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Ms Sally North
WorkSafe Commissioner
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Chamber of Commerce
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Dear Commissioner

Work Health Safety Act 2020 Statutory Review

The Chamber of Commerce and Industry of Western Australia (CCIWA) is the peak body advancing trade and commerce in Western Australia.

We are fundamentally committed to using our insights to develop, and advocate for, public policies that help realise our vision to make Western Australia the best place to live and do business.

CCIWA thanks the Department for the opportunity to provide feedback on the application of WA's move to the national Work Health and Safety (WHS) laws.

We have engaged directly with CCIWA members and provide the following overarching comments. Further concerns are outlined in **Appendix 1**.

Overarching Comments

The *Work Health and Safety Act 2020* is broadly working as intended. However, more focus needs to be on full harmonisation of the system, with WA-specific deviation only permitted for a clear and specific purpose.

For example, it is appropriate that WA has divergent regulations focused on mining, or other work types that are less common in other jurisdictions. Ministers and regulators must ensure that harmonisation continues to be the priority, including when considering amendments to the WHS Act, where practical.

In instances where there is a divergence from the regulations and standards of the harmonised system, the Government should be required to consult at the national level, through some form of pre-legislative consultation process. This would ensure it occurs only when truly necessary.

Further, this should also include a fulsome Regulatory Impact Statement, encompassing analysis of whether it increases the regulatory burden, and safety outcomes.

CCIWA also holds concerns about the creep of WHS obligations and requirements for employers that relate to functions outside of the workplace. This includes scenarios of workers choosing to work remotely, including from their own place of residence.

This is becoming increasingly challenging for employers, as they cannot practically mitigate all risks related to the way the employee is working, and the current interpretation of the definition of “as reasonably practicable” in the Act is not always adequate in properly addressing this issue. We would argue that current examples to ameliorate risk to the health and safety of workers may not be appropriate in the context of remote working environments.

The trade-off in ensuring they comply with WHS Act, while giving employees flexibility, can impact the relationship between employers and employees. Ultimately, this can result in employers paying higher costs in workers compensation insurance and reduced harmony within the workplace.

Lastly, the continued convergence of industrial relations and WHS should be resisted by the Government and regulators. Safety on site is paramount, but the insertion of industrial relations disputation into WHS issues makes engagement overly complex. Often, employees face minimal evidentiary burden to justify safety-related industrial action, so we continue to propose that, where possible, WHS and industrial relations engagements must be kept separate.

Thank you again for the opportunity to provide comment to the Statutory Review. Should you wish to discuss the content of this letter further, please do not hesitate to contact Anthea Wesley, Head of Policy, via email at anthea.wesley@cciwa.com.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Matt Golds', with a long horizontal stroke extending to the right.

Matt Golds
Acting Chief Executive Officer

Appendix 1: Responses to discussion paper questions

Question in Paper	CCIWA position	CCIWA's Recommendation
Q1: Health and Safety Duties	Outside of Section 26A of the WHS Act (which is dealt with in Question 2), the broad health and safety duties are working as intended. In consultation with CCIWA members, no concerns beyond section 26A have been raised with the duties covered in part 2 of the Act.	N/A
Q2: Section 26A of WHS Act	<p>When introduced in the 2019 Bill (now 2020 Act), CCIWA raised concerns about the unintended consequences of the inclusion of section 26A to WA's version of model laws.</p> <p>The recommendation for its inclusion was one of the 232 recommendations of the <i>National review into Model Occupational Health and Safety Laws</i>.ⁱ Importantly, however, this recommendation was not endorsed by the Workplace Relations Ministers' Council on the basis that they were already covered by the primary duty of care for PCBU's.</p> <p>No other jurisdiction with the model laws utilises similar duties to section 26A.</p> <p>CCIWA continues to hold the view the inclusion of this section is not appropriate, and the Part 2 provisions are sufficient to ensure providers of WHS advice do not cause harm to workers as a result of their advice.</p>	CCIWA recommends that the State Government repeal Section 26A in the interest of harmonisation, and due to serious concerns about the unintended consequences of this duty.
Q3: Changes to incident notification	<p>CCIWA does not support the proposed changes outlined in the incident notification section of the Review.</p> <p>As part of the 2023 consultation process run by Safe Work Australia, CCIWA raised numerous issues with similar changes, which were echoed in the Australian Chamber of Commerce and Industry's (ACCI) submission to the incident notification review.</p> <p>To summarise, our concerns relate to the following:</p> <ul style="list-style-type: none"> The extension of reporting obligations for incidents that are already captured for investigation and management by other government 	<p>CCIWA opposes the inclusion of these changes.</p> <p>CCIWA recommends that WorkSafe WA work with the respective regulators to review and implement improved MOUs and data sharing arrangements.</p> <p>This will enable WorkSafe WA to gain access to the</p>

