Submission by the New South Wales Nurses and Midwives' Association

Comment on the 2018 Review of the Model WHS laws

April 2018

The New South Wales Nurses and Midwives' Association (NSWNMA) is the registered union for all nurses and midwives in New South Wales. The membership of the NSWNMA comprises of those who perform nursing and midwifery work at all levels including management and education. This includes registered nurses and midwives, enrolled nurses and assistants in nursing (who are unregulated). Our members work across a wide spectrum to provide healthcare in facilities including public and private hospitals, corrective services, aged care, disability and community settings.

The NSWNMA has approximately 64,000 members. Eligible members of the NSWNMA are also deemed to be members of the New South Wales Branch of the Australian Nursing and Midwifery Federation. Our role is to protect and advance the interests of nurses and midwives and the nursing and midwifery professions. We are also committed to improving standards of patient care and the quality of services in health and aged care services. The members of NSWNMA are also members of Australian Nursing and Midwifery Federation (ANMF).

Health Care and Social Assistance is the largest industry sector by employee, employing around 1.5 million workers in 2015-2016. It also has the largest number of serious claims of any industry in 2015-2016 (16,175 claims or around 15% of the total serious claims). Despite these numbers there are no model Codes of Practice that specifically address the WHS hazards that are most significant to nurses.

Risks to Healthcare workers that are not appropriately referenced in the model legislation include musculoskeletal injury from patient handling, occupational violence, psychosocial hazards of bullying, fatigue, violence and workloads and exposure to workplace substances including cytotoxic drugs and Peracetic Acid. Consultation arrangements are often poorly managed or non-existent especially with respect to refurbishment or redevelopment projects. When consultation does occur it is often at the end stage of the project when little change may be facilitated.

The New South Wales Nurses and Midwives' Association recognises and supports the submission of the Australian Council of Trade Unions and further provides the following comments in relation to our membership. We welcome the opportunity to make a submission to this Review to the model Work Health and Safety Laws and the opportunity for further discussion this provides.

If you have further questions in relation to this submission, please contact NSWNMA WHS Professional Officers Veronica Black on vblack@nswnma.asn.au or Leslie Gibbs on lgibbs@nswnma.asn.au

Yours sincerely

Brett Holmes

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Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

The object of the WHS Act is to provide for *a balanced and nationally consistent framework to secure the health and safety of workers*, and to do this by protecting workers against harm to their health and safety; ensuring fair representation and consultation, encouraging the role of unions and employer organisations, promoting provision of advice, education and training and securing compliance with the Act. All of this must be undertaken with regard to the principle that *workers must be given the highest level of protection against harm to their health safety and wellbeing from hazards and risks arising from work*.

The NSWNMA support the principle of the three tiered approach to WHS Regulation, as provided that there is an effective enforcement regime in place, an Act outlining general duties and supported by detailed Regulations and Codes of Practice can be an effective way to ensure that duty holders understand and comply with their obligations. A further benefit of this approach is the capacity for flexibility to deal with emerging WHS issues through the development of new Regulations and Codes.

However, while the three tiered structure is an appropriate way to regulate safety, there are currently significant issues with the effectiveness of this approach in meeting the object of the Act. These issues relate to the need to modify some provisions of the law and to implementation and enforcement rather than to the structure, and will be discussed in further detail throughout this submission.

Additionally, the NSWNMA is concerned about the apparent reluctance of regulators to develop new Codes, preferring to issue 'guidance materials' that lack enforceability, and the tier at which some issues are addressed, (e.g. there is nothing about psychosocial hazards in the Regulations despite these being an increasing claims area, with a longer average cost of claim and length of time off work)

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

The WHS Regulations are failing to adequately support the object of the model WHS Act, as they fail to address key emerging WHS risks, and require a strengthening of Regulations associated with consultation, managing risk, and issue resolution. The absence of Regulations around the management of psychosocial risks is a major oversight and is of great concern to the NSWNMA. Please see also response to Q5 and Q9 for further detail about psychosocial risks and other significant risks impacting on nurses that are not adequately considered by the WHS Regulations.

<u>Representation and participation – Chapter 2</u>

To ensure that the Regulation supports the object of the Act in providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to workplace safety there are a numbers of matters that must be addressed.

Part 2.1 HSRs

In order to improve the effectiveness of WHS consultation, amendments are required to Division 2 Health and Safety Representatives, this includes an amendment to 18 (2)(c) to finish with the words “as soon as practicable”, and an addition of 18(2)(d) information about what the workgroups are, and who the HSRs are representing each workgroup must be available to all workers in the workplace in an accessible form.

HSRs need access to additional training to support them in their role, with current HSR training focusing on how to exercise their powers as HSRs. Other training may include training on WHS risks specific to their occupation, or practical sessions on particular elements of the HSR role that require additional support (for example: a session on establishing a WHS committee which may include making a request, the need for terms of reference and what should be included in them, information to request, chairing a meeting). In order to facilitate this Reg 21 (1) should be expanded to include (c) up to an additional 5 days per annum to attend other WHS training/conferences relevant to their role and approved by the regulator.

Part 2.2 Issue resolution

The default issue resolution procedure sees many issues unresolved and needs to include what to do when the matter is not satisfactorily resolved, please see response to Q22.

<u>Managing risks to health and safety – Part 3.1</u>

Effective management of WHS risks is imperative in improving the health and safety of workers. The current provisions in the WHS Regulation around managing risks to health and safety must be improved to ensure a proactive approach is taken in order to prevent injuries from occurring.

In order to ensure that part 3.1 *Managing Risks to Health and Safety* adequately supports the object of the Act, to protect workers through the elimination or minimisation of risks; provide for effective consultation; and provide a framework for continuous improvement and progressively higher standards of WHS, there are a number of changes that should be made, as outlined below.

As mentioned, there are key WHS risks that are not covered by the WHS Regulation but that still need to be effectively managed, unfortunately the application of part 3.1 is currently restricted to a PCBU with a duty *under this Regulation* to manage risks to health and safety. This should be amended to any PCBU with *responsibility to manage risks to health and safety* to ensure that it applies more broadly to WHS risks not just those risks covered by the WHS Regulation.

Additionally, while the WHS risk management process is well known to safety professionals, there are many PCBUs who require clear information about this process. The limited information available in the WHS Act, and the inclusion of a partial process in the Regulation lacks clarity about the steps that should be undertaken.

Section 3.1 of the WHS Regulation should be amended to include each of the steps involved in the WHS risk management process to ensure clarity. This would involve the insertion of a requirement to assess risks associated with a hazard (in between Reg 34 - duty to identify hazards and Reg - 35 managing risks); it would also require the inclusion of the need to consult with workers (and their HSR/s where they are represented by them) at each of the stages of the risk management process.

The review of control measures in Reg 38 should be "monitor and review" rather than just review (monitoring being keeping an ongoing watch on something whereas a review suggests looking at the matter again after a period of time has elapsed. Reg 38 should also be amended to include the requirement to review controls where new information and/or new technology exists that more effectively controls exposure to hazards.

General Workplace Management 3.2

In order to meet the object of the Act around the provision of advice, information, education and training in relation to work health and safety, Regulation 39 should be expanded from the need to provide training in relation to the safe performance of work functions, to include training on health and safety responsibilities, systems and processes, including matters like WHS consultation, issue resolution, and incident reporting. Additional training for supervisors and managers is essential, particularly if they are involved in hazard identification, risk assessment and decisions around risk controls, as well as workers' rights to raise safety issues and the prohibition of discriminatory, coercive or misleading conduct under the WHS Act.

Regulation 48 *Remote or isolated work* requires an amendment to the definition of remote or isolated work in order to effectively support the object of Act to protect workers through the elimination or minimisation of risks. Remote and isolated work is a key issue for nurses, whether this is community nurses working alone in people's homes, nurses working in remote area nursing and small multi purpose services through to nurses working alone in a unit separated from immediate assistance from colleagues. The current definition is inadequate to clearly identify that this provision applies to each of these examples and is subject to much debate.

