



# **2018 Review of the Model WHS Laws**

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# 2018 Review of the Model WHS laws

## Introduction

Unions NSW is the peak body for Trade Unions in NSW representing over 60 affiliate unions with a membership of over 600 000 members from both blue and white collar industries.

Unions NSW welcomes the opportunity to make this submission to the Review of the model WHS laws.

Unions NSW supports the Australian Council of Trade Unions (ACTU) submission and recommendations made to the Review as well as submissions.

Unions NSW continues to endorse the 9 point plan proposed in the 2016 Unions NSW submission to the *Statutory Review of the Work Health and Safety Act 2011 – Discussion Paper December 2016*. The 2016 Unions NSW Submission is attached.

Unions NSW notes the changing nature of work with the recent and rapid growth in non-traditional employment relationships, such as contracting out, labour-hire, outsourcing, complex supply chains, franchising, work visas and the emerging gig economy. Unions NSW believes the model laws recognise non-traditional workers see s19 (1) (a) (b), and therefore legally capture these workers and provide them with the same protections as traditional workers. However Unions NSW holds significant concerns about the ability of regulators to police and enforce compliance in these non-traditional working arrangements.

Unions NSW holds very real concerns for the safety of gig economy workers. Particular areas of concern are online platforms such as Gumtree and Airtasker, where high-risk work, such as the removal of asbestos, is regularly posted. Unions NSW is also concerned about the rise in unregulated work through delivery apps such as Deliveroo and Foodora and the safety of workers riding bikes to perform deliveries. These workers anecdotally report regular and serious injuries. Unions NSW does not believe that the Regulator SafeWork NSW has the resources, capacity or appetite to regulate and enforce the model laws for these 'hidden' workers in non-traditional work.

Unions NSW supports the ACTU's recommendation for an immediate and thorough review of the approach to enforcement taken by WHS regulators, including the reconsideration of resourcing and strategy to ensure that effective enforcement of compliance with the model laws occurs in all workplaces across all employment relationships.

### **Question 1 - What are your views on the effectiveness of the three-tiered approach- model WHS Act supported by model WHS Regulations and the model WHS Codes – to achieve the object of the model WHS laws?**

Unions NSW supports the three-tiered approach to WHS regulation.

**Question 2 – Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?**

The model WHS Regulations adequately supports the object of the model WHS Act. Comments will be made throughout the submission where adjustments could be made to better support some aspects of the WHS Act.

**Question 3 – Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?**

Unions NSW believes the model WHS Codes of Practice adequately support the object of the model WHS Act.

Unions NSW would support the drafting of Codes of Practice to assist in psychosocial risk management, working in heat risk management, occupational violence risk management and sexual harassment risk management.

**Question 4 – Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and the model Codes to ensure that they work together effectively to deliver WHS outcomes?**

Unions NSW is satisfied with the balance of legislation within the current framework.

**Question 5 – Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?**

Unions NSW recommends the development of a Code of Practice to strengthen the management of risks to psychological health with an approach similar to that of physical risks. Unions NSW notes that the work on workplace mental health currently being undertaken by SafeWork NSW in conjunction with various stakeholders, highlights the need for major improvement in the area of psychological health risk management given the difficulty encountered by stakeholders in managing this risk.

Unions NSW suggests that s19 (3) (c) is not effectively used to eliminate or minimise risks that often cause psychological harm as it can and should be. A safe system of work is a broad concept that can include but is not limited to safe rostering, safe staffing levels, safe worker to client ratios, safe working hours, safe breaks etc.

Risks such as student, client and patient violence can be eliminated or reduced through safe staffing levels and improved worker to client ratios. Unsafe staffing levels have the potential to lead to worker anxiety, depression and fatigue and this can and does create mentally unhealthy workplaces. However workers and their representatives struggle to get PCBUs to recognise this as a safety issue

captured by s19 (3) (c) that must be managed through the risk management process.

Furthermore workers who raise concerns around unsafe systems of work are often dismissed as lazy, ineffectual, unable to perform their work efficiently, or not able to perform as expected and frequently find their safety concern moved to Human Resources where workers then become performance managed. This practice is not uncommon in our experience and will almost always lead to a breakdown in the employment relationship with flow on effects for the individual worker's health and the other workers in the workplace.

