Queensland Council of Unions

2018 Review of the Model WHS laws

Submission of the Queensland Council of Unions

Queensland Council of Unions
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Introduction

The Queensland Council of Unions (QCU) is the peak union in Queensland. The QCU was instrumental in advocating changes in Queensland that will be discussed throughout this submission. Having had this experience, the QCU makes this submission in support of further reform to workplace health and safety (WHS) legislation and practices at a national level.

This submission commences with a literature review that focuses on prosecutions and enforcement in Australian WHS. That literature review was used by the QCU to advocate legislative change to the Best Practice Review of Workplace Health and Safety Queensland Final Report 3 July 2017 (WHSQ Best Practice Review) (Lyons 2017). It was also relied upon to support legislation that was taken to the Queensland Parliament and submissions made to a parliamentary inquiry into the Work Health and Safety and Other Legislation Amendment Bill 2017.

Following the literature review, this submission includes five case studies that were submitted to the WHSQ Best Practice Review. Those case studies were demonstrative of issues that unions and their members face in relation to the operation of the Work Health and Safety Act 2011. The Lyons Report (2017) was relied upon by the Queensland Government to make amendment to the legislation.

The Work Health and Safety and Other Legislation Amendment Bill 2017 was passed by the Queensland parliament in 2017 and provided for a range of reforms to Workplace Health and Safety Queensland (WHSQ) including some amendments to the Queensland Work Health and Safety Act 2011. Those amendments included:

- The introduction of the offence of manslaughter
- A new office to manage WHS prosecutions
- The reintroduction of compulsory codes of practice
- Compulsory Health and Safety Representative (HSR) training and re-emphasis on the role of the HSR
- Disputes being heard by the QIRC
- Preventing the use of enforceable undertakings in case involving fatalities
- The re-introduction of Work Health and Safety Officers (WHSOs)

That Bill did not include the ability of unions to prosecute for breaches of the legislation. The QCU does however continue to advocate for this vital reform notwithstanding it not forming part of the recent reform in Queensland.
Finally, this submission concludes with answers to the specific question raised by the 2018 Review of the Model Laws.

Prosecution and enforcement

The Australian labour market has undertaken substantial changes in the past few decades. These changes have resulted in several outcomes including declining union density and an increase in non-standard and precarious forms of employment (Quinlan et al 2009; Underhill 2013). It is probable that these two changes in the labour market are not unrelated. Casual employment, the use of labour hire and independent contractors have contributed to the increasingly precarious nature of employment and, in turn, to deleterious WHS outcomes. Employees with less employment security are less likely to make complaint with respect to unsafe work practices and potential breaches to WHS legislation (Quinlan et al 2009; Underhill 2013).

Coincidental with those changes to the labour market that are detrimental to WHS outcomes, unions have had serious restrictions placed on their capacity to bargain and represent their membership (Bray et al 2005:123; Gardner 2008:36; Gittens, R cited in Sappey et al 2006:226). Many restrictions placed on unions by virtue of Workplace Relations Act 1996 remain in place under the Fair Work Act 2009 (Cooper 2009:288; Cooper and Ellem 2009:304; Jerrard and Le Queux 2013:51; McCrystal 2009:4; Pittard 2013:95). Union officials' capacity to enter workplaces, take industrial action (other than protected industrial action) and bring matters before industrial tribunals have been severely curtailed and unions and/or workers breaching industrial legislation face massive fines. Most recently, the reintroduction of the Australian Building and Construction Commission and Building and National Construction Code places substantial restrictions on those matters over which a union can bargain and imposes even more disproportionate penalties upon those workers and unions that seek to assert their WHS rights. This factor was highlighted in the research that was undertaken by the QCU in relation to an inquiry undertaken into to Labour Hire in Queensland. In response to a survey question 48.5 per cent of respondent labour hire employees answered "no" the question as to whether they would be able to raise WHS issues at work (QCU 2016:10).

There is a small but compelling body of contemporary literature about the level of prosecutions being undertaken in the field of workplace health and safety (WHS) in Australia. Much of the literature that does exist demonstrates the lack of effort to establish the effectiveness of differing approaches to obtaining compliance with respect to WHS laws (Purse and Dorrian 2010; Scofield et al 2014). The literature discusses two different but not mutually exclusive approaches

to seeking the enforcement of and compliance with WHS laws, those being the approaches of deterrent and compliance. Deterrence refers to the use of punishment, in the case of WHS laws prosecution for breaches of the law, whereas compliance refers to the use of persuasion by "encouraging and supporting companies to comply with safety duties" (Schofield et al 2014:7120/11).

With the possible exception of New South Wales in a previous era, all Australian jurisdictions seem to have a preference for an approach of compliance rather than deterrence. There are a variety of potential reasons for this preference however, it is reasonable to assume that bureaucratic efficiency would be a very reasonable explanation (Schofield et al 2014). That is providing a supportive mechanism to business such as education and training is going to be far less expensive; require far less effort and meet considerably less political resistance than an approach that includes routine prosecution of non-compliant employers.

The regulatory authority in New South Wales was said to be more aggressive with respect to prosecution, thereby adopting a deterrence approach to WHS laws. In New South Wales the regulator was faced with a political campaign by employer organisations against the deterrence approach that included routine prosecutions for breaches of WHS legislation (Schofield et al 2014). The political campaign resulted in a review of the Occupational Health and Safety Act 2000 as it then was by the retired judge Paul Stein (2007). Whilst the author of the report did not agree with employer organisations that prosecutions rates were too high, the report recommended a more strategic and targeted approach to prosecutions. Since that more strategic and targeted approach has been adopted, New South Wales has become more like regulators in other jurisdictions. It is also worthy of note that New South Wales was the only jurisdiction in which unions could prosecute under the WHS legislation (Schofield et al 2014).

The absence of a deterrent approach within any Australian jurisdiction is of concern to the trade union movement. It is evident that a deterrent approach does work and does improve employer compliance with WHS legislation. Compliance with WHS legislation is, in turn, likely to bring about a reduction in workplace injury and death (Purse and Dorrian 2011; Safe Work Australia 2013).

