Submission to the Standing Committee on Public Administration:

Inquiry into WorkSafe Western Australia*

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Introduction

1. The objects of the *Occupational Safety and Health Act 1984* (WA) (**the Act**) are broadly aimed at protecting people from hazards and harm while they are at work.[1]

2. The Department of Mines, Industry Regulation and Safety (**the Department**) is the State Government body that is responsible for assisting the Minister in the administration of the Act.[2] WorkSafe Western Australia (**WorkSafe**) is a division within the Department.[3] The inquiry focusses on Worksafe's performance and processes.

3. This submission will concentrate on three issues relating to Worksafe. The first is the potential for infrequent review and reporting of WorkSafe activities. The second issue involves an inefficient process prescribed by s 25 of the Act, where notification of unresolved issues at workplaces go to Worksafe inspectors.[4] The third is the inadequacy of the prosecution processes within the Act.

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* This submission contains the authors' personal views. Those views should not be attributed to the authors' employers.

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1 *Occupational Safety and Health Act 1984* (WA) s 5. Also see generally: *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* [1994] 74 WAIG 2, 12.

2 The Department of Commerce amalgamated with the Department of Mines and Petroleum, and this is the department of the Public Service of the State principally assisting the Minister in the administration of the *Occupational Safety and Health Act 1984* (WA) s 3(1) (see the definition of the word 'department').

3 See: http://www.commerce.wa.gov.au/ and https://www.slp.wa.gov.au/legislation/agency.nsf/docep_home.htmlx

4 Section 25 of the *Occupational Safety and Health Act 1984* (WA) provides for notification to an inspector when there is an unresolved occupational health and safety issue following an unsuccessful attempt for resolution pursuant to a workplace procedure. Section 25(2) requires an inspector attend the workplace 'forthwith'.

Issue 1: Potential for infrequent review and reporting of WorkSafe activities

4. Section 61 of the Act requires the Minister to carry out a review of the operations of the Act on every fifth anniversary of its commencement. That review must have regard to, amongst other things, the effectiveness of the Act and the operations of WorkSafe.[5]

5. Section 61 of the Act also requires the Minister to prepare a report about his or her review and to table that report before each House of Parliament.[6]

6. Four reports have been tabled before Parliament in accordance with the requirements of section 61. To date the reports are known as:

    a. the Laing Report (No 1) – 1992;

    b. the Allanson Report – 1998;

    c. the Laing Report (No 2) – 2002; and

    d. the Hooker Report – 2006.

7. There are appear to be no reports tabled in accordance with section 61 post the Hooker Report.[7]

8. The absence of regular review of the operation of the Act is of concern to all workplace participants and might be perceived as indicating a significant deficiency in the level of scrutiny of occupational safety and health in Western Australia and, more particularly, in Worksafe activities. Delayed review could suggest the development of performance issues surrounding the Act's operations.

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5 *Occupational Safety and Health Act 1984* (WA) s 61(1)(c).

6 Ibid s 61(2).

7 The relevant Minister may have conducted a review post the Hooker Report and tabled it as required by section 61 of the Act, but it has not appeared in Parliamentary website searches. Alternatively, the relevant Minister may not have tabled a report as required by s 61 in the last decade.

9. It is worth noting the Hooker Report considered whether s 61 and its requirement for five yearly reviews should be amended, for being too prescriptive a timeframe. It concluded any change would be inappropriate and that the review period was suitable in the context of the "dynamic content of the subject matter" which "required regular monitoring and assessment of the operation of the Act and its delegated legislation".[8]

Issue 2: Inefficient process prescribed by section 25 of the Act

10. The efficiency of WorkSafe is compromised by the dispute resolution provisions contained in sections 24 and 25 of the Act. For the reasons outlined below, WorkSafe could be made more efficient if the power to resolve OSH disputes was removed from WorkSafe inspectors and instead entrusted in the Occupational Safety and Health Tribunal.

The need for an OSH dispute resolution process

11. Professor Johnstone, Dr Bluff, and Adjunct Associate Professor Clayton have provided a detailed summary of the importance of OSH issue resolution processes in their book, *Work Health and Safety Law and Public Policy (3rd ed)*.[9] In discussing the importance of OSH issue resolution processes in the context of the model OHS statute, the learned authors said:

> 27.64 The objectives of issue resolution should always be to ensure:
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> - that the health and safety of workers and others are not put at risk;
> - the model Act and regulations are being complied with; and

[8] Richard Hooker, *Review of the Occupational Safety and Health Act 1984* (2006) 170-1 [8.85] <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/hooker_final_report.pdf>.

[9] Richard Johnstone, Elizabeth Bluff, and Alan Clayton, *Work Health and Safety Law and Public Policy* (Lawbook Co, 3rd ed, 2012).