	<p>agencies, such as the police, Workcover authorities or respective coroners.</p> <ul style="list-style-type: none"> • The incidents are not clearly defined as work-related injuries or illnesses, leaving room for unnecessary interpretation. • The changes are inconsistent with or duplicate other regulatory regimes. <p>By extending the regime in this way, CCIWA is concerned that the additional reporting will not assist in delivering better outcomes for workers.</p> <p>Furthermore, as part of the consultation process with Safe Work Australia in 2023, CCIWA and our members also raised concerns relating to the period (batch) reporting, and the expansion of the incident notification framework to capture injuries/illnesses that developed over time and not from a specific incident. These concerns were also captured in ACCI's submission to the consultation stage.ⁱⁱ</p> <p>The proposed changes will likely substantially increase regulatory burden for every business, but most acutely for smaller businesses, with limited increase in employee safety and understanding risks in the workplace. Further, it's not clear whether WorkSafe WA will have the capability or resources to adequately manage the increased rate of notifications. This will potentially draw regulator focus and resources away from more worthwhile high-risk activities that protect workers in their workplaces and that, ultimately, save lives.</p> <p><i>Work-related Suicide and Self-inflicted Injuries</i></p> <p>CCIWA holds significant concerns about the inclusion of "work-related" suicide and self-inflicted injuries in mandated reporting requirements.</p> <p>Several cases have been litigated where this has been a matter of debate and these cases require specialist information, including from treating psychologists and doctors, who the employer cannot reasonably expect to have access to.</p> <p>Determining whether the death of a worker is due to psychological harm experienced at the workplace is incredibly difficult. Due to the sensitive and</p>	<p>information related to reportable conduct that is provided to other regulators.</p> <p>This approach would improve understanding, without increasing the regulatory burden on business.</p>
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	<p>complex nature of suicide, it should solely be a matter for a coroner to perform inquiries to determine the cause of death.</p> <p>This also applies to an “other death of a person due to exposure to psychosocial hazards” such as a heart attack from work stress.</p> <p>We hold concerns as to how this would work in practice, as well as the ability of WorkSafe WA to adequately train all inspectors in a trauma-informed approach to managing these cases. This is especially important given that this is a time when employees, the worker’s family and others are already dealing with numerous other investigators.</p> <p>CCIWA is also aware that the regulator currently receives the vast majority (approximately 95%) of all suicide notifications through the regulators, including police. The onus in this regard should remain with WorkSafe WA triaging this process, rather than a PCBU notifying WorkSafe WA.</p> <p>To this end, CCIWA suggests that the best way to perform these WHS investigations would be to have the police, coroner and other authorities share data when appropriate to WorkSafe WA, rather than employer-led investigations as proposed.</p> <p><i>Current guidance is lacking</i></p> <p>There is a substantial lack of guidance for small businesses to help them understand when and where such a notifiable incident has occurred. While this work is being undertaken, it is not clear from drafts that there will be adequate guidance for employers, and in particular smaller employers.</p> <p>Without this, these complex changes will be made harder to comply with and, ultimately, weaken the purpose of the incident notification regime.</p>	
Q4: Consultation/representation	Based on member feedback, CCIWA notes that Part 5 of the WHS Act is operating relatively effectively.	Additional guidance by WorkSafe WA with respect to how small businesses can

