

# Occupational Safety and Health Legislation: What Allied Health Professionals in Western Australia Need to Know

**Kevin G Brown**  
School of Business Law  
Curtin University of Technology

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## Abstract

The legislation dealing with occupational safety and health laws in Western Australia changed quite dramatically in the 1990s. This article provides an overview of the *Occupational Safety and Health Act 1984* (WA) and describes the main features of the current legislation that apply to allied health professionals and some of the pertinent legal cases and recorded 'significant incidents'.

## Introduction

Legislation dealing with safety in Western Australian workplaces can be traced back to the safety issues that caused concern in factories and shops, the timber industry as well as the concerns in the construction industry. Before the current legislation was introduced, the laws on safety were found in a number of pieces of legislation dealing with these specific types of workplaces.<sup>1</sup> These Acts were amended from time to time and remained in force until all workplaces (other than mining<sup>2</sup>) were covered by the *Occupational Safety and Health Act 1984* (WA) (the Act). Despite being passed by Parliament in 1984, the main provisions applicable to workplaces came into effect on 16 September 1988, after incorporating significant amendments made in 1987. Major amendments were made in 1995, most significant being an increase in some of the penalties for breaching the Act.

The Act was passed to provide uniform general duties upon persons at most workplaces in Western Australia. Thus for most people working in applied health, this Act applies to them. However there are some allied

health professionals who by virtue of their place of employment may be covered by other legislation, even though they may be working in Western Australia. This is either because of government policy or due to jurisdictional issues between state and federal governments. A brief discussion of these other statutes follows.

## Other health and safety legislation

Those allied health professions working in or at mine sites and quarries in the mining industry are covered by the *Mines Safety and Inspection Act 1994* (WA). This Act came into force on 9 December 1995.

Employees employed by the Commonwealth government and employees working for certain Commonwealth authorities are covered by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth).

Employees in the maritime industry are covered by the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) and employees working on exploration or exploitation of petroleum resources are covered by the occupational health and safety provisions of a complicated joint authority arrangement between the

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<sup>1</sup> *Factories and Shops Act 1963* (WA); *Construction Safety Act 1972* (WA); *Noise Abatement Act 1972*; *Machinery Safety Act 1984* (WA).

<sup>2</sup> *Mines Safety and Inspection Act 1994* (WA).

Commonwealth and Western Australia<sup>3</sup> dealing with 'Commonwealth Adjacent Areas', WA Coastal Waters, WA Onshore facilities and WA Pipelines.<sup>4</sup>

All these Acts have general duties in relation to occupational safety and health similar to those general duties found in the *Occupational Safety and Health Act 1984* (WA). There are also other legislative enactments that deal with specific safety matters.<sup>5</sup>

There are sometimes difficulties with determining which legislation applies and whether any legislation applies at all. Thus litigation can occur when determining the legislation applicable to such situations as 'contractors working on Commonwealth property'<sup>6</sup> and issues have also arisen on deciding whether an 'indoor play centre for children'<sup>7</sup> or 'the waters of the sea in a proclaimed area of a port'<sup>8</sup> were within the meaning of the term 'workplace' in the legislation.

### The main provisions of the Act

The *Occupational Safety and Health Act 1984* (WA) purports to place general duties upon people at workplaces, although it is also the source of regulations that require people with responsibility for work matters to comply with both specific and general requirements.<sup>9</sup>

The *Occupational Safety and Health Act 1984* (WA) (the Act) is modelled on legislation in the UK and this style of legislation is often referred to as 'Robens'

<sup>3</sup> See: *Petroleum (Submerged Lands) Act 1967* (Cth); *Petroleum (Submerged Lands) Act 1982* (WA) and *Petroleum Pipelines Act 1969* (WA) n.b. *Petroleum Safety Act 1999* (WA) (yet to be proclaimed).

<sup>4</sup> See: <http://www.dme.wa.gov.au/safety/petroleum/safetyleg.htm> for details of this arrangement.

<sup>5</sup> E.g. *Timber Industry Regulation Act 1926* (WA); *Electricity Act 1945* (WA); *Explosives and Dangerous Goods Act 1961* (WA); *Radiation Safety Act 1975* (WA); *Rail Safety Act 1998* (WA).

<sup>6</sup> See: *Commonwealth Places (Application of Laws) Act 1970* (Cth).

<sup>7</sup> *Moualem v Carlisle City Council* The Times, 8 July 1994 (District Court).

