

Independent review of SafeWork SA



SafeWork SA

**Preliminary Government
response**



Government of South Australia
Attorney-General's Department

Independent review of SafeWork SA Preliminary Government response



Message from the Minister

This Government wants to ensure SafeWork SA is a workplace safety regulator that has the trust and respect of businesses, workers and the broader community.

This is why we commissioned John Merritt to undertake a 'root and branch' review of SafeWork SA, with a view to understanding the work that has already been done to reform the organisation under the stewardship of Martyn Campbell, and what further action should be considered to strengthen our workplace safety regulator.

Below is our preliminary response to Mr Merritt's report.

We are still considering many of the findings and will be consulting further with both SafeWork SA and other stakeholders on a number of the recommendations, and will publish our final response before the end of June 2023.

KYAM MAHER
Minister for Industrial Relations and Public Sector

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Item	Recommendation	Preliminary Government response
CHAPTER 3 – ACCOUNTABILITY		
1.	SafeWork SA should adopt a new Vision which matches the objects of the WHS Act, “securing the safety of workers and workplaces”, and a Mission to “protect workers and other persons against harm to their health, safety and welfare”.	Accepted in principle – The Government will consult with the new SafeWork SA Executive Director on potential amendments to the Strategic Plan to reflect the objects of the WHS Act.
2.	SafeWork SA should adopt the fatality and injury data provided by ReturnToWorkSA as the measure of its performance in achieving its Vision and Mission.	Accepted in principle – The Government accepts that fatality and injury data available from ReturnToWorkSA may be a useful measure of performance amongst other statistics. The Government will consult with the new SafeWork SA Executive Director on how this data can be used to inform regulatory activity.
3.	The performance of SafeWork SA leadership should be measured against improvements in fatalities and injuries.	See response to Recommendation 2.
4.	The Minister should establish a SafeWork SA Oversight and Advisory Council (SWOAC). The Council should receive a detailed quarterly report on SafeWork SA activities and performance, including the following:	Accepted in part – The Government will establish a SafeWork Advisory Committee to provide a forum for stakeholder consultation on work health and safety matters and the strategic direction of SafeWork SA,

- a) South Australia's injury performance for the preceding quarter, injury performance year-to-date, comparisons with five-year averages, and comparisons against the strategy targets.
- b) Reports on fatalities that have occurred in the previous quarter, including follow-up regulatory and education actions, and engagement with deceased workers' families.
- c) Regulatory actions for the preceding quarter. The number of visits, both response and targeted, the number of notices, both improvement and prohibition that have been issued, the number of referrals for investigation, the number of investigations completed, enforceable undertakings, and prosecutions completed. This data should be presented against prior periods and the strategy targets.
- d) Activities to improve the management of psychosocial hazards at work, and support for the recently released code of practice
- e) A report on all s 231 requests, including the tracking of each individual matter against the statutory time limits.
- f) A report on all internal review applications and the outcomes of those applications.
- g) Feedback on inspections, including outcomes (notices and corrective actions), and a report on all contact with HSRs from inspection reports.
- h) Data on serious incident reports and notifications received by SafeWork SA and the follow up actions the agency has taken.
- i) Data on complaints received by SafeWork SA, including the outcomes of those complaints and the feedback to complainants. Also, any reports on any misuse of complaints.
- j) Exercise of entry permits, including incidences where entry has not been achieved, and follow up inspections to entry reports.

and to provide advice to SafeWork SA and the Minister for Industrial Relations and Public Sector.

The Committee will initially be established on an *ad hoc* basis but will later be codified into the WHS Act.

The Committee will be composed of an independent chair and representatives of stakeholder bodies including employee organisations, employer organisations, safety professionals, and ReturnToWorkSA.

The Government will consult further on matters such as the final composition and functions of the committee, terms of reference, standing agenda items, the meeting schedule, and terms of appointment.

The Committee will not be responsible for the operational oversight of SafeWork SA or the monitoring of staff performance. SafeWork SA will remain responsible to the Chief Executive of the Attorney-General's Department, and ultimately the Minister for Industrial Relations and Public Sector, for its performance.

The Government will support SafeWork SA publicly releasing more frequent activity statements, and copies of these statements being discussed by the Committee and provided to the Chief Executive of the Attorney-General's Department and the Minister for Industrial Relations and Public Sector.

