

COMMUNITY & PUBLIC SECTOR UNION
CIVIL SERVICE ASSOCIATION OF WA

**CPSU/CSA Submission to the
Standing Committee on Legislation
regarding Part 2 of the Work Health
and Safety Bill 2019**

Executive Summary

Honourable members of the Standing Committee on Legislation,

The CPSU/CSA is the combined entity of the Civil Service Association of Western Australia (CSA) representing public sector employees in the state of Western Australia as an organisation registered under the *Industrial Relations Act 1979* (WA); and its federal counterpart, the Community and Public Sector Union, WA Branch (CPSU) registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

The CPSU/CSA has a stakeholder interest in the reform of Work Health and Safety (WHS) legislation as it will affect both its members and employees working in Western Australia who are currently under the jurisdiction of the *Occupational Safety and Health Act 1984* (WA).

The modernisation of WHS laws in Western Australia is long overdue.

- Work-related deaths in WA have remained at an unacceptable level, out of pace with improvements in WHS awareness and technological advancements in safety capability.
- Regarding psychosocial safety and health factors, a broadening understanding in recent years of psychosocial impacts in workplaces calls for greater legislative and regulatory controls in this area.
- The recent experiences of the COVID-19 pandemic in both a local and global context have reinforced the need for decisive legislative action to protect the health and safety of workers in Western Australia and recognise WHS as intrinsic to public health.

The CPSU/CSA supports this Bill which has built on the experiences of the Model legislation in other states and the recommendations of the Boland Review of 2018. A long history of consultation with relevant stakeholders including a designated Ministerial Advisory Panel has improved upon this model for Western Australia.

The Bill creates a strong legislative and regulatory framework for improving WHS in Western Australia; clarifying duties, strengthening enforcement capabilities and building a WHS culture in our State. Accordingly, the CPSU/CSA makes the following submission and looks forward to a swift implementation of the Bill following the remainder of the legislative process.

Yours sincerely



Rikki Hendon
CPSU/CSA Branch Secretary

Review of Part 2 of the Work Health and Safety Bill 2019

Health and Safety Duties

During the parliamentary discussion that took place in the Second Reading of the Bill in the Legislative Assembly and the review of the Bill by the Standing Committee on Uniform Legislation and Statutes Review, some concerns with the implications of Health and Safety Duties under Part 2 of the Act were raised. This has precipitated the referral of the Bill to the Standing Committee on Legislation for further analysis and review. As the Committee considers Part 2 of the Bill, the CPSU/CSA requests that the following items raised are taken into consideration.

Division 4 section 27 - Duties of Officers

The health and safety duties of Officers under Part 2 of the Bill are designed to embed WHS priorities with high level decision-makers associated with a Person Conducting a Business or Enterprise (PCBU) acting as an agent of the Crown, or within the direct employment of a Crown agency.

The previous Occupational Safety and Health Act operated within a restrictive two-tier framework of duties between employers and employees. In contrast, the Work Health and Safety Bill creates a multi-tier framework of duties in the context of agencies of the Crown.

The proposed framework recognises not only non-traditional employment structures, but also recognises the potential impact that high level decision-makers in a Crown agency have regarding WHS. This is a functional way to bridge the gap between employer duties and employee duties in government agencies and reflect the reality of the current public sector workforce. The decentralised nature of the public sector means that many decisions regarding health and safety are made at an upper-managerial or directorate level, with direct reporting to the chief executive. This is the case particularly where the employing authority has multiple worksites.

Importantly, section 27 creates a positive duty for an Officer to perform due diligence to ensure the PCBU's compliance, which requires the Officer to take a proactive approach to their consideration and assessment of work health and safety. This will help to ensure the safety of all workers within that PCBU, as the Officer's due diligence duties are continuous. Subsection 27(5) clearly outlines what the expectation is, leaving no room for misinterpretation:

27(5) In this section —due diligence includes taking reasonable steps —
(a) to acquire and keep up-to-date knowledge of work health and safety matters; and
(b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
(c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act;
(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

When the Bill is viewed in its entirety, creating duties for Officers as defined under section 4A exists in conjunction with the primary duties of the PCBU, ensuring that key decision-makers within public sector agencies have an active role within WHS and legal and ethical responsibilities for WHS outcomes. This goes some way to establishing an effective and functional WHS framework which makes it easier for public sector agencies to comply with, and avoid incidents falling through the cracks.

