

QUEENSLAND RESOURCES COUNCIL SUBMISSION

Safe Work Australia

WHS Incident Notification

Reducing work-related fatalities, injuries and
illnesses through increased WHS regulator visibility
of health and safety incidents

9 October 2023

ABN 59 050 486 952
Level 29 12 Creek Street Brisbane Queensland 4000
T 07 3295 9560 E info@qrc.org.au
www.qrc.org.au



• About the Queensland Resource Sector

The Queensland Resources Council (QRC) is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies, both technical and professional.

The QRC works on behalf of its members to ensure Queensland's resources are developed profitably and competitively, in a safe, socially responsible and environmentally sustainable way.

The Queensland resources sector is committed to continuous improvement in all areas of work health and safety and follows a best practice, risk-based approach to managing risks of work-related injury and disease. Where work related injury occurs, the resources sector is committed to effecting timely and appropriate return to work arrangements.

The resources sector recognises that there is no competitive advantage in safety and acknowledges the importance of continuing to co-operate and share information, research and learnings.

The Queensland resources sector directly and indirectly employs over 450,000 persons largely in high paying roles, with a significant proportion of those roles located within rural, remote and regional areas of this state corresponding to the location of our energy sources and commodity groups.

QRC's latest annual economic contribution data details the resource industry's ubiquitous spending across Queensland down to the postcode level. The 2021-22 data shows that Queensland's resource industry collectively:

- supported one in six Queensland jobs,
- contributed one in every four dollars to the State economy,
- generates around 85% of the value of Queensland exports,
- supports more than 14,300 local Queensland businesses,
- contributes to more than 1,400 charities and local sports clubs

• Background

On 28 July 2023, Safe Work Australia (SWA) released its consultation paper on 'Options to improve WHS Incident Notification' (the consultation paper).

The consultation paper proposes several options to change the incident notification requirements, over a broad range of topics, which will be addressed in this response to the consultation paper.

The QRC and its members value SWA's commitment to meaningful engagement and consultation with stakeholders to ensure that any proposed policy or regulatory changes with a material impact on industry sectors are provided with sufficient time for consultation to occur.

The QRC thanks SWA for providing the QRC with an extension to 10 October 2023 to allow sufficient time for QRC to consult with our members and other sector representative organisations prior to lodgement of this submission. We are concerned however, of advice received that SWA policy position would be reached by the end of September 2023, prior to the receipt of the QRC submission.

This understandably raises concerns about the intent and genuine nature of the engagement and any willingness to fully examine the impact of this proposed policy on industry including the resource sector.

• **Executive Summary**

The physical and psychological health, safety and wellbeing of our workforce continues to be the highest priority for the QRC and its members.

The consultation paper states that:

- incident notification is a critical feature of the model WHS laws;
- providing an important source of information for WHS regulators by alerting them to the most serious workplace incidents and, in turn, helping to identify breaches of WHS duties.
- It also supports and informs WHS regulator functions and activities more broadly.
- The incident notification provisions support compliance with the model WHS laws and contribute to ensuring the health and safety of workers, which is the key objective of the model WHS legislative framework.

The consultation paper has not demonstrated how increased incident notification to the regulatory agencies will lead to improved health and safety outcomes for workers.

It is our contention that prior to the introduction of any additional incident notification requirements on industry, SWA in conjunction with state and territory regulators adopt nationally consistent incident notification policy and processes where data collected and response findings are provided back to industry in a format which will contribute to ensuring the health and safety of workers. This could include:

- the review and standardisation of the process for intervention priority setting and reporting, operational policies, data collection and analysis.
- strengthening support for existing consultation networks such as health and safety officers, advisors, and representatives.
- standardise and streamline regulatory first point of contact and response to worker notification to the regulator of work related psychological health and safety concerns.
- promote injury and illness prevention initiatives which are evidence based and evaluated such as Qld's injury prevention and management program.

Key QRC recommendations are outlined below, with detailed responses to chapters within the consultation paper within subsequent sections of this submission.

