

**Submission
No 2**

**INQUIRY INTO WORK HEALTH AND SAFETY
AMENDMENT (REVIEW) BILL 2019**

Organisation: Police Association of NSW

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Submission of the Police Association of NSW



Inquiry into the provisions of the Work
Health and Safety Amendment (Review)
Bill 2019

The Police Association of NSW represents the professional and industrial interests of all sworn police officers in NSW.

The physical and mental health and safety of our members and their families is of the highest importance to the PANSW, so we welcome the opportunity to contribute to this Inquiry.

We acknowledge the objects of the Work Health and Safety Amendment (Review) Bill 2019 includes implementing "*proposals based on recommendations made by the 2018 Review of the model Work Health and Safety laws: Final report (the 2018 Review)*"

We support the recommendations of the 2018 Review.

The overall effect of the Work Health and Safety Amendment (Review) Bill 2019 will make improvements to the regulation of WHS in NSW.

We therefore support the Bill and applaud the Minister for its introduction.

We do note there are a number of Recommendations from the 2018 Review which are not implemented by this Bill, some of which represent important improvements to WHS regulation. Most importantly for police officers in NSW, the recommendation regarding psychological health is not addressed in this Bill.

In the Second Reading Speech, the Minister acknowledged this, and identified the reason; further consideration needs to occur at a national level before it is clear what form the implementation of those Recommendations will ultimately take.

Acknowledging the Minister intends to delay certain amendments until it is clear what form such amendments to the model Act will take, we would strongly urge this Committee to consider and make recommendations regarding the issues from the 2018 Review not addressed in this Bill, to ensure commitment by the NSW Parliament and NSW Government to the forms of implementation that best protect the physical and mental health and safety of workers, including police officers, in NSW.

We have also identified a small number of minor changes to this Bill which we submit would improve its operation.

We thank you for your consideration of our submission and are happy to provide anything further if we can be of use.

Tony King

President

Police Association of NSW

Addressing psychosocial risks

Mental health, and the effect of work on mental health, has become a major concern in Australia. The effect of work on a person's mental health can impact severely on their quality of life, and work-related psychological injury can be devastating for a worker and their family.

For individuals, the deleterious impact on quality of life, and the costs associated with treatment and reduced ability to work is immense. For employers, the economy and our society at large, the loss of valuable members of the workforce, contributors to the community, the loss of productivity, and cost of claims and treatment is significant.

One study cited in the 2018 Review estimated "the total economy-wide cost of workplaces with poor 'psychosocial safety climates' to be approximately \$6 billion per annum and the total cost of depression to Australian employers through presenteeism and absenteeism to be approximately \$6.3 billion per annum."¹

The severity and costs of a psychological injury is typically far greater than for a physical injury.

These problems are particularly true for police officers and other emergency service workers. Studies consistently find that police and emergency services workers have higher rates of psychological injury than the broader population.² Safe Work Australia current lists police as the 2nd highest occupation unit group by rate of claims for mental health conditions, with other emergency service workers also amongst the highest rates.³

As a result of this, emergency service agencies around Australia, including the NSWPF, have made a concerted effort to improve their response to psychosocial injuries arising from work.

That increased effort is commendable, but, like many workplaces around Australia, those efforts are failing to make significant positive impact on the rates and severity of psychological injury and the impact on emergency service workers and their families.

Specific to the NSW police officers, injury trends show a pattern of:

- increases in the number of psychological injuries, and
- large increases in the severity of those psychological injuries (demonstrated by time off work, cost of compensation claims, and the number of medical discharges from the police force).

It is discouraging to police officers, and no doubt to senior management who are making genuine attempts to address the consequences of psychological injuries, that as effort and awareness of the importance of mental health in workplaces increases, this is not translating into better outcomes for the mental health of police officers.

The PANSW submits that this is in part due to the strategies utilised for psychological injury typically responding to the *consequences* of psychosocial risks eventuating, rather than successfully controlling those risks to begin with.

¹ 2018 Review, page 34, citing M Dollard & H Becher (2016), "Psychosocial safety climate and better productivity in Australian workplaces", University of South Australia, p 8.

² *Expert Guidelines: Diagnosis and Treatment of Post-Traumatic Stress Disorder in Emergency Services Workers*, Varker et al. (2017) "Research into Australian emergency services personnel mental health and wellbeing: An evidence map", *Australian & New Zealand Journal of Psychiatry*.

