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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

WORKPLACE LEGISLATION AMENDMENT BILL 2022

REVISED EXPLANATORY STATEMENT

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WORKPLACE LEGISLATION AMENDMENT BILL 2022

The Workplace Legislation Amendment Bill 2022 (the Bill) is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

BACKGROUND

The ACT Labor and ACT Greens Parliamentary and Governing Agreement (PAGA) commits to reviewing and amending work health and safety (WHS) laws to keep Canberrans safe.

The ACT, along with other states and territories and social partners (including industry and trade unions) are participating members of Safe Work Australia. There is ongoing work progressing nationally through Safe Work Australia to ensure that there are consistent and contemporary WHS laws nationally and includes responding to the recommendations arising from the 2018 review of the model WHS laws (otherwise referred to as the Boland Review).

To meet the commitments under the PAGA and in line with the Government's ongoing commitment to strengthening workplace safety laws, the Workplace Legislation Amendment Bill 2022 (the Bill) makes amendments to three Acts and a regulation within the responsibility of the Minister for Industrial Relations and Workplace Safety. Specifically, the Bill amends the:

- *Long Service Leave (Portable Schemes) Act 2009*;
- *Workers Compensation Act 1951*;
- *Work Health and Safety Act 2011*; and
- *Work Health and Safety Regulation 2011*.

OVERVIEW OF THE BILL

The purpose of the amendments in the Bill are set out separately for each Act amended by the Bill.

Long Service Leave (Portable Schemes) Act 2009

The *Long Service Leave (Portable Schemes) Act 2009* (PLSL) establishes arrangements for worker entitlements to long service leave within covered industries. This occurs by setting out specific arrangements for each specified industry in accompanying schedules.

The Bill makes technical and minor amendments to the *Long Service Leave (Portable Schemes) Act 2009* to correct errors and inconsistent references identified in Schedule 2 (contract cleaning industry), Schedule 3 (community sector industry) and Schedule 4 (security industry).

Workers Compensation Act 1951

Workers' compensation in the ACT is a statutory insurance scheme regulated under the *Workers Compensation Act 1951* (WC Act) and supporting *Workers Compensation Regulation 2002* (WC Regulation).

The amendments to the *Workers Compensation Act 1951* (WC Act) improve worker protections related to private sector workers' compensation. These relate to:

- a. allowing the taking/accrual of leave while an injured worker is receiving weekly payments under a workers' compensation claim;
- b. the financial penalty levels and offence penalties applied to licensees and others for non-compliance; and
- c. a technical amendment in relation to the procedure for ceasing weekly payments to an injured worker in instances of non-compliance.

Section 130 of the *Fair Work Act 2009* (Cth) (FW Act) operates to restrict the accrual and taking of leave unless permitted by a Commonwealth, state or territory workers' compensation law. The Bill amends section 46 of the WC Act to allow the ACT to 'permit' under the WC Act the taking/accrual of leave as contemplated by section 130(2) of the FW Act.

While section 46 of the WC Act was drafted prior to the FW Act (section 130) and would suggest that Part 4.3 (weekly compensation) is not intended to affect an entitlement that the worker has to a benefit or payment, this applies except where a law in force in the ACT otherwise applies. On this construction it is not considered to 'permit' the taking or accrual of leave as contemplated by section 130 of the FW Act, being a law in force in the ACT. This view is supported by the Fair Work Ombudsman and reflected in the advice provided on their [website](#).

The Bill makes amendments to expressly permit the taking and accrual of annual and long service leave and also retains the existing clarification under section 46 of the WC Act that weekly payments are not intended to affect any other entitlement of a worker to a benefit or payment (that is not leave) under any other law in force in the ACT.

Under the WC Regulation the existing penalties for insurers are not considered to be proportionate or an effective deterrent to non-compliance by licensees and are not consistent with other jurisdictions. The regulation-making power in section 223 of the WC Act caps:

- offences to 10 penalty units (\$1,600 for individuals and \$8,100 for corporations); and
- financial penalties on licensees and approved rehabilitation providers for non-compliance at \$1,000.

For example, this provision operates to limit the penalties that apply under the WC Regulation for insurers and self-insurers who contravene the WC Act or do not comply with the conditions of their licences to \$1,000.

The Bill amends the caps in section 223 of the WC Act. The caps will be increased in the WC Regulation as follows:

- up to 20 penalty units for offences; and
- up to \$17,000 for financial penalties on licensees and approved rehabilitation providers for non-compliance.

These amendments will allow the WC Regulation to more appropriately deal with penalties and better align them with the level and severity of the offence. The change would better encourage compliance with the WC Act and WC Regulation.

This amendment would not have an immediate effect on penalty levels as these would be progressed by subsequent amendments to the WC Regulation.

The Bill also amends section 113 of the WC Act which provides that a written notice by an insurer proposing to cease weekly payments on certain grounds is to be provided to the Minister. The amendment to section 113 changes this notification to the regulator, WorkSafe ACT, rather than the Minister. This is considered to be more appropriately aligned with regulatory functions being performed by the regulator and aligns with current delegations operating for this function. The regulator under the WC Act is the regulator under the *Work Health and Safety Act 2011*.

