in the Evidence Act 1977 *(Qld). The test for* prima facie *admissibility under evidence law is whether the evidence is* relevant *to a matter in issue. This test is subject to a number of rules developed under the common law and now largely replicated in the Evidence Act, which provide safeguards around evidence that is otherwise relevant but potentially prejudicial in some way. The fundamental problem with the proposed new section 273A is that it deems evidence of the existence of a WHSO or HSR to be automatically relevant (when it may not be). Relevance and admissibility are usually matters for a court to determine.*[205]

Further:

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203 Department response to additional questions, pp 11-12.

204 Department response to additional questions, p 12.

205 Submission 22, CFMEU, p 11.

> *The CFMEU rejects the notion that the proposed new section 273A incentivises the appointment of WHSOs or HSRs by PCBUs in any valid way. Firstly, PCBUs dot not appoint HSRs – by definition, they are the representatives of workers. Secondly, the WHS Act should not operate to encourage actions on the part of PCBUs that are motivated by a desire to avoid being held fully accountable for an offence. That would hardly bring about 'best practice'.*[206]

AiGroup was also concerned that "this provision will mistakenly lead employers to believe that the existence of these roles will reduce their liability".[207]

The department stated:

> *In response to the concern expressed by the AiG and CCIQ that methods other than the existence of a WHSO and a HSR should be able to be provided as evidence in a proceeding, this provision does not negate the fact that other methods employed to improve safety at a workplace can equally be presented as evidence to reduce liability. In addition, the CFMEU contends that evidence used to mitigate liability in a proceeding is a decision of a court not the regulator, so the existence of a WHSO or HSR cannot be automatically used in this way. However, in the event of an incident, this provision will encourage businesses to appoint a WHSO as a practical way for PCBUs to take proactive steps to meet their duty of care.*[208]

206 Submission 22, CFMEU, p 11.

207 Submission 6, AiGroup, p 24. See also submission 11, CCIQ, p 4.

208 Department response to submissions, p 46.

3 Compliance with the *Legislative Standards Act 1992*

TECHNICAL SCRUTINY REPORT ON

WORK HEALTH AND SAFETY AND OTHER LEGISLATION AMENDMENT BILL 2017

Date introduced:	22 August 2017
Responsible minister:	Hon Grace Grace MP
Portfolio responsibility:	Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs

BACKGROUND

The objective of the Work Health and Safety and Other Legislation Amendment Bill 2017 (the Bill) is to implement a range of recommendations arising from the Best Practice Review of Workplace Health and Safety Queensland July 2017 (the Review) conducted in response to workplace fatalities that occurred at Dreamworld and Eagle Farm.

The recommendations implemented through the Bill include:

- introducing an offence of industrial manslaughter
- establishing an independent statutory office for work health and safety prosecutions
- addressing issue resolution matters by expanding the jurisdiction of the QIRC to include hearing and determining work health and safety disputes
- restoring the status of codes of practice as existed under the WHS Act 1995
- prohibiting enforceable undertakings being accepted for contraventions, or alleged contraventions, of the WHS Act that involve a fatality
- reintroducing the ability of a PCBU to appoint a WHSO, and
- enhancing support for, and the role of HSRs.

FUNDAMENTAL LEGISLATIVE PRINCIPLES AND OTHER ISSUES

It is considered that:

- clauses 4, 20, 23, 55 and 62 contain issues of fundamental legislative principle.

The Bill also includes 12 offence provisions which are set out at **Annexure A**.

POTENTIALLY SIGNIFICANT FLP ISSUES WHICH ARE BROUGHT TO THE COMMITTEE'S ATTENTION

RIGHTS AND LIBERTIES OF INDIVIDUALS

Clauses	**4, 55, 62**
FLP issue	**Rights and liberties of individuals** - Section 4(2)(a) *Legislative Standards Act 1992* Does the Bill have sufficient regard to the rights and liberties of individuals?
Comment	**Summary of provisions** **Clause 4** inserts a new part 2A, which includes the offence of industrial manslaughter in the *Work Health and Safety Act 2011* (WHS Act). The offence at proposed s.34C applies to a person conducting a business or undertaking (PCBU) and to a senior officer at proposed

s.34D and include a penalty of 20 years imprisonment for an individual, or 100,000 penalty units for a body corporate (where the offence under s.34C is found).[209]

The penalty imposed under the proposed industrial manslaughter provisions is arguably severe and disproportionate when compared with that imposed under existing section 31, Reckless conduct – category 1 of the WHS Act.

