



Australian Government

Comcare

Consultation Regulation Impact Statement

Recommendations of the 2018
Review of the Model Work Health
and Safety Laws

Comcare submission

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Introduction

Comcare is a statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Comcare has a number of powers and functions conferred under the *Work Health and Safety Act 2011* (WHS Act) and SRC Act. Comcare is also responsible for managing the Commonwealth's asbestos-related claims liabilities under the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*.

Comcare supports participation and productivity nationally through healthy and safe workplaces that minimise the impact of harm.

Under the WHS Act, Comcare is the regulator for employers in the Commonwealth WHS scheme, who are primarily comprised of:

- Commonwealth departments and agencies
- national companies licensed under the SRC Act
- members of the Australian Defence Force when not at war, including reservists and cadets.

Comcare makes this submission in response to the Consultation Regulatory Impact Statement (Consultation RIS) relating to the recommendations set out in the *Review of the model Work Health and Safety laws: Final report December 2018* (Review Report) coming out of the 2018 Review of the Model Work Health and Safety Laws (2018 Review).

This submission addresses only the recommendations that are of particular relevance or interest to Comcare.

Psychosocial risks

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

Review Report

The Review Report notes that psychological health is a significant issue and one of the most frequently raised by stakeholders during the 2018 Review. The 2018 Review indicated that there were widespread views that the model WHS laws inadequately protect psychological health and safety in the workplace and that business owners were uncertain about how to address psychological health in the workplace.

The Review Report recommends amending the model WHS Regulations to deal with how to identify the psychological risks associated with psychological injury and the appropriate measures to manage those risks.

Comcare comments

Comcare notes that significant work has been undertaken by Safe Work Australia in relation to psychological health in the workplace which highlights the importance of this issue. Comcare acknowledges the comment in the Consultation RIS that the Review Report was finalised before the implementation of the *Work-related psychological health and safety: A systematic approach to meeting your duties* and that this guide could at least partly address the problem of practical guidance for stakeholders. However, Comcare agrees with Safe Work Australia that further work needs to be undertaken to improve psychological injury prevention.

Psychological health is an extremely complex matter that requires careful consideration ‘to get right’. Psychosocial hazards include but are not limited to stress, violence, workplace bullying and other workplace stressors. Risks to psychological health at work may arise from organisational or personal factors, with common work factors including poor design of work and jobs, poor communication and interpersonal relationships, bullying, occupational violence and fatigue. This complexity makes prescribing regulations difficult.

Comcare notes that any regulatory change in relation to managing psychosocial risk factors is challenging and could have significant impacts on regulators. Even seemingly minor changes such as amending the definition of serious injury and illness to include psychological injury could have significant impacts.

In 2018-19, there were 58 WHS concerns regarding psychological injury reported to Comcare, with a small proportion attributed to allegations of workplace bullying. There were also six notifiable deaths that were assessed as relating to psychological health. In the same period, accepted claims for workers’ compensation due to injuries classified with the major mechanism group *mental stress* represented five (5) per cent of accepted claims in the Commonwealth jurisdiction (132 accepted claims of 2810). This is slightly lower than the national proportion of *mental stress* claims reported

by SafeWork Australia¹. Accepted *mental stress* claims were the fifth most common mechanism of incident in the Commonwealth jurisdiction.

Extending the definition of serious injury or illness to include psychological injury, would see an increase in notifiable incidents to Comcare. This could result in resourcing challenges for Comcare.

Comcare also recognises the challenges in regulating and enforcing incidents involving psychological injury. As psychosocial risk factors and psychological injury can be often complex, it may be necessary to recruit or train specialist inspectors with appropriate qualifications to undertake monitoring and compliance activities to address psychological injury and illness. For Comcare, this could have funding implications.

Specific questions

How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

The identification of psychological injuries from a regulator's perspective presents a range of challenges.

One of the most significant challenges is the reporting (or under-reporting) of incidents in the workplace and to the regulator. This is due to the fact that psychological injuries rarely meet the threshold of a notifiable incident reportable to Comcare. Incident notification and claims data does not provide a complete representation of the extent of psychological illness and injury within jurisdictions.

While acknowledging that under the model WHS Act a PCBU has a general duty to ensure so far as is reasonably practicable the physical and psychological health of workers and others in the workplace, the absence of an express reference to psychological health in the model WHS laws (other than 'health means physical and psychological health'), is not sufficient to alert the PCBU to take positive steps to eliminate or minimise so far as is reasonably practicable, psychosocial risks and hazards. This could result in psychological injury being overlooked.

