

**Submission  
No 1**

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

**Organisation:** NSW Government

**Date Received:** 31 January 2020

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# **Response to the Legislative Council Inquiry into the Work Health and Safety Amendment (Review) Bill 2019**

**NSW Government**

February 2020



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# 1. Introduction

The NSW Government welcomes the opportunity to provide a submission to the Legislative Council Inquiry into the provisions of the *Work Health and Safety Amendment (Review) Bill 2019 (the Bill)*.

The NSW Government strongly believes that every worker in NSW should come home safely at the end of the day. The Bill introduces reforms that will assist workers in NSW to have healthy, safe and productive working lives, as well as ensuring that the offence provisions in the *Work Health and Safety (WHS) Act 2011 (the WHS Act)* better enable prosecution of the most serious WHS offences.

The Bill was introduced by the NSW Government to the Legislative Assembly on 12 November 2019 by the Minister for Better Regulation and Innovation and is due to be debated in early 2020. It takes forward 12 reforms that are based on those proposed by a national review of the model laws in 2018.

Determination and full implementation of the outcomes of the 2018 national review will take time, including legislative changes. The NSW Government is of the view that the NSW community should not need to wait for the benefits of the review to be realised while the national process, that is considering the recommendations, is still underway. If harm and serious injury to workers and the impacts on the broader community can be prevented or the risk minimised by taking action to improve compliance with the WHS laws, then this should be done as soon as possible.

This submission provides further information about the amendments contained in the Bill and the anticipated benefits for workers, businesses and the broader NSW community.

## 2. Policy Context

### How work health and safety is regulated in Australia

Work health and safety (**WHS**) is regulated in Australia under a harmonised framework underpinned by a risk prevention approach. Harmonisation involves a set of 'model' WHS laws (an Act, Regulation and Codes of Practice) underpinned by an Intergovernmental Agreement. The model laws are implemented in each jurisdiction through its own laws. The WHS Act commenced in NSW on 1 January 2012.

The Commonwealth and most States and Territories have enacted the model WHS legislation, except for Victoria and Western Australia<sup>1</sup>. There are some differences in the approaches across the jurisdictions but overall there is support for harmonised WHS laws.

Safe Work Australia (**SWA**) is the statutory body established to develop national WHS policy and has responsibility for maintaining the model laws. All jurisdictions are members of SWA along with representatives from employers and employees.

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<sup>1</sup> The Western Australian Government introduced a Work Health and Safety Bill 2019 into Parliament in late 2019 with the aim of moving closer to the model WHS laws. This Bill has not yet been passed.

In NSW, the WHS Act is risk-based legislation that has the primary objective of securing the health and safety of workers and workplaces through the elimination or minimisation of risks arising from work.<sup>2</sup> The WHS Act creates a strong framework to assist business to manage risks in their workplaces by requiring that risks to health and safety be eliminated or otherwise minimised through an assessment of the risks in a workplace, and use of control measures to create a safer workplace.

The NSW Government is committed to a harmonised WHS regulatory framework. The harmonised framework has had many benefits for NSW businesses, particularly enabling those that operate across NSW borders to apply a consistent approach to WHS issues regardless of their location.

The risk-based approach which underpins the WHS regulatory framework supports WHS regulators to act when risks to health and safety are identified, enabling prevention activities and interactions that build business capability, as well as compliance and enforcement activities, where required. The risk-based approach also recognises that businesses of different sizes and experience will have different risk profiles across industries and even between different workplaces within the same industry. This allows WHS regulators to approach businesses and assess compliance with the WHS legislation without a one size fits all mindset.

In NSW, the WHS regulators are:

- SafeWork NSW – who is responsible for regulating WHS at all NSW workplaces except for mining workplaces; and the
- NSW Resources Regulator – who regulates WHS at mines and petroleum sites.

Both regulators use a graduated approach to secure compliance with the WHS Act. For example, SafeWork NSW's document '*Our Approach to WHS Regulation*'<sup>3</sup> outlines the flexible approach that is taken when working with duty holders to prevent harm and improve the safety landscape within NSW. It demonstrates the use of the graduated compliance approach available to inspectors when responding to workplace incidents and requests for service. The risk-based approach also enables SafeWork NSW to focus their efforts on the areas with the greatest risk and to use an evidenced based compliance approach. This enables SafeWork NSW to conduct its prevention, compliance and enforcement activities with the aim of promoting a competitive, confident and protected NSW with workers who have healthy, safe and productive working lives.

