

21 September 2017

Our ref: KB –ILC

Committee Secretary
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000

By post and by email: FAC@parliament.qld.gov.au

Dear Committee Secretary

Work Health and Safety and Other Legislation Amendment Bill 2017

Thank you for the opportunity to provide a submission on the Work Health and Safety and Other Legislation Amendment Bill 2017 (the Bill). This submission has been prepared with the assistance of our Industrial Law and Criminal Law Committees.

The Queensland Law Society (the Society) is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The Society also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

The Society is a strong advocate for effective work health and safety laws that promote safety and prevent workplace injuries. We have repeatedly called for increased funding and resources to be directed to Workplace Health and Safety Queensland (WHSQ) so that further engagement and training can be undertaken and so that investigations and prosecutions can be increased, where necessary. We are also pleased that the Bill provides for the reinstatement of the role of Work Health and Safety Officers.

There are, however, a number of clauses in the Bill which cause us concern. These are outlined below.

Proposed section 34A(1), 48L(1), 25A(1) - Definitions

The Society is concerned about 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).

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...”).

Industrial manslaughter

The Society considers that the introduction of a separate industrial manslaughter offence is not warranted. Offences addressing fatalities occurring at or in the course of work already exist in section 31 of the *Work Health and Safety Act 2011* and in the *Criminal Code*. Those who are responsible for the fatalities are capable of prosecution under these laws and we submit it is the responsibility of WHSQ to ensure that such prosecutions are being pursued or referred to the DPP.

It is imprudent and ineffective for governments to continually draft new offences to cover specific events. The creation of these new offences will not prevent these tragedies from occurring, especially where there are existing applicable offences. As stated above, and in previous submissions, WHSQ needs to be sufficiently resourced to engage with and educate employers and workplaces and, when needed prosecute those who breach the existing law. We consider that it is unwise to overcomplicate the statute book with offences that cover the same acts and omissions.

We submit that if there is evidence to suggest that those within a business who are culpable but are unable to be prosecuted, then a review of duty holders and duties should be undertaken.

If, despite our advice, the new offence is introduced the Society has very significant concerns regarding the drafting.

The Society is extremely concerned that the proposed provisions (in the *Work Health and Safety Act 2011*, *Electrical Safety Act 2002* and *Safety in Recreational Water Activities Act 2011*) do not provide any defences to the charge. This is a serious defect in the drafting of these provisions.

The provisions do not account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will of the defendant employer (or person under the *Electrical Safety Act 2002* and *Safety in Recreational Water Activities Act 2011*) and do not afford any other defences which would otherwise be available in the *Code* for other homicide-based offences.

In the absence of defence or excuse provisions, these provisions essentially become strict liability offences, which infringe on fundamental rights given to those accused of homicide offences which carry an extremely high maximum penalty. This infringement is not outweighed by the objects and purposes of the acts.

With a reduction of the standard of proof, the reduction of the fault element in negligence and a complete removal of any defences to these charges, the Society is concerned that these offences could be utilised by a prosecutorial agency to prosecute a person for a homicide

offence not anticipated in the scope of this legislation and where there would otherwise be insufficient evidence to prove the offence.

Finally, we note that the comments of representatives from the Office of Industrial Relations suggest that these offences will only capture cases involving “considerable” or “serious” negligence. These words do not appear in the Bill. The threshold used is simply, negligence and thus the defects we have identified in the drafting of the offences (e.g. no defence provisions) need to be seriously considered.

Clauses 7 and 8 – Amendments proposed to Section 216

The Society is concerned about the amendments proposed to section 216(2) of the *Work Health and Safety Act 2011* (the WHSA) to prevent enforceable undertakings being utilised in cases involving a fatality. As stated in our submission to the Review, enforceable undertakings have been successfully used in these cases as a means of encouraging positive change by workplaces. Providing there is adequate consultation with parties, such as affected family, the Society does not see a need to abolish this tool.

Clause 15 - Requirement to ensure training.

The Society commends the introduction of a clause requiring health and safety representatives to attend training and train employees in accordance with prescribed regulations. However, without any prescribed time period by which this training is required to be completed, breaches of this provision would be impossible to enforce. We note that there are procedures under the WHSA to deal with contraventions of these undertakings which are sufficient to meet any concerns about compliance.

Clause 20 –Work health and safety offices

We note that proposed section 103G relates to immunity for work health and safety officers. 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.

Clause 23

The Society has concerns about the extremely broad powers given to inspectors under this provision. An inspector has the right to require documents and compel people to answer questions and does not take into account any rights or privileges for refusals to provide documents or answer questions (for example, privileges against self-incrimination or legal professional privilege). The Society has concerns that this legislation leaves it to an investigator to decide relevance of questioning and investigation where these matters should be properly left to the Courts to determine.

The Society is of the view that purposes of the legislation do not justify the infringement to individual rights posed in this provision. The Society also has concerns that this power extends to a compulsion on parties if an inspector has entered a workplace in the last 30 days under this division.

Clause 24 – 273A Evidentiary aids

The Society supports the reintroduction of this provision in the Act.

Clause 25 Schedule 2A

We query why a decision in respect of training is no longer reviewable. There has been no rationale provided to justify removing this right of review in the explanatory notes. Unless sufficient justification can be provided, the Society calls for this right to remain.

Clause 32

This clause inserts a new Division 7A into the WHSA to regulate work health and safety disputes. The Society supports the involvement of the Queensland Industrial Relations Commission (the Commission) in these disputes, providing that it is given the resources to deal with these disputes.

We are concerned with the timeframes allowed for notices of disputes under section 102B of the Bill. In our view 24 hours after a request is made to an inspector to intervene is inadequate. While we appreciate there may be matters where there is an urgent need for intervention, such a short timeframe does not seem to give the inspector appropriate time to look into the matter. We suggest a longer timeframe of 72 hours could be allowed with the Commission having a discretion to get involved earlier if necessary.

Clause 42

The Society has concerns that proceedings for an offence under the WHS can only be taken by a WHS prosecutor or, for a category 3 offence, an inspector with the written authorisation of the WHS prosecutor. This provision does not appear to be warranted and could lead to serious staffing or funding issues within Workplace Prosecutions, if enforced.

The Office of the Director of Public Prosecutions is a more than adequate and trained authority to deal with the prosecution of offences under this provision, and the exclusion of the DPP as a prosecuting authority excludes a valuable resource unnecessarily and without justification.

Clause 50 - Transitional provisions

On the current drafting of the Bill, the WHS Prosecutor steps in to a matter not finalised after commencement of the Act. This creates uncertainty for the parties and increases costs unnecessarily. Further, sections 315 and 318 again create confusion and uncertainty with respect to what constitutes “notice to the regulator”. We submit that the transitional provisions should not involve new procedures being applied retrospectively.

Clause 51 – Part 4 WHS Prosecutor

The Society has serious concerns with the drafting of section 28(2): “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.

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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.

Amendment of the *Electrical Safety Act 2002* and *Safety in Recreational Water Activities Act 2011*

We repeat our comments made in respect of industrial manslaughter and enforceable undertakings as they apply to amendments proposed for these acts.

Further, while the acts were not mentioned in the Practice Review of Workplace Health and Safety Queensland report, they were not considered in the original discussion paper and as such were not the subject for previous consultation or submissions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik by phone on (07) 3842 5851 or by email to K.Brodnik@qls.com.au.

Yours faithfully



Christine Smyth
President