This could be addressed by providing guidance on s19 (3) (c) in the model WHS Regulations under Chapter 3, General Risk and Workplace Management, Part 3.1 Managing Risks to Health and Safety. Such guidance could state that a safe system of work is a broad concept that includes, but is not limited to, safe rostering, staffing levels, worker to client ratios, working hours, breaks within working hours, suitable breaks between shifts, timetabling and any other system aimed at eliminating worker fatigue and ensuring that worker physical and psychological health is not put at risk through unsafe systems of work. Alternatively the above could be placed in the definitions of the model WHS Act.

ISO 45001 recognises workload as a hazard requiring risk management. Codifying this hazard would assist in bringing this hazard out of the human resources field where it is often mismanaged and into the safety field where the risk should be eliminated and or minimised.

**Question 6 – Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?**

No comment.

**Question 7 – Have you any comments on the extraterritorial operation of the WHS laws?**

Unions NSW supports the extraterritorial operation of the WHS laws and believe the extraterritorial operation of the laws is required to satisfy the Objects of the Act s3 (1) (h).

**Question 8 – Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?**

No comment.

**Question 9 – Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?**

Psychological harm risk management – Psychological harm risk management should have a Code of Practice to assist in managing this risk. Codifying psychological harm would help to bring this issue out of the industrial and human resources area where it is often dealt with poorly and unsuccessfully, frequently leading to further psychological harm, and into the health and safety area where it should always be.

Heat risk management - Climate change has brought with it increasing levels and duration of heat and humidity and this means that workers who do not work in air-conditioned environments are subject to risks associated with increasing exposure such as heat exhaustion, fatigue, melanoma etc. Unions NSW would like to see the adoption of a model Code of Practice to address these risks, particularly in relation to indoor workers in non air-conditioned environments.

Safe Systems of Work - As suggested greater clarity around the definition of safe systems of work to address risks derived from unsafe systems of work and ensure that PCBU's recognise unsafe systems of work.

Confined Spaces - Confined spaces should be classified as a high-risk area of work requiring licencing. A multiple fatality in Sydney, NSW in 2017 suggests this area is in greater need of regulation.

Illegally Imported Asbestos - The illegal importation of asbestos as an emerging issue needs to be addressed through the model legislation. New buildings built with illegally imported asbestos should be required to remove this asbestos. This is not currently the case so no real incentives exist to deter the use of asbestos in current building projects. The Model Regulation 435 (1) should be amended to provide for ongoing monitoring of workers exposed to asbestos, not just workers removing asbestos or engaged in work with asbestos.

Cladding- Highly flammable cladding commonly used to spruce up the appearance of high- rise buildings, such as the cladding used in the fire at Grenfell Tower in London, should be regulated. The cladding is largely decorative and acts as a flue on high-rise buildings when fires start. Unions NSW would support the banning of such cladding through regulation.

**Question 10 – Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?**

Unions NSW supports the definition PCBU.

**Question 11 – Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?**

Unions NSW supports the ACTU's recommendation that greater clarity be adopted within the definition to ensure the safety of workers engaged throughout a complex supply chain by the PCBU sitting at the top of the supply chain, and that documentation be kept to record the processes undertaken, and that this documentation be a requirement of the regulations and the risk management process.

**Question 12 – Have you any comments on the approach to the meaning of reasonable practicable?**

The Act should ensure that reasonably practicable s18 (e) must be considered not in terms of cost exceeding the risk but primarily with the cost of not eliminating or minimising the risk i.e. the cost associated with injuries incurred should the risk result in injury. A decision based on cost must consider the cost of injuries resulting from the risk and not the cost in isolation.

**Question 13 – Have you any comments relating to an officer's duty of care under the model WHS Act?**

Unions NSW supports the obligations placed on officers within the model laws. Officers in senior roles within an organisation have the capacity to make and enforce decisions that will have a crucial impact on the health and safety of workers. Poor management is often the driver of poor safety and wellbeing.

The requirements to undertake due diligence under s 27 (1), and set out under s 27 (5), to ensure compliance are appropriate.

**Question 14 – Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?**

The definition of worker is sufficient.

**Question 15 – Have you any comments relating to a worker's duty of care under the model WHS Act?**

Unions NSW believes the model act should recognise the level of control a worker has in the decision making process where the prosecution of workers is considered. The key question being how much control, if any, did the worker have in the decision making process.

**Question 16 – Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?**

Unions NSW supports the duties of 'other persons' under s 29 of the model Act.