Schedule 10 outlines prohibited carcinogens, restricted carcinogens and restricted hazardous chemicals. The carcinogen included in this schedule that impacts on the safety of nurses is cyclophosphamide which is a cytotoxic drug that can be used in hospitals and oncological treatment facilities. The schedule does not include any other cytotoxic drugs, many of which have greater health effects than that of Cyclophosphamide and should be notified where in use. The NSWNMA recommends the inclusion of "and other cytotoxic drugs" in this schedule.

Recommendations

- Addition of new Regulation in relation to occupational violence and aggression
- Addition of new Regulation in relation to management of psychosocial hazards including; bullying; workloads and fatigue.
- Improved information about WHS consultation systems in the workplace to be made available to workers, specifically, the workgroups and who are the HSRs for each workgroup in an accessible form.
- Up to an additional 5 days WHS training for HSRs per annum.
- Expansion of the default issue resolution procedure to include a process for escalating WHS issues that have not been resolved, (e.g. contacting the regulator or relevant trade union).
- Amendments to Part 3.1 Managing Risks to Health and Safety to ensure it applies to all WHS risks and includes the requirement to assess risks, consult and to monitor controls.
- Inclusion of WHS training relating to WHS systems and processes.
- Amendment of definition of remote and isolated work.
- Amend Schedule 10, item 3, to include other cytotoxic drugs.

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Codes of practice are essential in providing detail about what is known about a particular hazard or risk and how it should be controlled. Employers rely on this level of detail to understand what they need to do to comply with the legislation, and workers need access to this information to be able to clearly identify what the PCBU should be doing to ensure their safety at work. The NSWNMA is concerned at the apparent current preference of regulators for the development of guidance materials rather than making new Codes of Practice, particularly in relation to emerging WHS issues.

The NSWNMA has a strong preference for Codes of Practice (COP) over guidance as Codes have a higher degree of enforceability and are admissible in proceedings as evidence of whether or not a duty or obligation under the WHS Act has been complied with. Additionally, the process of development of a COP is far more robust than the development of guidance materials and fact sheets as there is a legislative requirement for consultation between government, unions and employer organisations.

Health Care and Social Assistance is the largest industry sector by employee, employing around 1.5 million workers in 2015-2016. [1] It also has the largest number

[1] Office of the Chief Economist, (2016), Australian Industry Report 2016,Commonwealth of Australia, P35 accessed 9/4/18 at https://industry.gov.au/Office-of-the-Chief-Economist/Publications/AustralianIndustryReport/assets/Australian-Industry-Report-2016.pdf

of serious claims of any industry in 2015-2016 (16,175 claims or around 15% of the total serious claims)[2]. Despite these numbers there are no model Codes of Practice that specifically address the WHS hazards that are most significant to nurses.

Recommendations

Codes of Practice that should be developed to address specific hazards and risks faced by workers in Health Care and Social Assistance include:

- Managing risks associated with manual tasks involving the handling of people
- Managing the risks of occupational violence and aggression
- Managing risks associated with remote and isolated work – currently covered in Managing Work Environment and facilities, but not comprehensively. Should either be made into its own Code or strengthened in existing Code
- Managing risks associated with psychosocial hazards (stress, fatigue and bullying)
- Control of work-related exposure to biological hazards (this would include the current content of the NSW COP *"control of work-related exposure to hepatitis and HIV (blood borne) viruses"*, but extend to include other biological hazards.)
- Managing risks of cytotoxic drugs and related waste
- Managing risks of heat (indoor and outdoor)

As stated earlier there are currently no model Codes of Practice addressing the specific Health Care and Social Assistance related hazards and risks. There are also very few pre harmonisation Codes that apply, which appear to be limited to:

- QLD - Manual tasks involving the handling of people COP
- NSW & WA - *Control of work-related exposure to hepatitis and HIV (blood borne) viruses"*
- WA – COP Violence Aggression & Bullying at Work
- WA – COP Working Hours & Working Hours – risk management guidelines

All of these documents are quite dated but could form the basis of a discussion for development of new Model Codes in these areas.

[2] Safework Australia, (2016) Australian Workers' Compensation Statistics 2015-2016, Commonwealth of Australia, p16 accessed 9/4/2018 at https://www.safeworkaustralia.gov.au/system/files/documents/1801/awcs_2015-16_report-20171023_v3_0.pdf

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

The NSWNMA supports the concept of the three-tiered approach, however believes that the current weighting between the WHS Act, Regulations and Codes of Practice is in favour of Codes of practice which can be an obstacle to improving safety outcomes, especially when it comes to important matters such as the management of WHS risks, see discussion in Q2.

The NSWNMA is also concerned that areas that should be more strongly regulated are not covered at all by the WHS Act, Regulation or Codes, see response to Q3 for specific areas of concern that are currently subject only to guidance material or fact sheets or where there is no relevant information from the regulator on the issue.

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

The WHS Act defines "health" as meaning *physical and psychological health*. Beyond this, there is little in the WHS Act, WHS Regulation or Codes of Practice that demonstrate any kind of commitment to managing risks to psychological health of workers.

A review of the injury statistics is the clearest demonstration that the legislation is not effective in management of risks to psychological health in the workplace. While there are clear reductions in incidents of almost all injury and disease types, there has been no decrease in claims relating to mental disorders.[3]

Mental disorders have seen the largest increase in median time lost from work, with a median of 16 weeks in 2014-2015 and one of the highest median rates of compensation paid with an increase in cost of claim of 99% to a median of $28400 in 2014-2015[4].

[3] Safework Australia, , (2016) Australian Workers' Compensation Statistics 2015-2016, Commonwealth of Australia, p33 accessed 9/4/2018 at https://www.safeworkaustralia.gov.au/system/files/documents/1801/awcs_2015-16_report-20171023_v3_0.pdf

[4] Safework Australia, , (2016) Australian Workers' Compensation Statistics 2015-2016, Commonwealth of Australia, p46-47 accessed 9/4/2018 at https://www.safeworkaustralia.gov.au/system/files/documents/1801/awcs_2015-16_report-20171023_v3_0.pdf

Recommendations:

- The WHS Act be amended to add a reference to psychological health to s19 Primary Duty of Care e.g. *A PCBU must ensure, so far as is reasonably practicable, the physical and psychological health and safety of:*
- Amendments to the WHS Regulation to incorporate psychosocial hazards, including provisions around occupational violence and aggression; bullying; workloads and fatigue.
- The development of relevant Codes of Practice such as those mentioned in response to q3.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

There are a large number of health industry specific pieces of legislation that have references to and/or impact on the safety of nurses.

Some examples of such legislation include:

- Federal Aged Care Act 1997
- NSW Private Health Facilities Act and Regulation
- NSW Mental Health Act 2007
- Mental Health (Forensic Provisions) Act 1990
- NSW Smoke Free Environment Act 2000
- NSW Public Health Regulation 2012

In many there arises a tension between the rights of patients and the safety of nurses, particularly in relation to nurses' exposure to occupational violence. Several examples are discussed below:

Federal Aged Care Act 1997

Nurses working in aged care facilities are subject to violence and aggression from residents. This may arise from residents experiencing dementia or delirium, being resistant to care, having a lifelong history of violent behaviour, or increasingly as other services close, to residents with mental health disorders, intellectual disabilities and drug and alcohol abuse.

Many aged care facilities are unable to safely provide care for people displaying aggressive behaviours, as they are not physically suitable, have insufficient numbers of staff and/or a lack of staff with relevant training and experience in these issues, however once a resident has been admitted to the facility it is very difficult to have them removed.

The Federal Aged Care Act 1997 contains a provision under s96-1 to develop User Rights Principles outlined in "User Rights Principles 2014". This includes security of tenure for resident in aged care facilities, which outlines the circumstances under which a resident may be asked to leave a residential aged care facility. One such circumstance is where the care recipient has intentionally caused serious injury to staff or another care recipient even then, the provider must not take action to make the person leave until suitable alternative accommodation is available.

It is very difficult to demonstrate that a person in an aged care facility has intentionally caused the serious injury, however this does not remove the risk. Even where the intention can be demonstrated, it is incredibly difficult to get other services to agree to take the resident once the risk is apparent. This leaves nurses continuing to be exposed to the ongoing risk.

