Queensland Government submission to the 2018 review of the model work health and safety laws

May 2018

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Executive Summary

The *Work Health and Safety 2011* (WHS Act) was assented to on 6 June 2011. The WHS Act gave effect to the national model work health and safety laws contained in the final draft of the Model Work Health and Safety Bill released by Safe Work Australia in November 2010. Queensland was the first jurisdiction to pass the necessary legislation to implement the model WHS laws. When introducing the WHS Act into the Queensland Parliament, the then Minister for Industrial Relations, the Hon Cameron Dick MP, indicated that the model WHS laws would end disparities and inconsistencies faced by businesses operating across jurisdictions when seeking to comply with a myriad of state and territory work health and safety laws. However, the then Minister also said that health and safety standards currently applying in Queensland workplaces would not be lessened.

It is important to note that there was recognition by the Commonwealth, States and Territories from the outset that there would be some differences in the way the jurisdictions implemented the nationally harmonised laws, which was based around factors such as the industry mix or climatic conditions etc. In the case of Queensland, during the development of the national model WHS laws, Queensland maintained that it's more detailed codes of practice applying to construction work would be preserved under the new WHS Act. Further, in the case of New South Wales, the Secretary of an industrial organisation of employees can bring proceedings for Category 1 or Category 2 offences if the Regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings (section 230(3)). In South Australia, the duty to manage health and safety risks only applies to the extent the person has capacity to influence and control the matter (section 17(2)), to cite some examples of variations.

The first formal opportunity to consider the effect and gain learnings from the implementation of the national model WHS Act in Queensland workplaces came in October 2016, when the Government announced a Best Practice Review of Workplace Health and Safety Queensland (WHSQ). The Best Practice Review was undertaken in response to the tragic fatalities at the Dreamworld theme park and an Eagle Farm construction site in 2016.

The Terms of Reference for the review specifically required the review to consider:

- the appropriateness of WHSQ's Compliance and Enforcement Policy (the national policy);
- the effectiveness of WHSQ's compliance regime, enforcement activities, and dispute resolution processes;
- WHSQ's effectiveness in relation to providing compliance information and promoting work health and safety awareness and education;
- the appropriateness and effectiveness of the administration of public safety matters by WHSQ; and
- any further measures that can be taken to discourage unsafe work practices, including the introduction a new offence of gross negligence causing death as well as increasing existing penalties for work-related deaths and serious injuries.

Following extensive tripartite consultation, on 3 July 2017 the report of the Review was submitted to Government, see Attachment 1. The Review made 58 recommendations, with the majority relating to operational improvements for either WHSQ or the Work Health and Safety (WHS) Board. Of the 58 recommendations, the Review made 21 recommendations for legislative amendments to Queensland's WHS laws. Seventeen of these amendments related to the *Work Health and Safety Act 2011* (WHS Act) and four of the amendments related to the *Work Health and Safety Regulation 2011* (WHS Regulation).

On 12 October 2017, in response to the Review recommendations, Queensland's Parliament passed the *Work Health and Safety and Other Legislation Amendment Bill 2017*. Amendments included:

- introducing a new offence of industrial manslaughter in the WHS Act with mirror amendments to the *Electrical Safety Act 2002* and *Safety in Recreational Water Activities Act 2011*;
- establishing an independent statutory office for work health and safety prosecutions;
- restoring the status of codes of practice as existed under the repealed *Workplace Health and Safety Act 1995*, i.e. codes regained status as minimum standards;
- requiring a mandatory review of approved codes of practice every five years;
- prohibiting enforceable undertakings being accepted for contraventions, or alleged contraventions, involving a fatality;
- expanding the jurisdiction of the Queensland Industrial Relations Commission (QIRC) to hear and determine disputes relating to work health and safety issues, cease work matters, requests for assistance by health and safety representatives (HSRs), and the provision of information to HSRs;
- transferring the jurisdiction of external review of reviewable decisions outlined in schedule 2A of the WHS Act to the QIRC;
- enabling inspectors to make a determination about whether a right of entry by WHS entry permit holder is valid and WHS issues that have given rise to the parties for entry;
- mandating training for HSRs within six months of being elected to the role, with refresher training to be undertaken at three-yearly intervals;
- requiring persons conducting a business or undertaking (PCBU) to provide lists of HSRs and copies of provisional improvement notices issued by HSRs to the regulator;
- introducing the ability for a PCBU to appoint a Work Health and Safety Officer (WHSO) and providing that the appointment of a WHSO or the election of a HSR is permissible as evidence that a PCBU has taken action to mitigate health and safety risks; and
- clarifying inspector investigation powers under section 171 of the WHS Act to ensure these powers are not inappropriately limited by a legal technicality.

