

Offshore Resources Safety Review

Submission by the Australian Council of Trade Unions to the
Department of Industry, Innovation and Science
Offshore Resources Safety Review

Contents

Contents	0
ABOUT THE ACTU.....	2
EXECUTIVE SUMMARY	3
Part 3: Objects.....	5
Part 3: Safety cases and diving safety management systems	6
Part 4: Duties	10
Part 4: Training and competency	11
Part 4: Mental health.....	13
Part 5: Workplace arrangements.....	17
Election and disqualification of HSRs.....	17
Powers of and protections for HSRs	19
<i>Protections for HSRs</i>	19
<i>Support for HSRs</i>	20
<i>Powers of HSRs</i>	23
Training for HSRs	24
HSR place on Health and Safety Committee	26
Engagement between HSRs and NOPSEMA	26
<i>HSR list</i>	27
<i>Requirement for HSRs to accompany and meet with inspectors</i>	29
Consultation provisions	30
Right of entry provisions.....	32
Information sharing: The safety case	36
Workforce representation on the NOPSEMA Board.....	38
Protections for workers.....	39
Issue resolution.....	43
Part 6: Compliance and enforcement.....	45
Inspections	45
Vessel facilities.....	46

Penalties.....	46
LIST OF RECOMMENDATIONS.....	49

ABOUT THE ACTU

Since 1927 the Australian Council of Trade Unions (**ACTU**) has been the peak trade union body in Australia. There is no other national confederation representing unions.

The ACTU has consulted with governments in the development of almost every legislative measure concerning employment relations over its 90 year history.

The ACTU consists of 43 affiliated unions and State and regional trades and labour councils, who between them have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

All of the unions that represent the interests of workers in the offshore oil and gas industry are affiliated to the ACTU.

EXECUTIVE SUMMARY

1. The ACTU welcomes this opportunity to contribute our views to the Offshore Safety Review. A full list of our recommendations to the review is appended to this submission.
2. As noted in the Discussion Paper, the offshore oil and gas industry faces a number of hazards due to remote locations, unpredictable weather and working with complex equipment.¹ Yet despite the high hazard nature of the industry, safety regulation of the offshore oil and gas industry lags behind that of other industries in many critical respects.
3. Harmonisation has been a core principle of work health and safety regulation in Australia since 2008, with industry-specific laws to continue only where 'objectively justified'.² Industry-specific laws continue in the offshore oil and gas industry, purportedly to address its high hazard work environment. In accordance with the harmonisation principle, the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS**) regime should only differ from the model WHS laws only where objectively justified and to the extent that they are tailored to address the industry's specific requirements.
4. Yet significant reform is required to achieve this policy position, despite it having been agreed since 2008. In making recommendations for reform, the starting point for this review should be to apply the harmonisation principle unless there is a genuine objective justification for why it should not apply in a specific instance. Such justification ought to be limited to differences necessary to address the high hazard work environment in the offshore oil and gas industry, and not influenced by other factors such as cost. This submission highlights several areas in which the OPGGS regime is deficient with no objective justification.
5. This review is occurring as Safe Work Australia considers the recommendations of the review of the model WHS laws concluded by Ms Marie Boland in December 2018 (**Safe Work Australia Review of the Model WHS Laws**). In accordance with the harmonisation principle, this review should adopt the recommendations of the Safe Work Australia Review of the Model WHS Laws, unless specific differences are objectively justified. This submission points

¹ See Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 14.

² See Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, pages 10 to 12.

to some of the relevant recommendations of that review, and a copy of our submission to that review, and to the current consultation process on the regulation impact statement, are enclosed.

6. This review also follows from an inquiry into the work health and safety of workers in the offshore petroleum industry by the Senate Education and Employment References Committee, which concluded in August 2018 (**Senate Inquiry**). This review ought to build on the significant work undertaken by the Senate Inquiry and by stakeholder participants. This submission references important recommendations of the Senate Inquiry. A copy of our submissions to the Senate Inquiry is enclosed.
7. The ACTU conducted a survey of 381 workers employed on facilities in the offshore oil and gas industry about their experience of work health and safety in the industry (**Offshore WHS Survey**). The results of the survey inform our submission to this review.
8. The primary issue that we urge this review to consider is this: the offshore oil and gas industry involves workers performing dangerous work in remote locations. It is one of the highest hazard industries, and yet the work health and safety regulation in the industry is deficient relative to the model work health and safety laws (**model WHS laws**) and other industries. That needs to change as a matter of urgency and priority.

Part 3: Objects

What are your views on the current objects in the OPGGS Act and Safety Regulations as they relate to OHS? Do you have suggestions for changes to the objects, or how they are defined? Do you think the objects in the OPGGS Act should include specific reference to the role of unions and employer organisations, or is the current requirement to foster a consultative relationship with all relevant persons sufficient? Why/why not?

9. The involvement of all relevant parties in health and safety issues is generally accepted internationally and in Australia as one of the core principles of an effective health and safety regime for the offshore oil and gas industry.³ As noted in the Discussion Paper, involvement of the workforce, in particular, is essential.⁴
10. Involvement of the workforce includes the involvement of their representative organisations. There is significant international evidence in support of union involvement in work health and safety.⁵ The importance of workforce representation is recognised in the objects of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), which provides for a proactive role for unions and employer organisations in promoting improvements in health and safety practices, and for fair and effective workplace representation, consultation, co-operation and issue resolution.⁶
11. An objects clause outlines the underlying purposes of legislation and may set out its general aims or principles.⁷ While the OPGGS Act includes an object 'to foster a consultative relationship between all relevant persons', there is no specific reference to the workforce or to unions and employer organisations, and the term 'relevant persons' is not currently defined in the OPGGS Act in relation to health and safety.
12. Given the importance of the involvement of the workforce and their representative organisations in the management of work health and safety, it is appropriate that this role is

³ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 12.

⁴ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 14.

⁵ See the studies cited in the ACTU submission to the Senate Education and Employment References Committee inquiry into the work health and safety of workers in the offshore petroleum industry (enclosed), paragraph 6.

⁶ WHS Act 2011, Part 1, Division 2, Section 3(b) and (c).

⁷ Australian Law Reform Commission, cited in Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 20.

acknowledged in the legislation rather than left to the interpretation of the regulator, which could change.

13. In accordance with the harmonisation principle, the objects of the OPGGS Act should differ from the model WHS laws only where objectively justified and to the extent that they are tailored to address the industry's specific requirements. There is no objective justification for why the objects of the OPGGS Act differ from the model WHS laws in respect of the workforce and their representative organisations, nor in respect of other objects including compliance and enforcement measures, scrutiny and review of actions and continuous improvement.

Recommendation 1: That the objects of Schedule 3 of the OPGGS Act be harmonised with the objects of the model WHS laws, particularly in respect to the workforce and their representatives.

Part 3: Safety cases and diving safety management systems

What are your views on the current OPGGS provisions relating to how and when safety case revisions occur? What are your views on the ability of a HSR to trigger a review of a safety management-related document, including a safety case?

14. Workforce involvement in the development and revision of safety cases is essential to achieving positive safety outcomes.⁸ The Safety Regulations require that consultation with the workforce be undertaken in the development and revision of safety cases.⁹ However, the current OPGGS provisions are inadequate in three fundamental respects.
15. **First**, in terms of consultation in the *development* of the safety case, the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 (Cth) (Safety Regulations)* require consultation with members of the workforce who are identifiable before the safety case is developed and working, or likely to be working, on the facility.¹⁰ The problem is that often the operational workforce may not be identifiable at the point the initial safety case is developed, particularly for greenfields projects.

⁸ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 54.

⁹ OPGGS Safety Regulations 2009, Chapter 2, Part 2, regulation 2.11(1).

¹⁰ OPGGS Safety Regulations 2009, Chapter 2, Part 2, regulation 2.11(3).

16. In the Offshore WHS Survey, 73.62% of workers said that they have never been consulted about the development of the safety case before the commencement of operations on a facility. The types of workers surveyed were predominantly in operational roles.

17. The Senate Inquiry recommended that the OPGGS Act be amended to require consultation with the relevant unions in the development of the initial safety case.¹¹ This requirement to consult with worker representative organisations would ensure the view of the workforce are accounted for. In the Offshore WHS Survey, 78.16% of workers said that unions should be consulted about the development of, or any changes to, the safety case¹² and 90.75% of workers said that accredited HSRs and union officials should have a right to conduct a work health and safety inspection of facilities before commissioning.¹³

Recommendation 2: That the OPGGS regime be amended to require consultation with the relevant unions in the development of the initial safety case.

Recommendation 3: That the OPGGS regime be amended to permit accredited HSRs and union officials to conduct a work health and safety inspection of facilities before commissioning.

18. **Second**, once hired, the workforce needs to *understand* the safety case. An independent review of the NOPSEMA's operational activities in 2008 noted that, 'The Greenfields situation where the Safety Case is developed before the workforce is often hired makes it difficult for them to be involved in the process. [The] workforce often does not understand the Safety Case and the documentation is not always in a format that can be easily understood.'¹⁴

19. In the Offshore WHS Survey, 26.22% of workers said that they were not made aware of the safety case for their current or most recent facility before they commenced work. Approximately two thirds (69.28%) said that they have never been consulted about changes to the safety case during operations on a facility. Of the workers who said that they have suggested changes to the safety case (22.89%), only about half said they were listened to (52.63%). When asked about access to the safety case, several workers said that they have

¹¹ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 3.

¹² 10.92% said 'No' and 10.92% said 'Don't know'.

¹³ 4.62% said 'No' and 4.62% said 'Don't know'.

¹⁴ Review of the National Offshore Petroleum Safety Authority Operational Activities 2008, page 30 (33), paragraph 5.6.1.

not been made aware of the safety case, do not know how or where to access it, have never seen a copy, and that it is 'too big' and workers are 'too busy' to understand it.

20. This issue of worker understanding of and engagement with the safety case is not new. The 2008 review recommended that 'Subsequent to the hiring of the workforce and preferably before the commencement of operations, a review of the Safety Case should take place with the new workforce to ensure they understand the accepted Safety Case, its risks and Safety Management Plan'.¹⁵ A 2009 review suggested that 'workforce input to continuous review of the safety case (monthly number of suggestions and percentage of workforce making suggestions annually)' be adopted as a safety indicator that is monitored to drive positive safety change.¹⁶ The 2009 review recommended that 'the workforce must be actively supported in understanding the safety case structure and use and effectively represented in its development'.¹⁷ The Senate Inquiry similarly recommended that the OPGGS Act be amended to provide for a requirement of a review of the safety case to take place with the workforce once hired (and before the commencement of operations, where possible).¹⁸
21. The Discussion Paper notes stakeholders' views that a review of the safety case following hiring of the workforce should be required to ensure the new workforce understands the safety case, the hazards and risks they will be exposed to, and the control measures in place to manage them. The Paper then goes on to say that, 'While the Safety Regulations do not explicitly require a revision of the safety case in situations where a new workforce has been hired, the regulations do not prohibit a revision of the safety case if the circumstance satisfies a requirement under the range of 'change in circumstance or operations' triggers or is requested by NOPSEMA'.¹⁹
22. This discussion conflates two separate issues: the need for a review of the safety case to ensure that a new workforce understands it and that their views are accounted for; and the circumstances in which the safety case may be revised. A review of the safety case to ensure that the workforce understands it and that their views are accounted for need not necessarily

¹⁵ Ibid.

