

2019

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

WORK HEALTH AND SAFETY AMENDMENT BILL 2019

EXPLANATORY STATEMENT

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Background

The *Work Health and Safety Act 2011* (WHS Act) gives effect to the Territory's commitment under the Inter-Governmental Agreement for Regulatory and Operational Reform in OHS to implement the model work health and safety laws in the ACT.

The infrastructure and governance established for the regulator under the model work health and safety laws has been left for each jurisdiction determine.

Purpose of the Bill

The purpose of this Bill is to amend the WHS Act to establish a new governance structure for the regulator under the WHS Act.

In doing so, the Bill implements legislative changes that are responsive to recommendation 21 of the *2018 Independent review of the ACT's work safety compliance infrastructure, policies and procedures* (2018 Independent Review). The 2018 Independent Review contained 27 recommendations, including recommendations relating to the governance arrangements of WorkSafe ACT. The 2018 Independent Review was tabled in the Legislative Assembly on 30 October 2018, alongside a Ministerial Statement which indicated the ACT Government's in-principle support for all recommendations.

Consistent with the 2018 Independent Review, the key design principles underpinning the new legislative governance arrangements established by the Bill are twofold:

- ensuring clarity of roles and independence of the regulator; and
- increased transparency, accountability and scrutiny.

The 2018 Independent Review identified lack of role clarity and confusion among stakeholders as to the current role of work safety commissioner. To address this, the Bill removes the current role of work safety commissioner from the WHS Act.

Outline of the Bill

The Bill establishes WorkSafe ACT as the Office of the Work Health and Safety Commissioner (the Office), an independent and separate entity under the WHS Act.

The Office has the overarching functions including the previous functions of the work safety commissioner of education, research and awareness raising. Specifically, the Office's responsibilities include:

- a.) to promote an understanding and acceptance of, and compliance with this Act or another territory law relating to work health and safety; and
- b.) to undertake research, and develop educational and other programs for the purpose of promoting work health and safety; and

- c.) to advise the Minister on any matter relevant to the operation of a territory law under which the commissioner performs a function; and
- d.) any other function given to the office under this Act or another territory law under which the office performs a function.

The Bill also creates a single statutory office role of the Work Health and Safety Commissioner (WHS Commissioner), who, along with the staff of WorkSafe ACT, constitutes WorkSafe ACT. The WHS Commissioner is responsible for:

- the management and administration of the office;
- the efficient and effective financial management of the office; and
- exercises the functions of the Office and the regulator's functions under section 152 of the WHS Act.

The Bill amends the WHS Act so that the WHS Commissioner is the regulator, thus vesting the functions of the regulator in the WHS Commissioner.

The Bill ensures transparency of funding and accountability by establishing annual reporting and financial reporting requirements for the Office by establishing it as a 'public sector body' for the purposes of the *Annual Reports (Governance Agencies) Act 2004*. It is further intended that the Office will also be a separate directorate for the purposes of the *Financial Management Act 1996*. This will enhance the transparency, accountability and scrutiny of the financial management and resources of the Office.

Further transparency and accountability for WorkSafe ACT is achieved through the preparation of the compliance and enforcement protocol, strategic plan and statement of operational intent. The Bill requires these documents to be regularly updated and publicly available. This will enable stakeholders to better understand the activities of the Office and have informed expectations about its compliance activities and priorities. The preparation of these documents on a regular basis ensures they are current, responsive and provides a formalised opportunity for strategic planning and a broad consideration of the role, protocols and operations of the Office.

Furthermore, the Bill ensures the ACT Work Health and Safety Council advisory role to the Minister includes matters relating to the performance and activities of the Office. In addition, through the Council, stakeholders will be given the opportunity to provide input into:

- the development of:
 - o documents made by the WHS Commissioner, including the compliance and enforcement policy and strategic plan;
 - o the statement of expectations issued by the Minister;
- annual report of the Office via inclusion of a statement from the Chair of the Council;
- advising the Minister on matters included in the annual report of the Office; and
- consultation as part of the appointment process for the WHS Commissioner.

