

Modernising Work Health and Safety Laws in Western Australia

Submission by the Chamber of Commerce and Industry of Western Australia

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Chamber of Commerce
and Industry WA

Chamber of Commerce and Industry of Western Australia

Submission

Modernising work health and safety laws in Western Australia

Proposals for amendments to the model

Work Health and Safety Bill for adoption in Western Australia

30 August 2018

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Acronyms and Abbreviations

2016 Model Bill	The current version of the model Work Health and Safety Bill
2011 Model Bill	The previous version of the model Work Health and Safety Bill
ACT	Australian Capital Territory
CCIWA	Chamber of Commerce and Industry of Western Australian
COAG	Council of Australian Governments
COSH	The Commission for Occupational Safety and Health
Cth	Commonwealth
DGAct	Dangerous Goods Safety Act 2004
DMIRS	Department of Mines, Industry Regulation and Safety
EPH	Entry Permit Holder
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
HSC	Health and Safety Committee
HSR	Health and Safety Representative
IR Act	Industrial Relations Act 1979 (WA)
MIAC	Mining Industry Advisory Council
Minister	The Minister for Mines and Petroleum, Commerce and Industrial Relations
MSI Act	Mines Safety and Inspection Act 1994
NSW	New South Wales
NT	Northern Territory
OSH IGA	Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
OSHT	Occupational Safety and Health Tribunal
OSH Act	Occupational Safety and Health Act 1984
OSH Regs	Occupational Safety and Health Regulations 1996
PCBU	Person conducting a business or undertaking
QLD	Queensland
SA	South Australia
SWA	Safe Work Australia
TAS	Tasmania
VIC	Victoria
WA	Western Australia
WAIRC	Western Australian Industrial Relations Commission
WHS	Work Health and Safety
WHS Act (WA)	The proposed Western Australian Work Health and Safety Act
WHSC	Work Health and Safety Commission
WHST	Work Health and Safety Tribunal

1. Introduction

1. CCIWA broadly supports the harmonisation of Work Health and Safety laws to provide consistency and alignment with the Commonwealth and other jurisdictions.
2. CCIWA welcomed the opportunity to participate on the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) established by Cabinet to advise the Minister for Mines and Petroleum, Commerce and Industrial Relations, the Hon. Bill Johnston MLA (Minister), on the development of a single harmonised and amalgamated Work Health and Safety Act for WA (WHS Act (WA)). The proposed WHS Act (WA) would be intended to cover general, mines and critical risk industries in WA.
3. The modernising of WA's work health and safety laws must ensure that the proposed WHS Act (WA) is contemporary. To that end, the basis for the legislative framework must be the 2016 Model Bill as the most updated version of the model work health and safety laws developed by Safe Work Australia.
4. The principal object of the model WHS Act (WA) is "*to provide for a balanced and nationally consistent framework to secure the health and safety of workers*". As a result, CCIWA does not support any amendment to the 2016 Model Bill that does not achieve the objectives of national harmonisation or consistency of work health and safety laws.
5. Any change to the legislative framework in WA must demonstrate that the benefits to employers and workers outweigh the costs of change. Change for the sake of change is not supported and any proposed legislation must deliver a fair, balanced and effective framework for work health and safety for workers and workplaces in WA. Change must not be motivated or driven to satisfy sectional interests.
6. Equally, change must not impose unnecessary prescription and compliance burden that directly undermines a key objective of the WHS Act (WA) to "*provide a framework for continuous improvement and progressively higher standards of work health and safety*" (Division 2, s.3(1)(g)).
7. CCIWA supports a two-tiered framework consisting of the WHS Act (WA) and Model Regulations together with supporting non-mandatory Codes of Practice.
8. Safety is the joint responsibility of employers and employees in every workplace and as such safe work places can only be achieved with cooperation and consultation directly between employers and employees working together to achieve improved safety outcomes.
9. CCIWA fully supports the role of the Regulator and its inspectorate as the responsible independent body for compliance and enforcement to ensure that work health and safety laws and standards are upheld.
10. CCIWA strongly opposes any proposal that provides a role for any third party (other than the Regulator) in the compliance and enforcement process of work health and safety laws and standards. The independence and experience of the Regulator should not be compromised by any responsibilities being shared with third parties with vested interests.
11. WHS legislation should work towards providing the best safety outcomes for workers and workplaces within WA.

2. National review of model WHS laws

13. Safe Work Australia (SWA) has undertaken a review of the content and operation of the model WHS laws to examine how the laws are operating in practice, whether they are achieving the objectives stated in the model WHS Act or if they have resulted in unintended consequences. The review involved extensive consultations and submissions with all workplace participants.
14. Consultation and submissions to the review have concluded.
15. The Terms of Reference for the Review were:
 - *As agreed by WHS ministers, SWA is asked to examine and report on the content and operation of the model WHS laws.*
 - *The review will be evidence-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the review.*
 - *In undertaking the review, SWA will have regard to the object of the model WHS Act (section 3).*
 - *The review will consider whether:*
 - *the model WHS laws are operating as intended*
 - *any areas of the model WHS laws have resulted in unintended consequences*
 - *the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships*
 - *the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation*
 - *the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and*
 - *the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.*
 - *The review will be finalised by the end of 2018.*
 - *SWA will provide a written report for the consideration of WHS ministers.*
16. CCIWA submits that the recommendations of the current National Review be considered as an integral component to the development of modernised work health and safety laws in Western Australia.

3. Harmonisation of work health and safety laws

17. In July 2008, the Council of Australian Governments (COAG) formally committed to harmonising the occupational health and safety laws in Australia by signing the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (OSH IGA). The harmonisation process commenced with the National Review into Model Occupational Health and Safety Laws (the National Review).
18. The National Review reported to the Workplace Relations Ministers' Council (Council) on the optimal structure and content of a model occupational health and safety act that would be capable of being adopted in all jurisdictions. The National Review published reports in October 2008 and January 2009 that provided 232 recommendations for the development of a contemporary model Work Health and Safety (WHS) Act.
19. On 18 May 2009 the Council agreed to a framework for uniform OHS laws and decided on a model WHS Act to be adopted by the Commonwealth, state and territory governments.
20. The Model Work Health and Safety Bill (**2011 Model Bill**) was developed by Safe Work Australia (SWA) and endorsed by the Council on 11 December 2009 and finalised on 23 June 2011. The model laws comprise the model WHS Act, model WHS Regulations and model Codes of Practice. These are supported by the *National Compliance and Enforcement Policy* which sets out the principles of how work health and safety regulators monitor and enforce compliance with work health and safety laws.
21. The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the model WHS laws on 1 January 2012 while South Australia and Tasmania implemented the laws on 1 January 2013. Western Australia and Victoria did not adopt the model WHS laws. As a result, WA's legislative framework remains the Occupational Safety and Health Act 1984 (OSH Act).
22. In 2014, the WA Government at the time introduced a draft WHS Bill as a WA version of the model 2011 Model Bill. The Government released the WHS Bill as a Green Bill for public consultation which closed on 30 January 2015. The Green Bill did not progress past the consultation phase.
23. On 12 July 2017, the WA Government announced the process that would be adopted to commence the development of modernised health and safety laws for WA that would:
 - (a) Be substantially based on the model WHS Bill, to improve consistency with the rest of Australia;
 - (b) Provide the primary legislation for workplace safety and health across all WA industries;
 - (c) Be supported by a number of industry specific regulations to suit the State's unique conditions, enabling the resources sector to continue to use a risk-based approach; and
 - (d) Continue to support the safety-case approach for petroleum and major hazard facilities.
24. To facilitate the process, Cabinet established the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) to advise the Minister for Mines and Petroleum, Commerce and Industrial Relations the Hon. Bill Johnston MLA (Minister) on the development of a single harmonised and amalgamated Work Health and Safety Act for WA (WHS Act (WA)). The proposed WHS Act (WA) would be intended to cover general, mines and critical risk industries in WA.

4. The Ministerial Advisory Panel

25. The Ministerial Advisory Panel (MAP) was established with the following Terms of Reference:

“The Government intends to introduce into Parliament, as soon as possible, but no later than mid-2019, a single WHS Act (the Act) regulating occupational health and safety in Western Australia. The Act will be administered by the Department of Mines, Industry Regulation and Safety.

The MAP will advise the Minister on the content of the Act, having regard to:

- *the current legislation, being the:*
 - *Occupational Health and Safety Act 1984;*
 - *Mines Safety and Inspection Act 1994;*
 - *Petroleum and Geothermal Energy Resources Act 1967;*
 - *Petroleum (Submerged Lands) Act 1982;*
 - *Pipelines Act 1969; and*
 - *Petroleum and Geothermal Energy Safety Levies Act 2011; and*
- *the importance of implementing harmonised laws in Australia generally, implement the optimal structure and content of the Model WHS Act in drafting the single Act; and*
- *whether the matters regulated under the Dangerous Goods Safety Act 2004 should:*
 1. *be incorporated into the single Act; or*
 2. *remain as a standalone, but modernised Act.”*

26. The proposed WHS Act (WA) would replace the existing Occupational Safety and Health Act 1984 (OSH Act) and the Mines Safety and Inspection Act 1994 (MSI Act).

27. The MAP was chaired by Stephanie Mayman and comprised five voting members: one representative from the Chamber of Commerce and Industry of WA (CCIWA); one representative from the Chamber of Minerals and Energy (CME); one representative from UnionsWA; Simon Millman (MLA) Member for Mount Lawley; and Penny Bond, Senior Policy Adviser to the Minister. The position of Chair was non-voting. Representatives from the Department of Mines, Industry Regulation and Safety (DMIRS) also participated in the MAP meetings to provide specialist and technical expertise as non-voting members.

28. CCIWA welcomed the opportunity to participate on the MAP.

29. The legislative basis of the work of the MAP was the 2016 Model Bill.

30. The MAP examined each individual section, sub-section and paragraph of the 2016 Model Bill to determine applicability to WA industry and to propose legislative amendments to adapt the 2016 Model Bill to the WA jurisdiction.

31. CCIWA does not support any amendment to the underlying 2016 Model WHS Bill that does not achieve the principal objective of modernising work health and safety laws in WA.

32. The desired process and operation of the MAP was to arrive at its decisions and recommendations via consensus of MAP members.
33. Where any proposed amendment to the 2016 Model Bill was not agreed unanimously, the proposed amendment was subject to a vote by MAP members with the majority vote determining the progression of the proposed amendment.
34. Consequently, not all recommendations contained in the PCD were arrived at by consensus.
35. The MAP first held its initial meeting on 11 August 2017 and subsequently held 12 further meetings concluding on 6 April 2018.
36. CCIWA had concerns with the operation of the MAP and its consultation mechanisms and process.
37. As a result, on 14 March 2018, CCIWA considered it necessary to write to the Minister expressing its “concerns that the MAP and its operational processes limited effective consultation to the detriment of the MAP’s objectives”. By written response from the Minister, CCIWA was assured any contentious issues would be highlighted in the PCD.

5. The public consultation document

38. On 30 June 2018 DMIRS released the recommendations of the MAP in the form of a Public Consultation Document (PCD) titled “*Modernising Work Health and safety Laws in Western Australia – Proposals for amendments to the Model Work Health and Safety Bill for Adoption in Western Australia*”.
39. The PCD contains 44 recommendations for amendments to the 2016 Model Bill to form the WHS Act (WA).
40. It is essential to note that these recommendations relate to the 2016 Model Bill, the most updated model work health and safety laws, that were the basis of the assessment and review conducted by the MAP.
41. CCIWA would also draw particular attention to matters raised within the PCD.
42. On page 1 of the PCD, the MAP Chair states that:

“The recommendations provided to you reflect the MAP’s decisions in consideration of Western Australian harmonisation with the Model Bill. The majority of these recommendations were agreed by consensus. On the few occasions where consensus was not possible the decision to recommend change was made by majority vote, and the Panel members’ views are reflected in the recommendations”.
43. Regrettably, the Panel member’s views were not provided in the recommendations.
44. Further on page 2 it states:

“I have pleasure in enclosing those members’ responses received following the MAP’s review of their recommendations”.
45. Again, member responses were omitted from the recommendations contained in the PCD.
46. On the page 4 synopsis of the history of harmonisation, the PCD fails to acknowledge that the 2011 WHS Bill was replaced by the 2016 WHS Bill by Safe Work Australia (SWA).