¹⁶ Kym Bills and David Agostini, Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority, June 2009, pages 157-8.

¹⁷ Kym Bills and David Agostini, Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority, June 2009, page 190.

¹⁸ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 3.

¹⁹ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 27.

require a *revision* of, or any changes to, the safety case. The latter would depend on the outcome of the former.

Recommendation 4: That the OPGGS regime be amended to require a review of the safety case to take place with a new workforce once hired (and before the commencement of operations, where possible), to ensure the workforce understands the safety case, the hazards and risks they will be exposed to, and the control measures in place to manage them, and to provide for workforce input to continuous review of the safety case.

23. This brings us to the **third** respect in which the current OPGGS provisions are inadequate, which pertains to the ability of a Health and Safety Representative (**HSR**) to trigger *revisions* to the safety case. Under the *Work Health and Safety Regulations 2011* (Cth) (**WHS Regulations**), HSRs have the ability to trigger a review of a variety of safety management-related documents, including the major hazard facility's safety assessment, emergency plan, safety management system and risk control measures.²⁰ Under the OPGGS regime there is no equivalent ability for HSRs to trigger a review of the safety management-related documents, and revisions of safety cases can only be instigated by the operator or NOPSEMA. This shortcoming is another example of a difference between the model WHS laws and the OPGGS Act for which there is no objective justification, contrary to the principle of harmonisation.

24. During the Senate Inquiry, stakeholders called for HSRs to be given the ability to trigger a review and revision of a safety case in certain circumstances, citing a need for greater consistency with the WHS Regulations. The Senate Committee recommended that HSRs have the ability to trigger a review and revision of the safety case in certain circumstances.²¹ In the Offshore WHS Survey, approximately half of HSRs surveyed said that a right to require a review of the safety case for a facility if there are new or increased risks or hazards would be a helpful additional power (47.06%). Given that workforce involvement is a core principle of an effective health and safety regime, this shortcoming ought to be addressed.

²⁰ WHS Regulations 2011, Chapter 9, Part 9.3, Division 3, regulation 559(4), 38(2e).

²¹ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 3.

Recommendation 5: That the OPGGS regime be harmonised with the model WHS laws in respect of the ability of HSRs to trigger a review of a safety management-related document, including a safety case.

Part 4: Duties

Do you think the OHS duties of care under the OPGGS regime are clear and effective? If not, what do you think could be improved?

25. According to the Discussion Paper, the key difference between the work health and safety duties in the OPGGS Act and those in the WHS Act is that the former apply to a more specific set of persons directly relevant to offshore oil and gas duties, and in more detail, using industry-specific language.²² The WHS Act applies duties to a wider group of primary duty holders and extends their duty of care to a wider group of persons across a broader range of industry sectors. The term ‘person conducting a business or undertaking’ is a broad term used in the WHS Act to describe all forms of modern working arrangements. The Safe Work Australia review of the Model WHS Laws stated that the use of this concept was intended to be broad enough and flexible enough to incorporate new industries, new ways of working and new risks arising from work into the model WHS framework, and included a recommendation to improve clarity on this issue.²³ Given the growth of new forms of employment and the rate of technological change in the offshore oil and gas industry, this flexibility is important in the OPGGS Act duties too. Another important difference between the duties framework in the two regimes relates to consultation provisions (this issue is discussed further under ‘Consultative provisions in Part 5 below).

Recommendation 6: That the duties in OPGGS Act be amended to be consistent with those in the model WHS laws (including any amendments following the Safe Work Australia Review of the Model WHS Laws), except where objectively justified by reference to the high hazard nature of the offshore oil and gas industry.

²² Department of Industry, Innovation and Science, ‘Offshore Safety Review: Discussion Paper’, A review of the offshore safety regulatory regime, June 2019, page 34.

²³ ²³ Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 4.

Part 4: Training and competency

What are your views on the effectiveness of the OPGGS permit to work system? If you believe there are deficiencies, what are they and how should they be addressed? What are the benefits and challenges of implementing a licencing system for high risk work, similar to that under the WHS Act and WHS Regulations, in the offshore oil and gas industry?

26. Under the permit to work system, the onus is on industry to ensure competency of employees undertaking high-risk work. By contrast, the WHS Regulations require that a person must not carry out a class of high-risk work unless the person holds a high-risk work licence for that class of high-risk work. The OPGGS regime differs to the WHS Regulations in that it does not dictate which licence specific employees must hold, nor which VET course employees must undertake to obtain the relevant licence.

27. Again, there is no objective justification for this difference between the model WHS laws and the OPGGS Act. As noted by stakeholders in the Senate Inquiry, the risks associated with high-risk work are inherent and not confined to particular industries, which calls for the application of the harmonisation principle. Indeed, the only differentiating feature is the high hazard work environment and remote work locations that characterise the offshore oil and gas industry. If anything, this should be justification for *stronger minimum standards* (which do not take away from the operator or employer's ability to mandate additional training and competency requirements in their operations).

28. In the Offshore WHS Survey, less than half of workers think that there is adequate training for workers in the offshore oil and gas industry (47.62%). Only about a third think that the training and qualification requirements for high-risk work in the offshore oil and gas industry are adequate (36.31%). Almost all think that the training and qualification requirements for high-risk work in the offshore oil and gas industry should be at least equal to the requirements in the rest of Australia.²⁴

29. These responses are broadly consistent with views expressed at a department-led safety workshop in 2018. Participants emphasised that training for offshore oil and gas participants should be improved and, relevantly, referred specifically to: requirements in safety cases for

²⁴ All, with the exception of eight people who said that they did not know.

training not being consistent or high enough; a difference in training across companies; a lack of specified standards; and the desirability of a list of Australian Qualifications Framework qualifications for each role.²⁵

30. The Senate Inquiry concluded that individuals working offshore should have the same calibre of qualifications as those required by individuals onshore. The Inquiry recommended that the OPGGS Act be amended to provide for consistency with the WHS Act in regard to a licensing system for workers performing high-risk work.²⁶

What are your views on the training of offshore oil and gas participants more broadly? Do you think current provisions under the OPGGS regime adequately provide for training of all participants?

31. As noted above, in the Offshore WHS Survey less than half of workers think that there is adequate training for workers in the offshore oil and gas industry (47.62%). More than half said that they have witnessed or experienced a near miss or accident at work in the offshore oil and gas industry that was due to a lack of training or competence (51.48%).

32. These findings are unsurprising given the fragmentation of the offshore oil and gas industry and growth of casual and labour hire employment. Less than one third of workers in the Offshore WHS Survey were working for, or usually work for, a facility operator (32.67%). More than half were working for a Tier 1 (43.43%), Tier 2 (5.58%) or Tier 3 contractor (2.79%). Only about half were employed full-time in their current main job (48.78%). Approximately one third were casual (33.54%) and around one in ten were labour hire (7.32%). More than two thirds said that they have, or have held, a casual or labour hire job in the offshore oil and gas industry (69.33%).

33. More than two thirds of workers said that casual and labour hire workers do not receive the same work health and safety standards and outcomes as permanent workers in the offshore oil and gas industry, including access to training (68.71%). Two thirds said that better access to training would help to achieve better work health and safety outcomes for casual and labour hire workers in the offshore industry (66.04%). The survey identified that cost

²⁵ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, pages 37-38.

²⁶ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 5.

pressures, particularly in the current industry downturn, have led to a reduction in paid training. A high-risk work licensing system would assist to overcome the adverse effects that industry fragmentation, the growth in casual and labour hire employment, and cost pressures are having on training standards.

Recommendation 7: That the OPGGS regime be amended to implement a licensing system for workers performing high-risk work, similar to that under the model WHS laws.

Recommendation 8: That consideration be given to mechanisms that would achieve better training standards and access for casual and labour hire employees.

Part 4: Mental health

Do you think the current provisions in the OPGGS Act effectively promote and support positive mental wellbeing workplaces in the offshore oil and gas industry? Can you suggest strategies or measures to further promote and support positive mental wellbeing workplaces in the offshore oil and gas industry?

34. As noted in the Discussion Paper, work on an offshore facility presents unique challenges for the management of mental health.²⁷ At a safety workshop in 2018 led by the department, participants raised mental health as a key issue regarding the offshore petroleum industry and indicated that the term ‘without risk to health’ in the OPGGS Act could be clarified to enable better interpretation and application.²⁸

35. The Offshore WHS Survey also identified mental health as a significant issue. Work in the offshore oil and gas industry carries inherent risks to mental health, including those listed in the Discussion Paper.²⁹ The main psychological hazards experienced by workers in the survey in the last 12 months were:

- Remote or isolated work location (e.g. fly in/fly out (FIFO) workers) (84.28%)
- Long work hours (67.92%)

²⁷ Department of Industry, Innovation and Science, ‘Offshore Safety Review: Discussion Paper’, A review of the offshore safety regulatory regime, June 2019, page 39.

²⁸ Department of Industry, Innovation and Science, ‘Offshore Safety Review: Discussion Paper’, A review of the offshore safety regulatory regime, June 2019, page 40.

²⁹ Department of Industry, Innovation and Science, ‘Offshore Safety Review: Discussion Paper’, A review of the offshore safety regulatory regime, June 2019, page 39.

- Shift work or unsociable hours (e.g. very early morning or very late at night (64.78%)
- Working in unpleasant or hazardous conditions (e.g. sun exposure, extreme temperatures or noise, hazardous chemicals or dangerous equipment, uncomfortable protective clothing or equipment) (55.97%)
- High workloads (too much to do, fast work pace or significant time pressure) (54.72%)
- Lack of recognition or reward (e.g. no positive feedback, lack of opportunity for skills or career development or promotion, skills and experience are underutilised) (54.72%)
- Poor management when major changes happen at work (e.g. restructure, redundancy, downsizing) (50.94%)
- Poor workplace relationships (e.g. bullying, aggression, harassment, conflict, lack of fairness and equality between workers) (42.77%)

36. Half of workers said that they experienced poor mental health because of their employer or the operator failing to manage or address these work conditions (50.63%). Of these, more than a third said that they were unable to work because of this poor mental health (35%).³⁰ Two workers said that work-related mental health issues resulted in the suicide of someone they know in the offshore oil and gas industry.

37. Approximately two thirds of workers think that their employer or workplace does not know how to address mental health issues at work (67.28%). When asked whether they think that their employer or workplace takes mental/psychological health seriously, 23.31% said 'Never' and 50.31% said 'Sometimes', while only 16.56% said 'Often' and 9.82% said 'Always'. Almost all workers believe that there should be work health and safety regulations specifically dealing with mental health conditions and psychological risks and hazards (96.3%).

38. We asked workers if they could suggest strategies or measures to further promote and support positive mental wellbeing workplaces in the offshore oil and gas industry. Responses focussed on the following key issues:

³⁰ A day (2.5%); 2-3 days (6.25%); a week (1.25%); more than a week but less than a month (6.25%); a month (2.5%); more than a month but less than a year (12.5%); a year (0%); more than a year (3.75%). Only five made a Seacare or workers' compensation claim in relation to this poor mental health (of which four had their claim approved), which demonstrates that claim figures understate the rates of work-related mental health conditions.