Finally, the Bill also changes the term “work safety” in schedule 2 to “work health and safety” to ensure consistency across the WHS Act. The term “work safety” was a relic of the Territory’s precursor of the WHS Act, the *Work Safety Act 2008*.

Human Rights Considerations

This section provides an overview of the human rights which may be engaged by the Bill, together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act 2004* (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the HRA contains a framework that is used to determine the acceptable limitations that may be placed on human rights, specifically a number of relevant factors are to be considered, including:

- a.) the nature of the right affected;
- b.) the importance of the purpose of the limitation;
- c.) the nature and extent of the limitation;
- d.) the relationship between the limitation and its purpose; and
- e.) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Bill may be considered to engage the following rights under the *Human Rights Act 2004* (HRA):

- Section 8(3) – recognition and equality before the law;
- Section 12 – privacy and reputation; and
- Section 17(c) – taking part in public life.

Section 8(3) – recognition and equality before the law

Section 8(3) of the HRA states that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Clause 13 of the Bill amends the WHS Act to insert a new section that allows an appointed member on the Council to be appointed for not longer than 8 consecutive years. This ensures that an appointed member to the Work Health and Safety Council is able to serve as a member for two consecutive four-year terms.

The purpose of this section is to ensure that the Council membership is refreshed after 8 years, recognising that this is an appropriate time to allow for changes in environment, work health and safety priority and action areas and changes in personnel within representative and peak bodies. Further it facilitates a broad range of industries and interests are represented through the Council and enhances the ability of the Council to remain contemporary with emerging employee and employer interests and work health and safety priorities.

This section aligns with the Government’s policy on refreshing the membership of advisory councils after six years, however, it also recognises that a single term of an appointed member to the Work Health and Safety Council is for up to 4 years, thus if reappointed would serve a total of 8 consecutive years.

Section 12 – right to privacy

Section 12 of the HRA states that everyone has the right:

- a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- b) not to his or her reputation unlawfully attacked.

The right to privacy in the HRA is based on the right to privacy set out in article 17 of the International Covenant on Civil and Political Rights (‘ICCPR’). As international case law does not exhaustively define ‘privacy’ or ‘private life’.

Clause 22 of the Bill inserts new sections on establishing the role of the WHS Commissioner that would require the WHS Commissioner to inform the Executive in writing about the Commissioner’s personal and financial interests within 7 days after:

- a) the day the Commissioner is appointed; and
- b) the first day of each financial year; and
- c) the day there is a change in the interest.

Provision for the WHS Commissioner to disclose interests is necessary for the purpose of providing evidence to maintain the independence, impartiality and integrity of the Commissioner and ensure that this position is not at risk of being influenced by personal or financial interests when exercising their functions as the regulator. This limitation also assists the Commissioner to protect themselves against false claims and conflicts of interest when carrying out their functions and enhances the confidence of stakeholders and the community in the position. This is essential to the effectiveness of the regulator who has the responsibility of enforcing compliance with work health and safety laws and obligations. This is a critical community function in ensuring a workplaces are safe.

Although the WHS Commissioner is not an employee of the public sector, the Commissioner is required to act with impartiality – that is, to put aside any personal interests, biases and views that might affect the performance of their official duties.

The Commissioner has a responsibility to ensure their personal interests (financial and non-financial), associations and activities do not conflict with their duties in exercising the functions of the regulator.

The nature of the limitation is relatively minor in practice as the disclosure is made to the Executive only and the use of information disclosed would be subject to the privacy principles set out in the *Information Privacy Act 2014*.

Given the role of the regulator in enforcing work health and safety obligations on all ACT employers, private sector and the public sector, it is reasonable to expect that disclosures of

this type would be required. It is proportionate and the least restrictive means of ensuring the independence of and confidence in the WHS Commissioner.

Section 17 – Taking part in public life

Section 17 of the HRA states that every citizen has the right, and is to have the opportunity, to have access, on general terms of equality, for the appointment to the public service and public office.

Clause 22, section 2.26 of the Bill provides that the WHS Commissioner must not, without the Minister's approval, engage in paid employment outside the functions of the Office. The purpose of this section is:

- consistent with the nature of the WHS Commissioner's role being a full-time position, to ensure that any other paid employment of the Commissioner does not interfere with the Commissioner's ability to perform their functions; and
- ensures the independence and impartiality of the Commissioner in performing the functions of the Office and the regulator.

