

UNIONSWA

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UnionsWA Submission on the *Work Health and Safety Bill* 2014

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Introduction

1. UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australia Branch of the Australian Council of Trade Unions (ACTU). UnionsWA represents around 30 affiliate unions, who in turn represent approximately 140,000 Western Australian workers.
2. The modern occupational safety and health system is the creation of the trade union movement. Current occupational safety and health laws (OSH) were enacted as a result of significant campaigning from trade union members and workers. The continuing successful operation of the OHS system depends on workers, through their representative trade unions, having an organised, independent voice and means of prosecution.
3. UnionsWA welcomes the opportunity to provide feedback to the consultations on the WA Work Health and Safety (WHS) Bill. UnionsWA also welcomes the opportunity to provide feedback on how regulations are drafted.
4. UnionsWA has been a long supporter of strong and consistent harmonised OSH legislation in Australia. However our support has always been conditional on a national approach that does not compromise or reduce the protections and standards for workers in any state or territory jurisdiction.
5. Given that the government has not yet committed to a particular course of action, we strongly recommend that this opportunity is used to ensure best practice laws are adopted so that West Australian workers are the best protected by the state occupational safety and health system in Australia. No worker, regardless of jurisdiction, should be worse off in comparison to either the model WHS laws or the current state Acts.

UnionsWA Key positives in the proposed WA Work Health and Safety Laws

6. UnionsWA welcomes a number of provisions in the proposed Bill which will improve on the current *Occupational Safety and Health Act 1984*.
7. We believe that the definition of a person conducting a business or undertaking (PCBU) is an improvement on the current Act and will better address the structure of modern employment relationships.
8. Additionally UnionsWA welcomes the duties placed upon officers and the due diligence provisions as well as the state government's decision adopt the uniform penalty provisions in the Act.

UnionsWA key concerns with proposed WA Work Health and Safety laws

9. UnionsWA is concerned that the provisions which are removed or amended in the proposed *Work Health Safety Bill 2014* will result in a lessening of protections to workers compared with the *Commonwealth Work Health and Safety Act 2014*.
10. We object to the use of contestable wording in the proposed legislation, such as 'reasonably practicable'. This runs counter to the ostensible purpose of reviewing these laws i.e. 'reducing red tape'. The new laws will instead open the door to protracted legal arguments and evaded responsibilities from employers and their lawyers as they argue over what 'reasonably practicable' means. Indeed it is impossible to take the claims of 'reducing red tape' and 'regulatory burdens' seriously in this legislation while such proposals remain in place.
11. By contrast, more responsibility for OSH is being shifted onto workers, but at the same time workers are being provided with fewer rights to seek assistance from their union representatives for OSH issues. Health and Safety Representative (HSR) rights to training, and to direct that unsafe work cease, will be wound back as will be their ability to appeal the decisions of the regulator. The result of these laws is that workers will have more OSH responsibilities, but have fewer means to carry them out effectively.
12. UnionsWA argues that, for the proposed laws to represent a genuine improvement in WA's OSH system, they should be strengthened by the inclusion of provisions for Industrial Manslaughter, for union rights to prosecute OSH violations, and for a stronger duty on employers to consult with employees about OSH.

Safe Work Australia Review into Commonwealth Laws

13. UnionsWA is concerned that the recent Safe Work Australia (SWA) Review into the harmonised laws will be 'considered' in the drafting of the final WA WHS Bill.
14. The recent examination of the model WHS Bill by SWA was politically motivated and inconsistent. It's stated objective to 'reduce red tape' did not take into consideration the potential impact of such moves on safety in the workplace.
15. Given that WA stakeholders will not have a chance to comment on the outcomes of SWA's recommendations, we believe that its Review should be disregarded and not included in the final drafting of the WHS Bill.

Comments on 'Red Tape'

16. Throughout recent reviews and public commentary on OSH laws, the phrases 'red tape' and 'reducing the regulatory burden' have been used frequently.
17. We submit that these phrases are political and ideological, and have no place for consideration in a modern OSH legislative framework. Any changes made to OSH

laws must be viewed in the context of the devastating effects of occupational injury and disease on the Australian community, rather than then the costs to business of complying with regulations that prevent workplace injuries from occurring.