- Shorter work rosters. Shorter periods away from home, family and friends ‘allow employees to maintain healthier and happier relationships at home’. Several workers cited the Norwegian roster as international leading practice (e.g. three weeks on/three weeks off/three weeks on/six weeks off or three weeks on/four weeks off/three weeks on/five weeks off).
- Bring back permanent jobs. Family breakdowns and stress in the workplace were attributed to the decline of the permanent workforce. Anxiety due to insecure work was also cited.
- More personal time and space, particularly for women workers who more often have to share a room. ‘Extended time in a captive environment’ was described as ‘the biggest single mental health issue facing offshore workers’. Poor rostering arrangements compound this issue.
- Improve responses to bullying, especially by managers and supervisors. Women workers in particular experience gender-based bullying, as typified by this story:

I was being bullied and belittled by a supervisor on a daily basis for years in front of other management and co workers just for being a female. One example and I quote “once this bitch leaves there will be no other women employed here.”

- Several workers suggested anonymous surveys at the end of each roster, to allow workers to raise issues for management to address. Two workers told stories about experiencing depression and stress as a result of work issues including workload, but not knowing that it was a reportable incident.
- Mandatory quality training for all employees in the area of mental health was another popular response.
- More support, including peer support, union involvement and employee assistance programs.
- Specific focus on men’s mental health, such as Men’s Sheds and training and encouragement to promote open discussion of mental health.

- Reduced work hours and improved crewing levels to reduce workload stress and assist to manage fatigue. The current downturn and cost pressures have had an adverse effect on work hours and workload. As one worker described:

The last 5 years I have seen the mental health eroded in the offshore catering industry due to consistent cut backs. Either through wage erosion, food costs being slashed, staffing levels being constantly being slashed.

- Fair and reasonable wages and conditions and fair enterprise agreement negotiations.

39. These responses emphasise mental health hazards in the offshore oil and gas industry that are already well known, yet regulation in this space in the offshore oil and gas industry trails behind onshore industries (and other jurisdictions such as Western Australia) – again, with no objective justification.

40. The first of our recommendations below serves to bring the OPGGS regime into line with the model WHS laws. The need for this change is obvious and it should not be controversial. The second two recommendations are adapted from the recommendations of the Safe Work Australia Review of the Model WHS Laws and are necessary to ensure that the OPGGS regime maintains pace with onshore industries.³¹

Recommendation 9: That the OPGGS Act be amended to expressly define ‘health’ as ‘physical and psychological health’.

Recommendation 10: That the Safety Regulations be amended to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks in the offshore oil and gas industry.

Recommendation 11: That the incident notification provisions in the OPGGS regime be reviewed to ensure that they provide a notification trigger for psychological injuries.

41. However, the offshore oil and gas industry faces unique challenges in the management of mental health, as the Offshore WHS Survey responses highlight. Regulatory reform in this

³¹ Safe Work Australia, Review of the model WHS laws: Final report, Recommendations 2 and 20.

space needs to pay particular attention to job security, rostering arrangements, accommodation on facilities, hours of work and crewing levels. We discuss these issues further in '(i) Factors impacting on the work health and safety of workers in the offshore petroleum industry' of our submission to the Senate Inquiry (enclosed) and commend the recommendations therein to this review.

Recommendation 12: That consideration be given to circumscribing or regulating contracting arrangements to maximise job security in the offshore petroleum industry.

Recommendation 13: That consideration be given to mechanisms that would achieve better work health and safety standards and outcomes for workers in insecure forms of employment such as casual and labour hire, including additional training specific to those employment categories or roving HSRs to assist these types of workers.

Recommendation 14: That consideration be given to circumscribing or regulating rostering arrangements to ensure that workers are not away from their home and family life for extended periods and have sufficient rest time between roster periods; for example, by amending r 95 of the Safety Regulations to require minimum continuous and uninterrupted periods off work and away from the workplace.

Recommendation 15: That consideration be given to requiring a minimum handover period between shift change which must occur during the workers' normal working hours and rostered on period.

Error! Reference source not found.

Election and disqualification of HSRs

Do you think the current requirements sufficiently provide for workers to autonomously determine the manner in which they elect a HSR? If no, why not, and how do you think the election process should be determined?

42. The Senate Inquiry recommended that the OPGGS Act be amended to provide for consistency with the WHS Act in regard to the rights, powers and entitlements of HSRs, including that the

WHS Act allows for workers to autonomously determine the manner in which they elect an HSR while the OPGGS Act does not.³²

43. The Discussion Paper says that the OPGGS Act already provides for the autonomous determination.³³ This analysis is not correct. In summary, under the OPGGS Act, if the decision to choose an HSR is not unanimous an election must be held. The Discussion Paper says that 'The operator must either conduct the election, *or may leave it to the workforce or another appropriate body to conduct, at the operator's expense*'.³⁴ This is not what the OPGGS Act says.
44. The OPGGS Act says that, 'The operator must conduct, or arrange for the conduct of, an election at the operator's expense'.³⁵ It is the operator who is empowered to determine the manner of the election, not the workers. The only power that the workers have to determine the manner of the election is to choose, on request by the lesser of 100 members or the majority of the workforce normally in the designated work group, for the election to be conducted in accordance with the Safety Regulations. Their power is to choose between either the manner determined by the operator, or the manner determined by the Safety Regulations.
45. Our affiliates advise that, in practice, this means that many HSRs are effectively 'appointed' by the operator with no true democratic decision of the workforce. In the Offshore WHS Survey, we asked current and recent HSRs (within the last three years) if they were 'appointed by the company as an HSR or elected by the workforce'? Five of 42 respondents said that they were appointed by the company.
46. By contrast, the WHS Act expressly empowers the workers to determine how an election of an HSR is to be conducted, including whether the election is to be conducted with the assistance of a union or other person or organisation.³⁶ The person conducting the business or undertaking must provide any resources, facilities and assistance that are reasonably

³² Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1 (see paragraph 3.27).

³³ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, pages 42-43.

³⁴ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 43.

³⁵ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A, Clause (26)(3).

³⁶ WHS Act 2011, Part 5, Division 3, Subdivision 4, Section 61(1) and (3).

necessary to enable the elections to be conducted.³⁷ Our affiliates advise that, in practice, this process results in significantly greater ‘buy in’ from the workforce in the election of their HSRs. There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 16: That the election process clause 26 of Schedule 3 of the OPGGS Act be amended to reflect s 61 of the WHS Act, to provide for workers in the offshore oil and gas industry with equivalent autonomy in determining the manner in which they elect an HSR.

What are your views on the disqualification process of a HSR under the OPGGS regime? Why?

47. Under the OPGGS Act, NOPSEMA may disqualify an HSR. Under the WHS Act, only a court can disqualify an HSR (however, we note that the NOPSEMA may only disqualify an HSR for a period not exceeding five years, while under the WHS Act the court can disqualify the HSR indefinitely).³⁸ It may be more appropriate that the power to disqualify an HSR, which is significant, can only be exercised by a court – with all of the safeguards a court process entails.³⁹

Powers of and protections for HSRs

Do you think the current provisions under the OPGGS regime on the powers and protections for HSRs are effective? What evidence can you provide to support your views? Are there any other powers of and protections for HSRs that should be provided for? If so, what are they and why do you think they are needed? Are there any other operator duties and obligations to HSRs that should be provided for? If so, what are they and why do you think they are needed?

Protections for HSRs

48. The Discussion Paper notes that a consistent theme in the Senate Inquiry, and during introductory stakeholder workshops led by the department, is the perceived gap between the requirements set out in the legislation and how they are implemented in practice. Evidence presented during the Senate Inquiry outlined situations where HSRs have not felt supported or protected to perform their role by operators, other employers and NOPSEMA, and

³⁷ WHS Act 2011, Part 5, Division 3, Subdivision 4, Section 61(4).

³⁸ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A, Clause 32.

³⁹ WHS Act 2011, Part 5, Division 3, Subdivision 4, Section 65.

occasions where HSRs have feared reprimand by their employers for raising health and safety issues. The Senate Inquiry considered that a culture of fear and reprisal exists, which it described as detrimental to achieving positive health and safety outcomes in the offshore petroleum industry.

49. These findings are consistent with reports from our affiliates and the results of the Offshore WHS Survey. When asked if the protections for HSRs to not be discriminated against by the operator or their employer are enough, more than two thirds of current or recent HSRs said that the protections are not enough (71.05%) and almost a third said that they had experienced backlash or discrimination by the operator or their employer because of their role as an HSR (29.73%). We also asked workers who are not current HSRs what would stop them from taking on that role. One of the most common responses was: 'Concerned about backlash from my employer or that it would harm my career going forward' (26.47%). Other responses included:

- 'NO PROTECTION PERFECT WAY TO GET SACKED'
- 'Why would you bring up issues and never work again'
- 'Fear of getting looked over for next job'

50. When asked what additional protections for HSRs would be helpful:

- 61.11% said of current and recent HSRs said better job security
- 58.33% said a bigger presence of NOPSEMA or safety inspectors at their facility
- 55.56% said bigger fines for employers or operators that discriminate against HSRs

These suggestions are addressed elsewhere in this submission.

Support for HSRs

51. The Survey indicated a general lack of support for HSRs in their role. When asked if they feel that the operator or their employer provides enough support for their role as an HSR, more than half of current and recent HSRs said that they do not receive enough support (57.9%). We also asked workers who are not current HSRs what would stop them from taking on that role. 'Not enough support and assistance' was a common response (17.65%). Other responses included:

- 'No extra incentive to deal with extra workload'
- 'Current company [does] not provide enough support to HSR and the extra workload, responsibility and time commitment is not accounted for in the working day i.e. HSR must conduct alot (sic) of work outside there (sic) working hours'

52. Insufficient time to perform the role is a significant issue. About half of current and recent HSRs said that they are not given enough time during work hours to perform their role as an HSR (53.85%). More than half said that they do not have enough time on shift to do a handover with the HSRs on the oncoming crew during crew change (57.9%) and almost half said that they find themselves spending time in their off swing performing HSR duties (44.74%). When asked what additional support would be helpful, 28.95% said 'more time'. We also asked workers who are not current HSRs what would stop them from taking on that role. The most common response was 'Not enough time to do the role during work hours' (40.2%). These responses are important also because of the relationship between work pressure and mental health.

Recommendation 17: That the OPSSG Act be amended to provide for a right for HSRs to attend to work health and safety business during work hours or while on a facility, including a requirement for the operator or employer to provide HSRs time to hold meetings and discussions with workers in respect of work health and safety matters during work hours or while on a facility.

Recommendation 18: That consideration be given to requiring a minimum handover period between HSRs and safety committee members between shifts, which must occur during the workers' normal working hours and rostered on period.

53. About two thirds of current and recent HSRs said that they do not have enough opportunities to network, collaborate and learn from other HSRs (68.42%), even though almost all said that such opportunities would be helpful (96%). An inaugural tripartite Health and Safety Representative Forum was held in June of this year. The HSR Forum provided an opportunity for HSRs to engage with their peers. The HSR Forum is discussed further under 'Training for HSRs'.