Work Health and Safety Act 2011

The *Work Health and Safety Act 2011* (WHS Act) sets out the framework for securing the health and safety of workers and workplaces. The WHS Act adopts the nationally agreed model WHS laws in the Territory.

The Workplace Legislation Amendment Bill 2022 proposes amendments to the WHS Act and WHS Regulation relate to:

- a) the implementation of a number of Boland Review recommendations; and
- b) the notification of a sexual assault incident at the workplace to the work health and safety regulator under the incident notification provisions.

Implementation of Boland Review recommendations under the nationally agreed model WHS laws

The ACT's work health and safety (WHS) laws adopt the nationally agreed model WHS laws as a signatory under the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (2008).

In 2018, WHS Ministers requested Safe Work Australia review the model WHS laws, with a view to examine and report on the content and operation of the model WHS laws (this is known as the [Boland Review](#)). The final report was published in February 2019.

In particular, the review considered whether the model WHS laws are operating as intended, and whether any areas of the model WHS laws had resulted in unintended consequences. The Boland Review made a number of recommendations to amend the model WHS laws. The Review was the subject of a regulatory impact assessment process to ensure that WHS Ministers were conversant about the potential impacts of the recommendations to the model WHS laws.

In May 2021, WHS Ministers agreed on actions for all 34 recommendations of the Review, and tasked Safe Work Australia, the national policy body responsible for maintaining the model WHS laws, with implementation of the recommendations.

This Amendment Bill amends the WHS Act to implement nine recommendations from the 2018 Boland Review which examined the content and operation of the model WHS laws. The amendments to the WHS Act provide greater clarity for duty holders about work, health and safety obligations and include clarifying amendments to provide:

- a. health and safety representatives with improved support by persons who conduct a business or undertaking (PCBU) to attend required WHS training (*Boland Review Recommendation 10: HSR choice of training provider*);
- b. clarifying arrangements for the formation of workgroups (*Boland Review Recommendation 7b: Work group is negotiated with proposed workers*);
- c. strengthened cross-border information sharing arrangements, and regulator requests for the production of information to assist investigations (*Boland Review Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of*

their jurisdiction and Recommendation 19: Enable cross-border information sharing between regulators);

- d. the inclusion of a negligence fault element for category 1 offences, allowing for local jurisdictional terminology differences to be accommodated (*Boland Review Recommendation 23a: Enhance Category 1 offence*);
- e. alignment of the service and process provisions in relation to the production of information and documents (*Boland Review Recommendation 16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency and Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace*);
- f. for PCBU's to be prevented from entering into contracts of insurance to cover liabilities arising from financial penalties issued under the WHS Act for breach of duty (*Boland Review Recommendation 26: Prohibit insurance for WHS fines*); and
- g. improvements to the process and accountability for prosecutions under the WHS Act (*Boland Review Recommendation 24: Improve WHS regulator accountability for investigation progress*).

Changes to the incident notification provisions to include sexual assault in the workplace

Part 3 of the WHS Act sets out the requirements for notifiable incidents and supports the WHS regulator (WorkSafe ACT) in delivering their compliance and enforcement functions. The purpose of the notifiable incident provisions is to alert the WHS regulator to serious incidents that require timely investigation.

The prevalence of workplace sexual assault and harassment has been in the public discourse over recent years, noting the *Respect@Work: Sexual Harassment National Inquiry Report*, the *Independent Review into Commonwealth Parliamentary Workplaces*, March 2021 (Review), the Australian Government's response to the *Respect@Work* report, 'A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces' and the Australian Sex Discrimination Commissioner's *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*, November 2021.

Recommendation 20 of the Boland Review recommended that incident notification provisions be reviewed to provide for notification triggers for psychological injuries, and adjusted as required to capture incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.

The Government recognises the role that persons who conduct a business or undertaking (PCBU's) have in ensuring workplaces are safe for all workers, which includes the elimination of factors, risks and hazards that might contribute to sexual assault, particularly in terms of

workplace culture. In recognition of the important role that PCBUs have in creating a workplace culture that is healthy and safe, through this Bill, the Government is moving to expand the incident notification provisions to cover workplace sexual assault - noting that subsequent national policy work may in due course produce further expansions of the notification provisions, to include incidents such as sexual harassment and psychological injuries.

Workplace violence is a growing concern and has serious health and safety impacts for workplaces and workers. Instances of workplace violence, including sexual assault and harassment, may be an indication that a PCBU has failed in a duty to ensure the health and safety of a workplace, which includes the risks arising from psychosocial hazards (eg, gendered violence and sexual assault). By notifying the WHS regulator of incidents, appropriate assistance can be provided to a PCBU to assess the risks and implement controls to prevent further incidence of violence or aggression. The incident notification requirements are not intended to impede or interfere with police responses and investigations for the enforcement of the criminal law. The inclusion of sexual assault within the work health and safety framework allows the WHS regulator to address the holistic obligations of a PCBU in addition to providing the appropriate regulatory support to the individual or individuals suffering injury as a result of the incident.