<sup>8</sup> *Elliot v Minister for Transport for the State of WA* [1999] WASCA 134.

<sup>9</sup> *Occupational Safety and Health Regulations 1996* (WA).

legislation. This is named after Lord Robens, the chairman of the committee that first suggested a general duty style of legislation to deal with health and safety in Great Britain.<sup>10</sup> A similar style of legislation is found in the other States and Territories of Australia.<sup>11</sup>

The Robens Committee report recommended that a general duty style of legislation should be introduced to cover workplace safety and health issues. One of the aims of the Robens approach is to remove previous safety legislation that concentrated upon specific detailed legal obligations that are inflexible and could become outdated, with more durable, yet flexible general duties. Legislation such as the previous *Factories and Shops Act 1963* (WA) was seen to be too prescriptive, as many of the safety requirements were previously found in numerous detailed specific regulations, rather than being couched in general duty obligations. The current Act imposes the 'general duties' suggested by Robens, but the regulations made under the Act retain some more specific duties.

The objectives of the Act are set out in section 5. They provide for: promoting and securing safety and health of people at work; protecting persons at work against hazards; assisting in securing safe and hygienic work environments; reducing, eliminating and controlling hazards. These objects also promote fostering cooperation between employees and employers; involving people in the formulation of standards and optimum practices; and allowing for people to contribute to the development and administration of the legislation.

### Administration

<sup>10</sup> *Report of the Committee on Safety and Health at Work 1970-72*.

<sup>11</sup> *Occupational Health and Safety Act 2000* (NSW); *Occupational Health and Safety Act 1985* (Vic); *Workplace Health and Safety Act 1995* (Qld); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Tas); *Work Health Act 1986* (NT); *Occupational Safety and Health Act 1989* (ACT).

Most legislation cannot be effective unless some type of administrative infrastructure is in place to implement the objectives in the Act. The Act does this by creating a WorkSafe WA Commission to advise the Minister for Consumer and Employment Protection on occupational safety and health matters (s 14). The Commission's activity is identified in its annual reports specifying the strategies that it has taken to deal with occupational safety and health policy issues. WorkSafe WA is a division of the Department of Consumer and Employment Protection in Western Australia. WorkSafe WA is given responsibility for the administration of the Act. Inspectors working for that department undertake the actual day to day implementation of the Act, and the monitoring of safety and health policy (ss 42-47).

### **The general duties**

The legislation places some important general duties upon certain categories of people, in relation to workplaces. Specifically the duties are imposed upon employers; employees; self-employed persons; people controlling workplaces; certain designers, manufacturers, importers; suppliers; erectors or installers of plant; and designers or constructors of buildings or structures (ss 19-23).

A characteristic of many of these general duties, is that they reflect identical standards of behaviour that have long been expected of employers and employees by the courts. The courts have identified these general duties when implementing common law obligations in civil actions based on negligence. The major distinction between cases brought under this Act, from cases based upon common law negligence, is that criminal penalties arise out of the breach of the duties under this Act. In contrast, at common law the emphasis has been placed upon the victim's rights to claim damages and attain appropriate compensation, if someone has breached their legal duty of care. In both the civil and criminal cases, the courts are required to examine 'duty of care' concepts and the standard or level of care expected of

the parties involved in workplace incidents. A significant practical difference is that insurance can be taken out to cover liability from civil claims but the only way to avoid prosecution under the criminal law is to take practical steps to comply with those duties.

### **Duties on employers**

The Act imposes a major duty on employers to provide and maintain a working environment in which employees are not exposed to hazards. The obligation only goes 'so far as is practicable' (s 19). The word 'practicable' is defined in the Act to mean reasonably practicable. Regard is made to such factors as: the severity of potential injury or harm; the state of knowledge of injury or harm; the state of knowledge of risk of injury or harm; the state of knowledge about means of removing or mitigating the risk or harm; and the availability, suitability and cost of removing or mitigating the risk or harm (s 3(1)). The issue of 'reasonably practicable' was given close attention by the Supreme Court of Western Australia in a case involving the prosecution of an employer under similar duties in the *Mines Safety and Inspection Act 1996* (WA), when structural damage to an iron ore reclaimer caused the death of the operator.<sup>12</sup>

There are some specific examples given in the legislation of this general duty obligation. They include a duty to provide: safe premises; safe plant; a safe system of work; information; instruction; training; supervision; consultation with safety and health representatives; personal protective clothing; protective equipment. The duty requires that employees are not exposed to hazards in relation to various dealings relating to plant and substances (s 19(1)).

