



Recommendations of the 2018 Review of the Model Work Health and Safety Laws

Submission by the Australian Manufacturing Workers Union
in response to Safe Work Australia's Consultation Regulation
Impact Statement

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Contents

Introduction	Page 2
Workers experience	Page 3
Recommendation 2	Page 6
Recommendation 5	Page 17
Recommendation 7	Page 17
Recommendation 8	Page 17
Recommendation 9	Page 18
Recommendation 10	Page 21
Recommendation 11	Page 22
Recommendation 15	Page 22
Recommendation 17	Page 22
Recommendation 23	Page 23
Recommendation 26	Page 23
Recommendation 27	Page 23
Appendix 1	Page 26
Appendix 2	Page 27
Attachment 1	

Please note the numbering in this submission is that of the 2018 Boland WHS Review Recommendations.

“A safe workplace is where workers have built relationships. Management big stick methods don't work. Safety is controlled by the workers, not by systems but by attitude. Attitude and relationships build safety culture”. AMWU member

Introduction

The Australian Manufacturing Workers' Union (AMWU) represents over 70,000 workers who create, make and maintain employment across Australia. The AMWU membership is predominately men who work in a variety of hazardous industries e.g. mining services, rail, automotive service and repair, printing and occupations e.g. maintenance workers, laboratory technicians, process workers etc.

The AMWU supports all 34 recommendations made by the Boland Review of the Model WHS laws and welcomes the opportunity to contribute to the Consultation RIS process.

This submission needs to be read in conjunction with that of the Australian Council of Trade Unions. Where the AMWU has not commented our comments are those of the ACTU.

The Consultation RIS requests information on the costs and benefits of recommendations made by Boland. In many cases this is a particularly difficult ask because of the lack of general data, the inability to predict costs/benefits of hypothetical change and the purely administrative nature of some of the proposals.

The AMWU is particularly supportive of the following Recommendations

- Psychosocial hazards (No. 2 and 20)
- Industrial manslaughter (No. 23b)
- Penalties and sentencing (No. 22, 23a, 25 and 26)
- Health and Safety Representative rights (No. 8 and 10)
- Worker representation, participation and consultation (No. 5 and 15)
- Risk management (No. 27).

The AMWU notes that the Review falls short of addressing all the problems identified by the AMWU and draws attention to the lack of Recommendations to:

- regulate a broad range of risks faced by AMWU members, for example lung diseases, Heat exposures, Reproductive health
- develop code of practice on due diligence
- protect workers health privacy
- prescribe gig economy workers as a particular class of worker and labour hire as high risk work¹
- include “of other persons” in section 84 to ensure workers can cease work if another person is at immediate risk
- amend the Act to ensure HSRs powers are not restricted by access to HSR training

¹ it is worth reading the latest ACSI ESG Reporting by the ASX200 fatalities of contractors

- increase the number of training days available to HSRs
- improve access of workers to a worker representative during negotiation work groups etc
- include provisions for Roving HSRs
- require inspectorate/regulator to take action to address issues raised in internal review of decisions
- address the lack of accountability, transparency and enforcement of higher order controls by health and safety regulators.

Workers experience

AMWU members, like other union and non-union members, responded to ACTU Survey of the State of work health and safety during July 2019.

The Survey was a self-report, online survey. Just over 1000 AMWU members responded – the survey was not advertised to Victorian members and was only available to be completed online.

One in five survey respondents indicated that health and safety was poor or very poor at their current workplace but one in three were not confident in raising health and safety issues at work. Given that good safety relies on reporting of hazards and risks this indicates we have considerable problems, even in probably well-resourced workplaces.

Some comments indicated that there has been deterioration in site health and safety performance.

I think workplace health and safety is going backwards with more evidence of employers talking the talk but not walking the walk.

I have been a HSR for 15 or more years and work in a workplace that has been regarded as a safe place. But over the last 6 or so years there has been a shift to casualised workers and more work loads and redundancy every year this is great for profits, but anxiety and unrealistic targets are creating a culture of poor mental health. The casualised and temps and Labour hire are scared to speak up in fear of losing their jobs.

Safety has gone south in recent times. Lots of issues get thrown into the too hard basket and forgotten.

These workers are experiencing the downside of changes in the labour market, particularly underemployment.

With casualization the worker has rights but to claim these rights affect the current position and all future positions. As I once heard at a prestart meeting: we can't hurt you here but think of your next of position when a reference check is being carried out.

With work opportunities limited I feel very uncomfortable raising issues and risking job security.

My company uses workplace safety issues as a means to terminate employees (especially staff). They have terminated various employees citing breeches of procedures on several occasions.

Companies will make you sign multiple forms to use in court if you hurt yourself, but on the job it's impossible to implement all the controls due to the pressure they put on you to get the job done quicker. If you speak up about it it's common knowledge that in this industry

they will sack you, which is easy for them to do because everyone's hired as a casual employee. It's no secret that's one of many reasons there's very limited opportunity to get full time employment.

Because we are located in central west NSW our employer uses our economic climate and limited jobs in our area as a threatening tool against our workforce.

Other comments relate to what Prof Sidney Dekker calls the "bureaucratization of health & safety".²

Safety is not a piece of paper it's an attitude and the attitude of management towards safety stinks. Regardless of how many procedures, JSA's, take 5's, safe starts, policies, sop's, take time talks, layered audits, racks, investigations (do you see what I'm getting at here) there will never be any safety until management are held personally accountable for the decisions they make. They can kill someone and walk away because we signed a piece of rubbish paper.

WHS is a joke. Rules & refs never apply to agencies like mine they always seem to talk their way out of it or just blame the employees.

My company tick boxes to follow legislations and requirements but on the floor a different situation. People are treated different If you have brought safety concerns up regarding work issues those jobs are given to different crew that will just do the work. Company won't fix the issues.

My employer has all the rules, and regs. However only follows them when it suits them.

The company uses WHS as a dictionary tool when it suits them and disregard it the rest of the time. The rules don't apply to certain people. General manager said he had no interest in safety or duty of care his job was production.

At my work place we are drowning in paper work around safety, we have JSA s (Job safety analysis) and then we have a high risk task (written up on a white board with hazards and controls, similar to a JSA) then if you are doing the high risk task that requires a pre task brief (another piece of paper again very similar to JSA) and then we have SWIs (safe work instruction) for the job. All this before we even lift a spanner, often the paperwork can take longer than the job. this is where Australia s productivity is suffering and yet we still have accidents.

Others highlighted the persist difficulties that workers face in getting action on health and safety matters

We have to harangue company reps to listen to our concerns and to deliver changes we suggest for improved safety procedures.

In nearly all industries I have worked in OH&S is not taken seriously until someone is injured and then a cover up is usually instigated or blame put on the employee. As a past OH&S rep it was only when I produced a Default Notice that I was taken seriously, and a half-hearted effort was made to remedy the situation.

That employers never consult with workers, they tell them what's happening, not work the problem out together.

² Dekker, S, The bureaucratization of safety, Safety Science 70 (2014) 348-357

Safety inspection is a joke seen one work site inspected in the last ten years and it was carried out by inspectors that had no idea E.g. they walked past live cabling that was dangerous looked at it and kept walking, Unguarded moving plant. Dangerous chemicals leaking inside roof space onto workers heads everyone thought it was water. Biological hazards overlooked.

My employers still put targets before safety. They stand up at bench talks and say follow procedures. But when we do, we get told we are wasting time by the supervisors.

From my experience companies hire health and safe to show that they have one then when he or her stands on employers' toes or makes job slower they get sacked or pushed out, it's really a farce within the industry.

Others have highlighted the imbalance between expectations on workers regarding training vs employers:

Employers should have to do mandatory training to fully comprehend the safety implications for their Employees. The federal government should legislate that all companies regardless of size contribute into a separate safety fund (on a pro rata basis) to ensure safety training is of an excellent standard across Australia and to ensure the high standard is maintained. Basic safety training in schools (i.e.. basic electrical safety).

The majority of survey respondents did indicate that health and safety at their current workplace was acceptable to very good.

While working in hospitality there was NO regard for worker's health, safety, mental health or rights! I'm now a laboratory technician and despite the work being more dangerous I feel safer, looked after and more respected!

I'm lucky to be in a company that treats safety 1st and last with all other issues about what we do as the other thing. You listed issues here that we already cover and treat with the respect and safety management they deserve.