- Uphold the previous decision by the Office of Impact Assessment for a Regulatory Impact Assessment for the proposed changes within the consultation paper.
- The QRC supports notification of serious high risk work related incidents to the health and safety regulators which require immediate regulatory intervention to prevent the reoccurrence of the circumstances that gave rise to the incident reoccurring at the notifying workplace, at similar workplaces, processes or equipment or industry sector.
- The consultation paper also outlines options proposing periodic reporting to the regulator of lower risk work related incidents that do not require immediate investigation or response by the regulator. The QRC contends that this information is readily available through workers compensation reporting by Work Cover within each jurisdiction.

- The QRC does not support the mandatory reporting to the regulator of non-work related illnesses, physical or psychological injuries or incidents as presented in the consultation paper. To do so may give rise to legal, ethical and privacy implications and additionally, may cause trauma to impacted workers and or their loved ones.

It is both disappointing and perplexing that an RIA was not conducted prior to the consultation paper being released. To have done so, would have both established an evidence base and informed stakeholder opinion. It is unclear how mandatory reporting to the regulator (in addition to any action taken by the duty holder) will translate to improved health and safety outcomes for workers.

• **General Feedback**

The QRC is supportive of policy and regulatory changes which are evidence based and materially reduce the incidence of physical or psychological harm.

The options presented within the consultation paper introduce unnecessary complexity and an increase in compliance and administrative efforts, without demonstratable benefit to health and safety.

Work-relatedness

Determining work-relatedness or work causation, particularly in relation to injuries such as suicide or suicide attempts could be challenging in the event that there is no clear evidence linking the injury to workplace factors, giving rise to potentially inappropriate inquiries as well as legal and ethical complexities. This has the potential to overwhelm regulators making triaging difficult and drawing resources and focus away from regulatory activities which prevent work-related harm.

Privacy and other considerations

The expansion of the incident notification framework to include psychological injuries and illnesses, or all injuries and illnesses that require medical treatment, may raise legal, privacy and ethical issues for workers who may not wish to disclose their personal or sensitive information to their employer or to the WHS regulator. This may cause additional trauma and also create challenges for duty holders and regulators seeking to verify and validate the information provided by workers, and to protect the confidentiality and security of the data collected and stored.

It is conceivable that in order to comply with the proposed mandatory reporting requirements, duty holders may be required to interact with persons beyond the workplace (for example family members and loved ones for reporting of non-work related suicides or attempted suicide) compromising the privacy and confidentiality rights of the impacted worker.

Additionally, in doing so, the duty holder could violate the human right to privacy protected by section 25 of the Human Rights Act. The scope of the right to privacy is broad and includes personal information, data collection, physical and mental integrity amongst other factors.

Perversely, mandatory reporting requirements as presented within the consultation paper, may require a duty holder who has an overarching obligation under the Act to ensure the health and safety of their workers to make inquiries that could result in psychological trauma to the impacted worker or their loved ones.

Administrative Burden - WHS Regulator and Inspectorate Capacity

In addition to impacting industry, the proposed options also have the potential to overwhelm regulators making triaging difficult and drawing resources and focus away from regulatory activities which prevent work-related harm. This is evidenced by the potential number of notifications that will be required to be made across Australia.

In 2021-22, Australian Bureau of Statistics Work related injuries survey data showed that 497 300 of the 14.1 million workers within the approximate 2.5 million businesses experienced a work-related injury or illness. Of those who experienced a work-related injury, 88% (437 624 workers) reported it to someone at their workplace.

In Queensland as of 30 June 2021, there were 460 669 businesses according to the Queensland Government Statistics Office.

To regulate the 2.5 million businesses, SWA reports in 2020-21 there were 1374 active field inspectors across Australia who undertook 248 973 workplace interventions. The majority of interventions (106 250) were non field reactive interventions such as desk based audits, meetings, telephone advice and the like. Proactive workplace visits totalled 79 137 and 59 900 workplace visits during the same period were reactive. The remaining 3686 interventions were proactive workshops and presentations. This averages out to 181 workplace activities per inspector over the 12 month period.

In Queensland as of 30 June 2021, there were 460 669 businesses. The number of field active health and safety inspectors was 240 correlating to 1.0 inspectors per 10,000 workers. This was slightly below the national average of 1.1 field active inspectors per 10,000 workers. Queensland inspectors reported completing an average of 403 workplace (proactive, reactive) activities each over the 12 month period, significantly higher than the national average of 181 workplace activities but still significantly less than the amount required to respond to each notification of work related injury or illness.

