SAFE WORK AUSTRALIA

REVIEW OF THE MODEL WHS LAWS

2018

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I’m pleased to be able to provide the following comments on the model WHS legislation.

The comments are personal observations and suggestions drawn from 18 years’ experience as a Health and Safety Representative (HSR) in a science and technology group (of approximately 2000 staff and contractors) of a large Commonwealth Department.

My HSR activities include inspections, committee engagement at Division and the Site Executive levels, discussion with colleagues in my work group and various WHS managers and experts. I have a strong desire to streamline and improve WHS effectiveness and so provide feedback in support of continuous improvement of our risk assessment and WHS education materials and processes. I sometimes have been able to design better risk assessment tools which prompts the organisation to adopt them.

My professional work is as a Research Engineering Manager, where the work environment can have explosives, lasers, non-ionising r.f. emissions, chemicals and other hazards in laboratories, mechanical and electronic workshops. Our trials and experiments are conducted on land, sea, air and under-water. We work at heights, in tropical rainforests, remote dessert locations, temperate and low temperature places at times. Some of this work is done in collaboration with foreign services in other countries.

I have also been a union delegate with Professionals Australia representing staff in performance matters and other conflicts with management, where potential for psycho-social injury is a significant hazard.

Are the model WHS laws operating as intended?

This is largely true in my workplace.

We have high quality systems, audits, people and resources to run our systems well, generally.

Our staff are intelligent people, generally compliant and sensible about WHS and its value to staff and the organisation. What helps keep staff noticing WHS issues and responding appropriately is a small core of dedicated, qualified professionals. These WHS consultants are responsible for establishing and updating WHS systems and information and connecting with the Divisions' WHS Coordinators. These staff (generally) full time provide general day-to-day impetus on behalf of the Chief of Division to ensure staff are complying with requirements of the ACT, Regulations and intents of the relevant Codes and Departmental WHS policies and procedures.

With creeping responsibly changes during constant APS restructure, these critical people can become loaded with "extra" roles, duties etc.

Role-splitting (i.e. 0.4 WHS and 0.6 Admin Support) or staffing below a critical threshold can be a major impediment to WHS staff successfully fulfilling the intent of the legislation.

Workgroups

Some of our divisions span the country. Our workgroups are usually geographically based (one HSR for part of a Division occupying one building, and sometimes for staff from 2 or more divisions in the one building).

Flexibility in self-organising how HSRs represent workgroups is critical to having it adaptable to constant change with minimal complexity.

There have been occasions where being able to represent another work group member if invited has been very invaluable to protect workers' safety. This has happened where the regular HSR is unavailable or feels unable or uncomfortable to represent the workgroup in a conflicting situation with management. (e.g. where there are performance questions by management).

PINs

It is critical that PINs remain as a feature able to be raised by HSRs on behalf of staff where regular negotiation has failed to produce a safe result in a reasonable time.

I've only had to *threaten* to lodge a PIN to get effective resolution to long-standing serious WHS problems (and only three times in 18 years). It's a pity that it sometimes gets to that situation, and only happens because of responsibility for plant and sites occupied by our Group is split between Staff, our contractors, a maintenance contracting service, their sub-contractors and the Department landlord.

At the core of this resistance is a tension between desire to comply with WHS requirements and inadequate funding for routine maintenance of plant and the sites we occupy. We have a Departmental landlord with national expenditure priorities. Small works are (usually) routinely reported by staff and fixed quickly through reactive maintenance. A program of regular maintenance occurs for air conditioning plant, rodent baiting etc.

Sometimes minor repairs aren't reported by staff, the site maintainers aren't prepared (or required by contract) to do regular inspections" looking for trouble" and so when noticed, the problem is declared as something which has become a Departmental responsibility to fix.

Most professional Science and Technology (S&T) staff resent being required to do things that more properly are the responsibility of site maintenance contractors. Viz: drive around a secure site at night and mark the broken street and security lights, then accompany the sub-contractor during the day to those lights so they can be quoted for fixing.