The ability to collect data and intelligence on psychological incidents would increase Comcare's understanding of the risk factors and the extent of the psychosocial risk profile. It would also aid Comcare in targeting compliance activities, such as the identification of treatments required to improve the management of psychosocial hazards and risks and enable the design of prevention strategies to assist jurisdictions to manage these risks. It would also assist Comcare to work directly with organisations where psychosocial hazards are evident and where appropriate, take effective enforcement action.

¹ SafeWork Australia. [Australian Workers' Compensation Statistics 2016-17](#). Published 21 December 2018.

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Comcare agrees that Option 1 will not address the problems identified in the Review Report.

However, Comcare does not agree that the Option 2 will solve the problems identified by the 2018 Review, especially in relation to small business who already feel confused and uncertain about how to manage the risks of psychosocial hazards in the workplace.

Comcare also does not agree that the impacts will be minimal. Option 2 of the Consultation RIS recommends amending the model WHS Regulations to introduce express requirements for the identification and control of psychosocial risks that a PCBU must meet in order to satisfy the existing health and safety duties. While there is no clear approach to how this will operate, the Consultation RIS notes the suggestion to mirror regulation 36 of the model WHS Regulations or move regulation 36 into the model WHS Act (as per recommendation 27).

Comcare does not believe that this recommendation would solve the problems identified, as submissions to the review of the model laws indicated that PCBUs want specific information with practical examples on how to comply with the duties under the model WHS laws; the hierarchy of controls does not (and cannot) set out in detail the steps a PCBU must take to minimise risks or the control measures that are most suitable in a particular circumstance.

While Comcare does not agree that either Option will solve all the problems identified in the Review Report and Consultation RIS, Comcare does agree that amendments are required in relation to definitions and incident notification. See response to final question on prescriptive psychosocial regulations (page 5) and also the response to incident notification (page 11).

Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Comcare notes that the *Work-related psychological health and safety: A systematic approach to meeting your duties* guidance provides general information about WHS and the hierarchy of controls. This guide would benefit from some additional supporting guidance or fact sheets that cover specific topics such as what is a psychological injury, the identification of psychosocial hazards and risks, and risk control treatments for psychosocial risks.

Consideration could also be given to updating or integrating the 2014 guidance *Preventing Psychological Injuries under the Work Health and Safety Laws* published by SWA into the *Work-related psychological health and safety: A systematic approach to meeting your duties* guidance.

Comcare acknowledges that the earlier the intervention after an employee suffers an injury, the better the recovery and return to work outcomes are likely to be. That is why Comcare places a strong emphasis on early intervention. Comcare's early intervention strategy delivers guidance for employers on the business case for early intervention, methods for measuring effectiveness and online training for supervisors and managers.

Comcare sees benefit in the development of an early intervention guide especially for small to medium businesses to assist them in identifying and responding to any signs of psychosocial hazards and risks in the workplace.

Consideration could also be given to a National Communications Strategy including social media campaigns and marketing where such forms currently do not exist. This could include the development of case studies and practical examples to assist PCBU's understand psychosocial hazards and risks and psychological injury.

Is the state of knowledge on psychosocial hazards, risks and control measures widely accepted and well established? Please support your answer with evidence.

No comment.

Do you have suggestions for what prescriptive psychosocial regulations might look like?

Comcare believes that the development of regulations to manage psychosocial hazards and risks may raise the profile of psychosocial risks, which could lead PCBU's to undertake proactive measures to address those risks and therefore improve safety outcomes.

Amendments could be drafted to include definitions of psychological health/illness/injury and psychosocial risks and hazards. However, this is not without its own issues and complexities. In drafting the definitions, it will be important the definitions do not capture non-WHS duties and obligations that are covered in industrial relations and other legislation. This includes matters such as performance management/reasonable management action, resilience, and pre-existing mental health conditions etc.

Comcare maintains that incident notification provisions should be amended to include an incident notification trigger for psychological injuries. Comcare raised this issue in its submission to the review of the model WHS laws and noted that there was a gap in the incident notification provisions relating to incidents arising from psychosocial risk. These provisions could benefit from an appropriate incident notification trigger to capture these types of incidents. Comcare indicated that the provisions could be based on an incapacity period as in the former Commonwealth *Occupational Health and Safety Act 1991* provisions. Comcare raises this issue again in this submission in relation to Appendix A - Recommendation 20 of the Consultation RIS (see page 11).

Comcare also notes the former Department of Jobs and Small Business views in its submission to the model WHS laws review that "consideration could be given to whether the existing definition of a serious illness or injury in section 36 of the model WHS Act is sufficient for the purposes of ensuring serious psychological illnesses and injuries are reported to regulators."²

² Department of Jobs and Small Business, *2018 Review of the Model Work Health and Safety Laws Submission*, May 2018, page 24

HSR training

Recommendation 10: HSR choice of training provider

Amend the model WHS Act to make it clear that for the purposes of section 72:

- the HSR is entitled to choose the course of training, and
- if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.