Prior to this Bill, there was potential confusion about the inclusion of acts of workplace violence as a notifiable incident within the notification requirements for serious injury or illness. This was largely due to the inclusion of medical treatment as a threshold test for the injury, which did not appropriately capture the seriousness of sexual assault for both physical and psychological injuries and placed the reliance of the notification trigger on the individual seeking the treatment.

The Amendment Bill makes amendments to Part 3 of the WHS Act in relation to the requirements for notifiable incidents which requires these notifications to be reported to the regulator by the PCBU. This supports the WHS regulator in delivering their compliance and enforcement functions under the WHS Act. The purpose of the notifiable incident provisions is to alert the WHS regulator to serious incidents that require timely investigation using their powers under the WHS Act. This data and information will assist the regulator to understand emerging trends in incidents, injury and illnesses and to target PCBUs with education and compliance activities.

The Amendment Bill makes clear that the triggering factor for notifying the WHS regulator of a sexual assault incident is either an incident or a suspected incident that exposes a worker or any other person at the workplace to sexual assault and is not limited by the PCBUs witnessing of the incident or a conviction following the incident. The express inclusion of workplace sexual assault as a notifiable incident clarifies obligations for PCBUs to ensure incidents of sexual assault are reported to the WHS regulator - this recognises that sexual assault is an act of violence that may result in serious physical or psychological injury, irrespective of the immediacy of medical treatment. The inclusion of sexual assault also

recognises that the impacts of the act of violence may result in exposure risks to other workers or witnesses at the workplace who in turn may suffer injury from the exposure.

It is not the intent of the amendments to capture sexual harassment in the definition of sexual assault – the amendments in this Bill are confined to the notification of a workplace sexual assault incident. Having said this, in some instances, sexual harassment will be so serious that it becomes a notifiable incident in its own right (e.g. severe bullying or harassment that causes psychological hospital admission) under the existing categories of a notifiable incident in section 35 of the WHS Act.

The Bill amends section 35 of the WHS Act to include a sexual assault incident as a mandatory notifiable incident for the purposes of the WHS Act. The amendment introduces a new section 37A to deal with what would constitute a *sexual assault* incident for the purposes of the incident notification. Under this section, a sexual assault incident means an incident (including a suspected incident) in relation to a workplace that exposes a worker or any other person at the workplace to sexual assault. This relies on the ordinary meaning of sexual assault, (for example the Macquarie Dictionary definition¹ to interpret) instead of referencing the criminal offence of sexual assault under the *Crimes Act 1900*.

In doing so, it is recognised that the WHS Act is required to be as accessible as possible to all businesses, enterprises, and workers and it may be difficult for people to determine whether or not an incident falls within the parameters of the criminal offences. The ordinary meaning of sexual assault is considered to be more readily understood by PCBU's and would be more easily supported by guidance material issued by the regulator to further assist PCBU's understand their obligations and meet their duties in ensuring a safe workplace for all workers. This will also allow the WHS regulator to develop an appropriate system of notification that addresses the confidentiality and privacy of workers captured by the notification requirements.

The amendments made for the notification of sexual assault in the workplace take into consideration privacy and human rights concerns in the information to be reported when notifying the regulator. The Bill provides that a sexual assault incident notifiable by PCBU's need only include the occurrence of a sexual assault incident, the description of the workplace at which the incident occurred and the name and contact details of the PCBU at that workplace and whether or not the incident was reported to the police.

For the avoidance of doubt, the Bill specifies that the PCBU must not give information disclosing the identify of any person involved in the incident when notifying the regulator. This maintains the person's identity at the initial stage when the notification is sent from the PCBU to the regulator. The person that has been sexually assaulted may choose to disclose

¹ *Sexual assault means (1) sexual activity inflicted on a person without their consent; (2) (in some jurisdictions) a statutory crime replacing rape, divided into categories according to the degree of violence accompanying the sexual intercourse.*

their identity at any point in time. The regulator would not be interviewing persons that have been sexually assaulted about the specific details of the incident. The regulator could interview these persons, PCBUs and other staff in the organisation in relation to the reporting process, WHS organisational policy and to confirm the awareness of incident notification requirements within the workplace. Appropriate work health and safety documentation and work practices could be assessed by the regulator to determine whether PCBUs are meeting their duties under the WHS Act.

Under this framework, the regulator's role will be to monitor and analyse emerging trends in sexual assault incidents and to target PCBUs with education and compliance activities. This provides an appropriate level of oversight of PCBUs and ACT workplaces in an effort to prevent or reduce the incidents of sexual assault across workplaces and contribute to more effective work health and safety outcomes.

Notification obligations are triggered when a PCBU becomes aware of an instance of sexual assault in the workplace, or a suspected instance, and includes circumstances where a report is made directly or indirectly to the PCBU – such as where a report has been notified to police who then in turn inform the PCBU. It would not be necessary that there has been a conviction or court finding has been recorded, or that court proceedings are underway.

The duty to notify the regulator of a workplace sexual assault is not limited by conviction or proof – a suspicion is sufficient for the matter to be notified to the WHS Regulator and the duty is not impeded or limited by the PCBUs certainty or lack of certainty with respect to the report.

Consistent with existing arrangements for notifiable incidents, the Bill requires that reporting of a sexual assault incident should be made to the WHS regulator immediately after the PCBU becomes aware of the incident.