In my workplace management and all Staff take Safety in the workplace very seriously. I just wish this could happen in all workplaces. Good luck on trying to change culture on Safety in most workplaces for the better.

We have come a long way and you will only ever control workplace incidents; workplace incidents will always happen; we need to minimise the harm as much as possible.

These days the place where I work does take health and safety seriously.

Recommendation 2: Make a Regulation dealing with psychological health

The AMWU supports Option 2.

AMWU survey respondents

Psychosocial hazards need to be more clearly enshrined in WHS laws. This would aid in destigmatisation and make it harder for employers to bully or exploit staff.

Yes mental health is becoming a major issue through out our industry due to the shift in the employment structure. Labour hire /casual and under employed.

I work at a Commonwealth Defence facility. The stress I have experienced in the last 3 years were initiated by the Commonwealth and handled poorly by my employer.

I have been employed for 26 years at the same place and I've been bullied out of my current job in the last 12 months.

Physical health and safety where I work is good. On call out of hours, Overwork and lack of staff is causing mental health issues. The push down the line culture with doing more with less is a real issue.

The urgency in rectifying mental health issues is a low priority to our bosses due to the lengthy time workers are left to endure their suffering.

Extent of identified problems

AMWU survey respondents – it's important to remember that AMWU members generally do not work in what are termed "emotionally demanding work" yet

- 12% answered yes to having a psychological injury/illness due to work
- 36% had experienced a physical injury and 32% had experienced both
- 52% had experience long work hours in the last year
- 54% had experienced high workloads and
- 43% had experienced poor workplace relationships – bullying aggression harassment etc.

Human costs

There is ample evidence of the extent of the problem of psychological risks at work.

The toll on workers' health can be deadly - from self-harm to severe physical injuries due occupational violence [e.g. health and community service sectors. See ACTU Submission.]

Non-government organisations recognise the prevalence of suicide and suicide ideation amongst trades or "blue collar" workers as a consequence of work-related psychological risks. These outcomes are barely recognised in official health and safety discourse.

The Australian Building and Construction Industry *Blueprint for Better Mental health and Suicide Prevention*, acknowledges the contribution of work to self-harm:

Research has suggested up to 17% of suicides have been found to be work related. The World Health Organisation estimates that for every person who dies by suicide another 10 to 20 will attempt suicide, with 17% of these individuals left with a permanent disability.

If this statistic applies equally to the construction industry, then we can presume that each year approximately 2,850 workers will attempt suicide and 485 of these will become permanently disabled following a suicide attempt.³ [emphasis added]

Automotive and engineering trades workers have a suicide rate just below that of construction trade workers and twice that of health professionals.⁴

If an estimate of 10% of suicides attributable to work is applied to the automotive and engineering trades this equates to death toll of 21 and at least 35 workers left with a permanent disability during the 2011-2014 period. It is difficult to compare such an estimate with the number of fatalities at work, as the public information for fatalities does not include such detail for occupational groups,⁵ but it is very likely to be at least equivalent.

BullyZero estimates that 7% of suicides are attributable to workplace bullying.⁶

These estimates are for the extreme “deadly” end of poor psychological health, but there is ample evidence that

Psychosocial work conditions are determinants of mental illness among worker populations⁷.

Adverse psychosocial work factors are recognised as a significant source of psychological distress, resulting in considerable socioeconomic burden.⁸

Exposure to work-related psychological risks has effects beyond mental health conditions. The 2006 VicHealth publication – “Workplace Stress in Victoria – Developing a Systems Approach” found that:

Job strain – the combination of high job demands and low job control – increases the risks of cardiovascular disease (CVD) in men from 1.2 to 4-fold and increases the risks of depression and anxiety at least 2- to 3-fold in women. These estimates are after adjustment for other known risk factors, including negative personality and socio-economic position. Published estimates of the proportion of cardiovascular disease attributable to job strain in men range from 7–16% for job strain assessed at a single point, and up to 35% for long-term exposure. Similar or larger attributable fractions are foreseeable for depression and anxiety in women, although none have been published as yet (see new estimates in Chapter 5). Job stress has also been linked to a range of organisational impacts, such as increased absenteeism, employee turnover and workers’ compensation rates.

In summary, there is strong epidemiologic evidence that job stress predicts mental illness and mental health problems, cardiovascular disease and various other adverse health outcomes. Job stress is a substantial public health problem, accounting for large preventable disease burdens, and deserving of a commensurate public health response.⁹

³ The Australian Building and Construction Industry *Blueprint for Better Mental Health and Suicide Prevention 2018–2020*, page 9. Construction Mates in Construction, a bi partite charity, peer to peer suicide prevention program. Workers covered by AMWU who have the 4th highest suicide rate of all occupational groupings.

⁴⁴ National Coronial Information System, Suicide 2011- 2014

⁵ <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry#table-1-worker-fatalities-number>

⁶ <https://bullyzero.org.au/programs/workplace-programs/>

⁷ Psychosocial Work Conditions and Mental Health: Examining Differences Across Mental Illness and Well-Being Outcomes [Jonathan K Fan, Cameron Mustard, Peter M Smith](#) *Annals of Work Exposures and Health*, Volume 63, Issue 5, June 2019, Pages 546–559, <https://doi.org/10.1093/annweh/wxz028>

⁸ Letellier et al, *Evaluation of the Quebec Healthy Enterprise Standard: Effect on Adverse Psychosocial Work Factors and Psychological Distress*, *Int. J. Environ. Res. Public Health* 2018, 15, 426; doi:10.3390/ijerph15030426

⁹ LaMontagne AD, Shaw A, Ostry A, Louie AM, Keegel TG 2006, *Workplace Stress in Victoria - Developing a Systems Approach: Full Report* Victorian Health Promotion Foundation, Melbourne - executive summary

The Whitehall studies found a clear link between systems of work and psychological health:

In 1997 the Whitehall Study showed an association between work and ischemic heart disease. These findings have been replicated and indicate that there is significant knowledge regarding the association between systems of work and physical and psychological health. There are also plausible models of biological explanations¹⁰.

Sir Michael Marmot describes the following risk factors as individually increasing the risk of illness – high demand and low control, imbalance between effort and rewards, social isolation, organisation injustice, job insecurity and shift work. **Together they are a toxic cocktail.**¹¹

It is also important to note that the number psychological injuries are grossly underestimated.

- ISCRR noted that SWA estimates that at least 30% of claims for psychological injury are rejected.
- ABS data shows that approximately 84% of workers with a stress or other mental condition did not receive workers compensation¹²
- 94% of AMWU survey respondents had not made a claim for workers compensation for poor mental attributed to their work or workplace.¹³

There is also strong evidence that workers with mental health conditions take longer to return to work and these workers face a much more difficult time when applying for workers compensation:

- *Workers with mental health conditions were least likely to report positive claims experiences or be working at time of interview. These effects were observed after accounting for other factors in statistical models. This finding replicates prior studies of return to work in workers with mental health conditions [20], and may be a product of the assessment, diagnostic and management challenges that arise from the invisibility of the injury in these cases [31].¹⁴*
- A recent example highlights the difficulty workers have when applying for workers compensation – a worker’s compensation claim was denied on the grounds of “reasonable management action”. This is despite extensive evidence of “bullying behaviour” over two years. The claim was eventually accepted on review – apparently the insurer/compensation authority was eventually convinced that the throwing of a chair was sufficient evidence of bullying! [what do people have to endure before the system believes them!].¹⁵
- The AMWU has received information from persons working for workers compensation body – who claim is that less than 5% for illness/injury as a consequence of bullying and harassment are accepted by the workers compensation authority.¹⁶

Monetary costs

Many estimates of the costs of work-related psychological risks are available. This list is far from exhaustive e.g.

¹⁰ Bosma H et al Low job control and risk of coronary heart disease in Whitehall II (prospective cohort) study *BMJ* 1997; 314 doi: <https://doi.org/10.1136/bmj.314.7080.558>

¹¹ Marmot, M. *The Health Gap – the Challenge of an unequal world*, page 170, Chapter 6, Bloomsbury, 2015

¹² ABS 6324.0 Work-Related Injuries, Australia, July 2017 to June 2018, Table 9.1

¹³ AMWU respondents to ACTU Survey July 2019

¹⁴ [Injured worker experiences of insurance claim processes and return to work: a national, cross-sectional study](#). Alex Collie, et al, Australia, *BMC Public Health*, online July 2019, doi: 10.1186/s12889-019-7251-x.

