



ASU Submission

Recommendations of the 2018 Review of the Model Laws Work Health and Safety Laws

Submitter:	David Smith, National Secretary
Organisation:	Australian Services Union
Address:	Ground Floor, 116 Queensberry Street Carlton South, Victoria, 3053
Phone:	03 9342 1400
Email:	info@asu.asn.au
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Introduction

1. Nationally the Australian Services Union (ASU) is one of Australia's largest unions, representing approximately 135,000 members.
2. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.
3. Currently ASU members work in a wide variety of industries and occupations because the Union's rules traditionally and primarily cover workers in the following industries and occupations:
 - Social and community services
 - Disability Support Services
 - Local government
 - State government
 - Transport, including passenger air and rail transport, road, rail and air freight transport
 - Clerical and administrative employees in commerce and industry generally
 - Call centres
 - Electricity generation, transmission and distribution
 - Water industry
 - Higher Education (Qld & SA)
4. The ASU has members in every State and Territory of Australia, as well as in most regional centres. Around 50% of ASU members are women; the exact percentage varies between industries, e.g. in social and community services and clerical and administrative around 70% of our members are women.
5. The ASU will always promote a collective approach to occupational health and safety regulation and welcomes the opportunity to comment on the Recommendations of

the 2018 Review of the Model Work Health and Safety (“WHS”) Laws (the Review). The ASU has read and supports the ACTU submission to the Review. For the same reasons, as outlined by the ACTU, the ASU supports all 34 recommendations of the Review and calls on all States and Territories to implement the reforms as a matter of priority in each harmonised jurisdiction.

6. The ASU supports harmonised, nationally consistent WHS laws but only if the aim is to achieve the highest standard of work, health and safety for workers. If for whatever reason it doesn’t then the ASU will continue to wherever possible pursue traditional measures to protect it’s members’ health and safety. The recent NSW United Services Branch/USU Local Council dispute before the NSW IRC in relation to industrial action by more than 500 Council workers banning the use of carcinogenic glyphosate weedkiller is an example of this. The “downing of tools” for health and safety reasons led to an immediate Council decision to phase out glyphosate spray and the trialling of organic alternatives¹.
7. The ASU in this submission has chosen to focus on the following Recommendations relating to:
 - Psychological hazards (No 2 and 20)
 - Health and Safety Representatives rights (No 8 and 10)
 - Worker representation, participation and consultation (NO 5 and 15)
 - Industrial Manslaughter (No 23b)

Regulations dealing with psychosocial health – A Collective Approach

8. **Recommendation 2** relates to amending the model WHS laws to address the question of how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks. The ASU proposes that

¹ *re USU v Blacktown City Council NSWIRC 4 July 2019*

a collective approach is the best way to address any hazard in the workplace but particularly those effecting psychosocial health.

9. Psychosocial hazards which include violence and harassment, bullying at work, stress, work overload, understaffing, irregular hours, low chance of promotion and job insecurity are the most prominent risks amongst ASU members and areas of coverage. ASU members are also highly likely to be exposed to other significant psychosocial risks, including long working hours, lack of autonomy, lack of bargaining power and regular organisational restructuring.
10. The recommendation reflects the current Model WHS laws failure to establish a minimum standard for the management of psychosocial hazards and promotion of psychological health at work.
11. Modern working arrangements inherently create greater exposure to psychosocial hazards. Outsourcing, privatisation, corporatisation and contracting out of previously permanent jobs has led to a large number of workers in insecure employment arrangements. Less secure employment arrangements lead to significant difficulties and virtually impossible circumstances for workers to raise health and safety complaints.
12. Furthermore, the risks associated with psychosocial hazards are exacerbated by the feminised characterisation of work and jobs in the ASU's coverage such as Social and Community Services, aged-care and child-care sectors; as well as the occupations in the Ground Operations in the Airlines industries, customer facing roles in Local Government industries, and any other clerical occupation involving direct contact with customers. Broadly, women are more likely to experience discrimination, sexual harassment, intimidation, group bullying and psychological harassment at

work². In support of ASU members' concerns about the inadequacy of anti-discrimination law, the ASU submits that it is imperative that the WHS regime recognises gender-based harassment and violence as serious WHS risks.

