

Electrical Safety and Other Legislation Amendment Bill 2024

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14 June 2024

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

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

Dear Committee Secretary,

RE: Consultation draft on the Electrical Safety and Other Legislation Amendment Bill 2024

Thank you for the opportunity to make a submission on the Electrical Safety and Other Legislation Amendment Bill 2024 (**Amendment Bill**).

We note you are seeking feedback on recommendation 31 of the Final Report of the Review of the Work Health and Safety Act 2011 (**WHS Review**) as well as recommendation 23(a) of the Review of the model Work Health and Safety laws Final Report (**Boland Review**).

The LGAQ is aware that these recommendations are as follows:

WHS Review

- *That the Minister consider establishing a review to examine the scope and application of the industrial manslaughter provisions to determine if amendments are warranted (rec 31, WHS Review)*

Boland Review

- *Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death (rec 23(a), Boland Review)*

In response to the Office of Industrial Relations (**OIR**) request for feedback on the drafting of the proposed amendments, the LGAQ provides the following comments for your consideration:

1. Part 1: Preliminary

1.1. Nil comment

2. Part 2: Amendment of Safety in Recreational Water Activities 2011

2.1. Refer to comments below.

3. Part 5: Amendment of Work Health and Safety Act 2011

Reckless conduct – Category 1

- 3.1. Clauses 38 and 40 aims to amend section 31 of the *Work Health and Safety Act 2011* (**WHS Act**) to include 'negligence' as a fault element in the category 1 offence, consistent with the Boland Review recommendations.
- 3.2. The Boland Review (in furtherance of comments in the National Review Into Model Occupational Health And Safety Laws First Report, October 2008) discusses the introduction of 'gross negligence' as a fault element of the Category 1 offence. It suggested that this would "maintain the risk-based approach and will add that extra deterrent into the model WHS offence framework recommended by the 2008 National Review. This change to the model WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duties." It also discussed, in the context of the industrial manslaughter offence, concepts of "a gross deviation from a reasonable standard of care". The report intended that inclusion of gross negligence assists "in addressing community concerns that many PCBU's accused of serious WHS breaches are escaping punishment because the bar for conviction is set too high."
- 3.3. Such comments are consistent with the concept of gross negligence, which involves the conscious and voluntary act or omission performed without intent to cause injury, but which involves such a great falling short of the standard of care which a reasonable person would have exercised, and such a high risk that injury would follow that the act merits criminal punishment.
- 3.4. The effect of including a fault element of 'negligence' is intended to substantially lower the threshold for conviction for Category 1 offences. This means a prosecutor can prosecute an offender for failing to provide a safe environment for others, without having to establish this failure as being intentional and in the absence of any demonstrable harm or injury to a person.
- 3.5. Justification for this position because of the use of "negligence" in existing section 34C and 34 D cannot be maintained, because of the substantial width of application of section 31, which (unlike s34C and 34D) is not limited to workers, but more significantly includes not only injury other than death, but does not require any injury to have occurred at all. Other jurisdictions that have used negligence in such provisions have either used the term "gross negligence" or defined "negligence" in a manner similar to gross negligence. Inclusion of a definition of negligence to mean gross negligence would go some way towards alleviating the concerns of the LGAQ, but for the reasons set out below, do not address all the LGAQ's concerns.
- 3.6. **The LGAQ notes the significant shift from the current fault element of 'recklessness' which in criminal law is intentional and requires the prosecution to prove a conscious choice to take an unjustified risk compared to 'negligence' which has no element of intention.** Further, as is recognised in the explanatory notes for the Work Health and Safety Bill 2011, reckless conduct is stated to relate to a pattern of conduct/behaviour over time. Introducing a negligence component removes such a temporal requirement, and will extend it to all instances of negligence, including temporary mere inadvertence. Application of the highest penalty for instances of one-off inadvertence, including those where (whilst there is exposure to a risk of death or serious injury or illness) no one is actually injured, produces a disproportionate result not readily

addressed by a Court imposing a lesser penalty. To the contrary, it has the potential to erode the existing seriousness by which industry views the offence provisions.