What is also evident is that there has been little effort to measure compliance with WHS legislation in any jurisdiction and the absence of any such measurement makes much of the statistical analysis of the efforts made by regulatory agencies, such as WHSQ, to be somewhat meaningless. Large businesses will comply to avoid prosecution because of the adverse impact to their reputation that a successful prosecution brings (Purse and Dorrian 2011). Prosecutions have a deterrent effect on small businesses by increasing awareness either by personal experience, media reports or word of mouth (Jamieson et al 2010). Alternatively, it is evident that a failure

to prosecute for breaches of the legislation will bring about a normalisation of the non-compliant conduct (Bailey et al 2015).

The harmonised legislation that was introduced with model laws in most Australian jurisdictions did bring significant increases to penalties in Queensland as a result. An important aspect of the model laws was the introduction of 3 categories of offences with respect to breaches, particularly for category 1 serious breaches risking serious injury or death through recklessness (Schofield et al 2004:713). Prosecutions however remain rare and prosecutions for officers of PCBUs remains even rarer (Bailey et al 2015; Jamieson et al 2010; Scofield et al 2014; Wheelwright 2016).

At the time of writing the submission to the WHSQ Best Practice Review, there were no reported cases for prosecutions under the head of power for category 1 breaches in any jurisdiction in Australia. We understand that there is now three category 1 prosecutions underway in Queensland.

One way to provide prospective for WHS enforcement strategies is to make the comparison with road safety (Bailey et al 2015). In so doing it is noted that breaches of road safety had traditionally normalised and if one takes community attitudes to drink driving as an example, substantial education has been coupled with routine prosecution. There is no defence against drink driving and offenders are routinely prosecuted. These efforts have resulted in a massive reduction in road deaths over recent decades. If this approach has been adopted with respect to road safety with such positive results, why has it not been applied to WHS?

The absence of prosecution against individuals also proves the current enforcement regime for WHS to be less than fully effective. The threat of personally being prosecuted provides substantial motivation for individual executives to ensure compliance with WHS obligations (Purse and Dorrian 2011; Wheelwright 2016). An absence of prosecutions and accountability is addressed by industrial manslaughter legislation:

"The main rationale for the introduction of this type of offence is its potential for removing the 'corporate veil' that has traditionally shielded directors and senior executives of large and medium-sized organizations from prosecution for OHS offences, thereby strengthening the deterrent effect of the law and assisting in the de-conventionalization of OHS crime" (Purse and Dorrian 2011: 356).

To de-conventionalise is to bring about the type of change in attitude that is necessary to reduce workplace deaths. As with changing community attitudes to road safety, regular prosecution and greater accountability for workplace deaths can bring about a similar improvement to WHS. The following cases studies provide examples of the concerns raised by workers in Queensland in relation to the operation of the WHS legislation.

Case Studies

Case Study #1 Emergency Lighting (ETU)

On the 24th and 26th of April 2017, an official of the Electrical Trades Union (ETU) raised concerns with the absence of emergency lighting on a construction site at West End. The absence of emergency lighting breaches several standards and pieces of legislation including section 40 (d) of the Workplace Health and Safety Regulation 2011, (the Regulation) which reads as follows:

> **40 Duty in relation to general workplace facilities**
>
> A person conducting a business or undertaking at a workplace must ensure, so far as is reasonably practicable, the following—
>
> (a) the layout of the workplace allows, and the workplace is maintained so as to allow, for persons to enter and exit and to move about without risk to health and safety, both under normal working conditions and in an emergency;
>
> (b) work areas have space for work to be carried out without risk to health and safety;
>
> (c) floors and other surfaces are designed, installed and maintained to allow work to be carried out without risk to health and safety;
>
> (d) lighting enables—
>
> (i) each worker to carry out work without risk to health and safety; and
>
> (ii) persons to move within the workplace without risk to health and safety; and
>
> (iii) safe evacuation in an emergency;
>
> (e) ventilation enables workers to carry out work without risk to health and safety;
>
> (f) workers carrying out work in extremes of heat or cold are able to carry out work without risk to health and safety;
>
> (g) work in relation to or near essential services does not give rise to a risk to the health and safety of persons at the workplace.
>
> **Maximum penalty—60 penalty units. (emphasis added).**

The official of the ETU raised this issue with Workplace Health and Safety (WHS) inspectors who responded that the matter of emergency lighting is an electrical issue. They added that an officer of the Electrical Safety Office (ESO) had attended the site and had not raised this issue. The inspectors refused to take any action in relation to what is an obvious breach of the regulation above.

In our submission, this example demonstrates a lack of diligence to enforcement of minimum standards and a willingness to pass responsibility to another branch of government.

Case Study #2 Unlicensed Electrical Contractor (ETU)

On 18 April 2017, at another site in West End, an official of the ETU ascertained that electrical workers were performing work for an electrical contractor that was operating without a Queensland licence. Section 56 of the Electrical Safety Act 2002 provides that:

> **56 Requirement for electrical contractor licence**
>
> (1) A person must not conduct a business or undertaking that includes the performance of electrical work unless the person is the holder of an electrical contractor licence that is in force.
>
> **Maximum penalty—400 penalty units.**
>
> (2) Without limiting subsection (1), a person conducts a business or undertaking that includes the performance of electrical work if the person—
>
> > (a) advertises, notifies or states that, or advertises, notifies or makes a statement to the effect that, the person carries on the business of performing electrical work; or
> >
> > (b) contracts for the performance of electrical work, other than under a contract of employment; or
> >
> > (c) represents to the public that the person is willing to perform electrical work; or
> >
> > (d) employs a worker to perform electrical work, other than for the person.
>
> (3) However, a person does not conduct a business or undertaking that includes the performance of electrical work only because the person—
>
> > (a) is a licensed electrical mechanic who—
> >
> > performs electrical work for the person or a relative of the person at premises owned or occupied by the person or relative; or
> >
> > makes minor emergency repairs to make electrical equipment electrically safe; or
> >
> > (b) contracts for the performance of work that includes the performance of electrical work if the electrical work is intended to be subcontracted to the holder of an electrical contractor licence who is authorised under the licence to perform the electrical work.

(4) This section does not authorise the performance of electrical work by a person who does not have an electrical work licence for the work.

(5) A person does not contravene subsection (1) if—

(a) the person conducts a business or undertaking that includes the performance of electrical work as a partner in a partnership; and

(b) the partnership is the holder of an electrical contractor licence that is in force.

The Parliament obviously intended that this provision is significant as a breach has a maximum penalty of 400 penalty units. The official of the ETU raised this matter with the ESO and requested that power be turned off at this site until this matter could be resolved. This request was refused by the ESO. The ETU official asked what action, if any, was being taken against the contractor that was operating without a licence and was advised that this information was unable to be provided because of the "Privacy Act". As far as is understood, there was no action taken against the contractor that was operating without a licence and that a Queensland licence was granted immediately to the contractor that was in breach of section 55 of the Electrical Contractors Act 2002.

