

17 January 2024

Our ref: KB:ILC

Committee Secretary
Education, Employment and Training Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Work Health and Safety and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide feedback on the Work Health and Safety and Other Legislation Amendment Bill 2023 (**Bill**).

As you may be aware, the Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 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. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been contributed to by the QLS Industrial Law Committee and Criminal Law Committee, whose members have substantial expertise in this area.

Due to the time constraints at this time of year, we have not undertaken an exhaustive review of this Bill and instead provide the following discrete points for your consideration, set out in reference to the Bill's stated objectives.

Amendments relating to the rights WHS entry permit holders can exercise at a workplace to assist workers in relation to suspected contraventions of the WHS ActGiving notice and remaining at a workplace

Section 118 of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) is amended by the Bill to provide, in subsection (1)(f) that a WHS permit holder can remain at the workplace for the time necessary to achieve the purpose of the entry, subject to section 126 (within usual working hours). We note the comments in the Explanatory Notes (**EN**) that this amendment is consistent with amendments to the *Summary Offences Act 2005* following the decision of *Commissioner of Police v Seiffert & Ors* [2020] QDC 50.

In addition, the EN provides that submitters to the WHS Review identified confusion about a WHS entry permit holder's obligation to give at least 24 hours' notice for similar matters under sections 120 and 122. As stated in the EN, new section 119(4) provides that when a WHS entry permit holder has given a notice of entry under section 119 in relation to a suspected contravention and still remains at the workplace, that WHS entry permit holder is not required to give an additional notice or notices under sections 120 and 122 (which require at least 24 hours' notice) to view relevant employee records or other documents held or accessible at the workplace, or to consult relevant workers in their inquiry into that suspected contravention.

On balance, we consider these amendments to be appropriate.

Providing documents and answering questions

QLS supports the amendments to section 171 of the WHSA that will allow people to answer questions by audio or audio-visual link, rather than attending in person before the inspector if they choose to do so.

Clarifying which entities or persons may assist workers and act as their representatives in relation to WHS issues.

We note the amendments in the Bill that seek to ensure a relevant union (whose rules entitle it to represent the worker's industrial interests) can assist workers and act as their representatives in relation to a WHS issue. The amendments also exclude other entities such as associations of employees or independent contractors that are not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW Act**) or the *Industrial Relations Act 2016* (Qld) (**IR Act**), consistent with the 2022 amendments to the IR Act.

These 2022 amendments were supported by QLS on the basis that the Queensland Industrial Relations Commission (**QIRC** or **Commission**) has held an historical role in the regulation of both registered employee and employer organisations. The long-standing regulation of employee and employer representative organisations has ensured regulation and enforcement of a number of matters, including but not limited to:

- a. Transparency through reporting obligations enshrined in the IR Act for registered organisations;
- b. The regulation of disputes about the "coverage" by different employee organisations regarding specific callings of employees;
- c. The regulation of permits for officers and officials of registered organisations; and
- d. The oversight of elections and other organisational matters.

As stated in our submission relating to the IR Act amendments, it is incongruous that unregistered organisations can operate and attempt to exercise representational and other rights without the correlative obligations that registered organisations are required to comply with to exercise those same rights. The amendments ensure that organisations that seek to represent employees and employers are subject to the obligations of transparency and probity that their members, and the public at large, expect if they are to exercise those rights.

Moving certain proceedings from the Magistrates Court to the Queensland Industrial Relations Commission.

The Bill makes several amendments to the WHSA so that certain proceedings will now be heard by the QIRC. QLS is conscious that the Commission will need to be appropriately resourced to ensure it is able to determine these additional matters without an adverse impact on its current workload. Appropriate funding for the QIRC should be included in the implementation of these reforms.

Amending the Category 1 offence to include negligence as a fault element, in addition to reckless conduct

This proposed amendment does not appear to be based on the Review of the WHS Act or the Government's response to the Review, but rather flows from the recommendations in the 2019 Boland Review.

On one hand, this amendment is appropriate when considering the object of the WHS Act is to create a nationally consistent system to ensure workplace health and safety. The corresponding section of the model WHS laws was amended to include negligence as a fault element of a Category 1 offence. In NSW, negligence was included in section 31 of the *Work Health and Safety Act 2011* (NSW).

The intention of the amendment, however, is to include the alternative fault element of negligence, lowering the threshold for convictions. It is widely held that there are considerable difficulties for the prosecution to establish the subjective element of recklessness (i.e. that the person's conduct posed a substantial risk of death or serious injury and carried out that conduct).

The obvious difficulty with the proposed amendment will arise at sentencing. The appropriate range for conduct involving recklessness will differ from that applicable to negligence. It is unclear what differences there will be in penalty and how these differences will be determined. That will be a matter for the District Court to determine. In any event, the charge is so infrequently before the court (for example, only once or twice per year), judicial consideration of the provision will be rare.

The considerations should be noted prior to these amendments being passed.

Prohibition on entering insurance contracts or being granted indemnity, or benefiting from these arrangements, to cover liability for WHS fines

QLS notes these amendments follow recommendations of the Boland Review and other inquiries, and seek to remove what is seen as an impingement on the deterrent effect of the WHS penalties when these are paid by an insurer, rather than incurred by the at-fault party. We note the penalties covered by these insurance policies mostly relate to strict liability offences where there is no "intent" element and we also note the operation of section 272 of the WHSA in respect of the prohibition on contracting out of any duties owed. On the basis these new provisions have been recommended by reviews and inquiries, QLS is broadly supportive of the amendments, however, we raise concerns with the:

- reversal of the onus of proof – in our view the offence provisions can be drafted in such a way so that the onus of proving the elements remains with the prosecuting authority rather than these provisions breaching the *Legislative Standards Act 1991* and this fundamental legal principle; and
- drafting of proposed section 42B(1)(b) of the *Safety in Recreational Water Activities Act 2011* and section 272B of the WHSA which are broad and seemingly may cover all officers of a body corporate due to the term, “indirectly”, when this was not the legislative intent. Further, this term might be confusing when read with the term, “knowingly concerned” which is also present in the provision.

We recommend these drafting errors be corrected to ensure the provisions achieve their purpose without producing adverse unintended consequences.

Extending 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.

Similarly to the amendment to the Category 1 offence provisions to add “negligence” as a fault element, this amendment flows from the Boland Review and does not appear to be a substantive change as it relates to extending the period in which a person can make a written request to the WHS prosecutor that a prosecution be brought.

It does not directly extend the period in which the WHS prosecutor can bring a prosecution. The purpose of the amendment is to enable workers, their families or unions a further period of time within which to seek a prosecution be brought. The impact of this amendment would be at most, negligible.

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].

Yours faithfully,

[REDACTED]
President