


WHS Act review NSW		
1	Do you wish for your feedback to remain confidential?	No
2	Comment by	<b>Mr Brett Holmes</b> <b>General Secretary</b> <b>NSW Nurses and Midwives' Association (NSWNMA)</b>
	Contact Details	50 O'Dea Avenue, Waterloo NSW 2017 
	Date	December 2016
3		Union and Professional Association

### Overview

New South Wales Nurses and Midwives' Association (NSWNMA) is the trade union and professional association for over 62,000 nurses and midwives in NSW. Our members work in public and private hospitals, corrective services, aged care, disability and community settings.

Nurses are intimately acquainted with the importance of robust safety legislation as not only do they bear witness to the outcomes of workplaces injuries in their daily work, but they also suffer the highest rate of workplace injuries of any industry in NSW, (in the most recently reported 2013/14 statistics, the health care and social assistance services industry had the highest number of injuries of any industry, and was third to manufacturing and construction in terms of the gross incurred cost of employment injuries in NSW).

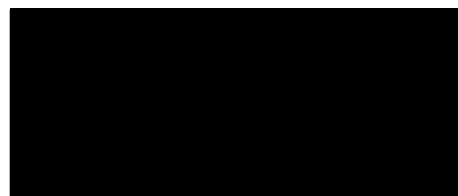
The NSWNMA appreciates the opportunity to have input into this review of the NSW specific provisions of the WHS Act 2011, in addition we support the Unions NSW submission in relation to this review.

### 4. Are the objects of the Act still valid?

The NSWNMA believes that the objects of the Act remain valid, with the possible exception of object (h) *"maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction"*.

The NSWNMA understands the rationale behind the implementation of nationally consistent laws, however 5 years after the introduction of the Model WHS Act in 2011, national harmonisation is yet to occur. Victoria and Western Australia continue to operate under previous state based legislation and most other jurisdictions having a number of variations to the model act.

Harmonisation should not be a priority if it is to see the dilution of protections and rights of workers. The WHS legislation in NSW should be the best in the country with the highest level of protection for workers.



It is recommended that an evaluation of the objects of the Act should be conducted by reestablishing Industry Reference Groups as part of a tripartite consultative strategy.

## **5. Are the terms of the Act appropriate for achieving the stated objectives?**

There are a number of key terms that should be included in order to enable the WHS Act to achieve the stated objectives, particularly the key objective to secure the health and safety of workers.

### Risk Management

To assist in achieving the stated objectives of the Act an increased emphasis should be placed on the conduct of risk management, including risk assessment as part of the decision making process of eliminating and minimizing hazards.

Risk assessment provides necessary information for PCBUs to prioritise and effectively manage risks. While the WHS Act makes a number of brief references to assessing risk and risk mitigation arising from work, the lack of an explicit, clearly stated requirement to conduct risk assessments sees PCBUs commonly stating that they do not need to undertake or document risk assessment. Where risk assessment is not conducted, controls to mitigate risk may not be appropriate and may even introduce new unforeseen risks, and leads to reactive rather than proactive risk management.

### Emerging issues

There are a wide number of workplace hazards that are not being well addressed by current terms of the WHS Act, particularly hazards that relate to systems of work rather than the physical workplace, key hazards for our members include:

- Violence - exposure to occupational violence is particularly pronounced for nurses working in emergency departments, acute mental health settings, aged care and drug and alcohol services, and results in both physical and psychological injuries;
- Fatigue - resulting from shift work, the inability to take breaks due to insufficient staffing and frequent working of overtime; and
- Bullying

Additionally, there has been an increase in the industry in precarious work, with ever increasing use of agency nurses, who are unfamiliar and often not appropriately inducted and trained in relation to specific workplace hazards or safe use of equipment.

There is currently no tripartite consultative structures enshrined in the WHS Act, despite the requirement under ILO C155 - Occupational Safety and Health Convention. It is recommended that the formation of industry sector tripartite consultative arrangements be prescribed in the WHS Act as exemplified in the Queensland WHS Act.

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

Cost cutting in safety results in increased costs of injured workers, and is a false economy. The Productivity Commission and Safework Australia have estimated that the total cost of injury borne by the employer is less than 5%, and that remaining costs are carried by the injured worker and the community.

