

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

Organisation: Unions NSW
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**SUBMISSION BY UNIONS NSW INTO THE INQUIRY INTO
PROVISIONS OF THE
WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL
2019**

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Introduction

Unions NSW welcomes the opportunity to make a submission to the Upper House committee into the provisions of the Work Health and Safety Amendment (Review) Bill 2019. In 2019 Unions NSW welcomed the recommendations of the Boland Review, the First Review into the National Harmonised WHS Act 2011, and we supported all 34 recommendations put forward in the Review.

Unions NSW supports the submissions of our affiliate unions.

Unions NSW is the peak body for NSW Unions. Unions NSW represents approximately 60 affiliated unions comprising over 600000 members. These unions represent a diverse range of workers from both blue and white-collar industries.

Unions NSW supports the introduction of the Work Health and Safety Amendment Bill 2019 and the recognition by this Government of the importance of health and safety in the workplace and the importance of the Boland Review recommendations. We understand that this Bill does not prevent further amendments and we will discuss some areas of the legislation that need to be expanded, clarified or changed.

Unions NSW and our affiliate unions are committed to protecting workers and other persons from harm to their health, safety and welfare by eliminating or minimising the risks that arise from work. We remain concerned that workplace fatalities and serious injuries continue to occur and believe these are all too frequent and often completely avoidable. The harm these fatalities and serious injuries cause to the family members of these workers and their co-workers is immeasurable. Unions NSW has made clear for many years now our concerns regarding the 2012 changes the workers compensation legislation and we continue to remain deeply concerned for workers seriously injured at work. While we encourage quick treatment in the hope of a speedy recovery and return to work, the reality is some injured workers will not be

able to return to work as a result of their injuries, and the current workers compensation system does not guarantee these workers will be supported throughout the course of their lives. Given this reality it is crucial that serious injuries be avoided and PCBU's and Officers take their duties under the Work Health and Safety Act 2011 (The Act), seriously.

Clause 3, schedule 1 – Response to recommendation 23b- Industrial Manslaughter

A recent campaign run by The Australian Council of Trade Unions has called for Industrial Manslaughter laws to be implemented nationally. This is in support of recommendation 23b of the Boland Review to introduce an industrial manslaughter offence. Unions NSW supports all the recommendations of the Boland Review.

Clause 3 of schedule 1 inserts a note in the part of the Act that sets out offences and penalties to the effect that workplace deaths and penalties may be prosecuted as manslaughter under the Crimes Act 1900. As noted in the second reading of the Bill by Minister Kevin Anderson, Minister for Better Regulation and Innovation,

'It has long been the case, that where appropriate, a work-related death can be prosecuted as manslaughter by criminal negligence. This is a penalty for which the Crimes Act imposes a maximum penalty of 25 years' imprisonment. But the availability of this offence to prosecute work-related deaths is not well known or well understood in the community. The insertion of the note will make it clear to employers, businesses, workers and the community more broadly that anyone who causes the death of a worker through negligence faces serious criminal sanction.'¹

The legal principle referred to here is correct. The Criminal law does not cease to operate when we enter the workplace. This is a principle that has been argued by Michael Tooma and his partner Alena Titterton of Clyde & Co. In their article Industrial Manslaughter....(Fill in heading), they argue a number of problems exist with the introduction of an industrial manslaughter offence.

¹ Work Health and Safety Amendment (Review) Bill 2019 NSW, second reading speech, Mr Kevin Anderson, 2

The objectives of the current risk-based preventative framework of our current health and safety laws require an investigative approach that ensures incidents and near misses are investigated thoroughly to allow for improvements to be made to prevent future similar incidents.² This argument has merit however Unions NSW is regularly made aware of instances where incident scenes are not left untampered and are actively covered up to avoid proper investigations occurring.

Unions NSW has long argued that the Regulator, Safework NSW, does not have the resources to quickly visit and investigate all incidents and unless the Regulator is able to access the site quickly, tampering often occurs.

