

# OCCUPATIONAL SAFETY AND HEALTH LEGISLATION AMENDMENT AND REPEAL BILL 2004

## EXPLANATORY MEMORANDUM

### INTRODUCTION

#### **Review of the *Occupational Safety and Health Act 1984***

1. The attached *Occupational Safety and Health Legislation Amendment and Repeal Bill 2004* (the Bill) has been developed with a view to strengthening and improving the existing provisions of the *Occupational Safety and Health Act 1984* (the OSH Act).
2. The Bill gives effect, in part, to the Government's decision to implement the majority of recommendations arising from the statutory review of the OSH Act, undertaken by Mr Robert Laing, formerly a Commissioner of the Australian Industrial Relations Commission. Other agreed recommendations are being implemented administratively or will require changes to the *Occupational Safety and Health Regulations 1996*, which will be actioned once the changes to the OSH Act are settled.
3. The review of the OSH Act found that while much has been achieved since the introduction of the Act in 1984, there are areas in which improvements can and should be made.
4. For the most part, the proposed changes to the OSH Act represent a strengthening or improvement of existing provisions. Nevertheless the proposed changes are significant, expanding the potential application of the Act to close some identified gaps in coverage, and broadening some of the existing duties. The changes need to be viewed in the context that duties under the Act are not without qualification. The duties of non-employees apply only so far as is practicable and the duty of employees is to take "reasonable care".
5. Significant areas of change are:
  - expansion of the general duties of care, largely to "close the gaps" particularly with respect to the labour hire industry;
  - substantial increases in penalties, particularly for corporations, including provision for imprisonment in cases involving serious harm or death where the breach constitutes gross negligence;
  - new provisions enabling prosecution action to be taken when offences relate to Government agencies;
  - more flexible processes for the election of safety and health representatives and the establishment of safety and health committees;
  - introduction of the right of appropriately trained and accredited safety and health representatives to issue provisional improvement notices (PINs);
  - the establishment of a safety and health tribunal under the auspices of the Western Australian Industrial Relations Commission, to hear appeals and related matters (including questions of entitlement to pay and conditions);

- establishment of a Mining Industry Advisory Committee, to advise and make recommendations to the Minister responsible for the *Mines Safety and Inspection Act 1994*, and to the Minister responsible for the OSH Act as well as the Commission. This body will replace the existing Mines Occupational Safety and Health Advisory Board established under the *Mines Safety and Inspection Act*.

## **PART 1 - PRELIMINARY**

### **Clauses 1 to 3**

6. The proposed Act will be cited as the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004*.
7. The proposed Act will come into operation on a day fixed by proclamation. Different dates of operation may be set for various provisions.
8. The amendments in Parts 2 to 8, except those in clauses 70 and 115, are to the OSH Act. Consequential amendments are made to the MSI Act and the *Industrial Relations Act 1979*. Part 9 repeals the *Shearer's Accommodation Act 1912*.

## **PART 2 – AMENDMENTS RELATING TO GENERAL WORKPLACE DUTIES**

9. The Bill makes a number of changes to the general duty of care provisions under the OSH Act with a view to overcoming existing limitations, closing the gaps in coverage and clarifying some provisions.

### **Clauses 4 and 5**

10. Clauses 4 and 5 establish a new division heading and repeal particular provisions of the employer's duties, relating to injury and disease notification and contractual relationships, which are re-established in new provisions later in the Bill.

### **Clause 6 – Section 21 amended**

#### *Duties of employers and self-employed persons*

11. Section 21 of the OSH Act imposes a duty of care on employers and self-employed persons. This section is amended for clarity and confirmation of the extent of the duty.
12. New section 21(1) is a clearer expression of the existing duty at section 21(1)(b) for an employer or self-employed person to look after his or her own safety and health. The reworded duty applies only to a self-employed person (ie the reference to employer is removed), given such a duty cannot by its very nature apply to a corporate employer, and an employer who is an individual is by definition under the OSH Act also a self-employed person.

13. New section 21(2) clarifies existing section 21(1)(b) which places a duty on employers and self-employed persons towards persons that are not their employees but who may be adversely affected by the work. Existing section 21(1)(b) may be interpreted either narrowly or more broadly, and the narrow interpretation would exclude application from situations where work has ceased (for example where a structure collapses after it is completed) or where the harm arises from an inadequacy in the system of work. The replacement provision makes it very clear that the duty:
- applies to work that has been or is being undertaken; and
  - extends to any hazard arising from or increased by the system of work.

#### **Clause 7 – Sections 21B and 21C inserted**

##### *Duty placed on body corporate to which section 23D, 23E or 23F applies*

14. These provisions create a new general duty of care owed by certain corporate entities to ensure other people are not adversely affected by the work. This duty provides protection to people such as members of the public, clients visiting the workplace, and others who may be affected by the work, such as work experience students. The duties are modelled on those applying to employers and self-employed persons under the new section 21(2).
15. This amendment closes an existing gap in coverage. Employers and self-employed persons already owe a duty to ensure that people who are not their employees are not adversely affected by the work. However, a corporation that engages labour solely by way of labour hire or a contract for services is neither an employer nor a self-employed person. It therefore does not owe any duty to people such as customers, members of the public, or work experience students. With the continued expansion of labour hire arrangements as a means of engaging workers, an increasing number of corporations are no longer employers, and this gap in coverage has become significant. While the duties owed to workers engaged under labour hire arrangements are dealt with elsewhere in the Bill, this additional change is required to ensure members of the public, work experience students or others present at the workplace are protected when a business is operated by a body corporate using paid labour through an arrangement other than a contract of employment.
16. The new duty applies only when a body corporate engages labour under one of the arrangements covered elsewhere in the Act, under new sections 23D, 23E and 23F. These sections cover, respectively, contract labour, arrangements that mirror a contract of employment, and labour hire. The linking of sections 21B and 21C to sections 23D, 23E and 23F means that if a body corporate doesn't owe a duty to its workers, then it doesn't owe a duty under the Act to other people including members of the public. This maintains the nexus with work, in keeping with the objects of the Act, and ensures that the provision does not capture bodies corporate that, for example, solely use volunteer labour.

