

16 July 2024

Our ref: KB:IL

Committee Secretary
Clean Economy Jobs, Resources
and Transport Committee
Parliament House
George Street
Brisbane QLD 4000

By email: ceitrc@parliament.qld.gov.au

Dear Committee Secretary

Electrical Safety and Other Legislation Amendment Bill 2024

Thank you for inviting the Queensland Law Society (QLS) to appear at Monday's public hearing on the Electrical Safety and Other Legislation Amendment Bill 2024 (**Bill**).

QLS took three questions on notice which were confirmed via email following the hearing. Our response is as follows.

1. In regard to negligence proposals under the Bill, does the QLS believe that a Minister could be held negligent?

a. Where does responsibility ultimately lie under the Bill and the current law?

The offences referred to in this question are the category 1 and two industrial manslaughter offences, sections 34C and 34D.

In respect of the proposed changes to the category 1 offence provision, the amendment is limited to adding a second threshold test of negligence. As such, the passing of the Bill, in its current form, would not alter the scope of *who* can be charged with the category 1 offence. **Attached** is a table which sets out the offences and proposed amendments.

Category 1 offence

The category 1 offence in section 31 of the *Work Health and Safety Act 2011* (**WHS Act**) applies where the person has a health and safety duty. Section 30 provides that a *health and safety duty* means a duty imposed under division 2, 3 or 4 of Part 2 of the WHS Act.

There are several duties within these divisions including the *primary duty of care* that is owed by the person conducting a business and undertaking (**PCBU**). Section 5 sets out when a person will be conducting a business or undertaking.

The role of a minister, however, appears to fit within the definition of an *officer* in the Dictionary in Schedule 5. While the duties of an *officer of the person conducting the business or undertaking* are set out in section 27 in division 4, the definition of officer in the Dictionary refers to section 247. This section provides:

247 Officers

- (1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the State, Commonwealth or another State is taken to be an officer of the State, Commonwealth or other State for the purposes of this Act.
- (2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

Given the operation of section 247(2), we suggest that a minister is not captured by this offence provision or the category 2 and 3 offences.

The Bill amends this offence in section 31 to add the element of negligence. However, as expressed at the public hearing, this amendment is inconsistent with the Boland Review which recommends the category 1 offence be amended to include “gross negligence”.¹ There are important legal differences between the concepts of “negligence” and “gross negligence” and an amendment to insert one, rather than the other, could have significant and unintended consequences.

Industrial manslaughter

Sections 34C and 34D contain the industrial manslaughter offences. The offence in section 34C applies to the PCBU while the offence in section 34D applies to a senior officer who is defined in section 34A as follows:

senior officer, of a person conducting a business or undertaking, means—

- (a) if the person is a corporation—an executive officer of the corporation; or
- (b) otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.

The explanatory note for this definition, which was inserted into the WHS Act with the industrial manslaughter provisions in 2017, does not provide additional guidance as to the type of role or position captured.

We cannot identify anything else in the provisions of this legislation to suggest a minister should be treated differently with respect to this offence, then they are in relation to the parts of the WHS Act – that is, differently to what is prescribed in section 247. We also do not consider they will be found to be a PCBU based on the circumstances described at the hearing.

¹ Recommendation 23a: Enhance Category 1 offence, *Review of the model Work Health and Safety laws*, Final report, December 2018: [Review of the model WHS laws: Final report \(safeworkaustralia.gov.au\)](https://www.safeworkaustralia.gov.au)

It might be useful for Parliament to clarify its intention in this regard by inserting a provision into the WHS Act that provides the reference to *officer* in section 247(2) includes a *senior officer* under Part 2A.

2. Does the QLS have any comments or concerns about the Bill's proposed requirements regarding the production of documents for an investigation?

a. How would this apply in practice and what are the potential issues of someone handing over documents that are outside the scope of the investigation?