18. The reality is that the complete removal of 'red tape' and 'regulatory burdens' would result in workplaces with no health and safety whatsoever. If a particular rule or regulation is accused of being 'red tape' the onus should be on the accuser to demonstrate how the aim of that rule or regulation can be achieved in another way. Without such a requirement, references to 'red tape' and 'regulation' are just empty rhetoric.
19. The total costs of workplace injury and illness to the Australian economy has been estimated to be \$34.3 billion¹. The total cost of injury and disease borne by employers is a mere 3 per cent, while 44 per cent is borne by workers and 53 per cent by the community.
20. Much of the recent analysis of OSH looks at regulations through the perspective of costs to employers against the direct costs of workplace injuries. A far broader view must be taken which takes into account the cost of pain, suffering and early death, which again could add a further \$48.5 billion to the figure above.
21. Given that so little of the total cost of injury is borne by employers, it must be viewed as a fundamental part of any OSH system that employers carry the cost of preventing these injuries. Any reduction in legislative protections for workers must be done with hard evidence and not be based on ideological grounds.

Management of Risks

22. UnionsWA has concerns about the inclusion of the following clause in the proposed WA WHS Bill:

(17)(2) A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

We believe that this clause is unnecessary and will provide an unreasonable defence to an employer claiming that they do not have control over aspects of the workplace.

23. UnionsWA also believes that the clause will encourage bureaucratic agreements between PCBUs and sub-contractors which will be extremely difficult for workers and health and safety representatives to understand.

¹ National Occupational Health and Safety Commission (2004), The Cost of work-related injury and illness for employers, workers and the community

24. It is entirely reasonable for the management of risks and duty of care to operate concurrently and overlap between PCBUs. Adequate provisions are already in place to ensure that steps are taken to differentiate between the responsibilities of multiple contractors or PCBUs within a workplace.

Duty of Care

25. In both current WA law and the proposed WHS laws, duties placed on PCBUs should not be limited by the phrase 'so far as reasonably practicable'.
26. The legal interpretation of 'reasonably practicable' is problematic and encourages protracted legal arguments. UnionsWA supports an approach to duties in the proposed Bill which state that a PCBU 'Must ensure the health, safety and welfare at work of all the employees of the employer'.

Duties of Workers

27. We object to the inclusion in the Bill of overly prescriptive language for workers. This is particularly bad in the language of section 28(d) in the WA Bill. We believe that the duties placed upon the workers in (a), (b) and (c) are sufficient, while (d) adds complexity and confusion into the legislation and does little to expand upon a worker's duties in (c) to 'comply with any reasonable instruction' from the PCBU.
28. We support the inclusion of provisions similar to those contained in section (20)(2)(d) of the *Occupational Safety and Health Act 1984*, which will encourage workers to report any injury or harm which arises in the course of work.

Health and Safety Representatives

29. Elected HSRs are integral to any modern OSH framework and should be the cornerstone of the *Work Health and Safety Bill 2014t*.
30. We are disappointed by the reduction in the number of rights afforded to HSRs in the WA WHS Bill. UnionsWA is concerned about the potentially wide ranging definitions of 'improper purpose' in section 65. Section 34 of the *Occupational Safety and Health Act 1984* uses the definition 'with the intention of only causing harm to the representative's employer'.
31. We recommend that 'Improper purpose' be replaced with the definition used in section 56 of the Victorian *Occupational Safety and Health Act 2004* which allows for a HSR to be disqualified if they undertake actions 'intending to cause harm to the employer or undertaking of the employer'
32. This will provide clarity to this definition and will give both HSRs and PCBUs greater certainty when navigating the laws.

33. Provisions relating to a HSR's right to request union assistance should not have the provision of that assistance tied to right of entry. If the HSR has declared that they need immediate assistance in order to act on a safety issue, requiring 24 hours' notice is unreasonable and puts the safety of workers at risk.
34. The removal of the right for HSRs to appeal a range of decisions under section 223 of the proposed legislation is a direct attack on the rights of HSRs. WorkSafe has not offered any explanation for this removal and we believe that appeal rights to an independent body are critical for a healthy occupational safety and health system.

Right of Health and Safety Representative to Direct that Unsafe Work Cease

35. UnionsWA strongly believes that HSRs must have the right to direct that unsafe work cease. UnionsWA has surveyed affiliates and has found no evidence which supports any allegation that these powers have been abused or misused.
36. There is evidence stretching back decades to indicate that, where OSH representatives have the power to cease work or to issue an improvement notice, the exercise of such powers has been reasonable². Additionally, since the introduction of the model WHS laws elsewhere in Australia, no evidence to the contrary has been brought to light, and in the absence of any such evidence, we can confidently claim that the OSH representative system has worked well for decades, and continues to do so.
37. With no evidence of misuse and with no reason to revoke this power, we believe that the removal of this right is an ideological decision by the state government which will put the health and safety of workers at risk.

