

Modernising Work Health and Safety Laws in Western Australia

Submission by the Community and Public Sector Union/Civil Service Association of WA

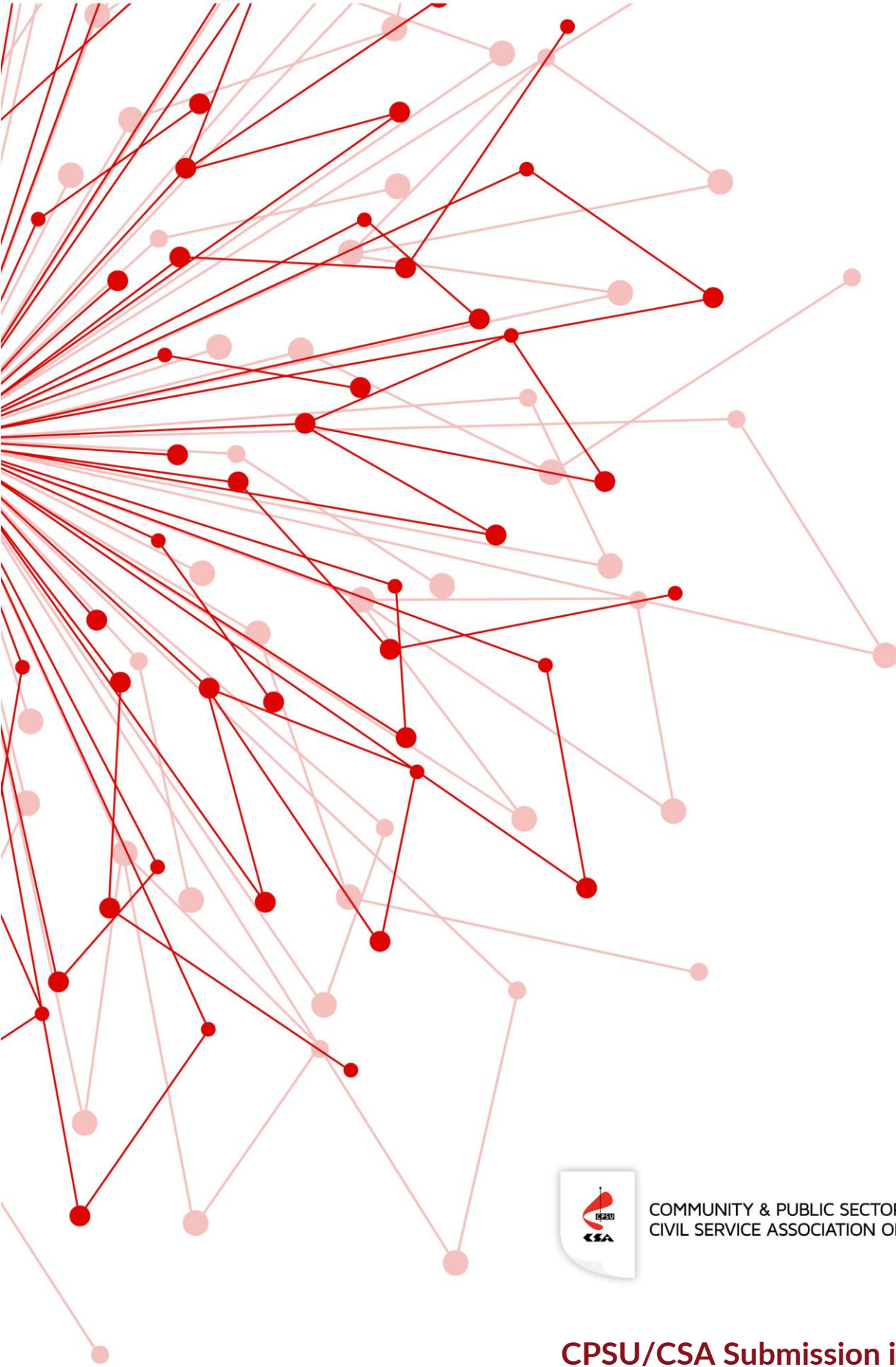
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COMMUNITY & PUBLIC SECTOR UNION
CIVIL SERVICE ASSOCIATION OF WA

**CPSU/CSA Submission in response to
the Ministerial Advisory Panel (MAP)
proposals on WHS Reform in Western
Australia**

Introduction

The Civil Service Association of Western Australia (CSA) has been representing public sector employees since 1900; initially as an association incorporated under the *Associations Incorporation Act 1895*; and then in 1967 it was recognised by the *Industrial Arbitration Act* as an organisation. Its federal counterpart is the Community and Public Sector Union, WA Branch (CPSU) and the entity is collectively known as the CPSU/CSA.

