

# Modernising Work Health and Safety Laws in Western Australia

## Submission by the Small Business Development Corporation

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Dear Reviewer

**Modernising Work Health and Safety laws in Western Australia**

Thank you for the opportunity to submit comments on the *Modernising work health and safety laws in Western Australia – Proposals for amendments to the model Work Health and Safety Bill* (Consultation Paper).

The Small Business Development Corporation (SBDC) is an independent statutory authority of the Western Australian (WA) Government established to foster the growth and development of small businesses in this State. We offer a wide range of services designed to meet the needs of small businesses, including advocacy to government on legislative and policy settings to ensure a fair and productive operating environment.

The SBDC welcomes the release of the Consultation Paper and commends the Department of Mines, Industry Regulation and Safety (DMIRS) on the extensive consultation conducted with interested stakeholders on modernising the Work Health and Safety (WHS) laws in WA. Given the scope of potential changes and the many affected industries it is important that all are given an overview of WA's proposed Work Health and Safety Act (WHS Act) and advice on how to provide feedback on the proposals.

**Background**

In January 2015, the SBDC provided comments on the Work Health and Safety Bill introduced under the previous government. Based on the national *Model Work Health and Safety Act 2011*, the government of the time had decided not to implement the complete model legislation, opting to adopt some of the provisions in the model laws to modernise and harmonise existing occupational safety and health legislation in WA. The SBDC supported the introduction of this bill with minor revisions particularly in relation to terminology and the need for plain English as well as enforcement measures and their

potential impact on small businesses. The SBDC also provided comments on the proposed Work Health and Safety Regulations for WA in August 2016.

Since these last submissions, the current State Government has decided to introduce one single WHS bill based predominantly on the 2016 version of national model laws. The SBDC is pleased to see the modernising of the WHS laws progressing again and supports, in principle, most of the proposed amendments outlined in the Consultation Paper. The SBDC has made some comments on a number of the proposals and their potential impact on the small business sector, as follows.

### **Person conducting business or undertaking**

A key feature of the model WHS laws, and part of WA's proposed WHS Act, is to extend the coverage of the primary duty of care beyond the traditional employer and employee relationship, moving towards a broader definition of "person conducting business or undertaking" (PCBU) to workers (and other persons). Under the proposed definition, the PCBU is the primary duty of care holder and must take reasonably practicable steps to ensure that the work is being performed safely by workers (and other persons). It is envisioned that the PCBU definition is broad enough to cover new industries and ways of working, including the gig economy and other non-traditional workplace arrangements.

The SBDC agrees that a broader definition, as contained in the proposed WHS Act, is required to better reflect modern workplace arrangements. Careful drafting of the regulations will be important and, in the absence of case law, may provide guidance on how the gig economy and other non-traditional working arrangements may be covered. Further, until there is case law to guide what this may look like, the SBDC recommends an education campaign specifically targeting those operating in a gig type workplace to ensure that they understand their responsibilities and duties under the proposed WHS Act.

### **Duty of care for providers of WHS advice, services or products**

The SBDC notes the inclusion of a new duty of care on people and organisations who provide WHS advice, services or products to other duty holders in the proposed WHS Act. The particular class of persons within the definition of service provider is unclear but the Consultation Paper indicated that it may include WHS consultants, training providers, occupational hygienists, lawyers and safety service providers.

The Consultation Paper notes that clear definitions of 'relevant service' and 'service provider' will need to be developed to ensure the scope of the duty does not extend beyond the nature of the services provided.

Without these clear definitions however the SBDC is unable to provide substantive comment. We note that this new duty may have a direct impact on small businesses that operate in the occupational health and safety service provision sector and it is important that their interests are considered in the drafting of the definitions and subsequent regulations.

Furthermore, as this is a new duty of care and does not feature in other harmonised laws, it is critical that a targeted education program is developed to ensure all covered service providers understand their new duty of care obligations.

The SBDC welcomes the opportunity to consult with DMIRS further on this specific proposal and the drafting of the definitions given its potential impact on small businesses and their compliance practices.

### **Enforceable undertakings**

The SBDC is pleased to see the proposed WHS Act includes the provision of enforceable undertakings as an enforcement measure in certain circumstances. In previous submissions the SBDC advocated for their inclusion as an alternative to prosecution.

As previously argued, some small businesses may not have the financial capacity to concurrently pay a fine as well as introduce improved standards in the workplace should they contravene part of the WHS Act. Therefore offering enforceable undertakings as an alternative to prosecution can lead to greater compliance with the WHS Act and importantly address WHS concerns in the workplace. In many cases, the costs of enforceable undertakings are generally consistent with the cost of a fine, but have the benefit of directly improving safety in the workplace.

### **Concluding comments**

As stated in previous submissions, the SBDC acknowledges that at this stage the full impact of the proposed WHS reforms on the State's small business sector cannot be properly assessed without knowing the final make up of the regulations (and associated codes of practice).

In order to minimise unnecessary administrative burden and costs on small businesses with implementing the reforms, the SBDC welcomes the opportunity to work with the DMIRS on the development of regulations and codes of practice, as well as guidance material, to ensure a smooth transition for the small business sector.

If you would like to discuss this submission in more detail, please don't hesitate to contact [REDACTED], Policy and Advocacy on [REDACTED] or [REDACTED].

Yours sincerely

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David Eaton  
SMALL BUSINESS COMMISSIONER

31 August 2018