

Modernising Work Health and Safety Laws in Western Australia

Submission by Unions WA

Confidentiality

This document has been modified to remove personal information not specifically authorised for publication or that is not in the public domain. This includes some contact and personal details, and metadata. Electronic signatures have also been removed.

This process may have resulted in minor changes to the appearance of the submission but has not modified the substantive content. If you believe there have been changes to content of the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

Accessibility

This is a third party document and DMIRS has conducted a basic review to ensure the majority of the substantive content is accessible. There may be elements of this submission that are not fully accessible (for example, scanned or hand-written elements). If you are having difficulties accessing the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

31 August 2018

By Email: whsreform@dmirs.wa.gov.au

UnionsWA Incorporated • ABN 64 950 883 305
Level 4, 445 Hay Street, PERTH WA 6000
PO Box Z5380, St Georges Tce, PERTH WA 6831
Tel: +61 8 9328 7877 • Fax: +61 8 9328 8132
unionsyes@unionswa.com.au • www.unionswa.com.au

UNIONSWA SUBMISSION ON MODERNISING WORK HEALTH AND SAFETY LAWS IN WESTERN AUSTRALIA

UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australia Branch of the Australian Council of Trade Unions (ACTU). UnionsWA represents 33 affiliate unions, who in turn represent approximately 150,000 Western Australian workers.

UnionsWA welcomes the opportunity to provide feedback to the consultations on the *Modernising Work Health and Safety Laws in Western Australia*. UnionsWA also appreciated the opportunity to participate constructively as one of the five voting members on the Ministerial Advisory Panel (MAP).

UnionsWA has been a long supporter of strong and consistent harmonised WHS legislation in Australia. However our support has always been conditional on a national approach that does not compromise or reduce the protections and standards for workers in any state or territory jurisdiction.

We view the Work, Health and Safety (WHS) legislation as a *minimum* benchmark, which each state and territory should aspire to go beyond in recognition of the unique circumstances in their jurisdictions.

UnionsWA would strongly oppose the final version of the WA WHS Act containing anything less than the standards and protections for workers contained within the model legislation.

There are key aspects of the legislation of vital importance to working people. Of particular importance is the essential changes to definitions within the Act, in particular the definitions of a Person Conducting a Business or Undertaking (PCBU) and Officer.

The MAP also made essential modernising changes to definitions in the Act which are supported by UnionsWA.

Aside from what is addressed further on in this submission, UnionsWA supports the recommendations of the MAP and encourages the state government to incorporate those recommendations into a Work Health and Safety Bill for Western Australia.

A number of the recommendations adopt some of the superior sections from the *Occupational Safety and Health Act 1984* which continue to work well in Western Australia.

In particular recommendation 10 is vital to ensure that appropriate consideration is given to injuries which result in incapacities that are not linked to an inflexible prescribed list.

We support the MAPs recommendations 16 and 31, which are of vital importance to the union movement.

Most workers interact with the public, or work in public places, at some point during a working day. Given the worker has an obligation under section 28 to not affect the health and safety of other persons, it is ludicrous that the model Act does not make it clear that a worker has the right to cease work if they may harm others.

The model laws rightly reflect the right for a review of decisions, however they do not allow unions to bring a review on behalf of groups of members. Restricting this section in the model to an individual worker denies justice to groups of workers who wish to act collectively with the assistance of a union. Recommendation 31 is strongly supported by UnionsWA.

UnionsWA provides further commentary on recommendations 19 & 33 below.

Comments on additional items:

Section 19(3) (a) to include the risk to psychological health.

UnionsWA believes that the WHS Act needs clear head of power for the adoption of a regulation, and accompanying codes of practices for various risks to a workers psychological health.

Despite the inclusion of psychological health in the definition of health, there is no provision anywhere in the Act or regulations which expressly references or expands on the issue of psychological health.

Many of our affiliates have concerns that psychological injuries following violence in the workplace continues to be inadequately captured by both the *Occupational Safety and Health Act* and the model Work, Health and Safety legislation. A change the duties around psychological health will assist workers and PCBUs with developing a clear guide to deal with the mental health issues which can follow even after physical injuries have healed.