The CPSU/CSA has a stakeholder interest in the reform of WHS legislation as it will affect both its members and employees in Western Australia. The modernisation of WHS laws in Western Australia is long overdue and the CPSU/CSA is supportive of the recent progress that has been made in this space, particularly by the Ministerial Advisory Panel in its recommendations of how best to adapt the model Act to the state of Western Australia. The CPSU/CSA looks forward to a swift implementation of all stages of the reform process.

Recommendations 25-28 – General improvements to powers of Inspectors

The CPSU/CSA supports MAP's recommendations 25-28 which expand the powers of the Regulator including inspectors' powers to direct a Person Conducting a Business or Undertaking (PCBU) to produce documents, inspectors' powers to record interviews, the power to require notification of compliance and to request an independent evaluation consistent with current practice.

CPSU/CSA members employed by WorkSafe have frequently raised the problem they face in being able to effect changes in employer behaviour, when their powers are not sufficient enough to make an impact. One of the key issues facing inspectors in having a matter proceed to prosecution, is the need to collect evidence that would establish a prima facie case of a breach. The expansion of these powers, particularly the power of inspectors to record interviews and collect supporting documentation, will enable more effective collection of evidence to support a prosecution or another form of regulatory intervention.

The CPSU/CSA also wishes to note the importance of the regulations when it comes to WorkSafe inspector's powers, which will be discussed at a later point of this submission.

Recommendation 8 – Duty of care for providers of WHS advice, services or products

Recommendation 8 of the Ministerial Advisory Panel (MAP) paper would establish a new duty of care for service providers of workplace health and safety training and other services and products. Service providers who may be captured by this include:

- Training providers;
- Lawyers;
- Consultants providing advisory services or WHS intellectual property;
- Occupational hygienists;
- Any person or entity (claiming to have knowledge and/or expertise in the area of occupational health and safety) providing a service to a business or undertaking.

Comments

Persons conducting a business or undertaking (PCBUs) and employers' use of service providers to deliver WHS training, materials and services has grown substantially over time and this emerging industry has largely been unregulated, given they have not been captured

by the existing Act's Duty of Care provisions. This raises concerns about the transparency and accountability of these providers, the accuracy of their WHS advice and verification of their claimed expertise. Meanwhile, educational services provided by WorkSafe were subjected to significant funding cuts by the previous Barnett government, meaning that employers have increasingly chosen to provide their own WHS services or rely on third party service providers.

The CPSU/CSA supports the MAP recommendation to establish a new duty of care for service providers of WHS. If implemented, this will ensure that the industry of providing WHS advice, information and services is well regulated and mirrors community expectations.

One minor variation the CPSU/CSA advocates to the MAP recommendation, is for the provision to expressly exclude Unions and Union training providers from liability for duty of care. This is because the Union provides advice and training on a variety of workplace and industrial issues, in the interests of its members. These may include WHS issues, however the provision of Union advice should not be construed as professional WHS advice to PCBU's. As is the case with members' needs to obtain independent and external financial or superannuation advice, Unions encourage PCBU's to obtain independent WHS training and advice. A clear exclusion of liability for Unions will enable the provision to be directed to where it is needed: to the currently underregulated WHS professional industry.

Recommendation 10 – Duty to report incapacity of 10 or more days

The MAP recommendation 10 establishes an onus on a PCBU to report any injury or illness which requires 10 or more days off work.

Comments

The WHS Act currently lists a range of serious illnesses and injuries which require notification to the Regulator, however the list was arguably never intended to be exhaustive. The spirit of the law, is to protect workers who are suffering from serious and/or chronic illness and injury and to ensure that employers are exercising their duty of care in creating a safe workplace for all.

With the medical field being a rapidly shifting area of expertise and diagnoses, the CPSU/CSA recommends the incorporation of the existing OSH Act provision to capture serious injuries or illnesses that fall outside of the WHS Act's designated list.

Recommendation 16 – Right for a worker to cease work when potential of harm to others

The MAP recommendation 16 expands the scope of a worker's right to cease work where they perceive potential harm to self or others.

Comments

Currently in the WHS Act a worker's right to cease work is limited to preventing harm to themselves or colleagues. The MAP recommendation is to extend this right to cease work where there is a potential of harm to *any* person, which would include customers, clients and members of the public in the vicinity of a foreseeable hazardous exposure or incident.