	<ul style="list-style-type: none"> k) Activities with social partner organisations to “promote the provision of advice, information, education and training in relation to work health and safety”. l) Communications and media activity completed and planned. 	
5.	The report should be forwarded on behalf of the Council to the Minister, and the Chief Executive of the Attorney-General's Department, before being published online.	See response to Recommendation 4.
6.	SafeWork SA's annual activity report should be expanded to include the activity and performance data in the quarterly reports.	See response to Recommendation 4.
7.	<p>The SWOAC should work with SafeWork SA to enhance its strategic plan. The expanded plan should include the following:</p> <ul style="list-style-type: none"> a) Targets for injury and fatality reduction. b) Targeted injuries, industries and employers, based on the ReturnToWorkSA injury data. c) Targets for regulatory activity. d) Targets for delivery of advice, information, education, and training by the social partner organisations supported by SafeWork SA. e) Targets for supporting and increasing the numbers of HSRs. 	Accepted in part – The Government accepts that it is appropriate for SafeWork SA to consult with the SafeWork Advisory Committee regarding enforcement and compliance targets.
CHAPTER 4 – TRIPARTISM		
8.	SafeWork SA should publicly and internally commit to encouraging and supporting employee associations and employer organisations to play	Accepted.

	their vital role in promoting improvements in workplace health and safety, in accordance with the WHS Act.	
9.	SafeWork SA should publicly and internally promote fair and effective workplace representation, consultation, cooperation, and issue resolution in relation to work health and safety.	Accepted.
10.	<p>The SWOAC terms of reference should reflect the following objectives:</p> <ul style="list-style-type: none"> a) To give practical effect to the tripartite mechanisms in the WHS Act and support the social partner organisations to play their critical role in securing the health and safety of workers and workplaces. b) To build confidence in SafeWork SA through transparency. c) To enable workers, employers and families of deceased workers to hold SafeWork SA to account for its strategic choices and regulatory actions, and its performance in securing the safety of workers and workplaces. d) To improve SafeWork SA's strategic choices in targeted injuries, industries and employers, and strengthen its capacity and confidence to use its regulatory powers. e) To support the Minister for Industrial Relations and Public Sector, and the Attorney-General's Department in the delivery of the Government's agenda for workplace safety. 	See response to Recommendation 4.
11.	The Minister should seek the advice of the SWOAC regarding SafeWork SA's preparedness to support any Industrial Manslaughter provisions in the WHS Act.	Accepted in principle – The Government is currently engaged in separate consultation on legislation to introduce an offence of industrial manslaughter in the WHS Act, including with many of the same key stakeholders.

12.	<p>Members of the SWOAC should be appointed by the Minister. All members should be the senior leaders of their organisations, with sufficient authority to contribute at a strategic level. There should be no provision for proxies in the event a member cannot attend a meeting. Membership should comprise the following:</p> <ul style="list-style-type: none"> a) An independent chair with sufficient experience and qualifications to earn the respect and confidence of the major parties b) Five representatives of employee associations c) Five representatives of employer organisations d) A representative of the Chief Executive of the Attorney-General's Department e) The Victims of Crime Commissioner f) A representative of the Australian Institute of Health and Safety g) A representative of ReturnToWorkSA 	<p>As part of that consultation the Government has foreshadowed it intends that SafeWork SA will investigate and prosecute industrial manslaughter offences consistent with other work health and safety offences.</p> <p>The Government will consider any feedback on that proposal at the conclusion of that consultation process.</p> <p>See response to Recommendation 4.</p>
13.	<p>The Council should meet quarterly. For the first year it should meet monthly. The Minister and the Chief Executive of the Attorney-General's Department should attend the Council annually. The agenda for that meeting should include feedback from the Council on the performance of the Executive Director of SafeWork SA. Two representatives of the Council should be on the interview panel when appointing the Executive Director of SafeWork SA. Council members should accompany a</p>	<p>See response to Recommendation 4.</p>

14.	<p>SafeWork SA inspector for a day within a month of their appointment, and thereafter this should be an annual activity. SafeWork SA should brief the Council on the skills and experience in each inspector intake.</p> <p>The SWOAC should receive an annual report from SafeWork SA confirming that all documents and standards called up by the WHS Act are updated.</p>	<p>See response to Recommendation 4.</p>
15.	<p>SafeWork SA should develop a new strategy to support HSRs. The strategy should include the following:</p> <ul style="list-style-type: none"> a) Actions to identify how many HSRs there are, where they are, and how to communicate with them. These actions should have regard to promoting and enforcing s 74(2) which requires a person conducting a business or undertaking (PCBU) to provide SafeWork SA with a list of HSR's. b) Initiatives to encourage more people to take on the HSR role. c) Regular reviews of HSR training and training providers, including feedback from trainers and HSRs. d) Initiatives to enforce the prohibition of discriminatory conduct against HSRs. e) Mechanisms to help SafeWork SA inspectors support HSRs, including the strict application of s 164(2)(c) and a system of monitoring and reporting on SafeWork SA's adherence to this provision. f) Opportunities to increase engagement with HSRs, including improving the portal and regular forums between HSRs and SafeWork SA inspectors for their industry. 	<p>Accepted in principle – The Government will support the new SafeWork SA Executive Director developing a strategy to support Health and Safety Representatives in consultation with stakeholders.</p>