## **2018 Review of the model WHS laws**

The model WHS laws are required to be reviewed every five years to ensure that they are working as intended. In 2018, an independent review was conducted by Ms Marie Boland, who was appointed by SWA.

The review involved extensive consultation with stakeholders across Australia, including NSW. Ms Boland met with stakeholders including regulators, businesses, workers, families, unions, industry organisations, academics, health and safety practitioners and community organisations, holding consultation sessions in every capital city and regional areas. Ms Boland's review received over 100 written submissions. In June 2019, SWA released a Consultation Regulatory Impact Statement (CRIS) on the recommendations made in Ms Boland's final report. It received

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<sup>2</sup> Section 3, Work Health and Safety Act (NSW) 2011. <https://www.legislation.nsw.gov.au/#/view/act/2011/10/part1/div2/sec3>

<sup>3</sup> SafeWork NSW 'Our Approach to work health and safety Regulation' (SW08027 0218) [https://www.safework.nsw.gov.au/\\_data/assets/pdf\\_file/0008/108368/SW08027-Our-approach-to-work-health-and-safety.pdf](https://www.safework.nsw.gov.au/_data/assets/pdf_file/0008/108368/SW08027-Our-approach-to-work-health-and-safety.pdf)

102 written submissions. WHS regulators in NSW made a submission to the CRIS on 23 August 2019. All submissions are now published on the SWA website.

The NSW Government acknowledges the rigorous public consultation processes that have occurred over the last two years. The NSW Government had regard to the issues identified by Ms Boland in her review and the 34 recommendations that were made in the review's final report<sup>4</sup> (the **2018 National Review Report**). On this basis, the NSW Government identified those proposals that it believed needed to be expedited because of the potential for these proposals to contribute early to the prevention of workplace deaths, provide support for workers and their families during WHS investigations, streamline investigation processes and clarify the WHS laws which could be commenced prior to the completion of the national process. A Better Regulation Statement on the proposals was developed that assessed the impacts of the proposals. This is publicly available on the Safework NSW website.

WHS ministers at a national level are likely to consider the decision regulatory impact statement this year and after that, amendments to the model law are anticipated to occur at a national level. The NSW Government is supportive of this national process but is mindful that it will take time. Any changes to the model law, if agreed to by WHS ministers, are unlikely to occur before the end of 2020. If changes are made, each jurisdiction will then be required to enact these changes in their respective WHS legislation.

The NSW Government is of the view that early action is necessary so that workers and others in NSW do not continue to be affected by those issues identified by the 2018 national review while the national process is underway. Moving forward with the Bill ahead of the national process does not affect the NSW Government's commitment to harmonisation. The NSW Government continues to engage in discussions in the national process. Should the amendments in NSW differ substantially from the approach that is subsequently taken to the model WHS laws, the NSW Government will have the opportunity to consider these differences. This means in the long term that NSW will remain aligned with the spirit and intent of the national framework.

## **NSW work-related fatality and serious injury rates**

The 2018 National Review Report found that overall, the WHS Act is working as intended. It has been effective in creating safer workplaces by helping businesses to manage workplace risks.

National targets set out in the *Australian WHS Strategy 2022* and which the NSW Government committed to in 2012 have already been exceeded in NSW – these were a 20 percent decline in work related fatalities; and a 30 percent decline in the incidence rates of claims for serious injuries and illnesses; and a 30 percent decline in the incidence rates of serious musculoskeletal injuries and illnesses respectively. In response, in 2018, NSW set its own more ambitious targets to achieve, by 2022, a 30 percent reduction in work-related fatalities; a 50 percent decline in the incidence rates of claims for serious injuries; and a 50 percent decline in the incidence rates of

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<sup>4</sup> Review of the model WHS laws final report, December 2018.

[https://www.safeworkaustralia.gov.au/system/files/documents/1902/review\\_of\\_the\\_model\\_whs\\_laws\\_final\\_report\\_0.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf)

illnesses and serious musculoskeletal injuries and illnesses to further drive down the numbers of people killed or seriously injured in NSW.<sup>5</sup>

Despite these improvements, work-related fatalities and serious injuries continue to occur. In 2018, 47 work related fatalities occurred in NSW, and 61 people were fatally injured in the previous year.<sup>6</sup> Workplace injuries also impact the lives of NSW citizens with 32,998 serious injury or illness claims accepted in 2016-2017.