The extension of this protection of a worker's right to cease work makes sense from a preventative public health perspective. It also ensures employers will act swiftly to rectify WHS issues without fear of personal or professional repercussions.

This recommendation is of vital importance to the union movement, who are leaders in the WHS space. Workers are best placed to make assessments of risk as they arise, due to proximity, awareness of their industry and the ability to assess WHS holistically, unconstrained by the commercial concerns of employers.

Recommendation 19 - WHS RoE provisions to be 2011 version of model act

This recommendation suggests mirroring the WHS Right of Entry (RoE) provisions on the 2011 version of the model legislation. The CPSU/CSA recommends a different approach to RoE than is recommended by the MAP.

Comments

This MAP recommendation suggests reversion to the 2011 version of the model Act, which reverses the restrictive changes which were made to the model act in 2016 by the Abbott Government, removing an entry permit holder's ability to enter workplaces without notice and increasing penalties for non-compliance with the RoE sections of the Act. However in the CPSU/CSA's view, this model of RoE is also too prescriptive.

The CPSU/CSA recommends that RoE should continue to be legislated through the Industrial Relations Act, as while imperfect, these processes are well understood by the Union movement and employers. Accordingly, the CPSU/CSA recommends that Recommendation 19 of the MAP report should not be adopted, and that part 7 of the WHS Act should be deleted.

The IR Act is currently under review itself, and while there is a need for expansion for RoE for Unions towards an unfettered freedom of entry for all WHS concerns, these changes should be made within that reform project. The CPSU/CSA is particularly concerned that the Act covers the right of an Entry Permit Holder (EPH) to enter non-traditional workplaces, which are likely to become more prevalent with the transition to the NDIS from the Department of Community's current residential services through the Disability Services Commission, as well as other sites of work which do not conform to traditional employment relationships.

Clarity around entitlements for permit holders to take photos, videos and collect evidence during RoE should also be set out in the IR Act and regulations.

Recommendation 20 - WHS Entry Permit Holder may provide report and onus on WorkSafe to respond

This recommendation provides that an Entry Permit Holder (EPH) may give notice of their intention to attend a workplace to the Regulator (WorkSafe) so that the Regulator may also attend. There is also an opportunity for the EPH to furnish a report to the Regulator based on their workplace visit. This then places an onus on the Regulator to engage and respond to the EPH's report.

Comments

The EPH will often have the most immediate knowledge of concerns with WHS issues, particularly in the case of Unions, when these concerns are raised directly by members. Due to this capacity for immediacy, the EPH may be able to respond to these concerns faster than the Regulator currently does.

The opportunity to advise the Regulator of intended visits and to furnish the EPH's report to the Regulator goes to ensuring that the Regulator has the opportunity to ensure that there is a

fair assessment of any WHS concern. This may encourage effective distribution of the Regulator's resources regarding visits to the workplace and assessment of situations, machinery, tasks and processes.

The onus of the Regulator to report on the EPH's report ensures that the Regulator cannot evade its responsibility to ensure the health and safety of Western Australian workplaces. CPSU/CSA members who work within WorkSafe advise that while they are passionate about their work and carrying through on workplace concerns as they arise, historically there has not always been the support within leadership to follow up WHS cases and carry out the Regulator's responsibilities under the Act.

The CPSU/CSA supports the WHS Entry holder being able to inform the Regulator prior to entry, should they choose to, rather than being compelled to. It is important that the EPH is under no obligation to do so, particularly where there is a need to act quickly. This recommendation also creates an onus on WorkSafe to respond to reports from the EPH following a WHS Entry and to detail actions taken.

Recommendation 31 - Unions included as an eligible person who may request decisions to be reviewed

This is a recommendation to ensure that a worker's union is deemed as eligible to request a review of a decision made by the Regulator. The current Bill proposes that a worker affected by the decision may request a review. However, there may be situations such as when there are multiple people affected by a decision, or where the worker's capacity to request a review is compromised. This recommendation allows for streamlining of the process which may otherwise involve much repetition.

Comments

One of the goals of the modernisation process has been to raise Western Australia to the level of other states, however there is also an opportunity to remedy any gaps which the modernisation process in other states has revealed.

This recommendation gives unions standing to be able to provide a professional and experienced view point to the review process. This may allow for the presentation of relevant material or questions or a specific focus that the typical lay employee would not be aware of, such as relationship between the review and the need to assess the workplace with regard to Codes of Practice.