Elsewhere in this submission reference is made to literature that draws an analogy between road safety and WHS. One can presume with some certainty, that driving without a licence would result in a routine prosecution of the offender. It is obvious from this example that operating without a driver's licence is taken far more seriously than operating without an electrical contractor's licence. It is also the case that there were other significant breaches occurring on this site.

Case Study #3 Asbestos and Air-conditioning (ETU)

On 6 February 2017, an official of the ETU attended the construction site of the along with another official of ETU, and officials of other unions.

Whilst attending the site under Section 117 of the Work Health and Safety Act 2011 an issue was raised with the PCBU in relation to unhygienic air conditioners in the cribbing facilities. The state of the air conditioners was of concern at this site as it had previous been discovered that the site had, prior to it becoming a construction site, been illegally used as a dump for asbestos.

The PCBU called WHSQ and sometime later two inspectors attended the site. An Inspector spoke to the project manager of the site in relation to the air conditioning matter. After talking to the project manager, the inspector was approached by an ETU organiser who had inspected the air conditioners. The inspector agreed that the air conditioners were dirty but posed no risk to

the workers. Another official of the ETU explained to the inspector that there was an asbestos incident on the site which resulted in the site being closed for five weeks. The air conditioners had not been cleaned or even checked for any airborne contaminants and that that they were unhygienic. The inspector asked this ETU official, in a condescending way, if he was an hygienist. The inspector then dismissed anything else the ETU official had to say on the matter.

The inspector then asked the PCBU management if they had any other matters to discuss because he was leaving. The ETU official asked the inspector to stay on site as there were other issues to raise. The inspector replied "No. I am not staying". The ETU official explained to the inspector that there were other issues that needed to be resolved and he had an obligation to hear them. The ETU official advised that members had raised issues of bullying and harassment that occurred on this site. The inspector laughed and said "That is great. A union official raising concerns about bullying and harassment. That is the pot calling the kettle black." The inspector went on to say "Why does it take four union officials to come and inspect an air conditioner. What is the real reason you guys are here?" These statements were made in front of PCBU management and the union officials on site had no doubt that the inspector wasn't performing his role impartially. The inspectors were on site for approximately 15 minutes.

The ETU has made a complaint about the inspector to whom the comments above were attributed. In this particular case, the issue of asbestos was not taken seriously by the inspectors called to the site. An obvious bias against the unions that were exercising their rights in terms of the Work Health and Safety Act 2011 was demonstrated by at least one of the inspectors. Moreover, for the comments to be made in front of the PCBU management was to undermine the position of the unions who were pursuing legitimate health and safety matters on behalf of their membership.

The inspector in question has acted in a totally unprofessional manner and has allowed his own prejudice to potentially endanger workers at this site. It is of concern that such an attitude can be adopted by an inspector charged with enforcing safety standards.

Case Study #4: Right of Entry and Poor Issue Resolution (NUW)

In November 2016, NUW officials were made aware that untrained labour hire employees were driving specialist machinery and working on unsecured ladders in areas where forklifts were loading at a manufacturing and storage site in Lytton. NUW officials sought to exercise their rights under section 117 of the WHS Act to investigate the suspected contraventions. The PCBU did not facilitate entry and WHSQ inspectors were called.

Two inspectors attended the site. The inspectors spent approximately 20 minutes asking NUW permit holders "whether they had state or federal" right of entry permits. It appeared to the NUW officials that either the Inspectors did not have adequate knowledge of the different permits, or were attempting to delay entry to the workplace. The NUW officials then outlined the suspected contraventions. The inspectors did not facilitate entry, rather they went to speak to the site manager. Approximately 15 minutes later the inspectors advised that the issues had been rectified, or were not contraventions.

Employees and NUW officials were concerned by this advice and showed the inspectors some footage taken by the employees. After viewing the footage, the inspectors re-entered the site. At some point the inspectors left the site but did not come back to NUW officials to advise of their findings. Neither the NUW or the workers were advised of an outcome at any later date. The only visible outcome was the PCBU placing cardboard over the window where the footage was taken.

Case Study # 5: HSRs and Poor Issue Resolution (NUW)

In approximately June 2016, workers at a large wholesaler in Northlakes appointed the NUW to assist negotiate designated work groups and elect HSRs. Workers expressed that the 17-person 'Safety Committee' had been appointed by management and did not address worker safety matters.

The parties were unable to reach a negotiated position and the NUW sought that an Inspector be appointed to make a decision under sections 54(1) and 54(3)(b) of the WHS Act on 30 August 2016. The NUW provided a letter outlining how the workers' proposal of having six HSRs took into account all the factors in section 17 of the Regulation. An inspector contacted the NUW on 8 September 2016 and was taken through the factors which included: the diversity of work in distinct areas without crossover (warehousing, security, receiving, fresh produce), the size of the workforce (more than 300) and the two shifts across multiple rosters and a seven-day operation.

The NUW did not hear anything further from the Inspectorate, however the PCBU released nomination forms for three HSRs to be elected. Upon contacting the Inspectorate, the Inspector suggested that "three was better than none", provided no evidence to suggest that she had made a decision in relation to the designated work groups and was happy to let the PCBU proceed without making a decision. As stated earlier, these case studies along with numerous other examples were submitted to the WHSQ Best Practice Review, which resulted in reform to the WHS legislation and practice in Queensland.

Best Practice Review

Consistent with the literature referred to above, there had been a change in emphasis and culture within Workplace Health and Safety Queensland. That change in emphasis tilted the balance towards a supportive and educative approach towards compliance with the legislation to the detriment of compliance outcomes. This view was reiterated by several unions and legal practitioners who made submissions to the Best practice review of Workplace Health and Safety Queensland (the Lyon Review). A range of potential explanations exist for the de-emphasis on deterrence and it was noted in the QCU submission to the Review, that such a cultural change was not limited to Queensland (Scofield et al 2014).

It is probable, having regard to the material that was provided to the Review, that this change in emphasis was an unintended consequence of the harmonised legislation that was introduced in most Australian jurisdictions in 2011. The cutting to funding and personnel that was undertaken during the period of the Newman Government was likely to exacerbate any imbalance that may have begun as a result of the harmonised laws.

