



CCIQ SUBMISSION

Finance and Administration Committee

Work Health and Safety and Other

▶ Legislation Amendments Bill 2017

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND

14 September 2017

Introduction

1. The Chamber of Commerce and Industry Queensland (CCIQ) welcomes the opportunity to provide feedback to the Finance and Administration Committee (the Committee) on the *Work Health and Safety and Other Legislation Amendment Bill 2017* (the Bill).
2. CCIQ is Queensland's peak industry representative organisation for small and medium businesses. We represent over 414,000 Queensland businesses on local, state, and federal issues that matter to them. Our guiding focus is to develop and advocate policies that are in the best interests of Queensland businesses, the Queensland economy, and the Queensland community.
3. This submission outlines our deep concerns in relation to the proposed amendments as contained in the Bill and the impacts such changes will have on businesses and safety standards in the workplace.
4. It is important to state at the outset that CCIQ supports any initiative that prevent fatalities or injuries in a workplace. Any death in a workplace is one to many. CCIQ believes in education, awareness and empowerment programs and policies which increase safety standards and cultures in a workplace.

Industrial Manslaughter

5. CCIQ strongly opposes the introduction of additional punitive discrete offence of Industrial Manslaughter into the *Work Health and Safety Act 2011* (the Act). As outlined in our previous [submission](#) to the Best Practice Review of Workplace Health and Safety Queensland (the Review) the additional offence is uncalled for, unnecessary and unwarranted under the current framework as no legal gap currently exists.
6. To explain, under the Act, breaches of work health and safety are able to be prosecuted under three categories¹ of penalties as well as the *Criminal Code Act 1989* (Qld) (the Code)². Breaches which result in a fatality can be prosecuted under category one or under the criminal offence of manslaughter³. Additionally, to date category one is untried and untested in the courts. Under section 31(3) of the Act, category one offences are classed as criminal and proceedings can be brought by the Director of Public Prosecutions (DPP).
7. Legal experts have said that there is no legal gap, nor is there any injustice in the system. In other words, the current laws are both adequate and effective from a strict legal perspective.

¹ <https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties>

² Sections 286, 289, 328 and 328A.

³ The Code, sections 300 and 303.

8. Similar industrial manslaughter legislation, which this Bill has been modelled on, is in place in the Australian Capital Territory (ACT) under the *Crimes Act 2011*⁴. To date, no prosecution has been successfully brought under the ACT legislation further reinforcing both the practical and legal irrelevance of such a law.
9. This additional offence will create an artificial delineation between senior management and officers and create a culture where only a select few will be viewed as responsible for the safety of workers. Work health and safety works best when all members work collectively to take responsibility for the safety of themselves and others, creating a safety culture.

Dispute Resolution

10. The expansion of the Queensland Industrial Relations Commission (QIRC) is yet another proposed change to fix an issue which is not broken. Under current arrangements disputes are handled by the Queensland Civil and Administrative Tribunal (QCAT). As highlighted by the Best Practice Review, a limited number of disputes have been lodged with QCAT⁵, demonstrating this to be a non-issue.
11. What is of a graver concern is the 24-hour mandate which means if inspectors do not make it onto a site when a dispute has been raised, the QIRC will then become the first point of redress to determine the outcome of the issue. When senior bureaucrats were queried regarding the policy (the Chamber expressed our concerns that if this policy was to be included in the Bill, worksites could be closed for days and the inspector's role would be circumvented entirely) the response was a guarantee that inspectors will attend to worksites within 24 hours ensuring the inspectorate role of dispute resolution is completed. CCIQ believes this to be an admission that there is no need for a safety net provision which risks due process.
12. CCIQ is also concerned that due to the under resourcing of inspectors in Work Health and Safety Queensland (WSHQ) that more disputes will not be dealt with correctly in the first instance and a Commissioner from the QIRC without the requisite, specialised knowledge and attendance to a site will decide complex issues.
13. In the financial year of 2015-16, 1,456 industrial applications were filed to the Commission. That is almost six applications per working day. With eleven Commissioners, that would require a Commissioner to address 132 applications per year, allowing only two days per application. This does not include leave, Industrial Court duties, filings, seminars and other responsibilities. Therefore, CCIQ is not only concerned about WSHQ resourcing, but also the resourcing of the QIRC.
14. CCIQ does not believe the current dispute resolution process warrants such a drastic change. Due to the under resourcing of WSHQ and the QIRC the process is more

⁴ Part 2A, ss 49C, 49C

⁵ *Best Practice Review of Workplace Health and Safety Queensland final report, pg 85*

likely to be delayed than streamlined. This will mean longer shut downs putting businesses, jobs and the economy at risk.