54. The HSR Forum was originally recommended by the ACTU and the Australian Petroleum Production and Exploration Association to a 2015 review. Both groups also recommended to the 2015 review that NOPSEMA reinstate the online portal for HSRs to communicate and share knowledge and experience with each other. Disappointingly, although the Australian Government accepted the recommendation, the NOPSEMA's response was simply to state

that it would 'continue to participate in the relevant forums for health and safety representatives and the workforce as appropriate'.⁴⁰

55. When asked what additional support would be helpful, as well as opportunities to network with and learn from other HSRs, 23.68% of current and recent HSRs said more information. A direct contact line and support with onshore company work health and safety management was suggested. This suggestion pertains to company's internal structures. We also submitted to the Senate Inquiry that the NOPSEMA should fund dedicated HSR support officers and operate a dedicated advice and support phone line for HSRs to speak directly and confidentially to an inspector or other expert for advice and support in performing their role and to report a health or safety issue. This service would be an invaluable resource for HSRs in managing daily work health and safety issues in their workplace. The NOPSEMA gave evidence to the Senate Inquiry of a dedicated NOPSEMA inspector that acts as a focal point for each facility and a dedicated hotline number, but our affiliates report that these services have not been well advertised or understood by HSRs. The HSR Forum provided HSRs with an opportunity to receive updates on current industry issues and challenges, to work together through case studies and to share their own safety related stories and information.⁴¹

Recommendation 19: That NOPSEMA continue to lead and sponsor the HSR Forum annually.

Recommendation 20: That NOPSEMA establish an online portal for HSRs to communicate with each other confidentially.

Recommendation 21: That the NOPSEMA give consideration to ways to better promote its dedicated NOPSEMA inspector focal point and dedicated hotline number to HSRs.

56. Four out of five current and recent HSRs said that it would be helpful to have access to a union representative in the workplace to support or assist HSRs in their role (81.08%) and almost all workers said that unions should have a role in supporting and assisting HSRs (91.91%). The Safe Work Australia Review of the Model WHS Laws recognised the importance of this assistance.⁴² Currently, workers in the offshore oil and gas industry are

⁴⁰ Progress Report on Implementation of the 2015 NOPSEMA Operational Review Recommendations, page 11.

⁴¹ <https://www.nopsema.gov.au/news-and-media/news-announcement/2019/03/12/inaugural-health-and-safety/>

⁴² Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 8.

denied access to a union representative exercising a right of entry. This issue is addressed elsewhere in this submission.

57. Section 70(1) of the WHS Act requires that the person conducting a business or undertaking provide an HSR with certain rights and benefits to assist and support the HSR in performing the role. To the extent that the equivalent provision of Schedule 3 of the OPGGS Act (clause 40(1)) is comparatively deficient, that should be corrected. For example, clause 40(1)(f) requires the operator to provide an HSR with access to such facilities as are necessary for the purposes of exercising the powers of an HSR, compared to s 70(1)(f), which requires an HSR to be provided with any *resources, facilities and assistance* that are reasonable to enable the representative to exercise his or her powers *or perform his or her functions under this Act*. Functions may include, for example, the HSR's function as a representative in consultation.⁴³ This recommendation was supported by the Senate Inquiry.⁴⁴ There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 22: That clause 40(1) of Schedule 3 the OPGGS Act be amended to address any deficiency relative to s 70(1) of the WHS Act.

Powers of HSRs

58. When asked if the powers of HSRs are enough to be able to perform the role effectively, just under half of current and recent HSRs said the powers are not enough (40.54%). When asked what additional powers would be helpful:

- 55.88% said a right to meet privately with workers to discuss work health and safety issues without management present
- 52.94% said a requirement that HSRs accompany a NOPSEMA safety inspector on visits or inspections to facilities
- 50% said a requirement that a NOPSEMA safety inspectors meet privately with HSRs when they visit or inspect a facility
- 47.06% said a right to require a review of the safety case for a facility if there are new or increased risks or hazards on a facility

⁴³ Under WHS Act 2011, Part 5, Division 2, Section 48(2).

⁴⁴ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1 (see paragraph 3.27).

In addition, 90.75% of workers said that accredited HSRs and union officials should have a right to conduct a work health and safety inspection of facilities before commissioning (4.62% said 'No' and 4.62% said 'Don't know'). These issues are addressed elsewhere in this submission.

Training for HSRs

What are your views on aligning the HSR training provisions under the OPGGS Act with the WHS Act? What would be the benefits or risks of increased alignment of HSR training provisions with the WHS Act?

59. In the Offshore WHS Survey, more than half of current and recent HSRs do not think that the training for the HSR role is adequate (19.51% said 'Not adequate' and 36.59% said 'Somewhat adequate'; while 41.46% said 'Adequate' and 2.44% said 'More than adequate').

60. The WHS Regulations entitle the HSR to an initial training course in work health and safety of up to five days and up to one day's refresher training each year.⁴⁵ The OPGGS regime contains no equivalent prescription of the period of training or any entitlement to refresher training. Given the importance of the HSR role and the responsibilities that the role entails, it is vital that they are properly trained and that their training remains up-to-date. The Senate Inquiry recommended that the OPGGS regime be amended to provide for consistency with the model WHS laws in this respect.⁴⁶ There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 23: That the OPGGS regime be amended to prescribe an initial period of training of up to five days and an entitlement to refresher training of up to one day per year.

61. In the Offshore WHS Survey, a significant proportion of current and recent HSRs said that they had experienced a disagreement with their employer or workplace about the choice of training provider for their HSR training (29.27%), time off to undertake their HSR training (38.46%) and the cost of the HSR training course (15.79%).

⁴⁵ WHS Act 2011, Part 5, Division 3, Subdivision 6, Section 72(2) and WHS Regulations 2011, Part 2, Division 2, Regulation 21.

⁴⁶ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1 (see paragraph 3.27).

62. The WHS Act allows the HSR to choose the approved HSR training course that they undertake, in consultation with the person conducting the business or undertaking, and requires that person to pay the course fees and any other reasonable costs associated with the HSR's attendance at the training.⁴⁷ The Safe Work Australia Review of the Model WHS Laws recommended that the model WHS laws be amended to make it clear that the HSR is entitled to choose the course of training, and to provide a mechanism for resolving disputes about time off for attendance or the reasonable costs of the training course that has been chosen by the HSR.⁴⁸ The OPGGS Act contains no equivalent provisions allowing the HSR choice of course or requiring the operator to cover reasonable costs. The Senate Inquiry recommended that the OPGGS regime be amended to provide for consistency with the model WHS laws in this respect.⁴⁹ There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 24: That the OPGGS regime be amended to be consistent with the model WHS laws (including any amendments following the Safe Work Australia Review of the Model WHS Laws) in respect of HSR choice of training course and operator requirement to cover reasonable costs.

What are your views on whether additional types of learning opportunities should be considered as 'appropriate training' for HSRs under the OPGGS regime?

63. As discussed above under 'Support for HSRs', the inaugural HSR Forum held this year provided critical support for HSRs. The NOPSEMA continue to lead and sponsor the HSR Forum annually. In order for the HSR Forum to be successful, it must be able to be accredited as training for the purposes of clause 30 of Schedule 3 of the OPGGS Act. Unless the operator is required to permit the HSR to take such time off work, without loss of remuneration or other entitlements, as is necessary to undertake the training, the majority of HSRs will be unable to attend.

Recommendation 25: That the OPGGS Act be amended as necessary to ensure that the HSR Forum is accredited for the purposes of clause 30 of Schedule 3 of the OPGGS Act, and provision

⁴⁷ WHS Act 2011, Part 5, Division 3, Subdivision 6, Section 72(2)(b).

⁴⁸ Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 10.

⁴⁹ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1 (see paragraph 3.27).

made for NOPSEMA or the employer or operator to cover the cost of travel and accommodation for HSRs to attend the training.

HSR place on Health and Safety Committee

Is there a need to specify in the legislation that a HSR is guaranteed a place on the HSC if they consent? Why/why not?

64. The WHS Act requires that an HSR be a member of the health and safety committee (**HSC**), if they consent.⁵⁰ The OPGGS Act contains no equivalent provision. The Senate Inquiry recommended that the OPGGS regime be amended to provide for consistency with the model WHS laws in this respect.⁵¹ There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 26: That the OPGGS regime be amended to be consistent with the model WHS laws in respect of HSR membership of the health and safety committee.

Engagement between HSRs and NOPSEMA

Do you think the current legislative provisions for engagement between HSRs and NOPSEMA are effective? Can you suggest further strategies (legislative or non-legislative) to improve engagement between NOPSEMA and HSRs?

65. We think that there is room for improvement in NOPSEMA's engagement with HSRs. The Senate Inquiry received evidence that indicated that NOPSEMA was not regarded as a fully effective or engaged regulator by workforce stakeholders.⁵² In the Offshore WHS Survey, only about a third of current and recent HSRs were confident raising a work health and safety issue or concern with NOPSEMA (29.27% said that they were 'Confident' and 4.88% said that they were 'Very confident'; while 12.2% said that they were 'Not at all confident' and 19.51% said that they were 'Not very confident'; 34.15% said that they were 'unsure'). As noted above, more than two thirds said that the protections for HSRs to not be discriminated against by the operator or their employer are not enough (71.05%). When asked what

⁵⁰ WHS Act 2011, Part 5, Division 4, Section 76(2).

⁵¹ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 1 (see paragraph 3.27).

⁵² Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Chapter 4 (Page 1).

additional protections would be helpful, more than half said, 'A bigger presence of NOPSEMA or safety inspectors at my facility' (58.33%).

Recommendation 27: That the NOPSEMA be required to develop, in consultation with stakeholders including unions and HSRs, an HSR engagement policy.

66. In terms of legislative measures, in Recommendation 1 to this review we recommended that the objects of Schedule 3 of the OPGGS Act be harmonised with the objects of the model WHS laws, particularly in respect to the workforce and their representatives.

'Representatives' include not only unions, but also HSRs. The objects of the WHS Act include 'providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety'.⁵³

HSR list

Do you think proposed amendments to the provisions regarding HSR lists would improve engagement?

67. The Senate Inquiry recommended that a centralised HSR register be maintained by NOPSEMA (including the HSR's name, position and contact details; their employer; details of HSR training and their work group).⁵⁴ This recommendation was supported in principle by the dissenting report. We agree that this register may assist in addressing concerns about NOPSEMA's approach to engaging and supporting HSRs and a perceived lack of engagement between NOPSEMA and HSRs, by ensuring NOPSEMA has access to HSR details and increasing scope to communicate directly with HSRs.

68. The WHS Act requires that the person conducting the business or undertaking prepare and keep up-to-date a list of each HSR for each work group. The person must provide an up-to-date copy to the regulator as soon as practicable after it is prepared.⁵⁵ The OPGGS Act requires the operator of a facility to prepare and keep up-to-date such a list,⁵⁶ but there is no requirement to provide a copy to the regulator.

⁵³ WHS Act 2011, Part 1, Division 2, Section 3(b).

⁵⁴ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 2.

⁵⁵ WHS Act 2011, Part 5, Division 4, Section 74.