Section 19 tends to be the section which is most often used by inspectors under the Act, because it is relatively direct and employers are usually in the best financial position and position of authority to make changes to

<sup>12</sup> *Hamersley Iron Pty Ltd v Robertson* [1998] WASCA 272.

improve safety and health in the workplace. A reported prosecution that illustrates the use of this section in something akin to an allied health situation is found in the NSW Industrial Relations Commission decision of *Tuckley v The Crown In Right of the State of New South Wales (Department of Community Services)*.<sup>13</sup> In that case the employer of a house manager of a group home for people suffering from developmental disabilities was injured after being assaulted by a resident of the home. The employer pleaded guilty of breaching the equivalent to section 19 in the NSW legislation. Other reported occupational safety and health prosecutions involving allied health professions seem to be rather rare.<sup>14</sup>

There are however reported occupational safety and health incidents, termed 'significant incidents',<sup>15</sup> in Western Australia (but not necessarily resulting in prosecution) involving allied health professionals being injured or being the cause of injuries. These include:

- a crushed ankle injury to a nurse from the use of a patient trolley,<sup>16</sup>
- dropping the side of a patient trolley, resulting in the amputation of a patient's finger,<sup>17</sup> and
- four carers being seriously injured during the year while lifting residents from the floor after they had collapsed<sup>18</sup>

In the Australian Capital Territory concerns with the safety and health risk of moving patients has resulted in a guidance document being produced to assist people on correct ways of moving them.<sup>19</sup> In Queensland concerns have been expressed over the temperature control of hot water systems in health care establishments after fatalities and severe hot water scalds had occurred.<sup>20</sup>

There are also reported civil actions based on negligence claims in Australia, New Zealand and the United Kingdom involving allied health workers. These cases are useful in this context as they also identify the type of practical safety and health issues that apply to allied health workers. As indicated above the general duty provisions in the Act are based on the common law standard of care found in the law of negligence and the civil cases are also a useful indicator of expected standards expected in the criminal jurisdiction found in the Act. These negligence cases have included:

- a nurses aide in the Australian Capital Territory who was injured while lifting a patient;<sup>21</sup>
- an assistant nurse in Queensland who sustained neck injuries that she claimed were related to her work;<sup>22</sup>
- an enrolled nurse in Tasmania sustained a back injury whilst adjusting an unco-operative geriatric patient in bed. She claimed an unsafe system of work when assisted by supervisor who in turn had failed to use lifting straps;<sup>23</sup>

<sup>13</sup> [1999] NSWIR Comm 402 (7 September 1999)

<sup>14</sup> Note the article discussing the frequency of litigation against dentists by Dr Brad Wright *Sue and be Sued. Does it Really Matter? Does Anyone Really Care?* 6.November 2002.  
<http://www.edental.com.au/mainarticle2.phtml?articleid=2979713cde>

<sup>15</sup> Also known as 'Alerts' in Queensland.

<sup>16</sup> 'Significant Incident Summary – Crush Injury from Patient Trolley' No 23/2000 WorkSafe WA  
<http://www.safetyline.wa.gov.au/pagebin/injrsign0189.htm>

<sup>17</sup> 'Significant Incident Summary – Patient Trolley Injures' No 05/2001 WorkSafe WA  
<http://www.safetyline.wa.gov.au/pagebin/pg001138.htm>

<sup>18</sup> 'Significant Incident Summary – Caring for the Aged' No 02/1997 WorkSafe WA.  
<http://www.safetyline.wa.gov.au/pagebin/pg001139.htm>

<sup>19</sup> 'Guidance on the Safe Moving of Clients' 15<sup>th</sup> December 2000, ACT Workcover

[http://www.workcover.act.gov.au/pdfs/safe\\_moving.pdf](http://www.workcover.act.gov.au/pdfs/safe_moving.pdf)

<sup>20</sup> *Temperature Control of Hot Water Systems in Health Care Establishments*, Health and Safety Alert, Division of Workplace Health and Safety, 96-I-47, May 1996

[http://www.workcover.act.gov.au/pdfs/safe\\_moving.pdf](http://www.workcover.act.gov.au/pdfs/safe_moving.pdf)