¹⁵ Details available on request

¹⁶ Personal communication – details available on request

- Medicare Private in 2007 estimated cost of workplace stress as \$25.7 billion
- \$890 million (5.8%) of the societal cost of depression in the Australian workforce was attributable to job strain¹⁷
- 2013 population-attributable risk (PAR) estimate of 8.7% for depression attributable to bullying and job strain, equating to \$AUD693 million in preventable lost productivity costs per annum¹⁸.
- BullyingZero quotes bullying at work costs \$36 Billion and 6.6% of workers directly experience bullying

The basic approach to cost reduction in Australia has been to limit the ability of workers to claim for mental health disorders:

*This 'back end' approach to cost reduction has resulted in an array of legislative formula designed to exclude work-related stress claims.*¹⁹

The 'back end' is exemplified by the insurance industry which is increasingly concerned about the effects of claim numbers - *"..... in the increasingly pressing context of a significant rise in mental health conditions as a proportion of overall injuries in the workplace"*²⁰

All jurisdictions make sure that access to work related stress claims is limited.²¹

Clearly, we have a problem.

The current H&S approach

From the 1990s, considerable effort has been spent on research and raising awareness. In 1996 there was enough recognition of the problem that researchers Dollard and Winefield commented:

*[t]he politics involved in conceptualising the stress problem and in recognizing psychological disorder as a leading occupational health issue in Australia has impaired advances towards prevention and treatment and the status of occupational stress as a national policy issue*²².

Contrary to assertions in the RIS²³ there is a plethora of academic research, guidance, community awareness and activity by non-governmental organisations dealing with work and risks. A bibliography is not appropriate here, but reference to a few seminal historical publications provides the context to why the AMWU and many others are proposing a change to the educate and increase awareness approach: -

¹⁷ Lamontagne A et al, *Estimating The Economic Benefits Of Eliminating Job Strain As A Risk Factor For Depression* *Occup Environ Med* 2011;68(Suppl 1):A1–A127

¹⁸ McTernan, W et al (2013) Depression in the workplace: An economic cost analysis of depression-related productivity loss attributable to job strain and bullying, *Work & Stress*, 27:4,321-338

¹⁹ Guthrie R, et al, *Work-related stress in Australia: The effects of legislative interventions and the cost of treatment*. *International Journal of Law and Psychiatry*, 33 (2010) 101–115

²⁰ Allianz, *Awareness into Action – A holistic approach to cultivating mentally healthy workplaces in Australia*, January 2019. Page 4

²¹ *The impact of changes to legislation affecting access to workers' compensation is also apparent in the data*. Page 12 Ibid, ISCR

²² Dollard, M., & Winefield, A. H. (1996). *Managing occupational stress: A national and international perspective*. *International Journal of Stress Management*, 2(2), 69–83 80

²³ Page 12 – "it is important to note that management of psychosocial risks is a relatively new area in work health and safety" .

- 1985 John Mathews published *Health and Safety at Work* – chapter 16 deals with stress ²⁴
- Toohey J, PhD thesis *Occupational stress: managing a metaphor*. 1992²⁵
- Toohey J et al, *OH&S in Australia: a management guide* included a section on workplace stress, 2005

The Australian Broadcasting Commission published a summary of jurisdictional initiatives including:

- 1998 WorkCover NSW issued a guide on stress which was updated in 2006 for a report called *Job Stress, Causes, Impact and Interventions*
- Comcare led the way for government authorities on an organisational approach since the early 1990s ²⁶
- Comcare 2006, *Preventing and Managing Psychological Injuries in the Workplace: Managers' Guide*, Comcare, Canberra
- WorkSafe Victoria StressWise – edition 2, 2007
- Queensland government initiative - People at Work, 2007²⁷
- ACT Work Safety Act - Stresswise – Preventing Work-Related Stress – 2008

Initiatives by health and safety regulators existed years prior to the 2018 Model Review law and for some jurisdictions the introduction of the Model Law was a backward step for psychological risks– for example

NSW OHS Act 2000 Objectives – section 3 section c ²⁸

- *to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs and*
- NSW OHS Regulation 2001 specifically mentioned psychological risks; Chapter Two – Clause 9, subclause 2 (b) ²⁹

Notable efforts to raise the public awareness and profile of work and mental health date from the 1990s:

- ACTU/VTHC OHS Unit Bulletin Stress Bulletins 55 and 56
- ACT section 9 [Public Sector Management Act 1994](#)
- ACTU Stop Stress at Work campaign 1997
- Stress at Work*, by Chris Peterson, 1999³⁰
- Prof Michael Marmot one of the authors of WHO Social Determinants of Health – The Solid Facts³¹ speaking tour Australia 2000

²⁴ *Health and Safety at Work*, Pluto Press, 1985

²⁵ Macquarie University, 1992.

²⁶ <https://www.abc.net.au/tv/stressbuster/resources/resources.html>

²⁷ <https://www.worksafe.qld.gov.au/injury-prevention-safety/mentally-healthy-workplaces/guidance-and-tools/people-at-work/overview>

²⁸ <https://www.legislation.nsw.gov.au/inforce/0d431445-2ac2-e5b8-a83a-e8a045336927/2000-40.pdf>

²⁹ <https://www.legislation.nsw.gov.au/inforce/dae6f0b4-221e-4e28-bf73-8ae956eef3d8/2001-648.pdf>

³⁰ First edition published by Blackwells 1999.

³¹ The Social Determinants of Health, Chapter 5, first edition 1998 . Professor Michael Marmot visited Australia talking to the health community and the OHS community about the studies behind the report.

- f. NOHSC Symposium OHS Implications of Stress, December 2001
- g. Publication by ACTU *Stop Stress at Work - A guide for workers*, 2003
- h. Vic Health *Workplace stress in Victoria: Developing a systems approach*, 2006
- i. In a response to the NOHSC 2002-2012 National Strategy OHS professionals noted that “49% of OHS professionals involved in dealing with mental workload/stress reflects the increasing profile of such factors”³²
- j. [ABC](#) Stress Buster programs. The presenter had been conducting audits around stress throughout the 1990s³³
- k. Australian Human Rights Commission – 2010, *Workers with Mental Illness: A Practical Guide for Managers* – chapters 1 and 4
- l. *Workplace Prevention of Mental Health Problems Guidelines for Organisations*³⁴.
- m. 2016 ABC Boyer lectures - Prof Michael Marmot on the *Socials Determinants of Health - Living and Working* September 24, 2016

A sample of the guidance or tools available to employers in one jurisdiction highlights the availability of information. The NSW list includes

Workers-compensation-return-work-advice-3457; bullying-complaint-form-3827; bullying-improvement-tool-3394; bullying-prevention-policy-related-procedures-advice-3454; consultation-advice-3453; consultation-guide-3450; Dealing with workplace bullying - a workers guide; Guide for preventing and responding to workplace bullying (PCBU Guide); injury-management-guide-3446; management-commitment-advice-3452; management-commitment-guide-3447; policy-procedures-guide-3448; reporting-bullying-advice-3456; reporting-bullying-guide-3449; training-supervision-advice-3455; training-supervision-guide-3451; bullying_at_work_2054; preventing_responding_bullying_factsheet_2269; brochure_prevent_bullying_5321; employer_checklist_bullying_2237; - fatigue_prevention_in_the_workplace_5581; 2008 - preventing_dealing_with_workplace_bullying_guide_employers_employees_4978; bullying_risk_indicator_2236, date unknown but predates 2012.

There is also a Heads of Work Safety Authorities document --- A Model Approach to the Regulation of Workplace Bullying – date unclear³⁵, reproduced in Appendix 1

At least three documents date were developed a decade ago.

³² Pryor et al, Profile of an OHS professional in Australia and implications for achievement of the National OHS Strategy 2002 – 2012, Safety in Action, 2006 page 13 https://www.ohseducationaccreditation.org.au/wp-content/uploads/2013/06/2006_Role_of_OHS_prof_Australia_and_the_national_strategy_Pryor.pdf

³³ <https://www.abc.net.au/tv/stressbuster/bio/nikiellis.html> Throughout the 1990s Professor Ellis conducted stress audits for workplaces.