47. This is misleading, suggesting that the 2011 Model Bill is the basis on which the process of modernisation of WHS laws should be approached. This is incorrect as the basis of the MAP review was the 2016 Model Bill. The 2011 Model Bill was only 'imposed' into the MAP considerations, by majority vote, with respect to Part 7 dealing with Right of Entry. At all other times the 2016 Model Bill was the basis for considerations and the recommendations proposed are with respect to the 2016 Model Bill.
48. With respect to the current legislation, the PCD states on page 4 that:
- "The Occupational Safety and Health Act 1984 (the OSH Act) has served the Western Australian community well since its introduction, but some of its key principles have become outdated in the past thirty years. In particular, the reliance on the employer/employee relationship has not kept pace with modern work practices".*
49. Modernisation is given primacy for the harmonisation of WA's work health and safety laws as the OSH Act is 'outdated'.
50. This being the case, the question remains why the 2016 Model Bill, the most updated and current model work health and safety legislation, should not be adopted in full rather than the reversion to the already outdated and replaced 2011 Model Bill with respect to Part 7 if not for the sole purpose of satisfaction of sectional interests.
51. The provisions for Right of Entry within Part 7 of the 2016 Model Bill reflect those of the Fair Work Act 2009. These provisions can only serve to ensure consistency in WA workplaces between the two primary pieces of workplace legislation. Critically, it would contribute to the reduction of compliance requirements and red tape, a significant WA State Government platform.
52. There is clearly a diminishing role of trade unions in modern workplaces with less than 10 per cent of WA private sector workers members of a trade union. CCIWA therefore has concerns that trade unions have been given disproportionate primacy in the recommendations, included only because of the MAP voting process, contrary to the provisions of the most recent 2016 Model Bill.
53. The Terms of Reference for the MAP, as re-stated on page 7 of the PCD, specifically state the:
- "importance of implementing harmonised laws in Australia generally, implement the optimal structure and content of the Model WHS Bill in drafting the single Act."*
54. If the objective, as clearly stated in the Terms of Reference, is to implement "the optimal structure and content" then this should be the optimal structure and content developed by SWA as contained in the 2016 Model Bill. While this had been adopted for the majority of the proposed WHS Act (WA), the selective reversion to 2011 Model Bill for one Part of the proposed WHS Act (WA) remains a considerable concern.
55. The reversion to Part 7 of the 2011 Model Bill, as opposed to the 2016 Model Bill, was justified on the basis of achieving alignment with existing legislation in other jurisdictions. However, as other jurisdictions enacted harmonised WHS laws prior to the development of the 2016 Model Bill, this argument cannot hold legitimacy and should not be the basis for introducing a retrograde and outdated provision in WA.
56. The purpose for change must be to provide WA with modernised WHS legislation that will achieve the best outcomes for work health and safety in WA.
57. On page 9 of the PCD, it states that:

“The Minister has determined the role of the Regulator will be the WorkSafe Commissioner who will have responsibility for health and safety in Western Australia. Additionally, the WorkSafe Commissioner will hold the power to appoint other industry-specific experts, as the need arises (for example, Construction Sector Engineer). This power to delegate will give effect to the Minister’s intention of creating a single safety regulator in Western Australia, with industry-specific directorates”.

58. CCIWA fully supports the role of the Regulator as the responsible independent body for compliance and enforcement to ensure that work health and safety laws and standards are upheld.
59. CCIWA fully supports the Minister’s intent, as expressed in the PCD, to “create a single regulator in Western Australia”.
60. However, the recommendations provided in the PCD seek to deliver the contrary result by weakening the independence and authority of the Regulator.
61. CCIWA strongly opposes any proposal that provides a role for any third party in the compliance and enforcement process of work health and safety laws and standards. The independence of the Regulator should not be compromised by the sharing of responsibilities with, or vested to, third parties with singular interests.
62. Trade unions should not be afforded any role that would allow these organisations to operate in any capacity as a de facto regulator. This capability does not exist in any other jurisdiction and is contrary to the purpose of modernising and harmonising work health and safety legislation.
63. CCIWA addresses these specific matters within section 7 of this submission.
64. Finally, it is taken that the 44 recommendations contained in the PCD are the only proposed amendments to the 2016 Model Bill and that no other changes are being considered for the proposed WHS Act (WA).

6. About this submission

65. The Public Consultation Document (PCD) presents 44 recommendations for amendments to be made to the 2016 Model Bill for adoption in Western Australia in the form of the WHS Act (WA).
66. This submission addresses each individual recommendation in section 7.
67. CCIWA responds to each recommendation in one of three ways:
 - (a) **Support** – the recommendation as proposed is accepted
 - (b) **Support with Amendments** – the recommendation is accepted only with the amendments as outlined in the submission
 - (c) **Oppose** – the recommendation as proposed is opposed as is any alternative proposal
68. Of the 44 recommendations proposed, CCIWA supports or supports with amendments 34 recommendations, and opposes 10 recommendations.
69. Appendix 1 of this submission summarises the position of CCIWA on each recommendation in tabular form as provided by DMIRS with reference to the relevant sections within this submission.

70. The recommendations are aggregated within this submission into the 12 categories consistent with the presentation of the recommendations in the PCD:
- (a) Objects of the Act (recommendations 1 - 3)
 - (b) Definitions (recommendations 4 - 7)
 - (c) Duty of Care (recommendation 8)
 - (d) Notifiable Incidents (recommendations 9 and 10)
 - (e) Health and Safety Representatives and Consultative Arrangements (recommendations 11 - 18)
 - (f) Right of Entry (recommendations 19 - 24)
 - (g) General Powers of the regulator (recommendations 25 - 29)
 - (h) Reviews and Proceedings (recommendations 30 - 33)
 - (i) Codes of Practice (recommendation 34)
 - (j) Dangerous Goods Jurisdiction (recommendation 35)
 - (k) Work Health and Safety Commission (recommendations 36 - 38)
 - (l) WHS Tribunal and Registrar (recommendations 39 - 44)
71. In section 8 of this submission, CCIWA addresses additional matters relating to the harmonisation of work health and safety laws in WA.
72. As the WHS Act (WA) is based on the adoption of the provisions of 2016 Model Bill with proposed amendments as outlined in the PCD, references to the provisions of the WHS Act (WA) should therefore be taken also to be those of the 2016 Model Bill.

7. Recommendations

73. Section 7 of this submission outlines CCIWA's position to either **Support**, **Support with Amendments**, or **Oppose** each of the 44 recommendations contained in the Public Consultation Document (PCD).
74. The Ministerial Advisory Panel (MAP) was established with terms of reference that provided clearly that the purpose of establishing a single WHS Act regulating health and safety in Western Australia was to have regard to *"the importance of implementing harmonised laws in Australia generally, implement the optimal structure and content of the Model WHS Act in drafting the single Act"*.
75. The 2016 Model Act provides, in section 3, the principle object of the Act as providing *"for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces"*. This is to be achieved by *"providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety"* (section 3(b)), *"providing a framework for continuous improvement and progressively higher standards of work health and safety"* (section 3(g)) and *"maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in [Western Australia]"* (section 3(h)).

7.1 Objects of the Act

Recommendation 1

76. Recommendation 1 proposes an amendment to Part 1, Division 2 (Section 3) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards	3(1)(c)

77. The proposed amendment to section 3(1)(c) is to focus on cooperation and consultation between the primary workplace participants, employers and employees.
78. The existing Objects of the OSH Act provide for a more cooperative and consultative approach though this extends to the formulation and implementation of safety and health standards to a level above what will necessarily apply to all workplaces – technical knowledge and development. This is beyond the scope of the significant majority of PCBU's who will rely on the Regulator for the development of relevant standards.
79. The provisions of section 3(1)(c) of the WHS Act (WA) focus on the promotion of improvements in work health and safety to achieve a healthier and safer working environment but is narrowly focused only on unions and employer organisations rather than workers and PCBUs.
80. Therefore, CCIWA would submit that section 3(1)(c) should be amended to reflect the current provisions of the OSH Act that reflect the importance of fostering cooperation and consultation between employers and employees.
81. As noted on page 15 of the PCD, this would in fact also, and more succinctly, emphasise cooperation and consultation between employers and employees as active participants at the workplace.
82. CCIWA **supports with amendments** recommendation 1.

Recommendation 2

83. Recommendation 2 proposes an amendment to Part 1, Division 2 (Section 3) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia	3(1)(h)

84. CCIWA **supports** recommendation 2 as proposed.

Recommendation 3

85. Recommendation 3 proposes an amendment to Part 1, Division 2 (Section 3) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act (WA)	3(1)

86. CCIWA **supports** recommendation 3 as proposed.

7.2 Definitions

87. Further comment is provided on section 4 (Definitions) of the WHS Act (WA) in **Section 8 – Additional Matters** of this submission.

Recommendation 4

88. Recommendation 4 proposes an amendment to Part 1, Division 3, Subdivision 1 (Section 4) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations	4

89. CCIWA **supports** recommendation 4 as proposed.

Recommendation 5

90. Recommendation 5 proposes an amendment to Part 1, Division 3, Subdivision 1 (Section 4) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
5	Amend the definition of import to include importation from another state or territory into Western Australia	4

91. While CCIWA **supports** recommendation 5 as proposed, this is **inconsistent with harmonisation**. No other jurisdiction includes such a provision.

92. However, the proposed amendment to adopt the current definition of *import* as contained within the OSH Act into the 2016 Model Bill will nevertheless provide consistency with the current WA environment.

Recommendation 6

93. Recommendation 6 proposes an amendment to Part 1, Division 3, Subdivision 2 (Section 6) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
6	Amend the meaning of <i>supply</i> to include the loan of an item	6(1)

94. CCIWA **supports** recommendation 6 as proposed.

Recommendation 7

95. Recommendation 7 proposes an amendment to Part 1, Division 3, Subdivision 2 (Section 5) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
7	Amend the meaning of <i>person conducting business or undertaking</i> to ensure only <i>workers</i> and <i>officers</i> who are 'natural persons' are excluded	5(4)

96. The provisions of section 5(4) have remained as drafted in the 2011 Model Bill and since adoption in 2012 by all other jurisdictions. To date there has been no evident litigation that suggests the issue may in fact be contentious in practice.
97. It is from that perspective that CCIWA is of the view that section 5(4) should remain as it was originally crafted in the interests of harmonisation, certainty and consistency.
98. CCIWA regards the proposed amendment as unnecessary and of itself may provide unintended consequences.
99. CCIWA would note that the perceived necessity for the proposed amendment may, based on the concerns expressed, be too focused on the word 'person' in isolation without considering how the meaning ought to be interpreted in light of the overall context and object of the Bill as a whole.
100. CCIWA **opposes** recommendation 7. The proposed amendment is **inconsistent with harmonisation**. No other jurisdiction includes the amended section 5(4) of the 2016 Model Bill.

7.3 Duty of care

Recommendation 8

101. Recommendation 8 proposes the insertion of a new clause to Part 2, Division 3 of the 2016 Model Bill (including the addition of new definitions in Section 4 of Part 1, Division 3, Subdivision 1) as follows:

No	Recommendation	Clauses
8	Include a new duty of care on the providers of workplace health and safety advice, services or products	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4

102. This recommendation has its origins from the initial National Review that reported in October 2008 and January 2009 with 232 recommendations for the development of a contemporary model Work Health and Safety Act.
103. As noted in the PCD, some submissions to the National Review suggested that people or organisations providing health and safety information, advice or services (including the provision of safety management systems) to the workplace should be subject to a specific duty of care.
104. The National Review recommendations noted the justification for the inclusion of a recommendation for placing a duty of care specifically on providers of services was *“that these persons may, in providing the services, materially influence health or safety by directing or influencing things done or provided for health or safety...”*¹
105. It is critical to note that the National Review’s recommendations in relation to the extended duty to providers of health and safety services was not endorsed by the Workplace Relations Ministers’ Council on the basis they were already covered by the primary duty of care for PCBUs.
106. Recommendation 8 seeks to resurrect the National Review’s recommendation to include a specific duty in the proposed WHS Act (WA) through the harmonisation process being undertaken in WA.
107. This recommendation would extend to apply to place a duty of care directly on health and safety professionals employed by a PCBU who, as part of their employment responsibilities, are required to provide the health and safety information, advice or services. This is an additional, and potentially conflicting, duty of care that they are required to exercise as well as the primary duty of care of the PCBU.
108. Further, this duty of care would also apply to health and safety representatives who, by the nature of their workplace representative role as required by the WHS Act (WA), provide health and safety information and advice. Thus, the proposed additional duty of care would apply to health and safety representatives.

¹ National Review into Model Occupational Health and Safety Laws, First Report, October 2008, Paragraph 7.105, page 102

109. The unintended impact, therefore, would be to reduce even further the number of employees willing to stand for election as a health and safety representative because of the exposure the role of health and safety representative would have to punitive action arising from the prescribed duty.
110. By extension, this duty would apply to union officials who, by virtue of their purported role supporting health and safety representatives and as a result of activities and actions they undertake arising from attendance at a workplace, provide health and safety information, advice or services in some form.
111. The impact would also extend to services provided by third parties, such as consultants and other health and safety service providers. Such third parties are a particularly valuable and essential service to small and medium businesses who do not have in-house health and safety professional expertise or capability and rely significantly on third parties to support them to achieve their health and safety responsibilities.
112. Additionally, third party health and safety service providers have limited ability to control the implementation of some, or all of, the advice and services provided to the PCBU.
113. The extension of the additional duty of care to third party providers will consequently lead to an increase in costs, particularly insurance costs with respect to professional liability, and thus cause an increased service cost to businesses, critically affecting those who rely on these third-party service providers.
114. The resultant impact would be to diminish the provision of third party services necessary to support small and medium-sized businesses.
115. Importantly, this recommendation serves to significantly contradict the Object of the proposed WHS Act (WA) which states that the main object of the Act to secure the health and safety of workers and workplaces by, among others, *“promoting the provision of advice, information, education and training in relation to work health and safety”*.²
116. The primary duty of care of a PCBU provided by section 19 of the 2016 Model Bill is sufficient to ensure that people or organisations providing health and safety information, advice or services do so in a manner that ensures that the PCBU fulfils the required duty of care. This is also required by section 27.
117. In addition, the provisions of section 29 of the WEHS Act (WA) relate specifically to the duties required of other persons at the workplace whether or not that person has a prescribed duty under Part 2. This is addressed at paragraph (c) where that the person must comply with instructions by the PCBU.
118. Safe Work Australia’s Guide to the Model Work Health and Safety Act states with respect to section 29:
- “Similar duties apply to other persons at a workplace. Any person at a workplace, including customers and visitors, must take reasonable care of their own health and safety and that of others who may be affected by their actions or omissions. They must also comply, so far as they are reasonably able, with any reasonable instruction that is given by the PCBU to comply with WHS laws.”*³
119. It is noted again, and emphasised, that while initially recommended by the National Review, it was not endorsed and included in the 2011 Model Bill nor was it subsequently included in the modernised, updated 2016 Model Bill.