- 3.7. By way of example, a failure to have a vehicle serviced more regularly than a court (assisted by technical expert opinion not readily resident within the knowledge of a person with a duty) considers reasonable, may face prosecution for a category 1 offence merely because other drivers are exposed to a vehicle stopped on the roadside in the event of a breakdown. Such a matter is one of common occurrence in circumstances that do not involve ties to workplace duties, and should not be considered an offence, let alone a category 1 offence.
- 3.8. Further, the LGAQ considers that the application of a criminal culpability for negligence is counter-productive to the rights of workers who fall outside the *Workers Compensation and Rehabilitation Act 2003*, and others affected by the work or workplace, including customers and members of the public. Individuals to whom a health and safety duty is owed are adequately protected against the consequences of negligence by civil cause of action, by way of common law duty of care, and by access to a person conducting a business or undertaking (PCBU)'s insurance cover, even where that PCBU is wound up. There are significant insurance cover ramifications disentitling cover where criminal behaviour is involved. Penalties imposed upon a prosecution do not go to an injured person. Criminal compensation limits in the *Victims of Crime Assistance Act 2009* are inadequate to provide proper compensation. In juxtaposition to this, the civil compensation regime administered by Courts is not only the appropriate forum for concepts of negligence to be tested, it is not fettered in the same way the criminal compensation system. It is however, a user pays system (or more properly a culpable party pays system). If a PCBU, whose public liability cover is declined by an insurer because of disentitling criminal conduct, has inadequate assets to cover either or both a penalty to the State and civil compensation and costs awarded to an injured person, litigation will not be commercially justified. Presently, such exposure to civil damages and costs is commonly covered by insurance, including public liability cover. Where insurance cover is refused because of criminal conduct, the injured person will effectively be left without remedy for the harm sustained by them.
- 3.9. Further, as presently drafted, concepts of causation in negligence are not addressed by the amendments. Existing examples of criminal offences for negligence are limited, but those that exist are posited on harm actually being caused. The proposed provision permits prosecution where no harm is actually caused. This is a substantial departure from presently accepted criminal standards. Further, negligence at common law still exists where there are multiple contributing factors to a result. Insertion of such a broad provision without adequately addressing how such issues are to be dealt with opens up significant questions of the extent to which the provision will apply where there are multiple causes in the risk of death or serious injury or illness.
- 3.10. In terms of penalties imposed, and in recognition of the varying degree of culpability, the LGAQ holds concerns that individuals who are negligent are exposed to the same penalties as those who are deemed to be reckless. On this point, we ask that the Category 1 offence is reserved for 'reckless' conduct and remain unchanged, and that consideration be given to whether a new offence with lower penalties should apply to negligence. A reduction of penalty would better align such an offence with section 328 of the Criminal Code.

- 3.11. Finally, the LGAQ is of the view that the current framework adequately deters PCBU's and senior officers from engaging in reckless and unsatisfactory health and safety practices in the workplace, and that incorporating a fault element of 'negligence' will not have any impact on deterrence.

Industrial manslaughter

- 3.12. Clause 42 omits and insert new sections 34C and 34D of the WHS Act to expand the scope of the industrial manslaughter offence.
- 3.13. The draft provisions give effect to the 3 recommendations made by the Office of the Work Health and Safety Prosecutor (OWHSP Report, 2 February 2024), namely, to broaden the industrial manslaughter offence to include bystanders (or individuals) whose death is caused by the negligent conduct of PCBU's and senior officers.
- 3.14. The LGAQ does not oppose this amendment on the basis that PCBU's owe a duty to the health and safety of all members of the public and that on this basis, liability should extend to conduct that causes the death of a person.

Entry permit holders

- 3.15. Clause 47 extends the rights that may be exercised by entry permit holders' (EPHs) under s 118 of the WHS Act to include taking photos and videos directly relevant to the suspected contravention.
- 3.16. Under this proposed change, EPHs will not be prohibited from posting images and videos on social media or through other electronic means.
- 3.17. **The LGAQ raises the following concerns:**
- 3.17.1. An EPH may post videos and images on social media of *suspected* contraventions, which, at the time of publishing the suspected contravention it may not yet be investigated by the Office of Industrial Relations. Because of this, the employer, including council are exposed to reputational harm as the suspected contravention may not be proved by the OIR.
- 3.17.2. Publishing suspected contraventions that identifies any person for example a worker or PCBU, such as via social media, may not only prejudice the reputation of a PCBU but may also cause psychosocial harm to any person in the workplace, and that such conduct is unacceptable. While noting that live stream footage cannot be published, footage taken from earlier in the day can be posted hours later prior to the suspected contravention being dealt with.

LGAQs Position

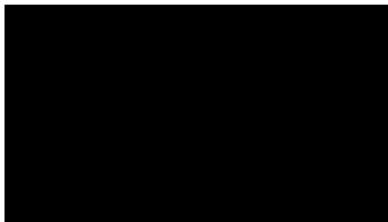
- 3.18. A Category 1 offence is a serious breach of a duty holders' obligations under the WHS Act which imposes with significant penalties (including imprisonment). These are criminal offences. We contend that your amendments have been rushed and may result

in unintended consequences which could have significant consequences for not only PCBU's, but also for individuals.

3.19. In the WHS Review, conducted over a lengthy period of time, it was unable to provide a tangible recommendation regarding such a complex area, and the authors recommended a comprehensive review.

3.20. The LGAQ considers this requires detailed analysis appropriately worded terms of reference, the appointment of a suitable panel of expert reviewers, and input from various stakeholders, so that comprehensive consideration can be given to the effects of the amendments especially the interplay between negligence and criminality, and its second order effects. As it presently stands, the proposed amendment to the Category 1 offence falls well short of those recommendations.

Yours sincerely,



Alison Smith
Chief Executive Officer