In the event that inspectors are actively discouraged from adopting a deterrence strategy, it would follow that the skills and confidence necessary to pursue such a strategy would lapse into atrophy. A lack of experience may well explain how the over-reliance on strategies that prefer a partnership approach would occur.

Industrial Manslaughter

Following the Lyon Review, the Queensland Government introduced the offence of industrial manslaughter. The rationale for the enactment of an offence of industrial manslaughter includes the difficulty applying the existing offence of manslaughter, as it applies in the criminal code, to corporations (Australian Capital Territory Legislative Assembly 2003; Clough 2007; Hall and Johnstone 2005). The existence of the offence of industrial manslaughter recognises the seriousness of negligence causing death in a workplace setting. Industrial manslaughter, by having application to corporations, has the capacity to make corporations liable for the actions or inactions that cause fatalities (Australian Capital Territory Legislative Assembly 2003). The QCU submission relies upon literature that compares workplace deaths with the road toll. That literature (Bailey et al 2015) contrasts the concerted effort to 'de-conventionalise' road deaths, particularly those associated with drink driving, through a rigid application of penal sanctions. By contrast workplace fatalities do not have the same level of priority. It is considered that the inclusion of an offence of industrial manslaughter should go some way to 'de-conventionalise' workplace fatalities.

The Lyons Report (2017:113) sets out the following finding in relation to industrial manslaughter:

> As previously identified, there are long standing entrenched views from stakeholders regarding the offence of industrial manslaughter which are unlikely to change or resolve the debate. It is however the view of the Review that, following consultation and research, a case supporting the introduction of an offence of negligence causing death can be made. In particular, it is considered that, despite the view of some stakeholders, there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect. In May 2017, the Queensland Government provided in principle support for this view.

This finding is consistent with the QCU submission that supports the introduction of this offence into the model laws. We also agree with the Lyons Review that this offence is best placed in the Work Health and Safety Act 2011 rather than the criminal code as was done in the Australian Capital Territory.

Independent Statutory Office

One of the primary problems identified by the union movement was a shift away from deterrence to the extent that it has had adverse outcomes for workplace health and safety in Queensland. The following finding of the Review reflects this concern (Lyons 2017:73):

> While the regulator is not subject to Ministerial direction when deciding whether to commence prosecutions, there is some perception from both employee and employer groups that the regulator has been subject to external pressure in respect of the prosecution function. This is so, despite the fact that prosecution decisions are delegated to the Director (LPS) applying the DPP Guidelines and that the Enforceable Undertaking scheme includes a step for independent advice and provides for judicial review. The Review finds that there is a need to strengthen the formal governance framework to ensure public confidence in the prosecutions system. These findings and related recommendations are not criticisms of any individuals involved in the current process, but reflect an in-principle' view of about the optimal policy settings that should apply to this vital function.

In order to remedy this situation, the Report (Lyons 2017:74) suggests that:

> The creation of a new independent statutory office should be headed by a Director of Workplace Health and Safety Prosecutions (Senior Executive Service level) to be appointed by the Governor-in-Council for five year renewable terms. A five year renewable term will provide independence to the role as it will not be aligned to political cycles and will ensure consistency in decision making. The Director should be supported by existing departmental staff from Prosecution Services including Legal Officers and support staff.

The Lyons Review finds that the overall level of prosecutions has been below that which would indicate that an appropriately robust approach was being adopted. There is an ongoing need to monitor the number of prosecutions and benchmark success rates (the latter measure serving partly as a proxy "quality measure": for both the investigation and prosecutions functions).

In our submission, this a cogent, legislative response to a problem that is widely acknowledged. The creation of this independent office will go some way to restore public confidence in policing and enforcing workplace health and safety matters.

Work Health and Safety Disputes

The QCU submission supported the capacity of parties to be able to notify disputes in relation to WHS matters to the Queensland Industrial Relations Commission (QIRC). The following excerpt is taken from the QCU submission (2017a:19) to the Review:

> The QCU submits that there should be the capacity to refer disputes concerning WHS matters to the QIRC for a quick resolution. Under current arrangements workers are often faced with the prospect of taking industrial action in cases where they believe there is a potential safety risk. The establishment of a mechanism that allows an existing tribunal to quickly deal with matters in dispute, in relation to the Act and Regulation, is a step towards dispute resolution rather than prosecution. Such a mechanism would be beneficial to workers, their unions and industries.
>
> The experience of unions is that they are left in a no-win situation when there is a bona fide health and safety dispute arising in the workplace. Within the construction industry, in particular, there is no alternative to taking what will be possibly considered industrial action in relation to unsafe work. The current regulatory regime, with the introduction of the Building Code 2016 and the Australian Building and Construction Commission means workers will be faced with massive fines if they are seen to be taking unprotected industrial action. The solution promoted by the Bill is directed towards a peaceful resolution of disputes concerning safety rather than punitive action against workers and their unions.

The Lyons Review (2017:88) makes the following findings:

> It is the view of the Review that the jurisdiction for the review of reviewable decisions (under Schedule 2A of the WHS Act 2011) as currently vested in QCAT, be transferred to the QIRC given that:
>
> - the QIRC is the specialist workplace tribunal established for Queensland;
> - the QIRC currently has jurisdiction to hear some work health and safety matters (including disputes regarding the right of entry of work health and safety entry permit holders and worker's compensation appeals); and
> - other states and the Commonwealth have vested external review jurisdiction in industrial commissions.

However, reviewable decisions prescribed under the WHS Regulation 2011 should appropriately remain with QCAT, as these matters are more administrative in nature and better align with QCAT's jurisdiction.

Given concerns raised by stakeholders around securing a timelier method of dispute resolution about key work health and safety matters, it is considered appropriate to expand the QIRC's jurisdiction to hear and determine the following categories of disputes:

- a dispute in relation to the provision of information by an employer to a HSR;
- a dispute in relation to any rights or functions that may be exercised by work health and safety entry permit holders;
- a dispute in relation to a request by a HSR for assistance;
- a dispute in relation to work health and safety issue resolution process; and
- a dispute in relation to cease work matters.

It is envisaged that this will be treated as a separate category of dispute under the Work Health and Safety Act 2011 with jurisdiction vested in the QIRC to deal with the dispute.