- the resolution of an issue preserves or builds a positive relationship between the workplace participants that is conducive to ongoing trust, consultation and cooperation on matters relating to OHS.

27.65 These objectives are best met where the process involves:

- those directly involved in the relevant work;
- those who make, or are able to make, decisions affecting the work and the way in which it is undertaken;
- those who have relevant information; and
- assistance and representation necessary to enable the parties to understand all relevant matters and contribute effectively to the discussions.

27.66 A worker may not have the expertise or the confidence to effectively deal with a manager or other person in seeking to resolve an issue. The worker should accordingly be entitled to the assistance of an appropriate person.[10]

12. Professor Johnstone, Dr Bluff, and Adjunct Associate Professor Clayton also said that:

> 27.84 The issue resolution process may not result in a resolution and third party intervention or the exercise of powers under the model Act may be necessary. The parties should not be able to agree a process that purports to prevent that intervention or exercise of powers.[11]

The problems with the OSH dispute resolution process contained in the Act

13. Section 24 of the Act requires an employer to attempt to resolve issues relating to occupational safety or health with, depending on the relevant procedure, the safety and health representative, the safety and health committee, or the employees.

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[10] Ibid 529-30.
[11] Ibid 532.

14. If a dispute is not resolved through section 24 of the Act, then section 25 provides that the employer, a safety and health representative, or an employee (but only if there is no safety and health representative) may notify a WorkSafe inspector of the dispute.

15. The only types of disputes that can be referred to an inspector through section 25 are ones where there is a risk of imminent and serious injury to a person, or of imminent and serious harm to the health of a person.[12] There is no provision for employees to bring an OSH dispute that does not involve a risk of imminent and serious injury to, or imminent and serious harm to the health of a person, before an independent decision maker.[13] The determination of whether the unresolved dispute involves a risk of imminent and serious injury or harm is presumably determined first, by the employer, the OSH representatives and/or employees, and then, subsequently, by the inspector. Having a threshold of seriousness or imminence can be a source of dispute in itself and does not assist in having the issue resolved.

16. The section 25 procedure involves the employer, an OSH representative, if there is one, or an employee, notifying an inspector of an unresolved dispute. An inspector is not appointed to resolve the dispute per se; rather, the inspector makes a response upon notification. The response is to take action, or not to take action. It may or may not resolve the dispute. There is no option provided for referral to an independent decision maker, to assist with resolution of the dispute.

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[12] *Occupational Safety and Health Act 1984* (WA) s 25(1).

[13] Model legislation does not require the health and safety issue to meet any threshold of seriousness or imminence. See *Model Work Health and Safety Act* ss 81, 82 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/model-whs-act-21march2016.pdf>

17. On notification the Worksafe inspector is to attend the workplace 'forthwith', and only then must they decide to take action that is 'appropriate'.[14] The sense of urgency in the order of response indicates the inspector's role is to deal with immediate issues. Their response to notification of an unresolved issue is to decide to act or not to act, which may not resolve the issues involved, and may not resolve any that are not immediate.[15] The inspector may decide no action is appropriate. The inspector's response to the notification is the final process provided for resolution of the dispute by the Act.

18. Section 25 of the Act is problematic for the following reasons:

    a. it disenfranchises individual employees who may be unsatisfied with the resolution (or lack of a resolution) of an OSH issue;

    b. it does not allow employees to be represented by a trade union or a lawyer;

    c. if notification of an unresolved dispute is not considered to involve a risk of imminent and serious injury to, or imminent and serious harm to the health of a person, then there is no mechanism within the Act for the resolution of the dispute;

    d. WorkSafe inspectors are not experts in dispute resolution;

    e. WorkSafe inspectors do not have the resources to adequately arbitrate disputes;

    f. WorkSafe inspectors do not publish written reasons for decisions; and

    g. safety and health representatives, trade unions, and employees have no right to appeal a decision of a WorkSafe inspector.

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[14] *Occupational Safety and Health Act 1984* (WA) s 25(2).

[15] Model legislation specifically refers to the inspector assisting in resolution of the dispute: *Model Work Health and Safety Act* s 82 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/model-whs-act-21march2016.pdf>

19. Importantly, while WorkSafe inspectors are busy trying to resolve section 25 disputes, they are taken away from other important tasks such as investigating breaches of the Act.

Recommendations for reform

20. The efficiency of WorkSafe could be enhanced if its inspectors were not appointed to deal with unresolved disputes under section 25 of the Act. This would enable WorkSafe inspectors to spend more time on their core functions such as conducting routine inspections and investigating breaches of the Act.