<sup>21</sup> *Bearman v. Australian Capital Territory Community and Health Service* [1990] ACTSC 3 (Supreme Court of the ACT) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/act/ACTSC/1990/3.html>

<sup>22</sup> [1999] QCA 383. <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/qld/QCA/1999/383.html>

<sup>23</sup> *Isabella v St Lukes (Anglican Church in Australia) Association* [1999] TASSC 39

- a trainee nurse aide in the Australian Capital Territory who sustained a back injury when lifting a patient from a wheelchair to a bed;<sup>24</sup>
- a chiropractor in New South Wales who manipulated the neck and back of a patient, resulting in the patient's back and neck to deteriorate markedly;<sup>25</sup>
- a radiographer in the Australian Capital Territory who failed to comply with the standard of care expected when it was claimed that there was partial dislocation of a facet joint in the lumbar region of a patient's back caused by a mammogram procedure involving Xeroradiography;<sup>26</sup>
- a radiographer in the United Kingdom who suffered from occupational asthma, also known as 'darkroom disease', successfully sued his hospital employer for exposing the radiographer to a known chemical hazard;<sup>27</sup>
- a radiographer in the United Kingdom who was negligent by failing to cover the patient with a lead-lined cloth during an exposure to Grenz rays, resulted in a hospital authority being vicariously liable;<sup>28</sup>
- a physiotherapist in New South Wales, where it was claimed that a patient performing exercises recommended by and under the supervision of the physiotherapist suffered an aggravation of a back injury;<sup>29</sup>
- a physiotherapist in Queensland where a patient complained that an injury was a result of the physiotherapist's negligence;<sup>30</sup>
- a physiotherapist in the United Kingdom treating a patient by subjecting the patient's heel to heat through a machine was held liable in negligence for the resulting amputation;<sup>31</sup>
- a dentist in New South Wales where a patient had brought proceedings to recover damages for injuries claimed to have received when being treated by the dentist for a grinding and clicking jaw and headaches after the dentist had fitted a device known as a Clark Twin or Bayer block to relieve pressure on the patient's temporomandibular joints;<sup>32</sup>
- a dentist in New Zealand where a patient complained of negligence with regard to dental treatment and subsequent care;<sup>33</sup>
- a pharmacist in the United Kingdom found negligent for misreading a prescription and then dispensing an incorrect drug;<sup>34</sup>
- a negligence action in the United Kingdom involving a pharmacist who prepared a lethal mixture of cocaine for an operation, after the pharmacist was given incorrect instructions by

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<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/tas/supreme%5fct/1999/39.html>

<sup>24</sup> *Re: Lane and: Capital Territory Health Commission* No. ACT G35 of 1984 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep1998.html>

<sup>25</sup> *McGroder v Maguire* [2002] NSWCA 261 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/NSWCA/2002/261.html>. Note a commentary on this case by Blake Dawson Waldron, Solicitors at:

<http://www.bdw.com.au/frameit.asp?page=/scripts/publications-index.asp>

<sup>26</sup> *Hinton v. Utley* [1991] ACTSC 66

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/act/ACTSC/1991/66.html>

<sup>27</sup> *Ogden v Airedale Health Authority* (1996) 7 Med LR 153. For a discussion of the case see: London Hazard Centre's website at:

<http://www.lhc.org.uk/members/pubs/books/chem/chgcbaba.htm>

Note: The Society of Radiographers in the UK has produced a 50 page booklet 'Occupational Asthma and Sensitivity to Chemicals' that deals with the background to occupational asthma and how to deal with these risks.

<sup>28</sup> *Gold v Essex County Council* [1942] 2 KB 293; [1942] 2 All ER 237.

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<sup>29</sup> *Juffermans v Central Sydney Area Health Authority* Matter SCNSW No 20089/96 (8 August 1997)

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/unrep577.html>

<sup>30</sup> *Burrows v State of Queensland* [2001] QSC 344

<http://www.courts.qld.gov.au/qjudgment/QSC%202001/sc01-344.pdf>

<sup>31</sup> *Clarke v Adams* (1950) 94 Sol Jo 599.