The Bill also amends section 39 of the WHS Act to exclude a sexual assault incident from the duty to preserve the site, as this is considered to be within the criminal jurisdiction for the police investigation. In many instances, it would be impracticable and difficult for PCBUs to preserve the site after a sexual assault incident has been reported to them.

Penalties associated with PCBUs not complying with obligations to notify the regulator of notifiable incidents are outlined in section 38(1) of the WHS Act. As a result of the amendments in the Bill, if a PCBU does not comply with the requirements to notify the regulator of a sexual assault in a workplace, the current penalty is \$10,000 for individuals and \$50,000 for body corporate organisations.

While this change would increase the reporting obligations on employers under the WHS Act, the change is in line with the current policy direction of the Government, the objective of improving work safety protections for workers and is considered to be proportionate to the serious impacts of sexual assault in the workplace.

It is noted that any increase in regulatory burden from reporting sexual assault incidents should be minimal as it would already be considered a WHS risk that poses a serious hazard to workers' psychological health in the workplace. Where PCBUs are meeting their WHS obligations, mechanisms to assess, identify and manage WHS risks should already be implemented.

Work Health and Safety Regulation 2011

Section 276(1) of the WHS Act provides for the Executive to make regulations in relation to any matter relating to work health and safety. Under section 276(2), the WHS Regulation may make a provision in relation to matters set out in Schedule 3.

The WHS Regulation is subordinate law under the WHS Act. The WHS Regulation is notified on the Legislation Register and presented to the Legislative Assembly according to Part 7 of the *Legislation Act 2001*.

The WHS Regulation implements the model WHS Regulation in the Territory and forms part of a system of nationally harmonised WHS laws.

The Bill makes consequential amendments to the WHS Regulation to implement two recommendations from the Boland Review relating to:

- a. ensuring the details of statutory notices issued by the WHS Regulator and evidence of operator training and instruction are included in the device's log (*Boland Review Recommendation 28: Improved recording of amusement device infringements and operator training*); and
- b. amending section 15 of the model WHS Regulations to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated (*Boland Review Recommendation 31b: Compliance with Standards not mandatory unless specified*).

As the amendments to the WHS Regulation implement these two recommendations from the Boland Review, it is considered administratively efficient to include these changes as part of this Bill.

Consultation on the amendments

Consultation on the policy associated with the Bill occurred with the Work Health and Safety Council, approved insurers and self-insurers. Changes were made to the Bill following these consultations.

Consultation with directorates and WorkSafe ACT occurred during the development of the Bill.

Changes to the model WHS laws follow the usual consultative process through Safe Work Australia, including with jurisdictions and social partners (industry and trade unions).

Climate Change Vulnerability Assessment

There are no climate change implications associated with the Bill.

CONSISTENCY WITH HUMAN RIGHTS

This section provides an overview of the human rights which may be engaged by the Bill, together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act 2004* (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Rights under the HR Act may be limited if such limitations are reasonable and proportionate. Section 28(2) of the HR Act contains a framework that is used to determine the acceptable limitations that may be placed on human rights, specifically a number of relevant factors to be considered, including:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Rights Engaged

The Bill may be considered to engage with the following rights under the HR Act:

- section 12 (Privacy and reputation);
- section 27B (Rights to work and other work-related rights);
- section 8 (Right to equality and non-discrimination); and
- section 22 (Rights in criminal proceedings).

Rights Promoted

Section 12 (Privacy and reputation)

The amendment to introduce the mandatory notification of workplace sexual assault to the work health and safety regulator engages the right to privacy, given that the PCBU is required to make a notification to the regulator, and that notification may include private or personal information protected by the right to privacy. However, section 38(9)(a) (inserted by clause 23 of the Bill), limits the information that the PCBU is required to provide to the regulator, specifically:

- i. the name and contact details of the person conducting the business or undertaking;
- ii. a description of the workplace where the incident happened; and
- iii. whether or not the incident was reported to police.

The new section 38(9)(b) further clarifies that the PCBU must not give information disclosing the identity of any person involved in the incident when notifying the regulator.

By restricting the disclosure of personal or identifying information to the regulator, the Bill's potential limitation on the right to privacy is considered reasonable and justified. With this new incident notification requirement, the regulator will be able to monitor incidents of sexual assault across ACT workplaces as part of their broader work health and safety compliance and enforcement functions, and undertake timely investigation, where appropriate and required. Providing limited information to the regulator about workplace sexual assault incidents is likely to be proportionate to the legitimate purpose of protecting ACT workers through early incident notifications and allowing the regulator to gather intelligence of work health and safety systems of work and issues.

It is noted that PCBUs may amend their workplace incident notification systems to allow workers to report incidents of sexual assault in the workplace in addition to the existing notifiable incidents of:

- a) a death of a person;
- b) a serious injury or illness of a person; or
- c) a dangerous incident.

Some of these systems may be used to allow PCBUs or corporate areas to monitor and track work health and safety risks and implement appropriate controls to prevent or minimise the incidents from occurring into the future. With the introduction of workplace sexual assault as a notifiable incident, appropriate arrangements will need to be put in place by PCBUs to ensure that the right to privacy of the victim and the accused is maintained.