Enforceable Undertaking

15. Enforceable undertakings are an accepted legal alternative to prosecutions. They are rarely utilised, however removing the option and only leaving prosecution as the only avenue for a breach of the Act in the event of a fatality may not be the most appropriate course of action.
16. CCIQ believes prosecutors should have the option to objectively and subjectively review each case on its merits, evidence and what is best for a community. Enforceable undertakings should remain as an option for category 2 offences under the Act.

Codes of Practice

17. The reinstatement of Codes of Practices to legislative status will see a return to the superseded *Workplace Health and Safety Act 1995*(QLD) code system. CCIQ opposes this amendment as the provisions do not have the same effect as the 1995 provisions and impose a reverse onus of proof on the employer.
18. The mandatory nature of the provision will create the need for Codes of Practice to be extremely prescriptive which will reduce innovation and could result in a decrease of businesses striving to improve their safety practices. Extensively detailed, mandatory codes will stifle innovation and processes which could benefit safety and business practice. This is a disincentive for evolving a business and developing market led best practice.
19. As the proposed new codes are not the same as the 1995 codes, they do not allow for abrogation where businesses are unable to follow a Code of practice in any way due to the circumstances of the work activity being undertaken. Therefore, even if a business is achieving equivalent procedures to the code, they will not be recognised meaning the business has not complied with the codes and therefore negligent. This failure to acknowledge best practice and to be flexible in a changing work environment could lead to unintended consequences.

Established WHS Prosecution Business Unit

20. CCIQ supports the creation of the statutory prosecution business unit, removing prosecution decisions from policy directives. This new unit will be governed by the fundamental principles of prosecution, resulting in better results and respect the rule of separation of powers. Reforms like this one are steps in the right direction to improve the internal issues within WHSQ to better improve prosecutions.

Work Health Safety Officer

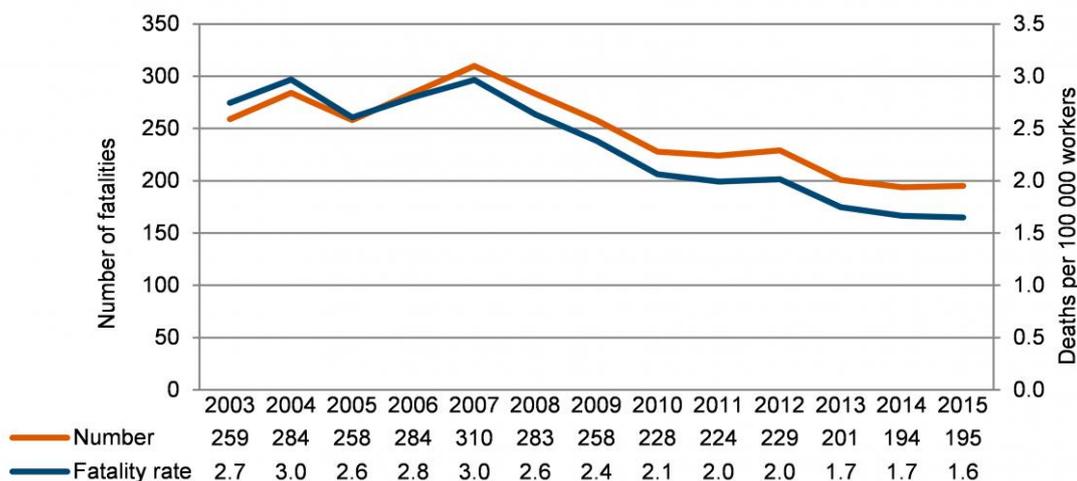
21. CCIQ believes the appointment of a Work Health and Safety Officer (WHSO) as a non-mandatory officer within a business is a misguided step towards creating a greater safety culture and improve safety compliance within a business. This amendment runs the risk of relegating safety to a single person. CCIQ believes it is all members in a workplace that share equal responsibility to ensure a safe and healthy working environment.
22. CCIQ wants to ensure that those managers and officers within businesses who have undertaken work health and training and achieved certificates will have their qualifications recognised as equivalent where possible. This is to avoid additional training costs and barriers for businesses.
23. By being admissible as mitigation in legal proceedings, appointment of WHSOs within a business has been incentivised for the wrong reasons. CCIQ believes this is not an example of effective safety policy. Businesses should be judged on their safety records, compliance, and efforts made company wide to prove and mitigate liability for accidents. Appointing a sole WHSO, although not a full defence, creates the perception that safety is the responsibility of only certain people within a business.
24. It should also be noted that the wording of clause 24 – 273A Evidentiary Aids - is poor drafting and does not reflect the intention of the Bill as explained by the explanatory notes. The wording 'whether or not' implies without a WHSO or health safety representative (HSR) a business has not complied with their duty. In the Minister's speech and explanatory notes the appointment of a WHSO is admissible but not conclusive, the drafting of the Bill however implies a more conclusive interpretation.