² Model Work Health and Safety Bill, revised as at March 2016, Section 3(1)(d)

³ Guide to the Model Work Health and Safety Act, Safe Work Australia, March 2016, page 9

120. The existing provisions of Part 2 are sufficient, and the proposed amendment is unnecessary and will have unintended and detrimental consequences.
121. CCIWA **opposes** recommendation 8.
122. Importantly, the addition of this duty is **inconsistent with harmonisation**. No other jurisdiction includes such a provision to extend the duty of care.

7.4 Notifiable incidents

123. Further comment is provided on Part 3 (Incident notification) of the 2016 Model Bill in **Section 8 – Additional Matters** of this submission.

Recommendation 9

124. Recommendation 9 proposes an amendment to Part 3 (Section 36) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital	36(a)

125. Section 36(a) of the 2016 Model Bill provides that a serious injury or illness of a person means an injury or illness that requires the person to have:

“(a) Immediate treatment as in-patient in a hospital;”

126. Section 8(4) of the Health Services Act 2016 (WA) defines a hospital as:

- “(a) premises where medical, surgical or dental treatment, or nursing care, is provided for ill or injured persons and at which overnight accommodation may be provided; and*
- (b) a day hospital facility; and*
- (c) a nursing post”.*

127. The definition of hospital is sufficiently broad, particularly the provisions of paragraph (a) of Section 8 that encompass any medical premises where the requirement for overnight accommodation may be provided. Overnight accommodation is not essential within a medical premise to be regarded as a hospital.

128. In-patients are patients that are admitted to hospital (as defined) but it is not conditional that an overnight stay occur, a patient may in fact be released on the same day after being admitted. Admission is the determinant not duration of stay.

129. The definition of ‘hospital’ adequately addresses any potential concerns that may exist as noted in the PCD due to WA’s geographical area. The proposed amendment has not been necessary in any other jurisdiction. No other state with a similar ‘remoteness’ of industry, especially in the resources sector, has encountered any issues with the provisions of the Model Bill.

130. While CCIWA **supports** recommendation 9, it is regarded as unnecessary and is **inconsistent with harmonisation**.

Recommendation 10

131. Recommendation 10 proposes an inclusion to Part 3 (Section 36) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
10	Include incapacity to work for 10 or more days as a category of serious injury or illness	36

132. Section 36 of the 2016 Model Bill provides the list of serious injuries or illnesses that require notification.

133. The Occupational Safety and Health Regulations 1996 (WA), provides that a notifiable injury includes “any injury other than an injury of a kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred”.⁴ This provision is for the purposes of section 231(2)(a) of the OSH Act.

134. Recommendation 10 proposes section 36 of the WHS Act (WA) include the provision currently provided under the OSH Regulations to provide for an incapacity to work for 10 days or more.

135. While CCIWA **supports** recommendation 10 conditional upon the amendment being consistent with the comparable definition contained in the OSH Act.

136. Although **inconsistent with harmonisation**, it would thus reflect the current practice in WA and serve to capture significant illness or injury not elsewhere defined.

7.5 Health and safety representatives and consultative arrangements

137. Further comment is provided on Part 5 (Consultation, representation and participation) of the 2016 Model Bill in **Section 8 – Additional Matters** of this submission.

Recommendation 11

138. Recommendation 11 proposes an amendment to Part 5, Division 3, Subdivision 2 (Section 52) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
11	Amend the heading ‘Negotiations for agreement for work group’ to ‘Negotiations for determination of work group’	52 (heading only)

139. Section 52 provides for the required processes for the determination of work groups within a PCBU.

⁴ Occupational Safety and Health Regulations 1996, Part 2, 2.4 (e)

140. Recommendation 11 proposes to amend the title of section 52 by replacing the word ‘agreement’ with the word ‘determination’ such that the title would then read ‘Negotiations for determination of work group’.
141. Section 52(1) provides for a work group to be ‘determined’ by negotiation and agreement, sub-section 3 refers to negotiations to ‘determine’ and sub-section 4 refers to the ‘determination’ of a work group.
142. The proposed amendment more accurately reflects the objective, intent and references within section 52.
143. CCIWA **supports** recommendation 11.
144. While the proposed amendment is **inconsistent with harmonisation**, the alteration for clarity to the heading of section 52 is of no consequential impact.

Recommendation 12

145. Recommendation 12 proposes an amendment to Part 5, Division 3, Subdivision 5 (Section 69) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace	69(3)

146. Section 52 provides for the determination of a work group(s) within a PCBU. Sections 55 and 56 similarly provide for the determination of work groups for multiple businesses.
147. Section 60 of the 2016 Model Bill provides that a worker is:
- “(a) eligible to be elected as a health and safety representative for a work group only if he or she is a member of that work group;”*
148. Section 62(1) provides that the *“health and safety representative for a work group is to be elected by members of that work group”*.
149. It is clear from the provisions of section 68(1)(a) of the WHS Act (WA) that the powers and functions of a health and safety representative for a work group are limited to representing *“the workers in the work group in matters relating to work health and safety”*.
150. Section 69(1) is equally clear in stating that a *“health and safety representative for a work group may exercise powers and perform functions under this Act only in relation to matters that affect, or may affect, workers in that group”*.
151. The only exception to the clarity of section 69(1) is that provided by section 69(2) which provides:
- “(2) Subsection (1) does not apply if:
- (a) *there is a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard that affects or may affect a member of another work group; or*
- (b) *a member of another work group asks for the representative's assistance,*

and the health and safety representative (and any deputy health and safety representative) for that other work group is found, after reasonable inquiry, to be unavailable”.

152. It is explicit from section 69(2) that the reasons for a health and safety representative to exercise any functions or powers beyond the work group for which he or she was elected to represent must be that either there is an **immediate and imminent exposure** to a hazard that affects or may affect another work group **or** a member of another work group has requested the health and safety representative’s assistance. In both circumstances the health and safety representative is **only** involved when the health and safety representative of the other work group is unavailable.
153. The consequences of recommendation 12 would be to empower a health and safety representative to exercise the functions and powers under the proposed WHS Act (WA) unfettered across any work group within a PCBU and across all PCBUs at the workplace.
154. It is appropriate that a health and safety representative, elected by members of a work group, represent that work group. The limitations applied by section 69 of the 2016 Model Bill are therefore proper.
155. The potential risk for vexatious and malicious use of the proposed extension of functions and powers provided by a generalised ‘request for assistance’ proposition is evident.
156. Further, as the ‘specified circumstances’ stated in the recommendation are not provided, a ‘blank cheque’ approach to this recommendation cannot be considered.
157. Regardless, it is the view of CCIWA that there are no circumstances, other than as provided for under the terms of section 69 of the 2016 Model Bill, for the powers to be provided beyond the work group for which the health and safety representative was elected to represent.
158. CCIWA **opposes** recommendation 12.
159. Importantly, the amendment is **inconsistent with harmonisation**. This recommendation represents a significant departure from the provisions of the 2016 Model Bill. No other jurisdiction includes such a provision to extend the powers and functions of health and safety representatives.

Recommendation 13

160. Recommendation 13 proposes an amendment to Part 5, Division 3, Subdivision 6 (Section 72) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission	72(1)(a)

161. This recommendation customises the 2016 Model Bill to the current structure in operation in WA.
162. However, CCIWA proposes that section 72(2)(a) that requires that the PCBU must “*as soon as practicable within the period of 3 months after the request is made, allow the health and safety representative time off work to attend the course of training*” be varied to extend the time to six months from the date of request.

163. There may be circumstances where the PCBU, particularly small and medium-sized businesses, cannot release the worker to attend or may need to make alternate staffing arrangements in order to accommodate the request. Additionally, the requested course may not have vacancies within the time requested, a circumstance that will be particularly acute at implementation of the WHS Act (WA).
164. It is to the benefit of the PCBU to ensure that the health and safety representative completes the required training. However, an extension of the period to satisfy the requirement from three months to six months would provide support to accommodate exceptional circumstances, acknowledging the significant and varied size and nature of businesses under the scope of the WHS Act (WA). It would additionally allow for time required for the approval processes of the Regulator to be considered within this satisfaction period.
165. CCIWA **supports** recommendation 13.

Recommendation 14

166. Recommendation 14 proposes an amendment to Part 5, Division 3, Subdivision 6 (Section 72) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'	72(1)(b)

167. CCIWA **supports** recommendation 14.
168. CCIWA would also identify that there is no specified duration of training to which the health and safety representative would be required to attend for which the PCBU is required to pay for and release the worker from duties to attend.
169. CCIWA recommends that the number of days training be specified and capped, most probably best located in the regulations. A cap of five days is recommended.

Recommendation 15

170. Recommendation 15 proposes the insertion of a new clause to Part 5, Division 4 (Section 76) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
15	Require that a health and safety committee must include a representative from management with sufficient authority to authorise the decisions and recommendations of the committee	New clause to be added to section 76

171. By prescribing that the management representative of the committee has sufficient authority to authorise decisions and recommendations that the health and safety committee may make, this recommendation therefore suggests that the health and safety committee become a decision-making body within a PCBU.

172. This would potentially interfere with the responsibilities of duty holders under the WHS Act (WA), particularly the primary duty of the PCBU, and would also extend to significantly alter the functions of the health and safety committee provided by section 77 of the 2016 Model Bill.
173. CCIWA supports the general premise that the health and safety committee, where possible, has a suitably senior representative from management as a member as this ensures greater communication, cooperation, consultation and understanding of health and safety matters and concerns at the workplace.
174. It is the case that many organisations already acknowledge these advantages and provide senior representatives on health and safety committees as a matter of course. However, health and safety committees do not make decisions independent of the organisation.
175. To imply that the representative would have unilateral authority independent of the overall organisational decision-making and corporate governance processes of a business is not practical or proper.
176. While authorisation may be possible for some items and on some occasions, it is not practical or possible on others. It simply is not possible to apply a “one-size-fits-all” requirement as suggested or implied by this amendment to insert such a prescriptive clause.
177. It is important to consider the range of businesses to which the WHS Act (WA) would apply and the practicality of each circumstance, considering the size of businesses from large to small, operational locations, industries, and business structures. Organisational sizes and authorities vary significantly as does organisational governance and compliance obligations under law.
178. Organisational authorities may reside beyond the authority level of those who may participate or be available to participate on the health and safety committee.
179. Additionally, as the committee involves health and safety representatives from all work groups, it would not necessarily be possible in all organisations for a senior management representative to authorise decisions affecting all work groups within a PCBU.
180. In determining the composition of the health and safety committee, section 76(4) of the 2016 Model Bill provides that *“at least half the members of the of the committee must be workers who are not nominated by the person conducting the business or undertaking”*.
181. The PCBU therefore would nominate half of committee members according to the most effective manner to fulfil the functions of the health and safety committee prescribed by section 77. The persons nominated by the PCBU would be different for each PCBU. The PCBU must have the right to select its representatives on health and safety committees as it sees fit, according to its own requirements and obligations.
182. There are too many variables and considerations for this recommendation to be implemented without unintended consequences.
183. CCIWA **opposes** recommendation 15.
184. Importantly, the proposed amendment is **inconsistent with harmonisation**. This recommendation represents a significant departure from the provisions of the 2016 Model Bill. No other jurisdiction includes such a provision.

Recommendation 16

185. Recommendation 16 proposes an amendment to Part 5, Division 6 (Section 84) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work	84

186. Section 84 of the WHS Act (WA) provides the right of a worker to cease unsafe work as follows:

“A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker’s health or safety, emanating from an immediate or imminent exposure to a hazard.”

187. Section 19(2) of the WHS Act (WA) refers, within the primary duty of care that:

“A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.”

188. Section 19(2) requires that a PCBU must ensure that the health and safety of other persons is not put at risk because of the work being carried out by the PCBU.

189. Further, the duties of workers provided in section 28(b), in addition to the provisions of section 28(a) to “take reasonable care for his or her own health and safety”, state that the worker must “take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons”.