In saying this, there are a number of industry specific resources and supports that could be provided by the regulator, which would prevent small to medium sized businesses from having to undertake as much research, or resource development as they currently should, (but often don't) undertake.

Resources could include a wide range of templates and tools such as:

- Industry specific risk identification and assessment tools;
- Handouts about industry hazards;
- Online ballot service for HSR elections.

There is also the capacity for an increased role for Unions to participate in safety in the workplace, this could include Union participation in audits and assisting in the provision of advice, information and education to be conducted in workplaces. Such proactive involvement would assist in developing and maintaining continuous improvement in the workplace.

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

The NSWNMA suggest that no unnecessary costs are being placed on business in implementing the objectives of the legislation – any cost burden in maintaining a safe and healthy workplace is offset by decreased workers compensation costs and increased productivity and increased worker commitment due to implementing a healthy workplace culture and environment.

Cost shifting to workers must be opposed.

### **10. Do you have any comments about how the strict liability provision is working?**

Strict liability is appropriate in relation to workplace health and safety. Whilst there are strict liability provisions, the most important provisions of the legislation are qualified with the term "reasonably practicable", this term should be removed and be replaced with an absolute duty of care.

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

The IRC is the appropriate jurisdiction to hear matters about the potential disqualification of HSRs. It provides timely access to justice without the need for legal representation making it more accessible for workers than other jurisdictions.

It is important that matters relating to the enforcement of safety legislation should be heard by a specialist jurisdiction with familiarity in industrial relations and workplace matters.

### **15. Are the organisations listed to clarify who is an emergency services worker, appropriate?**

The organisations listed are appropriate but this should be expanded to include disaster management personnel including nurses and healthcare workers and other state's emergency personnel that may be assisting in disaster management (e.g. fire service from interstate during bushfires).

**16. Are there any other organisations that should be listed?**

Please see response to question 15.

**17. Are there any organisations listed, that should not be?**

All of the currently listed organisations are appropriate to remain on the list.

**18. Do you have any comment to make regarding the District Court being the forum that can receive applications about civil proceedings in relation to discriminatory, coercive and misleading conduct?**

The district court is not the appropriate jurisdiction for these matters, they should be run by the Industrial Relations Commission and should be able to be run by Unions.

The Industrial relations commission is a specialist jurisdiction with experience in dealing with employment matters. It allows timely access to justice for workers and being a lay jurisdiction does not require expensive legal representation.

The district court has a range of competing priorities, the timeframes to have matters heard are longer and other matters will receive priority over WHS (for e.g. the need to give priority to people whose liberty has been denied where bail has been refused).

The district court is not a specialist workplace jurisdiction and does not have the same capacity to conciliate as the IRC.

**19. Do you wish to comment about the IRC being the Authorising Authority for NSW?**

The NSWNMA has had positive experiences working with the IRC as the Authorising Authority for NSW and supports this arrangement continuing.

**28. Do you have any comment to make regarding the District Court being the forum that can receive applications by the regulator, about noncompliance with notices?**

See response to question 18 above.

**29. Do you wish to comment about the District Court being the nominated forum to receive and hear an application for orders where a person is alleged to have contravened a WHS undertaking in NSW?**

See response to question 18 above.

**30. 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?**

The IRC is the appropriate jurisdiction to receive and decide an application for review of a reviewable decision made by the regulator. It provides timely access to justice without the need for legal representation making it more accessible for workers than other jurisdictions.

It is important that matters relating to the enforcement of safety legislation should be heard by a specialist jurisdiction with familiarity in industrial relations and workplace matters.

**31. 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?**

The IRC is the appropriate jurisdiction to receive and decide an application for review of a decision made, or taken to have been made, on an internal review by the regulator. It provides timely access to justice without the need for legal representation making it more accessible for workers than other jurisdictions.

It is important that matters relating to the enforcement of safety legislation should be heard by a specialist jurisdiction with familiarity in industrial relations and workplace matters.

**35. Do you wish to comment about the provision for the secretary of a union to bring proceedings for an offence against the Act?**

The NSWNMA supports the right for the secretary of a union to bring proceedings for an offence under the Act and strongly believes that this capacity to initiate prosecutions should be increased to at least the powers that were available pre-harmonisation.