These amendments, which followed extensive consultation including Queensland Parliament's Committee hearings process, are aimed at improving the operation of Queensland's WHS Act, the issue resolution process and worker safety. The Queensland Government submits that similar amendments be made to the model WHS laws to enhance safety and improve the overall operation of the model WHS laws.

The Queensland Government also recommends the review of the national model WHS laws consider other regulatory proposals that were recommended by the Review, including training and licensing requirements, as well as regulatory amendments to improve safety in the amusement device and theme park industries. While Queensland is currently developing regulatory proposals on these issues, consideration as part of the review may promote a national approach and consistency across jurisdictions.

Further, the Queensland Government recommends the review specifically consider the following issues that the Best Practice Review recommended should be considered nationally:

1. reintroducing a reverse onus of proof and considering the effect that the removal of the reverse onus of proof has had nationally on patterns of enforcement, the success rates of prosecutions and safety outcomes (recommendation 7); and

2. the development of sentencing guidelines that outline 'suggested penalties' to apply in all jurisdictions (recommendation 49).

The outcomes of the Best Practice Review of Workplace Health and Safety Queensland form the basis of the Queensland Government's submission to the 2018 review of the model work health and safety laws.

Background

The *Work Health and Safety 2011* (WHS Act) was assented to on 6 June 2011. The WHS Act gave effect to the national model work health and safety laws contained in the final draft of the Model Work Health and Safety Bill released by Safe Work Australia in November 2010. Queensland was the first jurisdiction to pass the necessary legislation to implement the model WHS laws. When introducing the WHS Act into the Queensland Parliament, the then Minister, indicated that the harmonised laws would end disparities and inconsistencies faced by businesses operating across jurisdictions when seeking to comply with a myriad of state and territory work health and safety laws. However, it was also noted that health and safety standards currently applying in Queensland workplaces would not be lessened.

It is important to note that there was recognition by the Commonwealth, States and Territories from the outset that there would be some differences in the way the jurisdictions implemented the nationally model WHS laws, which was based around factors such as the industry mix or climatic conditions etc. In the case of Queensland, during the development of the national model WHS laws, Queensland maintained that it's more detailed codes of practice applying to construction work would be preserved under the new WHS Act. Further, in the case of New South Wales, the Secretary of an industrial organisation of employees can bring proceedings for Category 1 or Category 2 offences if the Regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings (section 230(3)). In South Australia, the duty to manage health and safety risks only applies to the extent the person has capacity to influence and control the matter (section 17(2)), to cite some examples of variations.

The first formal opportunity to consider the effect and gain learnings from the implementation of the national model WHS Act in Queensland workplaces came in October 2016, when the Government announced a Best Practice Review of Workplace Health and Safety Queensland (WHSQ). The Review was undertaken in response to the tragic fatalities at the Dreamworld theme park and an Eagle Farm construction site in 2016.

Legislative amendments made to Queensland's *Work Health and Safety Act 2011*

1. Industrial manslaughter

In considering further measures that could be taken to discourage unsafe work practices, the *Best Practice Review of Workplace Health and Safety Queensland* (the Review) found that a new offence of industrial manslaughter is appropriate and necessary for dealing 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."[1]

The Review also concluded that an industrial manslaughter offence would address a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code do not provide for individual conduct to be imputed to an organisation.[2]

[1] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, p 113.
[2] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, p 113.