Section 31 of the WHS Act provides that a person commits a category one offence if they have a health and safety duty and, without reasonable excuse, engage in conduct that exposes an individual (whose is owed the duty) to risk of death or serious injury or illness, and are reckless to that risk. An offence can be found under section 31 regardless of whether death or serious injury or illness occurs; noting that it also does not preclude a death or serious injury or illness occurring.

The penalty for an offence under section 31 is up to 3000 penalty units or five years imprisonment for an individual (including an individual who is a PCBU or an officer of a PCBU) or up to 30,000 penalty units for a body corporate.

Potential FLP issues

A penalty should be proportionate to the offence. The OQPC Notebook states, "Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other".[210]

Comment

The explanatory notes discuss the severity of the penalty applied for industrial manslaughter, stating that:

> *The offence recognises the extremely serious circumstances in which both a fatality has occurred, and that an individual or corporation can be seen to have potentially failed through behaviours and attitude to a catastrophic extent, exceeding that of recklessness under category 1 offences. The guidelines for such prosecutions are identical to those for manslaughter under the Criminal Code, therefore providing the standard safeguards around prosecution decisions.*[211]

The department advised:

> *In considering which offence is greater (reckless conduct under Category 1 or negligence under industrial manslaughter), it is important to note that an injury or death is not an element of a Category 1 offence, and that the focus of this offence is on recklessly exposing an individual to the risk of death or serious injury by failing to comply with a health and safety duty. To this end, the Category 1 offence could be seen as a "lesser" offence in comparison to industrial manslaughter, given the severity of circumstances required to meet the proposed new industrial manslaughter offences (i.e. that a person's negligent conduct causes the death of a worker).*[212]

With the department also noting:

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209 Similar offences are inserted into the Electrical Safety Act 2002 (**cl.55** inserting new s.48N and s.48O) and the Safety in Recreational Water Activities Act 2011 (**cl. 62** inserting new s.25C and s.25D).

210 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 120.

211 Explanatory notes, pp 5-6.

212 Department response to additional questions, p 2.

	In reality the threshold for proving reckless conduct is similarly high as to that required to prove negligence (i.e. the conduct falls short of the standard of that which a reasonable person would do in the circumstances). This means that to see evidence of "reckless conduct" is rare and will ordinarily focus on a more independent act or omission, where the real potential results are known and potential controls were obvious.[213] The committee may wish to consider whether the penalties contained in the new industrial manslaughter offences are appropriate to the conduct addressed by those offences.

Clause	**23**
FLP issue	**Protection against self-incrimination** – Section 4(3)(f) *Legislative Standards Act 1992* Does the Bill provide appropriate protection against self-incrimination?
Comment	Summary of Provisions **Clause 23** amends section 171(1) of the WHS Act to provide that, where an inspector enters a workplace (or has so entered within the last 30 days), an inspector may require a person to give the inspector a document (or advise who has custody of that document) or require the person to attend before the inspector (at a stated reasonable time and place) to answer questions. The new subsection (1) is largely the same as it currently is, however the new provision will apply even when entry was made within the previous 30 days; and requires the attendance of the person at a stated time and place to answer questions, whereas previously it was "require a person at the workplace to answer any questions put by the inspector." A number of pre-existing safeguards remain in amended s.171, including that the requirement for access to the document must be made by written notice unless circumstances require the inspector to have immediate access; interviews are conducted in private where appropriate or requested; and a representative of the person being interviewed may be present at the interview. It is an offence (max penalty 100 pu) to fail to comply (absent reasonable excuse) with a s.171 requirement from an inspector. Potential FLP issues Legislation should provide appropriate protection against self-incrimination.[214] Comment Existing section 172 abrogates the privilege against self-incrimination, meaning that a person is not excused from answering a question or providing information or a document under s.171 on the ground that the answer, information or document may tend to incriminate the person or expose them to a penalty. There is however both a use and derivate use immunity, in that the answer to a question or information or a document provided by an individual[215], and other evidence directly or

213 Department response to additional questions, p 2.

214 *Legislative Standards Act 1992*, s. 4(3)(f).