³ <https://www.safeworkaustralia.gov.au/topic/mental-health>

There is a high degree of WHS expertise and competencies in identifying, assessing, controlling and monitoring risks, and designing safe systems of work in relation to *physical* injuries, but many PCBUs are failing to translate those skills to psychosocial risks.

For a large number of police, work continues to be a psychologically damaging experience. The impacts of this on individual police officers, their families, and the NSWPF are significant:

- Officers suffer severe and long-term harm from psychological injuries,
- The recovery time and time off work is often long,
- Their health and financial security, as well as that of their family members, are adversely affected,
- The NSWPF is losing more human hours each year to injury leave and sick leave,
- The cost of insurance and compensation claims is a significant burden on the NSWPF and State Government budget, and
- Almost all medically discharged police officers are discharged due to psychological injuries, causing a significant loss of experience and cost to the NSWPF.

Police officers are exposed to dangerous and traumatic incidents (external factors) more than most other workers. However, while this elevates the risk of psychological injury, the primary causes of psychological injuries in police officers are internal/organisational factors, such as work intensification, workplace conflict, lack of job control and burnout.

This is true for the broader population as well; Safe Work Australia identifies work pressure and work-related bullying/harassment as the top causes of mental stress.⁴

This shows that the factors that are most commonly causing psychological injury are well within the control of employers, if employers could improve their expertise and capacity to address internal risks to the mental wellbeing of their workers.

The PANSW submits that the patterns described above demonstrates the difficulty workplaces around Australia, including the NSWPF, have had in translating skills and expertise in WHS approaches to physical risks into addressing psychosocial risks, in particular those internal/organisational risks.

Recent analysis of psychosocial factors in emergency services and the interaction with the WHS regulatory framework has demonstrated a large gap between expected practice on the part of emergency service organisations, and what is considered compliant with WHS obligations.

The Parliamentary Inquiry into Emergency Services agencies was, amongst other things, assessing emergency services agencies' strategies to address psychosocial risks associated with bullying and harassment.

The Inquiry found that bullying and harassment was widespread in emergency service agencies, and that the actions and inaction of these agencies was not only failing to control these risks, but in many instances exacerbating the risk and the harm caused by those risks.

At the same time, the Committee also heard from Safe Work NSW that it had assessed these agencies as compliant with their obligations under WHS legislation and regulations.

The Committee heard evidence from experts in workplace psychosocial risks and management of psychological injury that there was a significant gap between competently utilising WHS risk

⁴ <https://www.safeworkaustralia.gov.au/topic/mental-health>

mitigation principles to protect workers from psychosocial risks, and compliance with the existing legislative and regulatory framework.

The Committee's findings were consistent with this evidence, stating:

... We are also surprised that SafeWork NSW accepts that each of the five emergency services agencies are meeting their compliance under the legislation, given the evidence we have seen during this inquiry. We acknowledge that SafeWork NSW's role is to ensure compliance with the legislation, however if the regulator is only auditing the policies and procedures and dealing with senior management, then this level of monitoring appears to be somewhat inadequate.⁵

We submit that the current obligations created by the Model Act and Regulations are inadequate to protect workers against harm from psychosocial risks and the elimination or minimisation of psychosocial risks arising from work. There is clearly a significant divergence between the strategies necessary to protect workers from psychosocial risks, and levels of compliance enforceable by regulators within the current framework.

Seeking to address issues such as those described above, the 2018 Review made the following recommendation:

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

The 2018 Review identified that the majority of stakeholders critiqued the current form of WHS laws as inadequate in addressing psychological health.

The review also identified that:

- “many employers find managing the risks to psychological health difficult. Most feel that they lack the requisite expertise”,⁶ and
- PCBU's, in particular small businesses, “wanted more prescription and practical guidance to help them identify and manage psychosocial risks and hazards.”⁷

In summary, the status quo regarding the mental health of workers is:

- Psychological injuries are increasing in frequency and severity,
- They are predominately caused by internal/organisational risk factors, rather than external factors,
- Workplaces around Australia, including emergency service agencies, have made a concerted effort to improve their response to psychological injuries, but have been unsuccessful in controlling risks and improving the injury trends and rehabilitation prospects,
- Existing obligations under the WHS Act and Regulations are inadequate to rectify this, and
- An extensive review of the WHS legislation recommended amending the Regulations to specifically address these deficiencies.

⁵ Portfolio Committee No. 4 – Legal Affairs, Inquiry into Emergency services agencies, Report, July 2018, para 2.99, page 36.