As a result, PCBUs and the regulator may also be required to comply with any applicable privacy obligations under the *Privacy Act 1988* (Cwlth) and the *Information Privacy Act 2014* in relation to the notification of the sexual assault in the workplace.

Section 27B (Rights to work and other work-related rights)

The right to work is set out at section 27B of the HR Act, where section 27B(1) particularly sets out that everyone has the right to work, including the right to choose their occupation or profession freely. Section 27B(2) provides that everyone has the right to the enjoyment of just and favourable conditions of work and section 27B(5) sets out that everyone is entitled to enjoy these rights without discrimination.

The Bill promotes workers' rights by addressing the under-reporting of sexual assaults in workplaces through a legislative obligation to report these incidents externally to the regulator. This provides for early sexual assault incident notifications to be sent which will allow the regulator to gather intelligence of work health and safety systems of work and issues that may require timely investigation using the regulator's powers under the WHS Act. The Government recognises the role that PCBUs have in ensuring workplaces are safe for all workers, which includes the elimination of factors, risks and hazards that might contribute to sexual assault, particularly in terms of workplace culture. In recognition of the important role that PCBUs have in creating a workplace culture that is healthy and safe, requiring PCBUs to report on workplace sexual assault incidents to the regulator further supports worker's rights to the enjoyment of just and favourable conditions of work.

Section 8 (Right to equality and non-discrimination)

The Bill positively engages with gender discrimination given that the majority of sexual assaults are aimed at women and attempts to address the prevalence of workplace sexual assault and harassment across workplaces which has been raised in the public discourse over recent years.

Rights Limited

Section 22 (Rights in criminal proceedings)

The two aspects of the right to the presumption of innocence in section 22 relevant to the Bill are:

- the risk that this Bill limits the right to presumption of innocence for a person accused of workplace sexual assault; and
- the strict liability offence where a PCBU fails to notify of a sexual assault.

Right to presumption of innocence for a person accused of workplace sexual assault

The right to the presumption of innocence has a potential to be engaged for a person who is accused of a sexual assault incident, within the meaning of this Bill. If the sexual assault incident is referred to the police and a criminal proceeding is underway, there is a question of whether the person who is accused of a sexual assault against another worker will be considered innocent until proved guilty through a criminal proceeding, where a sexual assault incident notification has been lodged against the accused.

The Bill is very unlikely to limit the right to presumption of innocence in criminal proceedings, because the Bill's framework is not intended to have any bearing on criminal proceedings or the presumption of innocence in those proceedings.

It is not the policy intent of the Bill that a person who commits or is suspected of committing a sexual assault incident should be considered guilty of a criminal sexual assault, if a sexual assault incident notification is lodged in relation to their conduct.

It is noted that some evidence in the workplace may be used as part of the criminal proceedings and any subsequent investigation by the regulator.

Strict liability offence where a PCBU fails to notify of a sexual assault

1. Nature of the right and the limitation (s28(a) and (c))

Offences of strict liability engage the right to be presumed innocent under section 22(1) of the HR Act, as they may reverse the onus of proof from the prosecution onto the defendant.

Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law. While the Government is taking positive steps through the Bill to protect the health and safety of workers and prevent workplace injuries, the Bill potentially engages and limits the right to the presumption of innocence through the

application of strict liability provisions in section 12A of the WHS Act which apply to elements of the offence provisions in Part 3.

Strict liability provisions generally engage and limit the right to be presumed innocent as they remove the need for prosecution to prove an accused person's fault (i.e. the mental element of intent or recklessness) in relation to an offence generally or for particular elements of an offence. As a result, this reverses the onus in criminal proceedings and requires an accused to prove a defence for those elements to which strict liability applies, such as a mistake of fact under the *Criminal Code 2002*.

Under section 38 of the WHS Act, PCBUs must ensure that the regulator is immediately notified after becoming aware that a notifiable incident in the workplace has occurred – breach of this duty is an offence under the WHS Act attracting a maximum penalty of \$10,000 for individuals and \$50,000 for body corporate organisations.

Strict liability offences are also applicable to the offences in the Bill in clauses 45 and 53.

In relation to clause 45, this clause inserts a new section responsive to recommendations arising out of the Boland Review that would make it an offence for a duty holder to enter into contracts or arrangements of insurance to cover penalties and fines for work health and safety breaches.

The offence set out in clause 53 of the Bill is not dealt with under human rights as the same conduct is currently subject to a strict liability offence under section 237(5) of the WHS Act.

Strict liability applies to each physical element of this offence, as per section 12A of the WHS Act (correspondingly, section 6A of the WHS Regulation) and will extend to sexual assault as a notifiable incident under the Bill. A strict liability offence for PCBUs not notifying the regulator of a sexual assault is considered appropriate. As with existing provisions, the offence of the duty relates to the notification provision - it is not applied to the incident or circumstances of the incident. Similarly, in relation to clause 45 the application of strict liability would apply to the question of fact as to whether a person conducting a business or undertaking did in fact enter into a contract that purportedly covered monetary penalties imposed under the WHS Act for breach of WHS duties or take benefit from such an arrangement.