Another point raised by Tooma supports the introduction of clause 3, schedule 1. Tooma argues that a myth appears to exist that health and safety laws are 'quasi' criminal in nature and not a 'real crime', and this also undermines the objectives of health and safety laws.³

This is a valid argument. The experience of unions has been one where for the most part workplace fatalities are not treated with the same degree of seriousness as fatalities outside of the workplace, instead there appears to be a view that workplace deaths are accidents and are unavoidable. There is also a view by many employers and employees that some types of work will involve a degree of risk that cannot be eliminated or effectively minimised, and therefore some serious injuries or fatalities will occur. Unions also witness a degree of acceptance from many workers who view violence and other unsociable types of behaviour as a 'normal' part of the job that must be accepted. This is particularly true of nurses, teachers and aged care workers.

The Crimes Act 1900 does operate within the workplace and Unions NSW would support the prosecution of fatalities involving negligent behaviour under the current manslaughter provisions, however we question why this

² Clyde & Co, 'Industrial manslaughter reform, the rise of a solution not fit for purpose' Discussion paper 10.

³ *ibid*

does not currently happen when there is no legal impediment to this occurring now.

Our experience suggests that this may not occur because police do not generally attend workplace incidents leading to fatalities. Instead it is viewed the role of The Regulator SafeWork NSW to attend these. It is our view that if the inclusion of the note at clause 3 schedule 1 is to be effective, both the Regulator and the police must attend any fatality occurring as a result of work. We use the term 'as a result of work' because a very different approach is taken if a fatality occurs within a residential address while a worker is working.

Late last year a tragic workplace death occurred in Balmain, Sydney, NSW. The death was of a mental health nurse who was undertaking a home welfare check of a mental health patient who was living within the community. The patient was a diagnosed schizophrenic and a family member had raised concerns that day about his wellbeing. A mental health nurse and a social worker attended his home to conduct the check. The nurse had a very large caseload of approximately 60 patients residing within the community. The social worker had recently had a council parking permit withdrawn by the PCBU, possibly a cost saving measure, and was unable to find parking in Balmain. Because of this the nurse visited the patient alone while the social worker looked for parking. In this time the mental health nurse was stabbed multiple times and died at the scene. Because this was not treated as a workplace fatality the police attended the scene. Because it was viewed as a crime scene that occurred in a private residence SafeWork NSW did not attend the scene.

This presents a number of problems. The patient who was not of sound mind will most likely be prosecuted and imprisoned. The employer who allowed the worker to enter the home of a patient who was clearly unwell and potentially violent will not be prosecuted. The Regulator will not investigate and therefore there will likely be no changes to the current practices occurring. Mental health nurses will continue to be subjected to potentially dangerous situations, alone, without any isolated worker protection devices, and the social worker

who was unable to find a car park will continue to spend time looking for parking spaces, unable to assist colleagues with unreasonable caseloads. The failure of SafeWork NSW to conduct an investigation in this instance, highlights the failure of our current system. A prosecution in this case will do nothing to change the dangerous systems of work that are in place. The objectives of the WHS Act will not be fulfilled. The PCBU will not be held to account. The system of work was not safe, the design of work was poor, these unprepared workers should not have been placed in this position. It was known that the patient was unstable as a family member had requested a welfare check. It is known that people with schizophrenia can be highly unpredictable, volatile and violent and police should have been sent to undertake the welfare check. Had the police attended the patient they would have had adequate support, equipment and training to deal with potentially dangerous and highly volatile situations. Because the Regulator will not conduct an investigation into this incident, as they state it is a police matter, these mitigating controls will not be considered. More fatalities or serious injuries could continue to occur.

It should also be noted that the Sentencing Council is currently asking for submissions into a review of sentencing for murder and manslaughter and ask Question 3.6: Industrial manslaughter- What principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law? The NSW State Government should watch for developments in this area.

Other contradictions exist at this stage and Unions NSW is keen to understand how any amendments to the Act will work where these contradictions exist.

Under the Work Health and Safety Act 2011 the Statute of Limitations applies however this is not the case under the Crimes Act 1900. Will the WHS Act be amended to align with the Crimes Act 1900?

