HSU
NSW / ACT
Health Services Union
ABN 850 3775 1682
Sydney Office
Level 2 - 109 Pitt Street
Sydney NSW 2000
Postal Address
Locked Bag 3
Australia Square
NSW 1215
Tel: 1300 478 679
Fax: 1300 329 478
Web: www.hsu.asn.au
E-mail: info@hsu.asn.au

December 21 2016 [redacted]

BRD Team Coordinator
Legislation Coordination
Locked Bag 2906
Lisarow NSW 2252

Via email: legislationreview@safework.nsw.gov.au

Dear BRD Team Coordinator

Re: Statutory Review of the Work Health and Safety Act 2011

Please find attached the Health Services Union NSW Branch's submission, with respect to the Statutory Review of the Work Health and Safety Act 2011.

If there are any issues arising please contact the HSU's Workplace Health and Safety Officer Seán Marshall, at the above address.

Yours faithfully

[redacted]

HSU Secretary NSW Branch

Statutory Review of the Work Health and Safety Act 2011 - (Discussion Paper) – Issued by the Regulatory Policy Branch, Better Regulation Division, Department of Finance, Services and Innovation.

Submission by the Health Services Union New South Wales & Australian Capital Territory Branch.

Date: December 21 2016.

Introduction

The HSU is pleased for the opportunity to make a submission to this review of the *Work Health and Safety Act 2011 (the Act).*

Before turning to the substance of reviewing the specific NSW provisions introduced into the NSW version of the Model OHS Laws, there were two key concepts in the National Review into Model Occupational Health And Safety Laws (OHS Review) that were seriously mishandled. The first of these was inquiring into best practice, followed by the *'red tape is strangling us'* – compliance costs arguments from employers.

Respectively by their absence and presence, they framed the debates that resulted in the Model OHS Laws and so the Act. So to approach a review of such important social law, without this frame of understanding, would exhibit a lack of due diligence in the task.

The Act & Best Practice

So the Review is a good opportunity to reflect on what the OHS Review failed to do. The First Report from the *National Review into Model OHS Laws: First Report to WRMC (First Report),* reproduced the original terms of reference, the Scope of the Review called for;

In undertaking the review, the panel will: examine the principal OHS legislation of each jurisdiction to ***identify areas of best practice****, common practice and inconsistency;*

The Panel's *First Report* makes one sole reference to best practice, as follows;

1.27 In formulating the optimal content of a model OHS Act, we have given close attention to the views of all interested stakeholders. We identified areas of best practice, common practice and inconsistency in legislation, and considered how model legislation could be adopted without compromising safety standards, and with the most effective use of resources.

Despite stating that the Panel had identified areas of best practice, the phrase does not appear in the rest of the report. The same lack of inquiry into best practice was followed in the preparation of the *National Review into Model OHS Laws: Second Report to WRMC (Second Report)*

In 475 pages it produced three references to best practice. One on page 56, referring to the *current best practice of ensuring all key people are involved in the governance of a company.*

The next on page 199, in the context of a 1995 Industry Commission report finding that;

Information, training and education were essential to successful management of health and safety at work... identifying and encouraging best practice in the management of risk;

The third and last reference to best practice appears on page 200

There was also broad agreement that all enforcement policies should be published. VECCI and ACCI noted that they were important for transparency and consistency and ACCI considered them to be "best practice regulation".

So there was no systematic approach to best practice in the 2008 National Review. It is therefore reasonable to argue that best practice was essentially ignored as a ground of inquiry in the twin reports that led to the formation of the Model OHS Laws and so the Act as it applies in NSW.

Therefore, the framework that in the end produced the Act manifestly failed in one of its most important tasks. It is no surprise then that the phrase, best practice, only appears in the *Discussion Paper* with respect with its references to the COAG 2014/15 review of the Model OHS Laws. It is otherwise absent from the document.

One example where best practice was lost in the OHS Review is the treatment of health and safety committees in Division 4, sections 75 – 79 of the Act. The previous OHS Act 2000 training provisions were removed and not replaced. Elected terms were removed, so committees could ossify guided by a smart employer.

Health and safety committees have important work to do and they deserve best practice. It would be simple and best practice to refashion the old health and safety committee provisions with the new functions of the Act's section 77. Time will tell whether best practice matters in health and safety policy.