17. Citing sections 23D, 23E and 23F also limits the application of section 21B to a body corporate that engages labour “in the course of trade or business”.
18. Penalties apply in accordance with the penalty regime introduced later in the Bill.

**Clause 8 – Part III Divisions 3, 4 and 5 and heading for Division 6 inserted**

*Certain workplace situations to be treated as employment*

19. Since its inception, the OSH Act has covered the contractual relationship between an employer and employee. Contract for services (principal/contractor) arrangements have also been recognised under the Act from the outset, however other alternative arrangements are not necessarily covered.
20. The changing nature of Western Australia’s workforce has given rise to an increasing number of workers who work under non-traditional arrangements. The Bill introduces new provisions to extend coverage to alternative working arrangements. It also contains replacement provisions dealing with contract work arrangements (ie principals and contractors).
21. With respect to provisions relating to principals and contractors, the existing provisions have proved difficult to understand. In particular, the existing phrase “but for an agreement between him and the contractor to the contrary” has often been misinterpreted to mean that a principal can contract out of his or her responsibilities, when the phrase actually means the opposite. The replacement provisions at proposed section 23D now clearly state that an agreement that attempts to pass on control of matters that come within the principal’s duties is void. The remaining provisions of section 23D restate existing provisions relating to contract work. The principal is deemed to be the employer of the contractor and the contractor’s employees with respect to matters over which the principal has control.
22. The Bill also introduces provisions to deal specifically with labour hire, a prevalent alternative working relationship where the worker, if employed at all, is employed by the labour hire organisation (the agent), yet works for a host (the client) without having a direct contract with that person. Duties currently applicable to the client are limited to the duty not to harm a non-employee, and if the client is a corporation without any employees, then the corporation escapes any responsibilities at all.
23. The Bill provides that both the agent and the client in a labour hire arrangement have an employer’s general duty of care to the worker in relation to matters over which each has control.
24. In addition to provisions relating to contract work arrangements and labour hire, there is a new provision designed to capture any other alternative working relationship where the work is directed and controlled by the duty holder in a manner similar to that under a contract of employment.

*Duties of employers to maintain safe premises*

25. The Bill introduces new provisions requiring an employer to ensure that residential premises provided in connection with work are safe for the employee. The duty applies only in limited circumstances, that is, where the following three conditions apply:
  - there is no alternative accommodation available;
  - the accommodation is outside a city or town; and
  - there is no written agreement containing terms that might reasonably be expected to apply to the letting of residential premises (such as a lease).
26. The application of the duty extends to land and outbuildings that are intended to be used in connection with the occupation of the premises. This is necessary to provide protection to employees undertaking the sorts of activities that would be expected as part of staying in the premises. For example it might apply to external toilets and laundries, and the pathways between them. Only where there is a clear nexus with the occupation of the premises will the duty extend to land and outbuildings.
27. Importantly, this duty, similar to existing duties in the Act, applies only “so far as practicable”.
28. The proposed approach addresses a concern that employees currently have no protection under the OSH Act if they are provided with unsafe accommodation by their employer particularly in remote locations where no alternatives are available. The approach is balanced, recognising that in many cases the employer provides employees with accommodation under a lease arrangement, which is essentially no different to those taken out in private, with no connection with work. The provisions of the Bill focus only on those circumstances in most need of legislative control.
29. Penalties will apply in accordance with the penalty regime introduced later in the Bill.
30. This new duty requiring an employer to maintain safe residential premises gives rise to some considerations not present in the case of existing duties. An employee in his or her own time is not subject to the same direction and control of the employer that he or she would be during work time. Further, the duties on an employee under the OSH Act apply only when he or she is “at work”. In recognition of these considerations, the Bill provides a defence in proceedings against an employer in cases of serious injury or death, if the employer proves that the serious injury or death would not have occurred if the employee had taken reasonable care to look after his own safety and health at the premises.

### Notifications of deaths, injuries and diseases

31. While employers currently have a responsibility to report to the WorkSafe Western Australia Commissioner certain injuries to employees, there are no requirements regarding the reporting of serious work-related injuries or deaths to non-employees. The provisions of the Bill require employers and self-employed persons to report such occurrences, as prescribed. In recognition of the complexities involved in specifying the circumstances under which such reports must be made, the detail of the requirements will be included in regulations specifying the circumstances under which particular types of injury (also to be specified in regulations) will be notifiable. In practice, the provision in the Act cannot come into effect until such regulations are in place.
32. Proposed section 23I of the OSH Act incorporates both the existing reporting responsibilities and the new reporting responsibilities.
33. Because the reporting responsibilities will apply with respect to injuries to a broader group of persons than employees, the duty holder may not always be aware of the notifiable event. It will therefore be a defence if the employer or self-employed person did not know and could not reasonably be expected to have known of the injury or disease concerned.