NSW Mental Health Act 2007

Nurses working in mental health have the highest rates of exposure to occupational violence and aggression, with a recent Australian study finding that that 88% of nurses surveyed in psychiatric facilities had experienced verbal or physical assault.[5]

The NSW Mental Health Act establishes the capacity for "mentally disordered persons" to be involuntarily admitted, detained and treated in a mental health facility. Mentally disordered is defined as when *a person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:*

(a) for the person's own protection from serious physical harm, or

(b) for the protection of others from serious physical harm.

The Act goes on to say that:

68(a) people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment.

The impact of this has been for an ongoing push to significantly reduce the use of safe assessment rooms (also known as seclusion rooms), which are sometimes the only available control to eliminate or significantly reduce the risk of serious injury to nurses.

[5] Delaney,J., Cleary, M., Jordan, R. & Horsfall, J. (2001). An Exploratory Investigation into the Nursing Management of Aggression in Acute Psychiatric Settings. *Journal of Psychiatric and Mental Health Nursing, 8*(1), 77-84.

In a discussion about nurse exposure to violence following a very serious assault on a nurse, a senior medical professional commented “In this kind of environment you need to expect some unfortunate incidents”. Unfortunately he does not appear the only one in the industry to share these views.

Recommendation:

- Where there are conflicts in legislation between the rights of patients/residents and the health and safety of nurses it must be clear that work health and safety laws protecting the health and safety of nurses take precedence.

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

The NSWNMA supports the inclusion of a provision for extraterritoriality in relation to regulator functions, including for the regulator to obtain records and issue notices outside of their jurisdiction.

This would ensure that regulators are able to carry out their functions of monitoring and enforcing compliance with the *WHS Act* where cross border issues are involved. See also, response to Q29

Recommendation:

- The NSWNMA supports an amendment of the model WHS Act to authorise extraterritorial application to the extent allowed by the relevant state/territory’s legislative powers, including to obtain records and issue notices outside of the jurisdiction.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

There are a number of issues in relation to the boundaries between general public health and safety protections and health and safety protections connected to work, particularly in healthcare settings, with WHS issues and clinical issues often significantly overlapping.

For example patient falls are a significant issue within healthcare, with falls being one of the 3 major adverse events occurring in Australian hospitals, (about 34,000 falls resulting in patient harm in hospitals recorded - a rate of 3.2 falls per 1,000 separations in 2015-2016).[6] Patient falls are also a significant contributor of injuries to nurses either by being fallen on, trying to catch a falling patient or trying to get a

[6] Australian Institute of Health and Welfare 2017, *Admitted Patient Care 2015–16: Australian hospital statistics*, Health services series no.75. Cat. no.HSE 185. Canberra: AIHW.

patient up off the ground. This could be considered both a clinical and WHS issue for patients and for staff. Inadequate infection control in the workplace and hospital acquired infections would be another similar issue.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

There are a number of work health and safety hazards and risks that affect NSWNMA members that are not effectively covered by the WHS laws, particularly in relation to occupational violence and aggression and psychosocial hazards.

Hazards and risks not effectively covered by the model WHS legislation that impact on nurses include:

- Occupational violence and aggression
- Manual handling of people (especially management of the bariatric patient)
- Exposure to chemicals including cytotoxic drugs utilised for cancer therapy and peracetic acid used in sterilising techniques (known toxic and skin and respiratory irritant, no exposure standards in Australia though they exist internationally)
- Psychosocial hazards including bullying, stress, workloads and fatigue
- Working in isolation – nurses are frequently working in isolation, especially community nurses providing nursing support for people in their homes. Client homes are not controlled by the PCBU, risk assessment processes are generally poor and risks can change significantly from one visit to the next. Provision of duress devices or other equipment for communication is patchy.

While s19(3)(c) requires a PCBU to ensure “safe systems of work” there is limited guidance about what this means and there has historically been a reluctance on the part of the regulator to enter into discussions about staffing levels as this can be perceived as an “industrial issue”.

For nurses and midwives, staffing levels as well as the skills mix of nurses is a serious work health and safety issue, both in relation to nurse safety but also patient safety. For example, where an aged care facility admits a resident who is 180kgs, they may note in the resident’s care plan that they are “4-assist” (meaning 4 staff members are required in order to reposition them), however, if they only have one staff member rostered to work in that section at night, and possibly four across the whole facility, then clearly the lack of available staff to undertake the work safely impacts on the safety of the nurse working in that area.

<u>Recommendations:</u>

- WHS Regulations - the NSWNMA recommends the development of new Regulations to deal with occupational violence and aggression, and psychosocial hazards, see response to Q2, Q5 and Q9.

- Additional guidance on the meaning of safe systems of work to be included in the WHS Regulations and Codes of practice.
- WHS Codes – the NSWNMA recommends the development of new Codes of practice including Managing risks associated with manual tasks involving the handling of people; Managing the risks of occupational violence and aggression; Managing risks associated with remote and isolated work; Managing risks associated with psychosocial hazards (including stress, fatigue, workloads and bullying); Control of work-related exposure to biological hazards; Managing risks of cytotoxic drugs and related waste; Managing risks of heat (indoor and outdoor) as discussed in response to Q3.

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

The NSWNMA is concerned that the definition of PCBU is inadequate to deal with the changing nature of work, and work relationships, particularly in relation to the increasing numbers of nurses in non-traditional employment arrangements.

In healthcare, a significant change to employment relationships has resulted from the new funding models for the NDIS and Aged Care Assistance packages. The Australian social compact provides a well targeted social welfare system that includes a suite of policies, legislation, programs, health care and social services to ensure that every Australian can have a decent standard of living. A key element of this is the provision of healthcare. The Australian Charter of Healthcare Rights contains three guiding principles that include:

- Everyone has the right to be able to access health care and this right is essential for the Charter to be meaningful.
- The Australian Government commits to international agreements about human rights which recognise everyone's right to have the highest possible standard of physical and mental health.
- Australia is a society made up of people with different cultures and ways of life, and the Charter acknowledges and respects these differences.

Much work is being done to ensure equity of access, particularly for vulnerable groups including people with disabilities and the elderly.

Previously these services would have been provided directly by the government (e.g. a community nurse employed by NSW health) or government funding for these services would have been provided to an organisation who would have employed workers to provide this care and assistance.

Now we are seeing more direct funding to clients through the NDIS and Aged Care Assistance packages, leaving people with disabilities or frail aged persons directly contracting people to provide care support in their homes.

This raises significant concerns in relation to who holds a primary duty of care in relation to nurses providing personal and nursing care in these circumstances, and the level of awareness and capacity of service users to exercise a primary duty of care. The NSWNMA strongly contends that where government funds essential services such as health services, that a change to funding models should not allow for a contracting out of primary WHS duties.

WHS chain of responsibilities legislation must be implemented for government funded healthcare services to ensure risks associated with providing care are proactively managed.

Recommendations:

- Further consideration must be given to the definition of PCBU to take into account the changing nature of work.
- WHS chain of responsibilities laws in relation to workers providing health care services.

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

To avoid any doubt the definition of health in the WHS Act (meaning both physical and psychological) should be placed within the primary duty, so that it reads *A PCBU must ensure, so far as reasonably practicable, the physical and psychological health and safety of*

Additionally, the NSWNMA has concerns that limiting the primary duty of the PCBU under s19 to "while the workers are at work" fails to capture key safety issues with a clear and demonstrable connection to work that may impact on the health and safety of nurses and over which the PCBU can reasonably exercise influence.

Examples might include increased risks of injury outside of the workplace due to:

- Rostering decisions that fail to take into account availability of transport options for shift workers;
- Rosters or other working arrangements that do not effectively minimise fatigue;
- Failures in work systems leading to a nurse being assaulted by a patient outside of the workplace.

Recommendations:

- S19 of the Act should be amended to ensure that PCBUs have a duty to ensure the health and safety of workers outside of the workplace where the health and safety risk has a clear and demonstrable connection to work and the PCU can reasonably exercise influence.

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

The approach to the meaning of "reasonably practicable" in the model WHS Act is sound, however concerns have arisen based on the 2015 decision of Judge Curtis in *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92 which suggests that a PCBU can discharge its obligations under the Model Laws simply by relying on the expertise of independent contractors.