The Act & Employer Cost Burdens

In 2009 SafeWork Australia (SWA) released the Decision Regulation Impact Statement for the Model OHS Act (the RIS). It stated the following with respect to the issue of health and safety compliance costs;

A data audit was also conducted but again, coverage of the costs of complying with OHS regulations in general, and of additional costs from complying with multiple jurisdictions' regulation, was found not to be reported in Australia. Access Economics (2008a) concluded that:

"As well as there being no existing data able to be used to reliably estimate the total cost of OHS compliance in Australia, in addition there is nothing in current data or literature that would be able to be used as an 'attributable fraction' in relation to the cost due to lack of harmonisation."

As such, it was concluded that new data would have to be gathered, via careful surveying, in order to measure the costs of OHS harmonisation. Page 35

... The actual costs of OHS compliance in Australia are not known, as there have been no surveys by the ABS or any other authority. Page 68

The Business case for safe healthy and productive work

SWA responded to this state of affairs in November 2013 by starting a collaborative project with MacQuarie University's International Governance and Performance Research Centre and the Safety Institute of Australia. This project cuts through the regularly made and poorly grounded arguments

of business that health and safety costs are too high for them. As part of this process in November 2014, SWA released '*The Business case for safe healthy and productive work*'.

The Executive Summary extracted from this document is stark in showing that the basis for a costs based argument still does not yet exist;

... the quality of traditional cost-benefit analyses appears fundamentally poor. On the one hand, the direct cost of a health and safety intervention has a measurable impact on the bottom line. On the other, both the anticipated benefits of intervention and the costs of failing to intervene are difficult to quantify. Aside from the significant costs disregarded as 'externalities' and therefore deemed largely irrelevant, many of the costs and benefits to organisations are hidden. Others are consciously ignored because they are perceived as too difficult to quantify reliably or to tease out of aggregated cost categories. ***As a result, work health and safety decisions tend to rely on vastly incomplete financial data. This renders cost-benefit analyses partial and unreliable, and has a tendency to bias financial analyses against investment in work health and safety interventions.***

So far from implementing best practice, the conclusion reached in SWA's Business case about poor practice non-investment in WHS should be shocking, front page news. Even more so given the conclusion of another SWA report, made with respect to overall human costs of non-compliance and the injuries, illnesses and ruined lives that result. SWA has conducted three iterations of its report, *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community.* The most recent of these for 2012–13 found that;

In terms of the burden to economic agents, 5 per cent of the total cost is borne by employers, 74 per cent by workers and 21 per cent by the community.

The trends over the three iterations of this report are for an increasing proportion of costs borne by workers and a decreasing proportion of costs borne by the community.

The cost to employers of work related illness and injury has been static over the three reports at 5% and the burden on injured workers is staggering – life destroying.

The Minister's Message

So, it is unfortunate to see that the responsible Minister, the Minister for Innovation and Better regulation has the following to say in his Discussion Paper Message;

The New South Wales (NSW) Government is committed to making NSW the easiest state to start a business. This will be achieved by creating a business-friendly environment for NSW entrepreneurs, by reducing or removing barriers, costs and complexity and making regulatory obligations easier to understand and implement.

Given the financial incentives that drive businesses or undertakings quoted above, with the tiny corresponding cost to PCBUs of the impact of their health and safety systems failures impacting overwhelmingly on their workers. It is hard to see from a small business perspective, what the Minister is referring to in referring to *reducing* or *removing barriers, costs and complexity,* when these costs are so low already.

The Minister goes on to observe *'We know the majority of businesses in NSW are strongly committed to providing a safe and healthy workplace.* The latest statistics with respect to small business in NSW show that;

The small business sector provides employment for approximately 43 per cent of employed Australians. This corresponds to employment for around 1.51 million people in NSW...NSW small businesses comprise approximately 96 per cent of all businesses (Small Business in NSW: Our Story, pages 4&5). It is noteworthy that health and safety 'Red Tape' does not warrant a mention in this Story of small business. Nor does health and safety more generally. This would lead one to suspect that the issue is not on the radar of the Minister for Small Business or his constituency.

How the Minister for Innovation and Better Regulation knows what he does with respect to the majority of businesses is hard to fathom, in the context of the clear eyed RIS, on which the Act is based. The RIS observed that;

Mayhew (1997) observed that only around a third of small businesses are members of an employer organisation. He also noted that even when they were members, and thus could avail themselves of information provided: "small business owners don't read, they hate reading, they hate paperwork that's why they are in a trade". They also have low compliance with OHS regulations in general (Industry Commission, 1997). They also have very low training rates. The National Centre for Vocational Education Research (2003) found that 82% of small businesses had not expended money on any form of staff training. Page 60

Given the Act's section 19 (3) (f) *general duty to provide any information, training, instruction... that is necessary to protect all persons from risks to their health and safety...*, if anything small business needs to massively lift its game with respect to health and safety. It is hard to ground in logic, any other response to the actual state of affairs with respect to their workers' health and safety.