190. Section 28(b) clarifies the duty of care to other persons as a primary duty of care of workers at the PCBU.

191. Section 26 of the OSH Act provides that an employee is permitted to refuse work if it would expose ‘any other person’ to a risk of serious injury or imminent risk’ as follows:

“Refusal by employees to work in certain cases

(1) *Nothing in section 25 prevents an employee from refusing to work where he or she has reasonable grounds to believe that to continue to work would expose him or her or any other person to a risk of imminent and serious injury or imminent and serious harm to his or her health.”*

192. The National Review’s recommendation 121(a)⁵ stated that:

“a worker(s) may cease work where they have reasonable grounds to believe that to continue to work would expose them or any other person to a serious risk to their health or safety or that of another person, emanating from immediate or imminent exposure to a hazard;”

193. It is relevant to note that this recommendation was not adopted in the development of the initial 2011 Model Bill and, importantly, was not adopted with the development of the updated 2016 Model Bill.

⁵ National Review into Model Occupational Health and Safety Laws, First Report, October 2008, Page lvii

194. Recommendation 16 seeks to codify common law rights as currently exist under the OSH Act.
195. CCIWA **supports** recommendation 16 as it maintains current WA practice.
196. Importantly, the proposed amendment is **inconsistent with harmonisation**. No other jurisdiction includes such a provision.

Recommendation 17

197. Recommendation 17 proposes amendments to Part 5, Division 6 (Section 89) and Part 12, Division 3, Section 229 of the 2016 Model Bill as follows:

No	Recommendation	Clauses
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST)	89, 229

198. The 2016 Model Bill provides, in Division 5 of Part 5 (sections 80 to 82) a procedure for the resolution of issues arising out of the cessation of work.
199. Section 89 provides that a PCBU, health and safety representative or a worker may ask for the Regulator to appoint an inspector to resolve an issue arising out of the cessation of work.
200. There is no convincing reason why the proposed amendment to section 89 should by-pass the procedures set out in Part 5, Division 5 of the WHS Act (WA).
201. CCIWA **supports** recommendation 17 where an inspector is unable to resolve a matter to allow for the right of any party to apply to the WHST to seek a review of a matter arising from a cessation of work.
202. Importantly, the proposed amendment is **inconsistent with harmonisation**. No other jurisdiction includes such a provision.

Recommendation 18

203. Recommendation 18 proposes the insertion of a new clause to Part 5, Division 7 (Section 100) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person	New clause to be added to section 100

204. While this recommendation would provide an additional sub-section to section 100 of the 2016 Model Bill, the inclusion of the proposed requirement to notify a health and safety representative when a review to a provisional improvement notice is requested would encourage and assist communication and co-operation.

205. CCIWA **supports** recommendation 18.
206. While the proposed amendment is **inconsistent with harmonisation**, it is highly practical in terms of achieving better work health and safety outcomes. No other jurisdiction includes such a provision.

7.6 Right of entry

207. Further comment is provided on Part 7 (Workplace entry by WHS entry permit holders) of the 2016 Model Bill in **Section 8 – Additional Matters** of this submission.

Recommendation 19

208. Recommendation 19 proposes amendments to Part 7, Division 2 (Sections 117, 119 and 120) and Part 7, Division 4 (Section 123) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions	117, 119, 120, 123

209. While the intent of the model Part 7 of the 2016 Model Bill is to bring workplace entry for specific purposes within the WHS legislation, CCIWA is opposed to the inclusion of Part 7 within the WHS Act (WA).
210. The WHS Act (WA) should provide its primary focus and objectives on the development of direct and productive workplace-based mechanisms for the participation, consultation and resolution of issues between the PCBU and the employees (and their health and safety representative) at the workplace.
211. Any explicit role for a trade union or other third party is superfluous and contrary to the objects of the proposed WHS Act (WA).
212. It is acknowledged that employees have the right to be represented by a trade union. As such, a trade union can raise any health and safety matter directly with the PCBU, Regulator or inspector without any need to enter the workplace.
213. Third party intervention such as prescribed by the provisions of Part 7 must be regarded as an impediment to effective employee involvement and consultation at the workplace, the essential ingredient for the development of positive safety outcomes.
214. The interjection of third parties as proposed by Part 7 serves only to create an adversarial workplace environment, detrimental to the delivery of positive workplace health and safety cultures.
215. Further, the provisions within the WHS Act (WA) provide an entry pathway to a workplace creating avenues whereby trade unions may enter workplaces to pursue and exert influence for other workplace relations agendas under the guise of health and safety. The potential for misuse is real and well evidenced by case law.
216. If Part 7 is to be retained, CCIWA strongly opposes the reversion to the provisions of the 2011 Model Bill, as proposed by recommendation 19.

217. The 2016 Model Bill is the most modern version of the model legislative provisions and unequivocally meets the objectives outlined by the WA Government to “*develop modernised health and safety laws for Western Australia*”.
218. For all other purposes in the development of the WHS Act (WA), the 2016 Model Bill was the basis of the review work of the Ministerial Advisory Panel (MAP) in developing the modernised legislation to apply in the form of the WHS Act (WA).
219. However, with respect to Part 7, the work of the MAP was diverted, without the unanimous agreement of the MAP, to the provisions of the 2011 Model Bill.
220. This reversion was ‘justified’ on the basis that it harmonises with all other jurisdictions. This is conveniently applied. If harmonisation with respect to Part 7 is to be so firmly applied as the justification in this case, then it should equally apply to all other non-harmonised recommendations contained in the PCO.
221. With the development of the initial harmonised legislation in the form of the 2011 Model Bill, all other state and territory jurisdictions proceeded to enact the model legislation except for Victoria and Western Australia. The adoption by other jurisdictions all occurred prior to the ‘modernising’ of the legislative framework with the development of the 2016 Model Bill.
222. If Part 7 is to be retained in the WHS Act (WA), CCIWA again submits that this should be in the form of the most recent model legislation, the 2016 Model Bill.
223. There is no compelling reason to revert to the outdated 2011 Model Bill other than to serve narrow, sectional interests.
224. The fact that other jurisdictions have not updated their enacted legislation to the provisions of the more recent 2016 Model Bill is not a material consideration.
225. The 2016 Model Bill equalises the provisions for right of entry with the provisions of the Fair Work Act 2009 (Cth). This provides considerable consistency for compliance to the benefit of all workplace parties.
226. The proposed amendments of recommendation 19 relate to sections 117, 119, 120, and 123.

Section 117 – Entry to inquire into suspected contraventions

227. The provisions of section 117 of the 2016 Model Bill expand the provisions of the 2011 Model Bill.
228. The 2011 Model Bill only contains the limited provisions of sub-sections (1) and (2) that were subsequently carried forth into the sub-sections (1) and (2) of the 2016 Model Bill.
229. It is relevant to note that South Australia has amended sub-section (2) to require that the reasonable suspicion of a contravention “*involves a risk to the health and safety of a relevant worker*”. This is an important clarification that refines the mere suspicion of a generalised contravention to a specific suspected contravention that involves **an actual risk to a worker**. CCIWA would support an amendment to sub-section (2) in this form in the WHS Act (WA) for greater clarification and assistance to the exercise of a right of entry for a suspected contravention.
230. The 2016 Model Bill expands section 117 with the addition of sub-sections (3) to (8). Importantly:

- (a) Sub-section (3) requires that: *“Before entering a workplace under this section, the WHS entry permit holder must give notice of the proposed entry and the suspected contravention to...”*.

This clearly requires the entry permit holder to advise the PCBU of the actual nature of the suspected contravention before entry takes place. This requirement does not exist under the provisions of section 117 of the 2011 Model Bill which simply requires that a *“(1) A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of this Act that relates to, or affects, a relevant worker”* and that *“(2) The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring”*.

- (b) Sub-section (5) provides that the entry permit holder must provide notice of at least 24 hours and no more than 14 days before the entry may take place. This provision aligns with the entry provisions under section 487 of the Fair Work Act 2009 for entry to hold discussions with employees and to investigate a suspected contravention of the Fair Work Act or a fair work instrument.

231. It should be noted that Part 3-4 of the Fair Work Act 2009 (State or Territory OHS Rights) also provides in section 495 the requirements for 24 hours’ notice of entry to inspect/access employee records.
232. The requirement for a minimum of at least 24 hours’ notice is essential as a consistent notice period.
233. The 2011 Model Bill provides that in the circumstances of entry for a suspected contravention that no notice is required and, further, provides that that *“A WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace under this Division, give notice of the entry and the suspected contravention...”*.
234. This allows for a permit holder to enter a workplace without advising the PCBU prior to the entry and that the only obligation to notify is *“as soon as is reasonably practicable after entering”*.
235. Allowing an entry permit holder to enter a workplace without prior notice and to require notice only after entering a workplace is not responsible or in the interests of the health and safety of all persons at the workplace. This is contrary to the fundamental principles of the WHS Act (WA).
236. A PCBU has a primary duty of care under section 19(2) of the 2016 Model Bill as follows:
“A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking”.
237. If the entry permit holder enters a workplace without prior notice, that is without the knowledge or permission of the PCBU, the PCBU is unable to fully satisfy the general duty of care to ‘other persons’ at the workplace. The entry permit holder is therefore at significant potential risk.
238. An entry permit holder entering a workplace, unless properly authorised and inducted, will not be aware of any workplace safety rules, restrictions, limitations and hazards that may be present at a workplace. Workplace conditions potentially vary daily, and employees are made aware through regular safety, pre-start and ‘tool-box’ meetings of any changes to workplace conditions including actual or potential hazards and other potentially impactful work activity. The entry permit holder, absent workplace knowledge, would potentially be at risk for which the PCBU could be deemed to have contravened the primary duty of care under the WHS Act (WA).
239. Therefore, it is unreasonable to expect a PCBU to be responsible or have liability for any event arising from an entry to a workplace that has not been authorised.

240. Further, section 29 of the 2016 Model Bill, replicated from the 2011 Model Bill, stipulates the duties required of other persons at the workplace. Paragraph (c) requires another person at the workplace, an entry permit holder for example, must “*comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act*”. This is not possible if the presence of the entry permit holder at the workplace is unknown or unauthorised, especially when the activities or whereabouts of the entry permit holder are not known in advance.
241. In addition to safety requirements, there are also workplace security requirements that may be required to be completed prior to any person entering a workplace.
242. Aside from the rights of access to workplaces that can be exercised by the Regulator, no third party should be able to access a workplace without the approval of the PCBU or entity that has management or control of the workplace and the duties assigned under the proposed WHS Act (WA). Any person not subject to the duties imposed under the proposed WHS Act (WA) to ensure workplace safety and health should not have a right of entry to a workplace without the consent of the duty holder of the workplace.
243. Safe Work Australia’s Guide to the Model Work Health and Safety Act cites that the primary duty of care of a PCBU includes “*the provision and maintenance of a working environment that is safe and without risks to health, including **safe access to and exit from the workplace***”⁶. [emphasis added]
244. If, as noted by Safe Work Australia, that a PCBU’s primary duty of care includes safe access and exit from the workplace, how can an uncontrolled, freely exercised and unrestricted access by an entry permit holder allow a PCBU to meet the primary duty of care.
245. If Part 7 is retained, CCIWA would **support** the adoption in full of the provisions of section 117 of the 2016 Model Bill. As a result, the proposed adoption of section 119 from the 2011 Model Bill that deals with the required notice for entry is not required as section 117(5) of the 2016 Model Bill provides for the required notice of entry in all circumstances.
246. Should the provisions of the 2011 Model Bill continue to be pursued, the notice of entry should be required **at the time of arrival at the workplace** not after entry has occurred.

Section 120 – Entry to inspect employee records or information held by another person

247. Should Part 7 be retained, CCIWA **opposes** the adoption of the provisions of the 2011 Model Bill and **supports** the adoption of the 2016 Model Bill provisions consistent with CCIWA’s submission with respect to section 117.

Section 123 – Contravening WHS entry permit conditions

248. The 2011 Model Bill provided the maximum civil penalty provision for a contravention of the conditions of the entry permit of \$10,000. The 2016 Model Bill increased the maximum civil penalty provision to \$20,000. A similar penalty provision currently exists within the Work Health and Safety Act 2012 (SA).
249. The amendment proposed to section 123 seeks to significantly reduce the enforcement penalty for contraventions of an entry permit condition while seeking to impose increased penalties to other parties within the proposed WHS Act (WA). This is an overtly inequitable approach.

⁶ Guide to the Model Work Health and Safety, March 2016, Page 7

250. If the penalties provided within the 2016 Model Bill are to be applied, they must equitably apply to all. Preferential treatment to entry permit holders, trade union representatives, must not be considered.
251. CCIWA **opposes** the adoption of the provisions of the 2011 Model Bill and **supports** the adoption of the 2016 Model Bill.