The union's professional staff may also be able to see a link between workers not recognised initially in the review process allowing for the review to be expanded to consider their interests too.

This recommendation is related to Recommendation 33 allowing for a union right to prosecute where a regulator has declined to do so. By being involved in the review process at an early stage a union will have a better understanding of any relevant issues when it makes a decision about whether it is reasonable to initiate a prosecution.

The CPSU/CSA supports unions being expressly included as an eligible person who may request a decision to be reviewed and congratulates the Ministerial Advisory Panel on this recommendation which is the first in Australia of its kind. This recommendation ensures that a union can bring these important WHS matters on behalf of its members.

Recommendation 33 – Right for union to initiate prosecution for WHS civil penalty provision

This is a recommendation to include a union as a party that can bring proceedings for breach of WHS civil penalty provisions, with a new clause to be added to 260.

Section 260 of the *Model Work Health and Safety Bill* states:

260 Proceeding may be brought by the regulator or an inspector

Proceedings for a contravention of a WHS civil penalty provision may only be brought by:

- a. the regulator, or*
- b. an inspector with the written authorisation of the regulator (either generally or in a particular case).*

The commentary provided in the proposed amendments to the WHS Bill notes that this is limited to those authorised by the Regulator and that it is proposed to extend the right to unions.

Comments

The CPSU/CSA supports the ability of a union to bring proceedings regarding breaches of civil penalty provisions of the WHS legislation without needing approval.

Following from this are the recommendations 31 and 32. Recommendation 31, which recommends that a union is an eligible person who may request a review of a decision is supported by the CPSU/CSA.

Recommendation 32 allows the regulator to appoint any person to initiate a prosecution. The CPSU/CSA would seek that Union Secretaries are appointed with the ability to initiate a prosecution. This should be a delegable power.

The CPSU/CSA also notes that s231 of the *Model Work Health and Safety Bill* allows for a review process if prosecution is not brought by the Regulator. Whilst reasons for not undertaking a prosecution may be required, there is no ability for an injured party to be able to initiate proceedings even where it is recommended by the Director of Public Prosecutions (DPP) that proceedings be commenced.

Of concern to the CPSU/CSA is the ability for Unions and the government prosecutor to prosecute on all worthy matters given the inevitable budgetary and workload prioritisation challenges that the Regulator faces.

However currently this list of civil penalty provisions is limited. The CPSU/CSA advocates for the expansion of this list such that unions are able to prosecute both civil and criminal WHS breaches, and for the consideration of dual criminal and civil penalties within the provisions of the Act for a range of offences which escalate in severity.

The CPSU/CSA's concern is that there is still a need to address the underlying issues causing the low numbers of prosecutions by the Regulator, such as a need for cultural change, the enhancement of WHS understanding within the prosecutions arm of the agency, and budgetary factors. This legislative solution to allow for prosecutions by Unions is a positive step, however given it has been caused in part by the lack of effective resourcing to the

Regulator, this should be revisited as a matter of priority, in tandem with the expansion of rights to prosecute.

Removal of the capacity to insure against penalties issued under the Model Act and Regulations and Personal Capacity for office holders

Comments

The CPSU/CSA has concerns that even in serious breaches of the Work Health and Safety legislation involving fatalities, any punishment upon a corporation will not be felt as there is the possibility to insure against fines. The CPSU/CSA is aware that the regulator in Queensland has encountered difficulties in successfully prosecuting matters due to the wide ambit of insurance mechanisms in place. This in turn affects the motivation of industry to improve WHS, as there are very few consequences to even the most egregious breaches of the legislation.

The CPSU/CSA seeks limitations to what can be insured against to ensure that these penalties have the intended impact. This is not dissimilar to the Australian Consumer Law which makes it an offence for a company to indemnify for a pecuniary penalty or legal costs in related proceedings.

The possibility of imprisonment for an individual under s31 shows the intention of the Act that this is a serious matter and that individuals should not be able to escape their responsibility. However, without a restriction on insurance it is possible that corporations may be able to avoid any penalty.

The CPSU/CSA would recommend that this is part of ss31 and 33 of the Bill.

Psychological harm

The CPSU/CSA wishes to see a more direct recognition of psychological harm as a head of risk in the WHS Act. The section 19(3)(a) definition of health includes a risk to psychological health, however the CPSU/CSA believes that the WHS Act needs a clear head of power within the Act for the adoption of a regulation and accompanying codes of practice for various risks to a worker's psychological health. Despite the inclusion of psychological health in the current definition of health, there is no provision elsewhere in the Act or regulations which expressly references or expands on the issue of psychological health.