⁵⁶ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A, Clause 27.

69. The maintenance of a consolidated list by the regulator would not only enhance NOPSEMA's ability to engage with HSRs, if the list were required to include the date on which the HSR completed their HSR training, it would also assist NOPSEMA to monitor compliance with the HSR training requirements. Currently the NOPSEMA collects no data that would enable it to monitor or enforce these requirements. The NOPSEMA is unable to identify the number or identity of HSRs or whether they have received the mandatory training. A consolidated list would allow NOPSEMA to effectively map HSRs and HSR training across the industry and develop its HSR engagement and education strategies accordingly.

Recommendation 28: That the OPGGS Act be amended so that the operator is required to maintain an up-to-date list of HSRs and to provide a copy to NOPSEMA as soon as practicable after it is prepared.

Recommendation 29: That the OPGGS Act be amended to require the list to also record the date on which the HSR was elected to the role and the date on which they completed the HSR training.

70. The WHS Act and model WHS Act also require that the person conducting the business or undertaking display the list of HSRs at the workplace in a manner that is readily accessible to the relevant workers.⁵⁷ The OPGGS Act requires the operator to ensure that the list is available for inspection at all reasonable times by the workforce and inspectors,⁵⁸ but there is no requirement to display the list. Workers generally have to request a list from the operator and thereby identify their interest in the list to the operator, which is problematic given the level of fear of reprisal for work health and safety activity that exists in the industry (as was identified in the Senate Inquiry and discussed in this submission). There is no objective justification for the harmonisation principle not to be applied in this case.

Recommendation 30: That the OPGGS Act be amended so that the list is required to be displayed at the workplace, in a manner that is readily accessible to the workers.

⁵⁷ WHS Act 2011, Part 5, Division 4, Section 74. This provision reflects the Model WHS Act, Section 74.

⁵⁸ OPGGS Act 2006, Schedule 3, Part 3, Division 3, Subdivision A, Clause 27(b).

Requirement for HSRs to accompany and meet with inspectors

Do you think that proposed amendments mandating that HSRs accompany and meet with NOPSEMA inspectors, would improve engagement?

71. We think that the proposed amendments mandating that HSRs accompany and meet with NOPSEMA inspectors would improve engagement. The Senate Inquiry heard significant evidence about a pervasive culture of fear and reprisal that characterises the offshore petroleum industry, in which workers are hesitant to engage with the regulator for fear it will cost them their job. But perhaps the most telling evidence on this issue was from the regulator itself, about HSRs requesting clandestine meetings with NOPSEMA inspectors:

Mr Gunn: That's very common because most of that information comes from the workforce and the HSRs. We're there 24/7 and have our badges and everything. We'll have informal meetings. We have workers who say, 'Can I come and see you behind this door and have a chat?' That happens quite often. ...

CHAIR: At one of these facilities, how to meet privately with someone?

Mr Gunn: They say, 'Can you meet me after tea in my room or at the back of the control room?' They arrange the private meeting because obviously, as you can say, they don't want to be seen talking to—

CHAIR: Self-protection.

Mr Gunn: Yes. That does occur...⁵⁹

72. In the Offshore WHS Survey, we asked current and recent HSRs whether they have ever accompanied a NOPSEMA inspector on an inspection of their facility. About a quarter said yes (25.64%), 41.03% said no and a third said that they are not aware of NOPSEMA ever having visited their facility (33.33%). Slightly more said that they had met privately with a NOPSEMA safety inspector on their facility, without the operator or their employer present (30.77%). We asked the current and recent HSRs if they feel, or have ever felt, worried or concerned about backlash or discrimination from their employer or the operator if they were to accompany or meet with a NOPSEMA safety inspector. More than a third said yes (38.46%).

73. The Senate Inquiry recommended that HSRs be *required* to accompany NOPSEMA inspectors on their inspections, and that NOPSEMA inspectors be *required* to meet separately and

⁵⁹ Evidence of Mr Rodney Gunn, Manager Assessment and Inspection Melbourne, NOPSEMA, 11 July 2018, transcript page 6.

privately with HSRs during inspections.⁶⁰ The Discussion Paper suggests that this recommendation may have been the result of a misconception that NOPSEMA sometimes conducted a site inspection without an HSR present, resulting from NOPSEMA conducting environmental management inspections, and notes that NOPSEMA has since introduced a new policy that all NOPSEMA inspectors should meet with HSRs at the beginning of all such inspections. With respect, this suggestion misunderstands the basis of the recommendation, which is to ensure that HSRs are confident to accompany and meet with NOSPEMA inspectors without fear of reprisal. Currently, too many HSRs say that they feel worry or concern about backlash or discrimination from their employer or operator if they accompany or meet with a NOPSEMA inspector. Making this a legislative requirement would overcome this fear, because there could be no perception that the HSR requested or initiated the meeting.

74. As noted earlier, just under half of current and recent HSRs said that the powers of HSRs are not enough to be able to perform the role effectively (40.54%). When asked what additional powers would be helpful, around half said, 'A requirement that HSRs accompany a NOPSEMA safety inspector on visits or inspections to facilities' (52.94%) and 'A requirement that a NOPSEMA safety inspectors meet privately with HSRs when they visit or inspect a facility' (50%).

Recommendation 31: That the OPGGS regime be amended to require HSRs to accompany NOPSEMA on their inspections and to require NOPSEMA inspectors to meet separately and privately with HSRs during inspections (i.e. without the operator or employer or their management representatives present).

Consultation provisions

What are your views on the current consultation provisions provided under the OPGGS regime? Which consultation provisions are working well? Which consultation provisions could be further improved?

75. As noted in the Discussion Paper, an important feature of a leading work health and safety regulatory regime is workforce involvement through consultation, representation and

⁶⁰ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 8. This recommendation was supported in part by the dissenting report.

participation in health and safety matters in the workplace.⁶¹ However, there is evidence that the current consultation provisions provided under the OPGGS regime are not working as well as they should. Further, consultation is another area in which the OPGGS regime lags behind the model WHS laws, with no objective justification. Given the importance of effective consultation to an effective work health and safety regime, this deficiency cannot be allowed to continue.

76. In the Offshore WHS Survey, more than one third of workers said that their employer does not regularly consult with them about health and safety at work (36.46%). A similar proportion of current and recent HSRs said that the operator or their employer does not consult with them as an HSR about work health and safety issues in their workplace (30.77%). As noted above, more than two thirds of HSRs said that the protections for HSRs to not be discriminated against by the operator or their employer are not enough (71.05%). When asked what additional protections would be helpful, more than one third said, 'More consultation by the operator or my employer about work health and safety issues at my facility' (39.47%). More than two thirds of workers said that casual and labour hire workers do not receive the same work health and safety standards and outcomes as permanent workers in the offshore oil and gas industry, including consultation about issues affecting work health and safety (68.71%).

77. The Discussion Paper sets out the ways in which the OPGGS regime is not equivalent to the WHS Act regarding consultation with, and participation of, the workforce. The WHS Act contains specific duties relating to consultation with workers, whereby a PCBU must, so far as reasonably practicable, consult with workers who carry out work for the business or undertaking, and are, or are likely to be, directly affected by a health and safety matter. The WHS Act specifies the nature of this consultation and the range of situations when consultation is required, and also imposes a penalty for non-compliance with this duty.⁶² The WHS Act also contains a duty requiring consultation with other duty holders. If more than one person has a duty under the WHS Act in relation to the same matter, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter. No equivalent duties specifically relating to consultation are provided for under the OPGGS regime.⁶³

⁶¹ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 53.

⁶² WHS Act 2011, Part 5, Division 2

⁶³ WHS Act 2011, Part 5, Division 1.

78. The Safe Work Australia Review of the Model WHS Laws made recommendations in respect to model codes of practice that provide detailed practical guidance on how persons conducting a business or undertaking can fulfil their consultation duties, including include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings. This practical guidance would be helpful in the offshore oil and gas industry also, particularly in respect of how meaningful consultation can occur with casual and labour hire employees.

Recommendation 32: That the OPGGS regime be amended to be equivalent to the WHS Act regarding consultation with, and participation of, the workforce, and that practical guidance be developed to assist duty holders to fulfil these additional consultation duties.

Right of entry provisions

Would you support the introduction of a right of entry provision for the offshore petroleum industry, similar to that of the WHS Act? Would this provision lead to improved safety outcomes for the workforce?

79. We support the introduction of a right of entry provision for the offshore petroleum industry, similar to that of the WHS Act but with modifications to account for the remote location of the work. As noted in the Discussion Paper, workforce representation in health and safety matters is an important feature of a leading health and safety regulatory regime.⁶⁴

80. The WHS Act provides that entry permit holders have a right of entry to investigate suspected contraventions and consult and advise workers.⁶⁵ It enables an employee representative to apply to the authorising authority for an official of that union to become an entry permit holder. A permit holder is able to enter a workplace to inquire into safety issues, consult, and advise workers on work health and safety matters. The OPGGS regime does not have provisions for workplace entry by entry permit holders. Arrangements for accessing offshore facilities is currently a matter for individual stakeholders to negotiate with the operator.

⁶⁴ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 53.

⁶⁵ WHS Act 2011, Part 7, Division 1.

81. There is no objective justification for this major deficiency in the OPGGS regime, relative to the model WHS laws and to work health and safety regulation internationally. Unions provide critical support to HSRs and HSCs, including training, information and protection from victimisation. The World Bank has noted that 'Trade unions can play an important role in enforcing health and safety standards. Individual workers may find it too costly to obtain information on health and safety risks on their own, and they usually want to avoid antagonising their employers by insisting that standards be respected.'⁶⁶ The 2008 national review of work health and safety found that providing a legislated right of entry for work health and safety purposes to union officials 'would contribute in a positive manner to OHS compliance at a workplace level'.⁶⁷ Union access to offshore facilities is a standard feature of work health and safety regulation in other jurisdictions internationally.

82. In the Offshore WHS Survey:

- 98.29% of workers said that unions should be able to represent workers and HSRs in disputes with their employer or company about work health and safety issues (0% said 'No' and 1.71% said 'Don't know')
- 95.29% of workers said that unions should be able to take employers and companies who break health and safety laws to court (4.71% said 'No')
- 93.71% of workers said that unions should be able to come to their workplace to talk to and support workers about work health and safety issues in their workplace (2.29% said 'No' and 4% said 'Don't know')
- 91.91% of workers said that unions should have a role in supporting and assisting HSRs (1.73% said 'No' and 6.36% said 'Don't know')
- 90.75% of workers said that accredited HSRs and union officials should have a right to conduct a work health and safety inspection of facilities before commissioning (4.62% said 'No' and 4.62% said 'Don't know')
- 85.06% of workers said that unions should be able to come to their workplace to investigate work health and safety breaches or suspected breaches (9.2% said 'No' and 5.75% said 'Don't know')
- 84.57% of workers said that unions should be involved in educating and informing workers, HSRs, employers and companies about work health and safety (4% said 'No' and 11.43% said 'Don't know')

⁶⁶ World Bank (1995) *Workers in an Integrating World*, Oxford University Press, Washington.

⁶⁷ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009, page 389.

