



CCIQ SUBMISSION

Best Practice Review of Workplace Health and Safety Queensland

Discussion Paper Comments

CHAMBER OF COMMERCE AND INDUSTRY QUEENSLAND

5 May 2017

About the Submission

1. The Chamber of Commerce and Industry Queensland (CCIQ) makes this submission in response to the Best Practice Review of Workplace Health and Safety Queensland (the Review) Discussion Paper (the Discussion Paper). The Discussion Paper had five Terms of Reference (ToR) and 58 questions to be addressed. ToR were:
 - a. the appropriateness of Work, Health and Safety Queensland's (WHSQ) Compliance and Enforcement Policy;
 - b. the effectiveness of WHSQ's compliance regime, enforcement activities, and dispute resolution processes;
 - c. WHSQ's effectiveness in relation to providing compliance information and promoting work health and safety awareness and education;
 - d. the appropriateness and effectiveness of the administration of public safety matters by WHSQ; and
 - e. any further measures that can be taken to discourage unsafe work practices, including the introduction of a new offence of gross negligence causing death as well as increasing existing penalties for work-related deaths and serious injuries.
2. The Review was announced by the Honourable Grace Grace MP in October 2016 following several highly publicised deaths in industrial settings. The reviewer is Mr Tim Lyons.
3. CCIQ is Queensland's peak industry representative organisation for small and medium businesses. We represent over 25,000 businesses on local, state, and federal issues that matter to them.
4. 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.
5. On 13 April 2017, the Discussion Paper with respect to the Review was released to interested stakeholders and industry groups to provide comment by 5 May 2017. A final report containing recommendations will be provided by the reviewer to Minister Grace Grace by 30 June 2017. Mr Lyons, between April 13 2017 and 5 May 2017, met with interested parties for feedback on the Discussion Paper.
6. The following submission contains CCIQ's commentary and concerns regarding the consultation process, proposed changes to the dispute resolution process, the introduction of industrial manslaughter and the proposed Prosecution Board.

Review Process

7. At the outset, CCIQ raises concern regarding the process of consultation and review. 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 Mr Lyons.

8. 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.
9. CCIQ were also disheartened to have not been considered for an appointment to the Reference Group to contribute to development of the Discussion Paper. Having been involved with Work Health and Safety harmonisation, and a peak industry advocate, the exclusion of the Chamber from the Reference Group and development process undermines the consultation process engaged in with respect to this Review.
10. In addition, 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 to be presented by Mr Lyons.
11. During CCIQ's informal consultations with Mr Lyons, questions posed by CCIQ representatives regarding previous reports, submissions and policy positions of legal bodies, including the Queensland Police Service, Queensland Ombudsman and Queensland Law Society, were raised. Due to the nature and process of the Review, their opinions will not be publicly disclosed. Again, CCIQ believes this to be contrary to the spirit of consultation.
12. CCIQ acknowledges a best practice review of WHSQ can go a long way in ensuring employees and employers are protected, educated and provided tools to ensure the continued safety of staff in workplaces across Queensland. However, CCIQ does not support the Review in its current format and urges the government to reconsider proceeding with this Review and commence a neutral, transparent and more formal review in the spirit of a genuine consultation.

Dispute Resolution Process

13. Part 2.9, page 23 of the Discussion Paper raised the issue of expanding the Queensland Industrial Relations Commission (QIRC) to be the preferred independent third party referee overseeing work health and safety operational disputes. CCIQ opposes any move to expand the powers and responsibilities of the QIRC.
14. CCIQ believes any expansion of the responsibilities of the QIRC would add further burden to an already stretched Commission while increasing red tape and compliance for small businesses. In the financial year of 2015-16, 1,456 industrial applications were filed to the Commission. That is five and a half applications per working day. With eleven Commissioners that would require a Commissioner to address 132 applications per day, allowing only two days per application. This does not include leave, Industrial Court duties and filings, seminars and other responsibilities.
15. It would be irresponsible to assign further duties to the QIRC, without further justification and an increase of resources to the QIRC.
16. To date, as per the Discussion Paper, a resolution process has already been established under the *Work Health and Safety Act 2011 (Qld)* (the Act). The process allows for internal and external review. Disputes, if necessary are referred to the Queensland Civil Administration Tribunal (QCAT). As also noted in the Discussion paper, disputes need to

be resolved as quickly as possible and reduce the need to refer to an inspector or tribunal due to health and safety concerns for any delay.