⁶ 2018 Review, page 31.

⁷ 2018 Review, page 33.

Clearly expressing obligations relating to psychosocial risks in the WHS Model Regulations would assist PCBUs in understanding their obligations, utilising WHS competencies and expertise to apply to psychosocial risks, and therefore devise better processes to identify, assess, control and monitor psychosocial risks.

The PANSW believes Recommendation 2 of the 2018 Review would make a significant contribution towards this improvement. We strongly support an extensive implementation of the objectives of Recommendation 2.

Implementation of Recommendation 2

Safe Work Australia conducted a regulatory impact assessment process regarding the 2018 Review, including Recommendation 2. It released a Consultation Regulation Impact Statement on 24 June 2019. The Decision Regulation Impact Statement is now with WHS ministers for their consideration and decision, and at time of writing this submission was not publicly available.

The Consultation Regulation Impact Statement proposed 2 options for the implementation of Recommendation 2:

1. Option 1 - Status quo, with additional guidance material such as the recently published Safe Work Guide: *Work-related psychological health and safety: A systematic approach to meeting your duties*.
2. Option 2 - Include requirements for managing psychosocial risks in the model WHS Regulations.

For the reasons provided below, the PANSW considers Option 1 to be inadequate and strongly supports Option 2. Whilst we are not yet aware of the outcome of the regulatory impact assessment, in the opinion of the PANSW, the Consultation Regulation Impact Statement (CRIS) showed a strong preference on the part of Safe Work Australia towards Option 1 (if this is a misinterpretation of the CRIS, we apologise for the inaccurate representation of that document). If this is indeed the outcome of the regulatory impact assessment, and the option ultimately implemented in NSW the PANSW, like all workers around Australia, would be extremely disappointed.

The practical impacts of Option 1 would be the continuation of approaches to psychosocial risks that are failing to adequately protect workers. Responses to psychosocial risks will continue to suffer from an inability to translate WHS competencies in physical risks to the psychosocial space, and workplaces will continue to introduce programs which deal with the consequences of psychosocial risks, rather than control those risks.

These programs will likely become more effective over time as shared knowledge develops best practice, but psychosocial risks will continue to arise without sufficient control strategies, so work will continue to be dangerous to the mental health of workers (albeit with improved strategies in place to respond to the consequences of that harm).

The practical impact of Option 2 would be more beneficial to the safety and wellbeing of workers.

The Regulations envisioned in Option 2 should include clearly worded and concrete obligations relating to identifying, assessing, controlling and monitoring specified psychosocial risks, including organisational risks. This should include specific processes to comply with these obligations.

This would resolve the difficulty PCBU's, including the NSWPF, have had in applying WHS obligations to psychosocial risks or in translating the WHS framework and competencies to strategies for dealing with psychosocial risks in practice.

The practical effect we would hope to see of such Regulations would be to cause the NSWPF to develop systematic processes to:

- Assess the risk of work intensification and burnout, and define job roles and work expectations accordingly,
- Ongoing workforce planning to ensure work demands and capacity are balanced,
- Incorporating WHS competencies in relation to psychosocial risks as a core component of position descriptions for any role with supervisory or managerial obligations, creating accountability mechanisms for performance of these functions, and balancing operational performance indicators with those functions,
- A balancing of commitment and prioritisation on the part of all supervisory, managerial and senior executive positions to operational expectations, expected workload, and the health of personnel in the NSWPF,
- Regular assessment of the risk of workplace conflict within workgroups and controlling those risks through management of workgroups, rather than mere policy level statements,
- Increase availability of flexible work arrangements, and
- Increase the use of reasonable adjustments to positions to enable injured officers to continue meaningful work without suffering exacerbation of injury.

As identified above, the NSWPF has made concerted efforts to develop and implement programs designed to improve the physical and mental health of police officers and their families. While program level evaluations have all been positive, and these programs have benefitted individuals who have participated in them, we are yet to see this translate into a measurable impact at an organisational level.

The practical impact of Option 2 represents the fundamental reform needed to protect police officers from psychological injury.