³⁴ Work-related injury and illness in Australia, 2004 to 2014 “Mental health claims have lower acceptance rates (Safe Work Australia, 2015c) and, as the findings of this report and previous research reiterate (Collie et al., 2016; Smith et al., 2014), result in more time off work” page 47, ISCR 2016.

³⁵ Documents provided on request

No doubt a similar exercise for each of the WHS jurisdictions which would reveal the same pattern of information available. One of the most recent includes the Queensland *Injury Prevention and Mental Health and Well Being*, February 2016.

The Heads of Workplace Safety Authorities [HWSA] Guide outlines how a complaint is to be handled. This Guide requires scrutiny of the systems of work and the effectiveness of the PCBUs prevention and intervention systems.³⁶

Government agencies outside of health and safety regulators have recognised the need to prevent exposures to psychological risks:

- Australian Public Service Commission - working together promoting mental health and well-being at work. 2014
- Australia endorsed the WHO *Rio Declaration on the Social Determinants of Health*, 2012. The social determinants include work
- Provision for an order to stop bullying in section 789FD of the *Fair Work Amendment Act 2013* (Cth).

There has been over two decades of public awareness, discussion and information, the current arrangements, of a multitude of non-binding guidance material, are not protecting workers from the risk factors known to cause psychological injury/illness.

Benefits of addressing the problem

Controlling risks to psychological health also has additional benefits - the promotion of good health outcomes. Recent research – a survey of 10,000 Canadian workers found that:

*Psychosocial work conditions were associated with both negative and positive measures of mental health. However, mental illness and mental well-being may represent complementary, yet distinct, aspects in relation to psychosocial work conditions. Interventions targeting the psychosocial work environment may serve to improve both those dimensions, although the measurement and examination of specific dimension may be required to obtain an integrated and comprehensive understanding of mental health in the workplace.*³⁷

*All else being equal, a higher level of job control, job security and social support at work increased the odds of a worker being free of mental health disorders by eight to 15 per cent. They also increased the odds of a worker experiencing positive mental well-being by 10 to 14 per cent. The findings were similar for both men and women, once personal factors were taken into account*³⁸.

Letellier et al³⁹ found

Beneficial effects of interventions were observed for two adverse psychosocial work factors: low rewards (ratio of prevalence ratios (PRs) = 0.77, 95% CI = 0.66–0.91) and low social support at work (ratio of PRs = 0.89, 95% CI = 0.77–1.03). Moreover, beneficial effects of interventions were also observed on the prevalence of high psychological distress (ratio of PRs = 0.86, 95% CI = 0.75–0.998). Psychosocial interventions implemented in the context of this standard improved the psychosocial work environment and had beneficial effects on workers' mental health.

³⁶ Copy of document in appendix 1

³⁷ *ibid*

³⁸ Institute for Work and Health, Newsletter, Summer 2019, <https://www.iwh.on.ca/newsletters/at-work/97/psychosocial-work-conditions-linked-with-both-positive-and-negative-mental-health>

³⁹ *ibid*

These large studies add further evidence to grey literature and Guides published by organisations such as *SuperFriend* and University of Melbourne.⁴⁰

There are also real examples - unfortunately, a site with AMWU members had 6 suicides, over a few years. The costs for this site would be difficult to quantify – co-workers experiencing emotional trauma, lost productivity etc. In response, management and HSRs embarked on an extensive review of working conditions and work-related risk factors. HSRs have been given management approval to make recommendations which are actioned. Consequently, workers now want to come to work because of the support they receive, and the approach has been adopted at another site of the same PCBU.⁴¹

ILO

Quote from survey respondent

Age, country of birth / race and gender discrimination is rife in the workplace. If someone in a middle / senior management position takes a dislike to you, then you are targeted and sacked at the first opportunity. Or they make your working environment so unpleasant, you look for another job and leave. The famous words, people don't leave companies, they leave poor bosses

In June 2019 Australia voted for the adoption of ILO Convention 190 Concerning “*The Elimination of Violence and Harassment in The World of Work*” and supporting Recommendation 206.

The Convention and Recommendation recognise the need to move away from reliance on a reactive, individualistic complaints model towards a systemic, collective, preventative approach.⁴² The instruments include a definition of ‘violence and harassment’.⁴³

Paragraph 8 of the Recommendation clarifies that the workplace risk assessment referred to in Article 9 should:

...take into account factors that increase the likelihood of violence and harassment, including psychosocial hazards and risks. Particular attention should be paid to the hazards and risks that: (a) arise from working conditions and arrangements, work organization and human resource management, as appropriate; (b) involve third parties such as clients, customers, service providers, users, patients and members of the public; and (c) arise from discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment.

For a fuller discussion please refer to the ACTU Submission.

⁴⁰ Promoting Positive Mental Health in the Workplace Guidelines for Organisations, SuperFriend, <https://www.superfriend.com.au/app/uploads/2016/10/Promoting-Positive-Mental-Health-in-the-Workplace-Guidelines-for-organisations.pdf>

And 2013 Guidelines published by ISCRR, University of Tasmania and University of Melbourne <https://mhfa.com.au/sites/default/files/GUIDELINES-for-workplace-prevention-of-mental-health-problems.pdf>

⁴¹ Detail provided on request

⁴² For example Article 9 of the Convention requires member states to require that employers ‘take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health’.

⁴³ [International Labour Conference, Final record vote on the adoption of the Convention concerning the elimination of violence and harassment in the world of work, 108th Session, Geneva 2019](#)

Action required – Option 2

Despite the evidence of a huge and largely hidden human toll⁴⁴, and decades of awareness and information there is no legislative framework that makes it clear to regulators, PCBUs and workers *what can be done*, so far as reasonably practicable, to control psychological risks.

As with ILO Convention 190, it's time to take a more proactive and preventative approach.

The framework of health and safety laws is

1. General duties enshrined in the parent Act
2. Regulations indicating *what is to be done*, so far as reasonably practicable. Regulations make it easier for the duty holder.
3. Codes of Practice providing the duty holder with information *on how it can be done*. Codes are therefore context dependent and able to be tailored to particular industries or hazard/risk groupings e.g. Fly In Fly Out work arrangements in the resources sectors as has recently been adopted in WA.

As reported in 2012 in *OHS Alert*, Barry Sherriff noted that the model Codes "are not imposing obligations" and "the Codes provide valuable information on hazards, risks and risk-control measures, and might be considered by courts "in determining whether you've done what you ought". "They're actually there to help."⁴⁵

One of the criteria that is used when developing a health and safety regulation is the level of harm caused by the "uncontrolled hazard/risk". It would be intellectually disingenuous to suggest that

1. There is a low level of harm, given death can be one of the outcomes
2. There is a lack of knowledge about the level of harm, both psychological and physical – see above
3. There is a lack of knowledge about what can be done – the evidence shows that changing the systems of work and reducing exposures to risk factors prevent harm and in fact promotes health. This unique feature of controlling risks to psychological health must be considered. This benefit to employer and worker alike, is not the case when controlling other work hazards e.g. lead.

It is clear that the key tests of *so far as reasonably practicable* have been met:

- the likelihood of the hazard or the risk – key risk factors have been clearly outlined
- the degree of harm is known – ranges from cardiovascular diseases, anxiety to death
- what the person concerned knows, or ought reasonably to know- at least two decades of awareness, documentation etc
- the availability and suitability risk minimisation; and
- whether the cost is grossly disproportionate to the risk.

As indicated in the AMWU submission to the Boland Review

- *there is no provision anywhere in the regulations for the implementation of risk control measures to prevent the occurrence of psychological illness. This is in stark contrast to the*

⁴⁴ Dr Takala, Workplaces Safety and Health Institute, Singapore, estimates that exposures at work cause 6% of all poor mental health.

⁴⁵ OHS Alert Tuesday 30 October 2012

requirement, correctly so, for the control of risks relating to musculoskeletal disorders [MSDs]. The causation of MSDs is multifactorial and MSDs are a grouping not a diagnosis. A corresponding categorisation can be applied to psychological injury/illness i.e. prevention of mental health conditions and the control of risk to psychological health.

A Regulation on the control of psychological risk factors could be crafted similarly to the Hazardous Manual Handling Regulation. Those Regulations lists the risk factors of force, awkward posture etc that require controlling. That is the *What is to be done*, i.e. control known risk factors as far as reasonably practicable. The Regulation would be covered by Regulation 35 and 36 which require the duty holder to identify hazards and then to control any that are a risk. If the hazard is not a risk, then there is no need for control measures.