Summary – Recommendation 19

252. CCIWA **opposes** the adoption of section 117, 119, 120 and 123 of the 2011 Model Bill.

Recommendation 20

253. Recommendation 20 proposes the insertion of a new clause to Part 7, Division 2 (Section 117) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes	New clauses inserted into section 117

254. As outlined in the CCIWA response to recommendation 19, if Part 7 is to be retained this must be in the form of the 2016 Model Bill as the most current model work health and safety framework.
255. Therefore, recommendation 20 is considered in the context of inserting additional sub-sections within clause 117 of the 2016 Model Bill.
256. These additional sub-sections are provisions reflected within subsections 117(3) and 117(6) of the Work Health Safety Act 2012 (SA) that incorporates required notification and reporting requirements for entry to the workplace in the event of suspected contraventions. (Amended to replace ‘Executive Director’ with ‘Regulator’ consistent with the WA regulatory framework)
257. CCIWA supports the approach taken in section 117(3)(a) of the Work Health and Safety Act 2012 (SA) that requires that the Regulator be notified of any proposed exercise of right of entry under section 117 to afford the Regulator the opportunity to also attend the workplace during exercise of the right of entry.
258. This can only be effectively achieved with the requirement for 24 hours’ notice of entry through section 117 to be in place. It is inconceivable that a Regulator can attend in any other circumstance.
259. As noted in the PCD, this will *‘provide the Regulator with the opportunity to investigate the suspected contravention at the same time as the EPH, and minimise disruption to the workplace’*. CCIWA concurs with this view.
260. It is therefore CCIWA’s submission that an entry permit holder exercising a right of entry under section 117 of the proposed WHS Act (WA) must be required to notify the Regulator of the proposed entry. Further, the entry permit holder must be required to produce a report in relation to that entry as provided in section 117(3) of the Work Health and Safety Act 2012 (SA) as proposed in recommendation 19.

261. Therefore, CCIWA does not support the amendment to sub-section 117(6)(a) of the South Australian WHS Act 2012 as proposed in recommendation 20 by substituting 'must' with 'may'. Where a Regulator does not accompany an entry permit holder when attending a workplace for a suspected contravention, the necessity to provide a report '*on the outcomes of his or her inquiries at the workplace*' should be established as a requirement as reflected by the retention of 'must' within the provisions of 117(6)(a).
262. This should not be optional as it provides the ability to simply circumvent the requirement by the exercise of 'individual discretion' as to whether the Regulator is notified or not and this would be the subject of 'abuse' to the required process.
263. It is submitted that where entry occurs under section 117, it is essential that a report clearly documenting observations and outcomes must be submitted by the entry permit holder on each entry occasion to the Regulator and, in addition, to the PCBU.
264. Therefore, CCIWA recommends that section 117(6)(a) of the Work Health and Safety Act 2012 (SA) be amended to include the provision of a report to the Regulator and the PCBU.
265. Not only would this support the purpose of the entry taking place but, more importantly, would improve the communication of relevant findings that would assist in the improvement of safety and health outcomes.
266. Further, this communication will have the added benefit of improving consultation and cooperation between entry permit holders and PCBUs and assist the PCBU in identifying any opportunities for making safety and health improvements consistent with the objects of the WHS Act (WA).
267. In addition, detailed documentation relating to the entry to the workplace would be beneficial should any dispute arise in relation to that entry.
268. Importantly, the requirement to provide a report by the entry permit holder is a significant deterrent for frivolous or vexatious entry to a workplace.
269. Further, CCIWA would recommend that a report must be provided by an entry permit holder on all occasions that entry to a workplace is exercised under section 117 regardless of whether or not the entry permit holder is accompanied by the Regulator. This will contribute to the objects of the WHS Act (WA).
270. CCIWA **supports** in principle the adoption of section 117(3) and 117(6) of Work Health and Safety Act 2012 (SA) into section 117 of the 2016 Model Bill as proposed.
271. However, recommendation 20 proposes specific amendments to section 117(3) and 117(6) of Work Health and Safety Act 2012 (SA) as follows:
- (a) amend SA clause 117(6)(a) to provide the EPH with discretion to provide the report to the Regulator (i.e. 'may' rather than 'must').
CCIWA **opposes** the amendment to section 117(6)(a) as proposed.
 - (b) amend SA Clause 117(6)(b) to include a requirement for the Regulator to provide a response to the PCBU in addition to the EPH in response to the Report issued by the EPH;
CCIWA **supports** the amendment to section 117(6)(b) as proposed.
 - (c) amend 'Executive Director' to 'Regulator' consistent with the Western Australian drafting approach.
CCIWA **supports** the amendment as proposed to accurately reflect the regulatory structure in WA.

272. While the proposed inclusion of additional sub-sections within section 117 of the 2016 Model Bill are **inconsistent with harmonisation**, these proposals would ensure improved operation and functioning of section 117 and would contribute to the improvement of health and safety outcomes.

Recommendation 21

273. Recommendation 21 proposes amendments to Part 1, Division 3, Subdivision 1 (Section 4), Part 7, Division 1 (Section 116), Part 7, Division 5 (Sections 131, 132, 134 and 135) and Part 7, Division 8 (Sections 149, 150 and 151) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system	4, 116, 131, 132, 134, 135, 149, 150 and 151

274. CCIWA **supports** recommendation 21.

Recommendation 22

275. Recommendation 22 proposes amendments to Part 7, Division 5 (Sections 138, 139 and 140) and Part 7, Division 6 (Section 142) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry	138, 139, 140 and 142

276. CCIWA **supports** recommendation 22 to establish the Work Health and Safety Tribunal as it reflects the operation of the current Occupational Safety and Health Tribunal

Recommendation 23

277. Recommendation 23 proposes amendments to Part 1, Division 3, Subdivision 1 (Section 4), Part 7, Division 1 (Section 116), part 7, Division 4 (Section 124), Part 7, Division 5 (Sections 131, 133, 137 and 138) and Part 7, Division 8 (Section 150) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)

278. CCIWA **supports** recommendation 23. This is a consistent approach with other harmonised jurisdictions.

Recommendation 24

279. Recommendation 24 proposes amendments to Part 7, Division 5 (Section 138) and Part 7, Division 6 (Section 142) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit	138(1), 142(4)

280. CCIWA **supports** recommendation 24.

7.7 General powers of the regulator

Recommendation 25

281. Recommendation 25 proposes an amendment to Part 9, Division 3, Subdivision 4 (Section 171) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading)

282. As noted in the PCD, WA is the “largest Australian jurisdiction in terms of geographical area, with a highly centralised inspectorate. Consequently, under present safety and health laws, inspectors may request documents or interview people without needing to enter the workplace. Using these powers, an inspector may be able to resolve an incident without incurring travel expenses, or conclude that a physical workplace visit is required”.

283. CCIWA **supports** recommendation 25 in principle to the extent that it is to ‘modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace’. However, the proposed recommendation is **inconsistent with harmonisation**,

284. The PCD cites recommendation 8 of the *Best Practice Review of Workplace Health and Safety Queensland – Final Report* and that ‘it is proposed to adopt the essence of Recommendation 8 in Western Australia’. Absent the detailed proposed amendments to section 171, it is not possible therefore to provide a submitted position on ‘the essence’ of the proposal absent the necessary detail.

Recommendation 26

285. Recommendation 26 proposes an amendment to Part 9, Division 3, Subdivision 4 (Section 171) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview	171

286. The recording of interviews would allow, as indicated in the PCD, for a *'clear, accurate and objective record of the interview'* and therefore reducing *'the scope for dispute as to the content of any representation made in interviews'*.

287. The PCD cites the review of the *Work Health and Safety Act 2011 (NSW)* that states *"...the review finds that there is merit in authorising the Regulators to record an interview without consent, after giving notice that the recording is taking place."*

288. CCIWA **opposes** the introduction of powers for inspectors to record interviews by any means without the consent of the interviewee. Recording of interviews would only be supported where an individual has provided consent to be recorded and any contrary proposition is unacceptable.

Recommendation 27

289. Recommendation 27 proposes an amendment to Part 10, Division 1 (Section 193) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance	193

290. CCIWA **supports** recommendation 27 as it provides continuity to current practice in WA.

Recommendation 28

291. Recommendation 28 proposes the insertion of a new clause to Part 8, Division 2 of the 2016 Model Bill as follows:

No	Recommendation	Clauses
28	Include the power for the Regulator to request an independent evaluation consistent with current practice	New clause to be added to Division 2, Part 8

292. While the current provisions under the MSI Act and the range of Petroleum Regulations provide for an independent evaluation to be requested by the Regulator, with the subsequent cost of such independent evaluation to be borne by the PCBU, these current provisions are contained within the specific industry primary legislation and relevant Regulations.
293. These provisions should remain identified and limited to those industry sectors within the industry-specific Regulations as any generalised provision with the WHS Act (WA) would consequently be applicable to all PCBUs of varying sizes, industry sectors and financial resource capability and would be an unnecessary and significant cost impost.
294. CCIWA **opposes** recommendation 28 within the WHS Act (WA) as proposed but would **support** the provisions being included within industry-specific Regulations thereby limiting the application to reflect current practice.

Recommendation 29

295. Recommendation 29 proposes an amendment to Part 9, Division 2 (Section 160) and Part 9, Division 5 (Section 187) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
29	For consistency with the Coroner's Act 1996, remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses	160(f) and 187

296. CCIWA **supports** recommendation 29.

7.8 Reviews and proceedings

Recommendation 30

297. Recommendation 4 proposes the insertion of a new sub-clause to Part 11 (Section 216) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality	New sub-clause to be added to section 216

298. Enforceable undertakings are an important enforcement mechanism as an alternative to prosecution that can provide benefits to the organisation and the wider community that would not be otherwise achieved through the application of punitive approaches to enforcement.
299. Enforceable undertakings provide the opportunity to positively impact on the health and safety of workers, a workplace and industry more broadly to demonstrate tangible actions and outcomes.

300. It is more appropriate that the option of enforceable undertakings is available as an enforcement option to avoid lengthy and expensive court proceedings where a suitable enforceable undertaking could deliver positive outcomes of benefit to workers and the community.
301. Safe Work Australia's National Compliance and Enforcement Policy describes an enforceable undertaking as *"a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for a contravention of the Act. An enforceable undertaking provides an opportunity for significant work health and safety reform to be undertaken"*.
302. Part 11 of the WHS Act (WA) provides for enforceable undertakings may be entered into by the Regulator with a person in relation to a contravention or alleged contravention of the legislation. The provisions under Part 11 of the 2016 Model Bill reflect those that were initially provided in the 2011 Model Bill.
303. The provisions of the 2011 Model Act have been adopted across all harmonised jurisdictions including the Commonwealth.
304. It is noted that Queensland amended the provisions for enforceable undertakings through the Work Health and Safety and Other Legislation Amendment Bill 2017 to include that an enforceable undertaking cannot be accepted for a category 2 offence *"if the person's failure to comply with a health and safety duty results in the death of an individual"*. Queensland is the only jurisdiction that makes this provision.
305. An enforceable undertaking cannot be entered into for a contravention or alleged contravention that involves reckless conduct, that is a Category 1 offence. CCIWA considers this appropriate.
306. CCIWA strongly supports the retention in full of Part 11 of the 2016 Model Bill.
307. The proposed amendment of recommendation 30 is not needed. By virtue of section 216(1) the Regulator has the discretion to accept a request from a person for an undertaking or refuse a request, reinforced by section 217(1) which refers to the Regulators **acceptance or rejection** of the undertaking.
308. Any request for an enforceable undertaking for an offence that resulted in a fatality would be expected to meet an 'exceptional circumstances' test and with the agreement of all parties. There are many instances where greater benefits to all parties and to the broader safety and health outcomes can be derived from a mutually agreed enforceable undertaking.
309. CCIWA considers it is appropriate an undertaking would only be available where this is agreed by the PCBU and the Regulator, ensuring the measures in the undertaking are appropriate and drive improvement in safety outcomes.
310. Section 230(3) of the WHS Act (WA) requires the Regulator to publish guidelines in relation to the acceptance of undertakings under the WHS Act (WA).
311. CCIWA supports the development by the Regulator of a clearly articulated enforcement policy with appropriate and transparent criteria for considering, accepting and managing enforceable undertakings under the WHS Act (WA).
312. Undertakings have the potential to lead to significantly improved safety outcomes. Where an undertaking is entered into, it can provide finality and certainty and foster a collaborative approach to safety. That is, it avoids the potential of an adversarial prosecution, in which the outcome is inherently uncertain, the process can be time consuming and a Court is ultimately limited in what outcomes it can deliver.

313. CCIWA strongly supports the role of enforceable undertakings in forming a critical component of the hierarchy of enforcement responses available to the Regulator to deal with non-compliance in safety. An effective penalty framework must provide a balance between deterrence and risk management flexibility.
314. An enforceable undertaking, rather than a prosecution, should only be accepted if it demonstrates benefits to the workplace, to the industry and to the community.
315. Again, the Regulator is not compelled to accept a proposal for an undertaking.
316. The majority of jurisdictions clearly identify the advantages of an enforceable undertaking as providing (a) for significant and on-going commitments that aim to achieve improved work health and safety outcomes and regulatory compliance, (b) an opportunity for organisational reform and (c) an opportunity to communicate with industry peers and the community generally about the consequences of unsafe work practices and the opportunities that putting in place safe work practices can deliver.
317. CCIWA submits that Part 11 of the WHS Act (WA) remain unchanged as a key component of providing a suite of enforcement mechanisms available to the regulator.
318. CCIWA **opposes** recommendation 30.
319. The proposed amendment is **inconsistent with harmonisation**.