- 80.08% of current and recent HSRs said that it would be helpful to have access to a union representative in the workplace to support or assist HSRs in their role

These findings underscore the importance of union representation, advice and assistance to workers and HSRs.

Recommendation 33: That clause 35 of Schedule 3 of the OPGGS Act be amended to make it clear that the consultant can be a union official, and that consideration be given to how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the *Fair Work Act 2009* (Cth) or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.⁶⁸

83. The Senate Inquiry recommended that a right of entry for work health and safety purposes be established under the OPGGS Act.⁶⁹ The dissenting report did not support this recommendation, stating:

While recognising the positive role unions can play in entering a workplace to inquire into safety issues and take a constructive role in promoting OHS improvements, it is noted however, that there are ongoing concerns about union entry rights being used for other purposes, including industrial purposes.⁷⁰

84. This reasoning is concerning. The health and safety of workers should be the paramount issue. Offshore oil and gas industry workers should not be denied the same basic rights as onshore workers because of the potential for misuse by a small proportion of permit holders. There are other avenues for dealing with any such misuses. Under the WHS Act, permit holders who contravene the legislative requirements are subject to significant civil penalties.

Recommendation 34: That the OPGGS regime be amended to provide for a union right of entry for work health and safety purposes, consistent with the model WHS laws (subject to any modifications following the Safe Work Australia Review of the Model WHS Laws and the further modifications outlined below).

⁶⁸ Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 8.

⁶⁹ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 4.

⁷⁰ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, page 60, paragraph 1.37.

85. The WHS Act right of entry provisions cannot be directly transposed to the offshore oil and gas industry because of the remote location of the work. Without modification, the WHS Act right of entry provisions will be ineffective. Right of entry provisions in the OPGGS regime will need to require the occupier to facilitate transport of the permit holder to the facility for right of entry purposes. Part 3-4, Division 7 of the *Fair Work Act 2009* (Cth) provides an example of the way in which this requirement might operate, although cost has posed a barrier to the effectiveness of this system. The cost issue could be avoided in the offshore oil and gas industry context if the cost of transport is recovered from industry by the levy revenue to NOPSEMA under the 'user pays' system.

86. Under the WHS Act, a permit holder may only enter a workplace for the purpose of inquiring into a suspected contravention of the WHS Act.⁷¹ Given the difficulties of accessing remote offshore work locations, this limitation would need to be removed in a right of entry system in the OPGGS regime so that a permit holder can investigate multiple suspected contraventions in one entry, including additional contraventions identified during the course of the entry.

Recommendation 35: That any right of entry for work health and safety purposes established under the OPGGS Act provide for:

- the operator of the facility to, as soon as possible, facilitate transport for the permit holder for right of entry purposes;
- the cost of transport for the permit holder for right of entry purposes to be recovered from industry by a levy revenue to NOPSEMA; and
- an ability for the permit holder to exercise entry for the purposes of inquiring into multiple suspected contraventions of the OPGGS Act, including additional contraventions identified during the course of the entry.

⁷¹ WHS Act 2011, Part 7, Division 2, Section 117(1).

Information sharing: The safety case

What are your views on the current provisions for information sharing? Do you think there is a need for increased transparency in relation to the regulation of health and safety? If so, what specific changes do you think should be made?

87. We are concerned that the current provisions for information sharing are problematic, in respect of HSR and workforce access to the safety case. The Senate Committee received evidence to suggest that HSRs are wary of accessing safety cases on offshore facilities for fear of being questioned or persecuted by management. While evidence was provided stating safety cases are available electronically at some facilities, there does not appear to be a consistent approach across the industry, nor is it a current legislative requirement. The Inquiry recommended that the OPGGS Act be amended to include a requirement that HSRs be provided with a copy of the safety case, including by remote online access.⁷²

88. In the Offshore WHS Survey, workers reported difficulties accessing the safety case:

- 22.22% said that they were not allowed enough time to read the safety case
- 9.09% said that they were only allowed access to a copy with a supervisor or manager present
- 7.07% said that they were not allowed access to a copy of the safety case

Other responses included:

- 'Control room copy was missing'
- 'Not made aware of it'
- 'Don't know how or where to access'
- 'I've never seen a copy'
- 'Time is the thing, you get out there, get blown in and let's face it, bring up problems with the safety case and you not required back'
- 'To big and to busy (sic) to get to understand it plus ... the company knows nobody will read it anyway'
- 'Time is always the problem and what's the point. You won't change anything you'll just put a target on your back'

⁷² Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 3.

89. Given the importance of the safety case, these responses are disturbing. The safety case is intended to be a 'living document'.⁷³ As noted in the Discussion Paper, workforce involvement in the safety case is 'essential to achieving positive safety outcomes':

Workforce involvement is necessary so that workers understand the hazards and risks and are able to arrive at informed opinions about the risks and hazards to which they may be exposed. In turn, workers are more likely to do the right thing regarding safety because they know and understand why it is required. Workforce involvement encourages and promotes a positive safety culture, where workers are involved in major accident event identification and control and aware of safety issues and their own responsibilities.⁷⁴

As noted in Part 3 above, previous reviews of work health and safety in the offshore oil and gas industry have also emphasised the need for workers to be familiar with and understand the safety case.⁷⁵

90. There are two issues in respect of workforce access to the safety case that need to be addressed. The first is that workers need to be provided with a copy of the safety case in circumstances in which they are given sufficient time to read and digest it. The second is that workers need to be able to access the safety case without management present or being alerted to that access. One step towards addressing these issues would be to require that the workforce be given a copy of the safety case, including by confidential remote online access.

Recommendation 36: That the OPGGS regime be amended to require that the workforce be given a copy of the safety case, including by confidential remote online access.

⁷³ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 26.

⁷⁴ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 54, citing NOPSEMA, 2019, Safety Case –Involving the workforce, <https://www.nopsema.gov.au/assets/Guidance-notes/A308788.pdf>

⁷⁵ Review of the National Offshore Petroleum Safety Authority Operational Activities 2008; Kym Bills and David Agostini, Offshore Petroleum Safety Regulation Better practice and the effectiveness of the National Offshore Petroleum Safety Authority, June 2009.

Workforce representation on the NOPSEMA Board

What are your views on the current provisions for workforce participation in governance arrangements? Do you think the OPGGS Act should be amended to require representation of the workforce on the NOPSEMA Board?

91. The Discussion Paper sets out the history and rationale for workforce participation in governance arrangements:

Workforce involvement includes participation in tripartite (industry, regulator and workforce) governance arrangements or forums which assist in the development of guidance on health and safety issues. Australia's WHS laws have historically been based on the UK's health and safety laws, often referred to as Robens-style legislation. One Robens principle was the concept of "a more effectively self-regulating system" that involved workers and management working together to achieve and improve upon, health and safety standards.⁷⁶

92. As noted in the Discussion Paper, the structure and composition of most of Australia's WHS advisory boards are based on the Robens-style principles, in that they require the participation and representation of employees in health and safety matters, including at a governance level.⁷⁷ The NOPSEMA Board is one such governance mechanism provided for under the OPGGS regime. There is no legislative provision requiring the representation of employees (or employers) on the NOPSEMA Board. The use of tripartite forums, aimed at collaboratively developing guidance on important health and safety issues or specific hazards, is less explicit under the OPGGS regime than in other jurisdictions, in Australia (e.g. Safe Work Australia) and internationally (e.g. the European Union). There is no objective justification for the harmonisation principle not to be applied in this case. The Senate Inquiry recommended that the OPGGS Act be amended to provide for equal representation of industry and workforce participants on the NOPSEMA Board, with the latter to be nominated by the Australian Council of Trade Unions.⁷⁸

⁷⁶ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 59, citing the Robens Report 1972, paragraph 41

<http://regnet.anu.edu.au/research/centres/national-research-centre-ohs-regulation-nrcohsr/overview-work-health-and-safety-regulation-australia>

⁷⁷ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 60.

⁷⁸ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 6.

93. Given the importance of shared management of work health and safety, the OPGGS Act ought to be amended to provide for equal industry and worker representation on the NOPSEMA Board. The Board's advisory function makes it an appropriate mechanism by which the regulatory approach of the NOPSEMA can be informed and guided by the unique expertise of the workforce. Further, consistent with the recommendations of reviews of NOPSEMA in 2008, 2009, 2011 and 2015, equal representation of workers and industry in this high-level forum would address the lack of trust and perception of regulatory capture that has prevented the NOPSEMA from earning its social licence to regulate.⁷⁹

Recommendation 37: That the OPGGS Act be amended to provide for equal representation of industry and workforce participants on the NOPSEMA Board, with the latter representatives to be nominated by the Australian Council of Trade Unions.

Protections for workers

What are your views on the effectiveness of the provisions relating to the protection of workers who are involved in or raise workplace health and safety issues, or who take on a representative role and raise health and safety issues? Do you have any suggestions for improvements?

94. As noted in the Discussion Paper, a positive safety culture requires that workers not be discouraged or prevented from raising health and safety issues or exercising any of their powers or functions under legislation.⁸⁰ The Senate Inquiry received evidence that within the offshore petroleum industry there is a culture of fear around raising safety concerns. The Inquiry noted that many HSRs claimed to be afraid to speak with NOPSEMA inspectors out of fear of reprisal, and NOPSEMA testified that it is common place for HSRs to surreptitiously seek meetings with inspectors to avoid possible repercussions and pressure from the operator for approaching the regulator. Witnesses also discussed how casual and insecure employment conditions and limited engagement between NOPSEMA and HSRs contribute to a poor safety culture.

⁷⁹ See the ACTU Submission to the Senate Inquiry ([enclosed](#)), under (d) 'The role and structure of the NOPSEMA Board and options for improving the effectiveness of their stakeholder engagement', pages 11 to 13 (paragraphs 34 to 42).

⁸⁰ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 62.

95. We have already outlined some of the results of the Offshore WHS Survey which accord with the evidence to the Senate Inquiry in respect of workers who take on the HSR role (under 'Protections for HSRs' above). We also asked workers about raising health and safety issues. Around a quarter did not say that they were confident in raising health and safety issues at work (24.36%).

96. We asked about whether workers are aware of existing conditions in their workplace that could cause serious injury or illness to a worker if left unaddressed or not properly managed (46.41% said yes), and whether those existing issues have been reported to an HSR in their workplace (88.57% said yes), to the operator or their employer (88.57% said yes) or to NOPSEMA (35.05% said yes).

97. Fear of reprisal was a common reason why more than one in ten had not reported the issue to an HSR, with comments including: 'Could jeopardise my position'; 'Fear of losing my job'; 'Company doesn't allow it'; and 'You don't get any more work'.

98. The more than one in ten who had not reported the issue to the operator or their employer gave reasons including, 'For fear of reprisal', 'Fear of losing my job', 'Fear of retribution and nothing will be done anyway', as well as, 'Poor safety culture resulting in unsafe acts being acceptable' and 'Bullying'. Respondents also said that management 'cover up' safety issues regularly, choosing not to report them to on shore management.

