

Work Health and Safety and Other Legislation Amendment Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing, make this statement of compatibility with respect to the Work Health and Safety and Other Legislation Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill amends the *Work Health and Safety Act 2011* (WHS Act) to implement recommendations from the Queensland 2022 *Review of the Work Health and Safety Act 2011* (WHS Act Review) and the national 2018 *Review of the model work health and safety laws* (Boland Review). The amendments will:

- strengthen and promote the role of health and safety representatives (HSR), including clarifying powers they can exercise and functions they can perform at the workplace;
- promote consultation about work health and safety (WHS) with workers and their representatives;
- clarify rights of WHS entry permit holders that can be exercised at the workplace to assist workers in relation to a suspected contravention of the WHS Act;
- clarify which entities or persons may assist workers and act as their representatives in relation to WHS issues by:
 - ensuring a relevant union whose rules entitle it to represent the worker's industrial interests may assist or represent the worker in relation to a WHS issue;
 - excluding other entities such as: associations of employees or independent contractors; other entities that represent or are purporting to represent the industrial interests of the worker; entities that demand or receive a fee from such bodies; and individuals connected with excluded bodies. Excluding associations of employees or independent contractors which are not registered unions under the *Fair Work (Registered Organisations) Act 2009* (Cwlth) or the *Industrial Relations Act 2016* (IR Act) is consistent with 2022 amendments to the IR Act;
- clarify and streamline the dispute resolution process;
- move certain proceedings from the Magistrates Court to the Queensland Industrial Relations Commission;
- amend the Category 1 offence to include negligence as a fault element, in addition to reckless conduct;
- enable HSRs to choose their training provider;

- prohibit a person from providing, entering into, or benefiting from a contract of insurance to cover liability for monetary penalties imposed under the WHS Act;
- clarify information sharing with other regulators and ensuring regulators can obtain information, from outside of their jurisdiction, that is relevant to an investigation into a breach of the WHS Act;
- extend the 12-month deadline, to 18 months, for a person to request the WHS Prosecutor bring a prosecution for a Category 1 or 2 offence; and
- make other amendments to enhance the operation and administration of the WHS Act, including minor technical amendments for clarity or consistency.

The Bill also makes complementary amendments to the *Safety in Recreational Water Activities Act 2011* (SRWA Act) and a consequential amendment to the *Public Health Act 2005*.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- Right to life (section 16, HR Act)
- Right to privacy and reputation (section 25, HR Act)
- Right to freedom of association (section 22, HR Act)
- Right to property (section 24, HR Act)

Promoting and enhancing human rights

The Bill generally supports and promotes human rights, in particular the right to life (section 16, HR Act).

The object of the WHS Act is to secure the health and safety of workers and workplaces, including by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant (section 3(1)(a), WHS Act). Amendments in the Bill strengthen and enhance the WHS legislative framework, consistent with the object of the WHS Act.

In particular, the Bill promotes the right to life with amendments to section 85 and new section 85A which provide for the circumstances in which a health and safety representative (HSR) can direct that unsafe work cease or not commence. This can occur if the HSR has a reasonable concern that carrying out the work would expose a worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.

The amendments to section 85 and 85A of the WHS Act, which vary the existing arrangements for ceasing unsafe work, promote the right to life by establishing clear rights for an HSR to direct that unsafe work cease, the mechanism to do so, and the obligations of a PCBU to ensure workers' lives are not put at risk by the unsafe work that has been identified.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Right to privacy and reputation (section 25, HR Act)

(a) the nature of the right

A person has a right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have their reputation unlawfully attacked. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. An interference with the right to privacy is permissible provided it is not arbitrary or unlawful. Arbitrariness can be defined in a human rights context as meaning capricious, unpredictable, unjust, or unreasonable in the sense of not being proportionate to the legitimate policy objective. The right to reputation protects individuals from unlawful attacks on their reputation.

The right to privacy is relevant to new section 271A (Additional ways that regulator may use and share information) of the WHS Act and an amendment to section 41 (Confidentiality of information) of the SRWA Act.

