



AIHS

Australian
Institute of
Health & Safety

Think forward

Queensland Work Health and Safety Act Review 2022:

AIHS Queensland Branch Response

Acknowledgement of Indigenous Peoples

We acknowledge the Traditional Owners of Australia and their ongoing strength in practising the world's oldest living culture. We acknowledge the Traditional Owners of the lands and waters on which we live and work, and we acknowledge that sovereignties of these lands and waters were never ceded. We pay our respects to Traditional Owners' Elders past and present, and commit to supporting them and Indigenous emerging leaders to create more equitable, healthy, and safe workplaces for all Australians, and in particular for those most disadvantaged.

WHS Queensland
Office of Industrial Relations
Queensland Government

(By email: WHSActReview@oir.qld.gov.au)

Dear Committee Secretary and Steering Group Committee Members,

We are pleased to make this submission on behalf of the Australian Institute of Health and Safety (AIHS). Specifically, we represent institute members, including the AIHS Queensland Branch and the AIHS Policy Committee. The AIHS represents more than 800 work health and safety practitioners and professionals in Queensland. Some additional background on the AIHS is appended for your information.

We have reviewed the Terms of Reference provided by Workplace Health and Safety Queensland (WHSQ) to provide this submission. We appreciate the opportunity to provide comment on this important review.

As the peak body of the health and safety profession, the AIHS looks forward to seeing the outcomes of the review and responses. We are willing and able to contribute to any further consultation and drafting/review processes.

Yours sincerely,



Brett Jones
AIHS Queensland Branch Committee Chair

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1. Introduction and Context

AIHS is the peak body for WHS professionals in Australia. In Queensland alone, AIHS has approximately 847 members, of which 231 are certified under the AIHS Certification Scheme¹ (27% of QLD members are certified, and Queensland represent 21% of the total Certified Members nationally).

AIHS acknowledge the Terms of Reference for the review to:

1. Consider and report on any need for amendments to ensure:

a) provisions relating to health and safety representatives are effective and operating as intended;

b) workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters;

c) the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act; and

d) provisions relating to the issue and dispute resolution are effective and operating as intended.

2. Any other matters relating to the Act's overall effectiveness and performance in ensuring a balanced framework to secure health and safety of workers and workplaces and consider whether any legislative or administrative amendments are required.

Based on the Terms of Reference, AIHS respectfully provides this submission for consideration by the review panel.

¹ <https://www.aihs.org.au/certification>

2. Key Question Responses

Are the provisions relating to health and safety representatives (HSRs) effective and operating as intended (see Part 5 of the WHS Act, sections 50–74, 85, and 90–102)?

AIHS are of the opinion that the provisions relating to HSRs are operating as per the way that they are written, but perhaps not as intended when the provisions were written. With this in mind, Part 5 of the WHS Act should be reviewed to consider:

- Support structures for HSRs, particularly new HSRs, whereby they have access to a ‘suitably qualified WHS professional’ (note that this ‘definition’ is addressed later in this submission), and/or a pathway to becoming suitably qualified WHS professionals themselves (for example, under a certification program).
- Reconsideration of the training requirements, options and expectations for HSRs (s72). AIHS support the requirement for mandatory training for HSRs, however we believe the 5-day training may be a deterrent rather than an attraction for many workers considering becoming an HSR. As per s67, the scope of the training review should include options for deputy HSRs to complete training that are consistent with those of the HSR.
- Review the requirements for WHS Inspectors to notify and consult with HSRs. It is widely understood that this requirement is rarely met, and it should not be up to the Inspector to ensure that this requirement is met. It should also not be at the discretion of the employer to notify the HSR, other than where the matter for which the Inspector is visiting the workplace is directly related to a request from the HSR (e.g., following the Workplace Issue Resolution process; or the Provisional Improvement Notice (PIN) process).
- Regarding PINs, AIHS believes that this aspect should be reviewed for effectiveness through the review of previous interactions between Inspectors and HSRs, and whether the matters raised were: a) considered an effective use of the Inspectors’ time; b) the matters were ones whereby the potential issues/risks were of significant importance to justify the Inspector’s attention; or c) the matters were resolved in a timely manner. AIHS does not have access to qualitative or quantitative data on this aspect, however we assume that WHSQ have such access.