## Other related inquiries

The 2018 Commonwealth Senate inquiry report into industrial deaths, entitled '*They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*' (the **Senate Report**),<sup>7</sup> highlighted the devastating impact that work-related fatalities have on families. The Report identified several issues around the incident investigation process and prosecution of workplace deaths. It made recommendations for WHS regulators to resolve these issues. The NSW Government has considered these recommendations in developing the Bill and anticipates that it will contribute to decreasing the impacts identified in the Senate Report.

## 3. Information on the reforms

The underlying objective of the Bill under consideration is to strengthen the WHS Act's objective of protecting workers and others from harm arising from work in NSW. It does this by amending the WHS Act to accelerate the implementation of 12 proposals based on recommendations from the 2018 National Review Report. The information below explains the Bill's reforms and the intended benefits.

The 2018 National Review Report made two recommendations relating to potential reforms to the most serious WHS offence provisions. The NSW Government has proposed to adopt Recommendation 23(a) of the National Review Report.

### Amendments to address workplace deaths

The risk-based preventative framework of the WHS Act must be supported by strong incentives for both persons conducting a business or undertaking (**PCBUs**) and workers to comply with the law. To that end, the Bill contains four reforms to strengthen the deterrence power of the WHS Act and encourage a strong health and safety culture in NSW workplaces.

#### Enhancement of the Category 1 offence

A critical proposal in the Bill is the amendment of section 31 of the WHS Act to make it easier to prosecute the most serious WHS offence, that is the Category 1 offence.

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<sup>5</sup> SafeWork NSW 'Work Health and Safety Roadmap for NSW 2022', revised August 2018, pg 3  
[https://www.safework.nsw.gov.au/\\_data/assets/pdf\\_file/0006/99123/whs-roadmap-revised-aug-2018-SW08067.pdf](https://www.safework.nsw.gov.au/_data/assets/pdf_file/0006/99123/whs-roadmap-revised-aug-2018-SW08067.pdf)

<sup>6</sup> SafeWork Australia, 'Work Related Traumatic Injury Fatalities, Australia 2018' pg 28  
[https://www.safeworkaustralia.gov.au/system/files/documents/1911/work\\_related\\_traumatic\\_injury\\_fatalities\\_report\\_2018-.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1911/work_related_traumatic_injury_fatalities_report_2018-.pdf)

<sup>7</sup> Commonwealth Parliament report, 'They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia' 2018  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/IndustrialdeathsInAus/report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsInAus/report)

Currently, a Category 1 offence is committed when a duty holder recklessly exposes a worker or other person in the workplace to a risk of death or serious injury or illness. Experience has shown that it is extremely difficult to prove 'recklessness' as there must be evidence that a person had an actual knowledge of a risk and consciously disregarded it. The 2018 National Review Report found that WHS regulators have been hampered in their ability to bring Category 1 prosecutions due to its evidentiary threshold. In NSW since the WHS Act came into effect, there has only been one prosecution for a Category 1 offence brought by the Resources Regulator. Instead, prosecutions are generally brought as Category 2 offences, which attract a lower penalty, and which involve fault elements that are more readily able to be proved.

The Bill proposes to amend section 31 of the WHS Act to include a fault element of 'gross negligence'. In common law, a person is grossly negligent when their behaviour falls so far short of what is reasonable and involves such a high risk of death or serious injury that it requires criminal punishment. It is intended that the existing common law will provide guidance to the courts on interpreting the amended provision.

This amendment will make it easier for WHS regulators to prosecute grossly negligent duty holders who expose workers and others in the workplace to a risk of death or serious injury/illness. As with the current Category 1 offence provision, it will be available regardless of whether a person is fatally injured or not.

Enhancement of the Category 1 offence is consistent with the risk based preventative framework that underpins the WHS law. The offence is not reliant on the outcome of a serious injury or death occurring. This will enable WHS regulators to prosecute in instances where there is a risk of these outcomes before they occur.