	<p>CCIWA members have not raised specific concerns with respect to representation, consultation and participation by the PCBU's workforce. However, some concerns were raised by smaller members about the regulatory impact of consultation but not with any specific provisions. In relation to this, it might be appropriate to provide additional guidance to small businesses on how to navigate these processes.</p>	<p>meet their consultation and representation requirements.</p>
<p>Q5a: current two-day turnaround</p>	<p>CCIWA notes that the 2-day turnaround process does not reflect the harmonised approach and, while recommended as part of the 2018 Model Laws Review (Boland Review), no other jurisdiction has brought the review recommendations into effect in State and Territory Model Laws.ⁱⁱⁱ</p> <p>CCIWA supports, in principle, some form of a timeframe being legislated as it assists in providing a determination time-limited period, and provides certainty for employers, and employees on when a decision by WorkSafe WA will be delivered. However, in practice, the time currently provided to WorkSafe WA is not the most appropriate timeframe for the type of matters being referred to it.</p> <p>This is for several reasons, but primarily because the issues being referred to them for determination are the most complex and technically difficult issues/situations.</p> <p>Naturally, these need more time to work through to satisfy the requirements of the Act. As noted in the Discussion Paper, insufficient time for determinations creates frustration for participants.</p> <p>CCIWA members have also raised concerns around the timeframe for decisions having no final resolution point, or "clear point for decision" to be handed down. As such, CCIWA would support consideration of repealing this section, only after the SWA's Best Practice Review is finalised.</p> <p>Where possible, CCIWA's focus is to ensure that all jurisdictions stay true to the principles of harmonisation, unless there is a good reason not to. For this, we suggest waiting for the Best Practice Review to be finalised and publication of</p>	<p>CCIWA supports the consideration of repealing the current 2-day turnaround, only after the Best Practice Review is completed by Safe Work Australia.</p> <p>A timeline for turnaround of decisions should be incorporated into either regulator guidance, or regulations.</p>

	<p>positions from WHS Ministers on the appetite to implement reform before the repeal of this provision.</p> <p>If there is appetite to replace such a structure, consideration should be given to a Statement of Regulatory Intent to be provided to indicate how long WorkSafe WA will endeavour to undertake the decision-making process.</p>	
Q5b: Queensland approach	<p>CCIWA has discussed the Queensland approach with members who have dealt with the Queensland version.</p> <p>Members raised an interest in the two-pronged approach being considered. The members who have experience with this framework indicated that while they are supportive, their preference would be to continue focusing on ensuring harmonisation between jurisdictions. There is also concern that a dispute can be referred immediately to a Tribunal/Commission without a determination being made by the Safety regulator.</p> <p>The recommendation for this approach came about through the review of the State's WHS Laws and has not been consulted on outside of Queensland. It is also not clear that any Regulatory Impact Statement was undertaken as part of the change. CCIWA recommends a focus of harmonisation of such items, due to the intent of the Model WHS Laws being to align all jurisdictions.</p> <p>At this stage, it is unclear why there is a process of resolving disputes differing between States and Territories.</p> <p>Noting that such divergent positions are being considered as part of SWA's Best Practice Review, CCIWA proposes that WorkSafe WA consider holding off making changes in this regard until the Best Practice Review delivers their recommendations, and more fulsome examination occurs.</p>	CCIWA recommends that consideration for this change should occur only after SWA's Best Practice Review, to ensure that harmonisation on such matters continues.
Q6 & 7: Infringement notice penalty scheme	<p>CCIWA is supportive of the introduction of an infringement notice penalty scheme being introduced to WA's WHS Laws.</p> <p>The reasons for this is twofold:</p>	CCIWA supports the introduction of an infringement notice penalty scheme, which should, where possible, align with the