While this requirement has the effect of preventing the WHS Commissioner from engaging in other paid employment without the prior approval of the Minister, it is not without precedent. For example, section 25 of the *Director of Public Prosecutions Act 1990* applies a similar restriction on the Director of Public Prosecutions and a similar requirement for the approval of secondary employment exists for any public servant under section 244 of the *Public Sector Management Act 1994*.

Given the role of the WHS Commissioner in exercising the functions of the Office and the regulator under the WHS Act it is reasonable to expect that they will be able to direct their attention in a full-time capacity to performing that role. Clause 22, section 2.26 of the Bill is considered to be the least restrictive means of achieving this objective and would allow the Minister to approve secondary paid employment in circumstances where other paid employment would not objectively interfere with or diminish the Commissioner's ability to perform their functions or create a conflict of interest in exercising the Commissioner's functions.

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CLAUSE NOTES

Clause 1 Name of Act

This clause provides the name of the Act.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act is to commence on a day fixed by the Minister by written notice. In line with section 79 of the *Legislation Act 2001*, the Act will automatically commence 6 months after the day it is notified if no written notice is made earlier by the Minister.

Subclause (2) deals with the transitioned commencement of Schedule 1, part 1.12 of the Act to replace references to the Work Safety Commissioner that appear in the *Working with Vulnerable People (Background Checking) Amendment Act 2019*, which will commence on 1 July 2020.

Clause 3 Legislation amended

This clause specified that the *Work Health and Safety Act 2011* (WHS Act) is being amended and notes that other legislation is also consequentially amended, as set out in schedule 1 of the Bill.

Clause 4 Schedule 2, part 2.1, heading

This clause substitutes the term 'work safety' with 'work health and safety'. This is a technical change to align the phrasing used in Schedule 2 with the rest of the WHS Act.

Clause 5 Establishment - Schedule 2, section 2.1

This clause substitutes the term 'work safety' with 'work health and safety'. This is an editorial change for consistency across the WHS Act.

Clause 6 Functions - Schedule 2, section 2.2

This clause substitutes the term 'work safety' with 'work health and safety'. This is a technical change to align the phrasing used in Schedule 2 with the rest of the WHS Act.

Clause 7 Schedule 2, section 2.2 (1) (c) and note

This clause substitutes Schedule 2, section 2.2 (1) (c) with a clause that inserts a requirement that the Work Health and Safety Council is to review and consider the annual report of new Office of the Work Health and Safety Commissioner and provide advice to the Minister on any matters arising from the review and consideration. This section provides additional clarity over the matters that the Council can consider and advise the Minister on.

Clause 8 Schedule 2, new section 2.2 (2) (aa)

This clause adds a new subsection to provide additional clarity over the matters that the Council can consider and advise the Minister on, in this case, the performance of the new Office and the WHS Commissioner.

Clause 9 Schedule 2, part 2.3

This clause amends the membership of the Work Health and Safety Council.

Clause 10 Schedule 2, part 2.3A

This clause inserts a new section consequential on the change in membership of the Work Health and Safety Council.

Clause 11 Terms of appointment

Schedule 2, section 2.4 (2)

This clause amends the terms of appointment for appointed members on the Work Health and Safety Council from a period of 3 years to 4 years.

Clause 12 Schedule 2, section 2.4 (2) note

This clause omits the note under section 2.4 (2) as a consequence of inserting a new subsection 2.4 (3).

Clause 13 Schedule 2, new section 2.4 (3)

This clause inserts a new subsection to allow members of the Work Health and Safety Council to be appointed for eight consecutive years, ie two four-year appointment terms.

Clause 14 Appointment of chair and deputy chair

Schedule 2, section 2.5

This clause amends section 2.5 to provide that the chair and deputy chair will be elected by the appointed members on the Work Health and Safety Council and how they will be elected.

Clause 15 Ending appointment of council member

Schedule 2, section 2.9 (1)

This clause omits subsection (1) in line with current drafting practice.