Recommendation 31

320. Recommendation 31 proposes an amendment to Part 12, Division 1 (Section 223) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed	223

321. Section 223 of the WHS Act (WA) provides that a worker, a PCBU or a health and safety representative as the only eligible persons who may apply for a decision made by the Regulator to be reviewed by the Work Health and Safety Tribunal.
322. CCIWA submits that the current provisions are sufficient, representative of the workplace and the requirements of the 2016 Model Bill. It is inappropriate to insert an unrelated third party, a trade union, with the capability for review as provided by section 223 through recommendation 31.
323. As noted in the PCD, "*an **eligible person** is someone whose interests are affected by the decision including the worker, the PCBU, or an HSR*". A trade union is not an affected person and is not a workplace participant that can be so affected. A health and safety representative is the appropriate representative of workers in the work group or at the workplace.

324. This is an unnecessary and unwarranted injection of an unrelated third-party that would only serve to contradict and interfere with the objects of the Act.
325. Trade unions are not representative of the WA workforce, representing less than 10 per cent of private sector employees.
326. CCIWA **opposes** the inclusion of a trade union as an eligible person to apply for a review of a decision of the Regulator.
327. The proposed amendment is **inconsistent with harmonisation**. Such a provision does not exist in any other harmonised jurisdiction.

Recommendation 32

328. Recommendation 32 proposes amendments to Part 13, Division 1 (Section 230) and Part 13, Division 7 (Section 260) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
32	Permit the Regulator to appoint any person to initiate a prosecution	230(b) and 260(d)

329. CCIWA strongly opposes the introduction of an ability for a third party, other than the Regulator, to initiate prosecutions or other enforcement or compliance actions under the proposed WHS Act (WA).
330. Sections 230(1) of the 2016 Model Bill provides that proceedings for an offence against the Act may be brought by the Regulator or an inspector with the written authorisation of the Regulator.
331. Section 260 of the 2016 Model Bill provides that proceedings for a contravention of the civil penalty provisions may be brought by the Regulator or an inspector with the written authorisation of the Regulator.
332. As noted in the PCD, at present under the OSH Act, proceedings may be initiated by any person authorised by the Commissioner and under the MSI Act by an inspector or a member of the Public Service authorised in writing for the purpose.
333. CCIWA notes that section 260 of the 2016 Model Bill only contains paragraphs (a) and (b) and the recommended reference to paragraph (d) in recommendation 32 is not provided in either Model Bill and is therefore unclear as to what this refers.
334. CCIWA **supports** the amendment as proposed conditional that the amendments to section 230(b) and section 260 are sufficiently clear to permit the appointment of 'any person' to be reflective of current practice and be limited to appointments from within DMIRS to ensure that appropriate expertise is applied to the process of initiating a prosecution from within framework of the independent Regulator.
335. However, the proposed amendment is **inconsistent with harmonisation**.

Recommendation 33

336. Recommendation 4 proposes the insertion of a new paragraph to Part 13, Division 7 (Section 260) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision	New paragraph to be added to 260

337. Section 260 of the 2016 Model Bill provides that either the Regulator or an inspector authorised by the Regulator may initiate proceedings for a civil penalty provision under the legislation.
338. The civil penalty provisions are for a range of contraventions in relation to entry into a workplace by an entry permit holder.
339. The amendment proposed is to extend the right to initiate proceedings to include a trade union in addition to the Regulator or inspector.
340. It is inconceivable that a trade union will initiate proceedings against itself or against an official of the trade union as an entry permit holder for a breach of a civil penalty provision.
341. The proposed amendment is only intended to provide a trade union with an unfettered ability to initiate proceedings against a PCBU.
342. CCIWA submits that this is an unacceptable proposition. This right, if allowed, will be open to significant malicious and vexatious use against a PCBU that will result in 'nuisance' proceedings being initiated that would be costly for the PCBU and lead to congestion in the courts on matters initiated with little prospect of success.
343. Matters would not be rigorously tested and evaluated by the experience and independence of the Regulator prior to proceedings being initiated.
344. There is no reciprocal provision that would allow for a PCBU to initiate proceedings against an entry permit holder for any breach of the civil penalty provision relating to right of entry. Such a provision would clearly allow a PCBU to seek redress against an entry permit holder for breaches of their requirements under the WHS Act (WA).
345. CCIWA fully supports the role of the independent Regulator for the enforcement and compliance of work health and safety laws in WA. Independence and impartiality are critically important to ensure confidence and trust in the enforcement of and compliance with work health and safety laws. This can only be delivered by the independence of the Regulator.
346. The Regulator is vested with the requisite statutory powers, functions, and responsibilities and is the appropriate body to prosecute for breaches of the WHS Act (WA) and the Regulations.
347. Additionally, the Regulator has the depth of experience, knowledge and resources necessary to effectively carry out its statutory functions.

348. Initiating a prosecution is a significant decision particularly as the effect on those impacted is a substantial one. Regulators operate within a broader prosecutorial framework as part of the State's judicial system that requires the highest standard of integrity to be applied to prosecutorial decision making.
349. WorkSafe adopts the principles of the Office of the Director of Public Prosecutions as the basis of the core elements of WorkSafe's Prosecution Policy.⁷ The WorkSafe Prosecution Policy ensures the law is applied impartially, in a fair and consistent manner and "*to ensure decisions in relation to prosecutions are based on appropriate criteria which are public, open, fair and capable of being applied consistently across the broad range of circumstances to which the occupational safety and health laws apply*".
350. The impartiality of the Regulator ensuring that the law is applied in a fair and consistent manner is essential to an effective legislative compliance framework.
351. In determining whether a prosecution should be commenced or, if commenced, should be permitted to proceed requires the Regulator to evaluate:
- (a) whether the evidence is sufficient to justify the institution of proceedings, that is, whether a prima facie case exists;
 - (b) the likely strength of the case when it is presented in court, that is, whether there exists a reasonable prospect of conviction;
 - (c) the application of a public interest test that includes considerations such as:
 - i. the seriousness or otherwise of the alleged offence;
 - ii. any mitigating or aggravating circumstances;
 - iii. whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
 - iv. the degree of culpability of the alleged offender;
 - v. the prevalence of the alleged offence and the need for deterrence, both specific and general;
 - vi. the efficacy of any alternatives to prosecution; and
 - vii. whether the alleged offence is of considerable public concern.
352. In addition to the WorkSafe Prosecution Policy, these matters are also outlined in Safe Work Australia's National Enforcement and Compliance Policy (the Policy) that sets out the principles endorsed by the Workplace Relations Ministers' Council that underpin the approach Regulators will take to monitoring and enforcing compliance with the Work Health and Safety Act and Regulations. The Policy ensures that a nationally consistent approach is taken by work health and safety regulators in each jurisdiction.
353. The integrity of compliance and enforcement must be upheld and cannot be compromised through the initiation of proceedings other than through the detailed assessment and evaluation processes required to be applied by the Regulator within the State's judicial system and procedures.
354. CCIWA strongly opposes any third party, other than the Regulator, being provided with powers to initiate proceedings under the WHS Act (WA).

⁷ <https://www.commerce.wa.gov.au/worksafe/prosecution-policy>

355. The introduction of third parties with the power to initiate prosecutions would add a layer of unnecessary complexity in the enforcement of work health and safety laws; create a clear risk of conflicts of interest for employee organisations which initiate prosecutions; could be misused to advance political or industrial agendas which would impact on the integrity of the prosecutor and on public confidence in its function to enforce the laws; and impact on the quality of analysis in prosecutorial decision making.
356. Trade unions are not impartial regulators.
357. Representing less than 10 per cent of the private sector workforce in WA, there can be no justifiable reason, absent political considerations, for trade unions to be given the authority to initiate prosecutions in relation to companies and PCBU's where they may have no members or involvement.
358. Trade unions have a demonstrated track record of using spurious work health and safety issues to pursue industrial relations objectives. Providing prosecutorial rights as proposed would thus extend into the court system and denigrate the integrity not only of enforcement but also the court system and processes.
359. In this context, extending the ability to bring prosecutions to trade unions would present an additional unacceptable risk to employers, unlikely to be in the best interests of the health and safety of workers and workplaces.
360. CCIWA **opposes** recommendation 33. The proposed amendment is **inconsistent with harmonisation** with no such provision existing in any other harmonised jurisdiction. Any proposition that reduces the integrity of the compliance and enforcement of work health and safety laws and standards undertaken by the independent Regulator in WA is unacceptable.

7.9 Codes of practice

Recommendation 34

361. Recommendation 34 proposes an amendment to Part 14, Division 2 (Section 274) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory	274(2)(b)

362. The provisions of section 274(2)(b) reflect the harmonised provisions in all jurisdictions except Queensland.
363. While CCIWA **supports** recommendation 34, the proposed amendment is **inconsistent with harmonisation**.

7.10 Dangerous goods jurisdiction

Recommendation 35

364. Recommendation 35 proposes amendments to the 2016 Model Bill with respect to dangerous goods safety laws as follows:

No	Recommendation	Clauses
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill	Section 3 references to 'dangerous goods' and Schedule 1

365. CCIWA **supports** recommendation 35 and the proposed two-stage approach for the regulation of dangerous goods in WA.

7.11 Work Health and Safety Commission

Recommendation 36

366. Recommendation 36 proposes the insertion of Schedule 2 to the 2016 Model Bill to establish the Work Health and Safety Commission as follows:

No	Recommendation	Clauses
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia	Schedule 2 to include clauses establishing the WHSC

367. The current Commission for Occupational Safety and Health (Commission) is the peak consultative forum on occupational safety and health in WA and is the driving force behind WA's workplace safety laws, policies and programs.

368. The Commission consists of employers, employees, and government representatives with expertise and knowledge in occupational safety and health matters. Importantly, the Commission liaises with WorkSafe that administers and enforces safety and health laws in WA.

369. CCIWA **supports** recommendation 36 to establish the Work Health and Safety Commission (previously the Commission for Occupational Safety and Health) as the tripartite consultative body in WA and retaining its current membership and functions.

Recommendation 37

370. Recommendation 37 proposes the inclusion into Schedule 2 the establishment of the Mining and Critical Risk Advisory Committee (MACRAC) to replace the Mining Industry Advisory Committee in the 2016 Model Bill as follows:

No	Recommendation	Clauses
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2

371. CCIWA **supports** recommendation 37.

Recommendation 38

372. Recommendation 38 proposes the inclusion into Schedule 2 as proposed by recommendation 36 to include the remuneration of members of the WHS Commission in the 2016 Model Bill as follows:

No	Recommendation	Clauses
38	Review approach to remuneration for appointed members of the WHSC in consultation with the Parliamentary Counsel	Remuneration clause for inclusion in Schedule 2

373. CCIWA **supports** recommendation 38.

7.12 WHS Tribunal and Registrar

Recommendation 39

374. Recommendation 39 proposes the inclusion of a new Part or Schedule to establish the Work Health and Safety Tribunal in the 2016 Model Bill as follows:

No	Recommendation	Clauses
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters	Include new Part/Schedule

375. CCIWA **supports** recommendation 39 to establish the Work Health and Safety Tribunal as the body for undertaking external reviews of decisions by the Regulator, for the resolution of work health and safety issues and for matters that may be referred under section 223. CCIWA does not support any extension of the jurisdiction of the WHST beyond that currently provided by Part VIB of the OSH Act.

Recommendation 40

376. Recommendation 40 proposes the inclusion of a new clause in Part 12, Division 3 (Section 229) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229

377. CCIWA **supports** recommendation 40.

Recommendation 41

No	Recommendation	Clauses
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters	51G(1) of the OSH Act to be incorporated into the WHS Bill

378. CCIWA **supports** recommendation 41.

Recommendation 42

No	Recommendation	Clauses
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the Industrial Relations Act 1979	Equivalent of 51G(3) of the OSH Act

379. CCIWA **supports** recommendation 42.

Recommendation 43

No	Recommendation	Clauses
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities	51J of the OSH Act to be incorporated into the WHS Bill

380. CCIWA **supports** recommendation 43.

Recommendation 44

381. Recommendation 44 proposes amendments to Part 5, Division 3, Subdivision 5 (Section 65), Part 6, Division 3 (Section 112), Part 6, Division 4 (Section 114), Part 10, Division 6 (Section 215) and Part 12, Division 3 (Section 229) of the 2016 Model Bill as follows:

No	Recommendation	Clauses
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters	65, 112, 114, 215, and 229

382. CCIWA **supports** recommendation 44.

8. Additional matters

383. In addition to the responses detailed in section 7 of this submission with respect to the 44 recommendations contained in the Public Consultation Document, CCIWA provides the following additional matters for consideration in the process of the development of harmonised work health and safety in WA and the WHS Act (WA).

8.1 Part 1 – Preliminary

Section 4 - Definitions

Definitions of Hazard and Risk

384. The terms 'hazard' and 'risk' are used throughout the WHS Act (WA) and are essential concepts as they operate to clarify what is "reasonably practicable" for a PCBU to ensure health and safety. This is critically important, as the "primary duty" under the WHS Act (WA) is for a PCBU to ensure the health and safety of persons engaged in their business or undertaking, "so far as is *reasonably practicable*".