**Question 17 – Have you any comments relating to the principles that apply to health and safety duties?**

The principles that apply to health and safety duties are appropriate.

**Question 18 – Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?**

Unions NSW supports the obligations set out in s 46 requiring duty holders to consult with other duty holders, however the practical application of this aspect of the model law is difficult to assess. Unions NSW would support greater resourcing of the regulators to allow for this element of the model laws to be audited and in doing so would suggest that PCBU's be required through the model Regulations Chapter 3 to maintain written procedures or policies detailing the application of this requirement.

**Question 19 – Have you any comments on the role of consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety.**

Section 49 of the model act does not require consultation to occur in relation to risk management, only when assessing risks and identifying risks. Therefore once risks are identified and assessed, workers are not provided with information beyond this. It is crucial that workers are genuinely consulted on the risk management process.

The requirement to genuinely consult with workers is set out in s 48 of the model act, and the Code of Practice Consultation Cooperation and Coordination however in practice affiliates report there is usually a failure to genuinely consult with workers. Unions NSW would support a requirement for PCBU's and Officers to document processes undertaken throughout the consultation process whenever there is a legislative requirement to consult with workers. Unions NSW believes greater enforcement is required through the Regulator to ensure the objectives of the model act are met.

Consultation with workers must also include consultation with the elected Health & Safety Representative, including consultation about the risk management process undertaken.

Schedule 2 allows for but does not require a jurisdiction to establish a tripartite consultation arrangement. Under the previous NSW legislation a tripartite consultative body existed however this has since been abolished.

Unions NSW recommends that Schedule 2 be amended to establish a tripartite body for consultation within each jurisdiction. This tripartite body would include industry and worker representatives. The 9 point plan proposed in the Unions NSW submission to the *Statutory Review of the Work Health and Safety Act 2011 – Discussion Paper December 2016* discusses the inclusion of a tripartite body.

Unions NSW suggests strengthening the role of the Health and Safety Committee (HSC) to better facilitate consultation with the workers. Committee minutes should be distributed to the Health & Safety Representative for discussion with the WorkGroup and the Chair of the Committee should be drawn from the workers to balance the asymmetry of power inherent in the worker/PCBU relationship.

**Question 20 – Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?**

Unions NSW believes the drafting of the legislation captures non-traditional workers such as gig economy workers through the definition of a worker under s7(1) of the Act. The requirement to consult with workers, including non-traditional workers such as gig workers is captured by s47 (1) of the Act. Unions NSW does not believe the Part 5 provisions of the model act are effectively implemented by PCBU's, particularly in the context of non-traditional work as outlined in the introduction.

Unions NSW has anecdotal information to suggest that effective and genuine consultation is still lacking in the vast majority of workplaces including traditional workplaces, where PCBU's fail to involve workers in the decision making process but continue to inform workers of decisions made after the fact. Unions NSW believes the legislation does make this legal obligation and process clear however the issue lies with the application and the enforcement.

Consideration should be given to consultation mechanisms where workers are not represented by a Health & Safety Representative.

**Question 21 – Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?**

Unions NSW suggests a provision in the model Regulations under Division 2 requiring the regulator in each jurisdiction to maintain a list of de-identified HSR's.

Gig economy workers, such as those working for food delivery service providers, do not currently have adequate representation. If they were to organise safety representation these workers would find it very difficult to effectively utilise the functions and powers provided in the model act given the transient, insecure and isolated nature of the work. These workers are isolated from each other and paid piecemeal rates, so any attempt to elect a Health & Safety Representative would be done in their own unpaid time. Unions NSW believes this is not the intention of the model legislation however for many workers it is the reality. An elected Health & Safety Representative would also have to perform their role in an unpaid capacity without any support or resourcing.

The determination of WorkGroups as per s 51 of the model act would be extremely difficult to achieve with such a divergent workforce. The capacity for a HSR to investigate complaints s68 (1) (c), monitor the measures taken by the PCBU to comply s68 (1) (b), inspect the workplace s68 (2)(a) etc. are all logistically difficult if not impossible tasks for the gig economy worker. So while the model laws recognise these workers as workers they are not in a position to utilise this mechanism of the model act effectively and therefore the model laws fail to fully protect this group of workers.