99. Similar reasons were given by the 64.95% who said the issue was not reported to NOPSEMA:

- 'As we could lose our jobs'
- 'They are not effective in their response'
- 'Culture of employer'
- 'Fear of losing my job'
- 'I find NOPSEMA a toothless tiger'
- 'Fear of reprisal for being a whistleblower. Also, a lack of confidence in the system in general'
- 'The operator and client do not want to draw attention to the issues'
- 'Complete waste of time'
- 'Because that's a waste of time we need jobs and if you report to "the powers that be" there will be no job'
- 'People afraid'
- 'NOPSEMA have no jurisdiction over cranes or rigging gear and its licensing, they are toothless tigers...'
- 'They don't care'
- 'They don't do a thing about it, only come for there scheduled inspections'

- 'Company avoids contacting if possible'

100. We asked about whether workers have ever had or witnessed a near miss in their current job or another job in the offshore oil and gas industry that would have injured themselves or another workmate (71.89% said yes), and whether that near miss was reported to an HSR in their workplace (85.81% said yes), to the operator or their employer (88.36% said yes), or to NOPSEMA (43.57% said yes).

101. The most common reason for the 14.19% who said that the near miss was not reported to an HSR was that there is no HSR in their workplace. Other reasons included:

- 'Fear of job loss'
- 'On a casual contract so if someone speaks up they will not have a job'
- 'Unless client rep is present and actually cares nothing is reported'
- 'It was brushed under the carpet'
- 'Client wanted to keep it off the books'
- 'Supervisor didn't want to do the paperwork or have people asking him questions'

Casual employees not wanting to speak up was a frequent answer.

102. The 11.64% who said that the near miss was not reported to the operator or their employer gave reasons including that, 'It would be overlooked', '[The company] didn't want to report it' and the 'Supervisor didn't want to do the paperwork or have people asking him questions'.

103. Similar reasons were given by the 56.43% who said that the near miss was not reported to NOPSEMA:

- 'Company would not want NOPSEMA involved as it would effect (sic) contracts'
- 'Could lose your job'
- 'It would be overlooked'
- 'To keep mine and workmates jobs'
- 'Toothless tiger'
- 'Company keeps these quiet'
- 'Supervisor didn't want to do the paperwork or have people asking him questions'

104. We asked about whether workers have ever experienced a physical or psychological injury or illness due to work in the offshore oil and gas industry (18.33% said physical, 28.33% said psychological, 26.67% said both and 26.67% said none), and whether that injury or illness was reported to an HSR in their workplace (58.14% said yes), to the operator or their employer (69.77% said yes), or to NOPSEMA (5.56% said yes).

105. The 41.86% who said that their injury or illness was not reported to an HSR gave reasons including that it was 'Frowned upon, not good for keeping position at work', 'Cultural and sexual discrimination along with social issues prevent direct management from reporting incidents wherever possible' and 'The company does not care'.
106. The 30.23% who said that their injury or illness was not reported to the operator or their employer gave reasons including, 'Fear of losing job', 'Cultural and sexual discrimination along with social issues prevent direct management from reporting incidents wherever possible', 'The company does not want to know', and 'Afraid'.
107. The 94.44% who said that it was not reported to NOPSEMA gave reasons including:
- 'They are ineffective'
 - 'Casual employment doesn't allow for reporting from contractors without repercussions'
 - 'Fear of losing job'
 - 'Cultural and sexual discrimination along with social issues prevent direct management from reporting incidents wherever possible'
 - 'They care less than the operator'
 - 'Afraid'
 - 'Didn't get that far as we were casual'
108. These findings support the evidence received by the Senate Inquiry that a fear of reprisal, and perceived ineffectiveness of the regulator, are barriers to workers speaking up about health and safety issues. Recommendations made elsewhere in this submission, about NOPSEMA engagement with HSRs and consultation provisions, will go some way towards addressing these barriers, but stronger legislative protections for workers who take on a representative role or raise health and safety issues are also required. This issue is further addressed below in respect of increasing penalties under the OPGGS Act.
109. Another issue contributing to these barriers is the fragmentation of the industry and growth insecure employment. This issue was highlighted in the evidence to the Senate Inquiry and the results of the Offshore WHS Survey. As noted earlier in this submission, less than one third of workers in the Offshore WHS Survey were working for, or usually work for, a facility operator (32.67%). More than half were working for a Tier 1 (43.43%), Tier 2 (5.58%) or Tier 3 contractor (2.79%). Only about half were employed full-time in their current main job (48.78%). Approximately one third were casual (33.54%) and around one in ten were labour hire (7.32%). More than two thirds said that they have or have held a casual or labour hire job in the offshore oil and gas industry (69.33%).

110. Labour hire providers and contractors are less likely to report work health and safety incidents for fear of compromising their contracts. Casual and labour hire employees are less confident in raising a work health and safety issue for fear of compromising their employment. Recommendations to address these issues have been made elsewhere in this submission (e.g. under Part 4: Mental Health).

Issue resolution

Do you think the current provisions for issue resolution of health and safety issues, such as the use of HSRs, HSCs and other consultative mechanisms, are effective? If not, what changes do you suggest?

111. To assist in resolving issues, the WHS Act provides that a person conducting a business or undertaking, worker or their representative may ask for an inspector's assistance.⁸¹ Prior to requesting the attendance of an inspector, the parties must make reasonable efforts to resolve the issue themselves. Further, the WHS Act provides that where a workplace has not developed its own issue resolution procedure, a default process is provided in the WHS Regulations.⁸² The OPGGS regime does not contain an equivalent provision. The OPGGS regime does not provide a specific provision for issue resolution should an issue be raised at a workplace that cannot be resolved through the HSR, HSC, or other consultation processes.

112. The Safe Work Australia Review of the Model WHS Laws recommended guidance on issue resolution, including practical examples of how issue resolution works, and recommended a mechanism for a court or tribunal to resolve an outstanding dispute after 48 hours. In the Offshore WHS Survey, 88.44% of workers believe that if workers and the company disagree about a work health and safety issue, and a safety inspector is not able to help them to resolve the disagreement, either party should be able to go to a court or tribunal to get it resolved (3.47% said 'No' and 8.09% said 'Don't know'). Further, 95.29% of workers said that unions should be able to take employers and companies who break health and safety laws to court.

113. In the Offshore WHS Survey, we asked current and recent HSRs if the operator or their employer consults with them as an HSR about work health and safety issues in their

⁸¹ WHS Act 2011, Division 5, Section 82.

⁸² WHS Regulations 2011, Regulations 22 and 23.

workplace. Almost a third said no (30.77%). We also asked, if there is a health or safety incident in their workplace or a near miss, whether they are adequately notified and involved in any investigation or response to the incident. Almost half said no (46.15%). As noted earlier in this submission, just under half of current and recent HSRs said the powers of HSRs are not enough to be able to perform the role effectively (40.54%). When asked what additional powers would be helpful, 55.88% said, 'A right to meet privately with workers to discuss work health and safety issues without management present.' We have, elsewhere in this submission, outlined other findings of the Offshore WHS Survey which go to a lack of confidence of workers and HSRs in raising work health and safety issues.

Recommendation 38: That the OPGGS Act be amended to provide for an issue resolution process consistent with the model WHS laws (subject to any modifications following the Safe Work Australia Review of the Model WHS Laws).

Recommendation 39: That unions to be given standing to commence prosecutions for contraventions of Schedule 3 of the OPGGS Act.

114. The Safe Work Australia Review of the Model WHS Laws recommended that guidance be developed with examples of HSC constitutions, agendas and minutes.⁸³ We asked the current and recent HSRs whether they think that model codes and guidance for HSCs, with examples of HSC constitutions, agendas and minutes, would be helpful. Around three quarters said yes (76.32%) and 7.89% said no (the remainder had not been a member of an HSC (7.89%) or had never been at a workplace which had an HSC (7.89%)).

Recommendation 40: That guidance be developed with examples of health and safety committee constitutions, agendas and minutes.

⁸³ Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 11.

Error! Reference source not found.

Inspections

What are your views on the provisions for inspector powers and inspection process under the OPGGS regime? Do you think that unannounced inspections are necessary on offshore facilities, and if so, why?

115. The Senate Inquiry heard evidence that the current planned nature of inspections allows duty holders to rectify, cover up or hide issues before the inspector arrives and, when NOPSEMA does carry out an unplanned inspection, the duty holder may assume that it was triggered by a report from a HSR, and therefore put pressure on the HSR. NOPSEMA advised that it has undertaken 'unannounced' inspections of offshore facilities in the sense that the inspection has been at short notice (one to three days' notification, noting that NOPSEMA does not have its own helicopters to travel to a facility), or that the inspection scope or issue is explored without advance notice to the operator.⁸⁴

116. Our affiliates advise us that if NOPSEMA were to access (e.g. hire) a helicopter and carry out inspections on changeover days (flight activities require some on site preparation), it would be able to reduce the notice time to two hours (flight time is normally less than 90 mins). This time should be sufficient to allow the facility to prepare to receive an additional flight.

117. The Senate Inquiry recommended that NOPSEMA carry out regular, unannounced inspections as part of its standard inspection regime.⁸⁵ It is important that this recommendation be implemented and that NOPSEMA reduce the capacity for issues to be rectified, covered up or hidden prior to the inspection. As noted in the Discussion Paper, inspections are one of the most important ways for a regulator to enforce regulations and to ensure regulatory compliance.⁸⁶

⁸⁴ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, pages 41 to 42.

⁸⁵ Senate Inquiry into the WHS of Workers in the Offshore Petroleum Industry, 2018, Recommendation 7.

⁸⁶ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 65, citing OECD, 2014, Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, page 4.

Recommendation 41: That NOPSEMA carry out regular, unannounced inspections as part of its standard inspection regime.

Vessel facilities

What are your views on how compliance is monitored at vessel facilities? Should the regime provide for any additional or different requirements for compliance monitoring? Can you suggest ways (both regulatory and non-regulatory) in which monitoring compliance at vessel facilities could be enhanced?

118. As noted in the Discussion Paper, monitoring compliance at facilities that are vessels, however, presents regulatory challenges, as these vessels are often engaged in relatively short scopes of work, of which only a portion of the activities may cause them to meet the definition of a facility, and it is difficult for NOPSEMA to know when vessels are a facility and therefore within OPGGS jurisdiction and subject to inspection.⁸⁷

Recommendation 42: That the OPGGS regime be amended to require duty holders to notify NOPSEMA when a vessel facility is going to be used for a relevant purpose defined under the OPGGS regime, to facilitate compliance monitoring.

Penalties

What are your views on the penalty provisions under the current OPGGS regime? Do the provisions provide effective incentive to comply with the regime? What evidence can you provide to support your comments?

119. Regulatory experts advise that two aspects of an enforcement regime will achieve cooperative compliance: first, significant sanctions at the top of the regulatory pyramid; and second, the likelihood that the regulator will move to the top of the pyramid and apply those sanctions.⁸⁸ The work health and safety regime in the offshore petroleum industry fails in both aspects.

⁸⁷ Department of Industry, Innovation and Science, 'Offshore Safety Review: Discussion Paper', A review of the offshore safety regulatory regime, June 2019, page 68.