13. The ASU calls on the Australian Government to ratify the new ILO Convention (No. 190) and Recommendations (No. 206) recognising the right of every worker to a world of work free from violence and harassment, including gender-based violence and harassment. Once ratified, the instruments will place clear obligations on governments and employers to take proactive steps to prevent violence and harassment in the world of work, recognising the need to move away from reliance on a reactive, individualistic complaints model towards a more systemic, collective solution.
14. The ASU also supports the ACTU recommendation on WHS reform made to the Australian Human Rights Commission for the 2018-19 National Inquiry into Sexual Harassment in the Workplace and calls on the Australian Government to develop a new WHS Regulation and Code of Practice, in consultation with social partners and experts on all psychosocial hazards, that includes sexual harassment (p. 46):

“The new Regulation and Code must address the current problematic definition of ‘bullying’ in workplace law and WHS law and the confused messages in WHS guidance material about the relationship between harassment, violence, discrimination and bullying at work.

² International Labour Office, ‘10 Keys for Gender Sensitive OSH Practice – Guidelines for Gender Mainstreaming in Occupational Safety and Health’ (Working Paper, SafeWork, 2013); Izaskun Larrieta-Rubín de Celis et al, ‘Women’s occupational health and safety management: An issue for corporate social responsibility’ *Safety Science* (2017) 91, 61–70.

The definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' should be reconsidered and redrafted to require reporting in relation to psychosocial hazards, including sexual harassment. The requirements for managing risks to health and safety that are set out in Part 3.1 of the Regulations should apply to all risks and hazards, not just the risks set out in the Regulation.

Australia's national approach to WHS compliance and enforcement in relation to psychosocial hazards, including sexual harassment, needs an urgent review. Unions should have the right to prosecute for breaches of WHS laws."

15. The ASU supports **Recommendation 20** to review incident notification provisions in the model WHS Act so that they provide for a notification trigger for psychological injuries that emerge from new work practices, industries and work arrangements.
16. The ASU opposes the increasing acceptance by employers and the wider community of violence being inevitable in certain workplaces. ASU's members are employed in the social and community services and customer service related sectors; all Local as well as State (Qld) and in certain Commonwealth government (ATO) sectors; and are exposed to workplace violence both physical and in the form of verbal abuse.
17. The ASU would strongly support amendments to model WHS legislation that includes provisions to assess and control workplace violence and recommend a model Regulation and industry and occupational specific Codes of Practice to protect service workers from workplace violence.
18. The Workplace Bullying jurisdiction in the *Fair Work Act 2009* was designed to stop workplace bullying as early as possible and was actively supported by the ASU.

However the legislative amendment was intended to stop systemic bullying normally through a collective response rather than relying on individual complainants. It is counter intuitive to have bullied workers left with the only option of making formal individual complaints publicly. The Fair Work Commission is as per traditional Industrial Tribunals in Australia at it's most effective for workers when resolving collective disputes including WHS disputes such as bullying. Further it was only ever intended to be one form of remedy as part of a suite of remedies which should include a regulation with supplementary Codes of Practice.

19. In July 2019 ASU members participated in the ACTU Workplace Health and Safety Survey and we rely on the results analysis in the ACTU submission. Of note for the ASU members participating was the following results:

- 32% had little to no confidence about raising health and safety issues at work.
- 64% had experienced mental illness at work (e.g. stress, depression & anxiety).
- 77% knew someone who had been seriously injured or ill at work.
- 94% thought that employers who cause workers' deaths through gross negligence should face serious jail time.

20. To mark World Day for Safety and Health at Work, the International Labour Organisation on 28 April 2016 released a major report on the impact of workplace stress and how to tackle it³. The ILO treated Workplace Stress as a '*Collective Challenge*'. ILO researchers reviewed the latest studies on the prevalence of workplace stress and its impact on workers' mental health and wellbeing. A 2014 Australian stress and wellbeing survey, they say, found nearly half of participants reported work demands as "barriers to maintaining a healthy lifestyle", while an

³ Workplace Stress – A Collective Challenge http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_466547.pdf

earlier study found seven in 10 Australian said stress was affecting their physical health⁴.