Regulation 36 requires the use of the hierarchy of control. Many have claimed that the risk management approach, and the hierarchy of control, cannot be applied to risks of psychological injury [including the RIS, page 13]. But the RIS on the same page, acknowledges that there is a Guide published by SWA which “*outlines how the hierarchy of controls can be applied to minimise the risks to psychological health*”.⁴⁶

It is important to recognise that **without** Regulations or Codes of Practice regulators and their inspector flounder. A common experience when an inspector visits a site in response to psychological risks, the inspector determines that the risks are being controlled because they have sighted a “policy”. A policy is useless if risks are not managed or the policy reflects the lower order of controls available e.g. administrative procedures.

There are overseas examples of regulation to deal with psychological hazards/risks. Some of these are summarised in the ACTU submission.

The Swedish Work Environment Authority promulgated regulations in 2015⁴⁷. The Regulations are structured differently than ours, but it is clear regulations can be drafted e.g.

Reg 11: *The employer shall take measures in order to counteract work tasks and situations that are severely mentally stressful leading to ill health among the employees*⁴⁸

It is instructive to read the advice given to workplace parties⁴⁹:

The new rules support employers in their work on preventing ill health in the workplace; the clearer regulations make it easier for them to do the right thing.

The somewhat higher administrative costs that the new regulations entail will likely be recovered in lower costs for any absences due to illness and to rehabilitation. At the same time, healthy organisations have healthier, more motivated employees. This can also support activities in the form of both higher productivity and creativity. If the rules are not followed, demands can be placed on the employer and fines can be imposed by the Swedish Work Environment Authority.

Unhealthy workload. *Make sure that the resources are adapted to whatever demands are imposed in the work. If the demands are greater than the resources, the employer can – for example – reduce the amount of work, change the order of priority, provide opportunities for rest and recovery or increase staffing. The employer needs to make sure that a dialogue is conducted between employer and employees in order to prevent ill health arising. **Working hours:** Certain types of working hours*

⁴⁶ Page 13 Consultation RIS

⁴⁷ <https://www.av.se/globalassets/filer/publikationer/foreskrifter/engelska/organisational-and-social-work-environment-afs2015-4.pdf>

⁴⁸ *ibid*

⁴⁹ Frequently asked questions. <https://www.av.se/en/work-environment-work-and-inspections/publications/foreskrifter/organisatorisk-och-social-arbetsmiljo-afs-20154-foreskrifter/>

– shift work, night work, long work periods, and being constantly reachable – can negatively affect health. In that case, it is especially important to take this into account when working hours are planned, for example that time for rest and recovery is planned in. **Victimization:** Be clear that victimization is not acceptable – explained in a policy, for example – and that there are procedures for what is to be done if victimization arises. The procedure includes such things as how and where the person subjected to victimization can obtain help. They can obtain help, for example, from an occupational health service.⁵⁰

Recommendation 5: Develop a new model Code on the principles that apply to duties

The AMWU understood that the Boland Review was trying to address stakeholders lack of clarity on how principles of duty of care apply to multiple stakeholders. The Recommendation builds on the expert evidence of Prof Johnstone⁵¹. It is unclear from Appendix A whether the RIS is correctly noting there is no regulatory burden on business or is dismissing the need for this work and has downgraded the Recommendation to publishing one piece of guidance only. The AMWU reading of the Recommendation is that a variety of Codes be developed for each type of duty holder e.g. a franchise business, labour hire, contractors, gig platform providers etc.

The AMWU supports the development of Codes for all working arrangements and strongly supports the Reviewers comment – “Recommendation 5 should be progressed as a matter of priority”.⁵²

Recommendation 7: New arrangements for HSRs and work groups in small businesses

The AMWU supports Option 2.

The AMWU understands that this Recommendation is to ease ‘regulatory burden’ on small employers. Any change must make it clear that

- workers have a right to elect a HSR and employers must respond to a request from workers
- employers must not be able to administratively declare that there are a small number of employees and bypass consultative procedures.

Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR

The AMWU supports Option 2.

AMWU survey respondents overwhelmingly supported unions assisting HSRs– 98%. Only 1 in 3 of our survey respondents were or had been HSRs in the past – only 1 in 6 were current HSRs.

The AMWU is consistently perplexed by the inability of peak bodies to understand these provisions of health and safety laws. The reasoning applied for the creation of extra barriers for union officials to provide assistance to HSR [and their employers] is muddled and illogical.

AMWU officials attend work sites to provide assistance to HSR, the members of their work group and indirectly to the relevant PCBU.

⁵⁰ ibid

⁵¹ Johnstone R, Regulation health and safety in “vertically Disintegrated” work arrangements: the example of supply chains, The Evolving Project of Labour Law, Chapter 9, 2017

⁵² Page 59. Review of the model Work Health and Safety Laws, Final Report December 2018.

We don't experience difficulties – we enter to assist all the parties. In previous submissions to the Model law or COAG review we have outlined the benefits of this provision.⁵³

Comment from AMWU HSR:

As a member of the AMWU we understand that for decades Victorian union officials and since the introduction of the WHS Act have been able to enter worksites, without the need to have a Fair Work Permit. Both ourselves and our employer have found the support of our officials very useful. The provision of advice, for free, to our employer has assisted us to improve the health and safety conditions. There is no need to confuse health and safety matters with the Fair Work Act.

Any requirement for a union official, who assist under section 68, to be differently credentialed those others providing assistance leads to a very silly outcome.

A hypothetical case illustrates the muddled thinking:

If a union official in possession of a FW entry permit and the entry permit was revoked for a civil infringement of the Fair Work Act, the application of the Powell⁵⁴ decision would discriminate against the union official and any worksite asking for assistance. However, if the person requesting entry to assist the HSR was a sergeant of arms in a bikie gang – and had an undisclosed criminal record – and H&S expertise, the PCBU would have less grounds to object to entry to the sergeant of arms than the union official.

In summary – application of the Powell decision harshly treats someone with a civil breach of the FWA.

Option 1 increases regulatory burden due to its reliance on case law. It is unclear what other provision of the WHS laws rely on case law? A prosecution of a general duty holder may be informed by case law when deciding if there is a breach or the level of breach, but the law is not changed because of the case.

The RIS notes that 40 individuals who have conditions placed on their FW permit or do not have a FW permit. That is an over inflated number, as there are people on the list who are no longer union officials and therefore do not have the right to hold a FWA entry permit. Additionally, even using the inflated figure of 40, that is 1.3% of the 3,055 permit holders.

Additionally, conflating the application of the unjust laws under the Australian Building and Construction Commission with the right of HSRs and their work groups to obtain assistance from a union official is strongly opposed for reasons of matters of procedural justice and logic.

Option 2 would be cost effective at the workplace level and easy to implement. The policy intent of Section 68 is clear, its application is clear and logical.

The AMWU also notes union officials often enter sites outside of the FW right of entry provisions e.g. attend meetings with employer – at request of management and/or workers; attend enterprise agreement discussion.

Recommendation 9: Requiring Inspectors to deal with a safety issue when cancelling a PIN

The AMWU supports Option 2.

The RIS suggests that the Review is deficient in not including data on inspectors' actions.⁵⁵ This is an unusual comment for the RIS to make and ignores the complexity of getting such data. Regulators do

⁵³ See AMWU submission to 2014 COAG review of WHS Regulations

⁵⁴ Page 18 RIS

⁵⁵ Page 21 RIS

not make this information available and as was shown in the Victorian Panel⁵⁶ regulators are notoriously reluctant to provide data.

During the training of HSRs it is made clear to them that their primary role “is to represent the interests of the workers of their work group in health and safety matters”.⁵⁷ AMWU publications advise HSRs that expert assistance is always available, including from inspectors. These resources are used in H&S Rep training because they reflect the policy intent and principles upon which Health and safety law is based -

Extracts from approved HSR training material:

It acknowledges that you don't need to be medically trained to know that a particular task causes you pain or your eyes water or you have breathing difficulties if exposed to certain fumes.

While the solutions to these hazards may need technical expertise such as, ergonomists or hygienists, the identification of hazards and often the solution to them can be done by the workers exposed to them. While WHS solutions may have technical aspects, WHS is not wholly a technical issue.

The workplace should aim for a representative committee where a range of areas, needs, operations and levels of expertise can work together.