A useful step in moving towards a rational, logical debate on work health and safety systems costs and benefits, would be a national review into the beneficial impact and implementation costs of the national health and safety management system standard, Australian Standard AS/NZS 4801. This has not occurred unfortunately and demonstrates again the echoing void of non-data, on the costs of health and safety compliance, from which can be heard 'red tape is strangling us' from employers still waiting for the sky to fall.

The Council of Australian Government's (COAG) Business Regulation And Competition Working Group - Commonwealth-State Implementation Plan and forward work program 2008.

It is often forgotten that the OHS Review was not originally pushed to fundamentally strengthen this crucial area of social law, but as part of a COAG process constructed to deliver;

Strategies and implementation plans for reducing the regulatory burden, including alternative regulatory regimes and processes for offsetting new regulations...

It was through this inherently biased approach that the framing of the OHS Review took place through COAG as a;

...top priority and that this should be reflected in an intergovernmental agreement (IGA) by May 2008.

Such framing willingly embraced the reduction of OHS regulatory burden as the core of the process. It is no wonder then that the OHS Review proceeded as it did to ignore best practice, despite a surface concern to identify areas of best practice. The forecast 2018 national review of the Model OHS Laws, must be grounded in a perspective that sees the Model OHS Laws as pre-eminent social law and not as a regulatory burden to be cut back.

The Validity of the Discussion Paper & Employer Cost Burden

The Discussion Paper has no references to any academic literature written on the impact of the Act since 2012. On the face of it, this was an easily avoidable gap in its production. By comparison the SafeWork NSW WHS RoadMap contains 26 references.

The Australian Journal of Labour Law has contained a rich vein of academic analysis of the Act since then. Looking at just one of these articles (AJLL 28, 2015, pages 32-56), up ends the health and safety costs burden approach of the Discussion Paper. Neil Gunningham's article 'Impacts of work health and safety harmonisation on very large businesses', concludes as follows;

At the time the model WHS Act was introduced serious concerns were expressed, particularly by industry groups, as to its likely impact in practice. They variously warned of the risk of 'business suffocating in red tape... Yet according to their senior WHS Managers, large organisations operating interstate have not experienced anything like the degree of problems that industry associations and others had feared.

...Even the worker participation and consultation provisions, which might have been a cause of some sensitivity, were rarely identified by respondents as a matter of concern, although a small group struggled to work out how they would discharge their new responsibilities. Of somewhat greater concern was the fact that the harmonisation process remains incomplete.

So the sky has not fallen in, with the introduction of the new Act. What is of concern though is, why is this Discussion Paper process, proceeding without acknowledging and discussing any of the academic and jurisdictional work that it has prompted? Especially as the Discussion Paper (page9), does state that;

Harmonisation involves ongoing monitoring, discussions and reviews taking place between all jurisdictions that have implemented the model laws.

Surely this current review process would have benefitted from a literature review on the model OHS laws? And bringing to the table for discussion any of the ongoing monitoring, discussions and reviews apparently taking place at the Heads of Work Safety Authority level?

Are the objects of the Act still valid? - Question 4

The central weakness of the Act lies not in its objects. But in an allied provision contained in section section 19 of Victorian OHS Act 2004, this establishes tripartite oversight of the Victorian OHS Act via an *Occupational Health and Safety Advisory Committee.* The lack of such a provision is a core weakness of the Model OHS Laws, reflected in NSW. It is also noteworthy that the Queensland version of the Act, has detailed tripartite provisions as well.

There is also logical tension between the main section 3 (1) object *'for a balanced and nationally consistent framework'* versus the sections 3(1) (g) and section 3 (2)

...'providing a framework for continuous improvement and progressively higher standards of work health and safety'...

...'regard must be had to the principle that workers ...should be given the highest level of protection against harm...

Both the latter objects would sit more logically if the main object called for best practice, rather than a balance. Indeed, the call for a 'balance' with respect to these latter objects sits uncomfortably, especially given the lack of a general risk management provision in the objects.