The QCU remains unconvinced of the need for a party to wait 24 hours to notify of a dispute as was legislated in Queensland. It would also appear reasonable to transfer existing functions from Queensland Civil and Administrative Tribunal (QCAT) to the QIRC, having regard to the other proposed amendments to provide the QIRC with some jurisdiction in this area. In our submission this is useful reform to promote the peaceful resolution of WHS disputes.

Codes of Practice

The harmonisation of workplace health and safety laws in 2011 brought with it some level of compromise. In order to create nationally consistent legislation, a "middle ground" was reached and is stated above and in various submissions to the Lyons Review, this may have had some unintended consequences for Queensland. One such unintended consequence might have been the virtual "shelving" of codes of practice. Under the current legislation, codes of practice might be seen as something that a duty holder might occasionally refer to rather than comply with on an ongoing basis. Under previous Queensland legislation codes of practice had greater status and therefore a greater likelihood to contribute to workplace health and safety outcomes. The following finding (Lyons 2017:22) sets out the comparative nature of the pre- and post-harmonisation effect of codes of practice in Queensland:

> While both the 1995 and 2011 work health and safety regimes provide a framework where compliance with a code of practice can be used as evidence that a duty holder has complied with their safety obligations, the regimes are markedly different in relation to their enforceability.
>
> The WHS Act 1995 made it explicitly clear that a code of practice had to be followed as a minimum and in doing so provided a specific provision that improvement notices could be issued against. Conversely, while the WHS Act 2011 continues to promote codes of practice as the minimum standard (this is evidenced by the application of codes of practice to court proceedings), there is no standalone provision that enables failure to reach this minimum standard to be enforceable by inspectors. While there is an ability for inspectors to refer to codes of practice in compliance notice directions (which would have the effect of making following a code of practice mandatory), this power is discretionary and requires a link back to an overarching duty of the WHS Act 2011 or Regulations, a somewhat more convoluted process than in the WHS Act 1995.
>
> Given the strong stakeholder support for the role of codes of practice, it is appropriate to clarify their status to give certainty to employers, unions and the regulator. The aim is to ensure that codes of practice operate in a manner which assists all industry participants to manage work health and safety risks, including the inspectorate.
>
> It is the view of the Review that a specific legislative provision, such as existed in the WHS Act 1995, is required to make it clear that codes of practice are the minimum standard and provide a clearer avenue for enforcement action by inspectors. Additionally, an approach similar to the WHS Act 1995 would eliminate the suggested need by unions for requirements in codes of practice to be brought up into the WHS

> Regulations 2011 - a review process that was commenced to facilitate enforcement action and provide clarity to duty holders regarding their obligations.

The QCU supports this policy position as assisting with better workplace health and safety outcomes. Compliance with codes is more likely to engender a preventative approach to workplace health and safety measures rather than apportioning blame after the event. We would urge the adoption of this measure in the model laws.

Enforceable Undertakings and Fatality

The QCU and other union submissions are cited in the Report (Lyons 2017:78) regarding enforceable undertakings. In our submission and the submission of other unions, enforceable undertakings are often seen as a "soft" option that will be readily agreed to by an employer and may be attractive to an agency that is under resourced. The Report reflects this sentiment (Lyons 2017:79):

> There is a strong view from the majority stakeholders that submitted to the Review that enforceable undertakings should not be permissible in circumstances where a fatality is involved. The genesis of this view is that public perception dictates that there should be a prosecution or punishment for a fatality and that an enforceable undertaking does not reflect the seriousness of the incident. The Review supports this assertion and is of the view that there is a need for clear expectations around when an enforceable undertaking will be accepted and that the acceptance of enforceable undertakings should be mindful of community expectations.
>
> To this end, it is the view of the Review that the current enforceable undertakings framework should be amended to provide a clear position on the treatment of fatalities and very serious injuries. In relation to fatalities, this could potentially be done in two ways:
>
> 1. Consistent with the approach being considered by WHSQ, the Guidelines for the acceptance of an enforceable undertaking could be amended to include a similar approach to Victoria where an application for an enforceable undertaking that relates to a fatality is generally excluded unless a case for exceptional circumstances can be made.
>
> 2. Alternatively, the WHS Act 2011 could be amended to exclude enforceable undertakings from being permissible for fatalities. This would be in addition to the current exclusion for Category 1 offences but would ensure Category 2 offences, where a fatality is due to a person's failure to comply with a duty, is explicitly excluded.

The QCU supports this policy position of preventing the use of enforceable undertaking in the case of fatalities, that is consistent with our initial submission.

Workplace Health and Safety Officers

The Workplace Health and Safety Officer (WHSO) was also discarded from the Queensland legislation as a result of harmonisation. It is noted that the proposed amendments will not mandate WHSOs but provide incentives for their engagement. This policy would appear to be sound having regard to the other policy positions adopted by the Report and contained in the Bill.

Health and Safety Representatives

The reduction in significance of Health and Safety Representatives seems to have recently occurred in Queensland since the introduction of harmonised legislation and deliberate policy on the part of the Newman Government.

In the QCU submission to the Review the following submission were made in the QCU submission (QCU 2017a:16):

> WHSQ's current approach does not identify the fundamental importance of HSRs in securing compliance at workplaces. While the discussion paper highlights programs, tools and strategies aimed at the PCBU, there appears to be no equivalent promotion or resourcing of worker engagement.
>
> As part of improving compliance in workplaces, WHSQ should fund programs and initiatives focused on actively assisting and promoting the role of elected HSRs and HSR committees in the workplace. A lack of enforcement may also be contributing to a trend in workplaces to develop alternative structures as substitutions for the legislatively recognised HSRs structures. In the experience of some affiliates, PCBU's are avoiding the framework of the WHS Act by developing their own version of 'workplace safety representatives' that are neither elected, or representative of workers. In most cases, these 'representatives' have managerial functions, have not received workplace health and training and acquire none of the powers or protections of HSRs under the WHS Act. These structures have the effect of undermining workplace health and safety by diminishing employee voice.

The Report made the following finding (Lyons 2017:124):

> While there is clear evidence of the important role HSRs can play in improving and maintaining safety performance at a workplace, it is the view of the Review that there is insufficient emphasis by WHSQ on supporting HSRs to fulfil their role. Accordingly, it is the finding of the Review that further funding and support is required to actively assist

and promote the HSR role. Such efforts could be tailored to the priority industries and undertaken as part of the industry action plan activities of WHSQ.

The QCU thoroughly supports the role of HSRs in providing a safer workplace. Having workers trained to identify hazards and understand how they are best managed is an essential aspect of the framework of the legislation.

