THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC/ELC/PDL:JBsb241025

24 October 2025

The Hon. Abigail Boyd, MLC
Chair, Public Accountability and Works Committee
Legislative Council
Parliament House
SYDNEY NSW 2000

By e-mail: PAWC@parliament.nsw.gov.au

Dear Chair,

INQUIRY INTO THE WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2025 AND THE PROVISIONS OF THE WORKERS COMPENSATION LEGISLATION AMENDMENT (REFORM AND MODERNISATION) BILL 2025

Thank you for inviting the Law Society to make a further submission to the Public Accountability and Works Committee's (**PAWC Committee**) inquiry into the Workers Compensation Legislation Amendment Bill 2025 (NSW) and the provisions of the Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025 (NSW) (**Bill**). The Law Society's Injury Compensation, Employment Law, and Privacy and Data Law Committees contributed to this submission.

Our comments are directed to the proposed changes to the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) contained in the Bill. Schedule 4 of the Bill introduces a new duty at s 21 of the WHS Act on 'persons conducting a business or undertaking' (**PCBUs**) to ensure that 'digital work systems' do not create health and safety risks to workers. It also requires PCBUs to provide WHS entry permit holders with reasonable assistance to access and inspect a digital work system relevant to a suspected contravention of the WHS Act.[1]

For these reasons, set out in more detail below, the Law Society does not support these changes.

We acknowledge that as digital systems are increasingly embedded into Australian workplaces, their use may give rise to physical and psychosocial risks, and raise novel legal and regulatory challenges within workplaces. At present, however, we do not consider the proposed changes, which would apply to NSW only, to be an appropriately calibrated response without further discussion and consideration across jurisdictions in the context of the model WHS laws.

In our view, they are unnecessary in light of the general duty on PCBUs to ensure the health and safety of their workers and may serve to undermine efforts to harmonise WHS laws which apply across all Australian

[1] *Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025* (NSW), Schedule 4, proposed s 118 of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

state and territory jurisdictions (excluding Victoria). Further, the increased rights conferred on WHS entry permit holders may be impractical to implement.

1. Existing general WHS duties on PCBUs

We consider the new duty in relation to 'digital work systems' is unnecessary, given that PCBUs already have a primary duty under the model WHS laws to ensure, so far as is reasonably practicable, the health and safety of the workplace. In NSW, we suggest that the general duty contained in s 19 of the WHS Act is drafted with sufficient breadth to capture WHS risks arising from new technological advances and systems. The duty at s 19 is also complemented by the requirement for the PCBU to take proactive steps to manage psychosocial risks in the workplace. Further, there are other protective provisions in the *Fair Work Act 2009* (Cth), including the 'additional hours' provisions at s 62 and the 'right to disconnect' provisions at s 333M.[2]

There are strong practical arguments against introducing discrete, prescriptive duty provisions into the WHS Act. The model law was intentionally drafted by reference to the three-tiered Robens model, whereby general duties contained in the overriding WHS statute are supplemented by more detailed standards contained in regulations and codes of practice.[3] The Robens model is widely accepted as allowing for an appropriately flexible approach for the distinct WHS risks arising across different industries and locations,[4]including with respect to evolving digital systems over time.

In our view, maintaining the general duty under s 19 is more appropriate, as it requires PCBUs to consider all aspects of their workplace environment, including the use of digital systems. The introduction of a secondary duty in relation to 'digital work systems' has the potential to dilute the principles-based approach of the model WHS framework and quickly become outdated as digital systems evolve.

2. Harmonisation of WHS law across Australian jurisdictions

The rationale for harmonisation of WHS laws across Australian jurisdictions is set out in the Discussion Paper of SafeWork Australia's current review of the model WHS Act and model WHS Regulations (**Safework Review**):

> At its simplest, the object of the model WHS Act and of this review is to ensure the model WHS laws continue to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.
>
> The last review of the model WHS laws occurred in 2018 and found that harmonisation had largely been achieved and continued to be strongly supported. However, the review also concluded that 'if the harmonisation objective is to be sustained into the future, it is critical that all jurisdictions commit to it.' Since then, Western Australia has enacted the model WHS laws, and only Victoria remains outside the national system. However, jurisdictions have also increasingly made variations within their own versions of the model laws, which poses a real challenge to the maintenance of harmonisation in the longer term.

[2] Note the NSW adopted the model psychosocial regulations in October 2022 when they were incorporated in the Work Health and Safety Regulation 2017.
[3] SafeWork Australia, Review of the model Work Health and Safety laws, December 2018, 22: https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf.
[4] Ibid., 4.