21. The Western Australian Industrial Relations Commission (**the WAIRC**) is a statutory body that is funded by the State Government. The WAIRC sits within Western Australia's hierarchy of courts.[16] The WAIRC already has jurisdiction to hear certain types of disputes under the Act.[17] When it does so, the WAIRC is referred to as the Occupational Safety and Health Tribunal (**the Tribunal**).[18]

22. The Tribunal is better equipped to resolve OSH disputes between employers and employees and their representatives. This is because:

    a. the Commissioners that sit in the Tribunal are experts in resolving disputes between employers, employees and trade unions;

    b. the Tribunal has far more resources at its disposal for the resolution of OSH disputes (for example: registry staff, a Registrar, mediation and hearing rooms, transcription services, the Commissioners, and the Commissioners' associates);

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[16] *Industrial Relations Act 1979* (WA) s 12.
[17] *Occupational Safety and Health Act 1984* (WA) s 51G(1).
[18] Ibid s 51G(2).

c. the Tribunal already has established procedures for the resolution of disputes;

d. the Tribunal holds hearings in public, and publishes detailed, written reasons for its decisions.

23. A re-drafted section 25 should seek to achieve the following things:

a. entitle employers, employees, safety and health representatives, and trade unions to refer unresolved OSH disputes to the Tribunal for hearing and determination;

b. entitle employers, employees, safety and health representatives and trade unions to be represented by lawyers in matters before the Tribunal;[19]

c. empower the Tribunal to attempt to conciliate any dispute that was unresolved through the process set out in section 24 of the Act;

d. if conciliation before the Tribunal is unsuccessful, then empower the Tribunal to hear and determine the dispute; and

e. ensure that orders made by the Tribunal are enforceable.

Issue 3: The inadequacy of the prosecution processes within the Act

24. The effectiveness, or at least the perceived effectiveness, of WorkSafe is seriously undermined by the fact that all prosecutions under the Act are heard and determined in the Magistrates Court of Western Australia by a Safety and Health Magistrate.[20] That there is no jurisdiction in higher level courts, recognising the serious nature of some offences created by the Act, downplays the nature of the

[19] This is already contemplated by section 51I(3) of the *Occupational Safety and Health Act 1984* (WA).
[20] *Occupational Safety and Health Act 1984* (WA) s 52(2).

offences themselves and casts a shadow over the ability of the Western Australian court system to effectively meet the objectives of the legislation.

No publically available reasons for decision

25. The Safety and Health Magistrates do not publish publically available, written reasons for decision. This means that it is often impossible for a member of the public to access a Safety and Health Magistrate's decision in a particular case.

26. Members of the public can access case summaries which are drafted by WorkSafe and published on WorkSafe's website. However, those summaries are not an adequate substitute for the actual reasons of a Safety and Health Magistrate's decision.

Offences involving the death or serious injury of a worker are being tried in a low-level court

27. The Magistrates Court of Western Australia ordinarily deals with criminal and traffic offences of a minor nature, and civil matters that are worth less than $75,000.[21] Its jurisdiction in relation to OSH matters that involve heavy penalties, of up to $625,000, and serious criminal offences is not consistent with the lower level of crime and civil matters it otherwise deals with.

28. Why the Magistrates Court has sole jurisdiction is not clear, and may be an unintended consequence of the evolution of occupational health and safety regulation in Western Australia, where serious breaches of duty, and higher penalty ranges, are now distinguished from less serious breaches, but court processes have not yet been adjusted. The deterrent value of serious offences

[21] See: *Magistrates Court Act 2004* (WA) s 11(2); *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 4, 6.

would be strengthened by making a distinction between court jurisdictions for minor offences and serious offences. As with other crimes involving serious injury and death, a court with jurisdiction to hear indictable offences would arguably be appropriate.[22]

29. The Act does not provide WorkSafe with an ability to prosecute more serious offences (such as in circumstances where a worker has been killed or seriously injured at work) in the District Court of Western Australia or the Supreme Court of Western Australia.

30. The inability of WorkSafe to prosecute serious offences in the District Court of Western Australia and the Supreme Court of Western Australia has the potential to undermine public confidence in WorkSafe and the State Government. This is because it sends the message that workplace deaths and workplace injuries are only minor legal matters.

Recommendations for reform

31. The Act should be amended so as to give jurisdiction to:

    a. the Supreme Court of Western Australia to hear and determine all prosecutions brought under the Act which involve the death of a worker;

    b. the District Court of Western Australia to hear and determine all prosecutions brought under the Act which involve a worker suffering from a serious injury other than death; and

    c. the Health and Safety Magistrates for prosecutions which do not involve the death or serious injury of a worker.

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[22] Richard Johnstone, Elizabeth Bluff, and Alan Clayton, *Work Health and Safety Law and Public Policy* (Lawbook Co, 3rd ed, 2012) 723-4. The authors recommend that prosecution of the most serious breaches are bought on indictment.

32. The Act should also be amended to require the Magistrates Court to publish written reasons for decisions, which are freely accessible to the public.

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