Research demonstrates that strategic prosecutions provide effective deterrence for breaches of work health and safety laws. In McCallum's *Reflections on General Deterrence and OHS Prosecutions*, he found that:

*prosecutions must be used routinely under the Act in order to deter non-compliance by non-prosecuted companies, because of the important constitutive and symbolic effects associated with such prosecutions.*<sup>1</sup>

Given that prosecutions are important in ensuring compliance and that the trend over the last 5 years indicates significantly decreased compliance activity from the NSW regulator across all avenues including infringement notices, improvement notices, prohibition notices and legal proceedings<sup>2</sup>, there is a clear role for unions to be able to undertake this activity in the interests of the safety of their members.

**36. Do you wish to comment on the penalty notice scheme being made under the *Fines Act 1996*?**

This seems appropriate, however the levels of the fines should be increased, as discussed in the response to question 76.

Additionally there should be further provisions to which penalty notices should apply, including a contravention of the general duties provisions and penalties for operating without a licence.

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<sup>1</sup> McCallum, Ron, 2010, *WP 75 - Reflections on general deterrence and OHS prosecutions*, National Research Centre for OHS Regulation, Canberra

<sup>2</sup> Safework Australia, October 2015, *Comparative Performance Monitoring Report*, Safework Australia, Canberra.

### 38. Do you have any comment regarding ongoing reviews of the Act?

The NSWNMA has a number of misgivings about this review of the WHS Act, these relate to the following matters:

1. The timing of the review;
2. The timeframes available for consultation
3. The areas under review.

Ongoing reviews of the WHS Act must allow adequate timeframes for effective consultation, review, consideration and feedback to be provided. This should occur at a seasonally appropriate time of year, rather than immediately prior to Christmas. Terms of reference should be broad to allow for suggestions around improvements to be made, rather than the current tightly directed questions.

### 40. What has/hasn't improved for PCBUs or workers operating in more than one jurisdiction?

For members of the NSWNMA, the following areas should be considered

#### Improved

HSRs - The introduction of HSRs has provided for a local mechanism for the resolution of WHS matters. This would be further enhanced by an increase in numbers of HSRs across the industry and additional support provided to existing HSRs (e.g. industry specific HSR training, additional resources available including HSR website)

Right of entry - The introduction of union right of entry for the purpose of holding discussions on WHS matters (under section 121), this enables members to be able to access health and safety advice from their union without a suspected contravention of the legislation.

Trade unions have an important role to play in raising awareness among union members about health and safety in the workplace – this is necessary if workers are to effectively participate in WHS process with their employers.

Lunt et al. assert that: *In cases where trade unions were present, more meaningful worker consultation and representation on health and safety has been found*<sup>3</sup>

Ayes reports that: *Empirical evidence from the UK tends to support such claims, showing that where trade union safety representatives work together with employers, accident rates are up to 50% lower than where managers alone make decisions over OHS*<sup>4</sup>

NSWNMA provides information to members about matters such as:

- Information on specific health and safety issues in the industry;
- Employees rights and responsibilities;
- Consultation;

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<sup>3</sup> Lunt, J., Bates, S., Bennett, V. & Hopkinson, J. 2008, *Behaviour change and worker engagement practices within the construction sector*, Research Report RR660, Health and Safety Executive, available on the Health and Safety Executive home page: <http://www.hse.gov.uk/research/rrhtm/rr660.htm>.

<sup>4</sup> Ayers, G., F., 2011, *Consultation and Organisational Maturity in the Victorian Construction Industry*, PhD Thesis, University of Ballarat.

- Identifying hazards and risk assessment;
- How to resolve work health and safety issues;

*It is important to note that freedom of association principles were the cornerstone of the Roben's committee's approach, recognising, as it did, the unique role of the representatives of employees (unions), and, whereas individual employees may not have had personal experience of health and safety adversity, collective organisations acquired what may now be called "corporate knowledge" of OHS issues, particularly those specific to an industry.<sup>5</sup>*

## **Not improved**

Reduced prosecution powers – the reduction in capacity for union initiated prosecutions has made it more difficult to resolve serious systemic issues in the industry, particularly given the reluctance of the regulator to engage in enforcement activity (please see response to question 35 for further information) ;

Notifiable incidents – the significant reduction in matters considered notifiable incidents means less attention to some major issues affecting nurses including occupational violence.