The Safe Work Australia *Consultation Regulation Impact Statement* identifies the following practical effects which it suggests support the adoption of Option 1 rather than Option 2:

- **The WHS Act already encompasses psychological health** - the primary duty of care in s 19 of the model WHS Act already requires a PCBU to protect the psychological health of workers and other persons.
- **Guidance material published since the Boland Review may address the intent of Recommendation 2** - Safe Work Australia has now released national guidance on managing risks to psychological health called *Work-related psychological health and safety: A systematic approach to meeting your duties* (the Guide).
... The Review Report was finalised before implementation of the Guide and many of the initiatives of WHS regulators in relation to psychological health. It may be the current status quo that includes the Guide (which was not the status quo at the time consultation for the Review was undertaken) would, at least partly, address the problem of practical guidance for stakeholders.
- **Management of psychosocial risks is a relatively new area in work health and safety** - The status quo would allow evaluation of the state of knowledge on management of work-related psychosocial risks and how it can be best applied in practice. This would support development of evidence-based actions to improve management of work-related psychosocial risks.

- **Obligations should remain broad and principle-based to allow flexibility** - WHS laws are designed to allow flexibility for workplaces to develop an approach that is best for their workplace, supported by more detailed requirements for specific high-risk matters.
... Some businesses, particularly larger businesses with the resources to develop and implement their own safety management systems, prefer flexibility in how they can manage risks to achieve the best outcomes for their workplace.
- **The impact of regulations envisioned by Recommendation 2 could have little impact** - If broad principles-based regulations are introduced then the impacts may be minimal, as they would do little to add to the current duties under the model WHS Act that already require a PCBU to ensure the psychological health of workers.
- **Compliance with the regulations envisioned by Recommendation 2 could be costly** - Prescriptive regulations could have significant impacts. Depending on the nature of the methods prescribed, this may impose additional compliance costs on PCBUs.

We respond to each of these arguments below:

The WHS Act already encompasses psychological health

While the primary duty of care in s 19 of the model WHS Act already requires a PCBU to protect the psychological health of workers, we submit that the psychological harm workers are suffering, the evaluation of many PCBU strategies to address psychosocial risks, and the assessment of many such employers to be compliant with their WHS obligations indicates that the current expression of obligations is inadequate to achieve the practical implementation desired.

The large majority of the literature and experience the PANSW has accessed in the course of its WHS functions with its members:

- Identifies that PCBUs would benefit from further clarification on how to implement WHS principles to address psychosocial risk,
- The Act and Regulations insufficiently utilises and defines terms and obligations relating to psychosocial risks and strategies to identify, assess, and control and monitor these risks,
- The result of the absence of express obligations relating to psychosocial risks is that PCBUs misunderstand their obligations and are applying the legislation inconsistently when compared to physical risks,
- Including specific obligations regarding psychosocial risks would assist inspectors to enforce practical workplace changes,
- The majority of stakeholders are in favour of expressly establishing such definitions and obligations in the Regulations, in accordance with Option 2.

We therefore submit the status quo is inadequate, even though the primary duty of care already encompasses psychological health.

Guidance material published since the Boland Review may address the intent of Recommendation 2

The PANSW submits that non-binding guidance material is insufficient to address the current failure of many PCBUs to adequately address psychosocial risks and protect their workers from psychological harm.

The 2018 Review also directly addressed the implementation of Recommendation 2 in light of the Guidelines, stating:

“This national guidance has been well received, and I recognise that it may satisfy some stakeholders’ calls for practical guidance on managing psychological health in the workplace. However, most stakeholders were aware that guidance was being produced, yet they still

argued that psychological health should be dealt with in the model WHS Regulations or Codes to ensure that duty holders have a clear legislative framework within which to manage psychological health issues.”⁸

The PANSW believes clearly expressed obligations, that can be incorporated into PCBU’s day-to-day operations, are required to address the significant psychological harm police officers are suffering as a result of their duties.

Management of psychosocial risks is a relatively new area in work health and safety

The PANSW submits the relatively recent development of understanding and evidence regarding management of psychosocial risk supports the necessity of regulations as envisioned by Recommendation 2, rather than negating it.

With many PCBUs finding it difficult to determine the practical steps they should take to address psychosocial risks, the answer is for the legislative framework and the Regulators to provide leadership, clarity and definitively expressed obligations to assist those PCBUs.

Obligations should remain broad and principle-based to allow flexibility

The current psychological harm resulting from work is occurring in a context of PCBUs being given the flexibility to develop their own tailored strategies to manage psychosocial risks and meet general obligations.

This approach to flexibility is failing.

PCBUs, including the NSWPF, are developing strategies to address psychosocial injury, but in many cases, these are failing to have the effect desired.

Consistent obligations are needed.