Section 271 (Confidentiality of information) in the WHS Act provides that a person who obtains information or gains access to a document in exercising any power or function under the Act must not disclose the information, give access to the document or use the information or document for any purpose. Section 41 (Confidentiality of information) of the SRWA Act serves the same purpose. There are exceptions set out in sections 271 and 41 which permit disclosure of information, giving access to a document or use of information or a document.

Consistent with the national model WHS Act, section 271 has been restructured and a new section 271A added to clarify the regulator's ability to use and share information. New section 271A(3)(b) enables the regulator or a person authorised by the regulator to share information that is necessary for the administration or enforcement of another Act or law prescribed by regulation. This replicates existing section 271(3)(c)(ii) but with an amendment to include the ability to prescribe 'a law' by regulation so that Commonwealth laws may also be prescribed.

Similarly, the Bill makes a complementary amendment to section 41(3)(c)(ii) of the SRWA Act to allow a 'law' generally to be prescribed by regulation. This will permit a Commonwealth law to be prescribed by regulation under section 43(3)(c)(ii) of the SRWA Act.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations on the right to privacy by permitting the regulator to share information necessary for the administration or enforcement of another Act or law prescribed by regulation is to ensure that information can be disclosed where required by laws which Parliaments have enshrined, which is consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Clarifying the ability of the regulator, or a person authorised by the regulator, to share information under new section 271A(3)(b) of the WHS Act and section 41(3)(c)(ii) of the SRWA Act is directly linked to the purpose of the restriction, which is to enable the disclosure, access or use of personal information where the regulator reasonably believes it is necessary for the administration or enforcement of another Act or law prescribed by regulation.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

The Bill is considered to achieve the purpose of the limitations in relation to the right to privacy and reputation without unreasonably restricting human rights and is considered to be necessary due to the lack of less restrictive, reasonably available alternatives. Any future amendments to the *Work Health and Safety Regulation 2011* or *Safety in Recreational Water Activities Regulation 2011* to prescribe additional Acts by regulation would need to be appropriately justified, including the extent to which those Acts have safeguards to protect personal information.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on the right to privacy, the ability of the regulator to share information for the purpose of the administration or enforcement of other Acts or laws prescribed by regulation outweighs any limitations on the right to privacy and reputation.

- (f) any other relevant factors

Nil.

Right to freedom of association (section 22, HR Act)

- (a) the nature of the right

The right to freedom of association with others protects the rights of individuals to join together with others to formally pursue a common interest, such as political groups, sporting groups, professional clubs, non-government organisations and trade unions. It includes the freedom to choose between existing organisations or to form new ones.

The right to freedom of association is relevant to amendments in the Bill clarifying which entities or persons may assist workers and act as their representatives in relation to WHS issues. The Bill amends the definitions of *union*, *representative* (for a worker), and *relevant union* and introduces the terms *suitable entity* and *excluded entity* to clarify who is entitled to represent or assist workers on WHS issues.

Registered unions, with well-established eligibility rules, have a recognised interest in regulating the way work is performed within their area of coverage to the direct benefit of workers. The amendments are consistent with the approach to supporting effective

representation of workers by registered employee organisations under the IR Act and FW(RO) Act.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments in the Bill regarding definitions for *union*, *relevant union*, *suitable entity* and *excluded entity* is to ensure that the WHS interests of workers are effectively represented by entities subject to regulation under the IR Act or the FW(RO) Act, rather than unregulated entities which are not required to meet the high level of transparency and accountability requirements under those laws. This is a proper purpose and is considered consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