Recommendations

- The NSWNMA supports the ACTU position that this interpretation is not consistent with the intention of the Model Laws. An amendment to the Model Laws needs to be considered to clarify that a PCBU must adopt a systematic approach to WHS management to ensure contractors are working safely.

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

The inclusion of a duty of care for officers is a very important element of the model WHS Act, given that injuries in the workplace are more often related to overall management decisions around safety procedures, and a workplace culture that lacks concern about safety rather than individual acts of carelessness.

Without personal liability for workplace safety to focus the attention of officers, there is little to prevent organisational decisions to accept safety risk as a cost of doing business with penalties (should they be issued) simply passed on to consumers, shareholders or employees.

In research by Gunningham commissioned by the National Occupational Health and Safety Commission, the comment is made that *In the literature review, regulation was identified by a large majority of studies as the single most important driver of corporations, and the* ***threat of personal criminal liability*** *(in particular of prosecutions brought against them as individuals) as the most powerful motivator of their CEOs to improve OHS… Prosecution of individuals within the corporate structure has both specific and general deterrent effects, particularly if the prosecution is widely publicised.* [7]

Section 27(1) of the Model Act requires an officer to exercise 'due diligence' to ensure compliance with an organisation's WHS obligations. Section 27(5) sets out the elements of the duty of due diligence in the WHS context, which essentially codifies the content of the due diligence obligation as interpreted by the courts. The positive duty on an officer to exercise "due diligence" to ensure compliance with the WHS Act is more stringent than "reasonable care". This is appropriate as the position of officer is more senior than that of workers and others and has greater capacity to effect positive change.

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[7] N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice* (Report prepared for the NOHSC, October 1999), at 39-40.

There have been very few prosecutions of officers for failure to exercise due diligence under the WHS Act. This is likely to be partly related to the very low level of prosecution activity in general as well as to the evidentiary burden on the prosecution to demonstrate beyond reasonable doubt that the officer has not exercised due diligence.

There is no simple and quick way to review prosecutions of officers (s27) across the harmonised jurisdictions, although a review of case summaries on the websites of the regulators operating under the harmonised legislation showed very small numbers as follows

Jurisdiction	Prosecution breach of s27	Amount of fine	Convictions?
QLD	5	$2,000-$50,000	No convictions
NSW	8	$8,500-$90,000	?
SA	1	$0 (no capacity to pay)	
ACT	0		
NT	0		
Tasmania	?		
Commonwealth	?		

It should be noted that each jurisdiction provides information about WHS prosecutions in a different format (or doesn't appear to provide it at all) with some more easy to access than others. Only Queensland had a useable search function.

In order to ensure that section 27 of the WHS Act has the impact intended, there needs be a reverse onus of proof on the officer that they have exercised due diligence, and regulators need to enforce this duty.

The current definition of who holds a duty of care as an officer is in line with the definition outlined in the Corporations Act 2001 (Cth). This intentionally excludes middle level management. As noted by Foster in Regnet Working paper 73, "Personal Corporate Officer Liability under the Model Work Health and Safety Bill", *to characterise someone as a "middle-level" manager does not automatically mean they ought to be immune from managerial personal liability. In particular, the larger the company, the more influence and scope to do harm will be enjoyed by "middle management"…. And the blanket exclusion of a whole class of "middle managers" is far too generous to those who may have substantial de facto, if not de jure, power and influence over matters impacting on the safety and lives of many workers.*[8]

[8] Foster, N., (2010), Personal Corporate Officer Liability under the Model Work Health and Safety Bill, National Research Centre for Occupational Health and Safety Regulation.

Suggestion, include in the definition of officer a person "who has the capacity to affect significantly the health and safety of those at work, or others who may be put at risk by the activities of those at work".

If the definition of officer is not amended, the definition from the corporations act should be replicated within the WHS Act rather than just referenced to make it easier for people to understand.

Recommendations:

- The WHS Act should provide for a reverse onus of proof in relation to due diligence.
- The definition of officer should include *a person who has the capacity to affect significantly the health and safety of those at work, or others who may be put at risk by the activities of those at work*.

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

The definition of worker in the model WHS Act appears sufficient.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

The NSWNMA is concerned that the workers duty of care under s28 of the WHS Act as currently written could result in workers being held responsible for matters over which they have no control. Under s28 workers have a duty to:

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and

(d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

While part (c) provides for "so far as the worker is reasonably able" this is not reflected in Part (d) in relation to cooperating with any reasonable policy or procedure. There may well be situations where a reasonable policy or procedure exits but a worker is unable to reasonably comply, e.g. where rostering does not provide sufficient staff numbers to undertake a task in the manner described, appropriate equipment or PPE is not provided or appropriate training has not been provided.

Recommendation:

- The NSWNMA recommends removing point (d) above, or if (d) is to remain, it should be couched in the same terms as (c) with the phrase “so far as the worker is reasonably able”.

Question 16: Have you any comments relating to the ‘other person at a workplace’ duty of care under the model WHS Act?

In Healthcare, the “other persons” at the workplace will most commonly include patients and their family members and visitors. Visitors and patients are one of the highest risks to staff.

While the duties of others do not appear onerous, on occasion, PCBUs have attempted to use these provisions in order to hinder an entry permit holder in the conduct of their role. For example, suggesting that the act of interviewing workers in relation to a suspected breach of the WHS Act was adversely affecting the health and safety of others by reducing the number of nurses available on the floor.

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

The NSWNMA supports the principles applying to health and safety duties in the model WHS Act.

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

There are many examples where NSWNMA members are working in environments with multiple PCBUs, particularly with the expansion of Public Private Partnerships (PPP) in health. This might include a facility owned by NSW Health but operated as a public hospital by a private provider; a facility built and maintained by a private provider but operated by NSW Health or a NSW health service operating within another service (such as a health clinic within a prison where the clinic is run by NSW Health but the prison is run by Corrections). Additionally, there are many services that are contracted out which may include services such as laundry, catering, security, engineering, pathology & cleaning.

There are attempts to establish consultation where there are multiple PCBUs, but these tend to be fairly superficial, for example, a nurse from a clinic within a prison may be included on the prison WHS committee and attend a quarterly meeting, but nurses are unlikely to be consulted in relation to changes that may affect their health and safety at work such as the design of new clinics being built to support the burgeoning prison population or new security procedures being implemented.

A major issue arises with the construction of new facilities where there is the best opportunity to ensure that risks are designed out or that controls that are high up on the hierarchy of controls can be implemented. In these instances, where consultation occurs, it is often far too late in the process. For example, where a new facility is built under a PPP arrangement, with Health contracting out the construction and ongoing maintenance of the facility, consultation with staff will occur following the announcement of the winning tender. At this stage, contracts have been signed and there is little to no scope to add or alter any items that may be of concern. This can result in construction of new facilities with clear risks to staff that could and should have been addressed in the design process.

Further once construction has occurred, the contractual arrangements with the PPP place exorbitant cost burdens on any departures from the existing contract that may be required in order to upgrade or improve the facility or services provided in order to ensure staff safety. Such contractual PPP arrangements may be in place for extended periods for example Orange hospital 21 Dec 2007 – 21 Dec 2035.

The management of WHS issues between the PPP and the Health Service are often not conducive to maintaining a safe environment for staff and patients.

Recommendation

- Where consultation occurs in instances where there are multiple duty holders, this is tending to be superficial and often occurring too late for workers to be able to *contribute to the decision making process* as required by s48(b)(ii). Further guidance in relation to consultation duties with multiple duty holders should be incorporated into the Code of Practice WHS Consultation, Cooperation and Coordination.

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

The NSWNMA strongly believes that effective WHS consultation is essential in order to reduce the high rates of injuries to nurses, and that in most workplaces, current arrangements are ineffective.

Consultation arrangements in the health sector range from no formal arrangement, a line item at the end of a staff meeting or quality meeting (often dropped off for lack of time), a WHS committee, HSR/s through to HSRs and a committee. The most common arrangement in NSW remains a WHS committee.