In response to this recommendation, the Queensland Government amended the *Work Health and Safety Act 2011* (WHS Act) creating a new offence of industrial manslaughter, with mirror amendments made to the *Electrical Safety Act 2002* and the *Safety in Recreational Water Activities Act 2011*.

The industrial manslaughter offence applies to both persons conducting a business or undertaking (PCBUs) and senior officers whose conduct negligently causes the death of a worker. This includes conduct that is either an act or an omission to perform an act. The penalties for industrial manslaughter are up to 20 years imprisonment for an individual or a maximum of $10.0 million for a corporation.

The offence of industrial manslaughter sends a clear message to duty holders about societal expectations on safety in the workplace and that companies, and the senior officers working for them, must do all that they can to ensure the safety of workers at their workplace. This in turn is likely to increase proactive work health and safety management and encourage work health and safety to be managed as a cultural priority within businesses.

The introduction of the offence also provides an alternative avenue for recourse where the police decide not to pursue charges under Queensland's Criminal Code. It also allows sentencing judges to have appropriate scope to deal with the worst examples of corporate or individual behaviour.

To ensure appropriate governance in decision making, prosecution decisions involving the offence of industrial manslaughter are subject to Director of Public Prosecutions approval in the same manner as Category 1 offences under s.31 of the WHS Act and that the Director of Public Prosecutions may take over any prosecutions for industrial manslaughter.

Including the offence of industrial manslaughter in the model WHS Act, will ensure that companies and senior offices are aware of their obligations rather than being alerted to such an offence under a criminal statute after charges have been laid. The Queensland Government recommends that amendments be made to the model WHS laws to introduce the offence of industrial manslaughter to ensure that PCBUs and senior officers can be held accountable for fatalities where their negligence causes the death of a worker and to enable a more effective application of the law to corporate employers.

2. Right of Entry

The Federal Circuit Court decision in Ramsay & Anor v Menso & Anor [2017] FCCA 1416 identified a significant limitation with the current work health and safety right of entry regime as it applies to inspector powers and functions. In particular, the court was of the view that under section 141 of the *Work Health and Safety Act 2011* (WHS Act), inspectors do not have the power to adjudicate or make a decision on the proper interpretation of the legislation when assisting parties to resolve a right of entry dispute.

The effect of this decision is that the role of inspectors is limited to facilitating discussions between parties, and inspectors are prevented from expressing a conclusion on the validity of a right of entry. As such, under the model WHS legislation, there is little an inspector can do to assist workplace parties to resolve a right of entry dispute.

To address this decision, in October 2017, the Queensland Parliament passed amendments to the WHS Act to clarify the powers of inspectors asked to assist in resolving right of entry disputes. In particular, new section 141A enables inspectors to make a decision about whether a WHS entry permit holder has a right to enter a workplace and whether notice requirements have been complied with. If an inspector is reasonably satisfied that there is a valid right to enter and that notice requirements have been adhered

to, the inspector is also empowered to direct a PCBU to immediately allow the WHS entry permit holder to enter the workplace. New section 141A commenced on 13 November 2017.

By empowering inspectors to decide if there is a valid right of entry, new section 141A ensures that right of entry disputes are resolved as quickly as possible at the workplace. This in turn allow safety issues to be addressed promptly, and may avoid having the matter referred to a tribunal causing further delays. It also recognises the role of the regulator and WHS inspectors in assisting to resolve health and safety issues at the workplace level, as part of their powers and functions under the WHS Act.

It is recommended that equivalent amendments be made to the model WHS Act to ensure inspectors have the appropriate scope and power to assist with resolving right of entry disputes.

3. Issue resolution

In considering the effectiveness of the issue resolution processes, the Review found that amendments were required to address the:

- length of time taken to resolve a dispute given the requirement to involve an inspector and the need for an internal review process;
- view that there is a lack of resolution mechanisms available where an inspector has refused to use their compliance powers to assist in resolving an issue; and
- view that there are limited avenues for issues to be resolved by an external independent umpire where they are not explicitly linked to a reviewable decision.

