

Modernising Work Health and Safety Laws in Western Australia

Submission by the South Metropolitan Health Service

Confidentiality

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

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

Accessibility

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

Submission template (including all recommendations)

Enter your comments on specific recommendations in the table below. You may add new rows at the end of the table if you wish to include comments on other aspects of the WHS Act other than those covered by the recommendations of the MAP.

#	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).	
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	
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).	
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	
6	Amend the meaning of supply to include the loan of an item.	6(1).	
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	
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.	
9	Amend the meaning of serious injury or illness to include	36(a).	

#	Recommendation	Clauses	Comments
	immediate treatment as an in-patient without reference to a hospital.		
10	Include incapacity to work for 10 or more days as a category of serious injury or illness .	36.	
11	Amend the heading 'Negotiations for agreement for work group' to Negotiations for determination for work group'.	52 (heading only).	
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	
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).	
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).	
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.	
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	
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.	
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.	The Committee somewhat misstates the law on right of entry. <i>"Significantly, workplace entry rights under the IR Act</i>

#	Recommendation	Clauses	Comments
			<p><i>are precisely confined to the employer/employee relationship and further restricted by the applicable awards."</i></p> <p>Section 49I of the IR Act holds that an authorised representative of an organisation may enter, during working hours, premises where relevant employees work for the purpose of investigating breaches of (amongst other things) the OSH Act or the Mines Safety and Inspection Act. "Relevant employees" is an employee who is a member of the union <u>or eligible</u> to become a member of the union. "Premises where relevant employees work" is not a closely-confined criterion – indeed the only limitation the IR Act provides is that you can't inspect certain residential premises (section 49K). If the Committee is saying that the IR Act right of entry inspections don't extend to situations where contractors are engaged (because they're not employees), then perhaps it should state that clearly.</p> <p>The workplace entry right is not "further restricted by" the applicable awards. That is not possible since the Commission is constrained by section 49N of the IR Act, which forbids the Commission from registering an industrial agreement which provides powers of entry or inspection inconsistent with those contained under the Act. The only capacity the Commission has to tinker with right of entry is to vary the notice period for entry (per section 49N(2)).</p>

#	Recommendation	Clauses	Comments
			<p><i>“Importantly, the IR Act limits right of entry by authorised representatives to employees on an award, order, industrial agreement or employee-employer agreement.”</i></p> <p>This is, respectfully, a basic misstatement, because the “relevant employees” for the purposes of an entry under section 49I of the IR Act are those who are union members or eligible to become a member of a union. A person does not have to be on an award, order, employee-employer agreement, and industrial instrument to be eligible to become a member of a union. All they have to be is an employee in the union’s coverage pursuant to the union’s rules. Therefore an authorised representative has a perfect right to speak to someone who isn’t presently under an industrial instrument. There is no limitation on that score.</p>
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117, 119, 120, 123.	How does the model bill propose to deal with union officials who enter under the auspices of a safety inspection, only to use that opportunity for organising opportunities within the workplace? This is particularly so given this act proposes somewhat wider powers of entry than are available under the IR Act – especially given a WHST inspection would explicitly not be an industrial matter for the purposes of the IR Act? How does the model bill assist employers in proving the entry was not, in fact, for safety and health purposes?

#	Recommendation	Clauses	Comments
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.	
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.	
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.	
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)	
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).	
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).	
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	
27	Include a requirement for the person issued an improvement	193.	

#	Recommendation	Clauses	Comments
	notice to notify the Regulator of their compliance.		
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.	
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.	
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	The text around including a union as a body which may seek a review. The crucial detail will be where you put the words "...or his or her union". If the clause reads "(1) A worker, or his or her union, whose interests are affected by the decision..." then you drastically increase the range of the provision, because a worker's interests and a union's interests can be drastically different. In addition, what does "his or her union" mean? Does it mean a union that the employee is eligible to join, or a union that the person is a member of? What happens if the worker leaves the union, does his claim disappear as well if the union has brought it in his stead? The better way would be to include a union among the categories of representative, not add those words to these clauses.
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	
33	Include a union as a party that can bring proceedings for	New paragraph to	Around section 143 – a union should not be able to prosecute an order made to deal with a dispute. That

#	Recommendation	Clauses	Comments
	breach of a WHS civil penalty provision.	be added to 260.	should be the role of the body that made the order. Around section 147 – “May be some circumstances where it is another person” is understating the possibility. If an employer or officer of an employer makes misrepresentations about what can or can’t be done in WHS entries, this gives the union a right to prosecute them for it. I am not certain whether this would be appropriate.
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).	
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.	
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.	
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.	
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	

#	Recommendation	Clauses	Comments
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.	
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.	
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.	
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.	
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215, and 229.	