

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

**Organisation:** New South Wales Teachers Federation

**Date Received:** 6 February 2020

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## New South Wales Teachers Federation

a branch of the Australian Education Union  
AEU NSW Teachers Federation Branch ABN 86 600 150 697



6 February 2020

In reply please quote: 94/2020/KM/jam

Ms Shelly Savage  
Principal Council Officer  
NSW Legislative Council Portfolio Committee No. 1

By email : [portfoliocommittee1@parliament.nsw.gov.au](mailto:portfoliocommittee1@parliament.nsw.gov.au)

Dear Ms Savage

### **Re: Inquiry into the Provisions of the Work Health and Safety Amendment (Review) Bill 2019**

I refer to the attached submission the Inquiry into the Provisions of the Work Health and Safety Amendment (Review) Bill 2019 for your consideration.

Please direct your inquiries about this submission to Kelly Marks, Research/Industrial Officer.

Yours sincerely

 **John Dixon**  
**General Secretary**

Attachment



**AUSTRALIAN EDUCATION UNION  
NEW SOUTH WALES TEACHERS FEDERATION BRANCH**

SUBMISSION TO

**NSW LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO.1**

ON

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

Authorised by

*per*  
**John Dixon**  
**General Secretary**  
**AEU NSW Teachers Federation**

**6 February 2020**

## SUBMISSION

### Introduction

The Australian Education Union NSW Teachers Federation Branch (Federation) represents teachers in all public education worksites in NSW. The current financial membership totals over 61,000 practicing teachers and student teacher members.

The Model Work Health and Safety laws apply not only to the workers in our schools and TAFE Colleges but also the students in their care as well as volunteers in our schools. In 2018 there were approximately 798,022 full time and part time Primary and Secondary Students in NSW schools<sup>1</sup> and over 436,000 course enrolments in TAFE<sup>2</sup>.

The Federation made a submission to the 2018 Review of the model WHS laws conducted by Ms Marie Boland and strongly supported the submissions made to the review by both the ACTU and Unions NSW.

In this submission the Federation will not provide extensive commentary on each of the 12 proposed new provisions of the *Work Health and Safety Amendment (Review) Bill 2019*, but supports the Unions NSW submission on those matters.

The Federation will make commentary on the issues that relate to the experiences of our members in schools and TAFE colleges.

Federation has found that the provisions of both the current NSW *Work Health and Safety Act 2011* (WHS Act), as well as the previous *Occupational Health and Safety Act 2000* (OHS Act), have been responsible for assisting our members in addressing risks posed by: unsafe equipment, poor planning and infrastructure and some violent behaviours displayed by students and community members.

The current provisions have not been adequate in supporting members to ensure that the Person Conducting a Business Undertaking (PCBU) takes appropriate action to minimise psychosocial risks consistent with the primary duty of care.

Our aim in this submission is to indicate our position on those proposed new provisions in the government's bill that are more relevant to our membership and, importantly, to highlight the strengths and weaknesses of the present Model WHS laws.

Federation notes the Minister's comments in his second reading speech that the government does not propose to expedite other recommendations from the Boland Review ahead of the national process. Why the Minister has chosen some recommendations to expedite so that they "do not continue to affect New South Wales workplaces" is unclear and in Federation's view, unnecessary picking and choosing. There is an urgent need for some reforms which we will outline below.

### Key provisions of the Work Health and Safety Amendment (Review) Bill 2019

#### Industrial manslaughter

Federation supports the government's intent to deliver justice for the families of victims of workplace deaths. However the proposed amendment makes no substantial change to existing law in this area. It merely inserts a note in the Act that references the existing provision in the Crimes

<sup>1</sup> <https://data.cese.nsw.gov.au/data/dataset/enrolments-in-government-schools-1848-2017/resource/d75af077-77ac-4706-87cf-9bc8bdd16253>

<sup>2</sup> <https://www.tafensw.edu.au/documents/60140/0/TAFE+NSW+Annual+Report+2018-19.pdf/0ff7d3a9-83d6-a8ff-6cd2-b4c646e75e59?t=1574836633208>

Act. What is of great concern to workers and the community is that workplace fatalities can be currently prosecuted under the Crimes Act but they are not. That is a problem that needs the government's urgent attention more than a new note in the Act.