	g) An annual survey of HSRs to ascertain the support they are receiving and their needs to fulfill their role under the WHS Act.	
16.	SafeWork SA should convene an annual conference of HSRs. The conference should be addressed by the Executive Director, who will report on progress against the strategy, and the broader strategic plan, and take questions from HSRs.	Response deferred pending further consultation.
17.	SafeWork SA should run an award for HSR of the Year. The prize should be a scholarship for professional development in workplace health and safety and be presented by the Minister at the annual HSR's conference.	Response deferred pending further consultation.
18.	The Minister should support the recommendation in the Model Laws Review that provision be made for an employee association official to visit a workplace to provide assistance to an HSR without the need to hold an entry permit.	<p>Not accepted – Recommendation 8 of the Model Laws Review has previously been considered by SafeWork Australia and has not been accepted.</p> <p>The recommendation would create significant complexity in its interaction with existing right of entry provisions at both State and Commonwealth level and undermine the balance struck by the existing right of entry framework.</p> <p>The review does not provide any evidentiary basis for why this recommendation is necessary. In the absence of an appropriate evidentiary basis the recommendation is not accepted.</p>
19.	The Minister should support the recommendation in the Model Laws Review to provide for disputes under ss 82 and 89 to be capable of being referred to a relevant tribunal (in this case, the South Australian	Response deferred pending further consultation.

	Employment Tribunal) if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes under the default or agreed procedures and with cease work disputes.	
20.	The Victims of Crime Commissioner should be appointed to the SWOAC to ensure that SafeWork SA is held to account and supported in respecting the rights and needs of families of deceased workers.	See response to Recommendation 4.
21.	The Government should commence consultation with employer organisations to amend the WHS Act such that the Workplace Entry by WHS Entry Permit Holder's regime created within the Act is consistent with the model laws. Those provisions that require notification to SafeWork SA about proposed entries to workplaces, and the requirements to furnish reports after entry has been achieved to SafeWork SA should be removed.	Response deferred pending further consultation.
22.	SafeWork SA should report quarterly to the SWOAC on the number of times it has been requested to intervene where entry to a worksite has not been achieved by an Entry Permit Holder, and the outcome of its interventions. Its report should contain an analysis of any patterns within these incidents, and its actions to resolve these matters. Requests from Entry Permit Holders and employers for an inspector to attend a site to resolve a dispute should be included in the quarterly report along with the outcome of the request. The report should also record where voluntary reports have been lodged by Entry Permit Holders and the response to those reports.	See response to Recommendation 4.
23.	The Government should commence consultation with employer organisations to amend the WHS Act to allow Entry Permit Holders to take photographs, video, voice recordings, measurements and tests	Response deferred pending further consultation.

	relevant to their investigations, in terms similar to the provision added to the Victorian <i>Occupational Health and Safety Act 2004</i> .	
24.	Section 271 should be amended to enable a person who has been seriously hurt, and the families of a person who has been killed at work to be kept abreast of the findings of SafeWork SA's investigation into the circumstances of the incident, including the materials that are being considered in deciding on whether or not to prosecute.	<p>Accepted in principle – The Government has committed to reforms of s 271 of the WHS Act following John Mansfield KC's review into SafeWork SA's investigation into the death of Gayle Woodford.</p> <p>The Government is finalising a legislative package to enable SafeWork SA to communicate more clearly with interested parties (including injured workers and their families) about its investigation and compliance activities, while balancing this against the need to preserve the integrity of investigations and the confidentiality of information obtained through the use of statutory powers.</p>
25.	Section 271 should be amended to expressly allow SafeWork SA to keep an applicant under s 231 abreast of the progress of their application.	See response to Recommendation 24.
26.	Section 271 should be amended to support an "informal release of information policy" that allows for inspection reports, appropriately redacted, to be provided to employee association and employer organisation officers, and HSR's who notify issues to SafeWork SA.	See response to Recommendation 24.
27.	The SafeWork SA Workplace Education Team should develop a strategy to transition from direct delivery of education and training, to coordinating and supporting education and training by employer organisations and employee associations. The team to work in	Accepted in principle – The Government will consult with the new SafeWork SA Executive Director regarding partnerships with stakeholder organisations to deliver education and training. It is noted

