



Australian Government
**Department of Industry,
Innovation and Science**

Deputy Secretary

Mr Stephen Palethorpe
Committee Secretary
Senate Standing Committee on Education and Employment
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe

**Question on Notice for the Inquiry into the work health and safety of workers in the
offshore petroleum industry**

The department has prepared a response to a Question on Notice (enclosed) which was taken on notice by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), referenced on page 19 of the Hansard record, for the 11 July 2018 Melbourne public hearing.

Given that this Question on Notice relates to legislation underpinning the offshore safety regime, the Department of Industry, Innovation and Science, having responsibility for the policy and legislative framework for offshore petroleum activities, has responded rather than NOPSEMA. This Question on Notice is provided on behalf of the department only.

Should you require further input or clarification in relation to this Question on Notice, please contact Lisa Schofield, General Manager Offshore Resources Branch

Yours sincerely

Mike Lawson

30 July 2018

Encl.

Senate Education and Employment References Committee
ANSWER TO QUESTIONS ON NOTICE
Department of Industry, Innovation and Science
Public hearing, Canberra
11 July 2018

AGENCY/DEPARTMENT: DEPARTMENT OF INDUSTRY, INNOVATION AND SCIENCE

TOPIC: Legislative differences between the OPGGS and WHS regimes

REFERENCE: Written Question – p.19

QUESTION No.: 1

Senator Marshall: The areas where your legislation differs from most other jurisdictions, in areas such as the ability of health and safety reps to autonomously determine the manner in which they select health and safety representatives, or work groups—all these issues have been raised with you. I'll go through them, and I'd like your response as to why there is a difference and whether you believe the difference needs to be there. There are the entitlement of health and safety reps to a specified minimum amount of training, the ability of health and safety representatives to choose which training course they undertake, the requirement for operators to cover the costs of health and safety representative training, the requirement for operators to provide the regulator with the current list of health and safety representatives, the ability of the regulator rather than a court to disqualify health and safety representatives, and union right of entry for work health and safety purposes. They are some of the key differences between your regime and most of the other jurisdictions. Can you tell me why they are there and whether they should be there.

Mr Smith: Can I take those questions on notice. I'm conscious that they're valid issues, and I'm happy to address them, but I'm also conscious that I'm here really in the capacity of input that we might provide to the board and I don't want to use up their time. As I say, I'm more than happy to provide a response if I can take those questions on notice.

ANSWER

Given this question on notice relates to legislation underpinning the offshore safety regime, the Department of Industry, Innovation and Science, having responsibility for the policy and legislative framework for offshore petroleum activities, provides the following response.

There are some differences between the operation of the safety regime established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) and that of the work health and safety (WHS) regime established under the *Work Health and Safety Act 2011* (WHS Act), including in relation to health and safety representatives (HSRs) and union right of entry.

As stated at the 11 July hearing, the department is undertaking a review of the offshore safety regulatory regime, and will consider all safety issues relevant to the *Offshore Petroleum and*

Greenhouse Gas Storage (Safety) Regulations 2009 and Schedule 3 of the OPGGS Act, which includes the HSR framework and right of entry provisions for work health and safety purposes.

The below information describes the legislative provisions raised in the Question on Notice, both in relation to the WHS regime and the OPGGS regime.

Health and Safety Representatives

The department recognises that HSRs play a very important role in representing the workforce on matters relating to health and safety and providing their views and concerns to the employer. HSRs can make a real difference in having health and safety issues addressed and help achieve better health and safety outcomes. The OPGGS Act facilitates the operation of HSRs with comparable roles, functions and duties to the WHS regime.