Division 1 Sections 14-16 - Duties not transferable

Sections 14-16 of the Bill are particularly relevant to the public sector, as they prohibit the delegation of WHS duties which may otherwise be possible under the existing OSH legislation and create a network of duties among multiple duty-holders which will strengthen the level of compliance.

The CPSU/CSA has long campaigned for direct employment in the public sector wherever possible. However, as long as there are still examples of the public sector engaging external labour hire (contracts for services arrangements), it's important the section 16 of the WHS legislation makes explicit that WHS responsibilities remain with the public sector. This is important for risk management for the government, and prevents employing authorities from attempting to absolve responsibility for discharging their legal duties under the WHS legislation.

Sections 15 and 16 further strengthen the employing authority's compliance through establishing what could be described as a network of duties that are expanded over multiple duty-holders as well as allowing for a single duty-holder to have multiple duties. This allows for greater capacity of control, and guards against a "bystander effect" between duty-holders. As outlined in the Explanatory Memorandum at paragraph [59], there are both legal and practical implications of this framework:

In formulating these principles, the Bill makes it clear that:

- a person with concurrently held duties retains responsibility for the duty and must ensure that the duty of care is met;
- the capacity to control applies to both 'actual' or 'practical' control;
- the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances; and
- where a duty holder has a very limited capacity, that factor will assist in determining what is 'reasonably practicable' for them in complying with their duty of care.

Division 1 Section 17 and Subdivision 2 section 18 – "Reasonably Practicable"

The WHS Bill maintains the existing OSH Act's modifier of "reasonably practicable" as the required standard of care for discharging duties in Part 2 of the Bill. Any concerns regarding the impact of duties under Part 2 of the Bill should be allayed by section 18. This section clarifies the steps which are required to be taken by a duty-holder to weigh up all relevant factors in making decisions on how to eliminate or mitigate risks. The Explanatory Memorandum at paragraph [65] outlines that this section focuses on this process of weighing up relevant factors:

After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

This importantly clarifies that where the cost of an intervention is grossly disproportionate to the risk, the standard of care for discharging the duty will not require it and will require a more appropriate and proportionate measure.

Psychosocial impacts

The primary duty of care under Division 2 section 19 includes a definition of health which includes both physical and psychological health, as defined in section 4 of the Bill.

As stated in the CPSU/CSA's submission in response to the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) recommendations, the CPSU/CSA welcomes the Bill's clarification that the general duty of care encompasses both physical and psychological health. However, a more direct recognition of psychological harm as a distinct head of risk in the Act would be more appropriate.

In the interim, an expansion of the duties in relation to psychological health is needed in the model regulations and through the development of relevant Codes of Practice and guidance materials for psychosocial risk factors under Part 14 Division 2 of the Bill and clause 1.2 of the Inter-governmental agreement for regulatory and operational reform in occupational health and safety. A body of work has been carried out in recent months on developing and updating Codes of Practice and guidance materials for *Violence and aggression* and another for *Bullying at work*, both of which will have a large impact on psychosocial factors in the workplace. The CPSU/CSA looks forward to the development of a targeted Code for identifying, mitigating and eliminating psychosocial hazards, following enactment of the legislation. However, much of this detail can and should be captured in the regulations, which would support the operation of the legislation.

The CPSU/CSA's view of psychological harm is consistent with that of the International Labour Organisation¹, that psychological harm can, in some cases, be caused by a series of behaviours of violence and harassment in workplaces that exist on a continuum. Psychological harm as a casualty of these behaviours can be its own discrete risk factor in a WHS setting, as well as having a strong correlation with physical harm, and can also exist alongside other WHS risks such as fatigue.

CPSU/CSA members are frequently in contact with the Union for industrial support on how to respond to the psychological impacts they have endured in their workplace. The following de-identified case study from a CPSU/CSA member is one of many similar examples of the psychological health impacts which impact workers. Examples such as this have been exacerbated by an outdated OSH framework which has not adequately recognised psychosocial factors as a work health and safety issue. Our members' stories demonstrate the importance of passing the Bill to directly recognise psychological health, as well as to create a framework which recognises the duties of Officers of the Crown as outlined above.

