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Mr Peter Cain MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
Via email: scrutiny@parliament.act.gov.au

Dear Mr Cain

I am writing in response to comments of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) in *Scrutiny Report 18,* released on 26 July 2022, in relation to the Workplace Legislation Amendment Bill 2022 (the Bill).

The Bill was introduced on 8 June 2022 and makes several amendments to legislation within my portfolio, namely the *Long Service Leave (Portable Schemes) Act 2009* (LSL Act), the *Workers Compensation Act 1951* (WC Act), the *Work Health and Safety Act 2011* (WHS Act), the *Work Health and Safety Regulation 2011* (WHS Regulation).

In relation to the matters the Standing Committee has considered and requested further information in *Scrutiny Report 18*, I provide the following.

Sexual assault incident notification – right to privacy and reputation

The Standing Committee has drawn attention to the right to privacy and reputation in the context of the new work health and safety sexual assault incident notification requirements in the Bill. In particular, the concerns appear to relate to the protection of the identify of any person involved in the incident.

The proposed changes to the incident notification provisions to include sexual assault recognises workplace sexual assault as a serious work incident. Relevant to the Committee's concerns, I assure the Committee that the Bill has been drafted to give paramount consideration to the privacy of individuals involved in a sexual assault incident.

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This is expressly achieved in the context of the requirement to notify a sexual assault incident by:

a.) stating that a PCBU **must not give information disclosing the identity** of any person involved in a sexual assault incident (clause 23 of the Bill which inserts new section 38(9)(b)) – this provision is specifically intended to ensure the protection of a person's right to privacy and reputation;

b.) further, the information that a PCBU need only give sets the **minimum level of information required** when reporting these incidents to the regulator (clause 23 of the Bill which inserts new section 38(9)(a)) – while this may permit the disclosure of additional information, it cannot be read in isolation from the provision described above so as to allow the disclosure of personal information.

The above protections are further supported in preventing the disclosure of personal information about a person involved in a sexual assault incident by privacy legislation and section 271 of the WHS Act. Importantly, the identity of persons involved would not be necessary in administering and enforcing the WHS Act and therefore maintained under section 271 and the new section 271A in clause 44 of the Bill. In administering and enforcing the WHS Act, the powers and functions of the regulator would be to determine whether there has been a WHS breach around the systems of work at the workplace and not to investigate the incident of sexual assault itself as this is the role of the police under criminal laws.

It is important to note that a person involved in a sexual assault incident may choose to disclose their identity at any point in time either to the PCBU or to the regulator. This is not prevented by the Bill, however, the Bill would restrict the person's identity being provided by the PCBU to the regulator when the incident is notified. This ensures that a PCBU cannot lawfully demand the person's identity when collecting information for the purposes of notification where a person chooses not to disclose it.

In addition, the identity of a person is not required in order to decide whether an incident meets the threshold for notification as all that is required is an incident, or suspected incident of sexual assault. Relevantly, the PCBU does not need to 'investigate' to establish that there has been a criminal offence of sexual assault before notifying the regulator.

Given this, it is clear that the Bill expressly contemplates the protection of personal information that may identify a person involved in a sexual assault incident and in doing so, promotes the right to privacy such that any disclosure of the identity/personal information of a person involved would be limited to circumstances where the person chooses to disclose that information outside of the PCBUs notification of the incident to the regulator.

I note that paragraph 1.19 of *Scrutiny Report 18* refers to section 238(7) of the WHS Act. It is assumed that the Standing Committee is referring to section 38(7) of the WHS Act, which requires the PCBU to keep a record of each notifiable incident that is given to the regulator for at least five years with penalties applicable for non-compliance.

In this regard, it is useful to refer to the guidance material issued by Safe Work Australia (SWA) such that 'records' may include a record of the PCBU having made the notification (eg. confirmation from the regulator) and any direction or authorisations given by an inspector. Section 38(7) of the WHS Act would operate together with the new sexual assault incident notification provisions and consequently, information collected or held by the PCBU should reasonably be considered to exclude any identifying information based on the above. It is also useful to note that the regulator is required to comply with the confidentiality of information requirements under section 271 of the WHS Act.

In any case, privacy obligations under the *Privacy Act 1988* (Cwlth) and the *Information Privacy Act 2014* would apply in the instance that personal information is collected in connection with a sexual assault incident at work. This may also include health record legislation where applicable. The Standing Committee has expressed a concern that these protections are limited in their application to many businesses and undertakings who will be subject to sexual assault incident notifications under the Bill. It is unclear what other protections the Standing Committee has in mind which could be put in place to protect the identify of any person involved in a sexual assault incident, further than the protections contained within the Bill.

It is also unclear how these protections are limited in their application because these Acts apply to many organisations. For example, under the *Privacy Act 1988* (Cwlth) and the *Health Records (Privacy and Access) Act 1997*, an organisation means an individual, body corporate, partnership and any other unincorporated association or a trust. The *Information Privacy Act 2014* applies to a number of ACT public sector agencies.