Moreover, the QCU supports the role of the HSR in providing workers with a voice for workplace health and safety issues.

Union Capacity to Prosecute

The QCU submission also advocated providing unions with the capacity to prosecute for breaches of the Work Health and Safety Act 2011. Unfortunately, in our submission, this recommendation was not adopted in the Report. Providing unions with the capacity to prosecute could only provide for better workplace health and safety outcomes. We note that the only jurisdiction that has ever enabled such a capacity is New South Wales (Bluff and Gunningham 2012) and incidentally that jurisdiction has historically been associated with a far greater use of deterrence (Schofield et al 2014).

More over unions are able to prosecute employers for breaches of industrial legislation and have long held such an ability. It appears incongruous that a union can prosecute an employer for not paying an employee correctly but has no standing with respect to workplace health and safety.

In summary, the more resources available to ensure compliance with workplace health and safety obligation the better it will be for workplace health and safety outcomes.

Specific Questions

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

Recent legislative change in Queensland has brought about a greater emphasis on codes of practice. In previous Queensland legislation (prior to harmonisation), codes of practice had maintained a position against which the PCBU would be assessed. That is the PCBU would be required to at least comply with relevant code of practice. Amendments made by the 2011 Act reduced codes to be a guideline grounds for defence in prosecutions. The Lyon Report (2017:22/23) made the following findings in relation codes of practice:

> "specific legislative provision, such as existed in the WHS Act 1995, is required to make it clear that codes of practice are the minimum standard and provide a clearer avenue for enforcement action by inspectors. Additionally, an approach similar to the WHS Act

> 1995 would eliminate the suggested need by unions for requirements in codes of practice to be brought up into the WHS Regulations 2011 - a review process that was commenced to facilitate enforcement action and provide clarity to duty holders regarding their obligations.
>
> In addition to providing clarity regarding the legislative status of codes of practice, it is prudent to ensure the content of codes of practice remains relevant and responsive to emerging safety issues, changes in industry work practices and technological advances. To this end, codes or practice must be regularly reviewed and updated in consultations with key industry stakeholders. For consistency, such reviews should be conducted every five years as is the case for the model codes of practice administered by Safe Work Australia (SWA)."

This approach was adopted by the Queensland Parliament (2017:3) which is well described by the following extract from the Explanatory Notes for the 2017 Queensland Bill:

> The Bill clarifies the status of codes of practice by restoring the previous requirements in section 26(3) of the repealed Workplace Health and Safety Act 1995 (WHS Act 1995) to require, where relevant, the safety measures in a code of practice to be followed unless equal to or better than measures can be demonstrated. To ensure the content of codes of practice remain relevant and up to date the Bill requires codes of practice to be reviewed every five years.

In our submission the model laws weaken the status of codes of practice to the detriment of work health and safety and we would advocate the elevation of their status as was done in recent amendments to the Queensland legislation.

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

We are not aware of any instances of the regulations not supporting the object of the Act.

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

See Question 1.

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

The scope of the model WHS Codes could significantly be improved to better support the object of the model WHS Act. An approved Code is admissible in a court proceeding as evidence of whether or not a duty or obligation under the model WHS Act has been complied with, and the court may 'rely on the code in determining what is reasonably practicable in the circumstances to which the code relates'. But, in our view, the matters that the model WHS Codes relate to are limited and generic.

Many matters dealt with by way of guidance material (which do not have the same admissibility in court as Codes), or not at all, would be better dealt with in Codes to provide more relevant, and explanatory, information on what may be determined as reasonably practicable in specific circumstances. For example, while there is a Code that relates to 'How to manage work health and safety risks' generally, it does little to provide relevant information on what may be determined as a reasonably practicable way to manage the risks of psychological injury in the workplace.

While we understand it would be cumbersome for model WHS Codes to address the management of each and every risk in the workplace, we believe there are currently significant gaps that need addressing. In our view, the model WHS Codes should be reviewed (in consultation with all relevant parties) to identify these gaps, and additional Codes should be approved where relevant.

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

The position adopted by unions in Queensland is that the management of psychosocial health issues remains problematic. There is little reference to psychosocial health within the body of the Act. This issue probably deserves further examination in connection with various workers compensation regimes.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

As a policy position, legislation that covers specific industries should be no less favourable than the model laws. Any laws that are found to be less favourable than the model laws should be amended accordingly.

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

Affiliated unions are unaware of any issues in relation to the exterritorial operation of the legislation.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

Affiliates advise of some difficulties where tensions arise between obligations to work Health and safety legislation and other Acts.

As an example, the Mental Health Act 2016 (Qld) places significant emphasis on the reduction of seclusion and restraint of patients. As a result, workers advise that in order to comply with this requirement they expose themselves to occupational violence as they are reluctant to seclude patients and therefore isolate themselves from the hazard.

Given this tension the QCU would seek to mandate paramountcy of Work Health and Safety legislation and urge similar adoption within the model laws.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

Affiliated unions are witnessing an increase in psychological injuries and workplace bullying. Problems associated with exclusions from workers compensation claims based on "reasonable management action" and the requirement for actions to be on-going in order to trigger the anti-bullying jurisdiction appear to contribute to a lack of redress for employees suffering from psychological stress.

As discussed in relation to Question 8, occupational violence is emerging as both a workplace and social issue.

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

Consideration as to the adequacy of the definition of PCBU must include reference to the relationship between franchise owners and master franchise owners. Recent advice from affiliates indicates the entry into the health and social assistance industry sector of franchises providing in home care and assistance in addition to the provision of nursing services including IV therapies, medication administration, Insulin injections, catheter care palliative care etc.

Franchises can be bought by individuals with no knowledge or experiencing in the provision of healthcare and relevant regulatory requirements for the provision of these services from a master franchise owner.

Given this industry sector is recognised as high risk the entry of franchise arrangements requires that workers employed in this sector must be afforded adequate protections particularly the identification of the PCBU.

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

The primary responsibility appropriately sits with the PCBU.

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

The QCU has no specific submission with respect to the meaning of reasonably practicable.

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

Industrial manslaughter has been introduced in Queensland. As stated earlier in this submission we urge the adoption of industrial manslaughter in the model laws.