To address these findings, amendments to Queensland's WHS Act provide for certain work health and safety issues to be referred to the Queensland Industrial Relations Commission (QIRC) for consideration and resolution. These issues relate to the provision of information to HSRs, a request by a HSR for an assistant to have access to a workplace, a matter about work health and safety that is subject to the current issue resolution procedure, and an issue about cessation of work.

In recognition of the central role inspectors play in the resolution of safety issues and the intention for these issues to be resolved quickly and effectively between parties at the workplace, an issue can only be escalated to the QIRC for consideration if it remains unresolved at least 24 hours after the Regulator has been asked to appoint an inspector to assist with resolving the matter. As is currently the case, an inspector can use their compliance powers to assist with resolving the dispute. The use of compliance powers, or decisions not to use compliance powers, can be reviewed by the QIRC should the matter remain unresolved and be referred to the QIRC for consideration.

It is recommended the model WHS laws be amended to provide ability for certain safety issues to be referred to an external review body for resolution where they remain unresolved, and for a 24 hour period to apply before the matter can be referred to the review body. This will ensure the WHS laws encourage issues to be resolved in a timely and effective manner at the workplace.

4. Enforceable undertakings

While enforceable undertakings have been found to be an effective enforcement tool in achieving long term sustainable health and safety improvements, stakeholder feedback to the Review indicated that community expectations dictate that, in some circumstances, enforceable undertakings will not

adequately reflect the seriousness of the incident and that instead, the offence should be prosecuted.[3] This feedback was directed primarily to incidents that involved a fatality, irrelevant of the category of offence that might apply.

The WHS Act has been amended to provide certainty prohibiting enforceable undertakings being accepted for contraventions, or alleged contraventions, of the WHS Act that involve a fatality. Mirror amendments were also made to Queensland's *Electrical Safety Act 2002* and *Safety in Recreational Water Activities Act 2011*.

This amendment reflected what has been usual practice for WHSQ since the inception of the enforceable undertaking program in 2004. Since 2004, only one undertaking had been accepted which involved a fatality. Following the amendments to the WHS Act, WHSQ has also amended its *Guidelines for the acceptance of an enforceable undertaking* to further reinforce that undertakings must not be accepted where the incident involved a fatality.

The model national WHS Acts in other jurisdictions, including New South Wales, South Australia, Tasmania, Northern Territory, the ACT and the Commonwealth enable enforceable undertakings to be accepted for contraventions, or alleged contraventions, of the work health and safety laws except where the contravention or alleged contravention relates to a Category 1 offence for reckless conduct.

To address community expectations that Regulator responses should reflect the seriousness of incidents, it is recommended that amendments be made to the model WHS laws to prohibit enforceable undertakings from being accepted for contraventions, or alleged contraventions, which involve a fatality.

5. Work Health and Safety Officers

During consultations with stakeholders for the Review, there was consistent support for the role of Work Health and Safety Officers (WHSOs) in advising persons conducting a business or undertaking (PCBUs) on ways in which risks to work health and safety can be eliminated or minimised. The role of WHSOs existed under the repealed *Workplace Health and Safety Act 1995* as a management appointee who performed a safety advocate role for a workplace.

Under the repealed Act, WHSOs completed regulator-approved training and undertook legislated work health and safety functions to assess and improve the performance of a workplace. They were a designated safety resource for a workplace either in full time roles or integrated into human resources, operational management or other function.

The Queensland Government implemented the recommendation of the Review by introducing a framework for the appointment of WHSOs by PCBUs on a voluntary basis. Amendments were made to the WHS Act to give effect to this framework, which will commence on 1 July 2018. The legislative amendments provide that, in any proceedings against a PCBU for an offence under the Act, the appointment of a WHSO will be admissible as evidence of whether or not a duty or obligation under the Act has been complied with.

It is recommended that equivalent amendments be made to the model WHS laws to enable PCBUs to access the role of WHSOs and better enable them to meet their duties under the WHS Act and provide a further incentive to PCBU's to have effective consultative arrangements in place to ensure safety.