An Australian National University (ANU) report commissioned by Safe Work Australia found that:

The limited studies of the effect of psychosocial legal obligations – for Europe generally, and for Sweden and Canada – suggest that legal obligations may help raise the profile of psychosocial hazards and contribute to the motivation in workplaces to take action on psychosocial hazards, which is likely to include establishing policies or procedures. These studies do not enable any conclusions to be drawn about the strengths or weaknesses of particular regimes, but they do suggest that organisational commitment and capacity, including resources, knowledge and skills, are predictors of organisational effort to address psychosocial hazards. To the

*extent that evidence exists, and it is limited, the studies suggest that legal obligations contribute to motivation more than to capacity*¹.

Unions have argued for some time in Western Australia that we need more comprehensive regulations and a code of practice to address the psychological health impacts of Fly-In, Fly-Out (FIFO) work on working people. While this issue will continue to be addressed within other forums in Western Australia it is important that psychological health is recognised in the Act.

To improve the occupational safety and health framework, the Legislative Assembly Education and Health Standing Committee Report into *Mental Health Impacts of FIFO Work Arrangements* stated that:

... making mental health explicit within references to health, and including psychological hazards within references to hazards, will be a significant step forward in assisting companies and industry peak bodies to understand the full extent of their responsibilities.²

UnionsWA strongly recommends that psychological health is included in the general duty of care to highlight its importance to safety in the workplace.

Recommendation 1: Amend Section 19(3) to include the risks to psychological health.

Union right to prosecute WHS Criminal penalties or dual civil/criminal penalty provisions

While the main enforcement of the WHS Act should always come from Government, UnionsWA and our affiliates believe that workplace safety affects the entire community and that unions should have the ability to prosecute breaches of the WHS Act and regulations.

For some time unions have expressed concerns that WorkSafe is not resourced sufficiently to prosecute near misses or minor offences of the current Act. For many years WorkSafe has had funding either reduced or not increased in line with inflation.

In recent years due to the resource constraints within WorkSafe the number of proactive investigations have fallen. Statistics tabled in the Legislative Council's Public Administration Committee inquiry into Worksafe showed that while in 2007-08 WorkSafe carried out 12,173 workplace visits, in 2016-17 that had dropped to 7,558.³

While the drop of the raw number of workplace visits is appalling, it is worth noting that during the same period that WorkSafe visits dropped by 4,615 the total workforce in

¹ *Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks*, Report to Safe Work Australia, National Research Centre for OHS Regulation, Australian National University, November 2016, page 6

² Education and Health Standing Committee, Report into mental health impacts of FIFO work arrangements, page iii
[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/D421339FD0A9DCB848257D3B0021E569](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/D421339FD0A9DCB848257D3B0021E569)

³ WorkSafe Division, Department of Mines, Industry Regulation and Safety – questions on notice from public hearing 2 October 2017

Western Australia increased by 240,000 workers from 1,111,500 in 2007 to 1,351,500 in 2018.⁴

The Community and Public Sector Union Civil Service Association (CPSU/CSA), the union representing the majority of WorkSafe employees, stated in a recent submission to the Legislative Council's Public Administration Committee that:

*A management reluctance to take on difficult cases or support prosecutions for Non Compliance with Improvement Notices means that cases which are not guaranteed to result in a conviction but may nevertheless test the current laws and expose their inadequacies do not usually have the opportunity to be heard.*⁵

In the same submission the CPSU/CSA also noted on the topic of resources that:

As with other divisions of WorkSafe, the Legal Services division also experience insufficient resourcing and workload issues, meaning there is less capacity to conduct proactive prosecutions (i.e. those not following an accident or injury)

First and foremost, UnionsWA believes that far greater resources and support should be given to WorkSafe to carry out its functions under the Act. However, given that Governments will have an austerity mindset in coming years we believe that in order to ensure effective enforcement of the Model Laws that trade unions should be given standing to prosecute offences under the WHS Act in the interest of our members.

