

Work Health and Safety and Other Legislation Amendment Bill 2015

Explanatory Notes

Short title

The short title of the Bill is the *Work Health and Safety and Other Legislation Amendment Bill 2015*.

Policy objectives and the reasons for them

The Bill implements election commitments made by the Government as part of the *Improving safety for Queenslanders at work* policy. In particular, the Government committed to restoring elements of the *Work Health and Safety Act 2011* (WHS Act) that were changed following a review of the model work health and safety (WHS) laws in 2012. This includes:

- restoring right of entry powers allowing WHS entry permit holders to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act; and
- empowering trained health and safety representatives (HSR) to direct workers to cease unsafe work.

The Government also committed to:

- amending the current incident notification requirements to include an additional requirement for employers to notify the regulator when a worker is absent for more than four days due to a workplace injury; and
- improving electrical safety by re-instating the Electrical Safety Commissioner, Electrical Safety Education Committee, Electrical Equipment Committee which were abolished in 2012.

Achievement of policy objectives

The Bill will achieve the policy objectives by amending legislation to:

- allow WHS entry permit holders to enter a workplace immediately if they suspect a contravention has occurred and provide notice of entry as soon as is reasonably practicable afterwards, removing the requirement to provide at least 24 hours' notice of entry;
- reinstate the power for a trained HSR to direct a worker in their work group to cease work if they have a reasonable concern that to carry out the work would expose the worker to a serious risk to their health and safety, emanating from an immediate or imminent exposure to a hazard. This will restore consistency with the model WHS laws;

- allow HSRs to request the assistance of any person, removing the requirement for at least 24 hours' notice if the assistant requires access the workplace;
- remove the penalty for failing to provide notice of entry to inquire into a suspected contravention of the WHS Act, consult and advise workers and make copies of documents relevant to a suspected contravention. This penalty does not exist in the model WHS laws;
- decrease the maximum penalty for contravening WHS entry permit conditions from 200 penalty units to 100 penalty units, to restore consistency with the model WHS laws;
- reinstate a requirement from the repealed *Workplace Health and Safety Act 1995* for the regulator to be notified of workplace injuries that result in a worker being off work for more than four days; and
- reinstate the Electrical Safety Commissioner, Electrical Safety Education Committee, and Electrical Equipment Committee.

Alternative ways of achieving policy objectives

The policy objectives can only be achieved by legislative amendment.

Estimated cost for government implementation

There are no significant financial impacts arising from the proposed amendments.

The amendments in relation to the powers of HSRs to direct workers to cease unsafe work and WHS entry permit holders at clauses 21 and 23 are not likely to increase costs as existing WHS Act provisions already allow for right of entry by permit holders and for individual workers to cease unsafe work.

The incident notification amendments at clause 16 may add to the burden for business, however are not likely to have a significant financial impact as businesses should already have systems in place to record and notify work-related injuries.

The amendments in Part 2 to reinstate the Commissioner for Electrical Safety and re-establish the Electrical Safety Education Committee and the Electrical Equipment Committee do not have significant costs impacts and will be met within existing departmental resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential inconsistencies with fundamental legislative principles are addressed below.

Confer protection from civil liability on the Electrical Safety Commissioner

The existing section 192B will confer protection from civil liability on the Electrical Safety Commissioner. The protection applies for an act or omission by the Commissioner done or omitted to be done in good faith and in the execution or purported execution of powers and functions under the *Electrical Safety Act 2002* (ES Act), and for the liability to attach to the State instead.

OQPC notes that this issue is unlikely to be of concern as this protection already exists for other persons under s192B of the ES Act.

Response:

Section 192B continues the civil liability protection previously afforded to the position of Electrical Safety Commissioner under previous section 205 which was omitted in 2014.

Given the proposed immunity is limited to acts or omissions that are done in good faith and in the execution or purported execution of powers and functions under the Act, the proposed sections are appropriate and justified. Other recent legislative amendments have included similar provisions conferring immunity where an officer is acting within the scope of his or her legislative authority and in good faith, e.g. *Public Safety Business Agency Bill 2014*.

Injury or illness prescribed under a regulation

Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the institution of Parliament depends on whether a bill authorises the amendment of an Act only by another Act. Clause 16 provides that the scope of what constitutes a ‘serious injury or illness’ can be further extended in the regulations. OQPC believes this may be regarded as an objectionable Henry VIII clause or delegation of power unless it is for a justifiable use such as to facilitate immediate executive action for health and safety reasons, or to facilitate the application of national schemes of legislation.