[3] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, p 79.

Workplace Health and Safety Queensland will have an approved WHSO course and WHSO appointment process in place for when the legislative amendments commence on 1 July 2018.

6. Health and Safety Representatives

The Review found that Health and Safety Representatives (HSRs), if properly trained, resourced and supported by the Regulator, can play an important role in improving and maintaining safety performance in the workplace.

In response to the review, the WHS Act was amended to require mandatory training for all HSRs to equip them with the appropriate knowledge and skills to effectively carry out their role. The Review found that the discretionary nature of HSR training detracted from the important role that HSRs have in representing the work group on WHS issues and securing work health and safety outcomes.[4]

Amendments to the WHS Act were also made to reintroduce a requirement which existed under the repealed *Workplace Health and Safety Act 1995* that persons conducting a business or undertaking (PCBUs) provide a list of HSRs and deputy HSRs to the Regulator. This will enable Workplace Health and Safety Queensland to better engage with HSRs and provide ongoing skills development. For example, it is intended to use this information to establish communities of practice with interested HSRs, using social media.

In addition, a PCBU is also required to provide the regulator with a copy of any Provisional Improvement Notice (PIN) issued by the HSR. These amendments are intended to enable HSRs to be better resourced and supported by the Regulator. The regulator will also be monitoring data on PINs to identify patterns for targeting compliance activities.

It is recommended the model WHS Act be amended to provide a mechanism that enables HSRs to be better supported by assisting them to be more effective in carrying out their role in representing the workgroup on work health and safety matters.

7. Codes of practice

The Review found the enforceability of work health and safety laws would be enhanced by restoring provisions that required codes of practice to be complied with as a minimum standard. The review recommended the previous requirements in section 26(3) of the repealed *Workplace Health and Safety Act 1995* be given effect under the WHS Act.5

In October 2017, the Queensland Parliament amended the WHS Act so that, from 1 July 2018, codes of practice outline the minimum standards for managing work health and safety risks. PCBUs will be required to comply either with an approved code of practice under the WHS Act or follow another method, such as a technical or industry standard, if it provides an equivalent or higher standard of work health and safety to the standard set out in the code. This means PCBUs are still be able to adopt alternative safety measures that provide the same or a higher level of protection against a risk which

[4] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, p 125.
[5] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, p 23.

ensures that technological advances and business innovations can be taken into account when determining compliance with health and safety duties.

In addition, to ensure the content of codes of practice remains relevant and up to date, the WHS Act was amended to require codes of practice to be reviewed every five years. This ensures the minimum standards in each code of practice are responsive to industry needs, and continue to reflect best practice.

It is recommended that equivalent amendments be made to the model WHS laws to ensure that codes can be enforced as a minimum standard, providing certainty to duty holders and that approved codes of practice be reviewed on a five yearly basis.

8. Inspector powers

The Review also considered the powers provided to inspectors under the WHS Act, including the power to require a person to produce documents and answer questions put by the inspector.

An inspector may enter a workplace under section 163 of the WHS Act to do a number of things to secure compliance. Specifically, under section 171 of the WHS Act, an inspector who enters a workplace has the power to require the production of documents and answers to questions.

The wording of section 171 of the WHS Act was raised as an issue during the Review in terms of its practical application in certain places at certain times. Stakeholders were of the view that this complicated the use of these inspector powers and limited the effectiveness of work health and safety investigations into serious risks, injuries and fatalities. Other issues identified during the review included:

- section 171 powers appear to be tied to physical entry into each individual workplace, which potentially limits both the speed and effectiveness of inspectors' investigations;
- entry into one workplace (e.g. regional site) does not necessarily permit the use of the power at other associated workplaces (e.g. head office); and
- the extent of inspectors' ability to make use of the requirement to answer questions at locations other than a person's ordinary workplace is unclear.