215 It appears that the use and derivative use immunities extend only to information provided under compulsion, as s. 173(3) states – "Nothing in this section prevents an inspector from obtaining and using evidence given to the inspector voluntarily by any person."

	indirectly derived from the answer, information or document, is not admissible as evidence against that individual in civil or criminal proceedings (other than proceedings arising out of the false or misleading nature of the answer, information or document) (s.172(2)). In addition, s.173 provides that before requiring a person to answer a question or provide information or a document, the inspector must identify themselves as such, warn the person that failure to comply without reasonable excuse is an offence, warn the person about the effect of s.172 and advise them about the effect of section 269 (which confirms that a person is not required to produce a document that would disclose information, or otherwise provide information, that is the subject of legal professional privilege). The Committee's attention is drawn to the compulsion to answer (absent reasonable excuse), the abrogation of the privilege against self-incrimination and the use and derivative use immunities, as well as the observance of legal professional privilege. It is for the Committee to determine whether it believes the use and derivative use immunities are a sufficient protection when weighed against the compulsion to answer and the abrogation of the privilege against self-incrimination.

Clause	**20**
FLP issue	**Immunity from proceedings** – Section 4(3)(h) *Legislative Standards Act 1992* Does the Bill confer immunity from proceeding or prosecution without adequate justification?
Comment	Summary of provisions **Clause 20** inserts a new Part 5A into the *Work Health and Safety Act 2011*, including proposed s.103G (Immunity for work health and safety officers). This provides that a work health and safety officer who is not the person conducting the business or undertaking is not personally liable for anything done or omitted to be done in good faith in performing a function under this Act, or in the reasonable belief that the thing was done or omitted to be done in the performance of a function under this Act. Potential FLP issues Legislation should not confer immunity from proceeding or prosecution without adequate justification.[216] The OQPC Notebook states "a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees.[217] Comment Proposed s.103G grants immunity for actions taken or omissions made in good faith by a work health and safety officer (who is not the person conducting the business or undertaking) without apparent regard to whether or not those actions could be considered

216 *Legislative Standards Act 1992*, s 4(3)(h).

217 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 64.

	negligent. As noted above, it is preferable if immunity is only extended to actions done honestly/in good faith and without negligence. In addition, the submission from the Queensland Law Society expressed the concern that: *This provision could offer an unintentional defence to a senior officer charged under the "Industrial Manslaughter" provision in section 34AD on the basis they are a work health and safety officer. There is no provision in this immunity clause to state that the person was a work health and safety officer at the time this immunity is claimed to have operated, which may lead to the appointment of work health and safety officers to avoid liability under the act. This appears to be an unintended consequence of the drafting.* The department advised that: *…the immunity offered to WHSO under section 103G could offer an unintentional defence to a senior officer charged under the "Industrial Manslaughter" is unlikely since the seriousness of this charge would remove the immunity from a WHSO by being able to prove that their conduct was not done or omitted to be done in good faith. The WHS Act provides immunity to people in similar roles such as HSRs and Inspectors.*[218] The immunity provision is drawn to the Committee's attention.

ANNEXURE A – PROPOSED NEW OR AMENDED OFFENCE PROVISIONS

Clause	Offence	Proposed maximum penalty
4	**Amendment of *Work Health and Safety Act 2011*** **s34C 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. *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.	(a) for an individual—20 years imprisonment; or (b) for a body corporate—100,000 penalty units.

[218] Department response to submissions, p 46.