Our affiliates have a proactive interest in protecting the health of our membership before harm occurs. With the safety inspectorate playing less and less of a role in our workplaces, it is vital that we are allowed greater powers and authority to prevent harm before it occurs to our members and the community.

There is strong evidence from NSW that union prosecutions are effective in bringing about cultural and organisational change and do not present a risk of misuse. For these reasons, a state monopoly on prosecutions for breaches of WHS laws cannot be justified.

Unions support the unqualified right to prosecute all criminal offences. However, in the absence of an across the board right there are a number of breaches of the act that relate to working people of which unions should have no restrictions with prosecuting. These include:

- Section 33, Failure to comply with health and safety duty
- Section 38, Duty to notify of notifiable incidents
- Section 47, Duty to consult workers
- Section 52, Negotiations for agreement for work group;
- Section 53, Notice to workers
- Section 56, Negotiation of agreement for work groups of multiple businesses

⁴ 6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, May 2018

⁵[Worksafe Inquiry Submission by the CPSU/CSA,
http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/0A7B0F55D13A18AB4825819900831D1F/\\$file/pc.wks.027.170731.sub.cpsu+csa.01.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/0A7B0F55D13A18AB4825819900831D1F/$file/pc.wks.027.170731.sub.cpsu+csa.01.pdf)

- Section 57, Notice to Workers
- Section 61, Procedure for election of health and safety representatives
- Section 70, general obligations of person conducting a business or undertaking
- Section 71, exceptions from obligations under section 70 (1);
- Section 72, obligation to train health and safety representatives
- Section 75, Health and Safety Committees
- Section 79, duties of person conducting a business or undertaking;
- Section 99, offence to contravene a provisional improvement notice
- Section 104, Prohibition of discriminatory conduct
- Section 107, Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct;
- Section 108, Prohibition of coercion or inducement;
- Section 109, Misrepresentation; and
- Section 273, person not to levy workers;

If unions aren't granted an unqualified right to prosecute, a mechanism such as dual-criminal civil offence provisions for the above sections would also allow unions to adequately represent and protect our members.

Recommendation 2: That MAP recommendation 33 is expanded to give unions further standing to prosecute breaches of the WHS Act.

Removal of the capacity to insure against penalties issued under the Model Act and Regulations

UnionsWA has concerns about reports that in other WHS jurisdictions some PCBUs have had WHS penalties paid by insurance companies.

The deterrent effect of penalties under the WHS Act are almost entirely undermined if insurance companies are able to pay fines. UnionsWA strongly recommends that the Model Act be amended to expressly prohibit contracts providing liability insurance against WHS penalties and fines, and that contravention of the prohibition be made an offence.

Section 29 of the NZ WHS Act prohibits a PCBU from outsourcing or insuring against penalties:

29 Insurance against fines unlawful

(1) To the extent that an insurance policy or a contract of insurance indemnifies or purports to indemnify a person for the person's liability to pay a fine or infringement fee under this Act,—

(a) the policy or contract is of no effect; and

(b) no court or tribunal has jurisdiction to grant relief in respect of the policy or contract, whether under [sections 75 to 82](#) of the Contract and Commercial Law Act 2017 or otherwise.

(2) A person must not—

- (a) enter into, or offer to enter into, a policy or contract described in subsection (1); or
- (b) indemnify, or offer to indemnify, another person for the other person's liability to pay a fine or an infringement fee under this Act; or
- (c) be indemnified, or agree to be indemnified, by another person for that person's liability to pay a fine or an infringement fee under this Act; or
- (d) pay to another person, or receive from another person, an indemnity for a fine or an infringement fee under this Act.

(3) A person who contravenes subsection (2) commits an offence and is liable on conviction,—

- (a) for an individual, to a fine not exceeding \$50,000;
- (b) for any other person, to a fine not exceeding \$250,000.

Adopting this section, or a similar section based upon the NZ Act would lead to better safety outcomes across the state.