Are workers appropriately represented and assisted in workplace for the purposes of health and safety matters, including representation and assistance by WHS entry permit holders (see Part 7 of the WHS Act, sections 116–151)?

AIHS strongly advocates for workplaces to have access to a ‘suitably qualified WHS Professional’. This belief is consistent with the officer duties (specifically s27 (5) (c) for ‘appropriate resources’). This could be triggered based on the type of industry, the number of workers at a workplace, or a risk assessment, perhaps completed annually by the PCBU based on weighted criteria provided by WHSQ.

AIHS also believes that a ‘suitably qualified WHS Professional’ definition/standard should be made by WHSQ consistent with the Global Capability Framework² developed by the International Network of Safety and Health Practitioner Organisations (INSHPO). Further thought is also required around specialist WHS advice, for example: safety cases in the amusement device industry; occupational

² <https://www.inshpo.org/work>

hygienist advice for potential personal exposure matters; emerging hazard areas (including but not limited to: management of psychosocial hazards; renewable energy risk mitigations; WHS management systems for complex working arrangements etc.). The definition should be placed in Schedule 5 (Dictionary) of the WHS Act.

The AIHS believes that current provisions for consultation are not sufficiently emphasised where a HSR or Committee has not been appointed within a workplace. We believe that Division 2 provides a sufficient framework for PCBU's to implement consultative arrangements. However our members' experience indicates that the general provisions may not be well applied in organisations that do not have WHS Professionals to rely on. Consideration might be given to reviewing the 'Primary Duty of Care Provisions' to also include requirements to ensure adequate consultation with workers.

AIHS also advocates that the option to appoint a WHS Officer (Part 5A) is fundamentally inadequate and requires significant review. This belief is based on the inconsistent use of this provision, the absence of regulatory focus on the requirements under s103D and 103E (Assessment Reports) and the gross inadequacy of 'annual reports' using unspecified criteria. This provides inadequate guidance for PCBUs on appropriate governance and assurance activities.

WHS Entry Permit Holders do not constitute a significant component of the AIHS membership, and as such we do not have a formal position on this part of the key question. However we note that the often adversarial and investigative nature of a WHS Entry Permit Holder entering a workplace (particularly in the construction industry) is counterproductive to the intended outcome of assistance for HSRs and other workers at a workplace.

What is the effectiveness of the legislative framework for review and stay provisions with enforcement notices under the WHS Act (see Part 12 of the WHS Act, sections 223–229F)?

The current framework for review and stay provisions appear adequate where they are enforced and applied consistently and with procedural fairness.

AIHS does however have concerns over the reported increase in decision reviews, particularly those whereby the review request is due to the inappropriate application of the legislative provision for which a notice was issued by an Inspector (rather than an administrative error). This reduces confidence in the overall ecosystem for compliance, and often introduces unnecessary requirements for the engagement of external legal support by employers.

AIHS members have reported issues with respect to:

- Notices issued to Principal Contractors, rather than the PCBU responsible for control of the work (and the hazard).
- Notices issued for menial matters under general provisions (s19).
- Multiple notices issued for the same issue (e.g. one notice per electrical extension lead not tagged).
- Notices issued for matters in which the WHS Inspector is unqualified (e.g. airborne contaminants).

Are the provisions relating to issue and dispute resolution are effective and operating as intended (see sections 80–82 and 102A–102G of the WHS Act)?

AIHS believe that the provisions related to issue and dispute resolution are generally operating as intended. Generally the default procedure in the WHS Regulations (Part 2.2) provides adequate guidance on the process that links to the execution of these provisions under the Act.

AIHS also notes that the Australian Government Office of the Federal Safety Commissioner (OFSC)³ have a specific criterion for Issue Resolution (Criteria FP3.2)⁴, reinforcing the importance of this provision within the Act.

3. Other Matters

AIHS has considered other matters related to the general key question (2) provided under the Terms of Reference.

Part 2

Duties (Division 3)

All of the duties under Part 2 should be critically reviewed as part of this review, however AIHS specifically believes that the ‘Duties related to duties of persons conducting businesses or undertakings that design plant, substances or structures’ (s22) could be strengthened (and more importantly, clarified) to ensure that:

- Safe design risk assessments are routinely completed for structures, consistently with the Safe Design of Structures COP 2021, including requirements for consideration and consultation with operators, maintainers, and constructors.
- Information and assessments, consistent with the hierarchy of controls, are applied to substances (e.g. building materials, chemicals etc.).
- Enforcement of these provisions is conducted by WHS Inspectors, and where applicable, during prosecutions.