385. These essential terms are not defined in the WHS Act (WA) and CCIWA submits that providing definitions for these terms will provide vital assistance to industry to understand how the Regulator will expect these concepts to be understood.

386. The MSI Act and OSH Act currently provide these definitions as follows:

*"**hazard** in relation to a person, means anything that may result in injury to the person or harm to the health of the person;*

***risk** in relation to any injury or harm, means the probability of that injury or harm occurring;"*

387. CCIWA recommends the inclusion of the definitions of hazard and risk as currently defined in the MSI Act and the OSH Act.

Definition of Officer

388. CCIWA submits that the definition of 'officer' be amended to clarify that it does not cover statutory appointees.
389. It is unclear whether the definition of 'officer' defined in section 4 of the WHS Act (WA) extends to include statutory appointees.
390. Particularly in the context of the WA resources sector, implications of this ambiguity are significant due to a number of persons 'appointed' under the MSI Act such as registered manager, underground mine manager, underground ventilation officer and surface ventilation officer.
391. The scope of the due diligence obligations which apply to 'officers' under section 27 of the WHS Act (WA), specifically relate to the term 'officer' as defined in section 4 of the WHS Act (WA). The duties imposed on 'officers' under the WHS Act (WA) are substantial, serious and have subsequently onerous requirements on companies to ensure they are met.
392. This ambiguity may be an unintended consequence of the WHS Act (WA) in that the definition of 'officer' is not intended to include statutory appointees. It is important that this matter is resolved with sufficient clarity that the application of the definition of 'officer' does not apply to statutory positions.
393. CCIWA would recommend that section 4(c) be amended to:
- “(c) an officer of a public authority within the meaning of section 252, other than an elected member of a local authority acting in that capacity **but does not include an appointee to a position under this Act or any associated regulations who is acting in their capacity as such an appointee.**”*
394. The proposed amendment would provide clarity but not to unreasonably refine the definition of 'officer'.

8.2 Part 3 – Incident Notification

Section 38 – Duty to notify of notifiable incidents

395. Section 38(1) requires that a PCBU “must ensure that the regulator is notified immediately after becoming aware of a notifiable incident”.
396. CCIWA submits that the provisions of section 38(1) require that a PCBU must ensure that the regulator is notified immediately is not achievable in practice. It is essential that any obligations provided in the WHS Act (WA) are in fact achievable, particularly given the significant nature of the penalties available for non-compliance.
397. CCIWA would submit that that the strict obligation placed on the PCBU using the word “ensure” be replaced with “as soon as reasonably practicable”.

8.3 Part 5 – Consultation, representation and participation

398. CCIWA does not consider that Part 5 works effectively to deliver workplace collaboration and consultation so as to encourage all parties to take responsibility, and to collaborate, for support continuous improvement on health and safety.
399. The provisions of Part 5 work contrary to the objects of the WHS Act (WA) and seeks to establish and maintain an adversarial rather than collaborative environment for workers, health and safety representatives and PCBUs.
400. The primary focus must be on ensuring that consultation occurs directly between employees and the employer for the achievement of health and safety outcomes at the workplace.
401. Part 5 of the 2016 Model Bill sets out a range of prescriptive requirements in relation to consultation, the election of health and safety representatives, health and safety committees, issue resolution, and the powers of health and safety representatives.
402. CCIWA submits that these provisions undermine the principal objective of section 3(1)(b) of the WHS Act (WA) to provide for “fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety”.
403. Consultation and co-operation are principally facilitated by section 46 of the WHS Act (WA) that requires duty holders to work together to consult and co-operate and by section 47 requiring that each PCBU must, so far as is reasonably practicable, consult with workers about health and safety matters that directly affect them.
404. Consultation and co-operation at the workplace between a PCBU and workers will deliver the objects of the WHS Act (WA) and the continuous improvement to workplace health and safety.
405. However, CCIWA considers that the WHS Act (WA) should contain a minimum level of prescription concerning consultative structures to allow workplaces sufficient flexibility to determine the arrangements which are most effective for their particular workplace. If specific processes related to consultation need to be prescribed, these should be implemented through Regulations and should be focused on ensuring consultation occurs directly between employees and the employer in the first instance.
406. Furthermore, it is critical to acknowledge that effective consultation is far more complex than a prescribed process for the election of health and safety representatives and the establishment of structured committees. Effective consultation and communication occurs openly and frequently between a PCBU and workers on an on-going basis throughout the course of daily operational activity.
407. CCIWA is concerned the consultation provisions enshrined in the WHS Act (WA) hinder an organisation’s ability to meaningfully engage with workers. It is imperative that the WHS Act (WA) provides for flexibility to support meaningful, outcomes driven consultation and communication with employees on work health and safety matters.

Section 48 – Nature of consultation

408. Section 48 prescribes the nature of consultation and requires that a health and safety representative be present in all consultative processes with workers. This is overly onerous, prescriptive and fundamentally impractical. It further limits the ability for open consultation with workers to achieve the principal objective of section 3(1)(b) of the WHS Act (WA).
409. While section 47 requires consultation with workers directly affected by a matter relating to work health and safety is undertaken ‘as far as reasonably practicable’, section 48(2) requires that the health and safety representative must be involved in every consultation. As section 47 relates broadly to ‘a matter’ this would oblige the PCBU to involve the health and safety representative in **every** workplace discussion on **any** matter with a worker or workers.
410. This is clearly an impractical and unworkable provision.
411. CCIWA would submit that section 48(2) must be amended to limit the requirement to involve the health and safety representative to be ‘**so far as is reasonably practicable**’.

Section 49 – When consultation is required

412. Extending the application of section 48 to the circumstances when consultation is required under section 49, the unworkable nature of these two provisions of the WHS Act (WA) becomes even more apparent.
413. Section 49, paragraphs (a) to (f) significantly encumber the primary duty of care of the PCBU under the WHS Act (WA) and is significantly broad in scope as to involve consultation on every decision that a PCBU is required to take in the fulfilment of the PCBU’s duty of care or on health and safety in general.
414. CCIWA submits that section 49 must be reduced in scope to remove the onerous and prescriptive nature of the provisions of section 49.

Section 50 – Request for election of health and safety representatives

415. CCIWA opposes the ability provided under section 50 for a single worker at a workplace to request for the election of a health and safety representative. This has the potential for any one person at the workplace, acting alone, to initiate the requirement for the election of a health and safety representative.
416. Further, considering the definition of ‘worker’ contained in section 7(1) of the WHS Act (WA), the request for the election of a health and safety representative can be provided by a range of individuals who are not employees of the PCBU, including an independent contractor, an employee of a contractor, a volunteer or even a work experience student.
417. This would provide scope for any individual to trigger an election for a health and safety representative and thus for the subsequent determination of a work group.
418. Arising from a request made under section 50, potentially by individuals unrelated to the PCBU, the PCBU must enter into negotiations for one or more work groups to be established, by agreement at the workplace. Section 51 makes that requirement to negotiate obligatory. The number of work groups determines the number of health and safety representatives. Further, if requested by the worker, that negotiation process must include the workers’ representative. While the determination must be agreed with the PCBU, the Regulator may be requested by any person to intervene if agreement cannot be reached as provided by section 54.

419. The provisions of sections 50 and 51 allow, for example, one individual (unrelated to the PCBU) to request the election of a health and safety representative, thereby compelling the PCBU to negotiate for the definition and establishment of work groups and involve a trade union representative in those negotiations.
420. While this process is of itself overly prescriptive and impractical, it is an unwarranted and unnecessary injection of a third party into the workplace at the initiation of a single individual.
421. If a PCBU does not agree with a work group determination or failing negotiations for the determination of a work group, this can be referred to the Regulator for resolution under section 54.
422. CCIWA has significant concerns about the provisions of the WHS Act (WA) in respect of the election and activities of health and safety representatives and the determination of work groups. These provisions create an adversarial rather than collaborative environment between workers and the PCBU.
423. The ability of a single individual worker, unrelated to the PCBU, to initiate the election of a health and safety representative is unacceptable and not conducive to the fulfilment of the objects of the legislation.
424. It is submitted that the request for the election of a health and safety representative must arise because of the request being made by the majority of workers at the workplace.
425. This is the essence of representation.
426. CCIWA further submits that the PCBU must have the ability to determine the number of work groups at the workplace and thus the number of health and safety representatives.

Section 61(3) – Procedure for the election of health and safety representatives

427. Section 61(3) provides: *“If a majority of the workers in a work group so determine, the election may be conducted with the assistance of a union or other person or organisation.”*
428. Section 61(3) serves to contradict section 50 on principle.
429. As mentioned in paragraphs [415] to [418], a single worker can request the election of a health and safety representative and request the involvement of a trade union representative in the negotiations for the determination and establishment of work groups.
430. However, section 61(3) requires that the majority of workers can request the assistance of a trade union in the election of the health and safety representative.
431. If a majority of employees is a prerequisite in order to request the assistance of a trade union in the election process, it must follow that a similar provision requiring a majority of employees as a prerequisite is necessary at the earlier stages as provided by sections 50 and 51.
432. CCIWA opposes the provision for the election to be conducted with the assistance of a trade union and therefore submits that section 61(3) be deleted.
433. Again, CCIWA would submit that the WHS Act (WA) contains an unnecessary level of prescription in relation to the election of health and safety representatives and the determination of work groups.
434. CCIWA opposes the current requirements relating to health and safety representatives and recommends the 2016 Model Bill be amended to provide for:

- (a) a more restrictive process for initiating health and safety representative elections;
- (b) elections of health and safety representatives be conducted by way of secret ballot;
- (c) further clarity in the scope of work groups;
- (d) a limit to the number of potential work groups and that the PCBU determines the number of appropriate work groups at the workplace;
- (e) amendments to the role of health and safety representatives to reduce the prescribed adversarial approach and create a positive duty for health and safety representatives to engage and cooperate with PCBUs in the resolution of work health and safety issues; and
- (f) health and safety representatives to be held to a prescribed standard of conduct in the performance of their roles.

435. If Part 5 of the WHS Act (WA) remains unchanged, CCIWA would recommend that Part 2 be amended to include a defined duty of care for health and safety representatives in the WHS Act (WA). This is particularly necessary considering the range of powers and functions afforded to health and safety representatives under subdivision 5 of Part 5 of the WHS act (WA).

436. As a result, section 66 of the WHS Act (WA) prescribing immunity for health and safety representatives should be deleted.

Section 65 – Disqualification of health and safety representatives

437. CCIWA would recommend the inclusion into section 65 of the WHS Act (WA) of provisions in section 59(1)(c) of the MSI Act that provide for the disqualification of a health and safety representative on the grounds that the health and safety representative “*has failed adequately to perform the functions of a health and safety representative under this Act*”.

Section 67 – Deputy health and safety representatives

438. CCIWA does not support the provision within the WHS Act (WA) for deputy health and safety representatives. This is an unnecessary duplication of process and with the requirements for training the cost burden on employers is significant.

Section 68 – Powers and functions of health and safety representatives

439. A health and safety representative is elected by a work group to represent the health and safety interests of the work group (and must be a member of that work group).

440. A health and safety representative may under section 68(2)(g) request the “assistance of any person” in the fulfilment of the powers and functions prescribed by section 68.

441. Where the person providing assistance requires access to the workplace, the health and safety representative is required to give at least 24 hours’ notice, but not more than 14 days’ notice, of the assistant’s proposed access.

442. Access to the workplace by the health and safety representative’s assistant may be refused by the PCBU on reasonable grounds under section 71(5). Where access has been refused by a PCBU, the health and safety representative may request the Regulator to resolve the access issue under section 71(6).

443. CCIWA would submit that section 68(2)(g) requires amendment to specify and add clarity to 'any person'. The current provisions are too broad in scope and should be defined to limit the assistance to either (a) a person who works at the workplace; or (b) a person who is involved in the management of the PCBU; or (c) a person possessing formal qualifications relating to workplace health and safety and approved by the PCBU; or (d) a consultant or subject matter expert approved by the PCBU.
444. Section 71(4) must add clarity to the ability to obtain access to the workplace by inserting a new paragraph that clearly requires that the person must be an entry permit holder under the WHS Act (WA). At present, section 71(4) only identifies that a denial of entry is permitted if the person assisting the health and safety representative has had an entry permit is revoked, suspended or disqualified. It does not establish the requirement for the person assisting the health and safety representative to actually hold a WHS entry permit.
445. A WHS entry permit is only required for entry to inquire into a suspected contravention of the Act (section 117) or for the purposes of consulting and advising workers (section 121). No specific additional requirement exists for a person providing assistance to be an entry permit holder.
446. As entry would be required under section 117, it would be the responsibility for the entry permit holder to provide the required notice under the AHS Act (WA), not the health and safety representative who would be required to advise the PCBU of the request for assistance but not the provision of the required notice of entry. The responsibility remains with the entry permit holder.

Section 81 – Resolution of health and safety issues

447. CCIWA submits that entry under section 81(3) should be clarified that entry is solely for the purpose of discussions for the resolution of the matter and not for any other purpose.