Response:

The Bill allows the definition of ‘serious injury or illness’ to be further extended by subordinate legislation due to the breadth of possible injuries or illnesses. This extension is not intended to amend the provisions in question - they would still be read in the same way and any extension of the definition is limited to the objects of the WHS Act. Complex national legislative schemes, such as the one for work health and safety, needs to be facilitated by strong regulation making powers.

Reinstate the power of a health and safety representative (HSR) to direct a worker to cease unsafe work

Clause 21 provides that a HSR has the ability to direct a worker to cease work if the representative has a reasonable concern that the work would expose the worker to a serious risk to their health and safety, emanating from an immediate or imminent exposure to a hazard. The provisions empowering a HSR to direct the cessation of work were removed under the *Work Health and Safety and Other Legislation Amendment Act 2014*. Clause 21 reinstates this power.

OQPC notes that this proposal may have an impact on the rights and liberty of individuals, e.g. employers, however, it is also noted that there are safeguards (e.g. resolution of issues under ss80, 81, 82 or 89 of the WHS Act) and the power may be justifiable for health and safety reasons.

Response:

The power of a trained HSR to direct a worker to cease unsafe work will be qualified in that a HSR must form a reasonable concern that performance of the work would expose the worker

to a serious risk to their health and safety emanating from the immediate or imminent exposure to a hazard.

The power to direct unsafe work to cease will also be governed by the obligation to consult with a PCBU prior to issuing a direction to cease work. For example, Part 5 Division 5 of the WHS Act requires parties to make a reasonable attempt to resolve an issue, and where this fails, enables the issue to be referred to the regulator. Where it is not reasonable to consult with a PCBU due to imminent safety risk, consultation with a PCBU must occur as soon possible after the direction is issued. A PCBU may also direct a worker to carry out suitable alternative work at the same or another workplace if that work is safe and appropriate for the worker to carry out until the worker can resume normal duties and does not affect the service period of the worker's employment.

Restoring this provision will also align with the cessation of work provisions contained in the model WHS laws and adopted by other participating jurisdictions.

Restore the right for work health and safety entry permit holders and health and safety representative assistants to gain immediate access to a workplace

Clause 23 gives a WHS entry permit holder the right to gain immediate access to a workplace to inquire into a suspected contravention of the Act and clause 17 removes the requirement for HSRs provide at least 24 hours' notice if a person assisting the HSR requires access to the workplace.

Before the amendments to the WHS Act under the *Work Health and Safety and Other Legislation Amendment Act 2014*, the WHS Act contained provisions that allowed:

- WHS entry permit holders to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act and provide notice as soon as is reasonably practicable afterwards; and
- a HSR to request the assistance of any person without providing notice.

The 2014 amendments introduced minimum 24 hours' notice requirements for both these access provisions. The intention of the Bill is to restore the original elements of the harmonised WHS Act.

The Office of Queensland Parliamentary Counsel (OQPC) notes that reinstatement of these provision is unlikely to be of concern where there are appropriate safeguards and the power relates to entry into business premises and is justifiable for health and safety reasons.

Response:

WHS entry permit rights may only be exercised in limited circumstances, i.e. in relation to suspected contraventions that relate to, or affect, the health and safety of a worker. There are also a number governance arrangements around exercising this power, in particular, entry powers can only be exercised during usual working hours, only in the area of the workplace where relevant workers work, and do not extend to entry of any part of a workplace that is used for residential purposes. The proposed amendment is also considered to be in the public interest with the main focus being to promote the health and safety of persons at the workplace.

The WHS Act clearly defines the functions and powers of a HSR to ensure they can perform this role effectively and reasonably. A person assisting an HSR is limited to providing assistance and they cannot exercise a HSR's functions and powers. If the person assisting the HSR also happens to be a WHS entry permit holder, the governance arrangements in the WHS Act that apply to WHS entry permit holder would be applicable to any action taken by that person as a WHS entry permit holder. Additionally, a person conducting a business or undertaking (PCBU) may refuse to grant a HSR assistant access to the workplace if there are reasonable grounds for doing so.