It is useful to note that the requirements under the *Privacy Act 1988* (Cwlth), the *Information Privacy Act 2014* and the *Health Records (Privacy and Access) Act 1997* already apply to organisations where workplace sexual assaults are currently reported.

I also note the Standing Committee has drawn attention to clause 50 of the Bill that inserts a new provision to include evidence of amusement device operator training and instruction in the logbooks required for amusement devices.

As set out in the Explanatory Statement, this provision adopts changes to the nationally agreed model WHS laws that implement recommendation 28 of the 2018 independent review of the model WHS laws by Ms Marie Boland (the Boland Review). Relevantly, the *Work Health and Safety Regulation 2011* (WHS Regulation) requires that amusement devices are ***only*** *operated by persons provided with instruction and training on its proper operation* under section 238. The operation of amusement devices has been identified as an area where there is significantly high risk of injury. There have also been a number of high profile and serious incidents involving amusement devices, highlighting the importance of safety when operating these devices and the significant risks associated with their operation.

The intent of this change, which mirrors the model WHS law changes, is to ensure that relevant information is contained in the logbooks to properly assess the safety of amusements devices and their operation. This is particularly pertinent with the movement of such devices within and across jurisdictions.

This allows third parties with duties under the WHS legislation to appropriately meet their obligations by properly assessing whether a ride is safe, and the operator is competent to operate it. The name and qualification of a person that provides training to an operator is fundamental information required for assessing the competence of an amusement device operator. Further, it allows the work safety regulator to effectively undertake their compliance and enforcement activities in relation to the safety of amusement devices and their operation.

This information requirement also aligns with existing practice for what is included in log book records, refer the SWA guidance for amusement devices. Given the importance of ensuring safety in the use and operation of amusement devices any potential to engage the right to privacy and reputation by the changes in the Bill that will require the name and qualification of trainers under the WHS Regulation is considered to be proportionate and justified.

Strict liability offences – rights in criminal proceedings

The Standing Committee has expressed concerns about the explanatory statement only directly addressing the reasonableness of strict liability in the case of sexual assault incident notification and does not address the two other strict liability offences contained in the *Work Health and Safety Act 2011* amendments in the Bill.

I note that the offence in relation to sexual assault incident notification is the only new offence that is not part of the nationally agreed changes to the model work health and safety template laws included in the Bill. Hence, its close attention in addressing any potential to engage the right to criminal proceedings under section 22 of the HRA.

The other two offences in the Bill, as noted by the Standing Committee, relate to entering into contracts or arrangements of insurance to cover penalties and fines for work health and safety (WHS) breaches and the making of amusement device log books available to person(s) that take control of the device.

Relevantly, both these provisions implement recommendations arising out of the Boland Review and have subsequently resulted in nationally agreed changes to the model WHS template laws. Neither of these processes recommended that the two offences should 'expressly' remove strict liability as is required under section 6A of the WHS Regulation when adopted into local legislation.

The application of strict liability is considered reasonable for both these offences. As indicated in the explanatory statement, strict liability offences arise in the regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. Relevantly, people to whom the WHS Act applies are expected to know and be aware of the duties and obligations. In this way strict liability is reasonable and justified in deterring non-compliance and protecting the health and safety of workers.

In relation to the offence provisions in the Bill for persons entering into contracts of insurance that cover penalties and fines for work health and safety (WHS) breaches. The imposition of penalties is to deter non-compliance. The ability to obtain insurance coverage is contrary to the purpose of WHS penalties and impedes the effectiveness of the law. This new offence further ensures the emphasis and importance of compliance with WHS duties as agreed public standards and expectations.

Strict liability is applied to the physical elements only of the new offences, and is applied relating to matters of fact, that is, questions to whether the defendant did in fact enter into a contract that purportedly covered monetary penalties imposed by the WHS Act for breach of duties or take benefit from such an arrangement. Strict liability for the physical elements of the offence does not remove the defendant's defence of reasonable excuse for entering into such an arrangement and is reasonable to apply to elements of known duties that are not open to subjective interpretation or intent.

In relation to the offence in the Bill where a person does not make the log book and maintenance records available to a person to whom control of an amusement device is relinquished, I draw the Committee's attention to section 237(5) of the WHS Regulation which already applies a strict liability offence generally to registrable plant, which would include amusement devices. In this way the 'new' offence in clause 53 of the Bill is not in fact a new offence but simply clarifies by express mention within the amusement device provisions what was otherwise already applied generally. Strict liability provisions for such offences support and enhance the importance of recording and maintaining details that are pertinent to the safety of the device.