### Duty to inform employee who reports a hazard or injury

34. The Bill introduces a new requirement for an employer to investigate, and to report back to an employee on intended action to be taken, when the employee reports to the employer either an unsafe situation that the employee cannot correct or injury or harm to a person.

### Notification of hazard to person having control of workplaces

35. The Bill includes an additional duty on employers and self-employed persons, to inform the person in control of the workplace of any hazards of which the employer/self-employed person becomes aware and which are the responsibility of the person in control of the workplace to rectify. The duty also applies in relation to the means of access to and egress from the workplace. The duty is limited by practicability.
36. This new duty has been introduced in acknowledgement that employers and self-employed persons using a workplace are likely to become aware of hazards before the person in control of the workplace does, particularly where the latter party does not physically work at the workplace.

## **Clauses 9 to 13**

### *Extended meanings of “employer” and “employee”, “workplace” and other amendments*

37. Clauses 9 to 13 make a number of amendments to the application of existing provisions as a consequence of changes elsewhere in the Bill.
38. Clause 9 extends the meanings of “employer” and “employee” to the parties deemed to be employers and employees in sections of the Act dealing with contract work arrangements, labour arrangements in general, and labour hire. These definitions are extended for the purpose of Part V of the Act dealing with inspectors and their powers, and are necessary to provide for the enforcement of the provisions of the Act dealing with these arrangements. This clause does not extend the meanings of “employer” and “employee” more generally.
39. Clause 11 similarly extends the meanings of “employer” and “employee” for the purpose of issuing improvement and prohibitions notices.
40. As a consequence of the new duty on employers in relation to residential premises, it is necessary to provide for the enforcement of the OSH Act to extend to such residential premises. This has resulted in the need to extend the meaning of “workplace” to include residential premises, for the purposes of an inspector’s powers and the issuance of prohibition notices only. Similarly, some further amendments have been required to the section of the Act dealing with prohibition notices to enable them to be issued in relation to residential premises supplied by the employer in connection with work.
41. As a consequence of changes made elsewhere in the Bill, a change is made to the section referenced as pertaining to injury and disease notification in the Schedule – Subject matter for regulations.

## **PART 3 -AMENDMENTS RELATING TO OFFENCES AND PENALTIES**

42. This Part gives effect to a new regime of penalties, characterised by:
  - significant increases, particularly in relation to bodies corporate;
  - higher penalties for repeat offences; and
  - new offences of causing death or serious harm through “gross negligence”, attracting high penalties including the option of imprisonment.In addition a new sentencing option is made available to the courts for certain lesser offences by the introduction of enforceable undertakings.
43. Maximum penalties have been substantially increased in response to community and Government concern that the penalties awarded for breaches of the OSH Act, particularly where such a breach results in death or serious injury, have on a number of occasions failed to reflect the seriousness with which such offences are regarded.

44. The new penalty regime is structured and provides a clear indication to the courts that the penalties should escalate in accordance with the seriousness of the offence.
45. Current penalties under the OSH Act are set at a maximum of \$200,000 for a general duty of care breach by a non-employee (whether a corporation or a natural person) causing death or serious injury.
46. Where the breach does not cause serious injury or death, the maximum penalty that can currently be awarded against a non-employee is \$100,000.
47. Under the new regime, maximum penalties for bodies corporate will be set at twice those for an individual who commits the same offence, and the maximum penalty for subsequent offences is set at 1¼ times the maximum for a first offence. This new structure will apply to penalties under the regulations as well as those under the OSH Act.
48. Maximum penalty for a first offence by a corporation will, under the proposed provisions, increase to \$500,000 with \$625,000 for a second offence (for the most serious of the offences, ie a general duty of care breach causing death or serious harm where gross negligence is involved).
49. Higher monetary penalties have been proposed in all cases where “gross negligence” is an element of the offence (including offences by employees). Where the offender is a natural person (and not an employee), the option of imprisonment is also included. In the case of offences by corporations, individuals may also be pursued where the offence occurs with the consent, connivance or neglect of a director or officer of the body corporate under section 55 of the OSH Act, and the imprisonment option may apply to that individual.
50. Where the offence is committed by an individual, other than an employee, the maximum penalty will be \$250,000 for a first offence and \$312,500 for a subsequent offence, with the possibility of imprisonment in both cases.

**Clause 14 – Section 3 amended**

51. The definition of serious harm at section 3(3) of the OSH Act is amended by updating the references to the relevant sections of the Act in line with the changes later in the Bill.

**Clause 15 – Sections 3A and 3B inserted**

*Penalty levels defined and meaning of “first offence” and “subsequent offence”*

52. The Bill establishes and defines four penalty levels for referencing in offence provisions elsewhere in the Bill.

<b>Penalty Level</b>	<b>Offenders</b>					
	<i>Employees</i>		<i>Individuals as Non-employees (eg employers) -</i>		<i>Corporate Non-employees (eg employers) -</i>	
	First Offence	Subsequent Offence	First Offence	Subsequent Offence	First Offence	Subsequent Offence
Level One (General Penalty)	\$5,000	\$6,250	\$25,000	\$31,250	\$50,000	\$62,500
Level Two (General Duty Breach)			\$100,000	\$125,000	\$200,000	\$250,000
Level Three (General Duty Breach resulting in serious harm or death)			\$200,000	\$250,000	\$400,000	\$500,000
Level Four (General Duty Breach involving gross negligence resulting in serious harm or death)			\$250,000 and imprisonment for two years	\$312,500 and imprisonment for two years	\$500,000	\$625,000

53. In addition, penalties for employees who breach their general duties of care are specified separately, later in the Bill.