17. Per the Discussion Paper, page 24, Work Health and Safety Queensland have found that disputes raised with inspectors are typically resolved in a matter of hours. Referring issues to third party would only further delay resolution.
18. Prima facie, there is no evidence to suggest the current dispute resolution process is inadequate and/or ineffective. CCIQ does not support any changes to the system as it currently stands.

Industrial Manslaughter

19. Under ToR 5, the Review considers whether further measures should be taken to discourage unsafe work practices. The Discussion paper at page 41 suggested the introduction of a discrete charge of 'Industrial Manslaughter'. This suggestion has been posed as concerns have been raised whether there is a legal gap between the defined three categories under the Act and the offence of Manslaughter, ss 300 and 303 of the *Criminal Code Act 1989* (Qld) (the Code).
20. Under the Act there are three categories¹ of penalties. 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).
21. CCIQ does not support the inclusion of an additional offence as legally there is no gap between the Act and the Code. To date this presumption has not been challenged or tested and found to be inadequate. The purpose of the Act is to deter, not to be punitive. By adding an additional, specific offence CCIQ does not believe it will deter further incidents of work health and safety resulting in death.
22. CCIQ advocates that resources be dedicated to education initiatives to deter further incidents. CCIQ does not support a punitive approach; an approach which is outside of the scope of the Act.
23. Mr Lyons requested comment be provided if the additional offence were to be legislated how it would look and its contents. As to its construction CCIQ fails to see how the definition of manslaughter is insufficient and the addition of an industrial or workplace description tacked onto a current manslaughter provision to create a separate offence would provide anything but mere puff.

Prosecution Board

24. In relation to prosecutions, the Discussion Paper raised the possibility of a Prosecution Board being appointed made up of key stakeholders, including the WHS Director of Prosecutions to determine cases to be prosecuted. The Discussion Paper makes it clear this suggestion resulted from a paper released by the Queensland Ombudsman in September 2015 recommending that prosecutions templates and memos of advice be reviewed by an independent person (a legal professional as highly desirable), examining how memos of advice pertain to recommendations to prosecute.

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

25. Nowhere in the Discussion Paper or publicly available material was it indicated that an independent legal professional, with a prosecution background reviewed the current prosecution case management, templates and memos of advice. This despite it being supported by the Director General of the Department of Justice and Attorney General.
26. Price Waterhouse Coopers conducted a full review of the Ombudsman's paper and suggested a Prosecution Board be formed to either assist the Director of Prosecutions or review the Director of Prosecutions' decisions.
27. To this end, CCIQ does not support a Prosecution Board being formed without a distinct and separate review of internal prosecution processes. CCIQ does not believe internal procedures and resources have been addressed and sufficiently reviewed to warrant an additional layer of prosecution deliberation. This position is formed on the belief that unless the reports recommending prosecution are improved, a Prosecution Board will still be working with the same issues currently being faced and not be able to provide any meaningful insight.
28. The suggestion for a Prosecution Board containing industry stakeholders is not only contrary to the rule of law but may create questions of nepotism in the process. If a Prosecution Board were to be formed it should only include professional, criminal prosecutors providing neutral advice based purely on the principles of prosecution.

Other Relevant Concerns

29. At present, Dr Jeremy Davis is undertaking a three-year research and review project of the training of WHS inspectors. The research is being undertaken at Queensland University of Technology and is being funded by taxpayer money. Any changes made to WHSQ policy prior to the conclusion of the research would compromise the integrity of the study and effectively waste taxpayer funds.

Conclusion

30. In sum, CCIQ was frustrated to learn of the last-minute announcement of a review into WHSQ. CCIQ was also frustrated that it was not given an opportunity to represent small business views on the Reference Group that examined WHSQ. The Chamber believes that formal consultation processes with respect to the Review were largely abandoned in favour of a speedy Review process and to this end, the Review has been conducted to the detriment of Queensland's small business community.
31. With consideration to the abovementioned arguments pertaining to the Review process, as well as proposed reforms to WHSQ in areas such as dispute resolution, industrial manslaughter, Prosecution's Board, and other relevant matters, CCIQ strongly urges the Review Panel to make recommendations that ensures Queensland's small business community is not adversely impacted.