The CPSU/CSA's view is consistent with that of the International Labour Organisation¹, that psychological harm can, in some cases, be caused by a series of behaviours of violence and harassment in workplaces that exist on a continuum. Psychological harm as a casualty of these behaviours can be its own discrete risk factor in a WHS setting, as well as having a strong correlation with physical harm, and can also exist alongside other WHS risks such as fatigue.

¹ Ending violence and harassment against women and men in the world of work, International Labour Office Conference, 107th session, 2018: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf

Other matters

The definition of due diligence in the Model Act (s27(5)) should be an inclusive list, not an exhaustive list, to allow for consideration of other matters that may need to be taken into account in a particular case.

Additionally, training for WHS representatives should be expanded to include a provision similar to s69(1) of the Victorian OHS Act 2004, such that the worker can elect their own training provider. Without this capacity for choice, employees would be limited to the training providers chosen by their employer, which may not provide the quality and overview of WHS training necessary to support them in undertaking their WHS role. Employees having the capacity to make their own choice will also enable them to upskill themselves in their industry areas, to be able to respond appropriately to the specific WHS risks encountered in their workplace or industry. This will enhance and broaden the skills within the general workforce as well as the WHS profession, allowing them to become subject matter experts on a range of WHS issues.

The CPSU/CSA also advocates for sentencing guidelines to be contained in the WHS Act or regulations.

Regulations

The CPSU/CSA understands that whilst the Ministerial Advisory Panel has provided items for consideration regarding legislative reform, the items for the WHS regulations will be drafted by the Regulator, in consultation with stakeholders including Unions. The CPSU/CSA appreciates that this is necessary in the interests of time to be able to introduce the legislation quickly, however stresses that a consultative approach is still required given the regulations have significant practical implications for WHS outcomes in Western Australia.

In terms of areas of focus for the regulations, the CPSU/CSA wishes to see an increase in reform to health surveillance, mandating focus in this currently neglected area. Members who work as inspectors within WorkSafe have frequently raised concerns regarding a lack of appetite within the agency to respond to categories of health surveillance, which do not have the imminence of some other WHS risks however are just as problematic to the safety of workers and members of the public in the medium to long term. Members have spoken to this being a particular concern in the health and agriculture sectors.

The CPSU/CSA is also of the view that the regulations should expand the rights of Health and Safety Representatives (HSRs) to be able to attend any course of WHS training that is approved or conducted by the Regulator, on the provision of reasonable notice. This will enable workplaces to upskill their HSRs on specific WHS issues disproportionately affecting that workplace or industry, for example regarding the public sector where excessive workload and resourcing issues are prevalent, there is a heightened risk of mental health and bullying risks. Additionally, the allocation of training should be increased in addition to the current standard, to allow for specialisation and the development of expertise which would assist the workplace.

There is also a need for public access to the Tribunal's decisions. It is difficult for Unions and other stakeholders including employers to keep up to date with the progress of how WHS law in Western Australia is applied and developed, when access to published decisions is limited. The CPSU/CSA recommends that the decisions of the Tribunal are made publicly available.

Concluding remarks

The CPSU/CSA appreciates the opportunity to provide feedback on the MAP recommendations and the overall WHS modernisation process.

The CPSU/CSA looks forward to the progress towards modernising Western Australia's WHS laws via an upcoming Work Health and Safety Bill. The CPSU/CSA supports the recommendations of the MAP, with the exception of the discrepancy to the Right of Entry recommendation, and a few other minor differences as stated in the above submission.

Given the delays caused by the previous state government in failing to respond to the need for modernisation of Western Australia's WHS laws, the CPSU/CSA strongly urges that the proposed reform schedule is as tight as possible and that the drafting of the regulations is progressed with urgency, while meeting the expectation of consultation.

References

Modernising work health and safety laws in Western Australia – Proposals for amendments to the model Work Health and Safety Bill

Safe Work Australia Model Work Health and Safety Bill 2016

Excerpt from Part 7 (Right of Entry) of Work Health and Safety Bill 2011

Modernising work health and safety laws - table of recommendations

Modernising Work Health and Safety laws in Western Australia - Presentation

Ending violence and harassment against women and men in the world of work, International Labour Office Conference, 107th session, 2018: https://www.ilo.org/wcmsp5/groups/public/--ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf