

# Modernising Work Health and Safety Laws in Western Australia

## Submission by United Voice

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## UNITED VOICE

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## United Voice Submission

### Modernising Work Health and Safety Laws in Western Australia

#### Summary

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##### About United Voice

United Voice welcomes the opportunity to make a submission on behalf of our members in response to the recommendations to modify the Model Work, Health and Safety (**WHS**) Bill for adoption in Western Australia.

United Voice is a union of workers organising to win better jobs and build stronger communities, a fairer society and a sustainable future.

In Western Australia, there are over 18,000 United Voice members working in a diverse range of industries including health, ambulance, disability support, aged care, education, early childhood education and care, cleaning, hospitality, security, and manufacturing.

##### Harmonised legislation for Work Health and Safety

United Voice supports strong and consistent harmonised WHS legislation in Australia. However our support is conditional on a national approach that does not compromise or reduce the protections and standards for workers in any state or territory jurisdiction.

Like our peak body, UnionsWA, we view the WHS legislation as a *minimum* benchmark, which each state and territory should aspire to improve on, bearing in mind the unique circumstances in their jurisdictions. United Voice would strongly oppose the final version of the WHS legislation containing anything less than the standards and protections for workers contained within the model legislation.

## **Position of United Voice**

United Voice acknowledges and commends the work of the Ministerial Advisory Panel (**MAP**) chaired by Stephanie Mayman in identifying recommendations to the Model WHS Bill in Western Australia (**MAP Recommendations**).

There are key aspects of the proposed legislation of vital importance to working people. United Voice supports the MAP Recommendations and encourages that they be adopted into a Work Health and Safety Bill in Western Australia. However we submit that in some areas the MAP Recommendations can be improved.

We have had the opportunity to consider a range of other submissions to this inquiry as they have been developed, including those of the AMWU and Unions WA.

### **United Voice endorses the submission and recommendations as made by Unions WA.**

In particular we strongly support the recommendations that psychological health be included as a general duty of care and for unions to have the right to prosecute safety contraventions. This submission provides commentary on those two issues, Industrial Manslaughter and Right of Entry relating to workers in the aged care and disabilities sector.

We urge the Government to support the MAP Recommendations and the further changes proposed by United Voice contained in this submission.

For more information on this submission, please contact Carolyn Smith via

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Carolyn Smith  
United Voice WA Secretary

## Recommendations

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### Psychological health

United Voice in Western Australian is the union for paramedics, communications, transport and first aid officers at St John Ambulance Western Australia Ltd (**St John**).

Emergency services providers are often the gateway to the primary health care system. The provision of quality ambulance services goes to the core of government responsibilities toward its citizens. The health and wellbeing of ambulance services personnel is therefore intrinsic to government provision of this service. As the only contractor for ambulance services in the state of WA, St John has a responsibility to minimise foreseeable risks to the health and wellbeing of its workforce. Mental health conditions developed by ambulance personnel in the course of providing an essential government service must be significant concerns of the State.

The State's responsibility for the mental health of first responders is reflected and realised in workplace health and safety and workers' compensation legislation.

As first responders to health-related incidents, ambulance officers are routinely exposed to traumatic and dangerous incidents, throughout their entire careers. Such incidents may include witnessing the aftermath of violent crimes, road trauma, suicides and horrific accidents. Other, less obvious sources of stress for frontline officers include the unpredictability of working with the public and the increase in violence against on-road staff. These stressors are additional to the significant, yet also routine, workplace stressors such as fatigue and workplace conflict.

It is now clearly understood that accumulated exposure to traumatic events can manifest in affecting psychological health - more so than exposure to a single significant incident.<sup>1</sup> Continual exposure to trauma frequently results in negative trauma response, such as burnout, anxiety and depression, which in turn can develop into serious conditions such as PTSD.<sup>2</sup> An estimated 10% of all emergency service personnel are reported as having PTSD.<sup>3</sup> In extreme cases, if left untreated, these trauma responses can lead to cases of intentional self-harm and suicide.

United Voice WA has been working with St John and the State Government to advocate for significant improvements to organisational health and wellbeing strategies, workplace culture, and government oversight. As a result of concerns raised by United Voice members

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<sup>1</sup> Independent Oversight Panel, 'Review of St John Ambulance: Health and Wellbeing, and Workplace Culture', 2016, 7.

<sup>2</sup> Cheryl Regehr, 'Bringing the Trauma Home: Spouses of Paramedics', *Journal of Loss and Trauma*, 10:97–114, 2005, 97.

<sup>3</sup> Australian Centre for Post-Traumatic Mental Health, *Australian Guidelines for the Treatment of Acute Stress Disorder and Post Traumatic Stress Disorder* (2013), 146.

and the public on paramedic health and well-being, and a reported number of paramedic and volunteer deaths from suicide, St John commissioned an independent review of workplace culture and well-being of their staff and volunteers.