54. First and subsequent offences are defined. The Bill is not retrospective in this regard, in that an offence is a subsequent offence (for the purpose of the penalty provisions) only if a previous offence is committed after the amendment Act comes into operation.

## **Clause 16 – Part III Division 1 inserted**

### *Meaning of gross negligence in relation to certain breaches of this Part*

55. “Gross negligence” applies to “general duty of care” breaches in circumstances where the offender:
- knew that the breach would be likely to cause death or serious harm to a person to whom a duty was owed; but
  - disregarded that likelihood;
- and the contravention did in fact cause such death or serious harm.
56. The concept of “gross negligence” is applicable to both individuals and bodies corporate. It applies to all the key duty holders under the Act including employers, employees, self employed persons, manufacturers, suppliers and persons in control of workplaces.

## **Clauses 17 to 28**

### *Breaches of the “general duties of care”*

57. Clauses 17 to 28 repeal the existing penalties applicable to the “general duties of care” under the Act and replace them with penalties in accordance with the new penalty regime. For the most part, the penalties are stated in terms of penalty levels, defined earlier. The exception is in relation to “general duty of care” breaches by employees which, being unique, are specified in dollar amounts in the relevant clause.
58. The penalties for an employee are:
- \$25,000 for a first offence and \$31,250 for a subsequent offence for a breach involving gross negligence (resulting in serious harm or death);
  - \$20,000 for a first offence and \$25,000 for a subsequent offence for a breach resulting in serious harm or death;
  - \$10,000 for a first offence and \$12,500 for a subsequent offence for a general duty of care breach (not involving the elements of serious harm or death or gross negligence).
59. Where an offender is charged with a serious offence causing death or serious harm, the provisions allow a court to convict the offender of the lesser offence, involving the same “general duty of care” breach, but without the element of causing death or serious harm.
60. Similarly, where the offender is charged with an offence involving gross negligence, the court may convict on a lesser offence that does not involve gross negligence. In this case the court has two options – the relevant general duty of care breach causing serious harm or death; or the “general duty of care” breach alone, where causation is not proved.

## **Clauses 29 to 35**

### *Further amendments related to penalties*

61. Further clauses are included in the Bill to maintain appropriate structure in the principal Act and make further consequential changes to the penalty regime.
62. Existing section 23B (re no double jeopardy) is repealed, and the provisions are reinstated in a more appropriate part of the Act dealing with legal proceedings.
63. The existing daily penalties for continuing offences are amended to reflect the new penalty regime. This results in a new daily penalty for a corporation of twice that of a natural person committing the same offence.
64. Existing section 55 is amended to take into account the new offences involving gross negligence. Section 55 currently provides for directors and other officers of a body corporate to be brought to account when the body corporate is guilty of an offence and that offence is committed with the consent or connivance of, or was attributable to the neglect on the part of the director or other officer. A director will be guilty of the gross negligence element of the offence where he or she knew that the contravention would be likely to cause the death of or serious harm to a person to whom a duty was owed, and disregarded that likelihood. Where these elements are not proved, the court may convict on a lesser charge of a breach of the general duty of care resulting in death or serious harm.

## **Clause 36 – Part VII Divisions 2 and 3 inserted**

### *Criminal Proceedings against the Crown*

65. Notwithstanding that existing section 4 of the OSH Act binds the Crown, it is the legal view that prosecution against Government agencies is precluded unless the Act specifically provides for it. (This is not a concern in relation to Crown corporations, which have their own entity.)
66. The report on the review of the OSH Act discussed this issue and concluded that the Act should be amended to specifically provide for the prosecution of State Government departments and agencies. Part 7, Division 3, of the *New South Wales Occupational Safety and Health Act 2000* was cited as providing a suitable model for applying occupational safety and health legislation, including provision for prosecution and the issuance of notices, to Government agencies.
67. The Bill contains provisions modelled on the New South Wales legislation. The provisions provide that the Crown may be prosecuted and that agencies of the Crown may be cited on the complaint, and may defend the complaint.

68. It is clear that the potential for prosecution is a significant deterrence factor and does much to improve occupational safety and health. This deterrence factor is equally important in the public sector, and employees in the public sector should be entitled to work in an environment where identified breaches are met with appropriate enforcement action, just as in the case of private sector employees.

*Undertaking by Offender in Lieu of Payment of Fine*

69. The Bill provides for an alternative to a monetary penalty for lesser offences under the Act, as a means of directly improving occupational safety and health. It does this by introducing an enforceable “undertaking” as an additional sentencing option.
70. An undertaking is defined as a written commitment with respect to occupational safety and health, given by a person convicted of an offence under the Act, the undertaking being agreed to in writing by the WorkSafe Western Australia Commissioner (the Commissioner).
71. Under the approach, the court may after having determined a penalty for a breach of the Act, offer the convicted offender the option of choosing between:
- paying the monetary penalty; or
  - entering into an undertaking with the Commissioner, where the monetary value of that undertaking is roughly equivalent to the level of penalty.
72. An undertaking may provide for an offender to:
- take specified steps to improve occupational safety and health;
  - take steps to publicise an offence and related details;
  - remedy any consequences of a specified offence; or
  - carry out a specified project or activity for the improvement of occupational safety and health in the community.
73. An undertaking must not provide for the offender to do something that he or she is required by the OSH Act to do, or that could be the subject of a notice.
74. The option of entering into an undertaking applies only with respect to “lesser offences”, that is where there has been no injury, death or harm to a person, and where the offence is against the regulations or a specified provision of the Act to which the general penalty at section 54 applies.
75. A court may not offer the option unless it has reason to believe that it is likely that the Commissioner and the offender can reach agreement on the undertaking.
76. Failure to comply with an undertaking by the due date will be an offence, and if convicted, the offender will be required to pay the original penalty as well as a further penalty for a new offence.
77. The Commissioner may cause an undertaking to be published.