<sup>32</sup> *Giusti v Taylor* [1998] NSWSC 445

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/1998/445.html>

<sup>33</sup> *Harris v McIntosh* [1999] NZCA 215

<http://www.austlii.edu.au/cgi-bin/disp.pl/nz/cases/NZCA/1999/215.html>

<sup>34</sup> *Prendergast v Sam & Dee Ltd* (1989) 1 Med Law R 36; *The Times*, 14 March 1989.

a resident house surgeon for 'cocaine' instead of 'procaine';<sup>35</sup>

- The extent of cases involving the liability of podiatrists in negligence has been considered by Blanchard.<sup>36</sup>

Other legal cases involving allied health workers are identified in various information publications provided by solicitors specialising in the specific area of health or medical law.<sup>37</sup>

There is also a duty on the employer to ensure that the safety and health of a person not being his or her employee is not adversely affected as a result of the work in which his or her employees are engaged. The obligation also only goes 'so far as is reasonably practicable'. This duty has been applied by the courts to visitors and to contractors (s 21(1)(b)). If the employer is an individual person, then there is also a duty on that employer to take care towards himself or herself (s 21(1)(a)).

There are also specific obligations placed upon employers in relation to contractors and subcontractors, designed to impose legal obligations that are similar to those placed upon employees (s 19(4)).<sup>38</sup> These legal

duties cannot be simply abrogated by requiring contractors to sign deeds of indemnity.<sup>39</sup>

The general duties on employers that have been discussed in section 19 and 21 are the most significant in the whole of the Act, as most safety and health prosecutions in Western Australia are based on these requirements. Allied health professions must therefore ensure that they comply with these requirements in terms of the health and safety of their employees; their contractors (often referred to as 'sub-contractors'); their patients and even couriers and visitors to their work premises. Allied health professions who treat patients who are involved as witnesses in a prosecution by WorkSafe WA, may also be able to assist their patients by being well aware of these statutory provisions and empathising with their situation.

#### **Duties on employees**

The Act also imposes a duty on employees to take reasonable care to ensure their own safety and health at work (s 20(1)(a)). There is also a duty on an employee to take reasonable care to avoid adversely affecting the health or safety of any other person at work (s 20(1)(b)). It would seem that this last duty applies to visitors or people authorised to be at the workplace such as other employees or contractors.

The legislation provides some specific examples of these obligations. They include: failing to comply with instructions; failing to use protective clothing; failing to use protective equipment; misusing or damaging safety or health equipment; failing to report on the state of the workplace; failing to report<sup>40</sup> any hazard or injury or harm to health (ss 20(2)).

<sup>35</sup> *Collins v Hertfordshire County Council* [1947] KB 598; [1947] 1 All ER 633.

<sup>36</sup> Blanchard J. 'Complaints and Litigation Against Podiatrists: A Review' (1998) (noted in *Author Index of First (Unclassified) Degree Research Titles and Abstracts in Podiatry, 1995-2002* at: <http://www.curtin.edu.au/curtin/dept/physio/podiatry/abglos/content.html>)

<sup>37</sup> Eg Hunt and Hunt: 'Health' <http://www.hunthunt.com.au/hunthunt/asp/publications.asp>  
Phillips Fox: 'Health e-Bulletin' <http://www.phillipsfox.com/publications/RecentPublications.asp>

Blake Dawson Waldron 'Health Industry Update'

<http://www.bdw.com>

Minter Ellison 'Health Law Update'

<http://www.minterellison.com>

Tress Cocks & Maddox 'The Health Business'

<http://www.tcm.com.au/>

Gadens 'Health and Aged Care'

<http://www.gadens.com.au/public/publications/>

<sup>38</sup> For a detailed discussion of the legal duty towards contractors see: K. G. Brown 'Contracting Out by Western Australian Government Departments and the Implications

Applicable to Safety and Health Related Issues' (1995) 1 *Journal of Contemporary Issues in Business and Government* 41.

<sup>39</sup> See: 'Conditions of Entry to Minesites - Deeds of Indemnity (1998) *Minesafe* 13.

<sup>40</sup> See: 'Reporting Dangerous Situations and Occurrences' (1996) 7 *Minesafe* 4.

All allied health workers who fit the criterion of being employees should therefore be aware of this legal obligation, which is often referred to by workers in industry as the employee's 'duty of care'.

#### **Duties on designers, manufacturers, importers, suppliers and constructors of buildings or structures**

There are general duties on designers, manufacturers, importers and suppliers in relation to plant and substances.<sup>41</sup> One practical implementation of these duties is the requirement of suppliers to provide Material Safety Data Sheets (MSDSs). A general duty is also imposed on persons who design or construct buildings or structures for use at a workplace to ensure that the design and construction does not expose people to hazards (s 23(3a)).

#### **Duties on directors and managers**

Section 55 of the Act provides for situations where a director or manager of a company commits an offence. This occurs when it is proved that when a company commits an offence under the Act, the offence occurred with the director's or manager's consent or connivance or was attributable to any neglect on the part of that person.<sup>42</sup> In recent years there have been a number of cases where prosecutions have been based on this section.<sup>43</sup>

<sup>41</sup> See: Section 23 and 'Manufacturers, Designers, Importers, Suppliers: How the Act and Regulations Affect You' (1996) 7 *Minesafe* 12.

<sup>42</sup> Some discussion of the responsibility of mine owners and board members is found in an article by C. Stedman, 'Proclamation of the Mines Safety and Inspection Act' (1996) 7 *Minesafe* 3.

<sup>43</sup> See: *MacCarron v Future Engineering and Communication Pty Ltd* (1998) 81 IR 241; *Morrison v Kiwi Electrix Pty Ltd* (1998) 19 WAR 482; *Morrison v Winton* (SC(WA), Scott J, No SJA 1098 and 1099 of 1996, 960698, 12 December 1996, unreported, BC9606040); *Palynolab Resources Pty Ltd v Morrison* (SC(WA), Ipp J, No 960477, 22 August 1996, unreported, BC9604075); and the following cases at first instance: *Re Ames* September 1993, *The West Australian* 21 January 1994, p 8; *Re Barnacle*, *SafetyLine*, No 20 November 1993, p 14 *The West Australian*, 21 January 1994, p 8; *Re Bobrowicz*, Perth Court of Petty Sessions No 72078/97, 14 July 1999, (see Safetyline Prosecution Summaries 1999 at [www.safetyline.wa.gov.au](http://www.safetyline.wa.gov.au)); *Re Grljusich* AISH&W 53-120, *The West Australian* 21 January 1994, p 8; *Re Letari* Perth Court of Petty Sessions,

#### **Reporting requirements**

An important reporting requirement is found in s 19(3) of the Act. This requires an employer to report to WorkSafe WA if a workplace accident results in a death or a prescribed injury or disease. The list of prescribed injuries or diseases is found in regulations 2.4 and 2.5. In cases of injuries, regulation 2.4(1)(e) requiring the reporting of any injury that is likely to prevent the employee being able to work within 10 days, is often the most relevant. Allied health professions may be required to provide evidence that the medical criteria in those regulations have or have not been met although it is more likely to be a matter determined by medical practitioners.

#### **Criminal penalties**

An important aspect of the general duties in sections 19-23 is that they create criminal consequences in the form of a penalty. In sections 19 and 21-23 the penalties can be up to \$200,000 in the event that there is a death or serious harm to a person. The fine is up to \$100,000 in other situations. If an employee is charged under s 20, the fines are up to \$20,000 in the event that there is a death or serious harm to a person. The fine for an employee is up to \$10,000 in other situations. Other offences in the Act are subject to the general penalty in s 54.

Allied health professions treating patients who are involved in a prosecution under this Act should be aware of the meaning of 'serious harm'<sup>44</sup> in this statute, as they may be called to provide evidence at the trial about whether the patient meets that legal definition.

No 15287/97, 16 March 1998, (see Safetyline Prosecution Summaries 1998 at [www.safetyline.wa.gov.au](http://www.safetyline.wa.gov.au)); *Re Nai* Perth Court of Petty Sessions, No 55027/96 21 July 1997, (see Safetyline Prosecution Summaries 1997 at [www.safetyline.wa.gov.au](http://www.safetyline.wa.gov.au)); *Re Pedreschi*, Perth Court of Petty Sessions, No 29829/99 13 October 1999 (see Safetyline Prosecution Summaries 1999 at [www.safetyline.wa.gov.au](http://www.safetyline.wa.gov.au)).

<sup>44</sup> 'Serious harm' is defined in s 3(3).

### **Resolution of safety and health issues at the workplace**

The legislation provides that ‘issues’ at the workplace that relate to occupational safety and health, must be attempted to be resolved by ‘the relevant procedure’. This procedure is as agreed between the employers and employees, or in the event of no agreement, in accordance with a prescribed regulation.<sup>45</sup> It is an offence not to follow this procedure. In the event of no resolution by this procedure, then there is an obligation on a safety and health representative (if there is one) to refer it to the safety and health committee (again, if there is one). It is an offence not to refer such an issue (s 24).

### **Involvement by an inspector**

Either the employer or the safety and health representative or the employee involved can notify a WorkSafe WA inspector where there is a risk of imminent and serious injury (or harm to health) of any person. However there is a requirement that the dispute procedure in s 24 has been attempted. The inspector can then take those steps that he or she thinks are appropriate (s 25).

### **Refusal to work**

The Act gives a legal right to an employee to refuse to work if there is a risk of imminent and serious injury or harm to the health of him or her or any other person (s 26). In such cases the employer may give that employee reasonable alternative work (s 27) but the employee is entitled to same pay and benefits that he or she would have been entitled to had he or she continued with his or her usual work (s 28). The Act provides in s 26(1a) an explanation of whether the employee has reasonable grounds for holding the belief that there is a risk of imminent and serious injury or harm. Section 26(2a) makes it an offence for the employee to leave the workplace altogether without the employer’s permission.

<sup>45</sup> Regulation 2.6

### **Penalty for refusing to work**

Section 28A provides that it is an offence to pay or receive pay, when any person (other than a person who qualifies under s 26), refuses to work on the grounds that to do so would involve a risk of injury or harm to any person. The section is aimed at preventing employees being paid by employers when they go on strike over a safety and health issue. This is sometimes called an offence of making or receiving ‘strike pay’. The section does not appear to apply to payments made by unions to workers who go on strike.

### **Safety and health representatives**

The Act encourages employees to identify safety and health issues to an employer and allows them to elect a representative called a safety and health representative to act on their behalf. Employees can request the employer at a workplace to instigate the process for conducting elections for safety and health representatives (ss 29-31). Amendments made in 1995 took away the administration of the elections for safety and health representatives from unions. The functions of these safety and health representatives are to inspect the workplace, investigate accidents and to generally be involved in the interest of safety and health at the workplace (s 33). It has been made clear that these safety and health representatives are not appointments by management and must be elected in accordance with the process set out in the Act.<sup>46</sup>

In practice allied health professions are unlikely to encounter such representatives in those workplaces that only involve a small numbers of employees. However in larger enterprises, such as factories or hospitals, especially those with a union presence, the presence of such representatives is much more likely to occur. The employer of such representatives has various legal duties towards these people, including notifying them of accidents or dangerous occurrences (s 35).

<sup>46</sup> *Commissioner for Occupational Health, Safety and Welfare v Federated Miscellaneous Workers’ Union (WA)* (1992) 72 WAIG 932.

### Safety and health committees

An employer can decide to create these committees (s 37(3)) or an employee can request one (s 36(1)). These committees are a mechanism for employees and employer representatives to formally meet and consider safety and health issues that arise in that particular workplace (s 40).

### Inspectors and notices

The legislation allows for the appointment of WorkSafe WA inspectors. They are given wide powers to enter, search and question under the Act (s 43).

Inspectors are given wide powers to issue improvement and prohibition notices under the Act. The notices may require steps to be taken to improve the safety and health concern (s 48) or may require a person to cease working or using equipment until a hazard is removed (s 49).

### Prosecutions

The Act allows WorkSafe inspectors to investigate any workplace. The WorkSafe WA Commissioner can authorise any person to commence prosecutions (s 52). As the legislation gives rise to criminal sanctions, the courts have required that charges that are laid are clear and they have been prepared to query complaints that lack clarity about the number of offences<sup>47</sup> or do not contain enough specific details.<sup>48</sup>

### Codes of practice

The Act allows for Codes of Practice to be made. The purpose of these codes of practice is to identify practices that are considered appropriate and in some cases inappropriate. The legal significance of these codes of practice are that they may be used in evidence to assist in establishing what is 'reasonably practicable'

<sup>47</sup> E.g. *Interstruct Pty Ltd v Wakelam* (1990) 2 WAR 100; *Meiklejohn v Central Norseman Gold Corp Ltd* (1998) 19 WAR 298.

