

**Submission
No 9**

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

Organisation: The Australian Workers' Union

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NSW BRANCH

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The Australian Workers' Union

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

Submission to NSW Legislative Council's Portfolio
Committee No 1 – Premier and Finance

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1. The Australian Workers' Union (the **AWU**) welcomes the opportunity to comment on the Work Health and Safety Amendment (Review) Bill 2019 (the **Bill**) at the inquiry stage.
 2. The AWU supports the Government's decision to reform existing work health and safety legislation in light of the findings of both:
 - a. *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, a report issued in 2018 by the Senate Education and Employment References Committee (the **Senate Report**);
 - b. the review of the Model Work Health and Safety Act (the **Model Act**) conducted by the independent reviewer, Marie Boland, in 2018 (the **Boland Report**).
 3. In addition, we consider that the 2017 *Best Practice Review of Workplace Health and Safety Queensland* (the **WHSQ Review**), should be given due consideration by the Government, as much of its contents is applicable to New South Wales. The WHSQ Review had a joint focus on the operational approach of the regulator and the provisions of the Model Act.
 4. While we consider that there are a number of other recommendations which also require urgent attention, we support the Government's decision to fast-track these amendments in advance of the national consultations over changes to the Model Act. However, we have some concerns about the operation of the amendments. We deal with the following concerns in turn below:
 - a. Changes to liability and penalty for the Category 1 offence established by s 31 of the *Work Health and Safety Act 2011* (the **WHS Act**);
 - b. Reduction in inspectors' powers to enforce a PCBU's obligations to allow an HSR to undertake prescribed training (s 72 of the WHS Act);

The AWU's interest in the Bill

5. The AWU represents over 20,000 workers in NSW in a diverse array of industries who rely on the protections afforded by the work health and safety framework in their daily employment. Our members predominantly work in 'blue-collar' industries with both significant physical and mental health challenges, including:
 - steel, aluminium, glass and other manufacturing
 - horticulture
 - roadmaking and asphalt
 - quarrying and mining

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- hairdressing
 - field operations in the National Parks and Wildlife Service and the State-owned Forestry Corporation
6. As a result, we are regularly involved in both consultation and disputes with businesses over safety arrangements in workplaces across the State.

Changes to liability and penalty for the Category 1 offence

7. Items [4] and [5] of Schedule 1 to the Bill give effect to Recommendation 23a of the Boland Report by changing the fault element (or *mens rea*) for a Category 1 offence from recklessness to encompass both recklessness and gross negligence. (The Boland Report also recommends the creation of a specific offence of industrial manslaughter, which the AWU supports.)
8. The AWU supports extending PCBU (**person conducting a business or undertaking**) liability for Category 1 offences to cases of gross negligence. However, we have a concern that the amendment as worded extends liability for gross negligence to any duty-holder, not just PCBUs and officers of PCBUs. The amendment, in its present form, would permit a prosecution of a worker without control over safety systems or supervision of work to be charged with a Category 1 offence and potentially imprisoned for up to five years.
9. We do not consider that this eventuality was the intention of the Boland Report's recommendation. Although the recommendation is framed in wide terms ("*Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death*"—Boland Report, p 124), the report explains the rationale for the recommendation related to community concerns over inadequate penalties for PCBUs (p 123, emphasis added):
- This change to the model WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duties. This will assist in addressing community concerns that many PCBUs accused of serious WHS breaches are escaping punishment because the bar for conviction is set too high.*
10. While the Boland Report suggests a simple amendment to extend the offence to all cases of gross negligence, the AWU considers that this approach is inconsistent with the Report's aim of extend liability for PCBUs and senior management for serious safety breaches. It seems to us that the best way to reform the current provisions of the WHS Act would be to create a

second type of Category 1 offence with which only PCBUs and officers can be charged. This would involve:

- a. maintaining the existing Category 1 offence in s 31 of the WHS Act; and
- b. creating a second Category 1 offence in a new section of the WHS Act, for example:

31A Gross negligence—Category 1

(1) A person commits a Category 1 offence if:

(a) the person is either:

(i) a person conducting a business or undertaking, or

(ii) an officer of a person conducting a business or undertaking,

(b) the person has a health and safety duty, and

(c) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and

(d) the person engages in the conduct with gross negligence.