Training of Health and Safety Representatives

38. It is critically important that HSRs are given comprehensive training to undertake this vital role.
39. There are several improvements that could be made in relation to HSRs' powers and functions. For example, under the current laws, HSRs only have the power to issue a Provisional Improvement Notice (PIN) and issue a cease work after completing their training. In practical terms, if the HSR's training is delayed unnecessarily, then she/he may be left in a legal limbo whereby they are powerless to stop dangerous workplace practices.
40. This will be a disincentive for employers to enrol a HSR into training as soon as possible. As HSRs are directly elected by their peers, the system would be more

² Quinlan and Bohle, 1991

democratic if representatives were legally entitled to carry out their duties immediately upon election.

41. Training for HSRs should not be limited to introductory and refresher training every few years or upon election. Given the increasing complexity of occupational safety and health issues we believe that the training options for HSRs should be expanded.
42. The WA Bill should allow a HSR to seek additional training on specific hazards or issues confronting a workplace or industry, the condition of this training should be captured by the same consultation and other requirements contained in section 72.
43. UnionsWA recommends retaining the Deputy HSR provisions from the model laws. We believe that these provisions allow a Deputy to step into any short term or casual vacancies without the need for an employer to run new elections, therefore reducing red tape and compliance costs.

Right of Entry

44. UnionsWA is disappointed with the exclusion of union right of entry from the WA *Work Health and Safety Act*. We have surveyed our affiliates and find no evidence that any WA union official has had their commonwealth WHS entry permit cancelled or rescinded as a result of a contravention of OSH laws.
45. 'Right of entry' for union representative is about a worker's right to access representation by their own collective organisation. Without such a right within the OSH system, workers lack an independent means to hold their employers to account.
46. We believe that union right of entry under OSH legislation recognises the trade union movement's role in building safer workplaces. In every occasion of an OSH entry, it is the intention of the permit holder to engage constructively to improve the lives of union members. Leaving union of entry in the *Industrial Relations Act* seeks to delegitimise union involvement in OSH and will frame right of entry solely as an industrial relations issue rather than a health and safety issue.
47. Additionally, not only should right of entry for permit holders be included in the proposed Bill but they should be strengthened to include permit holders being able to take photos and make recordings where doing so does not hinder work being carried out; and to provide for the permit holder to issue PINs on the same basis as a HSR. Any PINs issued by permit holders could be challenged by the employer on the same basis as a PIN issued by a HSR, in which case an inspector could be invited to review the PIN as an independent umpire.

Industrial Manslaughter

48. UnionsWA advocates the introduction of industrial manslaughter legislation. There is strong community concern in relation to workplace deaths. Fines or financial penalties alone are not a sufficient deterrent. Death at the workplace should be treated in a similar way to vehicular manslaughter, with criminal sanctions available in the most egregious cases.

Union Right to Prosecute

49. Under the current state and commonwealth laws employers are rarely held to account for safety breaches. In 2011-12, across Australia a mere 362 legal proceedings against employers resulted in a conviction, order or agreement. This indicates that the risk of conviction is quite low, and legal proceedings are therefore unlikely to act as much of a deterrent to employers under the current system.

50. With so few legal proceedings, it is critical that the entitlement to prosecute should extend beyond the regulatory authorities. Trade union members have a legitimate interest in upholding workplace safety standards and in encouraging deterrence. Moreover, union prosecutions allow for a more efficient distribution of resources as they free up the limited resources of the state regulator or the prosecuting authority. Prosecutions have been used very effectively in the past to create organisational and cultural change, significantly improving health and safety.

51. Where unions do engage in prosecutions, it is done so sparingly and only in the most egregious of cases – we are unaware of any union-initiated prosecutions that have been found to be vexatious or frivolous in nature. In our experience, where unions have brought legal proceedings against employers, this has resulted in significant cultural and organisational change resulting in better safety protections for workers.

Additional comments on clauses of the *Work Health and Safety Bill 2014*

Clause (section) of the Model WHS Bill	Comment
3 (c)	UnionsWA recommends the replacement of 3 (c) with the provision 5 (e) in the <i>Occupational safety and health Act 1984</i> which recognises a union's right to participate in the OSH system.
5 – Meaning of Person Conducting a Business or Undertaking	UnionsWA strongly supports these provisions and recognises that they are an improvement on current WA Law.