<sup>48</sup> E.g. *Interstruct Pty Ltd v Wakelam* (1990) 2 WAR 100; *Bunnings Forest Products Pty Ltd v Shepard* [1998] ACL Rep 230 WA 4 (BC9801616).

for the purposes of assessing the general duty offences in the legislation (s 57). In the writer's opinion allied health professionals are likely to be primarily concerned with health issues and to this extent the Code of Practice on the Management of HIV/AIDS and Hepatitis at Workplaces<sup>49</sup> is an example of a code of practice that may be of interest to them. Other Codes of Practice dealing with substances such as styrene,<sup>50</sup> vinyl chloride<sup>51</sup> ethylene oxide,<sup>52</sup> carcinogenic substances<sup>53</sup> and generally hazardous substances<sup>54</sup> can usually be found on the Safetyline website.<sup>55</sup>

WorkSafe WA also produces 'guidance notes'. These guidance notes are made using the power in section 14(1)(e) in the Act, but they have little legal significance. They do however provide useful practical guidance on certain topics which may have relevance to allied health professionals such as 'Environmental Tobacco Smoke', 'Safe Use of Mobile Phones', 'Reduce the Risk of Fatigue at Workplaces' and 'Dealing with Workplace Bullying'.<sup>56</sup>

### Regulations

There are many detailed regulations made under the Act and they are found in the *Occupational Safety and Health Regulations 1996* (WA). They canvass detailed issues and in many cases are quite prescriptive in nature. Breaches of the regulations are subject to various fines not exceeding \$25,000 and not exceeding \$5,000 in the case of employees.

<sup>49</sup> 11<sup>th</sup> September 2000 (see WA Gaz, 15 December 2000, pp 7239–40).

<sup>50</sup> Code of Practice for Styrene, 23 December 1996.

<sup>51</sup> National Code of Practice for the Safe Use of Vinyl Chloride, 7 June 1991.

<sup>52</sup> Code of Practice for the Safe Use of Ethylene Oxide in the Sterilisation/Fumigation Process, 18 February 1994.

<sup>53</sup> National Code of Practice for the Control of Scheduled Carcinogenic Substances [NOHSC:2014 (1995)].

<sup>54</sup> National Code of Practice for the Control of Workplace Hazardous Substances [NOHSC:2007 (1994)].

<sup>55</sup> See 'Codes of Practice' on <http://www.safetyline.wa.gov.au/>

<sup>56</sup> See 'Guidance Notes' on the Safetyline website at <http://www.safetyline.wa.gov.au>

Some of these regulations relate to health issues. They include regulations on the use of certain hazardous substances.<sup>57</sup> These hazardous substances refer to a national list of substances.<sup>58</sup>

### Review

The *Occupational Safety and Health Act 1984* (WA) has been subject to three formal reviews.<sup>59</sup> The latest review completed in 2002 by Laing identifies 107 recommendations. The most significant proposals are changes to the maximum penalties in the Act and to the introduction of a penalty of imprisonment as well as changes to various matters relating to safety and health representatives, including their ability to issue 'safety alerts'. Changes are also proposed for inspectors to issue 'on the spot' fines for breaching improvement notices and that mining operations should come under the Act. There is also a recommendation that a specialist Occupational Safety and Health Tribunal should be established to deal with non-judicial matters. If these recommendations are accepted by the government, and passed by Parliament as legislation, this will result in significant changes to the legislation. At the time of writing the government is considering the recommendations.

### Overview

The legislation purports to provide a balance between encouraging employers and employees at workplaces to identify and correct issues relating to safety and health, with an opportunity for government to sanction those who significantly breach their duty of care obligations.

Improving safety and health practices in the allied health professions will remain a difficult balance between prosecution and assisting the participants to understand and implement their legal obligations. For allied health practitioners seeking further information about the Act, a detailed publication on the legal aspects of the Act<sup>60</sup> and excellent information provided by WorkSafe WA on its website are two important sources of further information.<sup>61</sup>

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<sup>57</sup> A number of regulation relate to hazardous substances. They include: Regulation 5.12 which requires labelling; Regulation 5.13 which requires a register; Regulation 5.14 which controls their use; Regulation 5.15 which requires an assessment; and Regulation 5.21 which requires induction and training to be provided.

<sup>58</sup> List of Designated Hazardous Substances [NOHSC: 10005 (1999)].

<sup>59</sup> R Laing, *Report of the Inquiry into the Operations of the Occupational Health, Safety and Welfare Act 1984*, March 1992; J Allanson, *Review of the Occupational Safety and Health Act 1984*, 9 November 1998; and Robert Laing, *Review of the Occupational Safety and Health Act 1984: Final Report*, 14th November 2002.

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<sup>60</sup> See K. G. Brown, *Occupational Safety and Health: Western Australia* (1998) Butterworths, Sydney, (continuous updating service).

<sup>61</sup> <http://www.safetyline.wa.gov.au>