11. The AWU considers this or a similar approach to be preferable to the approach adopted in the Bill for the following reasons:

- (a) The Bill as worded would involve a substantial enlargement of the scope of the criminal law in its application to low-paid workers who lack the ability to influence safety management decisions and who only engage in negligent conduct.
- (b) A negligent worker whose conduct is so far outside the scope of a Category 2 or 3 offence may already be liable for prosecution under a provision of the *Crimes Act 1900*, including manslaughter.
- (c) The Boland Report, in its recommendation, was addressing community sentiment towards inadequate penalties for businesses which endanger life.
- (d) Significantly, the change could put at risk of criminal charges workers who follow habitual, unsafe directions given by managers who have the right to terminate their employment. Workers in these circumstances, if complicit in a safety breach leading to endangerment of life, should be dealt with by Category 2 or 3 offences rather than placed at risk of liberty. The severest penalty of imprisonment should be reserved for those persons with the resources and authority to influence safety

decision-making and culture at a workplace (except where a *Crimes Act 1900* offence may have been committed).

Reduction in inspectors' powers to enforce a PCBU's obligations to allow an HSR to undertake prescribed training

12. Items [6] to [10] of Schedule 1 to the Bill are intended to give effect to Recommendation 10 of the Boland Report, which states that the Model Act should be amended to clarify that a health and safety representative is entitled to choose their course of training under s 72(1), with certain consequential amendments.
13. The AWU strongly supports this amendment, which will reduce unhelpful disputation in workplaces caused by disagreement over the identity of training providers. It recognises the clear benefit, identified in the Boland Report, of allowing HSRs to select the accredited training provider of their choice.
14. However, one consequential amendment, in item [10], would have the effect of removing the civil penalty for a PCBU who refuses to permit an HSR time off work to attend the selected course of training. This is because item [10] amends s 72(7) of the WHS Act by removing the words "*allow a health and safety representative to attend a course decided by the inspector.*"
15. Under the amendments, an HSR has the absolute right to choose the training provider; whereas under the current WHS Act, an inspector may be requested to resolve a dispute between a PCBU and HSR over the selection of training provider. Currently, s 72(7) is designed to ensure an employer faces a penalty for refusing to comply with the direction issued with the inspector to permit the worker time off to attend the course of training.
16. The rationale for item [10] may have been that there should be no civil penalty in the absence of an inspector direction—and the new provision removes the role of the inspector in determining the choice of training provider. At first glance, this seems reasonable. The difficulty, however, is that this creates a gap in the enforcement framework. It is not clear what remedy is available to an HSR whose employer refuses to accede to his or her choice of training provider.
17. In the absence of any statutory right, it would appear the only option may be an application for injunctive relief made to the Supreme Court. (While a complaint could be made to the regulator, it is not clear that SafeWork has any specific power to enforce the request either.)
18. For this reason, the AWU considers that a further amendment is required to item [10] of Schedule 1 to the Bill to re-insert some form of enforceability for HSR training decisions. Our view is that it would be appropriate to add a new paragraph to s 72 which states:

(8) A person conducting a business or undertaking must allow a health and safety representative to attend a course chosen by the health and safety representative within the period of 3 months after the request is made.

Maximum penalty:

(a) in the case of an individual—\$10,000, or

(b) in the case of a body corporate—\$50,000.

19. Alternatively, if the view is taken that this provision would be too inflexible, a new provision could be inserted:

- (a) allowing an HSR or his or her representative to apply to SafeWork or an inspector to issue a direction to the PCBU requiring the release of the HSR for training; and
- (b) making it a civil penalty offence for a PCBU not to comply with such a SafeWork or inspector direction.

Other provisions of the Bill

20. The AWU also notes our support for the provisions of the Bill which:

- (a) increase penalties for offences under the WHS Act;
- (b) improve information-sharing between SafeWork NSW and other regulators;
- (c) clarify that a person can be both a worker and PCBU at the same time and clarify duty arrangements in complex, multi-contractor worksites.