Reduced investigation powers – Under the previous Act it was clear that unions had the power to take photographs and videos as part of an investigation into a contravention. Photographs and videos greatly assist in demonstrating the concerns held and assist in the resolution of issues.

### **41. Are there differences between how the NSW regulators are applying the legislation compared to other states, territories and the commonwealth? If yes, please provide a detailed response.**

Although the worker population in NSW is higher than other states the comparative data in the SafeWork Australia monitoring report exhibits lower numbers of proactive, reactive and interventional visits than some of the other states despite having comparable numbers of inspectors available to conduct such activities. This is coupled by comparative data relating to improvement and prohibition notices where Victoria and Western Australia far exceed the number of improvement notices issued by NSW, whilst Queensland and South Australia demonstrate more prohibition notices despite the significantly lower worker population in those states.

The comparative enforcement of Legislation across Australia does not represent the worker population to which it should be applied which is further demonstrated by the lower number of legal proceedings and convictions in NSW compared to both Queensland and Victoria.

### **42. Are there differences between how the NSW regulators are providing advice and assistance compared to the other states, territories and the commonwealth? If yes, please provide a detailed response.**

There is significant room for improvement when it comes to the resources that are available to both workers and employers in NSW to assist in meeting obligations under the WHS Act and Regulations and ensuring worker safety.

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<sup>5</sup> Parliament of Australia, Parliamentary library, Bills digest, 30<sup>th</sup> August 2005

Examples of materials and resources in other jurisdictions that would be useful in NSW include industry specific resources with best practice examples and guidance on key hazards such as that provided by Worksafe Victoria. Worksafe Victoria has a range of industry specific information available in an accessible form, below is an example of resources available that relate to the health care sector.

The screenshot shows the WorkSafe Victoria website. The navigation bar includes links for Home, Safety and Prevention, Diseases & Injuries, Injury & Claims, Return to Work, Laws & Regulations, Health Professionals, Forms and Publications, and Latest News. The breadcrumb trail reads: Back To: Home > Safety and Prevention > Your Industry > Health Care and Social Assistance Sector. The page title is "Health Care and Social Assistance Sector". The main content area includes a sidebar with links like "Health Care and Social Assistance Sector", "About The Sector", "Your Legal Duties", and "How To Comply". The main text states: "As the Occupational Health and Safety (OHS) regulator, WorkSafe Victoria (WorkSafe), is committed to supporting and assisting health services to comply with OHS requirements. WorkSafe also plays an important role in educating and enabling health services to encourage continuous OHS improvement, raising the level of protection available for health service employees and ensuring the provision of high-quality patient care." It also mentions that the health care and social assistance sector (HCSA) is Victoria's largest employing industry, with more than 12,500 claims made in the past three years (2012/13 - 2014/15) with a cost of almost \$650 million. A list of sub-sectors includes Aged Care, Community Support Services, Disability Services, Early Learning, Home Care, Hospitals, and Paramedics. A "Case Studies" section lists "Northern Health: A new approach in the Emergency department (PDF : 345KB)".

Further information relating to sub sectors such as aged care are also very useful materials available relating to aged care include:

- [Transferring people safely](#)
- [Repositioning people in bed](#)
- [Transferring people from beds and chairs](#)
- [Transferring people from toileting and bathing](#)
- [Assisting people who have fallen](#)

Comcare also provides some very useful guidance material, an example being Comcare's guide to Remote or Isolated Work.

In addition to these types of resources, Safework NSW appears to offer less support for HSRs than is available in other jurisdictions. An example of better support available is that offered by Worksafe Victoria, who has a dedicated website for HSRs with a range of useful information and links as well as providing support and resources for HSR's through Victorian Trades Hall including an annual HSR Conference.

The sharing of resources between regulators should be promoted.

**45. Do you have any comments to make about the forums nominated to conduct reviews under the WHS Regulation in NSW?**



The Industrial Relations Commission is the most appropriate jurisdiction to hear these matters.

**50. Is the above note about training for health and safety representatives helpful?**

Yes, this is helpful to clarify that HSRs can potentially undertake more than the 5 day HSR training course.

**52. Is the meaning of electrical equipment clear? (clause 144)**

Yes, the meaning of electrical equipment in clause 144 is clear.