Consideration might also be given to duties being include for Governments and/or policy designers to be required to consider potential health and safety impacts in complying with and/implementing those policies. This would raise awareness of the potential health and safety impacts from policies that lead to significant responses from industry. For example, the ‘Pink Batts’ scheme in 2007 and 2008 and the associated deaths of several workers. The renewable energy boom is another example.

The AIHS welcomes the opportunity to have greater input into regulatory impact assessment processes that consider these downstream impacts, such as whether smaller businesses have access to suitably quality advice in relation to WHS risks.

³ <https://www.fsc.gov.au/>

⁴ <https://www.fsc.gov.au/useful-documents-downloads?s=FSC+Audit+Criteria#s>

Industrial Manslaughter (Division 5; Part 2A)

The overarching policy of the AIHS with respect to industrial manslaughter (IM) is that it should be uniform across Australia. In particular, if it is to be included within WHS/OHS legislation, it should be harmonised to be consistent with jurisdictional undertakings in the 2008 COAG "Inter Governmental Agreement for Regulatory and Operational Reform in Occupational Health & Safety". AIHS believe that there is a need for:

- **Consistency across jurisdictions:** IM should be introduced consistently around the country with the same scope, application, legal tests, available defences, and maximum penalties; and
- **Consistency and alignment with the balance of the OHS legislative framework:** the AIHS does not support higher penalties in the context of lower standards of proof; and
- **Consistency with the general proposition that the law should apply to people equally:** so that the same rights and powers exist in relation to the investigation and prosecution of IM offences that would apply in the context of manslaughter offences under general criminal law.

The helpful October 2018 report by the Senate Education and Employment References Committee "They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia" includes many recommendations worthy of consideration and implementation including the necessary resourcing of WHS regulators. Recommendation 13 is that *"Safe Work Australia work with Commonwealth, State and Territory governments to: introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process."*⁵

While we are strongly of the view that IM should be harmonised and uniform across Australia, we also make the following specific comments:

- **Duty holders need to have a clear understanding of the scope and extent of the offence** that account for circumstances of accident, involuntariness, reasonable excuse or acts independent of the will of a defendant and do not afford other defences which would otherwise be available for other criminal offences.
- **We would like to see guidance being developed and provided for courts** in imposing penalties and sentences across all offence categories as there is currently a lack of consistency in sentences imposed across jurisdictions nationally.

Part 3

AIHS notes that the definition for notifiable incidents (s35) does not strictly have adequate guidance for PCBU's around 'serious illness', with a focus on 'serious injury'. With the development and awareness surrounding occupational illnesses from personal exposure to substances (e.g. dust), physical illness hazards (e.g. noise, vibration); and psychosocial illness there is an opportunity for this definition to be expanded to accommodate these matters.

⁵ On this point, we note that Federal ALP policy is to "work with state and territory governments to implement a harmonised industrial manslaughter offence".

AIHS however does not believe that exposure to 'dangerous dust' (or similar personal exposure hazards) should be included in the definition of a dangerous event. This is an important differentiation from the belief that a serious illness should be notifiable as there are no clearly defined parameters for an 'uncontrolled exposure'. Detailed consultation with accredited occupational hygienists should be sought before engaging in any discussion regarding inclusion of these types of exposures as a 'dangerous event'.

Part 11

AIHS supports provisions for restorative justice regimes, including enforceable undertakings.

Appendix 1: About the AIHS

The Australian Institute of Health and Safety (AIHS) is the national association for people who work in generalist health and safety roles (practitioners and professionals), and for leaders in health and safety more generally⁶.

On 1 July 2019 our name changed from the Safety Institute of Australia to emphasise the importance of occupational health as well as safety. For more than 70 years we have worked towards our vision of safe and healthy people in productive workplaces and communities. The AIHS is constituted as a not-for-profit company under Corporations Law. Our Patron is the Governor-General of Australia.