Clause 16 Schedule 2, section 2.9 (2)

This clause amends subsection (2) consequential on the change in membership of the Work Health and Safety Council.

Clause 17 Schedule 2, section 2.9 (2) (b) and (c)

This clause omits subsections that are no longer considered necessary.

Clause 18 Schedule 2, section 2.9 (3)

This clause amends subsection (3) consequential on the change in membership of the Work Health and Safety Council.

Clause 19 Quorum at council meetings

Schedule 2, section 2.9 (3)

This clause amends the quorum of a meeting of the Work Health and Safety Council consequential on the change in membership of the Council.

Clause 20 Schedule 2, section 2.13

This clause amends the section on voting at council meetings consequential on the change in membership of the Work Health and Safety Council.

Clause 21 Establishment

Section 2.16 (2)

This clause substitutes the term 'work safety' with 'work health and safety'. This is an editorial change for consistency across the WHS Act.

Clause 22 Schedule 2, part 2.2

This clause substitutes schedule 2, part 2.2 to change the governance arrangements of the regulator. By replacing the existing part 2.2, which in its current form establishes the role of work safety commissioner, that role is abolished.

Specifically, the new part provides for the following.

Section 2.17 provides definitions for the purposes of part 2.2 regarding the compliance and enforcement policy, operational plan and strategic plan that are to be made by the commissioner work health and safety for WorkSafe ACT in accordance with sections 2.27, 2.29 and 2.28 respectively.

Section 2.18 establishes the Office of the Work Health and Safety Commissioner (the Office).

Section 2.19 provides that the WHS Commissioner and the staff constitute the Office.

Section 2.20 outlines the functions of the Office.

Section 2.21 provides for the appointment of the WHS Commissioner who must be appointed by the Executive, where there has been consultation by the Minister with the chair and deputy chair of the Work Health and Safety Council, an open and accountable selection process and the person has the experience or expertise necessary to exercise the functions.

Section 2.22 outlines the functions of the WHS Commissioner, noting that the Commissioner is the regulator for the WHS Act. In addition to the exercising the functions of the regulator

under the Act, the Commissioner has functions regarding the administration, management and strategic planning for the Office. This includes the preparation of a compliance and enforcement policy, strategic plan, and operation plan, and ensuring that these plans and the policy are considered in the exercise of the Office's functions.

Section 2.23 provides for the independence of the WHS Commissioner. The Minister may however give directions to the WHS Commissioner that are of a general nature. Any directions issued by the Minister must be tabled in the Legislative Assembly within 5 sitting days.

Section 2.24 requires the WHS Commissioner to exercise their functions in accordance with a duty of good conduct.

Section 2.25 requires the WHS Commissioner to disclose their personal and financial interests. This provision ensures the independence and unbiased exercise of the Commissioner's functions as a regulator.

Section 2.26 provides that the WHS Commissioner must not engage in paid employment outside the functions of the Office. This is in recognition that the statutory office position of the Commissioner is a full time and independent role.

Section 2.27 provides for the grounds on which the Executive may end the WHS Commissioner's appointment. The WHS Act does not limit the Commissioner's right to judicial review of a decision to end their appointment, pursuant to the *Administrative Decisions (Judicial Review) Act 1989* (ACT) to the extent that the court would have jurisdiction under that Act review a decision made by the Executive.

Section 2.28 sets out the requirements and process that applies should the Work Health and Safety Council lose confidence in the performance of the WHS Commissioner as the regulator. This ensures that the Executive is able to consider the confidence of stakeholders in the regulator under the WHS Act and give the Commissioner the opportunity to address any issues raised before the Executive decides whether to end the WHS Commissioner's appointment under section 2.27 (1) (f).

Section 2.29 provides for the approval of leave of the WHS Commissioner.

Section 2.30 defines the staff of the Office.

Section 2.31 requires the WHS Commissioner to appoint a deputy WHS Commissioner. The deputy is to act as the WHS Commissioner if the Commissioner is absent or cannot exercise his or her functions for any reason. This is to ensure that during short-term, temporary periods of absence there is a person with the skills and experience to act in the WHS Commissioner's role.