### **Clause 37 – Section 60 amended**

78. Clause 37 amends the penalties applicable under the regulations, in accordance with the new penalty regime, as follows:
- \$5,000 for a first offence and \$6,250 for a subsequent offence for a breach by an employee;
  - \$25,000 for a first offence and \$31,250 for a subsequent offence for a breach by an individual other than an employee;
  - \$50,000 for a first offence and \$62,500 for a subsequent offence for a general duty of care breach (not involving the elements of serious harm or death or gross negligence).

## **PART 4 – AMENDMENTS RELATING TO SAFETY AND HEALTH REPRESENTATIVES AND COMMITTEES**

### **Clauses 39 to 48**

#### *Election of Safety and Health Representatives*

79. The election of workplace safety and health representatives is a fundamental feature of the consultative provisions of the OSH Act. However, the current provisions of the Act dealing with the election of safety and health representatives are highly prescriptive and inflexible and the level of prescription regarding elections is inconsistent with the emphasis on effective workplace consultation and the basic self-regulatory principles that underpin the legislation.
80. The intent of the amendments is to provide increased flexibility under the Act for parties at the workplace to agree on representational arrangements that are most suitable for the workplace concerned.
81. Existing mechanisms under the OSH Act, where the employer consults with employee delegates regarding the election of safety and health representatives, have been retained.
82. The new provisions enable the consulting parties, if they so wish, to agree to the establishment of a “scheme” which allows for the application of a variety of arrangements that are not currently available under the OSH Act. Where parties disagree on matters relating to an election, there is a mechanism for reference to the Commissioner, in the first instance, and subsequently to the safety and health tribunal, failing resolution.
83. In seeking to address the current inflexibilities, a “scheme” may allow safety and health representatives to be elected to represent employees at one or more workplaces. Alternatively one or more representatives may be elected for any group of employees of the employer concerned that constitutes a distinct unit of the employer’s workforce.

84. Significantly, a scheme may allow a contractor or employees of a contractor to participate in an election for a safety and health representative as if a contract of employment existed. This allows the consultative arrangements that centre on representatives and committees to apply more widely in industries and workplaces where there is a significant reliance on contract labour.
85. The consulting parties will also be able to determine how to deal with any casual vacancy for a safety and health representative that may arise. Currently the OSH Act does not deal specifically with casual vacancies for safety and health representatives and there is no provision enabling such a vacancy to be filled for the balance of the term.
86. The Bill contains the necessary savings provisions to maintain the status of representatives elected prior to the commencement of the new provisions. It also makes a number of amendments to existing sections to take into account that a safety and health representative may be elected in relation to a work group, or for more than one workplace.

#### Entitlements

87. The Bill also contains some improvements to the existing entitlements under the OSH Act for safety and health representatives. The provisions will allow regulations to provide for payment of course fees, as prescribed by regulations, where safety and health representatives attend prescribed training for which they are entitled to take time of work.
88. The Bill provides for entitlements to also include other associated costs, such as travel and accommodation costs, as prescribed. It is intended that the regulations will cover the detail of these entitlements.
89. A safety and health representative will also be entitled to pay when attending a prescribed course during his or her own time, or time off work with pay when attending during work time, to attend training, as prescribed. The latter provision already exists, but the former does not.
90. Although most employers do pay costs associated with attending training, or provide recompense to a safety and health representative who attends training in his or her own time, there is no requirement to do so. This leaves open the potential for the safety and health representatives to be disadvantaged, or for no training to be undertaken, where the employer refuses to pay. It is important to the effective operation of the legislation for all safety and health representatives to have access to training, at no disadvantage to themselves.

**Clause 49 – Section 35A, 35B, 35C and 35D inserted, and Clause 56**

*Discrimination against safety and health representatives*

91. Safety and health representatives perform a key function under the legislation and it is important that they are treated fairly in the workplace. They are currently covered by section 56 of the Act which protects persons from discrimination, for reasons relating to something they have done in the interests of safety and health. However, these provisions do not provide for re-instatement of a dismissed employee or any other means of rectifying or compensating for a wrong done to a person.
92. In order to protect safety and health representatives and to provide an adequate means of redress, the Bill contains provisions that give safety and health representatives who have been disadvantaged the right to seek redress through the new safety and health tribunal (which is established through later provisions in the Bill). Such a right will exist whether or not prosecution action is taken.
93. The tribunal may order re-instatement, compensation, or both.
94. These new provisions will apply to safety and health representatives only. Clause 56 makes the consequential amendment of removing reference to safety and health representatives from the existing discrimination provisions in sections 56(1)(a) and (b) of the Act.
95. To remove any doubt on whether public sector safety and health representatives have access to these provisions, the Bill provides that section 80E(1) of *the Industrial Relations Act 1979*, which might be interpreted as precluding such a claim, does not apply to a claim by a Government officer under these provisions.