The OPGGS regime does not preclude workers from **autonomously determining the manner in which they elect their HSR**. Instead, the Act allows for the workforce to control the process for selecting an HSR for a designated work group. In Schedule 3 of the OPGGS Act, Part 3, Division 3, Subdivision A outlines the provisions for selection of an HSR. An HSR is selected by one of two ways: if all members of the workforce unanimously agree, or if the person is selected by an election. The Act does not specify the process by which the workforce may choose an HSR under the first method, except that the decision be unanimous, and thus the workforce has broad autonomy under this method. If an HSR has not been autonomously selected by the workforce within a reasonable time, the operator must invite nominations and an election must be held if there is more than one candidate. 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.

Clause 26(4) clarifies that the election must be conducted in accordance with the regulations only if requested by the lesser of 100 members of the workforce normally in the designated work group, or a majority of the members of the workforce normally in the designated work group. Hence, unless it is requested by the lesser of the aforementioned categories, the election is not required to be held in accordance with the election process set out in the regulations. This provision allows the workforce to exercise control in determining the manner of an election.

In relation to the **amount of training of HSRs**, the WHS Act sets out the requirement for persons conducting a business or undertaking (PCBU) to allow HSRs to undertake approved training if requested by an HSR for a work group for that business or undertaking (Section 72(1)) and allows an initial course of training of 5 days and one day's refresher training each year (Section 21 of the *Work Health and Safety Regulations 2011*). The OPGGS regime (Schedule 3, Clause 30) mandates that HSRs must undertake training that has been accredited by NOPSEMA – the offshore health and safety regulator. It does not stipulate the length of this training, which may include refresher training, thus providing flexibility for the operator and regulator to determine what is considered most appropriate to ensure HSRs are adequately trained and competent to perform their role.

In regards to the **ability of HSRs to choose which training course they undertake**, the WHS Act allows for HSRs to choose a course of training in work health and safety that:

- is approved by the regulator; and
- an HSR is entitled to attend under the regulations; and
- is chosen in consultation with the person conducting the business or undertaking (Section 72(1)).

While the OPGGS Act does not dictate that HSRs are entitled to choose their OHS training course, they are not prevented from doing so either. As noted above, one requirement under the OPGGS Act is that the course must be accredited by NOPSEMA. The accreditation of appropriate and experienced training organisations ensures that HSRs have access to fit for purpose training on OHS matters pertaining to the offshore petroleum industry.

In relation to the **costs of HSR training**, the OPGGS Act does not prescribe the operator or employer pay for OHS training for HSRs, however it mandates the operator or employer must permit the HSR to take time off work to attend training, without loss of remuneration or other entitlements.

Under the OPGGS Act, the operator of a facility must prepare and keep up to date a **list of all the HSRs** of a designated work group and ensure the list is available for inspection, at all reasonable times, by the members of the workforce at that facility and NOPSEMA inspectors (Schedule 3, Clause 27). While the OPGGS regime does not require the operator to provide updated lists of HSRs to the regulator (like the WHS Act does), the department notes that the model WHS laws were amended on 21 March 2016, with a focus on reducing regulatory burden and streamlining or simplifying without compromising safety outcomes. As part of this, the Council of Australian Governments WHS ministers agreed to remove the requirement under section 74 of the Model Work Health and Safety Bill for persons conducting the business or undertaking to provide a list of HSRs to the regulator. The OPGGS Act is thus now consistent with the WHS model laws in this respect.

Section 65 of the WHS Act provides a court **the power to disqualify an HSR directly**. The OPGGS Act does not confer onto a court the power to disqualify an HSR directly; however, a decision by NOPSEMA to disqualify an HSR is an administrative decision subject to review by a court under the *Administrative Decisions (Judicial review) Act 1977*. NOPSEMA can only disqualify an HSR representative for a specified period not exceeding 5 years (clause 32(3)).

Union right of entry for work health and safety purposes

The OPGGS regime does not specifically provide for unions' right of entry for work health and safety purpose.

Part 7 of the WHS Act enables an employee representative to apply to the authorising authority for an official of that union to become a WHS entry permit holder. The WHS Act provides union officials with the ability to enter a workplace to inquire into safety issues, consult, and advise workers on WHS matters in certain circumstances.