In October 2017, the Queensland Parliament passed amendments to the WHS Act to:

- clarify that, provided an inspector has entered the workplace within the last 30 days, the inspector or another inspector can exercise powers under section 171 of the WHS Act;
- the requirement to produce a document applies wherever a document is located, not just at the workplace; and
- the requirement to attend before an inspector to answer questions applies at any reasonable time and place.

These amendments commence on 1 July 2018.

It is recommended that similar amendments be made to the model WHS laws to ensure inspectors have appropriate powers to ensure the effectiveness of work health and safety investigations into serious risks, injuries and fatalities.

Other regulatory proposals under consideration in Queensland

9. High Risk Work licensing framework

The Review considered the licensing and accreditation framework administered by WHSQ, including the role of Registered Training Organisations (RTOs) in training and assessing licence applicants, see chapter 38 of the Review report. The Review found that:

- the High Risk Work licence and accredited assessor frameworks should be designed so that only competent applicants are approved for a licence or accreditation. A formal assessment component for accredited High Risk Work accreditors would improve their competence;
- concerns about the quality of VET sector training warrant investigation into whether existing legislation can be used to refuse to grant a licence or accreditation; and
- the existing considerations for refusing to grant a licence are relevant to whether training provided was of a standard to ensure the applicant is able to carry out the licensed work safely and competently. This is consistent with the objects under section 3 of the *Work Health and Safety Act 2011 (Qld)*. Promotion of this decision-making process may be achieved through the development of an industry guideline or code of practice.

The Review also made recommendations addressing:

- the role of competency assessments in the approval process for new accredited High Risk Work assessors;
- an industry code or guideline to enable RTOs to understand the standard of training required,
- a process where the regulator could approve RTOs for training eligibility in addition to current Australian Skills Quality Authority approval for RTOs; and
- the conflict of interest existing where RTOs both train and assess for High Risk Work licences.

The Office of Industrial Relations (OIR) is currently considering these recommendations, including any wider ramifications for licensing in the national WHS framework. OIR will engage with Safe Work Australia and member jurisdictions where any consultation, and in particular, cross-jurisdictional agreement, is required.

10. Amusement devices

In October 2016, a catastrophic incident on the Thunder River Rapids Ride at the Dreamworld theme park resulting in the deaths of four passengers on the ride. Following this incident, the Queensland Government announced it would undertake the Best Practice Review of WHSQ, including consideration of public safety matters in Queensland.

The Review's final report, made three recommendations relating to amusement devices which were accepted in principle by the Queensland Government, including proposals for the regulation of amusement devices under the *Work Health and Safety Regulation 2011* (WHS Regulation).[6]

An Amusement Device Working Group of industry stakeholders including national stakeholder representatives has been established to advise on the drafting of the amendment Regulation and supporting guidance material. The working group consists of key stakeholders in the industry including representatives from major south-east Queensland theme parks, show ride operators, the Australian Amusement, Leisure and Recreation Association, the Australian Workers' Union, and Engineers Australia.

The amendments under active consideration but not yet agreed by the Queensland Government include:

- a requirement for amusement devices to have major inspections by competent persons at specified intervals – every 10 years from when the device was first commissioned or registered unless otherwise specified by the manufacturer or a competent person. In Queensland, a competent person for carrying out a major inspection will generally be a registered professional engineer. This is similar to the requirements in the WHS Regulation regarding major inspections for cranes.
- additional requirements for determining and recording the training and competency of amusement device operators in the log book for the device.
- additional requirements about information to be recorded in the log book for the amusement device and made available to certain people, including inspectors and event organisers.
- a safety case regulatory model and licencing for large theme parks, similar to the regulatory approach used for major hazard facilities.

While amusement devices following the show circuit around Australia are maintained, as devices age they require more frequent maintenance and pose greater risk of injury if not maintained. The proposed amendment regulation seeks to provide confidence to show organisers, school parents and citizens committees, and parents (at home parties), by ensuring log books contain sufficient information so that a third party can satisfy themselves that the ride is safe and the operator competent to operate it. It is recommended that the review consider these regulatory proposals in the context of promoting national consistency regarding amusement device safety.