21. The report identified ten types of psychosocial hazards divided into two groups⁵ as follows:

Content of work:

- Work environment and equipment – "problems regarding the reliability, availability, suitability and maintenance or repair of both equipment and facilities", and physical hazards;
- Job content – poor task design, repetitious and meaningless work, and job uncertainty;
- Workload – excessive workloads, time pressure and lack of control;
- Work schedule – fixed schedules, long or unsocial hours, and shift work or unpredictable hours that upset biological circadian rhythms and affect workers' sleep quality.

Context of work:

- Organisational culture and function & "poor communication, low levels of support for problem-solving and personal development, lack of definition of organisational objectives";
- Role in organisation – ambiguity or conflict in a worker's role;
- Career development – career stagnation and uncertainty, under-promotion and job insecurity during mergers and acquisitions, retrenchment and budget cutbacks;
- Decision Latitude – low participation in decision-making;
- Interpersonal work relationships – poor social relationships that increase "adverse effects of exposure to other psychosocial hazards";

⁴ Ibid, 8

⁵ Ibid,3

- Home-work interface.

22. The ILO report recommended seven measures⁶ to prevent work-related stress:

1. **Control** – ensure workplaces are adequately staffed and let workers have a say on how their work is carried out;
2. **Workload** – ensure work hours are reasonable, assign reasonable deadlines and regularly assess time requirements for tasks;
3. **Social support** – provide a workplace where "supervisory staff take responsibility for other workers and there is an appropriate level of contact" to build supportive relationships between the two groups. Maintain a workplace free of "physical and psychological violence" and "reinforce motivation by emphasizing the positive and useful aspects of the work";
4. **Matching the job and the worker** – ensure proper utilisation of a worker's skills by matching their jobs to their physical and psychological abilities, and assign tasks "according to experience and competence";
5. **Training and education** – provide information and training on psychosocial risks and stress management;
6. **Transparency and fairness** – be clear in assigning tasks and roles to avoid conflict and ambiguity and provide fair pay. Ensure procedures for dealing with complaints are transparent and fair;
7. **Physical working environment** – provide a healthy workspace for employees, taking into account appropriate lighting, air quality, noise levels and ergonomics. Remove all "hazardous agents".

23. The ILO indicated that in most countries policymaker and social partners had become involved in concrete interventions to tackle psychosocial hazards which are

⁶ Ibid, 4

the causes of work-related stress. *"A comprehensive OSH management system would ensure improved preventive practices and incorporation of health promotion measures. "This should include psychosocial risks in risk assessment and management measures with a view to effectively managing their impact in the same way as with other OSH risks in the workplace"*⁷. In Australia at this point in time a model Regulation supported by practical Codes of Practice addressing issues including the 7 identified by the ILO would be strongly supported by the ASU

Health and Safety Representatives rights

24. Once a union official needs to provide assistance to a Health and Safety Representative ("HSR") as per **Recommendation 8** there should be no impediment to accessing workplaces. Any impediment restricting union representatives from consultation and providing advice to HSRs in the workplace leads to compromising health and safety in the workplace. A collective response to hazards in the workplace is totally diminished by isolating HSRs from the external support they require to perform their role effectively as intended by the model WHS laws.
25. As soon as a HSR has been elected training is critical. Unions and peak bodies such as the ACTU and VTHC provide high quality training and should remain the choice of HSRs as recommended by their union. As per **Recommendation 10** HSRs should be able to choose their training provider. If there is any dispute it should be referred to a inspector to decide the matter.

Worker representation, participation and consultation

26. The ASU supports as per **Recommendation 5** the development of a new model Code on the principles that apply to duties including all the variations to modern work arrangements. The increasing use of labour hire, outsourcing, franchising and the gig

⁷ Ibid, 30

economy, although the target of regulation by trade unions, exist because of a reliance on reduced labour costs and PCBU obligations to those providing the labour for their increasing popularity. Any effort to regulate these new work arrangements needs to include health and safety as an inherent requirement for working in any new platform. More, not less, regulation recognising the power of a collective response is by definition required to ensure safe work.

