

WA Legislative Council Public Administration Committee Inquiry into WorkSafe.

Supportive information regarding MOU between the WA Police and Worksafe

MEMORANDUM OF UNDERSTANDING

BETWEEN

**WORKSAFE,
DEPARTMENT OF COMMERCE**

AND

WESTERN AUSTRALIA POLICE

ESTABLISHING

**PROTOCOLS FOR THE ENFORCEMENT OF THE
*OCCUPATIONAL SAFETY AND HEALTH ACT 1984***

**WITH RESPECT TO ITS
APPLICATION TO POLICE OFFICERS**

March 2015

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1. INTRODUCTION

1.1 Purpose

In August 2003, a Co-agency Agreement was developed to facilitate the interaction between:

- WorkSafe, a division of the Department of Commerce (referred to here as WorkSafe), as an enforcement agency; and
- the Western Australia Police (referred to here as the WA Police), as an employer

with respect to the application of the *Occupational Safety and Health Act 1984* and the *Occupational Safety and Health Regulations 1996* (referred to here as 'the OSH Act' and 'the OSH legislation') to police officers.

In 2004, the Co-agency Agreement was updated. In 2007, further amendments were made following discussions between WorkSafe and the Western Australia Police. The Co-agency Agreement will now be known as this Memorandum of Understanding (MOU).

The MOU recognises that special issues relate to aspects of police work. The MOU provides a framework for ensuring the appropriate considerations are taken into account in the enforcement of the legislation and the application of inspectors' powers and functions with respect to police officers and their work. It provides a protocol for contact between a WorkSafe Inspector and the WA Police, with a view to:

- facilitating the enforcement activities of WorkSafe Inspectors by providing ready access to the relevant WA Police personnel;
- preventing inadvertent safety and health risks arising through WorkSafe investigation activities unwittingly dealing with 'dangerous operations' or 'covert operations';
- minimising adverse impact on police operations and ensuring the security of the police officer(s) and the operation;
- maximising the safety of WorkSafe Inspectors;
- ensuring correct contact points for decision making in relation to the declaration of operations that may be defined as 'covert operations' or 'dangerous operations';
- recognising the need for a review process where a WorkSafe Inspector or a police officer has concerns about the practical application of the definition of a 'dangerous operation' under the OSH Act; and
- facilitating the resolution of issues affected by the exclusions provided in Section 4A(2) of the OSH Act.

This MOU does not, and cannot, derogate from any of the provisions of the OSH legislation.

1.2 Background

The *Occupational Safety and Health Amendment Act 2002* (referred to here as 'the Amendment Act') came into full effect on 3 January 2004.

References to the OSH Act from here onwards in this document refer to that Act as amended by the Amendment Act. References to 'police officer' throughout this MOU refer to the definition of police officer provided in the OSH Act.

The OSH Act:

- provides for police officers to be treated as employees of the Crown for the purposes of coverage under the OSH Act;
- covers police officers whenever they exercise their functions, regardless of whether the officer is rostered on or off duty;
- requires the Commissioner of Police to ensure the Crown's functions as an employer under the OSH Act are fulfilled; and
- recognises the special nature of police work and prevents police operations that are 'dangerous operations' or 'covert operations' from being prejudiced, should any conflict with the OSH Act arise.

With the exception of some limitations with respect to 'covert operations' or 'dangerous operations' police officers are covered by the full provisions of the OSH legislation.

It is recognised that the consultative arrangements, in particular the provisions dealing with the election, training and functions of safety and health representatives, together with their support and protection, are a key feature of the legislation.

1.3 'Covert Operations' and 'Dangerous Operations'

The OSH Act provides limited exclusions, in relation to 'covert operations' and 'dangerous operations', from the application of:

- Section 26(1) of the OSH Act, which allows employees under certain circumstances to refuse to undertake work which they consider to be unsafe; and
- Section 49(1), which provides for the issuance of prohibition notices by WorkSafe Inspectors.

'Covert operations' and 'dangerous operations' are defined in Section 4A of the OSH Act.