Referring again to the Victorian OHS Act 2004, the lack of an object in the Act, such as section 2 (1) (b) ;*...to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work;*

Weakens the reach of risk management within the Act. Such a provision is found in the Act's Regulation 35, technically restricting general risk management to Regulation specific matters only.

Are the terms of the Act appropriate for achieving the stated objectives? – Question 5

Again, one of the greatest weakness with respect to this question is the lack of a general risk management provision in the objects or elsewhere in the Act. Likewise, the lack of Act and Regulation provisions with respect to the psychosocial hazards; violence, bullying, harassment and fatigue is another crucial weakness in the Model OHS Laws regulatory framework.

The Real Burden in health and safety compliance - Question 6 & 7

The real costs of PCBUs' health and safety systems failures, has been filtered through the horrific shifting of work health and safety risk from employers to their workforce. This has occurred through decades of cuts to worker's compensation rights and benefits and accelerated massively since 2012.

With respect to this the recent submission by Unions NSW to the *NSW Parliamentary Law and Justice Committee's review of the 2012* changes to workers' compensation legislation found that;

- *Four in ten sick and injured workers have had their income support reduced or cut off since 2012.*
- *Employers have enjoyed a $447 million cut in premiums since workers compensation was slashed in 2012.*
- *The NSW workers compensation scheme operates with a $4 billion surplus, enough to comfortably restore benefits to those who have had them slashed.*
- *The business model operated by insurers has a 19% profit margin.*
- *Approximately one quarter of those who have been in the workers compensation system the longest report having suicidal thoughts.*
- *Of the 100 injured workers who told their story to the Unions NSW Return to Work Inquiry, 44 reported suffering depression and 7 mentioned suicidal thoughts.*
- *Separate studies by Macquarie University and Unions NSW have found virtually no improvement in returning sick and injured workers to employment, the stated aim of the 2012 changes.*

In the context of the foregoing, in a civilised liberal democratic society, it should be remarkable and counter intuitive that questions 6 and 7 of the Discussion Paper are framed to potentially shift health and safety risk to workers even further.

6. Could the objectives of the Act be achieved in ways that do not cost business as much time, resources or financial expenditure?

7. Are any of the objectives causing unnecessary costs for business?

As SWA found in 2008 the statistical value of a human life was 6,000,000 dollars, against this Peggy Trompf found the average cost of a fatality prosecution by WorkCover NSW was 100,000 dollars. And such prosecutions are now rare, as SafeWork's annual prosecution rates in 2005/06, were 482 successful, now down to 52 for 2013/14, with all forms of infringement notices suffering a similar plunge, despite a growing economy in NSW.

So these two questions posed as they are, strongly suggest further cuts to the rights of workers and to their representatives as part of a zero sum game, surpluses / profits versus negatively viewed expenditure on health and safety prevention activities. To answer them from that perspective is an insult to the thousands of injured workers cut off workers' compensation benefits, victims of their employers' faulty management systems.

These considerations leave the unanswered question; *'what measures could be reasonably practically taken by PCBUs to reduce the burden of financial, emotional and physical costs of faulty management systems on their workers and others?*

Union Prosecutions - Question 35

The RIS had the following to say about prosecutions overall, (page 62);

The National Review cited Unions NSW that in the 12 years between 1997 and 2009, ten successful prosecutions had been launched by unions. In contrast, in the four years between 2002-03 and 2006-07, regulators launched 1,866 successful prosecutions in NSW (WRMC 2008).

In this context, with respect to question 35 on union prosecutions, if the Discussion Paper was going to ask one NSW specific question only on the topic in the public interest, surely it would be *'what have the effects on general and specific deterrence been for PCBUs since the 2005/06 90% drop off in prosecutions by WorkCover NSW / SafeWork NSW ?'*

If this kind of research had been brought to the table as part of the Discussion Paper, it would have been possible to have a mature debate on the issue. But the positioning of question 35 apparently stripped of its fuller context and absent any research on the topic since 2009, hints at the guest list for the pre- review consultations, more than any empirically grounded reason for asking the question.

The right to prosecute provides NSW Unions with more leverage in health and safety disputes, when PCBUs know that the union they are negotiating with has that power. The RIS goes onto state regarding the paucity of union prosecutions;

One of the reasons that there have been few union prosecutions is that it is expensive to prosecute. Unions do receive a "moiety" in NSW for successful prosecutions, but this does not cover all the costs of prosecuting. Arguably, the threat of enforcement action may influence whether a person does comply or not with the OHS requirements. – This point itself requires research to properly justify it.