Feedback from members about the effectiveness of the committees is poor, with a common perception that they are about ticking a box in relation to compliance rather than a genuine forum for meeting the object of the Act *by providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to WHS.* Committees are reported to meet infrequently, be controlled by

management, and provide inadequate access to information, and committee members generally have no WHS training which makes it difficult to be effective.

WHS Committees

In order to improve the function of WHS committees there needs to be clarity around a number of issues including:

- Introducing a specified term of office of committee members;
- That worker representatives should be elected by their peers;
- That committee members should have access to WHS training;
- That the committee chair should have access to training in relation to chairing a meeting.

HSRs

HSRs are generally the most effective mechanism for effective consultation with workers and provide for workers to have a process for resolution of WHS issues where these are not being addressed.

Unfortunately we continue to see many instances in employers interfering with the capacity of HSRs to fulfil their role. This will be discussed in more detail in Q21 below. Please also see additional recommendations around HSRs as provided in response to Q2.

It must also be recognised that the consultation provisions in the model WHS Act do not provide a specific reference to tripartite consultation other than at Schedule 2 - *the regulator and local tripartite consultation arrangements* which goes no further than stating that the regulator may use the schedule to provide for consultation. This is inadequate as it fails to meet Australia's international obligations to ensure tripartite consultation outlined in ILO Convention (No. 155) concerning Occupational Safety & Health and the Working Environment, nor does it provide a mechanism to meet the object of the Act set out in s3(1)(c) *to encourage unions and employer associations to take a constructive role…*

Recommendations:

- Introduce a specified term of office for WHS committee members
- That worker representatives should be elected by their peers;
- That committee members should have access to WHS training;
- That the committee chair should have access to training in relation to chairing a meeting.
- Amend the model WHS Act to mandate tripartite consultation mechanisms, including sub committees at an industry level

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

WHS consultation mechanisms are currently ineffective for large numbers of NSWNMA members, though many of these matters are more to do with poor implementation of the legislation rather than the structure, (for example when you have a very large hospital employing nurses across a number of different units, 24 hours a day and 7 days a week and they have only one nursing representative on a committee that meets quarterly, it is hardly surprising that consultation is ineffective).

Beyond poor implementation, groups of NSWNMA members who are not effectively consulted include:

- Community nurses – these nurses often work alone in homes of clients and may only infrequently attend a workplace controlled by the PCBU;
- Night shift workers;
- Nurses providing services directly such as through the NDIS or aged care packages;
- Agency staff.

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

Workplace health and safety representatives are fundamental to achieving improvements in health and safety. Successive studies have demonstrated conclusively that the presence of HSRs lifted the general standard of WHS management in workplaces where they were present.

There are a number of matters negatively impacting on the capacity of HSRs to fulfil their role under the WHS Act including:

- HSR training
- 2014 COAG review

<u>HSR training</u>

The NSWNMA believes that the requirement for HSRs to complete HSR training prior to being able to exercise the full range of powers available under the WHS Act should be removed in line with the Victorian legislation. The NSWNMA has seen a range of strategies employed to stymie the effectiveness of HSRs, particularly to prevent them from issuing a PIN under s90 and to direct that unsafe work cease under s85 of the WHS Act.

With the use of these powers limited to HSRs who have completed HSR training, it is common to see PCBUs frustrating access to HSR training in order to prevent the HSR from exercising important powers that enable unsafe working situations to be addressed. In one recent example, the PCBU was blatant enough to advise the HSR that they would be attending a 3 day WHS course, not the 5 day one, because "we don't want you to be able to shut the place down". It is not uncommon for it to take up to 12 months before HSRs are able to access training.

Additionally, the most common time for workplaces without HSRs to initiate activity under s50 of the WHS act to request the election of an HSR is when there is an unresolved WHS issue or issues in their workplace and they are looking at a way forward in resolving the matter. The extended period involved in making the request, negotiating the workgroups, electing the representatives and then a request being made for training can mean a timeframe of upwards of 6 months before there is a trained HSR in the workplace able to assist with the matter.

HSRs should be able to access additional industry specific WHS training to assist them in their role, but this would require a process for the regulator to approve additional training without it being outlined in the WHS Regulation, (see Q2 for more information).

2014 COAG review

A number of changes relating to HSRs were made to the Model Act following the 2014 COAG review, these amendments have not been implemented in any jurisdiction and the NSWNMA strongly believes that they are a retrograde step and should be removed from the model as a matter of urgency.

These include:

1. limitations on the HSRs ability to request assistance from any person, with the inclusion of new sections 68(3)(a) and 68 (3)(b) and a new Regulation 20A. These new provisions require the person assisting an HSR to give at least 24 hours' notice of entry.

   HSRs are not safety professionals, and HSR training is designed to provide them with the knowledge and skills to represent their workgroup and to exercise their powers and functions under the Act, not to make them into safety professionals.

   Where there are safety critical issues or processes in which HSRs are expected to participate with limited notice, they must have the capacity to seek assistance from people with the requisite skills and knowledge to assist them in the performance of their role.

Additionally, the High Court decision Australian Building and Construction Commissioner v Powell [2017] FCAFC 89 that determined that a union official must have a valid FWC Entry Permit in order to enter the workplace to provide assistance, places a different requirement on union officials than any other person who may be requested to provide assistance. This is unreasonable and not in keeping with the original intention of s70(1)(g).

2. Removal of requirement for PCBU to provide lists of elected HSRs to the regulator. Given that a key object of the Act is to allow for fair and effective workplace representation, consultation, cooperation and issue resolution, it is important that there is some way to monitor this. The regulator should maintain records of HSRs by industry to assist in decision making around targeted information sessions and enforcement in relation to consultation, and should provide newly elected HSRs with some basic information about their right to request HSR training and what to do if this is denied.

   In addition to a list of HSRs being reported to the regulator, it should be notified to the relevant union.

3. The decision to change s93 so that HSRs can no longer provide directions, only recommendations on PINS issued should be reversed. HSRs are often the people best placed to understand controls within their workplace. This is even more important in light of internal structural change within the regulators' away from industry team to generalist teams with little understanding about industry specific controls or what may be considered reasonably practicable.

<u>Recommendations</u>

- Allow HSRs to exercise powers to issue a PIN and direct unsafe work to cease without the need to complete HSR training
- Increase available number of days for HSRs to attend WHS training that is not set out in the Regulation but is approved by the regulator, (suggest additional 5 per year)
- Allow HSRs to request assistance from any person without the imposition of a 24 hour notice provision and do not apply the additional hurdle for union officials of the requirement to have a FWC Entry Permit, given that this does not apply to any other person and these are the people that an HSR is most likely to be able to gain this support from.
- Return the requirement for the PCBU to provide information to the regulator re the election of HSRs, additionally require that this information is provided to the relevant union
- Regulator to provide information to newly elected HSRs regarding their right to request HSR training.
- Return the right for HSRs to issue directions in PINS.

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

It is the experience of the NSWNMA that it is rare for issue resolution procedures in place within organisations to in any way reflect the minimum requirements outlined in the default procedure in the WHS Regulation. Most issue resolution procedures that are in place across the industry are entirely inappropriate involving multiple escalating steps and often involving the WHS committee (who may well not be meeting for another 3 months and has no power to resolve the issue anyway).

Even if the default procedure was in place, it implies that the issue is resolved by a meeting or other communication between the parties, where this is not often the case. The default procedure must provide guidance on what happens where the matter is not resolved.

<u>Recommendations</u>

- Regulation 23(9) should be amended so that the end of the sentence reads *or union. Or the right to contact the regulator.*
- The default procedure must contain a process about what should happen when the issue is not resolved. This could include that the worker can contact their HSR, their union or the regulator for assistance.

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

Widespread discriminatory, coercive and misleading conduct continues to occur impacting HSRs, committee members and workers who raise WHS issues in their workplace. The current provisions in relation to these matters are ineffective as it fails to consider a wide range of threatening and intimidating behaviour that falls short of the definition of "discriminatory conduct", but is clearly designed to attempt to prevent the individual from exercising powers or raising issues in the workplace.

In criminal proceedings relating to discriminatory conduct, the burden of proof is on the prosecution to demonstrate that the discriminatory conduct was engaged in and provide evidence that this was for a prohibited reason.

