

Comments on the *Work Health and Safety Bill 2014*

Clause (section) of the Model WHS bill	Comment
<p>7. Meaning of worker</p> <p>(4) A person is not a worker if the person:</p> <p>(a) is a volunteer; or</p> <p>(b) is a prisoner as defined in the <i>Prisons Act 1981</i> section 3(1); or</p> <p>(c) is a detainee as defined in the <i>Young Offenders Act 1994</i> section 3; or</p> <p>(d) is an offender as defined in the <i>Sentence Administration Act 2003</i> section 76(1) who, under the pre-sentence order or community corrections order, carries out community work or community corrections activities of a kind mentioned in section 85(2)(a) of that Act; or</p> <p>(e) is a young person to whom the <i>Young Offenders Act 1994</i> section 50 or 50A applies and who carries out community work under a youth community based order or an intensive youth supervision order as defined in section 3 of that Act; or</p> <p>(f) is a young person to whom the <i>Young Offenders Act 1994</i> section 65 applies and who carries out community work under a community work order as defined in section 63 of that Act.</p>	<p>The Department raised concerns with WorkSafe in 2011, regarding the inclusion of prisoners, detainees and community based offenders in the definition of ‘worker’. The concern was that this could result in an increase in claims against the Department and anonymous reports to WorkSafe that are motivated by personal gain or to cause nuisance.</p> <p>Although the <i>Prisons Act 1981</i> and the <i>Young Offenders Act 1994</i> already place a considerable duty of care on the Department to prisoners, detainees and offenders in the community who perform community work, there may be other implications arising from these exclusions from the definition of ‘worker.’</p> <p>The Department is seeking State Solicitor’s Office advice about any implications of the proposed exclusion and further comment may be provided following receipt of State Solicitor’s Office advice.</p>
<p>18. What is reasonably practicable in ensuring health and safety</p> <p>In this Act:</p> <p>reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:</p> <p>(a) the likelihood of the hazard or the risk concerned occurring; and</p> <p>(b) the degree of harm that might result from the hazard or the risk; and</p> <p>(c) what the person concerned knows, or ought reasonably to know, about:</p> <p>(i) the hazard or the risk; and</p> <p>(ii) ways of eliminating or minimising the risk; and</p> <p>(d) the availability and suitability of ways to eliminate</p>	<p>Inclusion of the definition of reasonably practicable is noted; it provides sufficient clarity and guidance to assist with implementation of the provisions.</p>

<p>or minimise the risk; and</p> <p>(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.</p>	
<p>19 Primary duty of care</p> <p>(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:</p> <p>(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;</p> <p>49 When consultation is required</p> <p>Consultation under this Division is required in relation to the following health and safety matters:</p> <p>(c) when making decisions about the adequacy of facilities for the welfare of workers;</p>	<p>It is suggested that the Green Bill include a definition of welfare facilities that reflect the intent of the Code of Practice to provide clarity to clause 19(3) (e) and 49 (c). The Model Code of Practice “Managing the Work Environment and Facilities” refers to welfare facilities as drinking water, toilets, hand washing facilities, dining facilities, personal storage, change rooms etc.</p>
<p>35 What is a notifiable incident</p> <p>In this Act:</p> <p>notifiable incident means:</p> <p>(a) the death of a person; or</p> <p>(b) a serious injury or illness of a person; or</p> <p>(c) a dangerous incident.</p> <p>38 Duty to notify of notifiable incidents</p> <p>(1) A person who conducts a business or undertaking must ensure that the regulator is notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.</p> <p>Penalty:</p> <p>(a) in the case of an individual, a fine of \$10 000;</p> <p>(b) in the case of a body corporate, a fine of \$50 000.</p>	<p>It is suggested that section 38 is amended to require that the duty to notify WorkSafe of an illness, death or serious injury only occurs if they are in relation to work being carried out. As the Green Bill is currently worded, any serious illness or injuries to a prisoner, or offender in the community or detainee would be required to be reported as a notifiable incident to WorkSafe in every circumstance. Deaths and serious illness or injury may occur in custody that are not related to work being carried out.</p>
<p>48 Nature of consultation</p> <p>(2) If the workers are represented by a health and safety representative, the consultation must involve that representative.</p>	<p>Custodial workplaces have numerous Health and Safety Representatives (HSR) to represent the workers in the work group due to the Department’s 24 hour, 7 days per week business requirements.</p> <p>To avoid misinterpretation, it is suggested clause 48 (2) be reworded to specify that</p>