This strengthens the real deterrence value of the offence because it will make clear to a duty holder that they may be prosecuted if they expose their workers or others in the workplace to the risk of death or serious injury by engaging in grossly negligent work activities regardless of whether an injury or death is sustained.

### *Industrial manslaughter*

The NSW Government notes that some jurisdictions such as Queensland and the ACT have industrial manslaughter offences in place. Other jurisdictions such as Western Australia, Victoria and the Northern Territory have introduced or passed Bills with industrial manslaughter offences. All apply or propose different models of the offence. Some place these offences in the WHS framework while others appear in their respective general criminal legislation.

The ACT has had an industrial manslaughter offence since 2004. No prosecutions have been made under the offence in the ACT. Queensland's industrial manslaughter offence was introduced in 2017. One prosecution is underway in Queensland but is not yet finalised. In NSW, an industrial manslaughter type offence called 'reckless conduct causing death at a workplace' was introduced in 2005 and repealed in 2011. It was never prosecuted.

There is no evidence of successful prosecutions of this offence. There is also no evidence from other Australian jurisdictions that industrial manslaughter has deterred non-compliance with WHS laws or prevented risks that can lead to deaths or serious injuries in the workplace.

The NSW Government recognises the existence of manslaughter provisions in the *Crimes Act 1900*. It does not appear commonly understood that these provisions are available for consideration in the context of industrial deaths. As per below, the Bill draws attention to the availability of these provisions by proposing the inclusion of a note in the WHS Act.



## **Clarification that workplace deaths can be prosecuted as manslaughter under the Crimes Act 1900**

The Bill inserts a note at Part 2, Division 5 of the WHS Act to clarify that in certain circumstances, the death of a person at work may constitute manslaughter under the *Crimes Act 1900* and may be prosecuted under that Act with a maximum penalty of up to 25 years imprisonment.

This amendment recognises that a manslaughter offence already exists, can be applied to workplace deaths and demonstrates that it is unnecessary to look to another statute for this offence. This would also reduce any potential duplication between the Crimes Act and the WHS law and confusion that may arise from this. The clarification will make it clear to businesses, employers, workers and the broader community that anyone who causes the death of a worker or other person in a workplace through negligence potentially faces serious criminal sanctions.

## **Increasing the maximum penalties for over 70 offences in the WHS Act**

The Bill also includes amendments to increase the maximum penalty of offences committed under the WHS Act. Individuals will be liable for imprisonment for up to five years and/or a fine of \$346,500. Corporations will be liable for a fine of up to \$3,463,000.

Amendments are proposed to increase the maximum penalty for over 70 offences in the WHS Act to reflect the increases that have occurred in the consumer price index since 2011. This includes the Category 1 offence which already carries the highest penalty within the WHS legislation. This amendment will increase the amount of that penalty even further.

The amendment also creates a mechanism that ensures penalties will be automatically increased annually to reflect changes to the consumer price index in the future. This is critical because the maximum penalties for health and safety offences have not increased since 2012. There is concern that they have not kept pace with increases in the costs of compliance or growing community expectations about the penalties that exist for offences under the WHS Act. A built-in mechanism for annual increases aligned to the consumer price index ensures that these penalties continue to have real deterrent value into the future.

Importantly, the amendment includes consequential amendments to the WHS Regulation, meaning that the same increases and annual alignment to consumer price index will also apply to over 550 offences in the WHS Regulation.

## **Creation of an offence prohibiting insurance or indemnity arrangements which cover WHS penalties**

If duty holders can escape the consequences of their actions through the availability of insurance or other indemnity arrangements that cover WHS penalties, the deterrent powers of the WHS Act could be seriously undermined. The 2018 National Review Report and the Senate Report strongly condemned the availability of such insurance. The Bill's amendment will make it an offence for a person to enter into without reasonable excuse, provide or benefit from insurance or indemnity arrangements for liability for a monetary penalty for a WHS offence, thereby ensuring that the deterrents associated with WHS penalties are not diminished. The new offence would only apply to entry into insurance and indemnity arrangements after the date of commencement of the new provision.

## **Amendments to support victims of workplace incidents and their families**

The Senate Report found that the trauma experienced by families following a workplace fatality can be exacerbated by prolonged investigation timeframes and a lack of information about the investigation's progress. The 2018 National Review Report also identified issues around a person's ability to request that a WHS regulator bring a prosecution in relation to a workplace incident involving a risk of death or serious injury/illness.