27. As per **Recommendation 15** the ASU strongly supports the removal of 24 hour notice period for permit holders. The obvious opportunity for a PCBU to remove evidence of a breach and the total lack of opportunity for HSRs to address unsafe working conditions relatively quickly defeats the whole purpose of model WHS laws.
28. The ASU rejects consultation increasingly occurring in workplaces at a late stage so as it is instructing workers and their representatives about any decision just before it is implemented. Too often there is no opportunity to change the decision or mitigate it's effects. This is not genuine consultation and the Code should clearly define just what representation, participation and consultation is and what it is not.
29. Consultation involves giving those consulted sufficient opportunity to express their views, so those views can be taken into account when making a decision to do something. In various decisions, the Fair Work Commission has indicated that consultation is not a '*mere formality*' or '*perfunctory advice about what is about to happen*'⁸. Consultation requires in general terms, an opportunity to be given to employees or unions to influence a decision. A failure to comply with consultation obligations should automatically result in a significant Court fine.

⁸ [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Vodafone Network Pty Ltd, PR911257](#) (AIRC, Smith C, 14 November 2001) at para. 25.

Industrial Manslaughter

30. The introduction of a new offence of Industrial Manslaughter for gross negligence causing death would in the ASU's view be a game changer to alert all PCBU's of the seriousness of WHS and that no life should ever be taken for granted in the workplace.
31. Industrial manslaughter is a crime where the action or inaction of an employer results in the death of an employee. Industrial manslaughter usually has a much broader scope than standard criminal manslaughter.
32. The use of the term 'senior officer' for the industrial manslaughter offence is intended to capture individuals at the highest levels in an organisation (those who can create and influence safety management and culture at their workplace). The rationale for capturing these higher level officers is to ensure health and safety is managed as a cultural priority within organisations and to guarantee that safety standards are managed and supported from the top down.
33. A senior officer facing an industrial manslaughter offence is:
 - an executive officer of a corporation (i.e. a person who is concerned with, or takes part in, the corporation's management); or
 - for a non-corporation, the holder of an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of a PCBU's functions.
34. Queensland Industrial Relations Minister the Hon Grace Grace said the new laws would leave negligent employers culpable in workplace deaths with nowhere to

hide⁹. The industrial manslaughter provisions of the WHS Amendment Act commenced on assent on 23 October 2017 and should provide guidance on any proposed model Industrial Manslaughter laws.

35. A CEO/Manager may be prosecuted for industrial manslaughter as it is the manager's role to make decisions regarding how work can be undertaken and influence what safety procedures are used. Whereas supervisors' role is to provide advice and administer the procedures directed by his or her superior. The negligent conduct of the CEO/Manager in actively ignoring the advice of the supervisors and failing to ensure appropriate resources and processes are used to eliminate or minimise risks to health and safety should see the CEO/Manager prosecuted for industrial manslaughter.
36. The ASU does not cover industries that have the highest level of workplace death rates, such as construction, farming, road transport and mining, but there are serious, including psychosocial, hazards over a working life across all industries. There should in any case be no tolerance to an avoidable death of a worker in the workplace.
37. The difference would be in the prioritising of WHS issues so as no PCBU could operate without WHS as an inherent part of their business model. Profits should never be prioritised over life threatening hazards in the workplace and where it occurs the most senior decision maker needs to face the consequences of a criminal offence.

Conclusion

⁹ Media statement, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, *New industrial manslaughter laws to protect Queenslanders on the job*, 12 October 2017: <http://statements.qld.gov.au/Statement/2017/10/12/new-industrial-manslaughter-laws-to-protect-queenslanders-on-the-job>.

38. The ASU calls on all levels of Government to support all of the 34 recommendations to ensure further harmonisation towards a higher standard of WHS legislation. In particular as with all physical hazards there are very good reasons to support a collective approach to psychosocial hazards by regulation, protected HSR participation and worker consultation.
39. Industrial manslaughter laws has in the ASU's view the potential to be a lightning rod for what comes next in model WHS laws. It will attract a shift in corporate governance that should prevent the acceptance of any workplace deaths by PCBU's and jail senior officers who recklessly ignore their obligation to provide a safe system at work.