2. Legitimate purpose (s28(b))

The legitimate purpose of the strict liability provision(s) is that they seek to protect the health and safety of workers and acts as a deterrent against PCBUs providing unsafe workplaces and work cultures. The WHS Act imposes health and safety duties on all PCBUs in the Territory, as well as duties to their officers and workers. All PCBUs are required to be aware of their health and safety duties under the WHS Act.

3. Rational connection between the limitation and the purpose (s28(d))

The offence elements applying strict liability have been considered during the development of the Bill. The strict liability offences arise in a 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. The rationale for its use in the context of the Bill is that people who owe work safety duties such as PCBUs, persons in control of aspects of work, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. In particular, where an accused can reasonably be expected, because of his or her professional involvement, to know the requirements of the law, the mental (or fault) element can justifiably be excluded. Accordingly, strict liability offences are applied so that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and others at the workplace.

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.

4. Proportionality (s28 (e))

Given the serious impacts that sexual assault incidents may have on workers, the application of strict liability is necessary and proportionate to ensure a culture of safe work practices. It is not considered that there are any less restrictive means reasonably available to achieve the purpose of protecting worker safety and deterring PCBUs from providing unsafe workplaces and encouraging proactive work health and safety compliance is far more difficult to achieve without the use of strict liability offences. Strict liability clearly identifies the essential elements that form part of the regulatory framework that encourage PCBUs to maintain a workplace that is free from harm or injury.

The application of strict liability is reasonable to protect the health and safety of workers. Strict liability is only applied to particular elements of the WHS Act. It ensures those who hold responsibility for a health or safety duty uphold that responsibility and cannot escape liability by claiming ignorance of the duty or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* remains available to any accused for any strict liability provisions. The requirement to which the offences apply are not burdensome or out of alignment with the WHS framework - they relate to ensuring the safety of workers as well as the broader ACT community.

The Bill places the least restrictive limitation on the right to presumption of innocence, as it only applies to the physical fault elements which upholds or maintains the defence of the accused.

Right to privacy (section 12 of the HR Act) – amusement device logbook information (clause 50 of the Bill)

1. Nature of the right and the limitation (s28(a) and (c))

Section 12 of the HR Act protects the right of individuals not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. It further provides to protect the right of individuals not to have their reputation unlawfully attacked.

Generally, an interference with privacy will not be unlawful where it is permitted by a law which is precise and appropriately circumscribed. Interferences with privacy will not be arbitrary, provided they are reasonable in the circumstances, just and proportionate to the end sought.

The amendments proposed in this Bill would amend the WHS Act requiring the logbook for an amusement device to include evidence of the amusement device operator's training and instruction, specifically including the name and qualifications of the operator trainer.

Relevantly, this amendment adopts nationally agreed changes to the model WHS laws that implement recommendation 28 of the 2018 independent review of the model WHS laws by Ms Marie Boland (Boland Review) to ensure that amusement devices are only operated by *persons provided with instruction and training on its proper operation* under section 238.

2. Legitimate purpose and rational connection between the limitation and purpose (s28(b) and (d))

The legitimate purpose of this amendment is responsive to the risk of severe injury associated with the use of amusement devices.

The WHS Act sets up a framework to ensure the health and safety of workers and others at a workplace. The operation of amusement devices has been identified as an area where there is significant risk of severe injury. There have also been a number of high profile and serious incidents involving amusement devices in recent years, 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 amusement 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.

3. Proportionality (s28 €)

The information requirement in the amendments aligns with existing practice for what is included in logbook 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.

Given the risk profile of amusement devices the amendment is considered to be proportionate and the least restrictive means of achieving the intent of ensuring amusement devices are only operated by *persons who are provided with instruction and training on their proper operation*.

Workplace Legislation Amendment Bill 2022

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause provides the name of the Act as the Workplace Legislation Amendment Bill 2022.

Clause 2 Commencement

The Bill is split into the following parts:

- Part 2: *Long Service Leave (Portable Schemes) Act 2009*;
- Part 3: *Workers Compensation Act 1951*;
- Part 4: *Work Health and Safety Act 2011*; and
- Part 5: *Work Health and Safety Regulation 2011*.

This clause provides for the commencement of the Act. Section 3 and part 2 commence on the day after this Act's notification day.

Section 14 and parts 4 and 5 commence 6 months after the notification day.

The remaining provisions commence 1 month after the notification day.

Clause 3 Legislation amended

This clause provides for the amending of the legislation mentioned in parts 2, 3, 4 and 5.

Part 2 Long Service Leave (Portable Schemes) Act 2009

Clause 4 How are leave payments worked out for the contract cleaning industry?

This clause substitutes the example at section 2.11 of Schedule 2.

Clause 5 Payments for leave – community sector industry

This clause omits the reference '3.7' and substitutes it with '3.8', as a technical amendment, at section 3.10 of Schedule 3.

Clause 6 Payments instead of leave – community sector industry

This clause omits the reference '3.10' and substitutes it with '3.12', as a technical amendment, at section 3.11 of Schedule 3.

Clause 7 How are leave payments worked out for the community sector industry?