Consultation

There has been no formal consultation as the proposals in the WHS Bill were announced as part of the Government's pre-election commitments in *Improving safety for Queenslanders at work*.

Consistency with legislation of other jurisdictions

The WHS Act adopts the nationally agreed model WHS laws which provide a nationally consistent framework for the health and safety of workers and workplaces. The Bill will realign the majority of the Queensland WHS Act with the current model WHS laws.

The amendment at clause 16 to include an additional requirement for employers to notify the regulator when a worker is absent for more than four days due to a workplace injury will be different from other harmonised jurisdictions.

Notes on provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Bill.

Clause 2 states clause 16 and 26 commence six months after the date of assent and that Part 2 commences on a day to be fixed by proclamation.

Part 2 Amendment of Electrical Safety Act 2002

Clause 3 states that Part 2 amends the *Electrical Safety Act 2002*.

Clause 4 amends section 5 (How purpose of Act is to be achieved) to re-establish the role of a Commissioner for Electrical Safety and specific committees to promote community awareness about electrical safety (electrical safety education committee) and participate in developing requirements for the electrical safety of electrical equipment (electrical equipment committee).

Clause 5 reinstates Part 6 – Commissioner for electrical safety.

This part provides for the appointment of a Commissioner for Electrical Safety by the Governor in Council. The commissioner will resume the key role of managing the activities of the Electrical Safety Board and its committees and providing independent advice to the Minister on electrical safety matters. Part 6 reinserts the previous requirements and functions relating to the role including:

- requirements that for a person to be appointed as commissioner, the person must have an electrical trade or qualification and professional experience in electrical safety,
- outlining the employment provisions for the commissioner, which are to be approved by the Governor in Council,
- allowing for the commissioner's appointment to be ended, either by resignation or in accordance with contract provisions,
- providing for the appointment of a person to act as commissioner during any vacancy or period of absence. The acting commissioner is appointed for a term and on conditions decided by the Minister,
- outlining the commissioner's functions, including managing the activities of the Electrical Safety Board and its committees, chairing the Electrical Safety Board and the electrical licensing committee, and providing independent advice to the Minister on electrical safety matters, and
- providing that the commissioner has the powers necessary to carry out his or her functions.

Clause 6 amends section 77 to remove the position of chairperson, as a member of the Electrical Safety Board appointed by the Minister, and reinstates the commissioner as the chairperson of the Electrical Safety Board.

Clause 7 amends section 86 to allow for the reestablishment of the electrical safety education committee and the electrical equipment committee.

Clause 8 amends section 89 to reinstate the commissioner as the chairperson of the electrical licence committee.

Clause 9 reinstates Part 8, division 2A to re-establish the electrical safety education committee to provide advice and make recommendations to the Electrical Safety Board about the promotion of electrical safety in workplaces and the broader community. The reinstated Part also provides ways the electrical safety education committee may discharge its functions. The regulator must provide administrative and other support to enable the committee to perform its functions efficiently and effectively.

The reinstated committee will consist of the chairperson and at least six other members appointed by the Minister. In choosing members of the committee the Minister must consider the person's practical experience and competence in the promotion and marketing of electrical safety. The Minister must seek to appoint both men and women as members of the committee.

This clause also reinstates Part 8, division 2B to re-establish the electrical equipment committee to provide advice and make recommendations to the Electrical Safety Board about the safety of electrical equipment. The committee will give advice and make recommendations to the Electrical Safety Board about energy efficiency and the performance of electrical equipment. The reinstated Part also provides ways in which the electrical equipment committee may discharge its functions. The regulator must provide administrative and other support to enable the committee to perform its functions efficiently and effectively.

The reinstated committee will consist of a chairperson and at least six other members appointed by the Minister. In choosing committee members the Minister must consider a person's practical experience and competence in promoting and marketing electrical safety. The Minister must seek to appoint both men and women as members of the committee.

Clause 10 amends section 98 to provide that the reinstated commissioner is not precluded from being appointed as a member of an advisory committee.

Clause 11 amends section 99 to allow for the commissioner to be paid remuneration and allowances as an appointed member of an advisory committee.

Clause 12 amends section 184 to reflect the commissioner's reinstated role as chairperson of the licensing committee.