It is considered essential that genuine WHS issues are resolved quickly and efficiently to protect the health and safety of workers and others within a workplace, and the Bill enables this to be achieved by a *relevant union* authorised by the worker to represent them. The Bill allows for workers to authorise other suitable entities to represent or assist them provided they are not an *excluded entity*. The Bill does not restrict an individual's freedom to join an *excluded entity*, although it does seek to make clear the circumstances in which such entities cannot lawfully represent workers in relation to WHS issues, for example if that person is an employee of the excluded entity. This reduces the risk of workers and persons conducting a business or undertaking being misled or confused about the ability of an entity to represent a worker, or the entity's standing under the WHS Act and industrial relations legislation.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The Bill is considered to achieve the purpose of the limitations in relation to the right to freedom of association without unreasonably restricting human rights and is considered necessary due to the lack of less restrictive, reasonably available alternatives.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The amendments are considered to strike a fair balance between the benefits to be gained by workers and the community by fulfilling the purpose of the limitation, and the harm caused to the human right of freedom of association. The limitation imposed by the Bill is considered justified by providing certainty around which entities have representational rights to assist workers in resolving WHS issues. It is considered that the proposed amendment is not overly restrictive in relation to the right to freedom of association as an individual may still join an organisation that is an *excluded entity*.

- (f) any other relevant factors

Nil

Right to property (section 24, HR Act)

(a) the nature of the right

The right to property protects the right of all people to own property (alone or with others) and that a person must not be arbitrarily deprived of the person's property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality, and freedom.

Property includes real and personal property, for example land, chattels and money, including contractual rights, leases, shares, patents and debts. The term 'deprived' is not defined by the HR Act. However, deprivation in this sense is considered to include the substantial reduction of a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it, or deriving profits from it). The concept of arbitrariness in the context of the right to property carries a meaning of capriciousness, unpredictability, injustice, and unreasonableness, in the sense of not being proportionate to the legitimate aim sought.

The right to property is relevant to amendments in the Bill that provide that a person must not, without reasonable excuse, enter into a contract of insurance or other arrangement under which the person or another person is insured or indemnified for liability for a monetary penalty under the WHS Act and the SRWA Act. Further, a person must not take the benefit of such an arrangement. In addition, a person must not provide insurance or an indemnity for liability for a monetary penalty. The amendments extend liability to officers, knowingly concerned in the offence committed by the body corporate.

The intention is that persons will no longer be able to rely on a contract of insurance or indemnity to cover a monetary penalty imposed for non-compliance with duties owed under the WHS and SRWA legislation. This recognises that fines imposed are less effective if they can be absorbed as part of the costs of doing business.

These amendments may limit human rights to the extent that it deprives a person of the ability to protect their property rights through insurance.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the new offences proposed in the Bill is to deter persons from taking out a contract of insurance or entering into an indemnity arrangement to cover liability to pay monetary penalties imposed for non-compliance with duties under the WHS and SRWA legislation. This was a recommendation of the 2018 review of the model work health and safety laws that found that the deterrence effect of WHS laws is significantly reduced if a person conducting a business or undertaking can take out insurance or enter into an indemnity to protect themselves and officers of the business or undertaking from liability to pay monetary penalties. This is a proper purpose and is considered consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The proposed new offences in the Bill will apply not only persons seeking to take the benefit of an insurance contract and indemnity arrangement to cover a monetary penalty but also persons providing or entering into insurance contracts or indemnity arrangements. This is directly linked to the purpose of the amendments that insurance contracts and indemnity arrangements for monetary penalties under the WHS and SRWA legislation are no longer offered and cannot be relied on to cover monetary penalties imposed. Requiring persons to take financial responsibility for monetary penalties imposed on them increases the deterrence effect of legislation that exists to protect the health and safety of individuals.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The Bill is considered to achieve the purpose of the limitations in relation to the right to property without unreasonably restricting human rights and is considered necessary due to the lack of less restrictive, reasonably available alternatives.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The Bill includes transitional provisions in both the WHS Act and SRWA Act to defer the application of the new offences, thereby providing sufficient notice of the new offences and mitigating against adverse impacts on persons covered by insurance contracts or indemnity arrangements before commencement.

On balance the limitations on the ability to protect property rights through insurance are proportionate and are outweighed by the important objective of ensuring monetary penalties imposed provide appropriate deterrence from non-compliance with health and safety duties under the WHS and SRWA Acts.

- (f) any other relevant factors

Nil

Conclusion

In my opinion, the Work Health and Safety and Other Legislation Amendment Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

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