7 – Meaning Of Worker	UnionsWA opposes the removal of volunteers from the meaning of worker.
27 - Duties of Officers	UnionsWA strongly supports these provisions and recognises that they are an improvement on current WA Law.
35 & 36 - Incident Notification	<p>The requirement to notify for serious injury or illness of a person is defined but does not include the current requirement to notify an injury or illness requiring 10+ days off work.</p> <p>Currently the only way that psychological injuries are required to be notified are through this provision. Without it, a situation may arise for a worker who has experienced serious mental harm through work, with no requirement for Worksafe to be informed.</p>
39 – Duty to Preserve Sites	UnionsWA supports this provision as an improvement on the <i>Occupational Safety and Health Act 1984</i> .
49 (6) – When Consultation is Required	UnionsWA recommends that ‘identify and control’ is added to this section.
76 – Health and Safety Committees	<p>We recommend retaining the current provisions in the <i>Occupational Safety and Health Act 1984</i> in relation to the number of workers required to request a committee be established.</p> <p>We believe the five required in the proposed law is too high and may not be possible in many workplaces.</p>
76 – Health and Safety Committees	<p>Proposed Bill is silent on the minimum meetings required of a health and safety committee.</p> <p>We recommend retaining the current provisions of the <i>Occupational Safety and Health Act 1984</i> which set a minimum of 3 monthly meetings.</p>
82 (2)	No definition in the legislation of Resolution of Issues ‘relevant agreed procedure’, whereas in the <i>Safety and Health Act 1984</i> , it is defined and requires employees to be involved in agreeing with the procedure.
Division 6 - Right to Cease Unsafe Work	A significant difference between the current and proposed legislation is that under S26 of the <i>Safety and Health Act 1984</i>

	<p>a worker has the right to cease work if they believe it ‘would expose him or her or any other person to a risk of imminent and serious injury’.</p> <p>Under section 83 of the <i>Work Health and Safety Bill 2014</i> this will only apply if workers themselves are under risk of injury. We strongly recommend that section 83 is expanded to include risk of injury or harm to others.</p>
94 – Minor Changes to Provisional Improvement Notices	<p>UnionsWA supports this provision; this will assist HSRs and will resolve some contentious issues with the PIN provisions in the <i>Occupational Safety and Health Act 1984</i>.</p>
Division 7 - Provisional Improvement Notices	<p>UnionsWA strongly supports the ability for minor amendments to be made to provisional improvement notices. This is a common-sense change which will improve the serving of notices.</p> <p>We also recommend that PINs can only be reviewed within eight days before remedy can be required. Allowing a review up until the date that remedy is required allows the employer or other person to unreasonably delay remedies.</p>
105 – What is Discriminatory Conduct?	<p>UnionsWA opposes the deletion of (i) and (d), these are both important provisions when considering the nature of contract work.</p> <p>The removal of these provisions may give rise to a situation where a contract worker is not reengaged at the end of the contract or not reengaged on a subsequent job purely because of occupational safety and health.</p>
106 – What is a prohibited reason?	<p>The removal of 106 (h) (iii) is a consequence of the removal of WHS permit holders from the Act. However we believe that it is an oversight that other forms of right of entry and access are not included in this provision.</p> <p>The Act should state that discriminatory conduct cannot be carried out against a person for communication with anyone who has gained access to the premises or obtained a right of entry under other Acts.</p>
160 (f)	<p>UnionsWA opposes the removal of ‘monitor compliance with Act’ out of inspector duties. We recommend that this is</p>

	restored.
185 – Other Matters	UnionsWA supports the insertion of (c).
231 – Procedure if prosecution is not brought	This provision provides an important measure which will allow for workers to seek that a duty holder is prosecuted for serious breaches. We recommend that the provision is included in WA legislation.
Commission for Occupational Safety and Health	UnionsWA opposes amendments to reduce to four the minimum number of meetings for the Commission for Occupational Safety and Health.
Personal Protective Equipment	Section 19(1)(d) of the <i>Occupational Safety and Health Act 1984</i> should be incorporated into the proposed Bill to ensure that adequate free of charge PPE is provided to workers.

Conclusions

52. UnionsWA is concerned that the national harmonisation process is being used to diminish the protections of OSH laws for workers, not improve them.
53. The proposed laws should not replace stronger employer obligations ('the employer shall') with weaker language ('so far as reasonably practicable'). The duty of employers to provide a safe workplace needs to be an absolute one.
54. In their current form the vague wording used in the proposed Bill will open the door to protracted legal arguments and evaded responsibilities as employers argue over what 'reasonably practicable' means, making a mockery of state government claims to be 'reducing red tape' and 'regulatory burdens'.
55. More responsibility for OSH is being shifted onto workers, yet workers will have fewer means to carry them out effectively. They will have fewer rights to seek assistance from their union representatives for OSH issues. HSR rights to training and to direct that unsafe work cease are also being reduced.
56. For the proposed laws to represent a genuine improvement in WA's OSH system, they must be strengthened by the inclusion of provisions for Industrial Manslaughter, a union's right to prosecute OHS violations, and a stronger duty on employers to consult with employees about Health and Safety.