Federation notes that in the Minister's second reading speech no reference was made to the terminology "industrial manslaughter" nor "workplace manslaughter". The use of such terms assists in deterrence and ensures that work health and safety is given serious priority at an organisational level.

It is important that the current definition and duties of the PCBU and officers remain unchanged. In both schools and TAFE Colleges the workplace managers do not have adequate financial and other resources to undertake these duties, and more importantly, to ensure compliance.

It is the act or omission of the PCBU or the "officer" when they fail to comply with their duties to ensure that the workplace is safe from situations that may lead to employees and/or students suffering illness or injury or in the circumstances relating to this provision, death.

### **HSRs training**

Generally speaking this is a good amendment that will have the effect of allowing health and safety representatives to choose their course of training. However it remains unclear what "consultation" between the HSR and the PCBU looks like in relation to the reasonable costs associated with the training and how that is implemented in schools and TAFE contexts.

For our members "reasonable costs" is problematic because principals and managers need to release staff from face to face teaching to attend the course and replace them with a casual teacher. Unless the Department of Education (the Department) and TAFE NSW as the employer funds training centrally or provides workplaces with an additional budget item there will be difficulties with balancing the costs associated with health and safety training and the resourcing of teaching and learning.

For our members in rural and remote areas in particular the "reasonable costs" associated with training and release for teachers to attend are, for a range of reasons, often prohibitive, particularly because there is a shortage of available staff to replace teachers who are attending courses.

### **Insurance**

Federation strongly supports a ban on PCBUs from taking out insurance against offences under the Act. Such insurance products may act against the interests of workers and the provision of safety in workplaces. If a PCBU can insure against fines or prosecutions it reduces the impetus on them to provide a safe workplace.

### **Penalties**

Federation strongly supports the proposed change for penalties for offences in the Act to be expressed as penalty units rather than monetary amounts as a further deterrent for bad practice in workplaces on health and safety.

### **Federation submission to Boland Review**

The following is a summary of the Federation's position put to the Boland Review in relation to key changes to the model WHS laws that Federation believes would improve the health and safety of staff and students in schools and TAFE colleges in NSW.

## Regulation of psychosocial risks

PCBUs are legally bound to implement and follow regulations and codes; this does not apply to guidance material. Regulations and codes are more effective than guidance material in ensuring the implementation of best practice in creating safe workplaces, as guidelines can be ignored.

In particular there should be specific regulations or codes of practice associated with psychosocial risk factors such as workplace bullying, violence in the workplace and work related psychological injury.

Safe Work Australia suggests the need to consider “work place stressors” including *“high job demands, limited job control, and organisational change, such as restructuring or significant technological change, role conflict or ambiguity, job insecurity, an acceptance of unreasonable behaviours or lack of behavioural standards, unreasonable expectations of clients or customers”*.

In addition there is a need to consider whether these stressors and/or the organisational demands contribute to leadership styles and/or workplace behaviour that could pose risks of workplace bullying including:

- ☐ Abusive, insulting, demeaning or offensive language or comments.
- ☐ Aggressive and intimidating conduct.
- ☐ Belittling, ridiculing and/or humiliating comments or actions.
- ☐ Behaviour that is strict and directive and does not allow workers to be involved in decision making.
- ☐ Behaviour where little or no guidance is provided to workers.

The Federation asserts that specific reference to psychological injury should be included in the Objects of the Act to reduce the incidence of psychological injury. Providing more regulation and enforcement in relation to psychosocial risk would reduce the impact of psychological injury on:

- Affected individuals and their families.
- Students through the disruption to their learning caused by injured teachers being absent on leave.
- The high cost of injuries in terms of workers compensation.
- Additional injuries resulting from the physical work environment.

The lack of a Regulation reduces the ability of the WHS Act to provide protections to workers in the area of psychosocial risks and injury.