For an operation to be defined as a '**covert operation**', three elements must be present:

- 1) the performance of a function of a police officer where a covert operation is undertaken by the WA Police for the purpose of obtaining information about criminal activity;
- 2) the performance of the function must not be practicable without exposing a police officer to a risk of imminent and serious injury or harm to the police officer's health; and
- 3) unless the performance of the function is secret or confidential, its effectiveness would likely be reduced or a person would be exposed to the danger of physical harm arising from the actions of another person.

A '**dangerous operation**' is defined as the performance of a function of a police officer, in circumstances where the performance of that function is reasonably necessary, and is not practicable without exposing a police officer to a risk of imminent and serious injury or harm to the police officer's health.

The exclusions do not prevent the employer from being liable under the OSH Act for any breach of the employer's duty under the OSH Act occurring in relation to a 'covert operation' or a 'dangerous operation'. However, the employer's general 'duty of care' under the OSH Act applies only so far as is practicable.

2. PROTOCOLS AND UNDERTAKINGS

2.1 Notification of the Employer

Under the OSH Act, upon entering a workplace, a WorkSafe Inspector must take all reasonable steps to notify the employer of his or her presence. Where this duty involves the notification of the employer of a police officer, it is understood that the inspector will fulfil this duty by telephoning the following contacts:

- in cases where either the WorkSafe Inspector or the police officer(s) present consider the work does or is likely to involve a 'covert operation' or a 'dangerous operation', the appropriate contact is the Duty Inspector, Police Operations Centre Communications (POCC) on
- where the work of the police officer(s) present is unlikely to involve a 'covert operation' or a 'dangerous operation', the appropriate contact is the Safety Branch of the WA Police on , and
- where contact needs to be made outside of business hours, the appropriate contact point is the Duty Inspector, Police Operations Centre Communications (POCC), on

The WA Police understand they are, as soon as is practicable, to notify the relevant workplace safety and health representatives for the matters concerned of the WorkSafe Inspector's presence, as required by the OSH Act.

2.2 Responsibility of the WorkSafe Inspector to Avoid Unduly Interfering with the Work

In carrying out their functions under the OSH Act, WorkSafe Inspectors are required to act in such a manner as to avoid unduly or unreasonably interfering with any work or work process, or affecting adversely a 'covert operation'. It is acknowledged by WorkSafe that this responsibility, given the nature of police work, may result in limitations on the activities of WorkSafe Inspectors in relation to particular places where police work is undertaken.

Notwithstanding the limitations on the application of the OSH Act to 'covert operations' it is recognised that a WorkSafe Inspector retains the right of entry and powers of investigation, subject to the limitation to avoid unduly interfering with the work or adversely affecting a police 'covert operation'.

2.3 Action where WorkSafe Inspector is faced with a 'Covert Operation' or 'Dangerous Operation'

WorkSafe recognises that, with respect to both a 'covert operation' and a 'dangerous operation', it is necessary that the WorkSafe Inspector be guided by the relevant police personnel as to what action is appropriate in order to ensure he or she does not unduly interfere with the work or adversely affect the operations.

WorkSafe undertakes that, where the matter being dealt with by the WorkSafe Inspector involves or it appears likely that it may involve a 'covert operation' or a 'dangerous operation', the WorkSafe Inspector will be guided by the advice from the appropriate police personnel, contacted through telephoning the Duty Inspector, Police Operations Centre Communications. In particular the WorkSafe Inspector will:

- take no action (once having become aware that a 'covert operation' or 'dangerous operation' may be involved) until having made contact as mentioned above;
- take such action only as is consistent with the advice received from WA Police by way of the above contact;
- where prior advice has been given to the WA Police of attendance at a workplace where a 'covert operation' or a 'dangerous operation' is occurring, report to the designated WA Police contact and cooperate with that person while the operation is occurring; and
- at all times take reasonable care to ensure his or her own safety and health and to avoid adversely affecting the safety or health of any other person.