It is difficult to ascertain the effectiveness of the inspector interventions (in terms of harm prevention and behavioural change) or what proportion where in response to incident notification, employer enquiry, individual worker enquiry or complaint, or the intervention included an examination of the organisational health and safety risk or management systems.

The Consultation Paper notes that in order to realise safety benefits and improve health and safety outcomes, regulators will need to establish appropriate systems and capacity to collect, manage, analyse and respond to an expanded data set, while still prioritising investigation of the most serious incidents.

What the consultation paper fails to acknowledge is that a significant increase in the reporting of incidents has the potential to focus regulator attention away from the most serious injuries and poorly performing employers. The proposed options if implemented also have the potential to focus regulators attention to those good performing employers from a health and safety perspective who have robust health and safety systems in place and record and report all work-related injuries.

Regulatory Impact Analysis

While at face value proposals for some periodic reporting have merit, the options have not been subject to a full RIA to identify the costs and benefits of the proposed options, which in the

opinion of the QRC are not practical and will impose significant costs on business and governments (regulators).

Additionally, the RIA would identify and detail privacy, legal or ethical concerns of options proposed within the discussion paper. The QRC notes that an RIA had commenced on these recommendations, however the RIA was not finalised, and we understand was set aside, prior to the release of the consultation paper on 28 July 2023.

It is our understanding that the decision of the National Cabinet on 28 April 2023 to change the role of the Office of Impact Analysis (OIA) did not negate decisions made prior to 28 April nor did it identify that any decision already made by the OIA for an RIA was to be withdrawn.

As stated, the changes proposed within the consultation paper are significant. They have the very real potential to create trauma and confusion, duplicate existing reporting provisions, be contrary to legal, ethical and privacy considerations, to increase the administrative burden on both duty holders and regulators alike all without evidence based health and safety benefits to workers.

• **Response to Individual Chapters**

Summary

Chapter 5 – Periodic reporting of incapacity periods

Not supported as proposed. QRC contention is data can be obtained from WorkCover without placing an additional reporting burden on industry. Presents a duplication of existing reporting pathways.

Chapter 6 – Attempted suicide, suicide and other deaths related to psychological harm

Not supported. Provision seeks to impose a duty to report on matters not related to a business or undertaking, provision gives rise to significant legal, ethical and practical complexities without clear demonstrable benefit to health and safety.

Chapter 7 – Capturing workplace violence

Not supported. Criminal matters involving sexual assault, serious physical assault, deprivation of liberty, threats of serious violence are matters within the jurisdiction of the police. QRC contends that current reporting requirements are appropriate. If the police determine there is a work related component current provisions including MOUs allow for relevant information sharing, referral and joint investigation as appropriate.

Chapter 8 – Periodic reporting of exposure to traumatic events

Not supported. Chapter does not appear to be trauma informed. It is unclear how “after the event notification” of a traumatic event will benefit workers or obligation holders. Where traumatic events occur, obligation holders immediately put in place arrangements to ensure workers are supported. Current incident reporting requirements appropriate.

Chapter 9 – Periodic reporting of bullying and harassment

Not supported. Chapter does not appear to be trauma informed. Current incident reporting requirements appropriate.

Chapter 10 – Long latency diseases – exposure to substances

In principle support. This may be better placed within Regulation. QRC supports reporting of exposure to substances that cause long latency disease where clear reporting criteria is provided with aggregate data utilised to inform risk mitigation and harm prevention strategies.

Chapter 11 – Serious head injuries

Supported. QRC supports option 3 of the proposed options, noting that additional guidance material will need to be provided to industry and workers on what qualifies as 'immediate treatment'.

Chapter 12 – Other potential gaps in 'serious injury or illness'

In principle support. QRC provides qualified support for Option 2 with the proviso that 'serious bone fractures' and 'serious crush injuries' are clearly defined and supported by appropriate guidance material to support targeted reporting rather than presentation as an outpatient at an emergency department.

Chapter 13 – Capturing incidents involving large mobile plant

Supported.