⁸⁸ Richard Johnstone, 'Rethinking Regulation', video transcript, page 8
<https://www.safeworkaustralia.gov.au/sites/swa/files/transcript-richard-johnstone.docx>

120. First, the offences and penalties regime in the OPGGS Act is woefully inadequate. Regulatory expert Mr Richard Johnstone gave advice to Safe Work Australia that the regulatory theory on which the pyramid framework is based envisaged far greater penalties than those contained in the WHS Act. The current penalties available in the WHS Act fall short of optimum levels:

Ten years ago in a book of essays, John Braithwaite discussed restorative justice in health and safety and talked about restorative justice playing at the bottom of the enforcement pyramid and at the top you have significant mega penalties, and the kinds of penalties he was talking about were penalties of \$100 million dollars for contraventions, but major discounts where a firm had a robust approach to systematic health and safety management. So, when we talk about large penalties at the top, we are talking about significantly greater penalties than we currently find in the health and safety legislation.⁸⁹

121. Even to the extent that the penalties in the OPGGS Act are greater than those in the WHS Act, they fall short of the quantum proposed by regulatory experts. The penalties in the OPGGS Act need to be even greater than those in the WHS Act 'to reflect the greater consequences in a major hazard industry'.⁹⁰ Further, offshore oil and gas companies are some of the largest corporations in the world and the profits that flow from these facilities are significant. Financial penalties need to be sufficient to provide a meaningful deterrent.

122. Second, the NOPSEMA has demonstrated an overreliance on the lower levels of the regulatory pyramid, as demonstrated by its unwillingness to sensibly penalise or prosecute repeat offenders.⁹¹

123. We note also the evidence already presented in this submission that protections for HSRs and workers who raise issues about work health and safety are insufficient. For example, in the Offshore WHS Survey, more than two thirds of current and recent HSRs said that protections for HSRs to not be discriminated against by the operator or their employer are not enough (71.05%), and more than half said that additional protection in the form of bigger fines for employers or operators that discriminate against HSRs would be helpful (55.56%).

⁸⁹ Ibid.

⁹⁰ Explanatory Memorandum to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012 (Cth), pages 1 and 32.

⁹¹ See the ACTU submission to the Senate Education and Employment References Committee inquiry into the work health and safety of workers in the offshore petroleum industry (enclosed), pages 9 to 10.

124. The Safe Work Australia Review of the Model WHS Laws made recommendations about increasing penalty levels, introducing a new offence of industrial manslaughter and a consistent approach to sentencing.⁹² The Senate Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial death in Australia recommended that Safe Work Australia work with Commonwealth, state and territory governments to review the levels of monetary penalties in the model WHS laws, with consideration as to whether there should be increased penalties for larger businesses or repeat offenders. In its response, the Government supported this recommendation in principle.⁹³

Recommendation 43: That the penalties in the OPGGS regime be significantly increased, in line with best practice responsive regulation (and at least in proportion to any increases in the model WHS laws).

Recommendation 44: That the OPGGS Act be amended to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and should reflect as closely as possible any similar offence that is introduced into the model WHS laws.

Recommendation 45: That consideration be given to whether there should be increased penalties in the OPGGS Act for larger businesses or repeat offenders. This consideration should take account any similar consideration in respect of the model WHS laws.

⁹² Safe Work Australia, 2018, Review of the model WHS laws, Recommendations 22, 23b and 25.

⁹³ Senate Inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia 2018, Government Response.

LIST OF RECOMMENDATIONS

Recommendation 1: That the objects of Schedule 3 of the OPGGS Act be harmonised with the objects of the model WHS laws, particularly in respect to the workforce and their representatives.

Recommendation 2: That the OPGGS regime be amended to require consultation with the relevant unions in the development of the initial safety case.

Recommendation 3: That the OPGGS regime be amended to permit accredited HSRs and union officials to conduct a work health and safety inspection of facilities before commissioning.

Recommendation 4: That the OPGGS regime be amended to require a review of the safety case to take place with a new workforce once hired (and before the commencement of operations, where possible), to ensure the workforce understands the safety case, the hazards and risks they will be exposed to, and the control measures in place to manage them, and to provide for workforce input to continuous review of the safety case.

Recommendation 5: That the OPGGS regime be harmonised with the model WHS laws in respect of the ability of HSRs to trigger a review of a safety management-related document, including a safety case.

Recommendation 6: That the duties in OPGGS Act be amended to be consistent with those in the model WHS laws (including any amendments following the Safe Work Australia Review of the Model WHS Laws), except where objectively justified by reference to the high hazard nature of the offshore oil and gas industry.

Recommendation 7: That the OPGGS regime be amended to implement a licensing system for workers performing high-risk work, similar to that under the model WHS laws.

Recommendation 8: That consideration be given to mechanisms that would achieve better training standards and access for casual and labour hire employees.

Recommendation 9: That the OPGGS Act be amended to expressly define 'health' as 'physical and psychological health'.

Recommendation 10: That the Safety Regulations be amended to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks in the offshore oil and gas industry.

Recommendation 11: That the incident notification provisions in the OPGGS regime be reviewed to ensure that they provide a notification trigger for psychological injuries.

Recommendation 12: That consideration be given to circumscribing or regulating contracting arrangements to maximise job security in the offshore petroleum industry.

Recommendation 13: That consideration be given to mechanisms that would achieve better work health and safety standards and outcomes for workers in insecure forms of employment such as casual and labour hire, including additional training specific to those employment categories or roving HSRs to assist these types of workers.

Recommendation 14: That consideration be given to circumscribing or regulating rostering arrangements to ensure that workers are not away from their home and family life for extended periods and have sufficient rest time between roster periods; for example, by amending r 95 of the Safety Regulations to require minimum continuous and uninterrupted periods off work and away from the workplace.

Recommendation 15: That consideration be given to requiring a minimum handover period between shift change which must occur during the workers' normal working hours and rostered on period.

Recommendation 16: That the election process clause 26 of Schedule 3 of the OPGGS Act be amended to reflect s 61 of the WHS Act, to provide for workers in the offshore oil and gas industry with equivalent autonomy in determining the manner in which they elect an HSR.

Recommendation 17: That the OPSSG Act be amended to provide for a right for HSRs to attend to work health and safety business during work hours or while on a facility, including a requirement for the operator or employer to provide HSRs time to hold meetings and discussions with workers in respect of work health and safety matters during work hours or while on a facility.

Recommendation 18: That consideration be given to requiring a minimum handover period between HSRs and safety committee members between shifts, which must occur during the workers' normal working hours and rostered on period.

Recommendation 19: That NOPSEMA continue to lead and sponsor the HSR Forum annually.

Recommendation 20: That NOPSEMA establish an online portal for HSRs to communicate with each other confidentially.

Recommendation 21: That the NOPSEMA give consideration to ways to better promote its dedicated NOPSEMA inspector focal point and dedicated hotline number to HSRs.

Recommendation 22: That clause 40(1) of Schedule 3 the OPGGS Act be amended to address any deficiency relative to s 70(1) of the WHS Act.

Recommendation 23: That the OPGGS regime be amended to prescribe an initial period of training of up to five days and an entitlement to refresher training of up to one day per year.

Recommendation 24: That the OPGGS regime be amended to be consistent with the model WHS laws (including any amendments following the Safe Work Australia Review of the Model WHS Laws) in respect of HSR choice of training course and operator requirement to cover reasonable costs.

Recommendation 25: That the OPGGS Act be amended as necessary to ensure that the HSR Forum is accredited for the purposes of clause 30 of Schedule 3 of the OPGGS Act, and provision made for NOPSEMA or the employer or operator to cover the cost of travel and accommodation for HSRs to attend the training.

Recommendation 26: That the OPGGS regime be amended to be consistent with the model WHS laws in respect of HSR membership of the health and safety committee.

Recommendation 27: That the NOPSEMA be required to develop, in consultation with stakeholders including unions and HSRs, an HSR engagement policy.

Recommendation 28: That the OPGGS Act be amended so that the operator is required to maintain an up-to-date list of HSRs and to provide a copy to NOPSEMA as soon as practicable after it is prepared.

Recommendation 29: That the OPGGS Act be amended to require the list to also record the date on which the HSR was elected to the role and the date on which they completed the HSR training.

Recommendation 30: That the OPGGS Act be amended so that the list is required to be displayed at the workplace, in a manner that is readily accessible to the workers.

Recommendation 31: That the OPGGS regime be amended to require HSRs to accompany NOPSEMA on their inspections and to require NOPSEMA inspectors to meet separately and privately with HSRs during inspections (i.e. without the operator or employer or their management representatives present).

Recommendation 32: That the OPGGS regime be amended to be equivalent to the WHS Act regarding consultation with, and participation of, the workforce, and that practical guidance be developed to assist duty holders to fulfil these additional consultation duties.

Recommendation 33: That clause 35 of Schedule 3 of the OPGGS Act be amended to make it clear that the consultant can be a union official, and that consideration be given to how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the *Fair Work Act 2009* (Cth) or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.⁹⁴

Recommendation 34: That the OPGGS regime be amended to provide for a union right of entry for work health and safety purposes, consistent with the model WHS laws (subject to any modifications following the Safe Work Australia Review of the Model WHS Laws and the further modifications outlined below).

Recommendation 35: That any right of entry for work health and safety purposes established under the OPGGS Act provide for:

- the operator of the facility to, as soon as possible, facilitate transport for the permit holder for right of entry purposes;
- the cost of transport for the permit holder for right of entry purposes to be recovered from industry by a levy revenue to NOPSEMA; and
- an ability for the permit holder to exercise entry for the purposes of inquiring into multiple suspected contraventions of the OPGGS Act, including additional contraventions identified during the course of the entry.

⁹⁴ Safe Work Australia, Review of the model WHS laws: Final report, Recommendation 8.

Recommendation 36: That the OPGGS regime be amended to require that the workforce be given a copy of the safety case, including by confidential remote online access.

Recommendation 37: That the OPGGS Act be amended to provide for equal representation of industry and workforce participants on the NOPSEMA Board, with the latter representatives to be nominated by the Australian Council of Trade Unions.

Recommendation 38: That the OPGGS Act be amended to provide for an issue resolution process consistent with the model WHS laws (subject to any modifications following the Safe Work Australia Review of the Model WHS Laws).

Recommendation 39: That unions to be given standing to commence prosecutions for contraventions of Schedule 3 of the OPGGS Act.

Recommendation 40: That guidance be developed with examples of health and safety committee constitutions, agendas and minutes.

Recommendation 41: That NOPSEMA carry out regular, unannounced inspections as part of its standard inspection regime.

Recommendation 42: That the OPGGS regime be amended to require duty holders to notify NOPSEMA when a vessel facility is going to be used for a relevant purpose defined under the OPGGS regime, to facilitate compliance monitoring.

Recommendation 43: That the penalties in the OPGGS regime be significantly increased, in line with best practice responsive regulation (and at least in proportion to any increases in the model WHS laws).

Recommendation 44: That the OPGGS Act be amended to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and should reflect as closely as possible any similar offence that is introduced into the model WHS laws.

Recommendation 45: That consideration be given to whether there should be increased penalties in the OPGGS Act for larger businesses or repeat offenders. This consideration should take account any similar consideration in respect of the model WHS laws.

address

ACTU
Level 4 / 365 Queen Street
Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au
australianunions.org.au

ACTU D No.

29/2019