It's sometimes the bigger problems (site street and personal security lighting) or falling light diffusers which get "stuck" because they end up in the National Minor or Major capital works process which can take years to resolve, have officers with nebulous responsibilities or authorities, and often have so many vacancies or new staff in roles that efficiency and effectiveness is affected.

Risk Assessment and Definition of "so far as is Reasonably Practicable "

Regarding the ACT's Explanatory Memorandum comment 72 on how to evaluate "reasonably practicable", the evaluation is still a fuzzy process with a circular definition:

> It is recommended to take into account:
> "likelihood of a hazard or risk occurring";
> consequence of what might occur if the hazard occurs;
> what might reasonably be known about the hazard or risk;
> available mitigations or eliminations.
> Only then consider cost.

It is noteworthy that this definition confuses a hazard event with its evaluated risk. It is common to use a Risk Evaluation Matrix with likelihood and consequence as inputs (in line with AS/NZS ISO 31000:2009 Risk Management for calculating risk)

Generally, the **consequence** is easy to provide a rubric for:

- Major might be "Life threatening injuries".
- Moderate might be "hospital treatment needed" and
- Minor might be "first aid"

Some of the matrices used have fuzzy definitions of what constitutes **likelihood**:

- Highly Likely (almost all the time) etc.
- Very Likely (probably will occur sometime)
- Likely (could happen sometimes)
- Unlikely (Might almost never happen)

It's not clear if it is required to calculate the *average risk* or *worst case risk*.

e.g. If the hazard and related facts are:

> "Cars driving with a 40 kph speed limit on a dark site hitting a pedestrian or other car. Some street lights need repair to work, and there are carpark lights pointing in driver's faces sometimes."

The likelihood is high that I don't hit anyone, and thus rare that I do.

If I do hit them, there is a low likelihood that they'll have a minor or catastrophic (death) injury and moderate likelihood of a modest injury (needing ambulance and check out in hospital).

The consequence varies from nothing to death, depending on the person, their age and agility and alertness, and what they hit if they fall over.

These evaluations are often conditional probabilities, where consequences have a distribution, and related probability.

In this case, depending on the matrix, the worst case might be a High Risk and the averaged events might result in a moderate or low risk.

If the cost to repair this individual light is about $5000 (if replacing old incandescent with LED lights), it would possibly be seen as reasonably practicable to repair it if we use a worst case, and not if the average is used.

It's very hard to see that it's reasonably practicable if we are talking about 50 lights needing replacement that could cost $250k, if we believe that the risk is low.

Risk Evaluation Matrix Design

A research paper I came across in the System Engineering space recommended a simplified 3x3 technical risk matrix, based on how humans typically evaluate risk. It suggested that we usually are competent to break an event's likelihood into "Unlikely"(almost never happens), Possible ("less than half the time") and Likely (more than half the time) categories. It doesn't make much sense to have 5x5 risk matrices unless there are very clear rubrics for each of the likelihood and consequence selections.

	Consequence/Impact		
Likelihood	Minor	Moderate	Major
Likely			
Possible			
Unlikely			

Overall TRA indicator: Red (high); Amber (medium); Green (low).

Reasonable Budgets

The definition and evaluation of "so far as is reasonably practicable" needs to be looked at in the context of the Department's budget, not a particular Group or Division. E.g. we can't keep all the specified street lights on at our site because it's not seen as a high enough priority given the site maintenance budget, or where it goes above some threshold and needs to be considered as part of a national site remediation program over years.

In this case, it could be a large impost to have it fixed with the site budget or it might "bump" other higher safety risks off the list to be fixed. In this case the Department can claim that it's not practicable to fix it, or that it needs to wait for a multi-year fix. If judged by the Department's overall budget, it's trivial to fix.