Clause 13 inserts a new Part 22 which provides transitional arrangements which clarify that current chairpersons of the Electrical Safety Board and Electrical Licensing Committee will hold office until an Electrical Safety Commissioner is appointed.

Clause 14:

- amends the definition of *board committee* to include the reinstated *safety education committee* and *equipment committee*, and
- reinserts the definitions of *equipment committee* and *safety education committee*.

Part 3 Amendment of Work Health and Safety 2011

Clause 15 states that Part 3 amends the *Work Health and Safety Act 2011*.

Clause 16 amends the definition of ‘serious injury or illness’ to include an additional requirement to notify the regulator of an injury or illness causing a person to be absent from the persons voluntary or paid employment for more than four days.

Clause 17 makes a consequential amendment to the note in section 68(2) to include the reference to health and safety representatives having the power to direct work to cease in certain circumstances.

The clause also omits subsections 68(3A) to (3C) so that health and safety representatives (HSRs) are no longer required to give at least 24 hours, but no more than 14 days, notice before the assistant’s proposed entry to the workplace.

Clause 18 omits sections 71(5A) so that a person conducting a business or undertaking is no longer permitted to refuse to grant access to a workplace to a person assisting a HSR if the HSR has not given the required notice.

Clause 19 makes a consequential amendment to subsection 82(3)(b) as a result of reinserting section 85 so that a HSR can direct a worker in their work group to cease work.

Clause 20 amends the definition of ‘cease work under this division’ under section 83 to include a reference to ‘cease work on a direction of a HSR’.

Clause 21 establishes a HSRs’ power to direct that unsafe work cease. In general, this power can only be used to direct workers in the HSR’s own work group, unless the special circumstances in section 69 of the WHS Act apply. A HSR’s deputy could also exercise this power in the circumstances set out in section 67 of the WHS Act.

New section 85(1) sets out the circumstances in which an HSR may direct that unsafe work cease. Similar to section 84 of the WHS Act, a HSR may issue the direction under this clause to a work group member if:

- they have a reasonable concern that carrying out the work would expose the work group member to a serious risk to their health or safety, and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

New section 85(2) requires HSRs to consult with the relevant person conducting a business or undertaking (PCBU) and attempt to resolve the work health or safety issue under Division 5 of the WHS Act before giving a direction under this clause. However, these steps are not necessary if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (new section 85(3)). In that case, the consultation must be carried out as soon as possible after the direction is given (new section 85(4)).

New section 85(5) requires a HSR to inform the PCBU of any direction to cease work that the HSR has given to workers.

New section 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision, that is if the HSR has:

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
- undertaken equivalent training in another jurisdiction.

Clause 22 is a consequential amendment to section 86 as a result of reinserting section 85 so that a HSR can direct a worker in their work group to cease work.

Clause 23 sets out the provisions regarding notice after entry by a WHS entry permit holder. New section 119(1) requires a WHS entry permit holder to provide notice, in accordance with the regulations, to the relevant PCBU and the person with management or control of the workplace as soon as is reasonably practicable after entering a workplace under section 117 of the WHS Act to inquire into a suspected contravention. The contents of the notice must comply with the regulations.

However, new section 119(2) provides that a WHS entry permit holder is not required to comply with the notice requirements in section 119(1), including to provide any or all of the information required by the regulations, if to do so:

- would defeat the purpose of the entry to the workplace, or
- would cause the WHS entry permit holder to be unreasonably delayed in their inquiry in an urgent case, i.e. in an emergency situation.

New section 119(3) provides that the notice requirements in section 119(1) do not apply to entry to a workplace under section 120 of the WHS Act to inspect or make copies of employee records or records or documents directly relevant to a suspected contravention that are not held by the relevant PCBU.

Clause 24 amends section 123 to reduce the maximum penalty from 200 penalty units to 100 penalty units.

Clause 25 omits section 143A so that it is no longer an offence for a WHS entry permit holders to enter a workplace without providing notice under new section 119 or section 120 or section 122 of the WHS Act.

Clause 26 inserts a new Part 16 division 4 which clarifies that the new section 36(d) does not apply to injuries or illnesses sustained before the commencement of section 36(d), even if the injury or illness causes a person to be absent for more than four days after the commencement of section 36(d).

Clause 27 makes consequential amendments to the reviewable decisions in Schedule 2A as a result of reinserting section 85 so that a HSR can direct a worker in their work group to cease work.