	any one or more of the representatives must be involved in the consultation where there is more than one health and safety representative representing a work group.
<p>60 Eligibility to be elected</p> <p>A worker is:</p> <p>(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; and</p> <p>(b) not eligible to be elected as a health and safety representative if he or she is disqualified under section 65 from being a health and safety representative.</p>	<p>The requirement for a worker to belong to a work group, to be eligible to be elected as a HSR is supported.</p> <p>In addition, the ineligibility for a worker to be elected as a HSR if they are disqualified is supported. This will prevent disqualified HSRs from being elected if they become a member of another work group.</p>
<p>64 Term of office of health and safety representative</p> <p>(2) However a person ceases to hold office as a health and safety representative for a work group if:</p> <p>(d) the person is removed from that position by a majority of the members of the work group in accordance with the regulations.</p>	<p>The ability for a majority of members in a work group to remove a HSR is supported; this would ensure that the interests of the work group continue to be represented.</p>
<p>67 Deputy health and safety representatives</p> <p>Note: Section 67 is not required in WA.</p>	<p>The removal of Deputy HSRs from the Green Bill is supported. The number of HSRs required is determined as part of the consultation and negotiation in establishing a work group. This process allows for the workplace to determine its needs and negates the requirement for Deputy HSRs.</p>
<p>68 Powers and functions of health and safety representatives</p> <p>(1) The powers and functions of a health and safety representative for a work group are:</p> <p>(b) to monitor the measures taken by the person conducting the relevant business or undertaking or that person's representative in compliance with this Act in relation to workers in the work group;</p>	<p>It is suggested that section 68 (1) (b) be reworded to ensure that the meaning of 'monitor measures relating to work health and safety taken by the PCBU' is not misinterpreted, e.g. it could be taken to mean that a Health and Safety Representative (HSR) can determine the appropriateness of work health and safety measures taken by the PCBU. It is the responsibility of the PCBU to provide and maintain a safe workplace and manage risk.</p>
<p>69 Powers and functions generally limited to the particular work group</p> <p>(1) 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</p>	<p>The powers and functions of HSR being limited to the work group are supported.</p> <p>It is important that HSRs are supported to represent those workers who nominated the HSR. Any exceptions to this should be</p>

<p>affect, workers in that group.</p> <p>(2) Subsection (1) does not apply if:</p> <p>(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;</p> <p>or</p> <p>(b) a member of another work group asks for the representative's assistance, and the health and safety representative for that other work group is found, after reasonable inquiry, to be unavailable.</p> <p>(3) In this section:</p> <p>another work group means another work group of workers carrying out work for a business or undertaking to which the work group that the health and safety representative represents relates.</p>	<p>restricted to the circumstances in s69(2).</p> <p>It is noted that workers can cease unsafe work under section 84 if there is a serious risk to health and safety.</p>
<p>71 Exceptions from obligations under section 70(1)</p> <p>(5) The person conducting a business or undertaking may refuse on reasonable grounds to grant access to the workplace to a person assisting a health and safety representative for a work group.</p>	<p>The ability for persons conducting a business or undertaking to refuse entry to a person assisting a HSR on reasonable grounds is supported.</p>
<p>72 Obligation to train health and safety representatives</p> <p>(1) The person conducting a business or undertaking must, if requested by a health and safety representative for a work group for that business or undertaking, allow the health and safety representative to attend a course of training in work health and safety that is —</p> <p>(c) subject to subsection (5), chosen by the health and safety representative, in consultation with the person conducting the business or undertaking.</p> <p>(2) The person conducting the business or undertaking must:</p> <p>(b) pay the course fees and any other reasonable costs associated with the health and safety representative's attendance at the course of training.</p> <p>(5) If agreement cannot be reached between the person conducting the business or undertaking and the health and safety representative within the time required by subsection (2) as to the matters set out in subsections (1)(c) and (2), either party may ask the regulator to appoint an inspector to decide the matter.</p>	<p>As the Green Bill and the current <i>OSH Act 1984</i> are worded, consultation is required between the PCBU/employer and the Health and Safety Representative (HSR) on the selection of HSR training. However, the HSR makes the final decision about which accredited training course he/she will attend. This has reduced the opportunities to deliver cost effective training, for example by engaging accredited trainers to provide group training for HSRs.</p> <p>HSRs in regional areas choosing to undertake training in the metropolitan area, even though there is accredited training available locally has also been experienced.</p> <p>It is requested that the Green Bill provide flexibility to enable the PCBU/employer to select the accredited HSR training course in certain circumstances such as where this would enable efficiencies to be made without disadvantage to the HSR.</p> <p>The new inclusion in the Model</p>