Chapter 14 – Capturing the fall of a person

Not supported as currently worded. The option to amend the dangerous incident provisions (s 37) to capture the fall of a person, which exposes the person to a risk of death or serious injury (without a notifiable injury occurring), is not supported.

Further consultation is required on the wording to ensure targeted reporting. The provision as it currently is presented introduces complexities without clear demonstrable benefit to health and safety.

Chapter 15 – Addressing minor gaps and ambiguities in the current incident notification provisions

Supported.

Detailed response

Responses to specific issues raised within the Consultation Paper are provided below.

5. Periodic reporting of incapacity periods

If the aim of these options is to allow regulators to identify obligation holders where prevalence of these incidents at a workplace, then it is unclear why consideration is not given to obtaining this data set directly from Workers' compensation insurers around Australia on a periodic basis. All workers' compensation insurers in Australia record work-related injuries where the duration is greater than 10 days. It would be possible to legislate for workers' compensation insurers to share this data without releasing any personal information on the injured worker involved. This data could include:

- nature of injury/disease;
- bodily location of injury;
- specific mental health conditions;
- mechanism of incident;
- work location; and
- details of the policyholder.

The QRC has concerns over the ability of health and safety regulators to adequately triage these periodic notifications. This will inevitably lead to the need for additional resources which will be required to be funded through employer premiums to workers' compensation insurers without any identified evidenced based improvement in health and safety outcomes.

The use of accepted claims data would also address the issues such as notifications psychological injury in instances where a workers' absence relates to reasonable management action where psychosocial risks have been managed so far as is reasonably practicable. Further, the suggestion that greater than 10 days off work will avoid the inclusion of minor injuries in the periodic reporting does not recognise that in some instances workers with minor injuries may not be able to re-enter the workplace until the injury has healed, such as situations requiring infection control.

For these reasons and the reasons outlined above, the proposal to require periodic reporting (six monthly) of periods of incapacity from normal work for ten or more consecutive days due to a psychological or physical injury, illness or harm arising out of the conduct of the business or undertaking are not supported.

6. Attempted suicide, suicide and other deaths

The objective to improve health and safety outcomes by ensuring regulators are immediately notified of attempted suicide, suicide and other deaths due to psychological harm arising out of the conduct of the business or undertaking, is problematic. The factors that lead to an individual attempting or committing suicide are multi-faceted and may or may not arising out of the conduct of the business or undertaking and can take some time to determine.

These matters are usually responded to and investigated by the Police who will liaise with family members, any treating medical practitioners, and where appropriate (following investigation), hand the matter over to the health and safety regulator. Given the suicide of a person or death due to psychological harm is notifiable under s 35(a) ('death of a person') if it arises out of the conduct of the business of undertaking and an attempted suicide attempt 'arising out of the conduct of the business or undertaking', requires notification in circumstances where the person requires immediate treatment as an inpatient in a hospital (s 36(a)) or immediate treatment for specific injuries listed in s 36(b) or (c), no further regulation is required.

The WHS Act requires a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person or workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.

It further specifies a person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. These duties are discharged through the provision of safe systems of work, training and information.

Given the duties in the WHS Act relate to the conduct of the business or undertaking, the option (Option 2) to amend the definition of notifiable incident (s 35); or serious injury or illness (s 36) in the model WHS Act to specifically capture an attempted suicide of a worker whether or not the attempted suicide arose out of the conduct of the business or undertaking appears to be unenforceable.

It is unclear how a duty could be imposed on an obligation holder to periodically report matters to a health and safety regulator that did not relate to "the conduct of the business or undertaking". It is also unclear how a health and safety regulator would have the power under the WHS Act to intervene in an incident that did not arise out of the conduct of the business or undertaking.

The proposed options are intrusive and not trauma informed.

7. Capturing workplace violence

Under this option the incident notification provisions will be amended to require the obligation holder to immediately notify the regulator of an incident involving sexual assault, serious physical assault, deprivation of liberty, or threat of serious violence. If agreed, notification will be required where the violence arises out of the conduct of the business or undertaking. This is aimed at capturing violence linked to the work being undertaken or where the obligation holder has some control or influence over the likelihood of the violence occurring. If this option is implemented, it may result in an unintended consequence where obligation holders may be reluctant to employ workers with prior convictions for assault or have been subject to convictions and custodial sentences. In this situation, the obligation holder has control over the decision to employ a worker with an established violent past and in doing so may be investigated for a potential breach of their duties.