**55. Is the note that advises that residual current devices (RCD's) are also regulated under the *Electricity (Consumer Safety) Act 2004*, helpful? (clause 164)**

Yes, this note is a helpful reminder.

**76. Do you wish to comment on the penalty notice offences listed in schedule 18A? (clause 702A)**

The NSWNMA does not believe that the current penalties imposed under Schedule 18A are commensurate with the severity of the contraventions of the Act and regulations and that the penalties should be reviewed and increased to 20% of the maximum penalty that could be imposed by a court in line with section 243 (8) *The amount of the penalty prescribed under this section for an offence is not to exceed 20% of the maximum amount of the penalty that could be imposed for the offence by the court.*

In addition the NSWNMA would like to express it's disappointment in the amount of regulatory activity undertaken by Safework NSW and notes the substantial decrease in the number of notices issued, with the most recent 2013-14 data showing a 17% decrease in activity on the previous year<sup>6</sup>.

**77. Which of the pre-WHS codes listed above do you still use?**

The NSWNMA supports the retention of existing NSW Codes of Practice including all pre-WHS codes. *The National Review into Model Occupational Health and Safety Laws* recognised that codes of practice play an important role in assisting duty holders to meet the required standard of health and safety practices at work and that it is important that they be provided with a legal status that maximises that role.

The NSWNMA believes that a Code of Practice should maintain its current role within the legislative framework as a practical guide on how to comply with the legal duties under the Work Health and Safety (WHS) Act and Regulations.

The most frequently used of the pre-WHS Codes of practice, by NSWNMA is the "Control of work-related exposure to hepatitis and HIV (blood-borne) viruses code of practice". Our members are regularly exposed to blood and body fluids in the course of their employment and this code of practice is important in ensuring their safety.

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<sup>6</sup> Safework Australia, October 2015, Comparative Performance Monitoring Report, Safework Australia, Canberra.

**78. How often do you use the pre-WHS codes you have listed? Please explain how often you use each code you named for the question above.**

The "Control of work-related exposure to hepatitis and HIV (blood-borne) viruses code of practice" is accessed whenever we receive a call from a member who has been exposed to blood and body fluids in the course of their employment, as well as when providing feedback on health policies and procedures.

**79. What parts of the pre-WHS codes have you looked up in the last 18 months? Please describe the situation and whether the part you looked up was useful, or not, and why.**

The "Control of work-related exposure to hepatitis and HIV (blood-borne) viruses code of practice" is a 2 page document that enlivens the National Code of Practice for the Control of Work –related exposure to HIV and Hepatitis Viruses [NOHSC:2010(2003)] as an approved industry code of practice in NSW. Therefore the most commonly accessed section of this particular document is 6. *Adoption* which provides for this to occur.

**80. What parts of the pre-WHS codes do you or persons you represent find useful? Please describe which parts are useful, when and how these are useful to you or persons you represent.**

As noted in the previous question, the most useful part of the "Control of work-related exposure to hepatitis and HIV (blood-borne) viruses code of practice" is 6. *Adoption*, which enlivens the National Code of practice.

**81. Are there any parts of the pre-WHS codes that are unclear or confusing? If yes, please state which codes, which parts and what is unclear or confusing.**

The current code is clear, relevant and accessible.

**82. Are there any documents that cover the same subject matter as any pre-WHS codes, but are inconsistent with the codes**

There are a number of documents that cover some of the same subject matter as the "Control of work-related exposure to hepatitis and HIV (blood-borne) viruses code of practice" including the NSW Health Policy directive on HIV, Hepatitis B and Hepatitis C – Management of Health Care Workers Potentially Exposed, and the Comcare Approved Code of Practice for the Control of Work Related Exposure to Hepatitis and HIV Viruses in Australian Government Employment. There do not appear to be inconsistencies between these documents and the Code of Practice.

These documents are not an acceptable alternative as they do not cover the same group of workers, are not as comprehensive as the Code of Practice.

**83. Is additional guidance needed for any of the subjects covered by the pre-WHS codes? If additional guidance is needed, please explain what guidance would be useful with practical examples of when you (or persons you represent) would use it.**

The current document provides suitable guidance on the management of the risk of Hepatitis and HIV exposure.