Boland recommended in her final report dated December 2018 that, as a matter of urgency, new regulations be developed that deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

The Federation notes that one of the Objects of the NSW Occupational Health and Safety Act 2000 was *to promote a safe and healthy work environment for people at work that protects them from injury or illness and that is adapted to their physiological and psychological needs*.<sup>3</sup>

The Department has published guides for its staff on wellbeing but in Federation's view much of the material puts the onus on employees to manage their own psychosocial risks (by for example, eating well and getting enough sleep) rather than the onus on the Department as the employer to address the root causes of work-related psychological injuries.

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<sup>3</sup> Part 1 3 (c) Pg 2 *Occupational Health and Safety Act 2000*

The excessive pressure exerted by the Department on schools creates significant risks of occupational stress, bullying, harassment and discrimination. The Department must examine the organisational factors which create and contribute to this situation.

The Auditor-General, Margaret Crawford in a report on 15 December 2016 stated:

*"The Department should consider the effectiveness of workplace health and safety strategies for addressing the rise in psychological injuries."*<sup>4</sup>

The Audit office report identified that the total number of claims by Education Department employees relating to psychological injuries increased by 32.5 per cent, from 467 in 2014–15 to 619 in 2015–16. The associated cost of these claims escalated by 71.5 per cent, from \$15.1 million to \$25.9 million over the same period.

The *People Matter Survey*<sup>5</sup> provides an annual snapshot of the concerns of state government employees in NSW. The 2019 data illustrates the high levels of stress experienced by teachers and the prevalence of bullying in the public education sector.

<b>Survey Questions</b>	<b>Agreement of Teachers</b>
<i>I am able to keep my stress at an acceptable level</i>	40%
<i>I believe action will be taken on the results of this survey by my organisation.</i>	26%
<i>I have confidence in the way my organisation resolves grievances.</i>	39%
<i>In the last 12 months I have witnessed bullying</i>	36%
<i>In the last 12 months I have been subject to bullying at work</i>	19 %

The number of respondents from NSW public schools to the 2019 survey was 16,969.

The TAFE NSW Organisational Health 2019 Survey Results found only 15 per cent of 6773 staff who completed the survey agreed with the statement that TAFE NSW has effective plans for developing and retaining its people.<sup>6</sup>

In 2019 the Federation commissioned a research project, undertaken by a team of academics from the University of Sydney (Business School, and School of Education and Social Work) and Curtin University (Business School). The report, *Understanding work in schools – the foundation for teaching and learning*, examined in detail:

- Changes to the work of teachers, executives and principals over the past five years and the support provided to schools by the Department.
- The nature of the work undertaken, the relative importance of various work activities to teaching staff and resources available to support teaching and learning.
- The effects of various work demands on teaching and learning and consideration of the forms of support for teaching and learning that would be most helpful to teachers, executives and principals.

<sup>4</sup> Auditor General's Report to Parliament (Volume Thirteen 2016) Report on the Education cluster.  
<https://www.audit.nsw.gov.au/publications/latest-reports/volume-thirteen-2016-report-on-education>

<sup>5</sup> <https://www.psc.nsw.gov.au/reports---data/people-matter-employee-survey/people-matter-employee-survey-2019/education>

<sup>6</sup> <https://www.smh.com.au/business/workplace/staff-would-not-recommend-tafe-as-a-good-place-to-work-20191202-p53g0y.html>

The research was based on more than 18,000 responses received from a statewide survey of teachers, executives, consultants and principals in public schools across NSW. The report *Understanding Work in Schools* highlights the value and importance that all teaching staff place on the teaching and learning of their students.

More than 97% of all respondents indicated that administrative demands had increased over the past five years since the introduction of the devolutionary *Local Schools, Local Decisions* policy that saw 700 so-called “back office” staff deleted. As a result, data collection, analysis and reporting requirements were reported to have increased by 96% of respondents and the complexity of work increased in the view of 94% of respondents.

The increased work on administration and data collection were reported as obstructing a focus on student learning and the capacity to sustain quality teaching and learning.