To ensure the HSR is adequately equipped to effectively undertake their role s 72 of the model act should be amended to ensure the HSR is able to attend any training course that is approved by the Regulator on the provision of reasonable notice, as per the Victorian *Occupational Health & Safety Act 2004* s 69 (d) (ii) and the recent decision *Sydney Trains v Safework NSW [2017] NSWIRComm 1009 (Sydney Trains)*. The model Act s 72 (1) (c) has led to disputes as PCBU's direct HSR's to attend PCBU preferred training. Until recently it was believed that the *Sydney Trains* case had put this issue to rest, however the issue was again raised during the recent enterprise bargaining negotiations for Sydney Trains, primarily because the regulator has not been enforcing this decision. To remove any uncertainty or cause for further disputation, and to ensure the recent *Sydney Trains* decision is upheld by the regulator, s 72 (1) (c), could be amended to remove the words 'in consultation with the person conducting the business or undertaking', along with subsection 5.

**Question 22 – Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?**

Greater clarity is needed in the model Act s 80 (1) (c). A worker involved in the issue resolution process should have the right to be represented by their HSR **and** their representative not **or** their representative.

Unions NSW supports the default issue resolution procedure in the Regulations.

Some PCBU's have developed complex or onerous issue resolution procedures to delay or obstruct the reporting of issues. The Regulator must be adequately resourced to ensure it is able to monitor all aspects of the model laws. In these cases the Regulator must be able to enforce the default procedure from the model Regulations.

**Question 23 – Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as an HSR or member of a HSC, or who raise WHS issues in their workplace?**

Unions NSW supports the drafting of Part 6 of the model act. Unions NSW is not aware of any action taken by the Regulator in this area and anecdotal information suggests workers are generally still fearful of taking on a safety role within a workplace given the stigma that surrounds it and subtle discriminatory

behaviour from PCBUs. HSR's who do raise issues are sometimes performance managed, given less favourable shifts, duties, tasks, rosters etc. Casual workers have few protections because of the nature of casual work.

In NSW a culture of bullying and intimidation has existed for many years. Despite a Parliamentary enquiry into bullying within WorkCover in 2014, reports from members of the Public Service Association (PSA) working within SafeWork NSW currently, indicate this culture has not shifted. For further information on this please refer to the PSA submission.

The regulator must be afforded absolute independence to be a fierce and frank advocate for worker health and safety.

A more pro-active approach from the regulator in relation to promoting the role of the HSR, as well as promoting a culture of reporting incidents and near misses may assist. HSR's who do become targets must have the full support of the regulator.

**Question 24 – Have you any comments on the effectiveness of the provisions of WHS entry by WHS entry permit holders to support the object of the model laws?**

National recognition for WHS Entry Permit Holders (WHS EPH) across all jurisdictions where harmonised Model Laws are in place should occur to remove the requirement for multiple permits. This would support the objects of the Model Act.

Workers who do not have elected HSR's do not have the same level of representation as those that do have HSRs. Furthermore where the HSR is not trained, their capacity to enforce health and safety in the workplace is limited. Where workers choose to be represented by their WHS Entry Permit Holder the Entry Permit Holder should have the right to represent the worker as the HSR would. This would support s 3 (1) (c) of the Model Act.

Unions in NSW have brought numerous breaches under ss 144 and 145 of the Model Act to the attention of the Regulator SafeWork NSW over the last five years, however no prosecutions have occurred. WHS Entry Permit Holders must be able to perform their functions without delay, obstruction or hindrance as per the model act. The regulator must enforce these provisions of the model act.

**Questions 25 – Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?**

As outlined previously Unions NSW would support the introduction of industrial manslaughter, higher penalties for breaches of the model laws and a safe and supported independent workforce within each regulator to ensure inspectors are able to perform their job to the highest standard therefore ensuring the highest level of protection against harm to the health, safety and welfare of all

workers and others within all workplaces as per the Object of the model act s 3 (2).

**Question 26 – Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?**

Unions NSW holds concerns for the safety and wellbeing of the workers within the NSW Regulator SafeWork NSW as discussed. Please refer to the PSA submission. The model laws provide sufficient powers and functions to inspectors.

**Question 27 – Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?**

Unions NSW as the peak body does not deal with member matters however affiliate unions do have this experience. Please see the AMWU submission.

**Question 28 – Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?**

No reported experience of this.

**Question 29 – Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?**

Unions NSW supports s 152 (g) of the model act.