Recommendation 3: That the WHS contains a provision similar to S29 of the New Zealand Health and Safety at Work Act 2015

WHS Sentencing guidelines to be contained within the WHS Act or Regulations

Unions have long held concerns that the penalties imposed for breaches of the *Occupational Safety and Health Act* have been inconsistent and inadequate.

Following an extensive review in the United Kingdom the Sentencing Council have issued guidelines which following the publication of the *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* the consistency and level of fines for Health and Safety Offences have increased.

One of the principles contained within the guidelines is that fines must be:

Sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation

This is particularly important in Western Australia where we have seen high profile workplace fatalities attract penalties which have been inadequate and have disappointed both unions and family members of those deceased workers.

Particularly with the complication of safety legislation we believe that this form of stronger guidance will assist to deliver the safety culture change which is desired by the model legislation.

Following the introduction of sentencing guidelines in the UK an article by the Institution of Occupational Safety and Health they noted that:

The 2016/17 data on prosecutions released by the UK Health and Safety Executive (HSE) shows a large annual increase in fines. In 2015/16, the total fines for health

and safety offences was £38.8 million. This rose to £69.9 million in 2016/17. The average fine per case in 2016/17 was approximately £126,000, which is more than double the average fine in 2015/16. Notably, the ten highest fines in 2017 ranged between £1.35m and £3m.

There is no doubt that the sharp increase in fines over the past two years is the subject of regular discussion in boardrooms up and down the country.⁶

UnionsWA strongly endorses sentencing guidelines being incorporated in either the WHS Act or Regulations.

Recommendation 4: That sentencing guidelines is considered for inclusion in the WHS Act or regulations.

Industrial Manslaughter

Unions have concerns that in other jurisdictions prosecutions of category 1 offences under the WHS act have been few and far between and do not act as an effective deterrent against the most serious breaches of the model act.

In NSW the *Work Health and Safety Act 2011* became operation in January 2012. However, despite between 50-85 workplace fatalities a year it took until 2018 for the first category 1 conviction to occur.

The rarity of category 1 prosecutions leads to complacency in workplaces and shows the vital need for additional WHS offences to capture the most serious breaches of the WHS Act.

The introduction of a new offence of industrial manslaughter will likely to improve the capacity of regulators to enforce laws and will introduce tougher sanctions and ensure better compliance with the Act.

UnionsWA notes the *Best Practice Review of Workplace Health and Safety Queensland* which recommended that:

two new offences be created in the Work Health and Safety Act 2011 to give effect to the policy decision to create the offence of negligence causing death to be called 'Industrial Manslaughter'⁷

The Model Act should be amended to include the specific offence of causing the death of a worker or other person through a negligent act or omission. The offence should apply to duty-holders and officers who take part in the corporation's management, and should be subject to the harshest penalties, including substantial periods of imprisonment

UnionsWA recommends that the WA Government investigate legislating the offence of industrial manslaughter.

⁶ <https://www.iosh.co.uk/News/Sentencing-guidelines-anniversary.aspx>

⁷ https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0016/143521/best-practice-review-of-whsq-final-report.pdf

Recommendation 5: That a new offence of Industrial Manslaughter is created and that it should be broadly based on the provisions in the Queensland *Work Health and Safety Act 2011*.

Union Right of Entry

The view of UnionsWA and our affiliate unions is to take a different approach to union right of entry than the approach recommended by the MAP.

One of the terms of reference for the MAP was to draft a series of proposals which where to:

Generally, implement the optimal structure and content of the Model WHS Bill in drafting the single Act;

However due to the unique aspect of Western Australia which is the only state to retain an Industrial Relations Act which incorporates non-public sector workplaces UnionsWA suggests an alternative path to deviate from the model legislation.

While the workplace safety right of entry provisions in the *Industrial Relations Act 1979* aren't ideal and they are in need of improvement and modernisation they are generally well understood by both industry and unions in Western Australia and have been effective in ensuring safer workplaces.

Subsequent amendments will need to be made to a series of provisions tied to entry permit holders in the WHS Act to ensure that appropriate protections for workers and unions are maintained.

In particular, section 106 (h) (iii) should be amended to read 'that it is a prohibited reason to discriminate against a worker if health and safety issues are raised with a union or union official.'