It's important to clarify the steps and assumptions that lead to the issuing of a PIN by a HSR:

1. HSR must have consulted with the person – section 90. That is the person has indicated that they do not agree with the concerns of the HSR
2. The HSR must give at least 8 days after the notice is issued, by which the person is required to remedy the contravention or likely contravention. Section 92.
3. An inspector may be called, within 7 days, by the person to whom the PIN is issued. Section 100

If an inspector is called to the site, the PCBU has already indicated, at least twice, that there is a lack of agreement on how to address the issue raised by the HSR [scenario 1. & 2. or Scenario 1. & 3.]. It is at least twice, as in 35 plus years of experience the AMWU notes that when a HSR issues a PIN, it is an expression of frustration about the lack of action to address the health and safety matters.

The attendance by an inspector indicates that the issue is “unresolved”.

Given the above, it is a misuse of time, energy and expertise to ignore the issue at hand because of a “technical reason”.

AMWU members: If an inspector has been called to a workplace regarding a PIN this means the employer is unhappy with the content of the PIN. This is an acknowledgment that there a disagreement about the PIN. In such cases, it is sensible, efficient and would help solve issues if inspectors were required to deal with the issue.

Unfortunately, AMWU HSRs have experience of PINs being cancelled and the substantive issue is not addressed by the inspector for such technical breaches as:

⁵⁶ 2016 Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria, Pages 84,89, 120

⁵⁷ Approved Introductory HSR training material

- By providing too much detail e.g. incorrectly quoting a sub section of the Act, in addition to the correct Section of the WHS Act
- By providing detail in the actions to remedy that the inspector or PCBU doesn't agree with – noting that section 93 is optional [...may include directions....]

There are additional problems not captured by the Review which impede the implementation of the Act and failure to engage and protect workers. For example:

- Inspectors arriving on site and making no attempt to find and consult with HSRs, or to accept the PCBUs claim that the HSR is not available
- When an inspector cancels a PIN and internal review is sought under section 222. Internal review reverses the decision of the inspector but still no action by the regulator. The internal review doesn't have power to direct inspector to take further action, when the inspectors' decision has been found to be flawed.

The AMWU notes the some of the deficiencies in the Act can be easily rectified by making it clear that Section 82 applies when a WHS issue remains unresolved after a PIN has been cancelled for technical reasons by an inspector under section 102 of the model WHS Act. The other options presented appear to complicate the issue.

Additionally, as the AMWU submitted to the Boland Review⁵⁸ the WHS Act needs to empower the internal and/or external review to provide a direction (if needed) to the regulator if the Inspectors decision is overturned.

The ACTU submission notes that *the “Worker Representation and Participation Guide” is misleading, and inconsistent with the National OHS Panel report, in its use of ‘incorrect section references’ as an example of an error which could cause substantial injustice. Instead, a ‘technical deficiency’ should be understood as any deficiency which does not relate to the substance of the underlying safety issue, is not misleading and is not likely to cause ‘substantial injustice’.*

The Guide clearly needs to be changed.

⁵⁸ AMWU Submission April 2018

Recommendation 39:

- Amend Model Laws to require regulator complies with recommendation from internal review
- Ensure Inspectors activities are in compliance with the Act
- Inspectors must actively support and interact with HSRs
- Amend section 164 to require an inspector to issue their written report of a visit to and HSRs
- Amend Section 165 to clarify that inspectors' powers can be used outside of the workplace and are not dependent 'on entry' to the workplace
- Amend Part 12 Division 2 to compel the regulator to take action to address issues raised in and decisions from internal review [pending that there is no external review]
- Amend section 226 to provide for a direction when the regulator has erred
- Regulators to adopt a strategic approach to enforcement activity by targeting those PCBUs that influence supply chain behaviours.

Recommendation 10: HSR Right of choice of training course.

The AMWU supports Option 2.

The RIS makes the assumption that disputes about costs and time off - Page 25. The AMWUs experience does not support this assumption. Arranging for time off, is not different that arranging for time off for personal leave or other forms of training. HSRs are alive to the production or other pressures of their PCBU and are very flexible in negotiating a time suitable for all. Costs are less of a concern.

AMWU respondents to the survey, those who had been or were HSRs, reported more disagreements with employers about ‘the choice of training provider’ [27%] than “the cost of the HSR training” [17%]

The disputes occur when the employer becomes difficult about choice. This wastes money and energy that is much better spent on resolving health and safety issues. The current interpretation by some employers goes against the intent of having representatives, of working in a collaborative fashion. HSR are required to consult their employer, of course. As far as the AMWU is aware there is no evidence to suggest that HSRs choose courses that are more expensive than the courses difficult employers choose – in fact, often the opposite. This is because the dispute is actually about “control” by the PCBU/employer.

Unfortunately, the AMWU has experience of the waste of time and effort that is expended in discussions around choice of training provider. In many cases we contend that PCBUS/employers contest the HSRs choice of provider for reasons of control, nothing else.

The problem is PCBUs desire to have ineffective HSRs. To quote an AMWU HSR:

Employers want to control content, they want ineffective HSR, so that’s its business as usual – tick the box, a tick a box HSR. They don’t want anyone who knows the law. So they argue about cost but it’s really about quality?

For example:

- This year the AMWU HSRs have been denied access to a course conducted by an experienced training provider in general industry and sent instead to a RTO which usually provides training under different legislation. As is clear from the Sydney trains dispute, it is very hard for HSRs to challenge the PCBU and the inspectorate regularly supports the PCBU, not the HSRs choice.
- Often HSR will attend a course of their choice for one day refresher training. During the training there is often an audible “gasp” when the duties and rights under the WHS Act are outlined
- In a regional town HSRs have been forced to attend a provider which is subcontracted from an RTO i.e. the subcontractor is using the RTOs provider status to deliver the training

HSR are elected to “represent the health and safety interests” of their work group [section 68 WHS Act].

HSRs are representatives, and it is therefore contrary to the concept of representation that HSRs are unable to choose their training provider.

The AMWU refers to the following from the ACTU submission

*The current wording of s 72 not only lacks clarity⁵⁹ but fails to reflect the reasoning of the National OHS Panel, whose recommendations acknowledge that HSRs should indeed have a ‘primary or overarching right’⁶⁰ to choose their training, and that consultation and dispute resolution should be limited to the details of the training, timing, payment and/or costs only. The National OHS Panel recommended that, following election, an HSR must attend training and the approved course may be **either the HSR’s choice or as directed by an inspector**, although the training is to be at a time agreed with the PCBU. The National OHS Panel recommended that the annual refresher training should be a course approved by the regulator, and the HSR must first consult with, and **attempt** to reach agreement with the PCBU **as to the timing and costs** of the training, with any issue in relation to the details of the training or payment to be resolved in accordance with the issue resolution proceedings.⁶¹*

Consultation with the PCBU must not be used to influence training providers or delay HSRs attending training with the provider of their choice.

Option 2 removes any ambiguity and would narrow any disputes around choice of training provider to cost and timing.

Recommendation 11: Provision of examples of HSC constitutions etc

The AMWU supports this recommendation and provides a current workplace example which could be drawn upon during drafting. See Attachment 1

Recommendation 15: Remove 24-hour notice period for entry permit holders

The AMWU supports Option 2.

This Recommendation has absolutely no cost implications as it refers to a “virtual reality”. No jurisdiction has enacted this part of the Model WHS law so there are absolutely no compliance costs to making the change made to the Model WHS law in 2014.

Our experience is also that if an employer was given 24-hour notice this provides an opportunity for the employer to hide suspected breaches.

Recommendation 17: Extend the ability for inspectors to require information after workplace entry

The AMWU supports Option 2

The current arrangements are cumbersome, inefficient and time consuming, for PCBUs and the inspectorate. The AMWU notes that this option is consistent with Article 12 of the ILO Labour Inspection Convention 1947 (C81).

Recommendation 22: Increase penalties

The importance and inspections must not be underestimated. As discussed in the 2016 *Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria* these activities by the regulator decrease injuries⁶².

⁵⁹ Sydney Trains at [66]

⁶⁰ Sydney Trains

⁶¹ National Panel, Second Report, pp 145-146

⁶² page 108, referring to Tompa et al.