Clause 20 of the Bill amends section 141 of the *Electrical Safety Act 2002 (ES Act)* in relation to the power for an investigator to compel the production of documents and answers to questions on behalf of the regulator. The new subsection allows the inspector to make the request within 30 days of an inspection. Upon review of the drafting of the amendment, and some of the related sections, we note the following:

- The “particular document” required to be produced should have sufficient nexus to the investigators powers.
- Unfortunately, section 141A abrogates the fundamental legal right to privilege against self-incrimination. This abrogation could significantly impact the individual.
- Further, while section 141(2) provides that the answers to questions or the information or documents provided are not admissible as evidence in another proceeding, in our view this does not provide adequate protection against the use of this information for other purposes that might prejudice the individuals.
- Following on from this, we note the presence of section 193 - Confidentiality of information. However, as we noted in our submissions with respect to the corresponding provision in the WHS Act, this section permits disclosure of documents or information in a number of other circumstances in subsection (2). The individual should be provided with advice about how their information is permitted to be used.

3. The committee notes the concerns stated by the QLS about the filming and photography of a site by workplace health and safety investigators.

a. What is the situation in other Australian jurisdictions? For example, can those investigators take photos or video and what rules or restrictions apply to these images?

The *Occupational Health and Safety Act 2004 (Vic)* was amended in 2021 to allow health and safety representatives and permit holders to take photographs and recordings, which include videos.² One difference between the Victorian amendments and the proposed Queensland ones is that the Victorian provisions contain a reasonableness element:

- In section 89, the powers given to the entry permit holder may only be exercised to the extent that it is reasonable for the purpose of enquiring into the suspected contravention.
- The offence provision in section 91 that was inserted by the amendments provides that an authorised representative must not intentionally use, disclose or provide to another

² <https://www.worksafe.vic.gov.au/occupational-health-and-safety-and-other-legislation-amendment-act-2021>

Electrical Safety and Other Legislation Amendment Bill 2024

person, for a purpose not reasonably connected with the exercise of a power under this Part, photographs or measurements taken or sketches or recordings made in the exercise of a power under section 89(1)(ba).

However, we do not consider these provisions adequately address the concerns raised in our submission or at the public hearing.

These amendments have not been inserted into other Australian jurisdictions at the time.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED].



Rebecca Fogerty
President

s34C Industrial manslaughter – person conducting business or undertaking ¹	s31 Reckless, Negligent or reckless conduct – category 1	s32 Failure to comply with health and safety duty – category 2 ²
<p>(1) A person conducting a business or undertaking commits an offence if –</p> <p>(a) A worker –</p> <p>(i) Dies in the course of carrying out work for the business or undertaking; or</p> <p>(ii) Is injured in the course of carrying out work for the business or undertaking and later dies; and</p> <p>(a) An individual to whom the person has a health or safety duty:</p> <p>(i) dies; or</p> <p>(ii) is injured and later dies; and</p> <p>(b) The person's conduct causes the death of the workerindividual; and</p> <p>(c) The person is negligent about causing the death of the workerindividual by the conduct.</p> <p>Maximum penalty –</p> <p>(a) For an individual – 20 years imprisonment</p> <p>(b) For a body corporate – 100,000 penalty units</p>	<p>(1) A person commits a category 1 offence if –</p> <p>(a) The person has a health and safety duty; and</p> <p>(b) The person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and</p> <p>(c) The person is reckless as to the risk to an individual of death or serious injury or illness –</p> <p>(i) engages in the conduct with negligence; or</p> <p>(ii) is reckless as to the risk of the individual of death or serious injury or illness.</p> <p>Maximum penalty –</p> <p>(a) For an offence committed by an individual, other than as a PCBU or as an officer of a person conducting a business or undertaking – 5 years imprisonment or 3000 penalty units</p> <p>(b) For an offence committed by an individual as a PCBU or as an officer or a person conducting a business or undertaking – 5 years imprisonment or 6000 penalty units</p> <p>(c) For an offence committed by a body corporate – 30 000 penalty units</p>	<p>A person commits a category 2 offence if –</p> <p>(a) The person has a health and safety duty; and</p> <p>(b) The person fails to comply with that duty; and</p> <p>(c) The failure exposes an individual to a risk of death or serious injury or illness.</p> <p>Maximum penalty –</p> <p>(a) For an offence committed by an individual, other than as a PCBU or as an officer of a person conducting a business or undertaking – 1500 penalty units</p> <p>(b) For an offence committed by an individual as a person conducting a business of undertaking or as an officer of a person conducting a business or undertaking – 3000 penalty units</p> <p>(c) For an offence committed by a body corporate – 15 000 penalty units</p>

¹ Clause 42 of the Bill also amends the following provision, s34D, using the same drafting but referring to a senior officer rather than PCBU

² The Bill does not amend this section.