In 2016 the Independent Oversight Panel released its final report *Review of St John Ambulance: Health and Wellbeing, and Workplace Culture (IOP Report)*. The IOP Report made 24 findings and 27 recommendations. In summary the report found that the cumulative burden of trauma exposure is an important risk factor that could be better anticipated and managed by St John in relation to the predictable rates of psychological injury and the related risk of suicide in ambulance officers.

While the review has led to some positive developments, it is clear that more work needs to be done to improve available health and wellbeing supports and culture within the organisation. In particular, it is troubling that St John remains reluctant to accept the direct causal connection between the daily tasks of frontline officers and an individual's psychological wellbeing. Our members acknowledge that adverse health outcomes are related to a matrix of factors, including the cumulative traumatic stress involved in the role, organisational factors and individual risk factors. However, this does not negate the causal connection between the daily tasks of members and their health and wellbeing. Nor does it relieve St John or the government of any responsibility in terms of providing the right strategies to prepare, protect and support staff.

We note the ANU report commissioned by Safe Work Australia found that:

*The limited studies of the effect of psychosocial legal obligations – for Europe generally, and for Sweden and Canada – suggest that legal obligations may help raise the profile of psychosocial hazards and contribute to the motivation in workplaces to take action on psychosocial hazards, which is likely to include establishing policies or procedures. These studies do not enable any conclusions to be drawn about the strengths or weaknesses of particular regimes, but they do suggest that organisational commitment and capacity, including resources, knowledge and skills, are predictors of organisational effort to address psychosocial hazards. To the extent that evidence exists, and it is limited, the studies suggest that legal obligations contribute to motivation more than to capacity.*<sup>4</sup>

The current state safety legislation does not adequately address psychological health and United Voice considers the Model WHS Bill is also deficient in this area. The new legislation represents a unique opportunity to improve the framework for dealing with psychological health.

Despite the inclusion of psychological health in the definition of health, there is no provision in the Model WHS Bill or regulations which expressly refers to psychological health.

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<sup>4</sup> *Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks*, Report to Safe Work Australia, National Research Centre for OHS Regulation, Australian National University, November 2016, page 6.

United Voice believes that the Model WHS Bill needs a clear head of power for the adoption of a regulation, and accompanying codes of practices for various risks to psychological health. This will assist improvements in the management of psychological health for workers, particularly those in high risk, first responder jobs.

**Recommendation one:**

Amend section 19(3) to include the risks to psychological health

## **Right of Entry**

United Voice in Western Australia is the union which represents carers, assistants in nursing and enrolled nurses in the aged care and disability sectors.

As the consumer-directed care model rolls out in both sectors, it is becoming increasingly common for workers to provide direct care and support in group-home and/or private individual home environments. Care arrangements can be made in a wide number of ways and are often facilitated by a service provider through a shared management or brokered employment model. Individuals can also opt to directly employ a worker, without the involvement of a third-party provider. Employing the direct care worker directly without moving to a facility can be desirable for the client for many reasons, and also allows the client complete choice in who will be providing their services and where they receive them.

Under the Model WHS Bill, a workplace includes any place where a worker or contractor works or any place where a worker goes while at work. It includes offices, private vehicles, community venues, facilities, group-homes and individual homes.

There are particular safety risks for workers who work alone in a private home environment. These include physical violence and abuse, squalid conditions, and isolation. The work is often low paid and insecure. As a result these workers, most often women, need additional protections. For workers in the group-home environment, health and safety risks arise where carers are required to care for large numbers of residents, sometimes up to eight per carer. The proposed legislation provides that a permit holder 'must not enter any part of a workplace that is used only for residential purposes'. The effect of such a proposal, if accepted, would be that these workers would be denied the protection and representation afforded to other workers by the Right of Entry provisions.

While the privacy of clients must be respected, so too must the safety of vulnerable workers such as these. United Voice submits these workers should have the same right for their union to enter their workplace premises as every other worker. We consider, on balance, the time has come for this to be recognised and accepted. Once a client (or their agent) engages a worker to perform caring services, whether it be in their private residence or in a group-home or home-like environment, and particularly when they do so as part of a

government funded initiative or program such as NDIS, they assume a range of responsibilities. As a result, the usual safety standards and workers' rights commonly afforded to employees in other sectors should also apply to workers in this sector. This is particularly important in light of their distinct vulnerabilities when it comes to workplace safety.

**Recommendation two:**

That the exclusion for permit holder right of entry to residential premises be removed, where there is caring work taking place in a group-home, individual home or home-like environment.