The AIHS is mainly funded by member contributions and has a Chief Executive and small paid secretariat based in Melbourne. Most of our work is undertaken by volunteers through State and Territory Branch Committees. About 5 per cent of the membership are Fellows; the College of Fellows are thought leaders within the Institute who seek to ensure policy positions are based on evidence.

The AIHS strongly supports collaboration, including with our long-standing strategic partners. We share a common commitment with tripartite stakeholders (e.g. government, employers and workers) to provide the best possible health and safety policy and practice advice for the benefit of the wider community. However, our own voice as a profession and association of health and safety experts is often distinct from those of unions, employers, and government. Our focus is on the science and practice of health and safety based on best available evidence, in order to create safer and healthier workplaces. As a result, it is not uncommon for the Institute to present a view on an issue which unions, employer groups, or even regulators, may not agree with.

Legislative and WHS policy framework

As a Commonwealth, we are faced with the challenge of varying legislation, and more significantly, varying *application* of that legislation amongst different state and territory jurisdictions. This presents a range of challenges, especially for businesses and workers that operate on a national scale across jurisdictional boundaries. An impact of this is that scarce internal funding and focus can be diverted to managing varying compliance regimes rather than controlling critical hazards and managing risk.

The Australian Work Health and Safety Strategy 2012-2022 as amended in 2018⁷ has strong support by the AIHS and other stakeholders across the nation. The Strategy is managed by Safe Work Australia (SWA) through its CEO and Board utilising a tripartite committee framework comprising jurisdictions (governments/regulators), employers and unions. SWA's website provides background on the model WHS Act and Regulations and model Codes and guidance material⁸. SWA operates with regard to a July 2008 Intergovernmental Agreement (IGA) signed by all jurisdictions⁹ that undertook to harmonise OHS legislation.

⁶ See <https://www.aihs.org.au/about>

⁷ <https://www.safeworkaustralia.gov.au/about-us/australian-work-health-and-safety-strategy-2012-2022>

⁸ See <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>

⁹ See <http://www.coag.gov.au/content/intergovernmental-agreement-regulatory-and-operational-reform-occupational-health-and-safety>

The OHS Body of Knowledge

The *Australian OHS Body of Knowledge*¹⁰ (BoK) represents the best repository of its kind in the world on the practice, science and psychology of workplace health and safety and possibly Australia's greatest single health and safety asset, based as it is in the world's best evidence and research into health and safety practice. The BoK is used as an underpinning knowledge base used by universities providing OHS studies, and accredited courses. The BoK is used internationally. The *Steward* of the BoK (protector of the IP) is the AIHS, *which maintains the BoK as a public good* and provides the BoK open-source and free of charge.

The profession and its capability to provide high quality advice to prevent deaths and injuries

While oil and gas, mining, explosives and other high-risk work like electricity have their own important qualification and competency criteria and assessment, two distinct levels of education form the key entry points to work in the generalist health and safety profession who work alongside such specialists:

- **Practitioner level work:** is at the operations level implementing health and safety systems, and requires VET training. Commonly, people at these levels hold a minimum of Cert IV or Diploma in Workplace Health and Safety. At the practitioner/operational level, training standards have dropped significantly since the de-regulation of the VET system and are a serious concern. Employers can no longer trust the level of knowledge of recent Cert IV and Diploma graduates. The implications of this are very serious, especially in high-risk industries, where health and safety advisors' actions can directly affect the lives and wellbeing of the workforce. The Institute sees this is a critically important issue, and recently successfully advocated for a priority review of VET health and safety course content. Unfortunately, this view was not shared by either union or employer groups involved in the review, who argued that they did not wish to make the courses harder for their members and users of the training to undertake.
- **Professional level work:** is more applicable to management (and board) levels in designing health and safety systems within the broader organisational context. Commonly, people in these roles have bachelor's degrees or post graduate qualifications in health and safety. At the professional level, the process for continuous improvements in the quality of education is well structured and strongly underway. *The Australian OHS Body of Knowledge* underpins the work of the Australian OHS education accreditation board (AOHSEAB)¹¹, constituted under the AIHS, which now accredits all but one of Australia's higher education courses in OHS, in a program which is focused on continuous improvement and development based on current knowledge and emerging research.

¹⁰ [The OHS Body of Knowledge](#)

¹¹ [Australian OHS Education Accreditation Board](#)