De-Harmonisation

25. The Queensland Government were in full support of the move to nationally harmonise as a result of a decision reached by the Council of Australian Governments, hence making significant amendments to the WHS legislation in 2012 and changing the entire enforcement structure. Differentiating from other jurisdictions will only serve to decrease the state's attractiveness for business, increase red tape and duplicate criminal burden.
26. The purpose of harmonisation is to ensure the businesses who operate across different states have a clear understanding of their rights, duties and obligations in relation to health and safety. Creating disharmony about obligations, entrenching a clear delineation between employers and everyone else moves away from the goal of shared responsibility for safety, risks creating a blame culture and is very unlikely to improve occupational health and safety outcomes at an enterprise level.
27. CCIQ does not support a move away from federal harmonisation. A full review of the national system is due in 2018. This review and its subsequent legislative amendments is a pre-emptive move away from harmonisation, mere months before

a national review. To that end, CCIQ calls into question the agenda driving such rushed changes without effective or transparent industry collaboration.

28. As further argument against dissolving a harmonised system, under the current legislation the fatality rate has dropped in Queensland, demonstrating the system is working.⁶ Harmonisation occurred in 2012. As the graph below clearly shows fatality rates have steadily declined over the past five years. CCIQ does not support changing a system and governing legislation which has proven to be making positive change and reducing deaths across industries.



Process of Consultation

29. Minister for Employment and Industrial relations, Grace Grace MP, when introducing the Bill said in her speech said *“The review process included a discussion paper, submissions from interested parties, and extensive consultation with a wide range of stakeholders”*. CCIQ strongly disagrees with this statement and would like to take the opportunity to present some facts on what is considered to be extensive consultation.
30. The Discussion Paper was released at 2:10pm Thursday, 13 April 2017. Due to the four day Easter break, CCIQ and other interested stakeholders were provided with only two full business days to review a 104-paged document, review sources, consult with members and provide meaningful commentary at a face to face consultation with the reviewer, Mr Tim Lyons.
31. In total, from the release of the Discussion Paper to final day to provide comment, CCIQ and other interested parties were provided with a total 12 business days to provide comment on WHSQ, its functions, responsibilities and performance.

⁶ Safe Work Australia Comparative Monitoring Report (18th Edition) - Worker Fatalities 2003 – 2015

32. The nature of the consultation process, specifically informal closed door discussions accompanied by an informal and non-transparent submission process raises further concerns highlighting the opaque nature of the Review. This degrades the position and defensibility of the Discussion Paper recommendations and report. CCIQ believes this to be contrary to the spirit of consultation.
33. As a result of a flawed review, businesses are facing the potential to be burdened by further red tape that will not improve the safety culture of businesses or save lives.

Conclusion

34. CCIQ welcomes the opportunity to provide feedback on the proposed Bill and highlight the serious flaws of the Bill which are of grave concern to CCIQ and small business owners in Queensland.
35. If you wish to discuss this submission further please contact General Manager of Advocacy, Kate Whittle, kwhittle@cciq.com.au or 0418 221 265.