Involving inspectors

Clauses 81 (Resolution of health and safety issues) and 82 (Referral of an issue to regulator for resolution by inspector) work well, except that when approaching Comcare for assistance or advice, their focus has been on checking if the Department has policy that the legislation requires, and if they are following their own policy. i.e. they don't mediate or get involved on individual matters. I guess they do get involved in investigating matters after a serious accident occurs.

I've been told that they are open to receiving information, and can in some instances act on it, but they then can't let me know that they've done anything. This is disappointing and a disincentive to report troubling issues. Even knowing that they can act in this way is helpful.

Comcare have provided very useful guidance and suggestions at various times that I've contacted them. They seemed to have no interest in lobbying for changes to the act (i.e. about P-S injury prevention and reporting), citing that they are guided by the legislation. I would have hoped if the legislation itself was preventing workers from being kept safe, more would have been possible to change it earlier. Perhaps a PIN on the legislation would have moved things along sooner.

Areas of the Model WHS Laws that have resulted In Unintended Consequences

While the intention might have been that use of the term “PCBU” would make the act general and flexible, it’s resulted in some paragraphs being very tortuous and mind bending to read. Especially where describing shared responsibilities in an organisation or between organisations. Consequently, people setting out in establishing safe systems of work may be put off trying. i.e. the act could do to be more “plain language” or have a “plain language” version. I suppose that’s what the explanatory memorandum’s intention is.

Definitions of PCBU and Officer could use more definition, especially in government departments where I can be responsible for running a trial under directions or general policy as an executive, be the HSR and a worker in the trial.

The Privacy Act has been used by some managers as reason to not provide information about management decisions affecting a staff member, who has provided a release for that information. Even though I sought advice of the Department’s head Privacy Officer, I couldn’t resolve this matter. This area could do with some clarification, or improvement to ensure that the PCBU can’t hide the basis of their decisions behind an unreasonable privacy shield where staff health is involved.

Currently staff are directed to report broken plant and equipment, saving themselves the cost of having site maintainers routinely audit and repair. The result of spreading that responsibility across a thousand people is that few feel responsible to do it.

As part of the reason for doing written risk assessments it to be able to prove WHS diligence in court, the organisation endlessly risk assesses common events or repeated versions of the same event, but overlooks situations where there might be psycho-social (P-S) risks. This is largely because the ACT is silent on non-physical hazards and reporting same.

There are no rubrics for P-S injury reporting. PART 3 Incident Notification doesn’t cover serious stress levels reducing lifespan, or the value of workers reporting early symptoms which might lead to anxiety, burnout or depression. Comcare have reported that they have people front up with a P-S claim, with no previous history reported of incidents. If we don’t provide clear guidelines of what we want to track or identify in terms of low level hazards, staff won’t report, Comcare won’t require or provide for it in their mandatory reporting tool “Sentinal”.

Sub-clauses 7(3) and 19(5) says self-employed persons can be a PCBU and worker. It is not clear if contractors are self-employed or if self-employed relates to someone working on their solopreneur business at home. The definition of self-employed could be made clearer.

It is unclear how agencies protect contract workers going into a 3rd party’s-controlled area. I know that pressure is often put on the contractors to control the risks when they have no authority to do so in the places they visit. E.g. sign language interpreters attending a doctor’s surgery are supposed to ensure that they look after the ergonomics of the set-up to reduce repetitive strain injuries, but find it hard to ask to rearrange desks, chairs etc for their safety.

P-S Aspects of Performance Management vs Bullying, Reasonable Management Action

I have attended in a capacity as HSR some formal staff performance improvement (PIP and PEP) meetings where management were starting a formal review of a worker which intended to fix some performance problem and which could lead to demotion or losing their job. Management, knowing it is a stressful thing to go through offer the staff the usual support mitigations (website articles, EAP service for 4 sessions etc) and tell them they can have a "support person" in the room with them – who can not talk or represent. There has been strident resistance to my presence, even if invited by the staff member to raise on their behalf reasonable requests to mitigate stress hazards.