If the ability of individual PCBUs to develop tailored strategies and reduce psychological harm catches up and then exceeds the standard prescribed by the regulations, then perhaps the regulations should be revisited if and when that occurs. But in the current context, we do not believe strategies developed in a framework of flexible responses to general obligations have had sufficient success to warrant inaction on Recommendation 2.

As identified above, we consider the NSWPF to have made considerable efforts to improve the psychological health of NSW police officers within the context of broad obligations that allow flexibility. Despite the suite of programs developed within this flexible framework, injury patterns indicate limited success at an organisational level.

It is time for the WHS framework to prescribe clear, specific obligations that relate to practical process the PCBUs must implement.

The impact of regulations envisioned by Recommendation 2 may have little impact

If the regulations developed in response to Recommendation 2 are simply broad, principle-base restatements of the interpretation of existing obligations, then this may reduce the practical impact of the regulations.

Therefore the PANSW submits the Regulations should be specific, detailed, and cover the full range of psychosocial hazards, and processes to ensure they are identified, assessed, controlled and monitored.

⁸ 2018 Review, page 35.

Compliance with the regulations envisioned by Recommendation 2 could be costly

If compliance with such regulations is costly, that is only a reflection that the PCBU is not meeting its obligations and is failing to protect its workers from psychological harm.

If such cost is indeed a significant burden on PCBUs, this is appropriate. The burden of psychosocial risks should no longer be so heavily borne by workers who suffer psychological injury, often with severe consequences.

Studies are also demonstrating the return on investment for employers who invest in the mental health of their workers, through increased productivity, better retention, and lowered leave and insurance costs.

The Act and Regulations encompass psychological harm, and improvements have been made, but there is still significant psychological harm caused by work, and psychosocial risks that remain largely unaddressed by PCBUs. This reflects an inadequacy in the current legislative and regulatory framework that Recommendation 2 is seeking to rectify.

Option 2 is the only adequate option

We believe Recommendation 2 is necessary to bring WHS obligations in line with what PCBUs should be doing to protect their workers from the psychosocial risks arising from their work.

The 2018 Review conducted extensive consultation and made Recommendation 2 based on the findings of that extensive consultation. Recommendation 2 is consistent with the bulk of the literature assessing the WHS framework, and the views of stakeholders.

Recommendation 2 should be implemented, resulting in clear, specific and extensive obligations ensuring PCBUs identify, assess, control and monitor psychosocial risks.

The 2019 Bill and this Inquiry

We acknowledge that there is a process to go through at a national level in relation to the model legislation, not within the direct control of the NSW Parliament nor NSW Government.

However, for the sake of police officers and their families, we would expect the NSW Parliament and NSW Government to:

- Advocate in those national discussions for a position consistent with the intent of Recommendation 2 as discussed above, and
- Implement Recommendation 2 (as discussed above) in NSW even if the model legislation fails to do so.

To the extent this Committee can make a recommendation that would contribute to that objective, we strongly request you consider doing so.

Minor Amendments to the Bill

Section 72

Schedule 1[6]-[10] make amendments to section 72.

We support the intent of those amendments.

However, we believe the drafting of the amendments has an unintended consequence.

Currently, a PCBU has obligations under certain subsections (1), (2) and (4). Those obligations are dependent on consultation and agreement between the HSR and the PCBU. If agreement is not reached, an Inspector can decide the matter.

Failure to comply with decision of the Inspector may attract a penalty under subsection (7).

The proposed amendment to section 72 means that fewer of the obligations to facilitate access to training will be disputed (which is a positive outcome) but this has the unintended consequence of meaning the penalty provision apply to almost none of those obligations (as an inspector will no longer make a determination enlivening the penalty provisions).

We believe the amendments to section 72 should be redrafted to rectify this. One option would be to apply the penalty provision to each obligation, rather than only to those matters on which an inspector makes a determination.

Section 231

Schedule 1[16] amends section 231 to extend the timeframe in which a person can make a written request to the regulator that a prosecution be brought from 6 to 12 months, to 6 to 18 months.

Again, while a positive amendment, Recommendation 24 of the 2018 Review was to *remove* the 12-month deadline, rather than *extend* the deadline.

The PANSW submits the removal, rather than extension, of the deadline is appropriate:

- To remove unnecessary impediment to a person making such a request, and
- Given that limitation period for offences can be 2 years (as referred to in the 2nd Reading Speech) but can also be longer if certain circumstances described in section 232 are present.