Section 2.32 provides the WHS Commissioner with powers to employ staff under the *Public Sector Management Act 1994* (PSMA). In exercising this power, the WHS Commissioner is responsible and accountable for the effective and efficient financial management of the

Office and the scrutiny of this power is provided for under the reporting requirements established for the Office in Schedule 2, division 2.2.5 of the Bill

Section 2.33 enables the commissioner work health and safety to engage consultants and contractors. This power is commonly given to statutory office holders to facilitate the effective and efficient operations of the responsible entity.

Section 2.34 provides that, in exercising a function of the Office, staff are not subject to the direction of anyone else in the exercise of that function other than a direction from the WHS Commissioner or another member of staff authorised by the Commissioner to give directions. This section is limited to the exercise of functions of the Office.

Section 2.35 provides for delegations by the WHS Commissioner as a standard power given for statutory office positions to facilitate the effective administration and management of an entity.

Section 2.36 provides for the use of public service resources with the agreement of the Head of Service.

Division 2.2.5 sets out the policy and reporting framework for the Office.

Section 2.37 requires the commissioner work health and safety to prepare a compliance and enforcement policy for WorkSafe ACT at least every four years following consultation with the work safety council and Minister. While the policy must be reviewed at least every four years it may be reviewed at any time to ensure that it remains current and aligned to the regulatory strategies and approaches. To enhance public visibility of the compliance and enforcement policy it will be a notifiable instrument and the Minister will be required to present the compliance and enforcement policy to the Legislative Assembly within six sitting days after receiving the policy.

Section 2.38 requires the WHS Commissioner to prepare a strategic plan for the Office every four years following consultation with the work safety council and Minister. To enhance public visibility of the strategic plan it will be a notifiable instrument and the Minister will be required to present the strategic plan to the Legislative Assembly within six sitting days after receiving the plan. The strategic plan must contain the objectives, outcomes, strategies, the operating environment, performance criteria, strategies to improve capability and risk management procedures for the Office.

Section 2.39 requires the Minister must, after consulting with the Work Health and Safety Council, issue a statement of expectations every year to set out the Government's priority activities and initiatives for the Office. The statement of expectations is a notifiable instrument.

Section 2.40 requires the WHS Commissioner to prepare an annual statement of operational intent for the Office which is to be published on the website for the Office. The

statement is to give effect to the statement of intent issued by the Minister under section 2.39 and must be endorsed by the Minister.

Section 2.41 requires the WHS Commissioner to prepare an Annual Report for the Office under the *Annual Reports (Government Agencies) Act 2004* (Annual Reports Act). This section sets out the specific content required for the Annual Report of the Office in addition to the required content under the Annual Reports Act and requires that it include a statement from the Chair of the Work Health and Safety Council.

Clause 23 Dictionary, new definitions

This clause inserts a definition for the commissioner and the compliance and enforcement policy.

Clause 24 Dictionary, definition of *council*

This clause replaces 'Work Safety Council' with the new 'Work Health and Safety Council' as a consequence of changes to the name of the Council in clause 4 of the Bill.

Clause 25 Dictionary, new definitions

This clause inserts new definitions on establishing the Office under clause 22 of the Bill.

Clause 26 Dictionary, definition of *regulator*

This clause amends the Act's definition of regulator so that the regulator is the WHS Commissioner.

Clause 27 Dictionary, new definitions

This clause inserts new definitions as a consequence of establishing the new Office and role of the WHS Commissioner.

Clause 28 Dictionary, definition of *work safety commissioner*

This clause removes the definition of the work safety commissioner as this role will no longer exist under the WHS Act.

Schedule 1 Consequential and other amendments

Schedule 1 of the Bill contains consequential amendments to be made to other Acts.

Part 1.1 *Annual Reports (Government Agencies) Act 2004*

Clause 1.1 Section 7 (2) (b), note

This clause inserts a reference to the new Office in the note to make it clear that the Office is a public sector body that must prepare an Annual Report. This supports the requirement in the Bill for the WHS Commissioner to prepare an Annual Report for the Office.