This clause substitutes the example at section 3.12 of Schedule 3.

Clause 8 Payments by reciprocal authority on authority's behalf—community sector industry

This clause omits the term 'contract cleaning' and replaces it with 'community sector', as a technical amendment.

Clause 9 Payments for leave – security industry

This clause omits the reference '4.7' and substitutes it with '4.8', as a technical amendment, at section 4.10 of Schedule 4.

Clause 10 Schedule 4, section 4.10 (2)

This clause inserts the word 'leave' after the phrase 'How are'.

Clause 11 Schedule 4, section 4.12, heading

This clause substitutes the existing heading with: 'How are leave payments worked out for the security industry?'

Clause 12 Schedule 4, section 4.12, example

This clause substitutes the example at section 4.12 of Schedule 4.

Clause 13 Leave payments for service as registered voluntary member – security industry

This clause inserts the word 'leave' after the phrase 'How are'.

Part 3 Workers Compensation Act 1951

Clause 14 Section 46

This clause substitutes section 46 and permits the taking/accrual of annual leave and long service leave as contemplated by section 130(2) of the *Fair Work Act 2009* (Cth). This provision is not intended to affect any other entitlement of a worker to a benefit or payment (that is not leave) under any other law in force in the ACT.

Clause 15 Compliance by workers

This clause omits the word ‘Minister’ and substitutes it with ‘regulator’ in section 113(2).

Clause 16 Unreasonableness in stopping payment

This clause omits the word ‘Minister’ and substitutes it with ‘regulator’ in section 114.

Clause 17 Regulation-making power

This clause increases the penalty cap restriction from \$1,000 to \$17,000, consistent with the [Guide for Framing Offences](#) (April 2010) in setting the cap at approximately 20 per cent of the associated offence under the *Workers Compensation Act 1951*, section 145I for insurers and section 145T for self-insurers, for breach of a licence condition which is set at 100 penalty units. By setting the maximum at twenty per cent it is similar to the policy for applying infringement notices to offences under the [Guide for Framing Offences](#) (April 2010).

Clause 18 Section 223(3)

This clause increases the cap on penalty units from 10 to 20, consistent with the [Guide for Framing Offences](#) (April 2010).

Part 4 Work Health and Safety Act 2011

Clause 19 Section 31, heading

This clause omits the heading ‘reckless conduct – category 1’ and replaces it with ‘Negligence or reckless conduct – category 1’.

Clause 20 Section 31(1)(c)

This clause substitutes section 31(1)(c) and provides that a person commits a category 1 offence if the person (i) engages in the conduct with negligence; or (ii) is reckless as to the risk to an individual of death or serious injury or illness.

In (i) the fault element of negligence applies to the physical element of conduct but in (ii) the fault element of recklessness applies to the physical element of a result of the conduct (see section 14 of the Criminal Code for physical elements).

Clause 21 What is a notifiable incident

This clause inserts a new section 35(d) to include a sexual assault incident into the definition of a notifiable incident.

Clause 22 New section 37A – What is a sexual assault incident

This clause inserts a new section 37A to confirm that a sexual assault incident means an incident (including a suspected incident) in relation to a workplace that exposes a worker or any other person at the workplace to sexual assault.

Clause 23 Duty to notify of notifiable incidents

This clause inserts a new section 38(9) to limit the information that the PCBU is required to provide to the regulator, specifically:

- i. the name and contact details of the person conducting the business or undertaking;
- ii. a description of the workplace where the incident happened; and
- iii. whether or not the incident was reported to police.

Section 9(b) requires that the PCBU must not give information disclosing the identity of any person involved in the incident, when notifying the regulator.

Clause 24 Duty to preserve incident sites

This clause inserts a new requirement at section 39(4) to exclude the duty to preserve incident sites in relation to a sexual assault incident.

Clause 25 Negotiations for agreement for work group

This clause omits the word ‘will’ and replaces it with ‘are proposed to’ in section 52(1)(b) of the WHS Act to make it clear who a person conducting a business or undertaking must consult with when forming a work group.

Clause 26 Obligation to train health and safety representatives

This clause substitutes section 72(1)(c) to provide that a health and safety representative may choose a training course that they are entitled to attend and is approved by the regulator. Any disagreement about when and the reasonable costs of attendance between the health and safety representative and the person conducting the business or undertaking continues to be able to be resolved under subsections 72(5)-(7).

Clause 27 Section 72(2)

This clause omits the words ‘as to the matters set out in subsection (1)(c) and (2)’ and replaces it with ‘about a matter mentioned in subsection (2)’.

Clause 28 Power of regulatory to obtain information

This clause inserts a new provision at 2A in section 155 of the WHS Act to clarify the service requirements by aligning with the current service requirements in section 209 of the WHS Act.

Clause 29 Section 155(3)(b)

This clause substitutes section 155(3)(b) to clarify in the warning given that the defence of reasonable excuse applies as set out in subsection 155(5) of the WHS Act.

Clause 30 New section 155(8)

This clause inserts a new provision at section 155(8) to clarify when a notice may be served on a person.

Clause 31 Power to require production of documents and answers to questions

This clause clarifies the power that the inspector has while at the workplace to require production of documents and answers to questions.