Unions NSW has serious concerns around the capacity for workers to be easily targeted and prosecuted under the Crimes Act. The introduction of Industrial Manslaughter as a result of the passing by the Victorian Parliament of the

Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (WM Bill) which will amend the *Occupational Health and Safety Act 2004* (Vic) (OHS Act) under s39B removes Part 2 from applying to employees.

applicable duty means a duty imposed by a provision of Part 3 other than—

- (a) the duty imposed by section 25; or
- (b) a duty imposed by section 32 on a person who is an employee, but not an officer, at the workplace in relation to which the duty is imposed;

Unions NSW believes that this type of protection must also apply to workers under the harmonised legislation and in particular the Work Health and Safety Act NSW 2011.

Under the current WHS NSW Act, workers are able to be prosecuted under offences and penalties as they have a duty under s28. Where intentional behaviour occurs fitting the definition of gross negligence, a worker should not be exempt from the law and its consequences.

Unions NSW is concerned that many workers do currently engage in unsafe practices, follow unsafe and unreasonable instructions and are generally afraid to exercise their right under Division 6 s84 to cease work or refuse to carry out, work where the worker has a reasonable concern that to do so would expose the worker to a serious risk.

A large number of insecure workers fear loss of employment if they exercise this right, many workers are unaware of this right and lack basic training in WHS. Non-union trainers are unlikely to inform workers of their right under s84 and at-risk workers as defined by SafeWork NSW (CALD, migrant, young, labour-hire) are extremely vulnerable to retribution from their employer. Gig economy workers are punished for failing to accept work through the app they work under. The apps are generally designed to encourage unsafe practices. Workers are encouraged to accept jobs regularly and get these jobs finished quickly. This could require a delivery rider to ride up to 10kms. The faster the

delivery is made the more jobs the worker will receive. In order to keep receiving work safety must be compromised. These workers know they take very significant risks everyday however they do so to maintain their income. The rate of pay per job is low so a delivery rider must work long hours and accept many jobs to meet their financial commitments. The job design is extremely unsafe, and the riders do expose themselves to serious risks. It would be inherently unfair and contradictory to the objectives of the Act to expose these young workers to prosecutions and possible jail sentences when the design of their work is not examined and the PCBU is not prosecuted for designing a system of work which is inherently unsafe.

Without stronger protections for workers Unions NSW suggests mandatory training of all workers should occur to ensure they are aware of the consequences of their actions, and that these could result in prosecution under the Crimes Act 1900. Workers must understand their rights under s84 and must feel they will be protected if they exercise this right in good faith. Greater protections are required for 'at risk workers' and any worker in insecure work.

The role of the Regulator

As noted the Regulator must play a role alongside the police to ensure the effectiveness of the inclusion of this note. As Richard Johnstone notes,

Historians have ably documented how, from the 1840s, the UK factory inspectorate's approach to enforcement focused on securing compliance through advice, persuasion and negotiation, rather than on prosecuting contraventions: prosecutions were used as a last resort, and reserved for 'serious' or 'wilful' offences...the inspectors discovered that contraventions of the Factory Acts was widespread, even among 'respectable' employers, and the heavy use of prosecution would have resulted in the 'collective criminalisation' of highly influential employers. The adoption of the 'advise and persuade' approach to enforcement institutionalised the 'ambiguity' of factory crime, so that despite it having the features of criminal law, it was not regarded as 'really criminal'; and were frequently breached and substantially tolerated in practice (that is, 'conventionalised').⁴

⁴ Richard Johnstone 'Work health and safety and the criminal law in Australia' 2013 *Policy and Practice in Health and Safety*, 26 27.

Unions NSW has long argued the ineffectiveness of the Regulator to adequately 'regulate' workplaces across the State. Understaffing, a lack of effectively directed resources, and a culture of tolerating often serious breaches in an attempt to negotiate and persuade employers, continues to this day. This approach has given the WHS Act the 'quasi criminal' appearance that exists today and has allowed PCBU's to largely ignore their duties under s19 and argue at length with the Regulator making use of the broad nature of the Act.