Part 1.2 *Dangerous Substances Act 2004*

Clauses 1.2 – 1.4

This part amends the *Dangerous Substances Act* (DS Act) to change the person that has regulatory functions under the DS Act to the WHS Commissioner. This is consistent with the recommendations of the 2018 Independent Review by vesting work safety regulatory functions in a single statutory office position.

The regulatory functions under the DS Act relate to licensing, compliance measures, receiving certain notifications, and appointment of inspectors. These are functions that have been previously performed by WorkSafe ACT by virtue of a declaration under the *Public Sector Management Act 1994* (PSMA).

Part 1.3 *Dangerous Substances (Explosives) Regulation 2004*

Clauses 1.5 – 1.7

This part amends the *Dangerous Substances (Explosives) Regulation* (DS Regulation) to change the person that has regulatory functions under the DSE Regulation from the director-general to the WHS Commissioner. These are functions that have been previously performed by WorkSafe ACT by virtue of a declaration under the PSMA. This is consistent with the recommendations of the 2018 Independent Review by vesting work safety regulatory functions in a single statutory office holder.

The regulatory functions under the DS Regulation relate to authorisation of explosives, licensing, receiving notifications about certain issues, requesting certain kinds of information about explosives and safety, and making decisions about the supply of and use of explosives and fireworks displays.

Part 1.4 *Dangerous Substances (General) Regulation 2004*

Clauses 1.8 – 1.10

This part amends the *Dangerous Substances (General) Regulation* (DS General Regulation) to change the person that has regulatory functions under the DSG Regulation from the director-general to the WHS Commissioner. These are functions that have been previously performed by WorkSafe ACT by virtue of a declaration under the PSMA. This is consistent with the recommendations of the 2018 Independent Review by vesting work safety regulatory functions in a single statutory office holder.

The regulatory functions under the DS General Regulation relate to licensing, receiving notifications from licensees about certain issues, and determining route and time restrictions for transport of dangerous substances.

Part 1.5 *Energy Efficient (Cost of Living) Improvement Act 2012*

Clause 1.11 Section 28B (4) (b), example and note

This section is consequential on establishing the new WHS Commissioner and removes the references to the work safety commissioner.

Part 1.6 *Legislation Act 2001*

Clauses 1.12 – 1.13

This section is consequential on establishing the new WHS Commissioner and removes the references to the work safety commissioner.

Part 1.7 *Machinery Act 1949*

Clauses 1.14 – 1.17

This part amends the *Machinery Act 1949* (Machinery Act) to change the person that has regulatory functions under the Machinery Act from the director-general to the WHS Commissioner. These are functions that have been previously performed by WorkSafe ACT by virtue of a declaration under the PSMA. This is consistent with the recommendations of the 2018 Independent Review by vesting work safety regulatory functions in a single statutory office holder. The regulatory functions under the Machinery Act relate to appointment of inspectors.

Part 1.8 *Planning and Development Act 2007*

Clauses 1.18 – 1.20

This section is consequential on establishing the new WHS Commissioner and removes the references to the work safety commissioner.

Part 1.9 *Remuneration Tribunal Act 1995*

Clauses 1.21 – 1.22

This section is consequential on establishing the new WHS Commissioner and makes it clear that the Remuneration Tribunal will be responsible for making a determination in relation to the terms and conditions for the WHS Commissioner.

Part 1.10 *Workers Compensation Act 1951*

Clauses 1.23 – 1.26

This section is consequential on establishing the new WHS Commissioner and replaces references to the Work Safety Council with the Work Health and Safety Council.

Part 1.11 *Workers Compensation Regulation 2002*

Clauses 1.27 – 1.29

This section is consequential on establishing the new WHS Commissioner and replaces references to the Work Safety Council with the Work Health and Safety Council.

Part 1.12 *Working with Vulnerable People (Background Checking) Act 2011*

Clauses 1.30 – 1.35

This section is consequential on establishing the new WHS Commissioner and replaces references to the Work Safety Commissioner with the new WHS Commissioner. Commencement of this part is delayed because the amendments that reference the commissioner under the *Working with Vulnerable People (Background Checking) Amendment Act 2019* will only commence on 1 July 2019.