Often in a health environment the NSWNMA hears of increasing hostility from employers towards nurses exercising rights under the WHS Act culminating in allegations that nurses have failed to undertake their nursing duties in a competent manner. Recent examples of this type of behaviour include:

1. A HSR elected in a secure mental health facility was repeatedly denied access to training for a period of over 9 months, was spoken to in an inappropriately aggressive and derogatory manner in meetings and was

called into a disciplinary meeting for “deserting duties” and failing to conduct particular tasks in relation to an allocated patient at a time that he was exercising his rights under s68(2)(b) to accompany an inspector during an inspection at his workplace following a violent incident.

2. A health and safety committee member in a residential aged care facility raised issues about health and safety in relation to the management of a bariatric (obese) patient. She raised these issues through the incident reporting system and via the WHS committee, prior to seeking advice from the NSWNMA, (which she forwarded to the chair of the WHS committee). She was called into a meeting by her manager without notice and threatened with disciplinary action for “not following internal policy”, then was called into a meeting with her manager and regional manager and told not to discuss such matters with the union. Soon after she was accused of elder abuse and dismissed from her role. An investigation into the matter identified that the member was not even working in the area at the time of the alleged abuse. The member was represented before the Fair Work Commission by the Association and was happy with the outcome of this process.

Recommendation

- Changes to the provisions of the Act relating to discriminatory, coercive or misleading conduct including a reversal of the onus of proof must be introduced to ensure protections for workers raising health and safety matters at work.

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

WHS entry by WHS entry permit holders plays a vital part in ensuring the object of the Act in:

- Protecting workers against risks to their health, safety and welfare by the elimination or minimisation of risks
- Providing for fair and effective workplace representation, consultation, cooperation and issue resolution
- Encouraging unions to take a constructive role in promoting improvements tin WHS practices and assisting PCBUs and workers to achieve a healthier and safer working environment
- Promoting provision of advice, information, education and training, and
- Securing compliance with the Act.

The key issue hindering a WHS entry permit holder from effectively investigating a suspected breach of the Act and from being able to provide comprehensive advice in relation to the matter under investigation, is that unlike the provision for inspectors under 165(1)(d) WHS entry permit holders do not have a specified right to *take measurements, conduct tests and make sketches or recordings (including*

photographs, films, audio, video, digital or other recordings). This right is essential in WHS permit holders being able to clearly demonstrate concerns when writing reports as well as providing evidence of what was or was not in place at the time of the inspection which may be necessary information in proceedings in relation to enforcement of the Act, (particularly given that the burden of proof is on the prosecution).

Additionally, in the health sector there are issues in relation to the inspection of documents that may be directly relevant to the suspected contravention, as much of the information about serious risks affecting nurses may be contained in clinical notes which are "patient records" under the Health Records and Information Privacy Act 2002, and there is currently conflicting advice regarding whether this information can be accessed for these purposes or not.

For e.g. in a residential aged care facility with a high level of violent incidents in a secure dementia unit, information about the majority of incidents is likely to be contained within patient notes, and controls that may or may not be in place are likely to be contained in behaviour management plans for each resident. This information is essential in ascertaining whether the PCBU is managing the risks to nurses of exposure to occupational violence in the facility.

The PCBU may argue that this information is governed by privacy principle 11 of the Health Records and Information Privacy Act 2002 which provides for limits on the disclosure of health information including that *an organisation that holds health information must not disclose the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which is was collected*.

It should be noted that there are exemptions to this principle where the disclosure of the information is *reasonably believed by the organisation to be necessary to lessen or prevent a serious and imminent threat to the life, health or safety of the individual or another person* as well as where *the disclosure of the information for the secondary purpose is reasonably necessary for the exercise of complaint handling functions or investigative functions by investigative agencies.* Unfortunately, when an WHS entry permit holder is investigating a suspected breach and a PCBU doesn't wish to provide information, they are unlikely to determine that they reasonably believe it necessary to provide this information, and while an entry permit holder may be exercising an investigative function in investigating a suspected contravention, they are not an "investigative agency" as defined under the Health Records and Information Privacy Act (and for interest, neither is the WHS regulator).

This matter must be addressed as it is a serious impediment in investigating serious WHS risks for nurses.

<u>Issuing of PINS</u>

On completion of a WHS investigation into a suspected contravention of the Act, a WHS entry permit holder has limited scope to enforce necessary changes within the workplace to ensure the safety of their members, as the capacity to issue a PIN is restricted to HSRs, and there are still many workplaces that do not have HSRs.

Given the wealth of industry specific health and safety knowledge of most entry permit holders and the limited resources of the regulator to attend to all such matters, it would seem reasonable to extend the capacity to issue PINS to WHS entry permit holders in order support the objects of the Act to protect workers and secure compliance with the Act.

Harmonisation of WHS entry permits

While the object of the model WHS Act is to provide a nationally consistent framework, one area that appears to have been forgotten is in relation to WHS entry permit holders, who are required to undertake training and apply for a permit in each individual jurisdiction in which they operate.

While the NSWNMA operates within the NSW jurisdiction this matter can arise in relation to facilities with cross border arrangements. For example Albury Wodonga Health is managed by Victorian Health not NSW Health despite Albury hospital being located in NSW and accessing relevant information as part of an investigation of a contravention may require access to a Victorian location.

Additionally the NSWNMA is an authorised provider of Entry permit holder training and provides training for entry permit holders from a range of unions. It seems incongruous that a union official from a union such as the Media Entertainment and Arts alliance who may work with members across multiple jurisdictions would be required to undertake multiple entry permit holder training courses and apply for permits in each jurisdiction.

Recommendations

- Amend s118 to include the right to take measurements, conduct tests and make sketches or recordings (including photographs, films, audio, video, digital or other recordings).
- Ensure that an entry permit holder can access relevant information including that covered by the Health Records and Information Privacy Act 2002.
- Provide entry permit holders with the capacity to issue a provisional improvement notice.
- Enable WHS entry permit holders to use a permit issued in any jurisdiction to enter workplaces where there are eligible workers or that directly impacts on the WHS of eligible workers.

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

The NSWNMA believes that the lack of effectiveness in securing compliance with the Act is more to do with the implementation of the Act than its content, and would like to see the regulator taking a more proactive role to ensure compliance with the Act. Please see further comment on this matter in response to Q32.

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

The WHS Act stipulates requirements for training for HSR's and Entry Permit holders however does not stipulate any training requirements for Inspectors. It is recognised that there is a training program including the PSP50116 Diploma of government (Workplace Inspection) and on boarding program however there are no requirements documented in the Act.

Recommendation

- Ensure that there are requirements for training of inspectors.

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

The NSWNMA has no experience of an internal or external review process under the model WHS laws, primarily due to the fact that worker representatives are very limited in the review processes they are eligible to be part of. The model WHS Act restricts the eligibility of entry permit holders and or worker representatives to apply for a review of decisions relating to decisions made in relation to 54(2) – *decision following failure to commence negotiations* where they are able to apply for a review if they have been appointed as a worker representative under 52(1)(b).

As the union representing nurses and midwives in NSW this is a major concern for the NSWNMA as it means that we are unable to provide the level of support required and expected by our members at times that they are in dispute with their employer over WHS matters.

HSRs are still an exception to the norm in health care facilities in NSW, (and where they exist they generally need high levels of support to fulfil their roles), and workers within the industry are unlikely to have the knowledge or expertise required to identify their basic rights under the WHS Act, let alone the process for appealing decisions made by the regulator. If workers do not have the right for their union to initiate reviews, it is unlikely that they will be in a position to exercise their rights in this regard.

Recommendation

Amend part 12 of the WHS Act "Review of Decisions" to enable entry permit holders and/or relevant trade unions to call for a review on behalf of workers and HSRs, including decisions made in relation to the following provisions:

72(6) decision in relation to training of HSRs; (at the HSRs request)

76(6) decision relating to health and safety committee;

102 decision on review of provisional improvement notice; (at the HSRs request)

191 issue of improvement notice;

194 extension of time for compliance with improvement notice;

195 issue of prohibition notice;

198 issue of non-disturbance notice;

201 issue of subsequent notice; and

207 decision of regulator to vary or cancel notice.