For years our affiliates have tried to have fruitful discussions with the Regulator around safe systems of work. Division 2 Primary Duty of care s 19 (c). We argue that understaffing, overwork leading to fatigue, lack of resourcing and unreasonable deadlines, poor rostering are not safe systems of work. An understaffed nursing home without patient/nurse ratios is unsafe. It is common practice to roster on one registered nurse during night shifts in nursing homes. The assumption being that night shifts will be quieter. These nurses often have responsibility for large numbers of patients who may almost all be diagnosed with dementia. These patients are often unpredictable, violent, aggressive and agitated. They may also have a number of patients in palliative care, dying. The experience of the registered nurse is often not considered. Clearly this is a very stressful environment for the nurse and the risks are obvious. The Regulator has debated this with the NSW Nurses & Midwives Association for years and refuses to push PCBU's to comply, instead arguing that staffing numbers/ratios are an industrial issue and not a WHS issue. The bottom line appears to be the Regulator does not want to give a direction that will involve a significant cost to the business, despite the obvious safety risks.

The culture of persuasion, education and negotiation has a long history and has allowed safety breaches to flourish and the status of health and safety legislation to be diminished. Unions NSW remains extremely frustrated that health and safety legislation is not given the status, importance and focus it deserves.

Schedule 1- amend s31

Unions NSW supports the proposed amendment to s 31 of Division 5 Offences and Penalties, Reckless conduct- Category 1. The lack of prosecutions over the life of the harmonised Act suggests the bar has been set too high and this needs to be lowered.

Item 20- Schedule 1

Unions NSW supports the creation of new offences relating to insurance and indemnity arrangements which cover work health and safety penalties. The death of a worker or any person should not be able to be 'factored into the cost of doing business'. Insurance of this nature does seriously undermine the deterrent power of the Act and supports the notion that health and safety laws are 'quasi-criminal' in nature, and largely not enforceable.

Indexation of penalties

Unions NSW supports the indexation of penalties to reflect increases in the consumer pricing index since 2011 along with the creation of a mechanism to ensure penalties will be increased annually to reflect changes to the consumer price index in the future. Given the penalties have not increased since the Act came into operation this is appropriate and necessary.

Amendments to s 231

Unions NSW supports the addition of a provision requiring regulators to provide three monthly updates to a person who has made a request that the regulator bring a prosecution while the investigation is ongoing. We would ask that the Committee consider the inclusion of unions in this provision. Often unions act as represented for workers and provide support to the families of workers when a fatality of a member occurs. Given the Object of the Act states at s3 (1) (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety

practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment... Unions NSW would encourage and provision that supports the legal rights of unions to play a constructive role as set out in this section.

While the extension of time from 6-12 months to 6-18 months is an improvement, recommendation 24 of the Boland Review was to remove the deadline rather than extend it. Unions NSW agrees the deadline should be removed.

Amendment to s72

Unions NSW supports this amendment. We suggest the amendment should go further to make training of Health and Safety Representatives compulsory within the first six months of their election. The provision s72, that provides penalty provisions only after an inspector has made a decision should be removed in line with the context of the amendments.

Item 11 schedule 1

Unions NSW agrees that clarification for NSW courts to grant declaratory relief in cases of discriminatory and coercive conduct to protect workers from retributive action in a variety of circumstances.

Psychological health

The amendments do not address all of the Boland Review recommendations, one of the most important being recommendation 2: Make regulations dealing with psychological health, Amend the model WHS Regulations to deal with how to identify the psychological risks associated with psychological injury and the appropriate control measures to manage those risks.

Recently Unions NSW and affiliate unions were involved in a SafeWork NSW working group, 'Industry and Social Partners Working Group for the regulation of risks to psychological health'. We were disappointed to find the Terms of

References did not allow for any changes to the WHS Regulations. This contradicts the recommendation of the Boland Review and will simply add to the plethora of information already available, and unfortunately largely ignored. To effectively target the problem the Regulations should provide for a definition of Safe Systems of work. We do not oppose the development of a Code of Practice but would encourage the addition to the Act similar to s26 (a) of the *Work Health and Safety Act 2011* (Qld) which gives Codes of Practice equal status to Regulations.

Unions NSW is thankful for the opportunity to provide this submission to the review and we would welcome the opportunity to appear before the Committee to discuss our submission.