The most recent national Principal Health Occupational Health, Safety and Wellbeing Survey 2018 data indicated that the two greatest sources of stress that have remained consistently high over the length of the survey (since 2011) have been “Sheer Quantity of Work”, and “Lack of Time to Focus on Teaching and Learning”.<sup>7</sup>

Federation’s Annual Conference 2018 identified ways to minimise the harm from work-related stress by:

- Reducing face-to-face teaching time for increased collaboration on planning, programming, assessing and reporting.
- More professional learning during school hours to support collaboration.
- Providing more qualified specialist teacher support for students with additional needs.
- Ensuring teacher support for curriculum, programs etc., is provided by the Department centrally.
- Ensuring consultation prior to significant change, reforms or initiatives to ensure value and determine resources necessary for effective implementation.
- Acknowledge professional judgement by developing protocols for collection, recording and analysis of data to eliminate processes that are cumbersome and extremely time consuming.
- More effective system-level planning to prevent imposing competing workload demands on schools and/or unrealistic timeframes.

The Department has not delivered any meaningful change in response.

## **Bullying**

In her final report Boland said: *“To date, where there has been a focus on psychological health as a WHS issue, it has tended to be linked to widely recognised and acknowledged psychosocial hazards such as bullying and harassment. However, this has too often led to the individualisation of these complaints, their diversion into grievance processes and the removal of the original basis for the complaint from any assessment of the broader WHS organisational safety culture.”*

The Department’s *Local Schools, Local Decisions* policy not only cut support to schools but imposed excessive workload demands on principals, executive and teachers including excessive demands around “compliance” and so called “accountability” requirements.

Responsibility has been devolved to principals, executive and teachers without the necessary resources. This top down, hierarchical approach undermines genuine collegiality, and collaboration, as well as dignity and respect in our workplaces.

<sup>7</sup> [https://www.principalhealth.org/au/2018\\_AU\\_Final\\_Report.pdf](https://www.principalhealth.org/au/2018_AU_Final_Report.pdf)

Members have also reported significant concerns regarding the Department's *Complaints Handling Policy for Staff*. There is an urgent need for a genuine mediation process by appropriately trained mediators and a procedurally fair and effective investigation process.

Members report the Department's *Code of Conduct* is not an effective strategy in reducing risks associated with stress, bullying, harassment and discrimination. There are particular concerns that the Code of Conduct has been used as a tool to threaten staff in schools.

Federation recommends the development of a new Regulation and Code of Practice covering safe systems of work, particularly as it relates to staffing and workload matters, consistent with the objects of the Act.

### **Violence in the workplace**

It is important to note that the violent behaviour displayed by many students is often linked to issues associated with mental health or illness including trauma and anxiety and/or particular disabilities or injuries. The behaviour is frequently not intentional but this does not prevent either students or staff being injured from various forms of assault including punching, biting, kicking, hitting and verbal and written abuse.

Frequently these students need additional specialist assistance and more individual support if the risks posed by the behaviours are to be minimised. This additional support is often not provided by the Department. All public education workplaces must be safe for employees, students and others. The failure to provide safe workplaces has a negative impact not only on the safety and wellbeing of all persons at the workplace but also on student learning outcomes.

The SafeWork NSW publication, *Preventing and Responding to Work-Related Violence*, June 2017, states (p4):

*"Work-related violence is any incident in which a person is abused, threatened or assaulted in circumstances relating to their work. It includes a broad range of actions and behaviours that can create a risk to the health and safety of workers."*

*Some industries describe the behaviours as 'acting out', 'challenging behaviour' or 'behaviours of concern'. Examples of work-related violence include:*

- *"Biting, spitting, scratching, hitting, kicking."*
- *Throwing objects.*
- *Pushing, shoving, tripping, grabbing.*
- *Verbal threats, armed robbery, sexual assault.*
- *Attacking with knives, guns, clubs or any type of weapon."*

It goes on to discuss "service-related violence" (p4):

*"Service-related violence arises when providing services to clients, customers, patients or prisoners. It generally occurs in the hospitality, retail, health, aged care, disability, youth services, education and enforcement industries. Often, service-related violence is unintentional but it does cause harm and is therefore a risk to a worker's health and safety."*

The national 2018 Principal Wellbeing Survey showed the prevalence rate for "Threats of Violence" is extremely high (in 2011, 38% of participants had been threatened. This rose to 45% by 2018; close to 1 in 2 principals receiving a threat).