**Clauses 50 to 53, and 57**

*Establishment of Safety and Health Committees*

96. The Bill removes existing inflexibilities in the OSH Act, to enable the parties at the workplace to determine the safety and health committee arrangements that suit them best.
97. A safety and health committee may be established at the request of an employee or of the employer's own volition. These arrangements remain effectively unchanged.
98. The time frame of 21 days for responding to an employee request remains the same, as does the period of three months in which to establish a committee. However, the latter may be extended by the Commissioner, to take into account any delays that may arise because of difficulties the parties may experience in reaching agreement.

99. The Bill addresses the current prescription within the OSH Act regarding the composition of a safety and health committee. Subject to the constraint that at least half the committee members will need to be safety and health representatives or employees who work at the workplace, representing other employees, the Bill enables the employer to consult with employee representatives with a view to reaching agreement on the structure of their committee.
100. A “circuit breaker” is provided, by reference to the Commissioner if agreement cannot be reached. A decision by the Commissioner may be referred to the safety and health tribunal for review.
101. The new provisions will enable a committee to be established for more than one workplace. While such a provision currently exists, it is limited to workplaces where there are safety and health representatives.
102. For the first time, hierarchical committee structures will be recognised under the legislation.
103. A provision has been included enabling the agreement to be varied or the committee to be abolished, where the relevant parties agree, in recognition that it is not appropriate to “lock” workplaces into arrangements that may not continue to be appropriate to the circumstances.
104. The Bill contains the necessary savings and transitional provisions to maintain the status of existing committees and to bring them under the new provisions.

### **Clauses 38 and 55**

#### *Provisional Improvement Notices*

105. Clause 38 inserts a definition of provisional improvement notices (PINs) in section 3 of the Act (Interpretation).
106. Under the OSH Act, safety and health representatives have a fundamental role in the identification of hazards in the workplace and in bringing safety and health concerns to the attention of the employer. If such representatives are to be effective and to be encouraged to take up the onerous obligations associated with the role, it is necessary to give them some authority and empowerment.
107. To this end the Bill provides for appropriately trained and accredited safety and health representatives to issue provisional improvement notices (PINs) requiring the recipient to address specified safety and health matters in the workplace. This applies to the workplace or workplaces for which the safety or health representative was elected, or, where the representative was elected for a group of employees, a workplace where a member of the group works.

108. PINs are similar to improvement notices issued by WorkSafe inspectors except that they are provisional and may be issued where the authorised safety and health representative is of the opinion that a breach of the Act or regulations is occurring and is not immediately remedied by the employer.
109. In acknowledgement of the wide-ranging nature of the power and the need to provide protection from inappropriate use, the Bill includes a number of controls on the right to issue PINs, including undertaking appropriate training, to ensure PINs serve their intended function.
110. The provisions of the Bill place the following controls on the power to issue a PIN:
- the power to issue a PIN applies only to a safety and health representative who has completed a prescribed course of training;
  - the safety and health representative may only issue a PIN where he or she has consulted with the employer regarding the matter giving rise to the intent to issue a PIN;
  - the safety and health representative must, where practicable, consult with another safety and health representative at the workplace concerned before issuing a PIN;
  - if a person on whom a PIN is issued disagrees with it, he or she has a right of review by a WorkSafe inspector;
  - misuse of the power to issue a PIN will be dealt with by the existing sanctions in the OSH Act for the misuse of a safety and health representative's powers, and includes the potential for disqualification from being a safety and health representative.
111. Should it be found upon experience that a further control is needed on the power to issue PINs, the Government is prepared to make regulations requiring a safety and health representative, in specified circumstances, to consult with the WorkSafe division of the Department of Consumer and Employment Protection (DOCEP) before issuing a PIN. The power to make regulations on this point has been included in the Bill.

## **PART 5 – AMENDMENTS RELATING TO INSPECTORS**

### **Clause 58 – Section 42 replaced by sections 42, 42A, 42B and 42C**

#### *Restricted inspectors*

112. Section 42(1) of the OSH Act currently restricts the Commissioner to appointing inspectors from officers of the department (DOCEP). This provision is limiting, particularly in view of the vast regional areas of the State and the variety of circumstances in which occupational safety and health matters present themselves.

113. The Bill introduces new provisions enabling the appointment of any person employed in the Public Service under Part 3 of the *Public Sector Management Act 1994* as a restricted inspector for a specified period. The Commissioner may limit the appointment of a restricted inspector to certain functions, certain areas of the State, or the Commissioner may make the appointment subject to any other limitation or condition.
114. The power to appoint restricted inspectors will provide the flexibility to enable public servants with particular skills or knowledge to be assessed for a particular purpose, such as an investigation involving expertise not held by WorkSafe inspectors. Similarly the provision will improve the ability to service remote areas of the State, by way, for example, of appointing restricted inspectors from amongst inspectors of another agency that has a presence in areas where WorkSafe does not.