Case Study: Bullying in Adult Community Corrections

A CPSU/CSA member working in adult community corrections for the Department of Justice witnessed systemic bullying of multiple employees over a number of years from upper-management in the division she worked in.

Initially, the member was not personally impacted by the pattern of bullying, however led a challenge to the behaviour she witnessed by pursuing available OSH channels, consistent with her employee obligations under the OSH Act.

The employer distributed a Bullying survey to gauge the impact on employees. The survey results demonstrated how widespread the impacts of bullying were on the health and safety of employees. Given these employees work within highly stressful positions responding to the complex needs of offenders in the community, mitigating the psychosocial impacts of bullying is critical.

¹ Ending violence and harassment against women and men in the world of work, International Labour Office Conference, 107th session, 2018: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf

Unfortunately this member's contributions to resolving the issue led to her being personally victimised. The member's experiences included being silenced from speaking out about the bullying at the directorate and senior HR level, prevented from performing aspects of her job classification and excluded from being genuinely considered for promotion.

After some time, the employer initiated a horizontal transfer of both senior leadership staff involved in the bullying to another division for "operational reasons" without any acknowledgment of the bullying misconduct. Affected employees were actively discouraged from continuing to raise any bullying concerns or dissatisfaction with this response.

The member was severely impacted by the bullying itself, as well as the employer's minimisation of the harmful behaviours of its senior leadership and the lack of an effective resolution. The psychosocial impacts were serious and severe. These impacts included psychiatric illness creating an inability to work and prompting a Workers Compensation claim where liability was accepted.

Through settlement of the Workers Compensation claim, sustained time away from the workplace and psychiatric care, the member has been able to make a full recovery and successfully achieve merit selection for an alternate and higher-level position within the Department. However, the member continues to be affected by Return to Work processes which do not adequately recognise the residual impacts of the psychological trauma she has endured.

The above example is reflective of the need for a stronger legislative and regulatory framework which recognises psychosocial impacts as a central WHS issue. The overlapping processes of Workers Compensation, Fitness for Work, Return to Work and Bullying and Harassment policies demonstrate the efficiency of creating a strong WHS framework and accompanying Codes of Practice to assist in intercepting and de-escalating psychosocial hazards at the earliest stage.

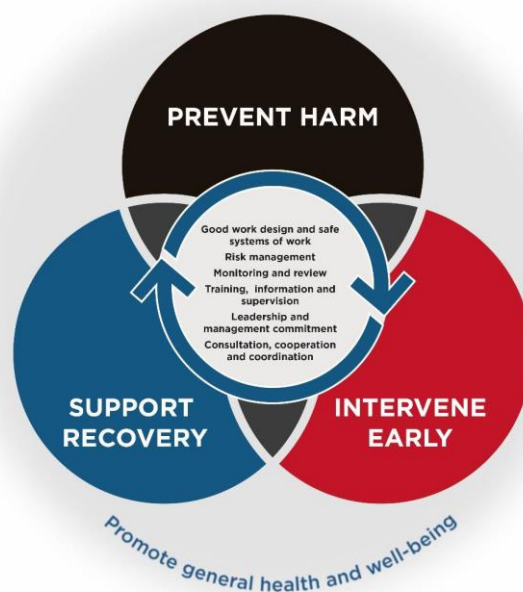


Figure: Systemic approach to psychological health and safety
Safe Work Australia, January 2019

Safe Work Australia's guidance material on work-related psychological health and safety under the Model Laws provides the above model of best practice to monitor and manage psychological risk in the workplace. Harm prevention enables psychosocial hazards to be eliminated through interventions such as effective work design and workload management. Early intervention mitigates risks once they present, through strategies such as employees' access to leave, reasonable accommodations in the workplace and managing areas of conflict. The third element of the model, supporting workplace recovery, is focused on strategies to support affected employees and disruptions to core business which may have taken place as a result of the WHS event. The model incorporates the statutory duties to eliminate and mitigate psychosocial hazards in making the case for harm prevention, early intervention and supporting workplace recovery.