> This matters, because inconsistent WHS laws across Australia risks recreating the confusion and competing requirements for businesses the harmonisation vision was intended to remove, with the side effect of weakening national productivity. It also risks Australian workers having different rights to safe workplaces depending on where they are working, again undermining a key objective of harmonisation.5

The Law Society supports the harmonisation of Australia's WHS system. We are concerned that if the changes proposed in the Bill are enacted, this will put NSW out of step with other jurisdictions who have implemented the Model WHS laws and undermine the overriding goal of national consistency and certainty for workers, duty holders and regulators.

3. Scope of the proposed duty for digital work systems

Proposed s 21 of the WHS Act is set out as follows:

> (1) A person conducting a business or undertaking that uses a digital work system must ensure, so far as is reasonably practicable, that the allocation of work by or using the digital work system is without risks to the health and safety of any person.
>
> (2) Without limiting subsection (1), a person conducting a business or undertaking must consider whether the allocation of work by or using a digital work system creates or results in any of the following risks—
>
> (a) excessive or unreasonable workloads for workers at work in the business or undertaking,
>
> (b) the use of excessive or unreasonable metrics to assess and track the performance of workers at work in the business or undertaking,
>
> (c) excessive or unreasonable monitoring or surveillance of workers at work in the business or undertaking,
>
> (d) discriminatory practices or decision-making in the conduct of the business or undertaking.
>
> (3) In this section— **digital work system** means an algorithm, artificial intelligence, automation, online platform or software.

The definition of 'digital work system' is broad and could conceivably encompass a wide range of digital systems employed in a workplace setting (e.g., rostering software, task allocation systems, performance tracking dashboards, scheduling apps). However, there is a risk that in the rapidly evolving digital environment that it could become outdated. We suggest that the general duty under s 19 of the WHS Act will prove more robust in the face of future technological developments, as it requires PCBUs to turn their mind to WHS risk within their individual operating environments, which would extend to any technological systems as they are implemented and evolve.

In our view, the language at s 21(2) has the potential to give rise to multiple disputes given that what constitutes 'excessive or unreasonable' workloads, metrics, monitoring or surveillance would tend to differ depending on the relevant industry and individual workplace. This may lead to confusion among duty holders, particularly in the short to medium term, before the case law is settled. The reference to 'discriminatory practices' is similarly ill-defined. In the context of the gig economy, it could refer to the way in which algorithms assign tasks and calculate pay for certain workers. However, it could also potentially encompass conduct captured by anti-discrimination laws.

---

[5] SafeWork Australia, *Best Practice Review of the model Work Health and Safety laws*, Consultation Paper, September 2025: https://www.safeworkaustralia.gov.au/media-centre/best-practice-review-have-your-say-australias-whs-laws.

Section 21(2) appears to contemplate that a nexus be established between the risk (e.g., workplace surveillance) and its use for the 'allocation of work'. This may give rise to confusion, for example, in a case where excessive surveillance of workers gives rise to a WHS risk, despite not being used in the allocation of work. Further, as technology is embedded to accomplish a range of tasks, it may be difficult to separate digital work systems from other workplace operations. For these reasons, we suggest that the general duty at s 19 of the WHS Act more appropriately captures the range of risks arising in different workplaces.

4. Practical consequences of expanding the rights of WHS entry permit holders

Proposed s 118, which would require PCBUs to assist entry permit holders to access and inspect digital work systems in the event of a breach of the WHS Act, may give rise to practical difficulties. In the Second Reading Speech for the Bill, the Minister for Industrial Relation and Work Health and Safety cited the following examples of matters which could be inspected by the permit holder under s 118, including 'code or algorithms used in the digital system, performance metrics, records, data logs or audit trails produced by a digital system'.[6]

There may be circumstances where it is not possible for the PCBU to facilitate access to its 'digital work system', for example if the relevant code or algorithm forms part of third-party software over which the PCBU does not hold proprietary rights, or where confidentiality agreements restrict disclosure.

In our view, it may be preferable for consideration to be given as part of the Safework review as to whether the harmonised WHS system should contain a greater role for risk assessments and system documentation in relation to digital systems to ensure their impacts can be more readily understood and monitored for any WHS risks which arise as a result of their use. Alternatively, it may be appropriate to develop a code of practice to guide the PCBU's compliance with the general duty under s 19 of the WHS Act in relation to emerging digital risks.

Thank you for the opportunity to contribute. Should you have any further queries in relation to this submission, please contact Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

[6] NSW, Parliamentary Debates, Legislative Assembly, Workers Compensation Legislation Amendment (Reform and Modernisation) Bill 2025 (NSW), Second Reading Speech.