**Question 30 – Have you any comments on the incident notification provisions?**

The definition of ‘notifiable incident’ under Part 3 s 36 (b) must be expanded. The list of notifiable incidences was significantly reduced as a result of the harmonisation process.

A ‘serious injury’ under s 36 should include any illness or injury requiring medical treatment. Workers with injuries requiring medical treatment who are not admitted to hospital do not currently fall within the definition of notifiable incident. Any worker with an injury requiring medical treatment should fall within this definition.

The definition should also include any injury or illness for which a worker is absent from work for a continuous period of five working days, is exposed to prohibited or carcinogenic substances or exposed to blood borne diseases.

Serious illnesses have been allowed to spread throughout schools with limited action to prevent these illnesses spreading. Were the PCBU mandated to report these illnesses where workers have sought medical treatment, the spread of illnesses such as whooping cough may have been averted.

The definition of a dangerous incident, s 37 of the model act, should be expanded to include the use of, or threatening to use, a weapon, including any object fashioned into a weapon and or used as a weapon, and any threat of violence, for example hostage situations, hold ups, death threats, threat of assault, threat to family, co-workers and others. These incidents can cause significant psychological injury often with life long effects however under the current model laws they are not classified as dangerous incidents. The requirement to report such incidents could lead to better risk management in the area of psychological harm.

**Question 31 – Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?**

Unions NSW supports the National Compliance and Enforcement Policy in principle.

**Question 32 – Have you any comments in relation to your experience of the exercise of inspector’s powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?**

Unions NSW does not have direct experience of this. Affiliates of Unions NSW have expressed frustration at the Regulators use of graduated compliance and failure to enforce the model laws.

Litigation has been on the decline since the harmonised model laws were introduced to NSW. There is a greater reliance on the provision of information, education and training. Unions NSW supports the provision of information, education and training however where serious breaches occur or ongoing breaches occur there must be some forceful mechanism to deter non-compliance.

In the 2014-2015 year only 101 prosecutions occurred in NSW.

While there are other contributing factors at play such as technological advances improving safety, changes in traditional forms of labour, changes to workers compensation laws that have artificially reduced claims through the reduction of liability, many Unions see ongoing breaches and injuries daily and are left questioning the graduated compliance enforcement principle.

**Question 33 – Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?**

Unions NSW would like to see higher penalties to deter non-compliance, prevent injury or illness and save lives.

As at April 6, 2018 SafeWork Australia statistics show 33 work related deaths across Australia. This is completely unacceptable and for the families of those workers who have died the impact is life changing and irreversible. Australia can do better than this. This statistic is reflective of a system that does not deter workplace tragedies.

Unions NSW would like to see the introduction of Industrial Manslaughter. In October 2017 the Queensland Parliament introduced two new criminal offences under industrial manslaughter: an 'employer' and a 'senior officer' offence if:

1. a worker dies (or is injured and later dies) in the course of carrying out work;
2. the person conducting a business or undertaking (PCBU) or senior officer's conduct (either by act or omission) causes the death of the worker; or
3. the PCBU or senior officer was negligent in causing the death of the worker by the conduct.

A PCBU found guilty of industrial manslaughter may be liable for a fine of up to \$10 million, while an individual (senior officer) may be liable to a term of up to 20 years imprisonment.

An offence of industrial manslaughter would deter conduct leading to loss of life through work and would provide the families of victims with some semblance of justice.

Unions NSW supports the Queensland provisions with some amendments. We would suggest exemptions for emergency service workers making decisions in good faith as well as an exemption for small business where an immediate family member dies in the course of working for the family business. The Crown must also be bound by these provisions to ensure the same rights for workers in the public sector.

**Question 34 – Have you any comments on the processes and procedures relating to legal proceedings for offences under the WHS laws?**

The decline in prosecutions is of concern to Unions NSW and its affiliates. Unions NSW supports the ACTU submission recommending unions have the right to prosecute where the regulator has failed to prosecute and does not intend to prosecute within a reasonable period.

**Question 35 – Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?**

As per the ACTU submission.

**Question 36 – Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?**

Enforceable undertakings should not be available in the event of a serious injury or fatality. The model laws should be amended to prohibit the use of enforceable undertakings for a category 2 offence resulting in a serious injury or fatality or where the applicant has a history of non-compliance.

**Question 37 – Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?**

The model act should be amended to prohibit the purchasing of liability insurance against WHS penalties and fines as per the ACTU submission.