	partnership with the ReturnToWorkSA Employer Risk Services to improve the targeting of education and training.	that right of entry training is already delivered through stakeholder partnerships.
28.	The Mining and Quarrying Occupational Health and Safety Committee should sit within ReturnToWorkSA.	<p>Accepted in principle – The Government has committed that MAQOHSC will no longer sit under SafeWork SA and will instead sit independently within the Attorney-General's Department.</p> <p>ReturnToWorkSA is an independent statutory corporation and it would be inappropriate for MAQOHSC to be placed within it.</p>
29.	The SafeWork SA complaints system should be modified to allow tracking of responses to complainants, with non-compliances to be included in the quarterly report to the SWOAC.	Response deferred pending further consultation.
30.	SafeWork SA should replace its three online complaints processes with a single process based on that used by WorkSafe Victoria.	Accepted in principle – The Government will support SafeWork SA in streamlining the complaints forms available on its website.
CHAPTER 5 – MONITORING AND ENFORCING COMPLIANCE		
31.	SafeWork SA should accelerate the streamlining and refining of the administrative procedures and processes that apply to worksite visits, with the goal of enabling inspectors to conduct an average of six to eight visits per week. This work to be done in consultation with inspectors, and with the oversight of SWOAC.	Accepted in principle – The Government will support SafeWork SA in its efforts to streamline administrative processes so that inspectors and investigators can spend more time on site.

<p>32.</p>	<p>SafeWork SA should set a target of 50% of visits by inspectors to be proactively initiated, based on the ReturnToWorkSA data and the revised strategy, and work with the SWOAC to achieve this.</p>	<p>Response deferred pending further consultation.</p>
<p>33.</p>	<p>SafeWork SA should review its investigation processes and investigator resources, including supporting inspectors to do some investigations, with the objective of creating the capacity to complete thirty prosecutions a year.</p>	<p>Response deferred pending further consultation.</p>
<p>34.</p>	<p>SafeWork SA should aim for 90% success in its prosecutions, and SafeWork SA have the flexibility to engage the DPP to support specific prosecutions where its skillset will benefit the outcome.</p>	<p>Not accepted – SafeWork SA is bound by the Prosecution Policy and Guidelines published by the Director of Public Prosecutions, which provides that a criminal prosecution can only proceed if there is a reasonable prospect of securing a conviction based on an evaluation of how strong the case is likely to be when presented in court.</p> <p>In those circumstances it would be inappropriate for SafeWork SA to set any target less than a 100% success rate in its prosecutions.</p> <p>If SafeWork SA is unsuccessful in a prosecution then it is necessary for SafeWork SA to evaluate the reasons for that outcome based on the particular circumstances of the case.</p> <p>The review does not provide any evidentiary basis for concluding that the Crown Solicitors Office lacks the necessary skillset to conduct prosecutions under WHS Act. In the absence of an appropriate evidentiary basis the Government does not support the transfer of this function to the Director of Public Prosecutions.</p>

35.	The WHS Act should be amended to allow SafeWork SA to seek a Court extension of time in limited circumstances.	Response deferred pending further consultation.
36.	The SWOAC should be provided with a briefing by Counsel on the advice relied on by SafeWork SA in its decision not to bring a prosecution following the tragic death of Gayle Woodford.	<p>Not accepted – Advice provided by Senior Counsel regarding a potential prosecution is subject to legal professional privilege. It would be contrary to longstanding policy to publicly disclose legal advice of this kind.</p> <p>The disclosure of legal advice to the Committee concerning an individual investigation would also be inconsistent with the organisation's function as a stakeholder advisory forum which is not intended to supervise individual operational matters.</p>
37.	SafeWork SA should develop a new Compliance and Enforcement policy to supplement the National Compliance and Enforcement Policy (NCEP), based on the policies of the Queensland and Victorian regulators.	<p>Not accepted – A comprehensive review of the National Compliance and Enforcement Policy (NCEP) is currently being undertaken at a national level through SafeWork Australia. It is preferable that there be a harmonised approach to this issue and SafeWork SA is actively participating in the current national review process.</p>
CHAPTER 6 – CULTURE		
38.	SafeWork SA should engage an independent consultant to conduct a survey of its culture, and use the results to engage with staff to design the culture necessary to achieve their potential and the full contribution of its partners.	<p>Accepted in principle – The Government will support the new SafeWork SA Executive Director engaging an independent consultant to conduct a review of current staff culture.</p>

CHAPTER 7 – IMPLEMENTATION OF PREVIOUS REVIEW RECOMMENDATIONS

No recommendations.

CHAPTER 8 – LEGISLATIVE REFORM

39.	The Government should commence consultation with employer organisations to amend the WHS Act to extend the existing civil penalty provisions to cover the primary duty at s 19 and the offences in Part 2 Division 5 of the WHS Act, and that standing for bringing applications in civil penalty provisions be extended to workers, families of injured workers, and employee associations.	Response deferred pending further consultation.
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