“Actual Physical Violence” prevalence has also risen from ~27% in 2011 to ~37% in 2018; 1 in 3 principals (now 9.3 times the rate of the general population, up from 7 times in 2011).<sup>8</sup>

Consistent with the harm minimisation approach to work health and safety, the Federation has called for the Department’s review of the Suspension and Expulsion of School Students Procedures to focus on providing students and staff the necessary resources to meet students’ learning needs within safe learning environments.

The efficacy of the procedures has been further undermined by cuts to specialist teacher support, particularly in relation to behavior and the undersupply of special education teachers. Ineffective schemes for the recruitment and training of school counsellors has resulted in shortages of school counsellors thus removing further support for the effective implementation of the procedures.

Federation’s 2019 Time to Act survey of members in schools demonstrated a desperate need for more resourcing for schools with support units and schools for specific purposes in particular.

The failure to provide equitable resourcing continually puts student learning, teacher well-being and health and safety for all at significant and unnecessary risk.

### **Inadequate and unsafe infrastructure**

Both physical and psychosocial risks are also posed by inadequate or unsafe infrastructure in schools. Many schools are already overcrowded with demountable classrooms occupying significant areas of playground space and a resultant shortage of toilet and other facilities. Overcrowding increases the risk that students will be injured during play as well as heightens the risks of violent incidents between students and against teachers.

The 2017 NSW Auditor General’s Office Report – Planning for School Infrastructure<sup>9</sup> noted that:

*“For much of the last decade, there has been chronic under-investment in NSW government school infrastructure and deficiencies in asset planning. Many schools have more students than can be accommodated in existing classrooms, and demountables are widely used for extended periods. The condition of classrooms has been declining due to insufficient maintenance, and many are not configured to support contemporary and desired future learning and teaching methods. At the same time, the government school student population is predicted to grow further, particularly in Sydney.”*

The report further noted that “over the next 15 years the student population in government schools will increase by 21 per cent and that the Department will need:

- 7,200 additional classrooms and to upgrade many existing classrooms to meet future teaching and learning needs
- to undertake much more planned maintenance, otherwise 40 per cent of existing government school buildings will be in such poor condition that learning outcomes could be compromised.<sup>10</sup>”

The 2017 report also indicated that “37 per cent of government schools are fully utilising all of their classroom space and 180 are operating above their permanent classroom capacity”.<sup>11</sup>

<sup>8</sup> [https://www.principalhealth.org.au/2018\\_AU\\_Final\\_Report.pdf](https://www.principalhealth.org.au/2018_AU_Final_Report.pdf)

<sup>9</sup> [https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01\\_Planning\\_for\\_school\\_infrastructure\\_Final\\_Report.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01_Planning_for_school_infrastructure_Final_Report.pdf) pg. 2

<sup>10</sup> [https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01\\_Planning\\_for\\_school\\_infrastructure\\_Final\\_Report.pdf](https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/01_Planning_for_school_infrastructure_Final_Report.pdf) pg. 3

<sup>11</sup> <https://www.audit.nsw.gov.au/publications/latest-reports/planning-for-school-infrastructure>, p17.

At Budget Estimates hearings in September 2019 it was revealed that the estimated maintenance obligation for school facilities is \$622 million.<sup>12</sup>

It is clear that overcrowding, poor maintenance and inadequate facilities are already negatively impacting on teaching and learning conditions in a significant number of schools. Members report that in many schools the lack of funds to maintain schools means that many risks cannot be eliminated or effectively minimised. This is particularly the case in relation to trip hazards in playgrounds and in classrooms which has resulted in many staff and students being injured in falls.

Inadequate and/or damaged guttering results in mouldy carpets and walls and flooding has resulted in some staff and students suffering respiratory illnesses such as asthma. The continued use of unflued gas heaters is also reported to have a negative impact on staff and students in terms of respiratory illness.

The Department's approach to burgeoning school enrolments has regrettably resulted in many cases in imposed "open space learning" on new and existing schools. Consultation with staff has been minimal.