Recommendation 23: Enhance Category 1 offences and introduce Industrial Manslaughter

“The only way for a faster culture change to the positive with Health & Safety is for industrial manslaughter laws to be introduced & higher fines so the cost of doing business with acceptable injury & death becomes cost prohibitive & jail time a reality, only then will real change happen”. Survey respondent

It is very sobering that 30% of AMWU survey respondents know someone who has been killed or died from a work-related disease. This compares unfavourably with all survey respondents where still a staggering 16% answered yes to the same question.

AMWU members work in hazardous and dangerous industries.

The AMWU supports Option 4 and refers to the ACTU submission.

To put these recommendations into perspective an AMWU HSR provides good insight –

In the community if someone is grossly negligent that person faces the full brunt of criminal law. There is a double standard when it comes to negligent practices at work. This means that a death at work, due to negligence, is regarded as just “an unfortunate event” or the “cost of doing business”. Young people are consistently being killed at our worksites. This is not acceptable, there must be greater deterrents to encourage better behaviours. If it works in the community for various offences e.g. negligent car drivers then the same approach needs to be taken for the workplace.

The AMWU notes that the RIS devotes seven pages of discussion of Recommendations 23 a and b. It is perhaps instructive that a Federal government body finds its necessary to do into so much detail about a Recommendation that is only going to affect those who have blatantly breached the law yet, for Recommendations which could add significant value to the prevention and promotion of good health there is much less discussion e.g. Recommendations 2 and 27.

Recommendation 26: Prohibit insurance for WHS fines

The AMWU supports Option 2.

68% of AMWU respondents opposed the ability of employers to take out insurance for WHS breaches.

The AMWU draws attention to the ACTU submission which notes:

However, companies and individuals should not be able to insulate themselves entirely from the consequences of negligent breaches that risk the health or safety of workers or others. Crucially, the deterrent and punitive intention of the criminal penalties in WHS laws is almost entirely undermined if insurance companies, rather than duty-holders themselves, are able to pay fines imposed by courts.⁶³

Recommendation 27: clarify the risk management process in the model WHS Act

The AMWU supports the intent of Option 2: a simpler option is to amend the Model Regulations rather than the Model Act.

Employers sometimes go overboard on minor safety issues, while ignoring the more serious, difficult to address ones. Survey respondent.

⁶³ Vanessa Finch, “Personal Accountability and Corporate Control: The Role of Directors’ and Officer’ Liability Insurance” p 888; P Herzfeld, ‘Still a troublesome area: legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees’ (2009) 27(5) C&SLJ 267 at 268–9

The RIS [blue text below] makes some statement which deserve comment:

Option 1 Status quo: Including the hierarchy of controls in the model WHS Act may increase certainty for some businesses leading to a small reduction in business costs. However, businesses are confused about what they need to do to meet their duties, that is, exactly what to do to eliminate or minimise risks arising from a particular WHS hazard or risk at their workplace. The hierarchy of controls ranks the level and reliability of protection a risk control measure will provide. It does not set out in detail the steps a PCBU must take to minimise risks or the control measures that are most suitable in particular circumstances. Therefore, the extent to which this option will reduce uncertainty for businesses is not clear.

This option will increase the amount of regulation and could increase costs for some businesses. For instance, it could result in an increase in unnecessarily detailed documentation as a way of businesses demonstrating that they have minimised risk according to the hierarchy. This would likely increase costs, particularly for small businesses, and potentially affect business operations (such as delaying the commencement of a particular task until documentation is completed, even where the task involves known risks and controls). Documentation in the law is not there

Option 2 adopt Recommendation 27. This benefit is expected to be minimal because the duty to ensure health and safety under the model WHS Act already requires a PCBU to do all that is reasonable to eliminate or minimise risk, including taking into account the suitability and availability of ways to eliminate or minimise the risk as far as is reasonably practicable. This is consistent with the approach recommended in the 2008 National Review and accepted by WHS ministers

This option is therefore contrary to the original policy intent of the model WHS laws. As discussed in the second report of the 2008 National Review, it could result in duty holders being led to believe they can meet their duty by simply applying the mandated process, with negative impacts on health and safety.

AMWU comment: The above text is counter to the current regulations which are prefaced by the words “so far as reasonably practicable” [a qualifier that the AMWU has questioned]. The 2008 National Review *did not make recommendations* about the Regulations. Applying the logic of the RIS, no prosecutions would be possible for a fall from 4 metres, for example. Prosecutions are generally conducted for breach of a duty of care, with the Regulations used as evidence that the duty holder did not do what was so far as reasonably practicable to control the risk.

The consequential amendments to the model WHS Act that would be required under this option, including to the definition of reasonably practicable, are not yet clear.

AMWU comment: the Boland Review noted that some consequential amendments may be required. There is no evidence to support the RIS contention that changes would need to be made to the definition of so far as reasonably practicable. Prior to the introduction of the Model WHS act, the NSW occupational health and safety regulations included the following:

Reg. 5. Meaning of “control” of risks (1) For the purposes of this Regulation, an obligation to control a risk to health or safety (in any case in which the elimination of the risk is not reasonably practicable) is an obligation to take the following measures (in the order specified) to minimise the risk to the lowest level reasonably practicable:

(a) firstly, substituting the hazard giving rise to the risk with a hazard that gives rise to a lesser risk,
(b) secondly, isolating the hazard from the person put at risk,

(c) thirdly, minimising the risk by engineering means,

(d) fourthly, minimising the risk by administrative means (for example, by adopting safe working practices or providing appropriate training, instruction or information),

(e) fifthly, using personal protective equipment.

(2) A combination of the above measures is required to be taken to minimise the risk to the lowest level reasonably practicable if no single measure is sufficient for that purpose.

(3) Any obligation in this Regulation to control a risk by taking specific risk control measures, or by taking specific risk control measures in a particular order, is in addition to the obligations referred to in subclauses (1) and (2).

During the process of adopting the Model there was considerable comment by stakeholders on reverse onus. There was little, if any comment on the scope of the Regulations.

WHS Regulation 32 provides that the risk management requirements of the WHS Regulations apply to those with a duty under these Regulations. The current risk management requirements do not apply to all risks to health and safety.

As outlined by Johnstone and Tooma⁶⁴

there is no statutory requirement to take a generic approach to identify, assess and control hazards which fall outside the hazards specifically addressed in the regulations. This is a very serious deficiency in the draft Model Regulations. This deficiency is exacerbated by the very conservative approach that has been taken to the hazards addressed in the draft Model Regulations and in the tranche of draft Codes of Practice that have been released for comment. It would appear that the drafters of the draft Model Regulations and Codes are very much picking the lowest hanging fruit and addressing the issues in which there is currently a fair degree of agreement. Inevitably this means that new and emerging hazards have been given low priority. Many of these hazards are not in fact 'new' – for example, stress, fatigue, and harassment.

It needs to be clear that all risks are to be addressed using the hierarchy of control etc. This would provide clear and concise help to workplaces especially where there are no regulations regarding the hazards e.g. bullying, excessive heat or cold, infectious diseases, dust related lung diseases e.g. silica, coal, hard metals, flour or sugar dust.

The disparities between the obligations and assistance given to duty holders for commensurate lung hazards is illustrative:

Silica, like asbestos, is a naturally occurring compound which can have disastrous effects on health – both cause cancer, both cause pulmonary fibrosis and a conservative reading of the evidence means we have known about the risk of both for close to a century.⁶⁵ Poignantly the health effects of silica are arguably better detected by health surveillance than asbestos, yet we have no mandatory requirements for silica exposures [health surveillance is required only if PCBU decides to].

Welding fumes are recognised carcinogens [IARC 1991 and confirmed 2016] and cause a variety of acute and respiratory disorders [metal fume fever, chronic obstructive airways disease].

Diesel fumes cause cancer and are irritants to the respiratory tract.

⁶⁴ [Johnstone Responsive Regulation](#)

[Submission 258 Johnstone and Tooma to Model WHS Regulations March 2011](#)

⁶⁵ ABC Radio National Ockham's Razor, Kate Cole, July 2019

WHS regulatory regime for known human carcinogens	All forms of Asbestos	Silica –	Welding fumes	Diesel fumes
Prohibition on “use”	Yes	No – this include no prohibition on the use of product that contains 90% silica	No	No
Section 19 Primary duty of care	Yes	Yes	Yes	Yes
WHS Regulations Part 3.1 i.e. identify, manage risks and apply hierarchy of control	Yes	No	No	No
WHS Regulations Part 8 including requirement for licenses for some work	Yes	No	No	No
Exposure standard	Yes	Yes	No – some individual compounds	No
Model Code of Practice	Yes - 2011	No	Yes - 2016	No
National Guidance	n/a	Being developed 2019!	n/a	Yes

Inserting risk management into the WHS regulatory framework for all risks makes it clear to all – it is efficient, cost effective and gives duty holders clear information on *what is to be done* to control risk. Flexibility on *how it is to be done* would be provided through Codes of Practice.