Section 82 – Referral of issue to regulator for resolution by inspector

448. Under section 25(1) of the current OSH Act (WA) where an issue is unable to be resolved and where there is a *'risk of imminent or serious injury to, or imminent and serious harm to the health of any person, the employer, a safety and health representative or, if there is no safety and health representative, an employee may notify an inspector thereof'*.
449. Section 25 requires the condition precedent to the issue being an 'imminent or serious' risk.
450. Section 82 of the WHS Act (WA) is too broad so as to encompass **any** health and safety issue at the workplace. There is no condition precedent that the issue presents an **'imminent or serious'** risk.
451. Section 82 must be narrowed to limit the scope of issue referral for resolution by an inspector to those matters that present a 'imminent or serious' risk and that cannot be resolved under section 81 of the WHS Act (WA).
452. Absent a narrowing of the scope of application of section 82, the Regulator will potentially be inundated with a range of issues that are either trivial in nature or that are simply the result of generalised dissatisfaction at the outcome of discussions to resolve the matter in accordance with section 81.
453. As a consequence of not limiting the scope of matters that can be referred to the Regulator for resolution, serious matters would become consumed amongst non-serious matters with the Regulator.
454. CCIWA submits that section 82 should be amended to matters that present an 'imminent or serious' risk at the workplace consistent with section 25 of the OSH Act (WA).

Section 85 – Health and safety representatives may direct that unsafe work cease

455. All workers have the individual right to cease work under section 84 of the WHS Act (WA) as follows:

“84 Right of worker to cease unsafe work

A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.”

456. The right conferred to an individual worker under section 84 allows a worker who has a reasonable concern that the work would expose the worker to a serious risk to their health and safety arising from an immediate and imminent exposure to a hazard, the worker may cease or refuse to carry out that work.

457. CCIWA considers health and safety representatives play an important role in workforce engagement in health and safety.

458. However, where all workers are required and encouraged to raise and manage work health and safety issues in their day to day work, and to work co-operatively and in a consultative manner with the PCBU in relation to any work health and safety matter, the primacy of the role of health and safety representatives is diminishing.

459. Given the provisions of section 84 that afford every worker at a workplace with the right to cease work, the designation of additional powers to health and safety representatives to direct the cessation of work is unnecessary, duplicative and inappropriate.

460. Additionally, this would effectively create confusion of responsibilities within the workplace.

461. The duty of workers under section 28 of Part 2 of the WHS Act (WA) requires that:

“While at work, a worker must:

- (a) take reasonable care for his or her own health and safety; and*
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and*
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and*
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.”*

462. Workers are expected, and are relied upon, to cease any work if the worker considers that work to be unsafe.

463. Provisions that place a responsibility onto a health and safety representative is a retrograde step that detracts from all workers exercising their individual responsibility at the workplace. Equally it would place health and safety representatives in a potentially adversarial position and subsequently discourage individuals from wanting to take on the role.

464. Section 85(1) to (4) of the WHS Act (WA) provide that:

“85 Health and safety representative may direct that unsafe work cease

- (1) *A health and safety representative may direct a worker who is in a work group represented by the representative to cease work if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.*
- (2) *However, the health and safety representative must not give a worker a direction to cease work unless the matter is not resolved after:*
 - (a) *consulting about the matter with the person conducting the business or undertaking for whom the workers are carrying out work; and*
 - (b) *attempting to resolve the matter as an issue under Division 5 of this Part.*
- (3) *The health and safety representative may direct the worker to cease work without carrying out that consultation or attempting to resolve the matter as an issue under Division 5 of this Part if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction.*
- (4) *The health and safety representative must carry out the consultation as soon as practicable after giving a direction under subsection (3).*

465. The substantive role of a health and safety representative does not include a responsibility to manage or direct activities for others in the workplace or managing work activities and people. Should a health and safety representative have particular concerns, workers can be alerted to these concerns and individuals can make their decision to cease work if necessary.

466. CCIWA opposes the powers provided to health and safety representatives to direct the cessation of work. It is unnecessary and inappropriate to include such a power and responsibility for safety and health representatives to direct others to cease work.

467. Health and safety representatives have an ability to report safety matters to the PCBU and to the Regulator. Should a health and safety representative consider that work should stop for health and safety reasons, this should be reported to the PCBU and action should then be taken as appropriate.

468. A health and safety representative and any worker, if it is considered warranted, can report the matter to the Regulator. The Regulator can issue an improvement notice or a prohibition notice in extreme circumstances. A health and safety representative may issue a provisional improvement notice, an available tool for health and safety representatives to address safety issues.

469. CCIWA has legitimate concerns that the power conferred on a health and safety representative to direct the cessation of work may be used vexatiously.

8.4 Part 6 – Discriminatory, coercive and misleading conduct

470. CCIWA questions the need for the provisions of Part 6 of the 2016 Model Bill to be included given the general protection provisions of Chapter 3, Part 3-1 of the Fair Work Act 2009 (Cth) and the operation of state and federal discrimination legislation.
471. It is noted that other jurisdictions have adopted Part 6. Therefore, if Part 6 is retained in the WHS Act (WA), CCIWA would oppose the retention of the reverse onus of proof as provided in sections 110(2) and 110(3). The onus of proof must always rest with the prosecution, regardless of the offence.
472. CCIWA would support clarification within Part 6 to address 'reasonable management action' such as is provided within section 789FD of the Fair Work Act that provides an exception for reasonable management action in the context of when a worker is bullied at work as follows:
- “(1) A worker is bullied at work if:
- (a) while the worker is at work in a constitutionally-covered business:
- (i) an individual; or
- (ii) a group of individuals;
- repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
- (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.”
473. The Fair Work Amendment Bill 2013 Explanatory Memorandum provides useful commentary on this distinction and a similar approach is recommended to be adopted in Part 6 of the WHS Act (WA):
- “Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions. They need to be able to make necessary decisions to respond to poor performance or if necessary take disciplinary action and also effectively direct and control the way work is carried out. For example, it is reasonable for employers to allocate work and for managers and supervisors to give fair and constructive feedback on a worker’s performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated.”*
474. With this distinction made, CCIWA would propose the following amendments:
- (a) Section 105 – definition of discriminatory conduct - the addition of a new section 105(3):
- “(3) To avoid doubt, discriminatory conduct for the purpose of subsection (1) does not include reasonable management action carried out in a reasonable manner.”*
- (b) Section 108 – prohibition on coercion - the addition of a new section 108(4):
- “(4) To avoid doubt, reasonable management action carried out in a reasonable manner is not an action with intent to coerce or induce a person.”*

8.5 Part 7 – Workplace entry by WHS entry permit holders

Section 120 – Entry to inspect employee records or information held by another person

475. The adoption of section 120 in the WHS Act (WA) requires the inclusion of significant protection of the privacy of an employee. This must particularly include any information that identifies the employee including the employee's name, contact details and any other unrelated information (such as pay etc).
476. It is submitted that the WHS entry permit holder must specify what records are sought to be inspected rather than a generalised inspection.
477. A PCBU must be provided with the ability to 'de-identify' the requested employee records prior to entry to inspect the requested records.

Section 124 – WHS entry permit holder must also hold permit under other law

478. CCIWA submits that section 124 must make it expressly clear that the right of entry cannot be made while the WHS entry permit holder's permit under the Fair Work Act 2009 is suspended, revoked or expired.
479. For clarity, CCIWA recommends that section 124 be amended to include the words "...and that entry permit is not suspended, revoked or expired" as follows:

"A WHS entry permit holder must not enter a workplace unless he or she also holds an entry permit under the Fair Work Act or the Industrial Relations Act 1979 and that entry permit is not suspended, revoked or expired."

Section 138 – Application to revoke WHS entry permit

480. As recommended for section 124 in paragraphs [478] and [479], section 138 should be amended to address permits that have been suspended, revoked or expired by the insertion of a new paragraph in section 138(2) as follows:

"The entry permit holder has been issued with an entry permit under the Fair Work Act or the Industrial Relations Act 1979 and that entry permit is not suspended, revoked or expired."

Section 146 – WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace

481. Section 146 does not distinguish the penalty to be applied to an individual and a body corporate as is the case with other civil penalty provisions.
482. CCIWA recommends, consistent with other civil penalty provides within the WHS Act (WA), that a maximum penalty of \$50,000 be included "in the case of a body corporate".

9. Implementation and Guidance Materials

483. Given the substantial nature of the proposed legislative change with the introduction of the WHS Act (WA), it is a priority matter that detailed Guidance Material and other resources are developed **prior** to enactment of the WHS Act (WA) that be provided to inform, educate and support business through the transition from the OSH Act to the WHS Act (WA).
484. It will also be essential that a detailed and expansive Explanatory Memorandum accompany the introduction of the WHS Act (WA).
485. Further, it will be critically important that interpretive guidelines are prepared by the Regulator to outline, as a formal statement on how the Regulator believes key concepts in the WHS Act (WA) will operate and thus provide clarity on how the new laws will be enforced.
486. This is particularly essential for small and medium-sized businesses who may not have the necessary expertise or skills in work health and safety within their businesses or the capacity to engage external assistance.
487. The transition of the primary legislation from the OSH Act to the WHS Act (WA) will necessarily deliver a complex and comprehensive range of issues including change-over of documentation, understanding of the new obligations, education of the workforce and other parties such as contractors and clients.
488. Implementation assistance is particularly necessary given the additional change to terms, definitions and concepts that are new and untested as to scope and meaning and will be, in large part, be confusing as such a substantial change is being implemented from legislation that has been in force for over 30 years.
489. Significant guidance material will be required for key concepts and definitions and the generally accepted interpretation and application of those concepts in practice.
490. It is critically important that all materials be produced in plain English style and provide simplified, lay explanations of the key provisions, avoiding overly detailed and complex content.
491. The Safe Work Australia review into the operation of the work health and safety laws reported that “*many small and medium-sized business experienced additional and sometimes onerous administrative costs imposed by the model WHS laws without obvious improvements in safety*” and that “*many smaller business struggled with the language in health and safety documents and had trouble finding information relevant to the specific needs and circumstances of their work. For these businesses the codes of practice and guidance material were too long and complex.*”⁸
492. In addition, transition arrangements must provide adequate time to enable employers to adapt to new requirements. Intrinsic to this transition is the adoption by the Regulator of a principal of education and information rather than strict compliance and enforcement and thus an effective and meaningful moratorium period should be considered.
493. Transition will be complex, costly and difficult for many and the impact on workplaces should not be underestimated.

⁸ Safe Work Australia – Synthesis of findings from studies conducted under the ‘Evaluation plan for the harmonisation of work health and safety in Australia’, 2012-2017, 20 June 2018, page 3

Appendix 1 – Summary of recommendations

The following table summarises the CCIWA response to each recommendation contained in the Work Health and Safety Act Consultation Document together with reference to the relevant section within this submission where the response is addressed in further detail.

#	Recommendation	Clauses	Comments
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c)	Support with Amendments Submission Page 13
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h)	Support Submission Page 13
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1)	Support Submission Page 14
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4	Support Submission Page 14
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4	Support Submission Page 14
6	Amend the meaning of supply to include the loan of an item.	6(1)	Support Submission Page 15
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4)	Oppose Submission Page 15
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new definitions to be added to section 4.	Oppose Submission Page 16
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a)	Support Submission Page 18
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36	Support Submission Page 19

#	Recommendation	Clauses	Comments
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only)	Support Submission Page 19
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3)	Oppose Submission Page 20
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a)	Support Submission Page 21
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b)	Support Submission Page 22
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76	Oppose Submission Page 22
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	Support Submission Page 24
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229	Support Submission Page 25
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100	Support Submission Page 25
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123	Oppose Submission Page 26
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117	Support with Amendments Submission Page 30
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	Support Submission Page 32
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142	Support Submission Page 32

#	Recommendation	Clauses	Comments
23	Replace references to the defined phrase relevant state or territory industrial law with the <i>Industrial Relations Act 1979</i>	4, 116, 124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	Support Submission Page 32
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4)	Support Submission Page 33
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading)	Support Submission Page 33
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171	Oppose Submission Page 34
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193	Support Submission Page 34
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8	Oppose Submission Page 34
29	For consistency with the <i>Coroner's Act 1996</i> , remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187	Support Submission Page 35
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216	Oppose Submission Page 35
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223	Oppose Submission Page 37
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b)	Support with Amendments Submission Page 38
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260	Oppose Submission Page 39

#	Recommendation	Clauses	Comments
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b)	Support Submission Page 41
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1	Support Submission Page 42
36	Establish the Work Health and Safety Commission (WHSC) as the tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC	Support Submission Page 42
37	Replace the Mining Industry Advisory Committee with the Mining and Critical Risk Advisory Committee (MACRAC)	Include a section establishing the MACRAC in Schedule 2	Support Submission Page 43
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2	Support Submission Page 43
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule	Support Submission Page 43
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229	Support Submission Page 44
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill	Support Submission Page 44
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the <i>Industrial Relations Act 1979</i> .	Equivalent of 51G(3) of the OSH Act	Support Submission Page 44
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill	Support Submission Page 44
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229	Support Submission Page 45