



Submission by Unions NSW in response to Safe Work Australia's Consultation Regulation Impact Statement

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Consultation RIS – 2018 Review Recommendations

Submission template

Psychosocial risks (Recommendation 2)

Unions NSW strongly supports the recommendation that the Regulations provide more specific guidance on eliminating and minimising psychological hazards from the workplace.

Although this is a current requirement of the legislation it is clear that these hazards are not being adequately eliminated or minimised.

State governments are pouring large amounts of money into schemes to improve mental health at work in response to this problem however this money is likely to fail to improve

Affiliates tell us that the NSW Regulator will often debate the actual hazard with union officials and workers when unions are trying to work with the Regulator to improve safety at worksites.

An example of this can be found within the healthcare sector. Registered nurses working in aged care at night are often the only registered nurse on duty, left to care for large numbers of dementia patients, often with some dying patients. These registered nurses are under an enormous amount of stress that could be minimised were more registered nurses employed to create safe nurse/patient ratios. This would act as a very effective control measure. However, this control measure does not come without significant cost, and so usually it is a control measure that is ignored, or the Regulator will strongly argue that the lack of trained staff does not pose a physical or psychological risk to the worker, as they are unwilling to suggest the PCBU engage more staff.

Unions NSW also 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 as suggested above. Safe staffing numbers create safe systems of work. However, safe systems of work is not defined in the Act. Unsafe staffing levels have the potential to lead to worker anxiety, depression and

fatigue and this can and does create mentally unhealthy workplaces. As stated workers and their representatives struggle to get PCBUs and the Regulator to recognise this as a safety issue captured by s19 (3) (c) that must be managed through the risk management process.

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.

Work Groups and HSRs in small businesses (Recommendation 7a)

Unions NSW does not hold a strong view on this recommendation however we do not oppose it.

Workplace entry by HSR assistants (Recommendation 8)

Unions NSW supports the right of the HSR to seek assistance independent of the right of entry provisions. In the National OHS Panel Report, the right of HSRs to seek assistance is discussed entirely separately from the right of entry provisions, under the section dealing with the *obligations* of PCBU's to HSRs.¹

Unions NSW experience is only in relation to workplace entry by union officials who hold a right of entry permit. The provisions relating to the right of entry of an Entry Permit Holder (EPH), or union official who holds a right of entry permit, are clear under Part 7 of the Work

¹ National Review into Model Occupational Health and Safety Laws, Second Report to the Workplace Relations Ministers' Council, January 2009 at p 133

Health & Safety Act, however this has not assisted unions in gaining entry with the ease and speed required when inspecting safety issues, often of a very serious nature.

Frequently unions are prevented from entering workplaces by the PCBU who will contact either the Regulator or the police.

The experience of our affiliates is that the Regulator is seldomly helpful in assisting the Entry Permit Holder to gain access, often taking the view of the PCBU and preventing the EPH from entering the workplace. This has occurred on many occasions where there have been major safety breaches which have been ignored at the expense of arguing technicalities, such as the use of names, shortened on the entry notice. This particular example was reversed on appeal, however it is our view that safety should always be the priority of the Regulator and the Act is plain and clear in its meaning and should not allow for argument or debate where the EPH is requesting entry on the grounds of reasonable suspicion.

The clarity of the Act does not assist workplace entry given the frequent support for the PCBU's position by the Regulator.

We support the recommendation to remove any requirement to provide 24-hour notice from s117 of the Model Act. It is clear that some PCBU's are relying on this provision and the Fair Work Right of Entry provision to deny entry and delay entry even though it is not in NSW harmonised Act.

Any additional clarity to the Act or Regulations that can assist an EPH in gaining swift entry is recommended.

Greater power to allow for the HSR to seek assistance from any source is recommended.

Cancelling a Provisional Improvement Notice (Recommendation 9)

Unions NSW agrees with that where an inspector cancels a PIN on a technicality, the safety issue that lies at the heart of the PIN, must be dealt with by the inspector. The frustrations that arise from these cancellations are usually because there is a failure to deal with a health and safety issue. It must not be forgotten that a failure to eliminate or minimise a risk is a requirement of the legislation, and so a failure to do so is a breach of the legislation.

Choice of HSR training course (Recommendation 10)

Unions NSW supports the right of the HSR to choose their own trainer. We do so because we support the right of the individual who will undertake a course, to choose the course that will best suit their needs. This will ensure the HSR remains independent of any decision making from management and will actively engage the worker as per the Robins model of health and safety as well as actively engaging the worker as a student who has been empowered to choose the training that best suits their needs.

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.

The HSR should be allowed to choose the course.

Referral of disputes (Recommendation 13)

Unions NSW agrees with recommendation 13.

WHS entry permit holders – prior notice of entry (Recommendation 15)

We support recommendation 15 to remove any requirement to provide 24-hour notice from s117 of the Model Act. It is clear that some PCBU's are relying on this provision and the Fair Work Right of Entry provision to deny entry and delay entry even though it is not in NSW harmonised Act.

Inspectors' powers (Recommendation 17)

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.

Seeking documentation in relation to an inspection, notice or PIN has also become extremely difficult in NSW, with SafeWork NSW suggesting that unions requesting information in relation to a safety concern must seek this through the lodging of a GIPA request.

Unions NSW supports recommendation 17.

The Category 1 offence and industrial manslaughter (Recommendation 23a & b)

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.

Unions NSW supports both recommendations 23a and b.

Prohibit insurance for WHS fines (Recommendation 26)

The model act should be amended to prohibit the purchasing of liability insurance against WHS penalties and fines. Unions NSW supports recommendation 26.

The risk management process (Recommendation 27)

The risk management process is frequently ignored under the current legislation. The current State Government has set about removing many of the effective controls which were historically built to protect workers from hazards, in an effort to make certain services more 'customer friendly'. In our rail system this has led to the removal of 'garrisons'. These are rooms used by rail staff to work from and oversee the activities on the concourse and around the station through CCT camera. Almost all garrisons have been removed and replaced with hubs, small stands/shelves that contain workstations. Staff are expected to stand and monitor the workplace throughout the day using the hub, while moving around the concourse greeting customers. This exposes the worker to all the potential hazards that exist on the concourse. Naturally this has led to an increase in abuse, violence and workplace stress for the workers affected. This is an example of a high-level control as per the risk management process being removed completely, effectively dismantling the capacity to eliminate a risk. Discussions with the PCBU have been difficult and the PCBU will not discuss the risk management process with the union.

Unions NSW strongly supports recommendation 27.

Safe Work Method Statements (Recommendation 29a & b)

Unions NSW supports recommendation 29 a & b.

Appendix A – Recommendations likely to have nil or minor impacts

Unions NSW supports all the recommendations of the Review of the Model Work Health & Safety Laws. We would be happy to participate in any further research or stakeholder engagement.