6	**Replacement of s74 List of health and safety representatives** A person conducting a business or undertaking must ensure that— (a) a list of each health and safety representative and deputy health and safety representative (if any) for each work group of workers carrying out work for the business or undertaking is prepared and kept up to date; and (b) as soon as practicable after the list is prepared or amended, a copy is given to the regulator; and (c) a copy of the up-to-date list is displayed, in a way that is readily accessible to workers in each of the work groups— (i) at the principal place of business of the business or undertaking; and (ii) at any other workplace that is appropriate, taking into account the constitution of each work group.	20 penalty units
15	**Amendment of s72 (Obligation to train health and safety representatives)** (1) The person conducting a business or undertaking must ensure, so far as is reasonably practicable, a health and safety representative for a work group for that business or undertaking has completed the training prescribed by regulation.	100 penalty units
15	(2) The person conducting a business or undertaking must— (a) allow a health and safety representative time off work to attend the training; and (b) pay the training fees and any other reasonable costs associated with the health and safety representative's attendance at the training.	100 penalty units
20	**Insertion of new s103F General obligations of person conducting business or undertaking to work health and safety officer** (1) This section applies to a person conducting a business or undertaking if the person has appointed another person as a work health and safety officer for the business or undertaking. (2) The person conducting the business or undertaking must— (a) give the work health and safety officer information that the person has about risks to the health and safety of workers and any other person at the business or undertaking; and (b) with the consent of a worker, allow the work health and safety officer to be present at an interview concerning work health and safety matters between the worker and the person; and (c) consult, so far as is reasonably practicable, with the work health and safety officer about any proposed changes to workplace practices that affect, or may affect, work health and safety at the business or undertaking; and	

	(d) allow the work health and safety officer to inspect the business or undertaking and carry out assessments at the business or undertaking during normal working hours; and (e) take appropriate action to manage— (i) any hazards and risks notified to the person by the work health and safety officer or included in an assessment report prepared by the work health and safety officer; and (ii) any incidents or immediate or imminent risks that have been notified to the person by the work health and safety officer; and (f) provide resources and assistance to the work health and safety officer that are reasonably necessary to enable the officer to exercise the officer's functions under this Act; and (g) keep an assessment report given to the person for at least 5 years. (3) The person conducting the business or undertaking may instruct the work health and safety officer to take reasonable action to eliminate or minimise risks to health and safety.	50 penalty units
20	**Insertion of new s103I Displaying identities** (1) The person conducting a business or undertaking must display, under this section, an up-to-date list of each work health and safety officer for the business or undertaking. (2) The list must— (a) be displayed within 5 days after the day a work health and safety officer is appointed for that business or undertaking; and (b) be displayed in at least 1 conspicuous place at the business or undertaking and in a way that ensures it can be seen by workers at the business or undertaking.	40 penalty units
32	**Insertion of new s102C Action for settling dispute** (1) This section applies if notice of a dispute has been given under section 102B. (2) The commission may deal with the dispute in any way it thinks fit, including by means of mediation, conciliation or arbitration. (3) Without limiting subsection (2), if the commission deals with the dispute by arbitration, the commission may make any order it considers appropriate for the prompt settlement of the dispute. (4) A person must not contravene an order made under subsection (3). WHS civil penalty provision.	100 penalty units
34	**Insertion of new s141A Powers of inspector asked to assist in resolving dispute** (1) This section applies if— (a) an inspector is appointed by the regulator under section 141 to assist in resolving a dispute; and	

	(b) the dispute is about— (i) whether the WHS entry permit holder has a right to enter the workplace under division 2 or 3; or (ii) whether section 119 or 122 has been complied with in relation to notice of the entry or purported entry. *Note—* This section does not apply if the dispute is about rights the WHS entry permit holder may exercise while at the workplace under division 2 or 3. (2) The inspector may— (a) decide the matter mentioned in subsection (1)(b)(i) or (ii); and (b) if the inspector is reasonably satisfied the WHS entry permit holder has a right of entry under division 2 or 3—give the person conducting the business or undertaking a direction, in writing, to immediately allow the WHS entry permit holder to enter the workplace under a stated provision of division 2 or 3. *Note—* The commission may review a decision made under subsection (2) in dealing with a dispute under subdivision 2—see section 142A. (3) A direction under subsection (2)(b) must state— (a) that the inspector is reasonably satisfied the WHS entry permit holder has a right to enter the workplace under division 2 or 3; and (b) the reasons the inspector is reasonably satisfied about the right to enter. (4) A person given a direction under subsection (2)(b) must comply with it. WHS civil penalty provision. (5) This section does not limit the powers of the inspector under this Act. *Example of powers of the inspector—* the inspector's power to issue a notice under part 10	100 penalty units
55	**Amendment of *Electrical Safety Act 2002*** **Insertion of new s48N 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. *Note—*	