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

The NSWNMA has no experience of an exemption application under the model WHS Regulations.

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

The NSWNMA has no experience relating to the provisions of the WHS Act that support cooperation between regulators across jurisdictions and so is not in a position to comment on their effectiveness.

The NSWNMA supports regulators being able to exercise their powers and functions for compliance and enforcement activities across jurisdictions in order to limit the potential for important safety issues to go unaddressed due to bureaucracy, differing priorities of regulators or a lack of cooperation between jurisdictions.
There would be many instances when this may be an issue for NSWNMA members, for example, members working in Albury hospital in NSW are included in and managed by a local health district that is part of Victoria Health not NSW Health. Nurses working in community health may be employed by an employer in NSW but be providing services in the homes of patients living in the ACT.

<u>Recommendation</u>

- ensure the Act provides for regulators and inspectors to have the capacity to use regulator and inspector powers and functions across jurisdictions, to enable enforcement and compliance activities that support the objective of the model WHS Act.

Question 30: Have you any comments on the incident notification provisions?

The NSWNMA is very concerned about the changes to notifiable incidents in NSW following the introduction of the model Act with many serious incidents and potentially life threatening situations affecting nurses no longer being notifiable. The effect of this is that key issues affecting nurses are not on the radar of the regulator and are receiving insufficient attention.

This is of particular concern to the NSWNMA in relation to nurses' exposure to occupational violence and aggression which is the top WHS issue that members contact the NSWNMA about. The issue appears to be getting worse, with the NSWNMA receiving a 31% increase in calls for support around violence and aggression in 2016 compared to the 12 months prior.

Some examples from last year where members were seriously assaulted by mental health patients that were not notifiable to the regulator include:

1. A member punched multiple times in the head sustained a fractured orbital socket and broken nose, with his injuries requiring reconstructive surgery. His jaw wouldn't close properly after the incident, he had concussion and he had bleeding in his eye. The patient only stopped as he was physically restrained by other nurses. Witnesses to the assault believe that the patient intended to kill him.

   Member was taken to hospital in an ambulance and attended the emergency department. He was not admitted to hospital at the time so did not meet the definition of "serious injury or illness" as he did not have immediate treatment as an *in-patient* in a hospital, (as required by 36a) nor did he have *immediate treatment* for one of the items on the list (as at 36b), with his surgery happening at a later time.

2. A member was punched and kicked multiple times in the head and body sustaining multiple injuries including damage to his liver, a 15cm tear to his intra-abdominal wall as well as injuries to his head, arm and back.

   Member received immediate care in an emergency department but was not admitted at the time. Further medical examination at a later date showed the extent of his internal injuries which have required surgery and rehabilitation. Member is unlikely to be able to work in his profession again. He was not admitted to hospital at the time so did not meet the definition of "serious injury or illness" as he did not have immediate treatment as an *in-patient* in a hospital, (as required by 36a) nor did he have *immediate treatment* for one of the items on the list (as at 36b), with his surgery happening at a later time.

<u>Recommendations</u>

To meet the object of the WHS Act, it is imperative that the regulator is aware of life threatening WHS incidents affecting nurses. As such the NSWNMA would like the following types of incidents included as notifiable incidents under the WHS Act:

- A workplace assault that involves a risk of serious injury or illness to a person;
- Exposure to bodily fluids that presents a risk of transmission of blood-borne diseases;
- A spill or incident resulting in exposure or potential exposure to hazardous chemicals (key chemical exposures for nurses include peracetic acid and cytotoxic drugs – both of which are known carcinogens);
- Suicide or attempted suicide
- Worker off work more than 7 days.

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

The National Compliance and Enforcement policy is designed to ensure a nationally consistent approach to compliance and enforcement. Given the very limited publically available information beyond the Safe Work Australia *Annual Comparative Performance Monitoring* report, (which would appear to indicate quite different approaches to compliance and enforcement by regulators in different jurisdictions), it is difficult to provide much comment.

Beyond the "nationally consistent approach" the object of the Act is to secure the health and safety of workers and workplaces by amongst other things, securing compliance with the Act through effective and appropriate compliance and enforcement measures. The very low levels of compliance and enforcement activity outlined in the *Annual Comparative Performance Monitoring* report would suggest that the National Compliance and Enforcement Policy is not effectively supporting the object of the model WHS Act.

Additionally, the NSWNMA has been very frustrated at the apparent barriers to ensuring compliance with the WHS Act, particularly in relation to workplaces where there have been multiple serious injuries of nurses and a PCBU who continues to contravene the WHS Act and is hostile and non-cooperative with the regulator.

In NSW, in addition to the National Compliance and Enforcement policy, which provides criteria to guide enforcement decision making under s7 and a further 3 criteria to be used in deciding whether or not to prosecute, which includes: the existence of prima facie case; a reasonable prospect of conviction; and a public interest test (with a further 9 sub points), there are further guidelines in relation to enforcement, including:

- the *SafeWork NSW Prosecution Guidelines*; and
- Memorandum 1997-26 *Litigation Involving Government Authorities*.

The *SafeWork NSW Prosecution Guidelines* extend the public interest considerations from 9 to 14 matters and add an additional section under 3.13 on prioritising offenses involving:

- Target industries or hazards;
- Serious injury types and fatalities
- Alleged failure to comply with a prohibition notice;
- Interfering with inspectors or authorised officers so as to prevent them from exercising their powers;
- Impersonating an inspector
- Failure of accredited Assessors to conduct full and proper assessments for those applying for High Risk Work Licences.

Then, even if the matter meets all of those criteria, but the PCBU happens to be a government authority, (the majority of NSWNMA members work for NSW Health) the *Memorandum on Litigation Involving Government Authorities* also applies. This memorandum issues guidelines applying to both civil and criminal proceedings and is based on the principle that litigation between Government authorities is undesirable and should be avoided whenever possible. The NSWNMA asserts that government authorities who breach their obligations should be subject to the same accountabilities as other PCBUs.

Recommendations:

- Improved access to information about enforcement activity is essential. Information from across jurisdictions should be readily available and able to be sorted by jurisdiction, enforcement type, industry and offence at a minimum;
- Compliance and enforcement activity by the regulator should be increased in all jurisdictions;
- The Memorandum on *Litigation Involving Government Authorities* should not apply to litigation relating to prosecutions initiated to enforce compliance with WHS legislation, and this document should be amended to reflect this.

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

The structure of SafeWork NSW has changed considerable over the years and has seen the dissolution of specialist teams (except in construction) in favour of generalist teams of inspectors. This has led to a significant loss of industry specific skills and knowledge and as a result less effective compliance activity.

With a decrease in the industry specific skills and knowledge, the improvement notices issued by the regulator and seen by the NSWNMA are far more likely to focus on processes such as a requirement for the PCBU to consult or to conduct a risk assessment than they are to outline specific directions or recommendations relating to putting in place control measures to address the actual safety risk. This appears to primarily be due to the fact that the inspectors do not know what control measures are reasonably practicable in the industry. This is allowing PCBUs to undertake a process that sees no actual change in the workplace but to be in compliance with the notice.

The NSWNMA has had experience of the regulator implementing a graduated compliance and enforcement principle in relation to a high secure mental health facility with a long history of very serious assaults on nurses, and that despite more than a year of activity from the regulator has still seen no change to reduce the risk to nurses to the frustration of the NSWNMA and our members.

History

- SafeWork NSW inspectors had visited on a number of occasions following assaults on nurses between 2009-2016. No improvement notices or other enforcement activity had been undertaken as a result of these visits.
- In early 2017 SafeWork NSW were contacted after several assaults committed by the same patient over a couple of weeks, resulting in nurses sustaining serious head injuries (including facial fractures). The inspector visited on several occasions and issued improvement notices (mostly procedural). The PCBU responded aggressively with lawyers and had a number of the notices removed and “complied” with the others, resulting in no actual changes in the workplace to reduce the risk to nurses.
- An inspector was appointed by the regulator to work with the PCBU to improve matters like their consultative processes. Management were shuffled around but there has been no change to reduce the risks to nurses;
- The inspector who had issued the improvement notices recommended that the matter go to full investigation with view to prosecution. The decision making committee accepted the matter met the prosecution guidelines and agreed to send it for investigation.
- The NSWNMA heard the matter had been dropped as is was a NSW government employer and was “too difficult”. Ongoing representation saw the matter investigated, though the investigator did not interview any of the HSRs from the site or the NSWNMA WHS officer as part of this process.
- It appears that the matter is not progressing to prosecution, though there has been no formal notification of this. Nurses at the workplace are exposed to the same very serious levels of risk that they were when SafeWork NSW initially got involved.