### **Compliance with safety standards**

Workers risk injury, illness and death when workplace safety standards are not complied with. Without the deterrent of punishment, compliance can be considered discretionary.

United Voice echoes the submissions of the AMWU that a prominent purpose of sanctions in any regulatory regime is to deter non-compliant behaviour.<sup>5</sup> A continual concern for policy-makers and judges in sentencing is how to maximise the deterrent effect of sanctions and thus increase compliance. It is well-settled jurisprudence that appropriately-weighted punishments effectively deter undesirable behaviour. However, there is now considerable research that shows that increasing the certainty or possibility of apprehension and punishment provides an even greater deterrent effect than the severity of the punishment.<sup>6</sup>

In the current OSH legislation and Model WHS Bill the government regulator, WorkSafe, is the 'police' of the system. It is the only body that can enforce compliance through prosecuting offences. United Voice considers that the government should always play the main role in enforcing safety compliance. Workplace safety affects the entire community, and it is appropriate that it receives government attention and oversight. However, when the regulator does not receive sufficient resources, compliance suffers. The deterrent effect of sanctions falls away in the absence of enforcement.

United Voice agrees with many other unions in Western Australia, that the current regulator does not have the resources to either:

- proactively or reactively investigate workplaces (which reduces the likelihood of non-compliance being caught); or

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<sup>5</sup> Other purposes of sentencing and sanctions include punishment, protection, rehabilitation and denunciation: 'Considerations to be taken into account when sentencing', ALRC, <<https://www.alrc.gov.au/publications/considerations-be-taken-account-when-sentencing>>.

<sup>6</sup> 'Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment', Valerie Wright, The Sentencing Project, November 2010 <<https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>>; Durlauf, S.N. and D.S. Nagin (2010). 'The Deterrent Effect of Imprisonment.'; Briscoe, S. (2004). 'Raising the Bar: Can Increased Statutory Penalties Deter Drink-Drivers?' Accident Analysis and Prevention, 36: 919–929.

- prosecute offences.

As set out in the AMWU's submissions, former WorkSafe Commissioner Lex McCulloch recently gave evidence to the Legislative Council's Public Administration Committee Inquiry into WorkSafe ("WorkSafe Inquiry") that WorkSafe has jurisdiction over 225,000 registered businesses, and 1.2 million workers in Western Australia. Despite this large number, which is spread across the breadth of this state, WorkSafe only has the resources for 132 staff, 93 of which are Inspectors.<sup>7</sup>

In the statistics of WorkSafe visits tabled to the WorkSafe Inquiry, the reduced resourcing of the regulator was further evident. In the 2007-2008 financial year there were 12,173 work site visits. This has dropped every year since, with 7,558 visits in 2016-2017.<sup>8</sup> This is despite the Western Australian labour force growing by 240,000 workers over the same ten-year period.

United Voice considers, as with other Western Australian unions, that this significant problem can be addressed by:

- allocating more funding to the regulator so that it may hire more Inspectors and staff and have the capacity to properly uphold the relevant safety standards; and
- allowing unions to prosecute offences.

Under state and federal industrial laws, unions have the standing to initiate proceedings and seek financial penalties for contraventions. Unions should also be given standing to represent members in pursuing workplace safety offences.

This right has been adopted in NSW under their modernised WHS laws. United Voice refers to the well-developed submissions of the AMWU in relation to the work of the FSU on behalf of members in NSW to prosecute banks for safety breaches in the wake of lax security measures and armed hold ups. In *Presdee v Commonwealth Bank of Australia*<sup>9</sup> the Court recognised the "manifest involvement of unions in relation to workplace safety..."<sup>10</sup> when reaching their decision to allocate part of the fine to the FSU. It is notable that despite the number of successful prosecutions by the FSU in NSW, the NSW Regulator is yet to commence any of their own proceedings against a bank for breaches of safety legislation.

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<sup>7</sup> Lex McCulloch evidence (4 September 2017)

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/FDA35653FEE7DB7F482581A3001A40B0/\\$file/pc.wks.170904.tro.001.lm.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/FDA35653FEE7DB7F482581A3001A40B0/$file/pc.wks.170904.tro.001.lm.pdf)

<sup>8</sup> Question 8, Department of Mines, Industry Regulation and Safety – WorkSafe Division – questions on notice from public hearing 2 October 2017

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/33CF3A3F545A1C94482581C400037FF8/\\$file/pc.wks.171025.aon.001.lm.consolidated+redacted+version.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/33CF3A3F545A1C94482581C400037FF8/$file/pc.wks.171025.aon.001.lm.consolidated+redacted+version.pdf)

<sup>9</sup> [2005] NSWIRComm 389.

<sup>10</sup> *Ibid*, at [56].