These types of offences are covered by Queensland's Criminal Code and the Queensland Police are best placed to investigate these matters.

The QRC is strongly of the view that in relation to occupational violence the focus must be on prevention. Obligation holders and workers must continue to be supported with information and advice from regulators. It is essential that obligation holders have arrangements in place to mitigate risks of occupational violence, where these are known, such as frontline workers including paramedics, fire fighters and child protection workers.

To determine what needs to be notified to the regulator is likely to be complex, as not all obligation holders have some control or influence over the likelihood of the violence occurring. In Queensland, the WHS regulator has in place a memorandum of understanding with the Police, which sets out when the parties will notify each other of when certain incidents occur. This approach ensures the sharing of information on serious incidents where the regulator is informed of the circumstances of the incident and whether violence was linked to the work being undertaken or where the PCBU has some control or influence over the likelihood of the violence occurring.

In view of this, the QRC considers that obligation holders should not be required to notify the regulator of an incident involving sexual assault, serious physical assault, deprivation of liberty, or threat of serious violence, if the Police have been contacted and are involved in investigating the incident. Existing provisions, including MOUs allow for relevant information to be shared with the health and safety regulator, for referral of investigation or for a joint investigation to be undertaken as appropriate.

8. Periodic reporting of exposure to traumatic events

The option requiring the periodic reporting (six monthly) to the regulator of instances where workers, or other persons at the workplace, are exposed to serious injuries, fatalities, instances of abuse or neglect that are likely to be experienced as traumatic by the worker or other person, where the exposure arises out of the conduct of the business or undertaking is problematic.

It is unclear how “after the event notification” of a traumatic event will benefit workers or obligation holders. Where traumatic events occur in the resources sector, obligation holders immediately put in place arrangements to ensure workers are supported. If the policy intent of this option is to inform regulators of worker responses to traumatic events to enable guidance materials to be developed and inform the regulator’s response to these situations, then regulator’s may be better served by a legislative amendment that allows for monitoring of de-identified claims data workers’ compensation insurers. See periodic reporting of incapacity periods above.

The proposed options appear to lack a trauma-informed focus, as complaints may need to be notified to the regulator against an impacted person’s wishes.

9. Periodic reporting of bullying and harassment

The purpose of periodic reporting on bullying and harassment is unclear.

SWA and jurisdictional regulators have identified bullying and harassment to be an issue in some Australian workplaces and in response have developed guidance and compliance material to inform PCBU’s of harm prevention and corrective actions. Should additional information be required, readily available information sources include survey data, published research, proactive inspections or activities, exiting reporting requirements, anonymous reporting requirements, and engagements with the PCBU or workforce.

The proposed options appear to lack a trauma-informed focus, as complaints may need to be notified to the regulator against an impacted person’s wishes. Option 2 includes language on ‘protected attributes’, introducing concepts from industrial law such as the *Fair Work Act 2009*.

It is unclear how periodic reporting would apply to large private sector and government portfolio agencies such as health, emergency care, policing, corrective services, youth justice and education who established reporting systems in place. Nor is it clear how such reporting requirements relate to bullying and harassment over social media and other digital platforms.

10. Long latency diseases – exposure to substances

In principle support. This may be better placed within Regulation. QRC supports reporting of exposure to substances that cause long latency disease where clear reporting criteria is provided with aggregate data utilised to inform risk mitigation and harm prevention strategies.

11. Serious head injuries

Serious head injuries are captured under s 36(b)(ii) if they require ‘immediate treatment’. If there is concern that the current provision may not adequately capture a head injury that worsens over time such as blood clots, then could be appropriately addressed through guidance material.

The QRC supports option 3, which proposes updating the guidance material to explain what is meant by ‘immediate treatment’ and how this applies to serious head injuries.

12. Other potential gaps in ‘serious injury or illness’

The Consultation Paper notes that some concerns were raised through the incident notification review that there may be other specific gaps that need to be addressed. The examples given were bone fractures and crush injuries to hands and fingers. To address two options have been identified to address this potential gap in reporting:

Option 1 would require the obligation holder to immediately notify the regulator of all episodes of treatment provided as an outpatient in an emergency department; and

Option 2 would require the obligation holder to immediately notify the regulator of 'serious bone fractures' and 'serious crush injuries' requiring immediate treatment.