Clause 32 Section 171(1)(b)

This clause substitutes section 171(1)(b) and is consequential on clause 33 that would allow an inspector to exercise their powers to require the production of a document or answers to questions within 30 days following a workplace visit.

Clause 33 New section 171 (2A) to (2E)

This clause inserts provisions new subclauses (2A), (2B), (2C), (2D) and (2E) in section 171 of the WHS Act.

New subsections 171(2A)-(2E) permit the inspector, within 30 days after the inspector enters a workplace to exercise their powers to require the production of a document or answers to questions in relation to the purpose for which the workplace was entered.

Clause 34 Section 171(3)

This clause is a consequential amendment to clause 33 and applies the existing section 171(3) to the new section 171(2A)(c) such that any interviews must be conducted in private if the inspector considers it appropriate or the person being interviewed requests it.

Clause 35 Abrogation of privilege against self-incrimination

This clause inserts a new section 172(3) to provide that this section does not apply to answering a question or providing information or a document in response to a requirement made under a corresponding WHS law. A footnote example is included.

Clause 36 Warning to be given

This clause is a consequential amendment to clause 33 and inserts the words 'other than by a written notice under section 171(2A)'. Specifically, clause 38 inserts the relevant warnings to be made for a written notice issued under section 171(2A).

Clause 37 Section 173(1)(b)

This clause substitutes section 173(1)(b) to make a technical revision for consistency with the new subsection 155(3)(b) of the WHS Act.

Clause 38 New section 173(1A)

This clause is a consequential amendment to clause 33 and inserts section 173(1A) to outline the requirements associated with a written notice under section 171(2A).

Clause 39 Section 173(2)

This clause substitutes section 173(2) and is consequential on the new subsection 173(1A) inserted under clause 38. Gendered language has been removed from this section.

Clause 40 Procedure if prosecution is not brought

This clause substitutes section 231(1) to extend the period in which a person may request the regulator to bring a prosecution in if no prosecution has been brought from six to twelve months to six to eighteen months. The new subsection would also allow a request for prosecution to be made within six months after the day a coronial inquiry or inquest report is made or ends. While on the face of it this section removes industrial manslaughter from the current offences this section applies to, this removal has no practical effect as an act, matter or thing that is reasonably considered to constitute an industrial manslaughter offence would meet the lower thresholds required for a category 1 or category 2 offence.

Clause 41 New section 231(2A)

This clause inserts a new subsection 231(2A) requiring the regulator to keep persons updated regularly where an investigation is not completed within three months.

Clause 42 Section 231(3)

This clause is a consequential amendment on clause 41 and inserts the words ‘under subsection (2) or (2A)’.

Clause 43 Confidentiality of information

This clause is a consequential amendment and substitutes section 271(3)(c) in light of the contents being transferred to an express provision inserted under clause 44.

Clause 44 New section 271A

This clause inserts section 271A covering additional ways that the regulator may use and share information. This amendment is part of the nationally agreed model WHS laws.

In exercising these powers, the regulator would be required to comply with the privacy obligations under the *Privacy Act 1988* (Cwlth), the *Information Privacy Act 2014* and *Health Records (Privacy and Access) Act 1997*.

Clause 45 New section 272A and 272B

This clause inserts section 272A WHS (No insurance or other indemnity against penalties) and section 272B (Liability of officers for offences by body corporate under section 272A) which prevents PCBUs from entering into contracts of insurance to cover liabilities arising from financial penalties issued under the WHS Act for breach of duty.

Clause 46 Dictionary, new definition of *sexual assault incident*

This clause inserts the definition of sexual assault incident into the dictionary.

Part 5 Work Health and Safety Regulation 2011

Clause 47 Section 13, new note

This clause inserts a note at section 13 to clarify the application of the Australian Standard or Australian/New Zealand Standard to the WHS Regulation.

Section 164 of the *Legislation Act 2001* outlines the requirements that apply to references to Australian Standards.

Clause 48 New section 238(3)

This clause inserts a new subsection 238(3) to clarify the meaning of ‘instruction and training in the proper operation of a device or ropeway’ to include the things required under subsections 238(2)(a) and (b).

Clause 49 Section 242(1)(a)

This clause substitutes section 242(1)(a) is consequential on the insertion of a new subsection 242(1A) in clause 50 to clarify the details to be recorded in an amusement device logbook.

Clause 50 New section 242(1A)

This clause inserts a new subsection 242(1A) in relation to the record requirements of logbooks for an amusement device. This new subsection ensures that records are kept and are available to third parties to demonstrate that a duty holder can properly assess whether a ride is safe and that devices are only operated by persons that are properly trained.

Clause 51 Section 242(2)(a)

This clause substitutes section 242(2)(a) and is consequential on the insertion of subsection 242(1A) in clause 50 of the Bill which sets out the details required in a logbook.

Clause 52 Section 242(2), note 2

This clause omits note 2 as it is no longer required given clause 53 of the Bill.

Clause 53 New section 242(3) and (4)

This clause inserts section 242(3) and (4) sets out the offence clearly in relation to an amusement device that previously applied under section 237(5) of the WHS Act.