

Working for your business.
Working for South Australia



Business SA submission:

*Work Health and Safety
Act 2014 Partial Review*

21 December 2016

Introduction

As the peak employer representative body in South Australia with 178 years behind us, Business SA welcomes the opportunity to provide a submission to the Statutory Review of the *Work Health and Safety Act 2012 (SA)*. Business SA has a long history of advocating for changes to the Work Health and Safety legislation and in 2011 was actively involved in negotiations for the new legislation. Business SA welcomed the positive changes introduced by the State Government to the Model Harmonised Act. It is Business SA's view that these changes were essential to ensuring fair and balanced legislation that improved workplace practices and safe workplaces.

However, Business SA has serious concerns about the restricted review of the WHS Act. The sections reviewed are those that differ from the model Act. These sections of the Act were the subject of vigorous debate between relevant parties and there is no evidence these sections have caused any unintended consequences and therefore should be reviewed in isolation.

Whilst Business SA opposes the form of this review, we have provided responses to the sections being reviewed in order to demonstrate that such a review is not necessary.

For further information from Business SA's policy team, please contact Estha van der Linden, Senior Policy Adviser, (08) 8300 0000 or at esthav@business-sa.com.

(a) Managing Risks (Section 17(2))

The difference between the Model WHS Act and the WHS Act (SA) is the additional sentence stating *“but only to the extent to which they have the capacity to influence and control the matter.”*

Business SA supports the retention of the wording *“but only to the extent to which they have the capacity to influence and control the matter.”* This wording was included in the WHS Act (SA) to prevent a person being held criminally liable for something they cannot control. It is preposterous and morally wrong that criminal liability could be imposed upon a person who cannot control or influence the situation. Without this wording a duty holder has an obligation to act in circumstances where they have no control or influence.

(b) Prosecution exemptions (Section 34)

The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act.

It is Business SA's view that this provision must be retained. The additional wording provides clarity to the legislation. Business SA supports and welcomes any additional wording that provides clarity to an area of law that is already complex.

(c) Limitations on Health and Safety Representative seeking assistance (Section 68(2), (3) & (6))

The model WHS laws allow an HSR to seek assistance from ‘any person’. However, the WHS Act (SA) provides that ‘any person’ is limited to”:

- A person who works at the workplace;
- A person who is involved in the management of the relevant business or undertaking; or
- A consultant who has been approved as required by the legislation.

It is Business SA's view that this provision must be retained as it provides that a ‘person’ who can assist has a knowledge and connection with the workplace. It is common sense that a person providing assistance is either connected to the workplace or suitably qualified and approved by legislation in order to properly assist. Additional wording in the Act, such as this, helps to provide a safer work environment and therefore must be retained.

(d) Training Days for Health and Safety Representative (Section 72(9))

The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third. Business SA does not see a need to vary the number of training days for Health and Safety Representatives. However, Business SA would oppose any increase to the number of days. It is our view that an increase in days would not provide increased safety in the workplace and would be an additional and unnecessary burden for businesses.

(e) WHS entry permit holders (Section 117)

The WHS Act (SA) includes certain policies and procedures relevant to when an Entry Permit Holder (EPH) seeks to exercise a right of entry to enquire into suspected contraventions of the WHS Act. This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend the workplace at the time of entry. However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred.

The current wording in the WHS Act opens up the Act for abuse by EPHs to enter the workplace for reasons other than suspected contraventions of the Act. It is Business SA's view that any entry to the workplace should be subject to notice provisions and the terms provided by the Model Act should be adopted.

(f) Right of Entry for inquiry into suspected contraventions (Section 120)

The WHS Act (SA) includes certain policies and procedures relevant to when an EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act.

Business SA believes this to be an essential variation that protects the privacy of workers and workplaces. It is essential that when an EPH has access to personal, private information, there are policies and procedures that prevent misuse of this information and ensure privacy is not breached. If an EPH has broad access to personal information the information may be used for purposes not related to the breach such as determining Union membership. The right to privacy is an important tenant to our society and needs to be protected. Any access to personal information should be closely monitored by SafeWorkSA to ensure that privacy breaches do not occur. The power should be subject to the direction of an inspector and should be accompanied by an amendment for notice provisions in line with the model Act.

(g) Self-incrimination (Section 172)

The right of an accused to not incriminate themselves is a legal principle that has been indoctrinated in our legal system for centuries. The privilege is necessary to preserve the presumption of innocent and ensure the burden of proof remains with the prosecution.

The WHS Act is criminal law and therefore this right should be maintained in the Act. This right is also contained in the Criminal Law Consolidation Act (SA). Business SA would strongly oppose the removal of such a fundamental legal right and believes such provisions should be retained in the WHS Act.

(h) Approval of a Code of Practice (Section 274(2))

As per the model WHS laws, the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP.

However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include:

- A requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister;
- A requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act; and
- A requirement that COPs be subject to disallowance by Parliament.

It is Business SA's view that this provision must be retained. Codes of Practice are complex documents that require the input and review of experienced WHS practitioners and have the potential to significantly affect business as well as employees if not correctly drafted. Furthermore, as Codes of Practice are admissible as evidence, it is essential that a vigorous approval process is undertaken.

Conclusion

Business SA believes changes to the WHS Act to be unnecessary. There is no evidence that the provisions being reviewed are not working for either employers or employees. The provisions have, in most cases, added to the Act or provided further interpretation. Business SA submits that any variations to legislation that allows for greater clarity should be retained.