A study conducted by Macquarie University<sup>13</sup> assessed the impact of noise levels in 'open space learning' with that experienced by teachers and students in conventional classrooms. The researcher concluded that the environment had a significant impact on student learning:

*In the quieter enclosed classroom, children's speech perception scores were consistently high (approximately 80%), irrespective of how far they were seated from the teacher. In the noisiest open-plan classroom, children's scores dropped from 75% at the front to less than 25% at the back, which is very concerning and likely to severely impact the children's learning. Not only that, but it is exhausting for the child trying to concentrate amid the noise.*

*We also need to better understand how children who have special educational needs, such as attention deficits, hearing impairments, language delays and English as a second language cope in these environments as they are likely to be even more affected by the noise.*

The study also found issues relating to the work of teachers. Specifically, the noise provided a potential barrier to the quality of teaching:

*It's not only the students in open-plan classrooms who suffer. Teachers we visited reported being more distracted by noise, found speech communication significantly more difficult and thought children had more difficulty hearing them, compared to the teachers of the enclosed classrooms.*

### **Definition of 'reasonably practicable'**

The concept of 'reasonably practicable' is too often linked to what funding is available rather than what could actually be done to minimise or eliminate risks. It can be a barrier to the employment of workers with a temporary or permanent impairment or disability.

Subdivision 2 section 18(e) of the model WHS laws states that:

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<sup>12</sup> <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2228/Transcript%20-%204%20September%2019%20-%20CORRECTED%20-%20PC%203%20-%20Education%20and%20Early%20Childhood%20Learning%20-%20Mitchell.pdf>

<sup>13</sup> <http://theconversation.com/students-struggle-to-hear-teacher-in-new-fad-open-plan-classrooms-37102>

*After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

In her final report Boland noted that the definition of 'reasonably practicable' at s 18 of the model WHS Act is clarified in the Safe Work Australia guide *"How to determine what is reasonably practicable to meet a health and safety duty in relation to the consideration of cost."* This guide contains the statements:

*"The cost of eliminating or minimising risk must only be taken into account after identifying the extent of the risk (the likelihood and degree of harm) and the available ways of eliminating or minimising the risk".*

and

*"If a PCBU cannot afford to implement a control measure that should be implemented after following the weighing up process set out in section 18 of the WHS Act, they should not engage in the activity that gives rise to that risk."*

However guides are not binding, and Federation believes that greater clarity around this matter needs to be included in regulations and codes to prevent cost being the only consideration and undue focus being directed on the costs of minimising risks.

The ACTU wrote in its submission to the Boland Review:

*"Feedback from our affiliates is that the inclusion of the qualifier of reasonable practicality in the primary duty of care itself has in practice focused attention on what the standard of reasonable practicality means, rather than on the overarching primary duty to ensure the health and safety of workers and others. This is undesirable and inconsistent with the purpose of the legislation."*

The qualifier 'so far as reasonably practicable' should be retained but removed from s 19 (the primary duty of care) and relocated in the Model Act as a defence to alleged breaches.

This failure impacts on the ability of the Department to effectively identify, minimise or eliminate risks.

TAFE teachers have also reported attempts to reduce the time provided for Work, Health and Safety committees or representatives to carry out their functions due to financial and administrative constraints.

### **Effective consultation**

The terms of the WHS Act need to be expanded to clarify the need for workers to be engaged directly in developing the strategies to minimise or eliminate risks. The Federation found that the emphasis on risk management in the previous OHS Act provided transparency around the development and implementation of minimisation and elimination strategies. The lack of emphasis on risk management has undermined a focus on safety.

The Federation is particularly concerned that the Department does not commit adequate support for schools to facilitate genuine consultation with teachers and other employees in terms of identifying and developing appropriate strategies to eliminate or minimise risks so far as is reasonably practicable.

Members report that it is the exception, rather than the rule, that either health and safety representatives or work health and safety committees are provided with adequate time to consult with colleagues and carry out their other functions.

Effective consultation between workers and the PCBU is essential to enable the HSRs and Workplace Committees to have the processes and opportunities to address risks and hazards in the workplace. The terms of the Model WHS Laws could be amended to strengthen requirements regarding consultation with workers.

Section 48(c) requires that the views of workers are 'taken into account' by the person conducting the business or undertaking. However, it is not clear what this means in practice. The Model Laws should be amended to include a requirement to document workers' views as well as the ways in which they have been considered.