	See section 188 or 190B 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.	(a) for an individual—20 years imprisonment; or (b) for a body corporate—100,000 penalty units.
55	**Insertion of new s48O Industrial manslaughter—senior officer** (1) A senior officer of 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 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. (2) An offence against subsection (1) is a crime.	20 years imprisonment
62	**Amendment of *Safety in Recreational Water Activities Act 2011*** **New s25C Industrial manslaughter—person conducting business or undertaking** (1) A person conducting a business or undertaking that provides recreational water activities 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. *Note*—See the *Work Health and Safety Act 2011*, section 244 or 251, as applied by section 36 of this Act, in relation to the imputation to a body corporate or public authority of conduct of an employee, agent or officer of the body corporate or public authority. (2) An offence against subsection (1) is a crime.	(a) for an individual—20 years imprisonment; or (b) for a body corporate—100,000 penalty units.
62	**Insertion of new s25D Industrial manslaughter—senior officer** (1) A senior officer of a person conducting a business or undertaking that provides recreational water activities 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. (2) An offence against subsection (1) is a crime.	20 years imprisonment

EXPLANATORY NOTES

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins. The explanatory notes provide information on how some clauses will amend the WHS Act which is helpful.[219]

There are a number of inaccuracies and inconsistencies within the explanatory notes. These include inaccurate description of requirements in the Bill, particularly with respect to a requirement that the PCBU provide a list of all PINs issued by a HSR to the Regulator – this is not contained in the Bill and the department acknowledged the oversight and advised this will be introduced as an amendment to the Bill.[220] Similarly, the explanatory notes are inconsistent with respect to the codes of practice and advise that the codes of practice are required to be reviewed every five years –the Bill merely provides that the codes will expire after five years.[221] Additionally, a typographical error refers to clause 1, instead of clause 14.[222]

Of the FLP's that the department has identified in the explanatory notes, there is no reference to the specific clauses to which those FLPs apply.

219 A good example of this is at page 10, regarding clause 23.

220 Explanatory notes, p 4.

221 Explanatory notes, p 4; compared to p 8 which is accurate with respect to clause 12.

222 Explanatory notes, p 9.

Appendix A – List of submissions

Sub #	Submitter
001	United Voice
002	Australian Sugar Milling Council
003	Australian Meat Industry Council
004	Queensland Nurses and Midwives' Union
005	Master Builders Queensland
006	AiGroup
007	Building Service Contractors Association of Australia
008	National Electrical and Communications Association
009	Queensland Council of Unions
010	Ms Sue McMullen
011	Chamber of Commerce and Industry Queensland
012	Housing Industry Association
013	Master Electricians Australia
014	Recruitment & Consulting Services Association
015	Property Council of Australia
016	Australian Chamber of Commerce and Industry
017	Independent Education Union
018	Civil Contractors Federation
019	United Fire Fighters Union Queensland
020	Australian Lawyers Alliance
021	Village Roadshow Theme Parks
022	Construction, Forestry, Mining and Energy Union
023	Queensland Law Society
024	AgForce
025	Queensland Teachers' Union

026	Australian Workers' Union
027	Queensland Police Union of Employees
028	Bar Association of Queensland
029	Australian Institute of Company Directors