Appendix 1

A MODEL APPROACH TO THE REGULATION OF WORKPLACE BULLYING

This Model sets out a regulatory approach to the regulation of workplace bullying that is consistent with the seven key principles of consistency, constructiveness, transparency, accountability, proportionality, responsiveness and targeted, outlined in the National Compliance and Enforcement Policy (NCEP) endorsed by the Workplace Relations Ministers' Council. The Model is intended to inform jurisdictional policies and procedures governing the use of regulatory tools.

Commonwealth, state and territory WHS Regulators ensure that duty holders manage and control risks effectively, thus preventing harm. In relation to workplace bullying the following Model actions apply:

1. Regulators' efforts in relation to workplace bullying matters primarily are directed towards assisting persons conducting a business or undertaking (PCBU/duty holder) to develop and implement safe systems of work to prevent and respond to workplace bullying and to understand what good practice looks like.
2. Regulators should manage the complainant's expectations by assisting them to understand that the WHS regulator will decide on the most appropriate action to take by assessing the information provided, the circumstances of the allegations, and by considering the NCEP. This may include contact with the PCBU/duty holder by letter, phone call or inspector visit.
3. When responding to a complaint the WHS Regulator should in the first instance seek information of the complainant's interaction with the PCBU/duty holder's systems for reporting (including early intervention) to ensure systems of work are effective in preventing and responding to workplace bullying and that duty holders are complying with their responsibilities under relevant legislation.

These Model actions provide a transparent staged approach that can be used once a complaint has been received:

- > **Receive complaint alleging workplace bullying**—this could be online, phone, help-desk or in person.
- > **Regulator responds in a staged manner focusing on the:**
 - obligations of the PCBU/duty holder to provide and promote safe systems of work which include a socially responsible work culture and to implement systems with the capacity to achieve compliance with the law;
 - ability of the PCBU/duty holder to demonstrate that they have been timely and responsive to complaints of workplace bullying;
 - effectiveness of the PCBU/duty holder's prevention, intervention and rehabilitation systems in relation to workplace bullying.
- > **Seek evidence of the complainant's engagement with the PCBU/duty holder's systems and processes**—have they reported the alleged behaviours or bullying in the workplace? Has the PCBU/duty holder responded or is the complaint a result of a PCBU/duty holder not responding appropriately
 - Regulator's response to allegations in the first instance will require evidence of the complainant's interaction with the PCBU/duty holder's systems for dealing with workplace bullying, and that PCBU/duty holder has responded
- > **Seek complainant's consent to raise issue with relevant workplace parties**
 - the extent of a Regulator's actions may depend on whether permission is given by the complainant to raise the issue with the PCBU/duty holder.

- > **Seek complainant's consent to advise the relevant workplace parties that the issue has been raised by them**

- Regulators are required by law not to disclose any information that may identify a person who has expressly requested for their identity to remain confidential to the Regulator.

- > **Refer complainant to other appropriate agencies**—if a complaint, on the face of it, does not fall under the Regulator's authorising environment, identify the most appropriate agency to consider this matter.

- where the Regulator assesses that the matter does not meet the criteria for workplace bullying or a risk to health and safety, or is outside the Regulator's authorising environment, the Regulator will advise the complainant that no further action will be taken and will provide contact details for other agencies as appropriate e.g. Fair Work Commission, Fair Work Ombudsman, Anti-Discrimination Board.

- > **Assess what action to take**—assess what action to take based on the information provided by the complainant and the NCEP

- Regulator's response to allegations of workplace bullying will focus on the duty holders' actions as they are responsible for any risks arising from the conduct of their business and are best placed to control them.

- Regulator activities could include a number of different approaches (education, information, incentives and enforcement) depending on the nature of the issue, the extent of risk to the complainant and others of the workplace and potential breaches of the legislation

- where possible the Regulator's response will be informed by the intelligence available to them. Intelligence may include previous reports of workplace bullying, previous interventions by the Regulator and workers compensation (depending on the jurisdiction) and injury / incident reports.

- > **Communicate determinations**—Regulators will provide complainants with the outcome of their request for assistance, the reason for the decision, any actions taken and review rights.

- this communication could be by letter or phone call. If there are delays in finalising requests for assistance, Regulators should endeavor to keep complainants informed of the progress of their activities, and how long it is likely to take to complete them. Regulators will ensure that decisions and actions are based on consideration of all relevant legislation, policies and procedures and are reasonable, fair and appropriate in the circumstances.

Linked Documents:

- > *Work Health and Safety Act 2011* or OHS legislation [Insert relevant name]
- > National Compliance and Enforcement Policy
- > Framework for a common approach to work health and safety regulator event triaging
- > [State/Territory/Commonwealth Compliance or Regulatory Policy]
- > Safe Work Australia Guide—*Managing and responding to workplace bullying*
- > Safe Work Australia Guide—*Workplace bullying—a worker's guide*
- > Model Framework—*Preventing and Responding to Workplace Conduct Matters* [+ 3 guidance documents]

Appendix 2

AMWU Recommendations to the Productivity Commission Inquiry into Mental Health April 2019

Adopt the Recommendations from the 2018 WHS Law Review - noting that psychosocial risks must include – bullying and all forms of harassment including

- Amend the model WHS Regulations to deal with psychosocial risks and the appropriate control measures to manage those risks
- Review of notification provisions in WHS laws to ensure psychosocial hazards are dealt with appropriately and promptly
- Amend the WHS Model laws to require the discharge of duties in regard to psychological health of workers
- Amend the WHS Model Laws Act to clarify the risk management process by including a hierarchy of controls (consistent with WHS Reg 36) and making any corresponding amendments necessary to the model WHS Regulations.
- Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of:
 - the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and
 - processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act).

Following on from the Boland Report Recommendations

- Adopt supporting codes of practice to address psychosocial risks, including but not limited to bullying, all forms of harassment and violence.
- Adopt a WHS Regulation on the Prevention of Occupational Violence
- Clarify that PCBUs at the head of the supply chain be required to identify all those working along the supply chain in order to eliminate or minimise the risk to health and safety. Additionally, clarify that the duties to consult along the supply chain, apply vertically and horizontally

Workers compensation laws

- Review of all workers compensation laws to remove the structural impediments to those with psychological injuries when applying for and receiving benefits
- Review, with the intent of removal of impediments to receiving fair and just compensation for secondary psychological injury – for example removal of restrictions on the exclusion of secondary psychological injuries from the assessment of permanent impairment
- Remove all ‘reasonable management action’ type exemptions from all workers compensation laws

- Adopt, with the requirement for a biannual review of the implementation of the SafeWork Australia Guide *Taking Action: A best practice framework for the management of psychological claims in the Australian Workers Compensation Sector*⁶⁶. Implementation of the Guide would address many of the barriers faced by people psychological injuries when returning to work.

The context of work

The conditions under which work is performed increase the risk of mental health conditions. Particularly hazardous are the various forms of insecure work and “Fly In Fly Out” arrangements. Therefore, immediate action is required to control the negative consequences of these work arrangements:

- All governments and relevant industries to adopt the Recommendations contained in the Report – *The impact of fly in fly out work arrangements on the mental health and wellbeing of FIFO workers*⁶⁷
- Adoption by all governments legislation to improve the conditions and quality of labour hire modelled on current state laws in Victoria and Queensland -- the Victorian *Labour Hire Licensing Act 2018*, Queensland [Labour Hire Licensing Act 2017](#)
- All jurisdictions to review and adopt a Regulation and Code or Practice for FIFO workers – as per the recently adopted Western Australian Code.

⁶⁶ <https://www.safeworkaustralia.gov.au/doc/taking-action-best-practice-framework-management-psychological-claims-australian-workers>

⁶⁷ <https://www.mhc.wa.gov.au/media/2548/impact-of-fifo-work-arrangement-on-the-mental-health-and-wellbeing-of-fifo-workers-summary-report.pdf>