The Occupational Health and Safety Act 2000 required employers to consult with employees "to enable employees to contribute to the making of decisions affecting their health safety and welfare at work".<sup>14</sup> The Federation believes that the reference to consultation under the WHS Act 2011 is diminished by limiting the requirement for the consultation to be conducted "so far as is reasonably practicable" in Part 5, Division 2, 47(1).

Members have reported that this provision has been used to restrict the process of consultation and the number of people engaged in consultation around particular risks, especially violent student behaviour. The question of consultation is also important as new schools are being planned and existing schools are being rebuilt or renovated. The Federation and the teachers on the site should be involved from the beginning of the planning process so that they too can contribute to assessing risks and ensuring safety for themselves and their students.

## **SafeWork NSW**

It is important to recognise that regulations and codes must be implemented and action must be taken when the provisions are breached. The regulators must ensure that there are sufficient inspectors and that when advisory powers fail, prosecutions occur.

In its submission to the Boland Review, the ACTU wrote:

*"Feedback from affiliates is that PCBUs frequently breach their consultation requirements and yet inspectors seldom give adequate consideration to participation and consultation procedures during workplace visits. It is crucial that compliance with consultation and participation provisions is properly monitored by inspectors and enforced when breaches are identified."*

While education plays an important role in improving work health and safety, it appears that regulators including SafeWork NSW have leaned too heavily on that strategy at the expense of compliance and enforcement.

There are insufficient numbers of inspectors employed by SafeWork NSW and they have not acted to prosecute the Department or TAFE NSW for many years. Federation is concerned that many of the positive changes achieved by previous prosecutions are being undermined by the lack of compliance action on the part of SafeWork NSW.

Federation notes that SafeWork NSW has moved to appoint specialist inspectors in the area of psychosocial hazards and work is being done in this area in consultation with unions. This is a

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<sup>14</sup> Occupational Health and Safety Act 2000, Division 2, Section 13

reasonably recent development and as matters are still being investigated Federation cannot yet comment on whether this will lead to improved outcomes for our members.

Of greater immediate concern to Federation is the recent restructure of SafeWork NSW into six different sections in a new super-department, under two different Ministers, combined with other entities as diverse as the Greyhound Welfare and Integrity Commission and the Independent Liquor and Gaming Authority.

Federation wrote to the Minister for Better Regulation, Mr Victor Dominello, expressing its concern that the proposed restructure would seriously dilute the expertise and skills developed over time by staff and inspectors from SafeWork NSW.

The Minister let his Deputy Secretary of the Better Regulation Division Rose Webb respond to the Federation who indicated that the "realignment will not result in any change to the duties, skills, expertise or accountability of inspectors appointed by SafeWork NSW." Further, Ms Webb indicated that a recruitment process was underway to engage a further thirty SafeWork inspectors.

These are matters that Federation will be monitoring closely as there are potentially significant impacts on our members.

### **Incident notification provisions**

The Department runs a reporting hotline with a toll free 1800 number as does TAFE. This is a central point of contact for reporting WHS matters and workplace injuries. Such phone reporting systems are easily accessed, but reporting alone does little to solve the issue at the school or college.

Members frequently report that injuries relating to mental health impact are treated far less seriously than physical injuries and are often dismissed.

The list of injuries classed as *serious illness or injury* in section 36 of the model WHS laws all but excludes psychosocial injuries from being considered to be serious. Under this definition, only in the situation where a teacher has become so unwell on the school that an ambulance is called and they are then taken to emergency and placed in a mental health unit that a psychological injury could be defined as serious. This definition should be extended to include all 'time lost' injuries where an injured worker is absent from the workplace.

The definition of 'notifiable incident' under Part 3 s 36 (b) must be expanded. Any worker with an injury requiring medical treatment should fall within this definition.