The Bill proposes to amend section 231 by extending the current 12 month period to 18 months, and inserting a requirement for persons who have made a section 231 request to receive updates every three months from the WHS regulator about the investigation's progress. These amendments will reduce the trauma and frustrations of injured workers and families around not knowing what's happening in a particular incident investigation. It will also ensure that injured workers and their families have appropriate time to make a request for the WHS regulator to bring a prosecution (and have the outcome of the investigation reviewed by the Director of Public Prosecutions if needed) within the two year limitation period for WHS offences.

## **Amendments to streamline investigations**

Both the 2018 National Review Report and the Senate Report both confirm community expectations that WHS regulators should complete timely, efficient and effective investigations into workplace incidents.

The Bill proposes to remove one of the barriers faced by the WHS regulators during investigations by amending section 171 of the WHS Act to enable inspectors to exercise powers to require the production of documents and answers to questions, for up to 30 days after they or another inspector has entered a workplace. Currently, inspectors must re-enter the workplace to exercise these powers each time further information is required to assist the investigation. It is anticipated that this amendment will minimise the potential for delays created by the need to re-enter workplaces to obtain further information, particularly in regional and rural areas.

Another amendment proposed to reduce investigation barriers is to create consistent processes for the issuing and service of notices in the WHS Act. This amendment will mean section 155 and section 171 notices may be issued by way of post and email rather than requiring an inspector to issue them in person.

## **Amendments to clarify WHS laws**

Finally, the Bill proposes the following amendments which are designed to bring clarity to key aspects of the WHS Act as follows:

- Amendment of section 271, the information sharing provision, to clarify the extent of WHS Regulators ability to share information with WHS Regulators in other jurisdictions. This proposal will streamline the completion of cross-jurisdictional investigations and minimise the current restrictions identified in the 2018 National Review Report which are potentially delaying investigation timeframes.
- Inclusion of notes at sections 5 and 7 to clarify that in certain situations persons can be both a worker and a PCBU concurrently. Primarily this relates to complex, multi-contractor

worksites where there are subcontractor type contractual arrangements. The amendment is designed to confirm that a person can at the same time be considered a worker for those persons up the contractual chain, whilst being a PCBU and having duty holder obligations for workers engaged below them in the contractual arrangement, reflecting the increasing complexity and numbers of PCBUs that work concurrently at workplaces in NSW.

- Amendment of section 72 of the WHS Act to clarify that health and safety representatives (**HSRs**) can choose their course of training. While HSRs and PCBUs still need to consult about when to undertake HSR training and the reasonable costs associated with the training, it is anticipated that the clarification will resolve some of the disputes which arise between PCBUs and HSRs leading to delays in completion of the HSR training.
- Amendment of section 112 to clarify that in cases of discriminatory or coercive conduct, the District Court can provide declaratory relief giving flexibility to courts in responding to discriminatory or coercive conduct where other orders available at section 112 are inappropriate. Section 112 is critical because it provides protections for workers from retributive action in a variety of circumstances connected with performing duties under the WHS legislation or when raising health and safety issues.
- Amendment of Schedule 1 of the WHS Act to clarify the identity of the duty holder in relation to the storage and handling of certain dangerous goods and the operation or use of high-risk plant equipment outside of a workplace or where the high-risk plant equipment or certain dangerous goods are not being used to carry out work. This issue has been long standing having been identified through a recommendation of a 2017 statutory review of the WHS Act and it is timely to include it in this Bill which seeks to clarify a number of areas of the WHS Act.

## 4. Conclusion

The NSW Government is committed to a risk-based preventative framework for addressing risks to workplace safety. There have been a number of recent workplace deaths and serious injuries in NSW and these amendments were chosen because they are anticipated to contribute to minimising risks in NSW workplaces now.

The NSW Government is seeking to strike an appropriate balance between the objective of maintaining nationally consistent WHS legislation in Australia and the NSW Government's overarching objective of minimising risks to worker's safety in NSW as soon as possible.

The Bill will strengthen the deterrence value of the WHS Act and support the efforts of the NSW WHS regulators to reduce workplace fatalities and injuries and embed a strong health and safety culture in NSW workplaces contributing to a competitive, confident and protected NSW.