It also notes that serious bone fractures are arguably captured under s 36(b)(vii), 'loss of bodily function' if these result in the loss of movement of a limb. The most serious bone fractures (e.g. compound fractures) would also be captured under s 36(a) if they require immediate treatment as an inpatient in hospital for cleaning and surgical repair. A serious crush injury would currently be captured under:

- 36(b)(viii) if it is associated with a 'serious laceration' – a deep cut or tear in skin or flesh
- 36(b)(i) if it involves amputation, and
- 36(b)(v) if it involves separation of the skin from an underlying tissue.

Given the Consultation Paper acknowledges that serious bone fractures and serious crush injuries are arguably captured under the Act then a third option should have been included in the Paper. That is, an additional option proposing the introduction of further guidance material to explain what types of bone fractures and crush injuries are to be reported.

Presentation at an emergency department may not equate to an individual having sustained a serious injury or illness. Available options for treatment in rural and remote communities may be limited and a worker may present at the emergency department for treatment of a minor injury. Conversely, some workplaces, particularly those in rural and remote locations may provide on-site medical treatment. The proposed reporting requirement based on the criteria supplied could result in large scale notifications of little or no preventative value.

The QRC is of the view that additional guidance material will resolve the matter and avoid the situation where there is the potential for a significant increase in the volume of notifications for less serious injuries. It will also avoid overlap with the current legislated notification requirements.

13. Capturing incidents involving large mobile plant

Under Queensland's mining safety and health legislation the site senior executive as soon as becoming aware of a high potential incident must notify an inspector and a district workers' representative of the incident. A high potential incident includes the malfunction or loss of control of powered mobile plant that exposes a worker or any other person to a serious risk to a person's health and safety.

14. Capturing the fall of a person

The option to amend the dangerous incident provisions (s 37) to capture the fall of a person, which exposes the person to a risk of death or serious injury (without a notifiable injury occurring), is not supported.

This option has the potential to lead to large volumes of notifications, which will be resource intensive and difficult for regulators to triage. It will potentially impose a significant reporting burden on obligation holders where the focus should be on addressing and resolving these risks at workplace level using the consultative arrangements established under the WHS Act.

In view of the potential for a significant increase in the volume of notifications which regulators will be hard pressed to action due to finite resources, the QRC considers that falls from height may be best addressed by further guidance developed using the existing tripartite mechanisms.

15. Addressing minor gaps and ambiguities in the current incident notification provision

Causal link

The QRC supports the development of further guidance material and resources to define the term 'causal link'.

Objective test

The proposal to amend the incident notification provisions in ss 35-37 of the model WHS Act to ensure they clearly reflect that the test for serious injury or illness is an objective test is not supported. The QRC supports the development of further guidance material and resources to define the objective test principle.

Immediate treatment / Immediate treatment in hospital

The QRC supports the development of further guidance material and resources to define definitions 'immediate treatment' 'immediate treatment in hospital'.

Improving understanding of 'loss of bodily function'

Further guidance would be supported that focuses on notifiable injuries and illnesses that have a causal link to work being performed.

Medical treatment for exposure to a substance

Not supported as currently proposed. The broadening of the definition would require significant consultation to ensure the provision meets the policy objective.

Exposure to human blood and body substances

The QRC supports the development of improved guidance to workers and PCBU's on exposures to bodily substances.

Infections and zoonoses

Supported. Improved guidance of the notification requirements to the health departments and regulators would be supported.

Dangerous incident provisions – reducing complexity and improving PCBU understanding

Supported. The QRC supports improved guidance material that provides a simplified definition of a dangerous incident to reduce complexity and ambiguity for PCBU's.

Improving the electric shock provision

Supported. The QRC supports additional and improved guidance material to better inform workers and PCBU's of incidents involving electric shock and electrical hazards that are notifiable.

Duty to notify and site preservation requirements.

QRC supports the development of guidance around duties to notify and site preservation requirements in relation to acute vs cumulative incidents and operator/contractor duplication.

ENDS