Further, Federation supports the recommendation by the ACTU in its submission to the Boland Review that:

- "a) *The definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' need to be reconsidered and redrafted to cover new, emerging or neglected areas of risk, including at least:*
  - i) *Psychosocial hazards, including stress, workplace bullying and fatigue (for example, by reinserting the requirement to report a 7 day or more absence);*
  - ii) *Occupational violence, including when it causes psychological harm as well as physical harm."*

## Prosecutions

In the current NSW context the concept that the Crown is bound by WHS legislation has been undermined by reluctance within the State Government for one government entity to take legal action against another. There have also been issues with the Department of Public Prosecutions as a 'model litigant' being wary of taking on cases, which they do not believe have a high enough chance of success.

A further concern is that even when there is a successful prosecution the outcomes may not be effectively enforced.

Crucially, the Federation supports the model WHS laws being amended to restore the provisions of Section 106(1)(d) of the NSW OHS Act 2000 which provide the secretary of an industrial organisation of employees with the authority "to institute prosecutions in relation to offences affecting members of that organisation."

The changes introduced in the WHS Act place significant limitations on the ability of unions to prosecute as set out in Part 13 Division 1 Section 230 (1) (c) and (3). This, combined with the costs and level of resources associated with prosecutions, has made it difficult for the Federation and other unions to pursue compliance in this way. This is unfortunate as previous prosecutions conducted by the Federation resulted in significant improvements in work health and safety.

The Federation prosecuted the then NSW Department of Education and Training (DET) twice using this right to prosecute. The Federation decided to prosecute because the breaches were significant and there was an urgent need to bring about system level change in risk identification, assessment and management in relation to violent student behaviour.

The successful prosecutions did not just result in positive changes for our members. All students have benefitted from schools being safer and allowing them to be able to seek more support for students demonstrating violent behavior. Resources are then freed up to focus on teaching and learning.

The first of these prosecutions was only commenced by the Federation after discussions with the DET to secure improvements to inadequate DET policy and procedures concerning violent student behaviour failed.

The Federation's prosecutions related to the failure of the Department to protect the health and safety of teachers from violent student behaviour at Dover Heights High School and Rowland Hassall School for Specific Purposes. Both prosecutions canvassed the failure of the DET to provide information it held and/or could have reasonably obtained, on violent students and had failed to make available to teachers at the school when the students were enrolled. It was argued in both cases that this failure had led to significant injuries to teachers in the schools.

Two of the four teachers injured at Dover Heights did not recover sufficiently from their injuries (psychological) to return to teaching. In the Rowland Hassall case, one teacher was physically assaulted, with severe bruising, lacerations and a broken tooth and another teacher was psychologically injured.

The DET was convicted of failing to protect the health and safety of teachers at Dover Heights High School in March 2006 and fined \$220,000. In September 2006 the DET was convicted of failing to protect the health and safety of teachers at Rowland Hassall SSP, followed by a fine of \$105,000 imposed in June 2008.

As a result of both prosecutions, significant improvements were introduced which have contributed to NSW public schools and TAFE colleges becoming much safer. Within months of the first

prosecution commencing in December 2003 the DET changed its Suspension and Expulsion of Students Policy to make it mandatory for the suspension of students whose violence had resulted in pain or injury (regardless of the intent). Explicit provisions also required risk assessment and control measures to be put in place before these students could return to the school.

Improvements were also made to enrolment procedures as set out in Legal Issues Bulletin 40 which applied to both schools and TAFE colleges.

In December 2006 the NSW Government amended the Education Act to provide for the exchange of information regarding students with a history of violence transferring between public and private schools, and for the exchange of information between authorities in different states. It also gave the NSW Director-General of Education and Training the power, when necessary, to direct the enrolment of students with a history of violence to particular schools or educational settings which were best able to minimise the risks and meet educational needs.

In 2007 the NSW DET commenced a program designed to provide every student with a unique identifier number to ensure that any student with a history of violence could be easily tracked if they changed schools.

A range of training and support materials were provided to assist in minimising the risks and injuries caused by violent students' behaviour.

As a consequence of these changes, there is no doubt NSW public schools are safer. Students and teachers are more able to focus on their core business of teaching and learning.

The Federation believes that providing trade unions with the authority to prosecute breaches of WHS legislation is not a power that has been or will be used indiscriminately. Prosecutions are difficult to prepare and expensive to conduct. Very few prosecutions initiated by trade unions in NSW have been unsuccessful. There is no evidence that the NSW legislation has been abused in this respect.