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

Penalties for failure to comply with WHS obligations play an important role in deterrence, and fulfil an important role in ensuring society's expectations are met when it comes to the application of consequences for exposing workers to risk of death or serious injury. The NSWNMA supports the introduction of industrial manslaughter and an increase to financial penalties in the WHS Act. This must be supported by sentencing guidelines given the inclination of the court to issue very low penalties.

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

The NSWNMA is extremely concerned about the lack of enforcement of the WHS Act by regulators to ensure compliance with the Act and protect the health and safety of workers. We note that prosecution numbers are dwindling in almost every jurisdiction, see also our responses to Q31 & Q32 above.

Prosecutions must occur in more significant numbers and must be well publicised to raise awareness of work health and safety laws and the consequences of non-compliance, in order to deter others from engaging in similar practices.

If it is widely perceived that the WHS Act is optional and will not be enforced, it is little wonder that some may decide that the risks associated with non-compliance are so low as to be of little regard.

Regulators must be more active in this space, and initiate prosecutions for breaches of the Act more regularly. It is also the view of the NSWNMA that there is a role for unions to play in this area to protect the health and safety of their members.

Union enforcement

NSW is the only jurisdiction where unions have the right to initiate prosecutions for offences related to breaches of workplace health and safety laws, and have had the right since the 1980s. Prior to the introduction of the WHS Act, these powers were used sparingly and it was recognised in the Second Report of the *National Review Into Model Occupational Health and Safety Laws*, Second Report that there are no signs that these powers were abused.

In NSW, the right of Unions to initiate prosecutions under previous legislation was used sparingly and successfully, in instances where the regulator was unable or unwilling to initiate a prosecution and these prosecutions have resulted in systemic industry-wide improvements in safety standards, and significant decreases in worker exposure to hazards, particularly in the banking industry.

While a right of unions to initiate prosecutions has been retained in the WHS Act in NSW, there have been no prosecutions initiated by unions in NSW since the introduction of the WHS Act. The SafeWork NSW review of the WHS Act in 2017, reported *there have been no prosecutions commenced by a secretary of a union to date under the* WHS Act*. This may serve as an indication SafeWork NSW is commencing prosecutions where required, the provision is not being misused, and the legislation is effective with regard to this matter.* The NSWNMA asserts that the lack of union prosecutions does not relate to a lack of need for union initiated enforcement activity, but rather to a combination of the high threshold for commencing prosecutions, the cost and the removal of the reverse onus of proof.

High threshold - The current legislation provides a high threshold for a secretary of a union to commence proceedings: under section 230(3), proceedings for a "Category 1" (reckless conduct) or "Category 2" (failure to comply with a health and safety duty) offence can only be brought by a secretary of union, if the Regulator has (after referral of the matter to the Regulator and the Director of Public Prosecutions) declined to follow the advice of the Director of Public Prosecutions to bring the proceedings.

Cost – under the previous occupational health and safety laws in NSW, if unions initiated a successful prosecution, they were able to apply for a moiety of 50% of the amount of the fine issued. This helped to offset the costs involved in running the prosecution, which can be extensive. The current WHS Act in NSW specifically prevents this by the inclusion of s230(6) which states that *The court before which proceedings for an offence under this act are brought by the secretary of an industrial organisation of employees must not direct that any portion of a fine or other penalty imposed by the proceedings be paid to the prosecutor (despite section 122 of the Fines Act 1996).*

This inclusion is inconsistent with a number of other pieces of legislation including the Fines Act 1996 and the Fair Work Act which both provide for a portion of a fine to be paid to a union as follows:

> Fair Work Act 2009 s546(3)
> *The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
> *(a) the Commonwealth; or*
> *(b) a particular organisation; or*
> *(c) a particular person*
>
> Fines Act 1996, s122(2)
> *The court before which proceedings are taken to recover any such fine or other penalty may direct that such portion of it (not exceeding one-half) is to be paid to the prosecutor.*

Given that there is no indication that Unions were misusing their rights to commence prosecutions under previous NSW legislation, where a moiety was payable, it could be considered that the decision to prevent unions from accessing a portion of any fine was designed to restrict their capacity to engage in the work of securing compliance with the Act to ensure the safety of their members.

Onus of proof – the previous safety laws in NSW had a "reverse onus of proof" for offences related to duties of care, where the defendant was required to demonstrate that they had done everything reasonably practicable to ensure safety. The requirement in the Model WHS Act for the prosecution to demonstrate all elements of the contravention including that the employer has not taken reasonably practicable measures to prevent the breach is unreasonably onerous for the prosecution and no doubt a contributor to the low numbers of prosecutions being initiated.

Recommendations:

- Ensure the Model WHS Act provides the right for unions to initiate prosecutions
- Provide for unions to receive a 50% proportion of any fines issued in successful WHS prosecutions initiated
- Introduce a reverse onus of proof

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

There have been very few WHS prosecutions undertaken to be able to compare sentencing outcomes, however a small review of the legal outcomes relating to prosecution of officers under s27 shows very different outcomes across jurisdictions.

Sentencing guidelines may be useful for meeting the object of the model Act to provide national consistency, and given that sentences must be sufficient to act as a deterrent, this could provide an effective mechanism for addressing the failure of the courts to impose appropriate sentences for offences.

Recommendations:

- Implement sentencing guidelines with sentencing set at appropriate levels to provide effective deterrence.

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

The NSWNMA has little to say about the effectiveness of the provisions of the WHS laws relating to enforceable undertakings, given that there have been so few undertakings made, and none have applied to our membership.

Enforceable undertakings were included in the model WHS Act as an alternative to having the matter decided through legal proceedings for contravention of a work health and safety law. Enforceable undertakings are intended to allow an opportunity for significant work health and safety reform to be undertaken.

There have been very few enforceable undertakings made in any jurisdiction, with 35 enforceable undertakings across all jurisdictions in 2015-2016, 12 of these in NSW. There have been a total of 32 enforceable undertakings in NSW since the introduction of the WHS Act. While one of these was an undertaking by the North Sydney LHD, it was in relation to electricians exposed to asbestos. There have been no enforceable undertakings in relation to nurses or other health professionals in NSW.

Recommendations:

- Enforceable undertakings should not be used as an alternative to prosecutions and should not limit the right to pursue a prosecution. Enforceable undertakings should only be considered in consultation with HSR and the relevant unions.

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

Without work health and safety penalties provide a deterrent effect for PCBUs prioritising profit over safety by deciding to accept safety risk. This deterrent effect is almost entirely undermined where PCBUs can insure against the risk of WHS penalties.

Under the Model Laws, there is no provision expressly prohibiting contracts providing liability insurance against WHS penalties. Section 272 provides that a term of any agreement or contract that purports to exclude, limit, modify or transfer any duty owed under the Act is void. However, it is not clear whether a contract for directors' and officers' liability insurance indemnifying for penalties under the Model Laws would be a contravention of s 272, and this matter is yet to be considered by the courts.

As a matter of practice, corporations are readily able to, and frequently do, insure against WHS penalties. As a consequence, it is predominantly insurance companies rather than duty-holders paying fines following successful prosecutions.

While no Australian jurisdiction currently prohibits contracts providing liability insurance against WHS penalties, s 29 of New Zealand's *Health and Safety at Work Act 2015* provides a precedent. In New Zealand, an insurance policy or a contract of insurance which indemnifies or purports to indemnify a person for the person's liability to pay a WHS fine or infringement fee is of no effect, and persons seeking to enter into such a contract commit an offence.

Recommendations:

The NSWNMA supports the ACTU's recommendations that:

- the model WHS Act be amended to expressly prohibit contracts providing liability insurance against WHS penalties and fines;
- Contravention of the prohibition be made an offence.

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