With the abolition of the substantial moiety and the standard criminal onus placed on unions as prosecutors, as part of the cuts to best practice subsequent to the OHS Review, it is little wonder that NSW unions have spent their precious resources elsewhere since 2012. This is not to infer that

unions will not in the future find a strategic prosecution, most likely against a government agency, given that WorkCover NSW / SafeWork NSW have historically been reluctant to prosecute 'in house' so to speak.

An important lacuna – Question 50

One missing aspect of the Discussion Paper is any analysis of the impact of the introduction of a new NSW specific capstone of health and safety consultation. Being the introduction of health and safety representatives (HSRs), following the Victorian model. SafeWork NSW is the repository for every PCBU's lists of their HSRs since 2012 under section 74 of the WHS Act. Following a recent GIPA request it was revealed that there are around 8500 of these for a workforce of around 3,800,000. No further breakdown by occupation, gender, age, training etc were possible.

This lack of research activity starkly contrasts with the statements in the Second Report with respect to the role of HSRs, Chapter 25 p89;

There is considerable evidence that the effective participation of workers and the representation of their interests in OHS are crucial elements in improving health and safety performance at the workplace. This representation occurs through the use of health and safety representatives (HSRs), elected by the workers to represent them in relation to OHS.

The question that would have best served the public interest would have been '*what impact has the introduction of Victorian style HSRs in NSW had on health and safety processes and outcomes.* But that type of deeper question would have needed some rigorous analysis and policy work by SafeWork NSW to set the parameters for the debate of such a question. A further question on the provision of HSR facilities would also have been very useful in such policy work.

The HSU is grateful to receive from SafeWork NSW their publication, '*WorkCover NSW Health & Safety Representatives Survey results June 2013*', this does break down HSRs by industry at least. It sets a benchmark for research into HSRs that will hopefully be built upon through the RoadMap process.

In future SafeWork NSW must be more proactive in the gathering, analysis and publication of data on HSR formation in NSW. Perhaps a jurisdictional note under section 74 could set that process in motion.

Nonetheless the note in Regulation 21 on additional HSR training - the subject of Question 50, is helpful as far as it goes. But after the SWA production of the Workers Guide to Representation and Participation, picked up as guidance in NSW, no additional resources have been produced in NSW for HSRs. Hopefully this information gap will be given attention under the SafeWork NSW RoadMap 2022.

Questions Regarding the Role of the Industrial Relations Commission of NSW (IRC)

The HSU generally supports the role of the IRC in all its current guises with respect to the Act. The HSU also supports the Industrial Court of NSW in its former role as the primary jurisdiction for health and safety prosecutions.

There is one area that is currently lacking with respect to its jurisdictional authority, the IRC is not specifically authorised to handle health and safety compliance disputes. An amendment to section 82 of the Act would remedy that jurisdictional gap.

Do you have any comment to make regarding the IRC being the forum that can receive and decide whether to disqualify a HSR? – Question 12

The IRC's role is supported and it is noteworthy that the provision has not seen any use.

Do you wish to comment about the IRC being the Authorising Authority for NSW? - Question 19

The system for the authorisation of Entry Permit Holders works well and the Registry plays an efficient role in their issuance.

Do you wish to comment on the Industrial Relations Act 1996 being named as the relevant state or industrial law in NSW? – Question 20

This made sense in 2012 and still does in 2016.

Do you wish to comment about the IRC being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator? - Question 30

This made sense in 2012 and still does in 2016.

Do you wish to comment about the IRC being the nominated external body to receive and hear an application for review of a decision made, or taken to have been made, on an internal review by the regulator? – Question 31

This made sense in 2012 and still does in 2016.

Do you have any comment regarding ongoing reviews of the Act? – Question 38

The HSU supports a five yearly cycle for the review of the Model OHS Laws and the Act. As previously argued here, any such a review must genuinely place the identification of health and safety best practice at its heart.

With the 2018 national review in mind, perhaps SafeWork NSW could review the various jurisdictional awards for health and safety since 2012 as a resource for such a review. Making recommendations for amendments to the Act and its Regulations in the light of this research.

Is the note advising that the Public Health Act 2010 also imposes obligations relating to the notification of certain medical conditions, helpful? (Regulation 699) – Question 74.

The note is useful, as is any note that draws other relevant Acts and Regulations to reader's attention.