Public sector example: Modernised WHS laws as a foundation for cultural change regarding psychosocial hazards

A barrier to our members in the public sector pursuing current OSH processes for bullying or harassment is the lack of cultural awareness in the sector of psychosocial issues. Circumstances which collectively lend themselves to members making OSH claims with the assistance of their Union are often self-managed by members looking for a swift resolution to their matter, at considerable personal and professional cost. Claims are often incorrectly pursued by employees and Human Resources (HR) through a grievance policy due to the perceived simplicity of these policy processes, particularly where bullying is concerned. Evidence gathered by public sector agencies during the grievance process is often then used to pivot into a misconduct process against that employee, which exposes our members to discipline action without being afforded the principles of procedural fairness. This blindsides members who would otherwise have been able to trigger compulsory OSH processes such as health and safety investigations and reporting requirements if they had pursued the OSH route, which would have produced a more equitable outcome. It also neglects to resolve any of the underlying psychosocial hazards which have led to the cascade of policy interventions.

Where members have progressed through OSH processes, there has been the tendency of employing authorities to conflate ongoing OSH complaints with Workers Compensation claims for work-related mental health conditions. While there is often an overlap in these processes, our members frequently face difficulties having their OSH matters involving psychosocial hazards appropriately remedied, particularly where liability for Workers Compensation has been denied. This is due to employing authorities and their decision-makers quite often lacking the knowledge and awareness of the complexity of psychosocial impacts, such as the impact of work design, excessive workload, and interpersonal conflicts in the workplace. As a result, employing authorities in the public sector often lack the knowledge to disentangle these dual processes of OSH and Workers Compensation.

The modernised WHS laws provided by this Bill could be further improved in terms of further delineation of psychosocial issues, however the explicit inclusion of psychological health in the Bill's definition of health, goes some way to creating cultural change regarding psychological health and psychosocial hazards.

The Public Sector Commission's annual State of the Sector report 2018-19 provides some data on the rates of misconduct in the Western Australian government sector involving inappropriate interpersonal behaviour, which necessarily creates psychological hazards:

Type of unethical conduct	Number of allegations	Number of substantiated allegations
Offensive or inappropriate personal behaviour (e.g. threatening or abusive language/conduct)	489	267
Repeated unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that creates a risk to health and safety (e.g. bullying)	269	181
Discrimination, harassment, sexual assault or other discriminatory/indecent behaviour	127	75
Inappropriate physical behaviour (e.g. assault)	125	50

Unethical conduct by type and number identified through the Public Sector Entity Survey, and Integrity and Conduct Survey 2019

It is important to note that each of the above examples constitutes a psychological risk to at least one but more likely multiple employees. This comes at a personal cost to the affected employees as well as a financial cost to the public sector for remediation. If psychological risk was more of a focus of WHS laws, there would be appropriate risk assessment through the due diligence of officers and supportive interventions that would reduce the frequency and severity of these incidents.

Endorsement of UnionsWA's submission and support for the WHS Bill

The CPSU/CSA supports the submission of UnionsWA as the peak body of Union affiliates in WA in all remaining items beyond the scope of this submission, particularly regarding the importance of establishing a 2-tier offense for industrial manslaughter under sections 30A and 30B of the Bill. The consultation process regarding industrial manslaughter has been extensive, and has drawn on aspects of the Boland Review, the Ministerial Advisory Panel recommendations, extensive public consultation and collaboration between UnionsWA and its affiliates whose members are predominantly impacted by this aspect of the legislation. This two-tier approach is focused on delivering systemic justice to families who have been impacted by deaths which would otherwise have been avoided if comprehensive safety strategies had been adhered to. In relation to section 30B(c) which creates a simple offence category for Officers of a PCBU, there needs to be neglect, consent or connivance on the part of the Officer in relation to the PCBU's failure to comply with their duty. This causal link means this offence category is not anticipated to be frequently used, however its inclusion in the Bill recognise that adherence to WHS duties by all duty-holders is critical to saving lives.

The CPSU/CSA appreciates the opportunity to make a submission to the Parliamentary Committee's review of Part 2 of the Bill. The above feedback of the CPSU/CSA endorses the Bill and provides explanation of the importance of Part 2 of the Act and the consideration which has been taken in its drafting.

References

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