UnionsWA recommends that the MAP recommendation 20 is amended if the union right of entry and the entry permit holder provisions are removed from the WHS Act.

The intent of the recommendation is that WorkSafe report back to a person conducting business or undertaking and the union if a report is forwarded to the regulator by a union following a right of entry is vital.

It has been the experience of UnionsWA and our affiliated unions that unions play a vital role representing workers and members can be sidelined if we raise issues on behalf of our membership. It is vital that this act ensures that reports on behalf of our members are taken seriously and that feedback is provided to unions.

Recommendation 6: That Right of Entry for WHS continues to be regulated by the WA *Industrial Relations Act 1979*.

PCBUs to facilitate attendance at Health and Safety Committee meetings

While the Act requires that a PCBU allow a health and safety representative to 'spend the time that is reasonably necessary to attend meetings of the committee' it does not prescribe for the facilitation of attendance.

With the large-scale workforce change occurring due to the so called 'gig economy' and the National Disability Insurance Scheme changing the way that work is performed, it is particularly important that this provision is modernised to ensure that workers in disparate or fragmented workplaces can appropriately engage in conventional workplace safety structures.

In more traditional workplaces the need to facilitate attendance is particularly important for shift workers, workers who are working offsite or those that may have a need to electronically attend the meeting.

This amendment will ensure that the section is comprehensive in how it interpreted in the workplace to ensure Health and Safety Committee meetings can be attended by all workers regardless of workplace, shift or location.

Recommendation 7: Amend sections 76 & 79 of the WHS Act to ensure that a PCBU must facilitate a HSR's attendance at Health and Safety Committee Meetings.

Training for Health and Safety Representatives

UnionsWA believes that from time to time Occupational Safety and Health representatives need to further obtain skills and knowledge necessary to assist them to undertake their duties.

We recommend an amendment to include the provisions contained within Section 69 (1) of the Victorian *Occupational Health and Safety Act 2004* which allows a HSR to attend training that is not set out in the Act but which is authorised by the Regulator.

The Victorian provision allows a safety representative to attend additional training with pay additional training:

(d) allow a health and safety representative for the designated work group to take such time off work with pay as is necessary or prescribed by the regulations for—

(ii) taking part in any course of training (other than a course of training covered by section 67) relating to occupational health and safety that is approved or conducted by the Authority and of which the employer is given at least 14 days' notice;

The introductory and refresher representative courses are by the nature of them broad and encompassing and don't always provide a safety representative with detailed guidance on specific safety issues that may occur in individual workplaces.

Examples of this kind of training could include everything from one day training on falls from heights, stress or mental health, or further training on consultation provisions in the workplace.

This section is strongly recommended to allow health and safety representatives additional training to better carry out their duties under the WHS Act.

Recommendation 8: That the WHS Act contain a section similar to 69 (1) of the *Victorian Occupational Health and Safety Act 2004*.

A recent decision on health and safety representative rights under the NSW WHS Act has interpreted section 72 of the NSW WHS Act to restrict a Health and Safety Representatives right to choose a training provider.⁸

It has been a long held view of unions, backed up by model WHS guidance material, that a health and safety representative has the ultimate right to choose the training provider that they attend.

While it is important that a HSR consult with a PCBU on the date of training it was never the intent of the model legislation to restrict the choice of a health and safety representative to choose a training provider.

Given the uncertainty around this right which has arisen from NSW it is vital that section 72 is amended to ensure that a Health and Safety Representative may choose their training course and that the requirement to consult with the PCBU relates only to the date of the course.

Recommendation 9: That section 72 of the WHS Act is amended to enshrine the right of a Health and Safety Representative to decide on which training to attend.

UnionsWA thanks the department and minister for the opportunity to contribute to the MAP process and to provide feedback on these major issues, and would be happy to provide any further assistance or clarification on our submission. Please contact me on [REDACTED] or [REDACTED] to discuss these matters further.

Yours sincerely

Owen Whittle
Assistant Secretary

⁸ *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009