### **Clauses 54 and 59 to 61**

#### *Amendments to inspectors' powers and functions and offences related to such*

115. Clause 54 inserts a new division heading pertaining to issuing of notices by inspectors.
116. Clause 59 introduces a new power of an inspector to provide information for the purpose of facilitating compliance with the OSH Act. It gives a legislative basis for existing practices. By recognising this formally in the Act, inspectors are covered by the protections of the Act when fulfilling this important function.
117. Clause 59 also removes an inconsistency whereby the “statute of limitations” of the Act is 3 years, yet an inspector has the power to interview a person who the inspector has “reasonable grounds to believe is, or was at any time during the preceding 2 years, an employee who works at the workplace”. The bill extends the latter to 3 years.
118. Clause 60 amends the requirement for an inspector to notify an employer when entering a workplace, to take into account that in some cases there are many employers operating from a single workplace (for example a construction site), yet the inspector’s visit may not be relevant to some of these employers. The changes tie the notification requirement to the relevant employers. Similarly the requirement for an inspector to notify the employer, and any safety and health representative and safety and health committee of the action taken or required has been limited to those parties who are relevant.
119. Clause 61 clarifies the application of provisions dealing with the provision of information under compulsion, and the protections from incrimination.

## **PART 6 – AMENDMENTS RELATING TO THE ESTABLISHMENT OF A TRIBUNAL**

### **Clauses 62 to 72**

120. The OSH Act currently provides for a number of matters to be referred to a safety and health magistrate for resolution. The Bill provides for the more administrative matters such as the entitlement of an employee to wages and conditions under the stop work provisions and appeals of the Commissioner’s decisions, for example in relation to reviews of notices, be dealt with by a specialist safety and health tribunal (the tribunal). Prosecutions will continue to be dealt with by safety and health magistrates.
121. The model adopted in the Bill is that the tribunal will operate under the auspices of the Western Australian Industrial Relations Commission (WAIRC).
122. Under the tribunal concept, a single Commissioner of the WAIRC with appropriate expertise will hear such matters.
123. The Bill makes the necessary amendments to the *Industrial Relations Act 1979* and also provides for the necessary provisions of that Act to be “picked up” under the OSH Act to enable the tribunal to operate.
124. When there is before the WAIRC both an unfair dismissal claim (under the *Industrial Relations Act*) and a matter under the OSH Act, relating to the same employee, employer and circumstances, the provisions also allow an employee to request both matters to be heard by the same Commissioner.
125. The bill contains transitional provisions to deal with matters referred to or determined by a safety and health magistrate before the new arrangements come into effect. Similarly, transitional provisions also apply to appeals of decisions by a safety and health magistrate.

## **PART 7 – AMENDMENTS TO MAKE EXPRESSIONS IN THE ACT GENDER NEUTRAL**

### **Clauses 73 to 103**

126. The OSH Act was originally drafted at a time when it was acceptable to use the male gender, accepting that references to the male gender also include the female gender. Such language is now out of step with modern expression. Further, the Act was amended in 1995, after drafting practices had changed, using gender neutral language, therefore the Act currently contains a mix of styles.
127. The Bill contains the necessary provisions to make the expressions in the Act general neutral.

## **PART 8 – MISCELLANEOUS AMENDMENTS**

### **Clause 104 – Section 3 amended**

128. This clause introduces new definitions and makes changes to a small number of existing definitions.
129. Definitions of “Australian Standard”, “Australian/New Zealand Standard”, and “import” are new and have been introduced in response to an identified need.
130. The definition of “apprentice” has been amended to reflect the statutes as they currently stand. The existing definition of “apprentice” refers to the *Industrial Training Act 1975*, however that Act would be repealed if the unproclaimed Part 7 of the *Vocational Education and Training Act 1996*, were to be proclaimed. The amendment ensures the definition of “apprentice” will remain meaningful should such proclamation occur.
131. The definition of “industrial trainee” is removed, as present day trainees do not meet the definition of “industrial trainee” and a definition of “trainee” has been substituted.
132. The definition of “supply” has been amended to clarify what is included in its scope.
133. Some amendments to the definitions are necessary as a consequence of other changes in the Bill.

### **Clause 105 – Section 6 amended**

#### *Occupational safety and health in the mining industry*

134. Although occupational safety and health in the mining industry falls outside the OSH Act, there has long been recognition of the role that the Commission for Occupational Safety and Health (the Commission) plays in the provision of advice to the Government on safety and health in all industries, including mining.
135. The amendments to the OSH Act improve on the existing arrangements by expressly providing for representation of the mining industry on the tripartite Commission.

136. The Bill provides for the following changes to the Commission’s membership:
- one of the Public Service Officers to be the officer of the “department”, as defined in the *Mines Safety and Inspection Act 1994* (the MSI Act), nominated in writing by the Minister responsible for the administration of the MSI Act;
  - for two persons (rather than three) nominated by the Chamber of Commerce and Industry of Western Australia;
  - one person to be nominated by the Chamber of Minerals and Energy of Western Australia Inc; and
  - one of the three persons nominated by The Trades and Labor Council of Western Australia is to have knowledge of or experience in the mining industry

### **Clauses 106 and 115**

#### *Mining Industry Advisory Committee*

137. This clause provides for the Mines Occupational Safety and Health Advisory Board (MOSHAB) to be abolished and reconstituted as a tripartite advisory committee of the Commission.
138. The Bill establishes the Mining Industry Advisory Committee with the functions of providing advice to the Ministers responsible for the OSH Act and MSI Act, and the Commission.
139. The model delivered by the Bill provides two channels of reporting to Ministers, one through the Commission, its Chair and the Director General of the Department of Consumer and Employment Protection (DG DOCEP) for reporting to the Minister responsible for the OSH Act, and a second through the Director General of the Department of Industry and Resources (DG OIR) to the Minister responsible for the MSI Act. It thereby preserves the existing reporting relationship of MOSHAB to the Minister for State Development while opening up an additional reporting relationship through the Commission to the Minister for Consumer and Employment Protection.
140. The functions of the new Mining Industry Advisory Committee reflect those of MOSHAB.
141. The necessary consequential amendments to the MSI Act are included at clause 115 of the Bill.