The above points apply where a 'covert operation' or a 'dangerous operation' is actually occurring. They do not apply where the investigation is being carried out in retrospect where the 'covert operation' or 'dangerous operation' is no longer occurring.

The WA Police undertakes to provide WorkSafe Inspectors with all reasonable assistance in performing their duties and to avoid unduly interfering with the activities of a WorkSafe Inspector. Advice provided to a WorkSafe Inspector, under the protocol that limits the activities of the WorkSafe Inspector, will be provided only where reasonably considered to be genuinely necessary to avoid interfering with the work or adversely affecting a police 'covert operation', or alternatively where there are reasonable grounds to believe that the WorkSafe Inspector's actions would pose a risk of serious and imminent harm to any person, including the WorkSafe Inspector or a police officer.

2.4 Mechanisms to Facilitate the Above Protocols

WorkSafe Inspectors are organised into industry teams. WorkSafe undertakes to maintain a small core group of inspectors within the relevant industry team who are aware of the special needs of police work and are familiar with the protocols established in this MOU. Wherever possible, one of these trained WorkSafe Inspectors will be assigned to any matter that involves application of the OSH legislation to police officers.

WorkSafe notes that the WA Police operates in an environment where access to some police operations, procedures, material, and information related to such is restricted to persons (whether WA Police personnel or non-WA Police personnel) with the appropriate security clearances. WorkSafe recognises that the same security arrangements will apply to WorkSafe Inspectors where their activities require access to such (restricted) operations, procedures, material or information. In practice, such clearances are most likely to be necessary with respect to matters relating to 'covert operations' and some 'dangerous operations'.

Such access will be facilitated by arranging prior clearance by the WA Police State Intelligence Services of a small core group of inspectors assigned and trained with respect to application of the OSH Act to police work.

The WA Police undertakes to ensure that, through appropriate instruction and training, the contact officers identified in this document are well versed in the contents of this MOU and will work cooperatively with a WorkSafe Inspector. This may include referring the WorkSafe Inspector to other appropriate personnel.

2.5 Information Management

As a general rule the WA Police undertakes to actively assist WorkSafe Inspectors in obtaining all relevant information they require to form opinions, make decisions or frame reports or other processes in the course of their work in accordance with the OSH Act. Nevertheless, some information held by the WA Police is sensitive, including information relating to processes, procedures, and persons, particularly in relation to some dangerous and covert activities. WorkSafe recognises that there will be circumstances where a WorkSafe Inspector's duty to avoid unduly interfering with the work or adversely affecting a 'covert operation' means it will not be appropriate to have access to, and/or take copies of, sensitive material. Where any disagreement arises between a WorkSafe Inspector and WA Police personnel in relation to sensitive material, the arrangements below for resolution of disagreement will apply.

2.6 Resolution of Disagreements between Police Service Personnel and a WorkSafe Inspector

The signatories to this MOU recognise that, in practice, issues may arise between the WA Police and WorkSafe with respect to the application of this MOU. The signatories to this MOU undertake to attempt to resolve such questions between the WorkSafe Inspector and the WA Police contact in the first instance. Where this cannot be achieved, the WA Police contact and the WorkSafe Inspector will respectively refer the matter to his or her superior, or other relevant contact as per the respective internal procedures. This referral process will continue up through the respective chains of command, so far as is necessary to reach a reasonable agreement that enables the matter to be dealt with. The final point of contact will be between the Commissioner of Police and the WorkSafe Western Australia Commissioner (or the representative of either when they are not available).

The signatories to this MOU undertake to ensure that, in following the above process, such matters will be afforded an urgency and priority that is commensurate with that of the issue giving rise to the disagreement.

The above procedure does not usurp the processes under the OSH Act, such as a WorkSafe Inspector's power to issue notices, and the WA Police's right to seek review of such notices.

2.7 Review Process where there are Concerns that an Operation is defined as a 'Dangerous Operation'

The signatories of this MOU recognise that there may be situations where a WorkSafe Inspector or a police officer has concerns about the practical application of the definition of a 'dangerous operation' under the OSH Act.