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

The broad definition of "worker" in the model laws is vastly superior to definitions of "employee" in other industrial legislation and this topic is discussed further in answering Question 33.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

Workers' obligations are largely enforced by disciplinary action by their employer. Workers will usually pay the ultimate price for safety breaches by the termination of their employment contracts. A perusal of unfair dismissal cases in the Fair Work Commission will reveal that termination of employment on the basis of serious health and safety breaches are upheld by members of that tribunal . Accordingly, we see no reason for further action in relation to this matter.

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

See Question 9

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

The QCU has no specific submissions on the principles that apply to health and safety duties.

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

A positive obligation exists in section 46 of the Act in relation to over-lapping duties of duty holders. We are aware of criticisms that these obligations are not complied with.

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

We would urge clarification that consultation means and includes consultation with unions.

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

It is obvious that the HSR model is not appropriate to a range of emerging occupations and industries. The QCU supports the ACTU submission that there is a need to broaden the capacity of unions to represent workers' interests in these industries.

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

An unjustified amendment made to the Queensland legislation by the Newman Government in 2014 was removing the ability of the HSRs to cease unsafe work. The excuse given by the Newman Government for this amendment was that workers were able to cease work themselves and did not require a HSRs assistance (Parliament of Queensland 2014a).

This disingenuous reasoning ignores a range of factors that illustrate the need for such a provision in the first place. Primarily, HSRs receive mandatory training in relation to their role and as such are able to identify risks far better than someone who has not undertaken training (QCU 2014). Trained Health and Safety Representatives will look for solutions higher up the hierarchy of control and a much higher degree of confidence will come with effective training (Culvenor et al 2003).

The most vulnerable in the workforce will not know how to identify risks, especially among young workers(QCU 2014). The capacity of HSRs being able to stop a dangerous process is fundamentally important to protecting workers and assists an employer in their primary obligations under the Act. As was submitted to the parliamentary enquiry that reviewed the amendments eventually made by the Newman Government, the QCU would rely upon the panel review of the model OHS laws that addressed the ability of HSRs to stop work as follows (Commonwealth of Australia 2012:184):

> The HSRs, given their training and operation on a day to day basis in the workplace, may be better placed than an individual worker to be able to progress discussions with the person conducting the business or undertaking and have more experience in use of the issue resolution process. Concerns raised in submissions and consultation about the potential for misuse by an HSR of the power to direct a cessation of work, can be met by the provisions that we recommend for the disqualification of an HSR.

Prior to the introduction of the provision, allowing the HSR the ability to cease unsafe work was the subject of some concern amongst employers. It was erroneously thought union delegates would masquerade as HSRs to misuse this provision for the purpose of industrial action. This belief was proven to be mistaken as was proven by the experience after the adoption of model laws and by virtue of the fact that most HSRs are not union delegates (QCU 2014). As is stated above, in the unlikely event that an HSR did abuse his or her ability to cease unsafe work, the legislation is capable of dealing with such a situation.

There has also been some suggestion that a worker's common law right to not perform unsafe work is sufficient and renders legislative power unnecessary. This view in our submission is

conveniently simplistic and ignores the realities of the workplace. Common law rights are vague and there is benefits to codifying such rights in specific legislation such as this Act (Commonwealth of Australia 2012). The model law need to reflect the ability of HSRs to stop work .

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

Previously discussed in this submission was the expansion of the QIRC's jurisdiction to hear and determine WHS disputes. The Lyons Report (2017:89) made a recommendation that "the QIRC's jurisdiction be expanded to hear and determine the following categories of disputes:

- a dispute in relation to the provision of information by an employer to a HSR
- a dispute in relation to any rights or functions that may be exercised by work health and safety entry permit holders
- a dispute in relation to a request by a HRS for assistance
- a dispute in relation to work health and safety issue resolution process
- a dispute in relation to cease work matters

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

Affiliates were unable to provide specific examples of victimisation of HSRs. However, we fear that this may be a reflection on the absence of HSRs in workplaces rather than the effectiveness of protections for them.

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

In 2014 the Newman Government introduced legislation to introduce a 24-hour time limit on permit holders entering a workplace under the Workplace Health Safety Act 2011 (Qld). The apparent justification for this amendment was two round table discussions that involved the former Attorney General in late 2012 and early 2013, where it was alleged that officials in the building and construction industry were misusing their right of entry (Queensland Parliament 2014a). The number of complaints concerning right of entry at the time of the Newman

Government amendments was 57 (Parliament of Queensland 2014b). However, it is not known exactly how many of these complaints were in any way proven (QCU 2014). It was also curious that these complaints materialised in the lead up to the amendments made by the Newman Government.

The number of complaints concerning right of entry are numerically insignificant in the scheme of Queensland workplace health and safety. It is ludicrous to compare the potential minor inconvenience to an employer by not having 24 hours' notice with the potential for loss of life or serious illness or injury from not allowing access.

Under the various acts covering industrial and workplace health and safety, union officials have long held a right of entry into premises (Commonwealth of Australia 1996; Shaw and Walton 1994). In the federal jurisdiction, awards often dealt with right of entry and section 286 of Industrial Relations Act 1988 (Cth) set out the power to enter, inspect and interview so long as the official did not hinder or obstruct an employee in the performance of their duties (Commonwealth of Australia 1996; Mills and Sorrell 1975).

Serious limitations were first placed on union right of entry by the Howard Government in the Workplace Relations Act 1996 (Cth) (WRA). Sections 285B and 285C of the WRA allowed authorised permit holders to enter a workplace for the purpose of investigating suspected breaches or holding discussions with employees. Curiously, section 285D of the WRA required that permit holders were required to give employers 24 hours' notice to exercise these rights (Commonwealth of Australia 1997).

It is uncertain as to the need for 24 hours' notice and union right of entry had not been an overly contentious issue before the introduction of these provisions in 1996. Much of the WRA was particularly and specifically anti-union and the limitations placed on union right of entry have been interpreted in that context (Balnave et al 2007; Bray et al 2005; Peetz 1998). There is evidence that employers use the 24 hours' notice to undermine union recruitment efforts within the workplace (Pyman 2004).

The right to enter a premises specifically for occupational health and safety reasons was first introduced into Queensland in 2006 by virtue of the Workplace Health and Safety and Other Acts Amendment Bill (Queensland Parliament 2006). Such a provision had existed in New South Wales legislation for decades and more recently in other jurisdictions such as Victoria. A similar provision was adopted in the harmonised workplace health and safety laws that led to the introduction of the most recent act. As submitted by the Queensland Government to the National OHS Review, there had been no evidence of abuse of the right of entry provisions introduced in 2006 (Queensland Government 2008).