	<p>Regulations that entitles HSRs to annual one day refresher training is noted. If adopted in WA, this could have significant cost implications; therefore, flexibility to provide HSRs with training and refreshers in an efficient way would be helpful.</p> <p>It is noted that the model WHS Regulations do not contain a requirement for a minimum notice period by a HSR to attend training, as is currently contained in the Western Australian <i>OSH Regulations 1996</i> (i.e. at least 21 days). Due to the Department's hours of operation (24/7) and rostered work arrangements that apply to a significant number of employees, the inclusion of a minimum notice period in the Regulations would assist in the planning for attendance at training.</p>
<p>78 Meetings of committee</p> <p>A health and safety committee may determine its own procedures, subject to the regulations.</p>	<p>The provision to allow committees to determine their own procedures is not supported.</p> <p>In order to retain a minimum level of consultation, the prescription in the Model WHS Act for meetings to occur at least every three months or sooner as determined by the committee is supported.</p> <p>If the above requirement is not included in the Green Bill, it is suggested that it is included in the WHS Regulations.</p>
<p>85 Health and safety representative may direct that unsafe work cease</p> <p>Note: Section 85 is not required in WA.</p>	<p>The removal of section 85 is supported. Section 84, right of worker to cease unsafe work is sufficient to enable cessation of work that would expose the worker to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.</p>
<p>90 Provisional improvement notices</p> <p>(5) A health and safety representative cannot issue a provisional improvement notice in relation to a matter if an inspector has already issued (or decided not to issue) an improvement notice or prohibition notice in relation to the same matter.</p>	<p>This clause is supported. There is no benefit in a HSR issuing a Provisional Improvement Notice when an Inspector has already issued a notice in relation to the same matter.</p>
<p>100 Request for review of provisional improvement</p>	<p>Allowing a review to occur at any time prior to the time specified on the notice</p>

<p>notice</p> <p>(1) If a provisional improvement notice is issued to a person:</p> <p>(a) the person to whom it was issued; or</p> <p>(b) if the person is a worker, the person conducting the business or undertaking at the workplace at which the worker carries out work, may ask the regulator to appoint an inspector to review the notice.</p> <p>(2) If a request is made under subsection (1), the operation of the provisional improvement notice is stayed until the inspector makes a decision on the review.</p> <p>(3) A request made under subsection (1) must be received by the regulator not later than the time specified in the provisional improvement notice for the purposes of section 99(2).</p> <p>99 Offence to contravene a provisional improvement notice</p> <p>(2) The person must comply with the provisional improvement notice within the time specified in the notice.</p> <p>Penalty:</p> <p>(a) in the case of an individual, a fine of \$50 000;</p> <p>(b) in the case of a body corporate, a fine of \$250 000.</p>	<p>contained in the Green Bill is supported, rather than within 7 days of a notice being issued as required in the Model WHS Act section 100(1).</p> <p>It is not always known within the first 7 days that a notice is required to be reviewed, and without the ability to seek a review, there may be an increase in non-compliance with Provisional Improvement Notices.</p>
<p>195 Power to issue prohibition notice</p> <p>(4) An inspector who is at the workplace when the inspector issues a prohibition notice prohibiting the carrying on of an activity, or the carrying on of an activity in a specified way, other than in respect of an activity as defined in subsection (5), must remain at the workplace until the activity or the carrying on of the activity in the specified way has ceased, unless it is not practicable to do so.</p>	<p>The inclusion of the requirement that the Inspector remain at the workplace until the activity ceases is supported to ensure that the activity ceases.</p>
<p>223 Which decisions are reviewable</p> <p>(1) The following table sets out:</p> <p>(a) decisions made under this Act that are reviewable in accordance with this Part (reviewable decisions); and</p> <p>(b) who is eligible to apply for review of a reviewable decision (the eligible person).</p> <p>See:</p> <p>Attachment 1.</p>	<p>The removal of the ‘eligible’ persons (below) from the Model WHS Act, Part 12 section 223 Table is noted:</p> <ul style="list-style-type: none"> • The HSR who issued the notice; • A worker whose interests are affected by the decision; and, • A HSR who represents a worker whose interests are affected by the decision. <p>The removal of eligibility of the above persons to apply for a decision review, is</p>

Work Health and Safety Green Bill 2014 –

Section 223 Which decisions are reviewable table.

Attachment 2.

Model Work Health and Safety Act –

Section 223 Which decisions are reviewable table.

not supported, in relation to:

- Item 4, Provisional improvement notice;
- Item 7, improvement notice;
- Item 8, extension of time for compliance with improvement notice; and,
- Item 9, prohibition notice.

Allowing all persons as provided in the Model WHS Act to apply for review decisions about notices would provide additional transparency to the review process.

Additionally, it is noted that the section 223 Table does not include a nominated representative of the PCBU.

Business processes have included a departmentally nominated representative (i.e. a safety and health coordinator, who is outside of the work group and who was not issued with a notice) to request a review or extension of time for compliance with an improvement notice. Therefore, it is suggested that the section 223 Table includes a nominated representative of the PCBU.