Appendix B – List of witnesses at public briefing and hearing

Public briefing

Date	Location	Witnesses from the Office of Industrial Relations, Queensland Treasury
6 September 2017	Brisbane	Dr Simon Blackwood, Deputy Director-General Mr Paul Goldsbrough, Executive Director, Safety, Policy and Workers' Compensation Services

Public hearing

Date	Location	Witnesses (in order of appearance)
25 September 2017	Brisbane	**Queensland Council of Unions** • Michael Clifford, Assistant Secretary **Construction, Forestry, Mining and Energy Union** • Jade Ingham, Acting Divisional Branch Secretary • Ashley Borg, Senior Industrial Officer **Independent Education Union** • Danielle Wilson, Industrial Officer **Queensland Nurses and Midwives' Union** • Deborah Twigg, Research and Policy Assistant • James Gilbert, Occupational Health & Safety Officer **Queensland Law Society** • Rebecca Fogerty, Deputy Chair of the QLS Criminal Law Committee • Ashley Uren, Deputy Chair of the QLS Industrial Law Committee • Kate Brodnik, Senior Policy Solicitor **Bar Association of Queensland** • Elizabeth Wilson QC, Barrister and Chair of the Bar Association's Criminal Law Committee • Laura Reece, Barrister and Member of the Bar Association's Criminal Law Committee **AiGroup** • Mark Goodsell, Acting Head – Queensland **Chamber of Commerce and Industry Queensland** • Kate Whittle, General Manager, Advocacy • Joseph Kelly, Advocacy Officer **Housing Industry Association** • Warwick Temby, Acting Chief Economist • Kelvin Cuskelly, Assistant Director Building Services

		Master Builders Queensland • Paul Bidwell, Deputy Chief Executive Officer • Melanie Roberts, Manager Workplace Health, Safety and Environmental Policy **AgForce** • Lauren Hewitt, Policy Specialist **Australian Meat Industry Council** • Bradley Jackson, Health, Safety and Environment Coordinator, Comgroup Supplies Pty Ltd • Kerry Melrose, Managing Director, Melrose Wholesale Meats **Master Electricians Australia** • Jason O'Dwyer, Manager of Advocacy and Policy **Best Practice Review of Workplace Health and Safety Queensland** • Tim Lyons, Independent Reviewer *(via teleconference)* **Interim consultative committee for work related fatalities and serious incidents** • Michael Garrels • Kevin and Christine Fuller • Dan and Debbie Kennedy • Jenny Newport (Independent witness) **Office of Industrial Relations, Queensland Treasury** • Dr Simon Blackwood, Deputy Director-General • Mr Paul Goldsbrough, Executive Director, Safety, Policy & Workers' Compensation Services

Statements of Reservation

GOVERNMENT MEMBERS OF THE COMMITTEE

Keeping Queensland workplaces safe from injury or death is of paramount importance for the people of Queensland and I commend the Minister for presenting this Bill to the committee for consideration. The *Workplace Health and Safety Act 2011* (WHS Act) establishes a clear duty on the Person Conducting the Business or Undertaking (PCBU) to provide a safe workplace. The amendments contained in this Bill move to strengthen this position and will ensure that the PCBU prioritises the safety of its workers in carrying out its business efficiently.

The committee received a number of submissions, some of which were supportive and others were less supportive and although the committee cannot agree that the Bill be passed it is important the government members outline the importance of this reform and why parliament should allow for its passage. In doing so, this statement will address key elements of reform in this Bill including industrial manslaughter.

The Best practice review of Workplace Health and Safety Queensland identified the need for the creation of an offence of industrial manslaughter. The elements of the offence as defined in the Bill will ensure that the complex contractual relationships that exist through employment practices will not exclude the principle contractor from liability for the death of workers on their worksite, if they are found to be negligent.

As Chair, I submit that this amendment will make significant inroads in the attitudes of senior executives of corporations to ensure they make safety a priority on their worksites. If this Bill is passed, Queensland will be the first jurisdiction in Australia to have industrial manslaughter as an offence in their occupational safety legislation. The decision to locate this offence in the WHS Act, instead of in the Criminal Code, was one that was made with due consideration. In this respect, the Reviewer found that the WHS Act is a more appropriate location for the offence because the Act includes provisions allowing for a person's conduct to be imputed to a corporate entity, thereby reducing the barriers to attributing criminal liability to a corporation in instances involving the most serious health and safety breaches.