Where either a police officer or a WorkSafe Inspector raises concerns about a situation being appropriately defined as a 'dangerous operation' under the OSH Act, the police officer or WorkSafe Inspector should try to have the concerns addressed by consultation with the operation commander or the police officer involved. This approach should not detract from the issue resolution process set up in accordance with the OSH Act.

If the concerns are not addressed, the police officer or WorkSafe Inspector can request a review to be conducted by the WA Police according to the WA Police review process.

A safety and health representative and a member of the Safety Branch from WA Police should be involved in the departmental review process.

The objective of the review process is to provide information that can be used to improve safety and health in future operations of a similar nature.

The outcomes of all reviews conducted in accordance with this section of the MOU will be available to members of the Corporate OSH Steering Committee and to relevant safety and health representatives.

2.8 Resolution of Issues and Refusal to Work

In general terms, the provision in Section 24 of the OSH Act for the resolution of issues are the same for 'covert operations' and 'dangerous operations' as those for all other functions and duties undertaken by police officers.

However, under Section 4A(2), a police officer cannot refuse to work as mentioned in Section 26(1) if the refusal to work would adversely affect, or could reasonably be expected to adversely affect, a 'covert operation' or a 'dangerous operation'.

The parties note that the resolution of issues that apply to the right to refuse work when police officers are involved in a 'covert operation' or a 'dangerous operation' may be affected by the exclusions provided under Section 4A(2) of the OSH Act.

Where there is an unresolved issue associated with a 'covert operation' or a 'dangerous operation', the employer, safety and health representative or employee may notify WorkSafe under Section 25 of the OSH Act. It is recognised by WorkSafe and the WA Police that the police officers involved in the operation cannot refuse to work.

The WorkSafe Inspector shall attend forthwith at the workplace following WorkSafe departmental procedures and shall be mindful of the fact that the police officers cannot refuse to work.

Following the investigation, the WorkSafe Inspector shall either take such action under the OSH Act as is considered appropriate, or determine that in the circumstances no action is required under the OSH Act.

2.9 WorkSafe Contacts

Initial Contact	Customer Help Centre	1300 307 877
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Subsequent Contacts	Team Manager - Service Industries
	Director, Manufacturing, Transport & Service Industries
	WorkSafe Western Australia Commissioner

After Hours (urgent matters) Director - Call Centre

2.10 WA Police Contacts

Refer to section 2.1 of this MOU ('Notification of the Employer') for appropriate WA Police contacts.

3. SUPPORTING GUIDANCE MATERIAL

In 2004, the Commission for Occupational Safety and Health released a guidance note, *'Covert operations' and 'dangerous operations' in the Western Australia Police Service*. This provides practical guidance on the implementation of the OSH Act with respect to 'covert operations' and 'dangerous operations', given the exclusions in the application of the OSH Act in relation to these two areas of police work.

This guidance note was developed by a tripartite working party consisting of representatives from the WA Police, WorkSafe and the Western Australian Police Union of Workers and subsequently endorsed by the Commission for Occupational Safety and Health.

The signatories to this MOU will endeavour to support this guidance note.

4. CONSULTATION AND ASSISTANCE

WorkSafe and the WA Police will endeavour to consult with and assist each other on the training necessary for a core group of WorkSafe Inspectors and WA Police and WorkSafe contact officers who may be involved in giving effect to this MOU.

4.1 Arrangements

The Occupational Safety and Health Amendment Bill 2002 provided for a transition period of nine months before the Amendment Act came into effect. During this time, only a limited number of provisions in the OSH legislation applied to police officers. The Co-agency Agreement signed in 2003 set out protocols for this transition period.

Since 3 January 2004, the OSH legislation (as amended by the Amendment Act) fully extends to police officers. This Memorandum of Understanding sets out the appropriate protocols of the updated OSH legislation.

**WorkSafe Western Australia
Commissioner**

Dated 19.3.2015

Commissioner of Police

Dated 8.4.15