While it is noted that strict liability has the potential to engage the right to the presumption of innocence, the strict liability offences in the Bill appropriately and proportionately give recognition of the offence elements that are known or should have been known by the PCBU. This allows for the effective operation and enforcement of compliance with WHS laws to not be circumvented by the ignorance of a duty by the PCBU.

This further explanation on the use of strict liability offences within the Bill is provided to the Standing Committee for information. I do not see a need to update the explanatory statement with this material, as this response will be publicly available on the Legislation Register and can be read alongside the Explanatory Statement.

Use of negligence as a fault element – rights in criminal proceedings to the presumption of innocence
It is noted that the Standing Committee is concerned that the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA may be indirectly limited or the rights and liberties of the accused otherwise affected, in relation to the amendments to section 31 of the WHS Act. The Standing Committee has requested further information on why the introduction of a negligence standard is justified and to amend the explanatory statement to include this justification.

The WHS Act provides three categories of offence, in addition to the highest level offence of industrial manslaughter, for breach of WHS duties. After industrial manslaughter, category one offences relate to the most serious cases of non-compliance, involving a risk of death or serious injury or illness. I would emphasise that this type of risk in the workplace is not considered to be minimal and conduct in breach of the WHS duty that exposes a person to a risk of death or serious injury or illness at work is never considered to be minimal.

With the exception of industrial manslaughter which applies to the type of harm that occurs, the tiered category of offences applied under the WHS framework are aligned to the failure to comply with a WHS duty, with the scale of penalties reflective of the culpability of the person, including a PCBU.

This approach is specific to the WHS framework to ensure that the highest penalties are applicable to the most egregious of breaches, ie breaches that involve recklessness on the current provisions and would be expanded to include negligence under the Bill.

Convictions of category one offences are reliant on the successful prosecution of all elements of the offence, including on the current provisions proving that the person was reckless as to the risk to the person, of death or serious injury or illness, and bears the burden of proving that the conduct was engaged in without reasonable excuse.

The amendments to introduce the fault element of negligence as an alternative to recklessness do not remove the prosecution's burden of proving the offence was engaged in without reasonable excuse. Recklessness refers to the state of mind and intention of the person to engage in a course of action while consciously disregarding the risks that are known to the defendant. Alternatively, negligence allows the Court to consider whether the defendant should have known the risk engaged by the conduct or course of action, and, without reasonable excuse or intention, continued to engage in the conduct that realised the risk.

Both fault elements are applied in the context of serious risk to the life, health and safety of workers and others at a workplace from the failure to comply with a WHS duty. PCBUs, as duty holders under the WHS Act, must ensure, so far as is reasonably practicable, the health and safety of workers while undertaking work. In this way, the WHS Act imposes positive duties on PCBUs that are required to be proactively undertaken which in turn allows the defence which is recognised by the WHS Act as to what is reasonably practicable.

An act, or omission, that breaches this duty of care that is an act of recklessness or negligence is regarded most seriously. It is noted that the test for negligence is:

(a) ***such a great falling short of the standard of care*** *[emphasis added] that a reasonable person would exercise in the circumstances; and*
(b) *such a high risk that the physical element exists or will exist.*

In the context of negligence as the fault element it is noted that the penalties for a category one offence are maximum penalties.

As outlined in the explanatory statement, this expansion was implemented as part of *recommendation 23a* of the Boland Review under recent changes to the model WHS Act. Relevantly, its adoption in the ACT is consistent with established local definitions of negligence that are considered to align with the Boland Review's recommendation for the inclusion of 'gross negligence' for category one offences. In the ACT context, a review of the list of prosecutions published on the work safety regulator's website is consistent with the observations made in the Boland Review that across Australia there have been very few successful category one prosecutions under the existing test of recklessness.

In adopting the recent nationally agreed changes to the model WHS laws that introduce negligence as an alternative, it is noted that this was in fact the position in the Territory prior to the adoption of the model laws, which applied a negligence test to exposure to substantial risk of serious harm.

In adopting the recent changes, the ACT will maintain alignment with the national template laws and community expectations following serious WHS breaches.

Relevantly, and for the Committee's benefit, introducing a test of negligence does not operate to reverse the onus of proof for these offences.

This further justification on the amendment to the negligence standard within the Bill is provided to the Standing Committee for information. I do not see a need to update the explanatory statement with this material, as this response will be publicly available on the Legislation Register and can be read alongside the Explanatory Statement.

Outline of provisions within the Explanatory Statement

The explanatory statement accompanying the Bill has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and will not be endorsed by the Legislative Assembly.

Relevantly, the detail provided in the outline section is considered to provide sufficient explanation about the changes. The explanatory statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision.

As a result, I do not see a need to update the explanatory statement as proposed in paragraph 1.36 of Scrutiny Report 18 and consider the Bill, together with the detail provided in the outline section of the explanatory statement as sufficient in addressing the intent of the changes.

I thank the Standing Committee for your consideration of the Bill.

Yours sincerely

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