Specific issues arising from Best Practice Review of Workplace Health and Safety Queensland

11. Legal proceedings - reverse onus of proof

Prior to the implementation of the nationally harmonised WHS laws in 2012, and the introduction of the qualification of 'reasonably practicable' in relation to duty of care offences, Queensland's *Workplace Health and Safety Act 1995* provided for a reverse onus of proof.

[6] *Best Practice Review of Workplace Health and Safety Queensland*, Final Report, 3 July 2017, recommendations 41-43.

The Review noted that the onus of proof (both legal and evidential) lies with the prosecution, is a long standing common law principle that reflects the balance struck between the power of the state to prosecute and the position of an individual who stands accused. However, it is also a long-standing principle that the onus of proof may be regulated by a legislative provision.

Under the *Work Health and Safety Act 2011*, the Regulator is required to prove all elements of the breach of duty and demonstrate that the duty holder has not taken reasonably practicable measures to prevent the breach. As a result, the Regulator is required to collect sufficient evidence to prove a case beyond reasonable doubt. The number of prosecutions commenced by WHSQ declined in alignment with the introduction of the WHS Act in 2012, from 98 in 2011-12, to 67 in 2016-17. There may be a number of reasons for this, but it is considered that changing the onus of proof had a direct impact on this outcome. Further detail on WHSQ's prosecution performance over the last ten years is available in the Best Practice Review of WHSQ final report.[7]

The Review found that there is a not-insignificant case for the restoration of the reverse onus of proof being restored as an aid to compliance and enforcement, and to ensure the positive obligations of PCBUs to maintain a safe system of work. However, given the issue of onus of proof is a core part of the model WHS Act, a change to this requirement is problematic if pursued solely by Queensland. The Review recommended the issue be considered as part of the national review of the model WHS laws.

The Queensland Government recommends that the national review of model WHS laws specifically consider this issue. In particular, whether the existing burden of proof arrangements have had an effect on patterns of enforcement, success rates of prosecutions and safety outcomes nationally and give consideration to introducing a reverse onus of proof in the model WHS Act.

12. Sentencing guidelines

The Review found that Queensland courts tend to impose lower sentences on matters brought under the model WHS laws than courts in other jurisdictions, due to the precedents set when Queensland had lower maximum penalties under the pre-harmonised laws.[8]

The review suggested that courts could better exercise their discretion to impose penalties if they could refer to national sentencing guidelines that include guidance on appropriate sentencing ranges that would apply in all jurisdictions. It was suggested that the UK Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline could be used as a basis for an Australian guide.

A national guide could also incorporate the sentencing principles set out in the recent Queensland District Court case *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 20* (2 March 2018). In this case, Judge Fantin confirmed that the sentences imposed by a magistrate against the two defendants were manifestly inadequate, and increased fines from $1,000 to $10,000, and from $2,000 to $35,000 respectively.

[7] *Best Practice Review of Workplace Health and Safety Queensland,* Final Report, July 2017, p 71-74.

[8] *Best Practice Review of Workplace Health and Safety Queensland,* Final Report, July 2017, p 115

In reaching this decision Judge Fantin also confirmed the principles established in the New South Wales Court of Criminal Appeal case *Nash v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96* for deciding a sentence, and set out the following factors that should be considered in sentencing:

- the potential consequences of the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring;
- the probability of the risk occurring;
- the availability of steps to lessen, minimise or remove the risk;
- whether those steps are complex and burdensome or only mildly inconvenient;
- the particular offence in the context of the penalties imposed by the WHS Act;
- the maximum penalty as an important but not determinative guidepost;
- factors that mitigate the penalty; and
- when there are multiple co-offenders, consider the relevant factors with respect to each offender for the offence it has been charged with, rather than apportion a global fine across both entities.

The Queensland Government considers that the absence of national sentencing guidelines is a significant impediment to achieving national harmonisation of work health and safety laws. Consistency in Court decisions and Court awarded penalties is a central tenant of the harmonisation process. It is recommended that the development of national sentencing guidelines be considered as part of the review.