	<ul style="list-style-type: none"> • Firstly, it will further harmonise WA's WHS statutory regime with other States' and Territories' regulatory regimes. This is important for businesses and workers alike, particularly where businesses work across jurisdictions. • Secondly, it is a cost-effective model to secure compliance and provides an efficient method to manage minor breaches of the Act or regulations. <p>CCIWA members consulted on this issue were supportive of the introduction of such a regime on the premise that the following are harmonised as best as possible:</p> <ul style="list-style-type: none"> • the penalty amounts. • what contraventions will be covered by the Infringement notice; and • procedural challenges to the notice. <p>For example, NSW's regime requires the review of the infringement penalty notice to be provided to their revenue authority, Revenue NSW.^{iv} However in South Australia, the process resides entirely within WorkSafe SA.^v</p> <p>WorkSafe WA should implement an infringement notice scheme that is most harmonised with other participating jurisdictions.</p>	<p>majority of other Australian jurisdictions on the following:</p> <ul style="list-style-type: none"> • penalty amounts. • type of contraventions; and • procedural review of the notice.
Q8: Requirement to display notices changes	<p>CCIWA notes that the proposed change deviates from the harmonised system, but to protect those who speak up and report sexual assault and sexual harassment in the workplace, it is worthwhile to do so.</p> <p>Employers are strongly supportive of ensuring that employees who speak up about sexual harassment and sexual assault at work do not feel that they will be identified in any process if they choose not to be.</p> <p>In addition to this change, and for smaller employers, WorkSafe WA should develop clear guidance on when it is appropriate for such a notice to be displayed.</p>	<p>CCIWA supports the proposal to remove the requirement in relevant circumstances.</p> <p>WorkSafe WA should develop clear guidance material for employers to understand when they are not required to display notices.</p>
Q9: General Feedback	<p><i>Stronger Small Business Advice</i></p> <p>While CCIWA notes that the move to reform and change codes of practice is underway at WorkSafe WA, a gap in guidance notes and information tailored for smaller businesses remains.</p>	<p>CCIWA recommends:</p> <ul style="list-style-type: none"> • additional guidance material to tailored small business contexts.