It was also apparent at the Queensland Parliamentary Committee hearing into the 2014 amendments that workplace health and safety right of entry was of no concern to any other employer body other than Master Builders. By contrast unions covering diverse industries and occupations were able to point to grave concerns and potential risks associated with the 2014 Bill being enacted. The model laws need to reflect the Queensland legislation that provides reasonable entry for permit holders.

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

It is reasonable to say that the experience in Queensland has been an overemphasis on compliance at the expense of enforcement. This matter has been dealt with earlier in this submission and is noted in the literature such a problem does not seem confined to Queensland. The problem has however been addressed in Queensland and the Lyon Review made the following recommendations (2017:74/75):

> 31. A new independent statutory office be created to exercise all functions in relation to work health and safety prosecutions under the Work Health and Safety Act 2011. The new independent statutory office should:
>
> - be headed by a Director of Workplace Health and Safety Prosecutions (Senior Executive Service level) to be appointed by the Governor-in-Council for a five-year renewable term and be supported by existing Office of Industrial Relations prosecutions staff reporting to the Director.
> - not affect the current referral process by WHSQ to the Director of Public Prosecutions for category 1 offences under section 31 of the Work Health and Safety Act 2011.
>
> 32. As the Office of Industrial Relations has a centralised function for prosecutions, consideration be given to transferring prosecutions under the Electrical Safety Act 2002 and the Safety in Recreational Water Activities Act 2011 to the new Director of Workplace Health and Safety Prosecutions.
>
> 33. The Office of Industrial Relations develop a formal policy regarding the release of information on the status of prosecutions to affected families and those individuals and companies under investigation.

34. The Director of Public Prosecutions Guidelines be mandated under the Work Health and Safety Act 2011 to ensure that they are followed when decisions are made about whether to initiate a prosecution.

35. The Office of Industrial Relations collect and use data on its investigations (including the length of time and outcomes of investigations) to regularly analyse the effectiveness of prosecution decisions. This regular analysis by the Office of Industrial Relations should be used to better focus prosecution resources and establish best practice timelines for different categories of incidents.

36. The Work Health and Safety Board monitor patterns and trends relating to WHSQ's prosecutions, including success rates and penalties awarded."

The QCU urges a similar approach in relation to the model laws.

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

See question 25.

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

As is discussed elsewhere in this submission, the Queensland legislation has empowered the QIRC to settle and determine WHS disputes. This amendment provides for an independent external review as well as given unions standing in the process. We would urge the adoption of similar provisions in the model law.

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

The QCU has no specific submission on exemption application under model WHS Regulations.

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

See question 25.

Question 30: Have you any comments on the incident notification provisions?

In our view, the current regulation around the reporting and notification of injuries most particularly musculoskeletal would rarely require an employer to report. It is not uncommon for workers to sustain significant injuries that can result in them not returning to work that do not fall within the confines of notification requirements. As a consequence, the inspectorate may be unaware of injury trends and problems within a particular industry or workplace in a timely manner. This is because the definition of serious injury, most particularly 36(b)(vi) which refers to spinal injuries, does not provide adequate detail as what constitutes a spinal injury, which could range from paraplegia to a disc protrusion that ends the workers employment.

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

See question 25.

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

As is discussed elsewhere in this submission, a finding of the Lyons Review was that enforcement has suffered at the expense of "softer" compliance strategies. The QCU (2017a) submission to the Best Practice Review highlighted instances of this occurring in Queensland under the harmonised WHS laws.

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

The continued level of death and serious injury in the workplace indicates that penalties are insufficient. The Lyons report in Queensland established a number of factors that are in all probability not restricted to that jurisdiction. An absence of prosecutions is coupled with relatively low penalties being applied in the rare cases where prosecutions were taken.

Turning around this culture of non-complaince requires more than legislative change. The Lyons report advocated a range of changes to the way in WHSQ conducted business including an internal separation of compliance and enforcement function within WHSQ. To effectively provide for independence in the process of prosecution, amendments to the Queensland

legislation included the establishment of a new statutory office, the Director of Workplace Health and Safety Prosecutions. In our submission this is a positive step towards removing the decision to prosecute from the potential of undue influence or political interference.

As previously mentioned in this submission, the Queensland legislation also introduced the offence of industrial manslaughter. Such an offence provides additional penal sanction to redress the apparent inadequacy of the existing legislative regime in deterring negligent behaviour. The analogy with road safety (Bailey et al 2015) is a compelling reason as to why community attitudes to workplace deaths need to change and in our submission, the introduction of a higher penalty within the work health and safety enforcement regime goes someway to bringing about that change.

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

The comments made in relation to question 33 above are also relevant to this question. We would also advocate opening up the ability to prosecute to relevant unions. We note that section 230 (1) (c) of Work Health and Safety Act 2011 (NSW) enables unions to prosecute for category 3 offences and in some cases category 1 and 2 offences. Unions argued during the review of WHSQ for such an extension but were not successful in that instance. We do not resile from the position that unions should be able to prosecute for breaches of WHS laws as this would assist in the process of enforcement and changing community attitudes and workplace cultures in relation workplace deaths and injuries. We also note the capacity of unions to prosecute employers under section 539 of the Fair Work Act 2009 (Cth) for a range of civil remedies for breaches of industrial instruments and that act. It is incongruous that unions are quite rightly able to prosecute an employer for failing to provide, for example, meal money on overtime, yet unable to prosecute an employer that fails to provide a safe system of work.

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

The Lyons Report (2017:115/116) noted the inconsistency in application of penalties by courts. Sentencing guidelines may assist with overcoming this issue and also the previously mentioned need to change community attitudes towards workplace death and injury.

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

The QCU and other stakeholders have continually argued that there is an over-emphasis on the use of enforceable undertakings, particularly at the expense of enforcement by way of prosecution. The Lyons Review (2017:78/79) accepted that enforceable undertakings have an important role to play in relation to improving WHS standards. It did however make recommendation to prohibit their use in cases of repeat offenders and for incidents which involve fatalities.

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

The QCU position is that PCBUs should not be allowed insure against their obligations under the WHS Act. Unless the penalty is actually imposed on the PCBU it is unlikely that the object of deterrence of breaches of the WHS Act will be furthered.

At the very least prosecutors and sentencing judges should be made aware of the existence of such insurance coverage so that penalties can adequately take this into account.

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