## **Clause 107 to 110**

### *Amendments to provisions dealing with notices*

142. Clauses 107 and 108 make necessary consequential amendments to the provisions of OSH Act dealing with the issuance of improvement and prohibition notices, to take account of the fact that the amended Act will put responsibilities on certain corporate entities to ensure that the work doesn't harm other people, such as members of the public and visitors to the workplace (new sections 21B and 21C).
143. Clauses 107 and 108 also deal with the display the Commissioner's decision when a review of the notice is sought under the OSH Act and the Commissioner decides to modify the notice. Currently, the Act requires the display of the notice, but not the modifications to the notice, and this omission could be misleading.
144. Clause 109 provides for issuance of notices to the Crown. While notices can currently be issued to the Crown, this amendment provides for a consistent approach to the issuance of notices with respect to agencies of the Crown, and will make it easier for inspectors "in the field" to determine the entity to which the notice should be issued, and will maintain consistency with the provisions dealing with prosecution of the Crown. Notices will be able to be served on Government departments and agencies that have no legal identity in their own right, by issuing the notice to the "State of Western Australia" and including in the notice the name of the responsible agency. These provisions also extend to the issuance of PINs, providing a simple means of enabling a safety and health representative working in a Government agency to identify the entity to which a PIN should be issued.
145. Clause 110 provides the Commissioner with the power to cancel a notice. Currently the Commissioner can only do so as the result of a request for a notice to be reviewed (and such requests cannot be made after the compliance date of the notice). The new provision will enable the Commissioner to cancel a notice when it comes to light outside the review process that there is a good reason such notice should be cancelled. Where the review process is underway it is intended the review process should take precedence.

## **Clause 111 – Section 53 amended**

146. Clause 111 makes a number of changes to the averment provisions in the OSH Act. The averments simplify court proceedings by allowing certain facts to be taken as proved in the absence of evidence to the contrary.
147. Two averments have been amended, one for greater clarity, and the other to refer to "a restricted inspector" which is a new concept introduced through this Bill.

148. Two new averments have been added. One is that a complaint for an offence against the OSH Act is taken to be authorised under section 52(1) to institute proceedings, in the absence of evidence to the contrary. The second relates to codes of practice, an Australian Standard, or an Australian/New Zealand Standard. It provides a means of demonstrating to the court that such documents are what they are purported to be, in the absence of evidence to the contrary, without the need, say, to obtain a representative of the publishing body to testify in court.

**Clause 112 – Section 56 amended**

149. This clause provides an additional circumstance under the Act that is protected from discrimination, that of having made a complaint about safety and health to the Commissioner.

**Clause 113 – Section 57A inserted**

*Visitors to comply with directions*

150. This clause introduces a requirement for visitors to comply with directions given by employers and others in authority at workplaces where such directions are given for safety and health reasons. This provision will assist employers and self-employed persons to enforce requirements implemented in the interests of safety and health, in relation to visitors present at the workplace.

**Clause 114 – Schedule amended**

*Hazard Identification, Risk Assessment and Risk Control*

151. A key concept in occupational safety and health is that hazards may be addressed by a three step process of identifying the hazards, assessing the risk associated with each hazard, and controlling (or reducing) those risks.
152. This clause provides a “head of power” to write new regulations requiring hazard identification, risk assessment and, importantly, risk control or reduction.
153. While regulations currently exist requiring hazard identification and risk assessment, they do not require risk control or risk reduction. Rather, they provide that the duty holder must consider the means by which the risk may be reduced. This is considerably weaker than a requirement to control or reduce risk, and, being process oriented rather than outcome focussed, such regulations are difficult to enforce.
154. This change to the schedule will allow more effective regulations to be written.

Duties on owners or persons having control of plant at the workplace.

155. Clause 114 also provides a power to make regulations on duties to be observed by the owner or a person having the control of plant used at the workplace. Current regulations place duties on employers, self employed persons and persons in control of a workplace, however the person who owns or controls the plant is often not one of these, and difficulties can arise in effecting improvements to plant in such circumstances. The new provision will enable regulations to be made to better target persons who can make improvements to plant.

**PART 9 – REPEAL OF SHEARERS’ ACCOMMODATION ACT 1912**

**Clause 116**

156. The *Shearers’ Accommodation Act 1912* deals with standards of accommodation for shearers. It is outmoded and highly prescriptive, detailing matters such as the minimum width of the dining table, the cutlery to be provided, and the numbers, dimensions or materials pertaining to facilities such as rooms, toilets, washing facilities, and so on.
157. The prescriptive nature of the *Shearer’s Accommodation Act* is inconsistent with the general duty of care approach adopted in the OSH Act. It is ineffective, with a maximum penalty of \$50.00 for a non-continuing offence. The Act has not proved to be a suitable enforcement tool in addressing unsafe accommodation.
158. As a consequence of including provisions dealing with employee accommodation in the OSH Act, the Bill includes the repeal of the *Shearers’ Accommodation Act*.