70 (1) e General obligations (to allow HSR into WHS related meetings) may not be broad enough if dealing with HR matter of performance which overlaps with WHS aspects.

Some HR management have not been aware that the Industrial Relations Act (and in fact our EBA) allows for the staff member to have a representative who can speak on their behalf in serious situation meetings. To deny workers that advice in such a situation I think is deliberately withholding a mitigation. Worse when this is pointed out and management still issue invitations to staff only mentioning allowing a silent "support person".

In these cases I've been unsure as HSR if, failing in negotiations with the Officers of the PCBU, I can put a PIN on the meeting, management or HR advisors in this case, as they haven't risk assessed the situation they're directing the worker into, and often ignore reasonable requests for mitigations which might reduce the staff member's exposure to stress or injury.

The silence on this aspect in the Act is troubling as many compliant APS staff look for guidance before acting – if there is none, they struggle to show initiative as it exposes them to possible criticism of wrong action.

Our EBA or WHS guidance describes it as "not bullying" when management take reasonable "performance management" actions. It's unfortunate that "reasonable" isn't better defined. It would be helpful if future versions of the Act, Regulations and Codes had more on this aspect. I have no problem with people having to perform reasonably in their work duties, but it is wasteful of much time and energy when performance matters turn to conflict.

I have met some wonderful senior managers who are very flexible and people oriented, and some who scare me, and who appear to subtly target 'difficult' staff to be removed. Unfortunately, the manipulators are intelligent, well trained people who know how to walk the line where they are not over-reaching their authorities. In effect, they appear to use their specialist qualifications and authority to convince independent performance delegates that staff should be able to perform certain functions where it is actually debatable. Such managers are widely known in the organisation as using embarrassment and belittling to get their way to a point where staff stop opposing them. They never do anything specific that can be seen in public and challenged, yet the accumulation of actions is demoralising, debilitating and unhealthy.

In these situations, the regulator can't be called in (management are following their policy) and because it's called a "performance issue" it can't be bullying. In one case a staff member was so affected by being required to do something technical that they weren't qualified to do, that they needed emergency medical response, twice on separate occasions. When I suggested having an educational psychology assessment done as a mitigation, I was told that could be done, but only after the PIP/PEP process had been completed (i.e. after the person was sacked, and this was then not done).

I don't know how this issue (the known high prevalence of sociopaths, psychopaths and narcissists in upper level management) can effective be addressed in legislation or Code of Practice, but it is an important thing to bring light to, and to strengthen the anti-bullying protection laws or codes of practice for manager selection.

Another subtle risk for P-S injury is the constant churning change associated with sometimes overlapping strategic reviews at APS, Department or organisation level, the quickly changing nature of topics we have to cover, and sometimes nebulous and complex tasking. When recruitment is frozen or difficult to do, and when structures are frequently altering, it's very easy to feel overloaded with responsibilities unmatched by resources, skill, authority or control. It's expected that we'll "make do", "do more with less" or even "less with less", but not be empowered to dump work that is no longer sustainable.

Requests for relief can be met with "well we're all stressed here too", or "this is the nature of the business now". I was recently so concerned about suicide risk in an adjacent workgroup which had shrinking staff numbers with expanding workload expectation that asked if they wanted me to intervene and speak to the CEO. With some prompting they approached senior management (who also had all been in acting roles) to reduce or delay workloads and hurry up some recruitment actions that were long overdue. Many men feel unable to speak up and say they don't like the pressure they constantly can't properly manage because they don't have the power to. These are suicide risks. Many agencies in our position have very low engagement rates (the proportion of people who enjoy and want to be at work) . I've been surprised that management rarely seem to see this as a WHS risk indicator of P-S sickness, or do anything directly about it.

Burnout, and the associated anxiety, depression and potential for suicide is a debilitating and preventable situation. It's not as clear and simple as falling hammers to monitor, report and fix, but it's (P-S injury) the area that needs some hard work to remedy. It leaves staff unmotivated, and debilitated at home after work. It robs families of staff's "best self" and means that the organisation is less than highly productive and safe.

The framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships

Generally, yes.

Working in a Commonwealth Department as a full-time worker means that my HSR role and other WHS duties as an employee are covered in work time.

As stated before, my Department has been in constant flux for 18 years that I've been there. The one thing that seems to adapt particularly well is the WHS aspect. New work groups and clusters of groups, and committees form and re-form. The main hassle is updating the new Division policies etc and where they are found.

I'm aware of some South Australian organisations which have hourly paid casual or part time workers. When management calls management meetings, these staff seem to be expected to attend in their own time, without pay. Some of their newly appointed HSRs are similarly not paid to do their WHS roles at the moment.

Some of these organisations appear to have put little effort into WHS training for workers, letting them know that they can have workgroups, HSRs, access to WHS policies, procedures and incident report forms etc. It's strange that this can happen given the length of time that the act has been in force.

The compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation

Yes. At one point our organisation had an enforceable undertaking based on poor chemical exposure management. The result was a focus on chemical safety, labelling training and use of ubiquitous chemical management software throughout the department. It is now a very carefully controlled aspect of our work.

I'm aware of some private organisations in SA and some acting nationally who don't seem to be aware of their obligations and possibly are breaching the act. I've raised this issue with relevant union organisers to raise with the companies concerned.

Perhaps advertising the impacts (loss of life and fines /gaol) on CEOs through the media might make more headway.

The consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes.

One of the very important cultural aspects of WHS that has been kept, while stiffening the responsibilities and penalties for the PCBU, is that of *focus on fixing problems, not the blame*.

I was concerned that the new penalties and opportunities to end up in gaol might create an atmosphere of covering up problems. In my organisation, WHS is seen as a very important component of our duties because it keeps us safe and able to return home at the end of a trial or day at work.

The committees are open places to raise and deal with issues at appropriate levels. They are chaired by senior managers (Executive level or SES) and our CEO has frequent messages of support or congratulations for jobs well done in this sphere.

One aspect I'd like to see more material / training / support for, is how to complain effectively. i.e. how to more strategically identify the person with the responsibility to do something about a problem and provide them with the advice or request in such a way that it is dealt with effectively the first time, instead of having a serious issue take literally years to circulate without resolve.

More examples of successful PIN use would be valued, anonymised stories of getting things wrong and right would be good.

These provisions and especially HSR powers need to stay and be advertised more widely. People at work don't respect when I'm investigating a failure or problem and want to limit me in sorting out a WHS issue. I'm asked "In what capacity are you asking questions." Where there's some confusion as to whether I'm wearing my union delegate hat or the WHS HSR one.

The HSR powers are necessary and valuable to find out what's gone or going wrong, and to identify how to keep things safe.

I'd like to suggest that HSR training be optionally expanded to include investigation training, negotiation, identifying narcissistic or sociopathic staff or leaders, protecting your reputation in the organisation in cases involving serious conflict.

It's hard to evaluate the impact on individuals who raise issues with management (where some HSRs are dealing with management nine levels above them APS 4 to SES). The awe and power factors gets in the way of some of these reps effectively raising concerns. Having more than just routine legislation review sessions and access to a HSR network to share advice or information would be useful.

In smaller organisations, I know that the job of HSR can be very difficult to balance conflicts of interest as unpopularity or conflict can result in fewer hours for casuals etc and be quite justifiable by management.

The *model WHS Regulations*, model Codes of Practice and *National compliance and enforcement policy* adequately support the object of the *model WHS Act*.

It's useful having general powers and protections in legislation, stable and changing slowly over time, with faster changeable codes and standards as needed to be developed in new industries or where new risks arise or are wanted to be controlled. It's useful as the "gold standard" in a code can be updated to industry best practice regularly.

More work needs to be done to publicise the excellent screening and assessment tools available to indicate how staff are travelling psychologically.

References

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