The Model WHS Bill includes a range of offences throughout that the regulator (or an Inspector) exclusively has standing to prosecute. A discreet section of the Model WHS Bill (Part 7) contains ‘WHS civil penalty provisions’ that also can only be initiated by the regulator (or an Inspector).

United Voice commends MAP Recommendation 33 that unions be given standing to initiate proceedings for breaching of the WHS civil penalty provisions. However, the list of WHS provisions that actually have a civil penalty is limited and do not actually capture the provisions that affect and protect Western Australian workers the most in their day to day work. United Voice supports the unqualified right of unions to prosecute for safety offences under the Model WHS Bill.

Like the AMWU, United Voice acknowledges that there is a school of thought that only the State should have the ability to bring proceedings for criminal offences. If that thinking dominates, United Voice submits that some WHS provisions should be amended so that they operate as dual criminal/civil offences.<sup>11</sup> These provisions are as follows:

WHS Section	
33	Failure to comply with health and safety duty – Category 3
38	Duty to notify of notifiable incidents
47	Duty to consult workers
52	Negotiations for agreement for work group
53	Notice to workers
56	Negotiation of agreement for work groups of multiple businesses
57	Notice to workers
61	Procedure for election of health and safety representatives
70	General obligations of person conducting a business or undertaking
71	Exceptions from obligations under s 70(1)
72	Obligation to train health and safety representatives
75	Health and Safety Committees
79	Duties of person conducting a business or undertaking
99	Offence to contravene a provisional improvement notice
104	Prohibition of discriminatory conduct

<sup>11</sup> There is precedent for dual criminal/civil sanctions in Australian legislation, see: *Telecommunications Act 1997* (Cth); *Corporations Act 2001* (Cth); *Environmental Protection and Biodiversity Conservation Act 1999* (Cth); *Commonwealth Authorities and Companies Act 1997* (Cth).

107	Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct
108	Prohibition of coercion or inducement
109	Misrepresentation
273	Person not to levy workers.

United Voice submits that provisions relating to financial penalties under the Model WHS Bill should also be expanded to include provision for the awarding of monetary penalties to unions who bring proceedings.

### **Jurisdiction**

As submitted by the AMWU, United Voice believes there should also be consideration of how civil contravention proceedings should be dealt with. Currently under the OSH Act breaches are prosecuted by the regulator in the Magistrates Court. While criminal proceedings should remain in the State Court system, civil proceedings may be better suited in the proposed Work Health and Safety Tribunal (**WHS Tribunal**).

Under MAP Recommendation 39, the WHS Tribunal would be set up with almost identical powers and purpose as the OSH Tribunal; a body of external review. United Voice submits that there is an opportunity to expand the operation of the WHS Tribunal so that it can also deal with civil contraventions of the Model WHS Bill.

The WHS Tribunal is formed from the WAIRC, which is noted for the speed with which it deals with matters, and the emphasis it places on mediated outcomes that work for both parties. This is more likely to lead to an outcome that has been reached and owned by both parties in such a way that they are better placed to resolve future disputes without external intervention. The WHS Tribunal is best placed to facilitate such outcomes in a fast and easily accessible manner.

### **Recommendation three:**

That MAP Recommendation 33 be expanded to give unions standing to prosecute offences under the Model WHS Bill.

### **Recommendation four:**

That the WHS Tribunal jurisdiction be expanded to include dealing with civil contraventions.

### **Recommendation five:**

That monetary penalties can be awarded to unions who initiate proceedings for contraventions under the Model WHS Bill.

## **Industrial Manslaughter**

United Voice is concerned that in other jurisdictions prosecutions of Category 1 offences under the Model WHS legislation have been few and far between.

In NSW despite between 50-85 workplace fatalities a year and the commencement of their Model WHS legislation in January 2012 - it was not until 2018 that the first conviction for a Category 1 offence occurred.

The rarity of Category 1 prosecutions leads to complacency in workplaces as the deterrent effect of serious sanctions is little to non-existent.

There must be improvement and additional WHS offences to capture the most serious contraventions of workplace safety.

The introduction of the offence of industrial manslaughter will improve the capacity for law enforcement and provide an effective sanction to drive stronger compliance.

The Model WHS Bill should be amended to include the specific offence of causing the death of a worker or other person through a negligent act or omission. The offence should apply to duty-holders and officers who take part in the PCBU's management, and should be subject to significant penalties, including imprisonment

United Voice broadly endorses the approach taken by the Queensland Government in introducing industrial manslaughter to WHS law.

### **Recommendation six:**

That the Model WHS Bill includes the offence of Industrial Manslaughter modelled on the provisions in the Queensland *Work Health and Safety Act 2011*.

**31 August 2018**

**United Voice**