The other reforms presented in this Bill will provide clarity to both workers and employers in their day to day operations. The ability to take workplace health and safety disputes to the Queensland Industrial Relations Commission (QIRC) will ensure that disputes are not drawn out, allow the QIRC to make a decision on the matter and expedite the disputation process. The provision to allow 24 hours, after an inspector is called, before the dispute can be taken to the commission will allow both companies and workers a cooling off period to resolve the dispute and, if this can't be done, have the dispute heard by the QIRC.

In relation to enforceable undertakings, the government members of the committee believe that the public perceptions around incidents that involve a fatality have shifted quite significantly. The public expect that if an incident involves a fatality there ought to be a prosecution or punishment; an enforceable undertaking does not reflect the seriousness of the incident. I as Chair, believe that this is a timely reform and reflects the sentiment that exists in the community around incidents involving a fatality.

Finally, the reform restoring the codes of practice as the required minimum standard; although some employer organisations submitted concerns around this, we find that making codes of practice the minimum standard provides a benchmark to ensure there is no confusion on worksites for workers or employers. That being said, if an employer exceeds their obligations under a code of practice, this could be used as evidence that they complied with their duty to provide a safe workplace where an incident occurs. Although there were alternative positions taken in the submissions, I also believe that the codes of practice will provide clarity for workers, employers and the regulator when issuing notices on a worksite.

One death on a worksite is a death too many, the recent tragedies which led to the review of Workplace Health and Safety Queensland and these reforms presented by the government, will ensure that Queensland workplaces are safer.

I am proud as Chair of the committee that the government has presented these reforms to the committee for consideration, and I firmly believe that the standards set by this Bill will ensure that workers can be confident of having safer workplaces and visitors to the state can feel secure in enjoying the many attractions that we have to offer.

Mr Peter Russo MP
Chair, Finance and Administration Committee
Member for Sunnybank

STATEMENT OF RESERVATION

WORK HEALTH AND SAFETY AND OTHER LEGISLATION AMENDMENT BILL

THE NON-GOVERNMENT MEMBERS' POSITION

The Non-government members of the Finance and Administration Committee reject completely the need for this union-building legislation which is faulty at law as evidenced by the submissions from the Queensland Law Society and the Queensland Bar Association. It is also adding a further cost to industry as advised by the Chamber of Commerce and Industry Queensland (CCIQ) and seriously transgresses several areas of Fundamental Legislative Principles.

Workplace health and safety is a shared responsibility between everyone. The LNP members of the Finance and Administration Committee believe in the dignity of work and the right for all workers to go to work each day and come home safely to their families at the end of every shift.

The Government committee members' of the committee in their lemming-like adherence to union building legislation before the House ignores the vast majority of submitters to the Bill deploring the need and efficaciousness of this Bill.

The only benefit that will certainly be attained by the practical approval by the House of this legislation is to empower Union representatives to threaten and coerce employers to adopt more union representatives and union affiliated employees or face serious persecution consequences through union instigated prosecutions.

A similar law has been in existence in the ACT since 2004 with not one prosecution successful since its inception. Clearly, and self-admitted by proponents of this Bill's introduction is the fact that industrial deaths will not be prevented by the introduction of this heavy-handed legislation. The successful utilisation of the felony of industrial manslaughter is a jurisprudence concept that is pure conjecture and speculation in its practical implementation in Queensland.

However, it is a sledge-hammer to crack a walnut approach by this Government to ensconce union affiliation and union power in the workplace at a time when more onerous conditions and costs on business are job threatening and may result in economic blackmail.

The Non-government members do not believe this legislation will give real & tangible answers to the victims' families who presented to the committee about their serious and devastating losses.

The Non-government members unreservedly and unilaterally reject the presentation of this flawed union building legislation to the House.

Deputy Chair, Finance and Administration Committee
Member for Mermaid Beach