	<p>We propose that a greater focus is placed on how smaller businesses can best utilise and understand guidance notes and supporting material, so obligations are more easily understood.</p> <p><i>Industrial Relations Seeping into WHS</i></p> <p>CCIWA continues to have serious concerns with industrial relations issues seeping into genuine WHS matters. As noted in the Royal Commission into Trade Union Governance, it is often the case that safety becomes weaponised during enterprise bargaining and for other industrial goals.^{vi} This has been seen in across multiple jurisdictions in recent times.^{vii}</p> <p>In the interests of harmonisation, CCIWA suggests that WA's right of entry provisions related to safety should be moved into the WA's WHS Act.</p> <p>CCIWA prefers Queensland's model provisions, which includes a requirement to provide 24 hours' notice, together with an explanation of reasonable suspicion. There are exceptions for serious risk to the health or safety of a person from immediate or imminent exposure to a hazard.</p> <p>We also contend that a similar provision to Queensland's section 122 be included, ensuring major proponents are notified of notice of entry requests. These changes would allow for the protection of worker safety on site, without unduly restricting right of entry; limit the ability for safety disputes to be utilised for industrial purposes; reduce tense situations during alleged safety contraventions entries, due to prior notice being provided to the employer; and enable the provision of third-party experts to provide advice where needed.</p> <p>In addition to this, we are concerned with the expansion of the ability for unions to bring forward prosecutions for alleged contraventions of the WHS Act, as seen in recent legislative changes in NSW. These powers should not be included in WA's WHS Act.</p> <p>We hold the view that any prosecution should continue to be held within the remit of the Government and its processes. If there are concerns with the delay in</p>	<ul style="list-style-type: none"> • Moving the safety right of entries from WA's IR Act and having their own provisions within the WA WHS Act. This should include a requirement for 24 hours' notice alongside providing the person with control/management of a worksite the notice and not just the PCBU. • the ability to bring forward prosecutions for alleged contraventions of the WHS Act are not extended to unions in the WA WHS Act. • providing legal protection for businesses who implement regulator advice that turns out to contravene WHS laws. • providing clearer guidance to businesses, particularly small ones, to help them navigate how to develop WHS guidance and standards for new ways of working. • not including new duties relating to "digital work
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	<p>bringing forward prosecutions, or their timeframes, that is a matter for Government to resolve, by providing adequate resourcing to the Director of Public Prosecutions.</p> <p>We are also concerned with the implementation of regulator advice that may result in legal issues under other legislative frameworks. Recent examples include the Safe Work Australia's Fatigue Code of Practice, which provided advice related to rostering that could result in employers breaching industrial obligations.</p> <p><i>Emerging Issues Around WHS and New Forms of Working</i></p> <p>CCIWA is also concerned with some of the expectations being placed on employers for the development of guidance and standards. For example, in relation to working from home environments. The competitive tension between managing WHS risks, while rightfully not impeding on an employee's personal environment, is clearly present. Particularly for smaller business, there is a significant burden on them to determine how best to ameliorate and balance those competing issues. Clearer guidance should be provided to support smaller businesses in navigating this space.</p> <p>Alongside this, we are also concerned about the inclusion of new duties related to "digital work platform" in the NSW WHS Framework. We suggest the current duties cover such items, and therefore, would oppose any inclusion of such duties in the WA WHS Act.</p> <p><i>Harmonisation Issues</i></p> <p>CCIWA would like to reiterate our view that WA should work closely in alignment with other jurisdictions where possible. However, this does not mean we should apply items when they are not suitable for WA industry and WA workers.</p> <p>As a case in point, we are concerned about the diesel particulate matter (DPM) Workplace Exposure Limit (WEL) issue and the process that has been undertaken to date at a federal level.</p>	<p>platform" in the WA WHS Act.</p> <ul style="list-style-type: none"> • WorkSafe WA to investigate the consideration to not automatically implement the National WEL Workplace Exposure Standards in WA.
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	<p>As a result, we would support WorkSafe WA implementing a process whereby the State WHS Laws are not automatically updated when the National WEL Workplace Exposure Standards are amended.</p> <p>Industry has raised concerns with the process that was undertaken to update the WELs. The process of consultation, regulatory impact and importantly development of the standards was without appropriate rigour. This is particularly the case in relation to DPM and aluminium welding fumes.</p> <p>Unless the processes undertaken by SWA are improved, particularly in their consultation with impacted industries and medical research, it is unlikely that automatically updating State WHS laws is in the interests of workers and industry.</p>	
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ⁱ National Review into Model Occupational Health and Safety Laws, First Report, October 2008, Paragraph 7.105, page 102

ⁱⁱ ACCI (2023), [Incident Notification Review](#) submission

ⁱⁱⁱ Only WA has passed this recommendation into legislation.

^{iv} [Improvement, prohibition and penalty notices | SafeWork NSW](#)

^v [Penalties | SafeWork SA](#)

^{vi} *Royal Commission into Trade Union Governance and Corruption* (Final Report, December 2015) vol 5. Chapter 9 Right of Entry, 607-610, [84] – [91].

^{vii} For example, David Marin-Guizman, '[CFMEU in 'open defiance' of the law: Judges](#)', *the Australian Financial Review*. (10 May 2024), *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 1662, *Royal Commission into Trade Union Governance and Corruption* (Final Report, December 2015) vol 3. Chapter 6 Right of Entry, 607-610, [84] – [91]