Review Report

The Review Report notes some union submissions called for the model WHS laws to be amended to allow HSRs to choose their preferred training provider, as long as the course is approved by the regulator, and reasonable notice is provided.

Disputes on the choice of HSR training can cause unnecessary delays and defer a HSR's ability to fulfil their role and exercise their powers under the model WHS Act. The Reviewer noted that the choice of provider remains a necessary feature in encouraging the independence of HSRs.

The Reviewer recommended that an HSR should be able to choose their preferred training course, if that course has been approved by the regulator and is one that the HSR is entitled to attend. It was recommended that the model WHS Act be amended to remove the requirement for the HSR to consult the PCBU about their choice of training course.

The Review Report states that issues about timing and costs are critical and directly impact the PCBU, given the PCBU's obligations to cover course fees, pay reasonable costs and provide an HSR time off work to attend the course. It also makes reference to the appropriateness for the PCBU and an HSR reach agreement on the issues of cost and timing of a training course, and that either party can request an inspector be appointed to assist when agreement cannot be reached on matters of cost and timing as set out in s 72(2) of the model WHS Act.

Comcare comments

Comcare has considered both Option 1 - Status quo, and Option 2 - Allowing the HSR their choice of training provider.

Noting the Reviewer's comments that allowing the HSR to choose their own course may provide an HSR with independence, it does not alleviate disagreements regarding reasonable costs and time off to attend the training course, as the HSR and PCBU will still be required to consult on these two matters.

Comcare supports Option 1 as it does not see any benefit in allowing the HSR to choose the course of training without consultation with the PCBU.

Specific questions

How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings? What do you consider to be the cause and extent of disagreement over HSR training?

Comcare has not been largely affected by HSR training provider disputes with only seven matters raised since January 2012.

The main matters of disagreement include appropriate time off, delays in organising the course of training, and reasonable costs associated with attendance.

Not all matters required an inspector to intervene under s 72(5).

Option 2 would not alleviate the matters raised in the Commonwealth jurisdiction however, providing additional information in the *Worker Representation and Participation Guide* in relation to 'reasonable costs' may be of assistance.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Comcare supports Option 1 - Status quo as the preferred option.

Comcare does not agree that there is any benefit to allowing the HSR to make the choice of training provider without consultation with the PCBU.

Comcare recommends that additional information be included in the *Worker Representation and Participation Guide* to assist the PCBU and HSR reach agreement about reasonable costs associated with the training.

Additional Questions

What evidence do you have about the number of workplaces that experience disagreements between PCBUs and HSRs about HSR training?

Comcare has been contacted on seven occasions since January 2012 in relation to disputes between PCBUs and HSRs about HSR training. Not all of these disputes required an inspector to intervene under s 72(5).

The main matters of disagreement included appropriate time off, delays in organising the course training, and reasonable costs associated with attendance.

What factors should an inspector be able to consider when assisting with a dispute about HRS training? How do you think the recommendation impacts on this?

Comcare inspectors already consider the following factors when assisting with a dispute:

- whether the course of training is approved by the regulator
- the suitability of the course considering the HSR's industry
- availability of suitable courses

- location of approved courses
- what could be seen as unreasonable costs to the employer associated with HSR training

Comcare cannot suggest any additional factors that would assist inspectors in resolving a dispute.

Incident notification

Recommendation 20: Review incident notification provisions

Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.

Review Report

As set out in the Review Report, stakeholders find the existing incident notification provisions confusing and ambiguous. This means that there is over-reporting by some PCBU's (out of an abundance of caution) and under-reporting by some PCBU's (based on interpretations of the technicalities of what must be notified).

There is also concern amongst stakeholders that the existing incident notification provisions do not capture the right types of incidents. Stakeholders gave examples of the absence of notification triggers for psychological injuries, occupational violence, bullying and fatigue.

The Review Report concludes that the existing incident notification provisions are not operating as intended and that improved guidance material is not enough to solve the problems. It recommends that the provisions be redrafted, following further assessment and review.

Comcare comments

The incident notification provisions are one of the few parts of the model WHS laws that the Review Report concluded are not operating as intended.

In Comcare's view, the incident notification provisions should ensure that WHS matters of a serious nature are promptly brought to the regulator's attention. This allows the regulator to act quickly on matters that the regulator considers warrant an immediate regulatory response.

For the provisions to function effectively:

- they need to be easy for duty holders to quickly understand and apply, to avoid delay or disturbance of the incident site
- they need to identify the right categories of matters that warrant prompt notification and may require an immediate regulatory response.

Comcare undertook extensive internal consultation in 2017 and 2018 to gain an overview of the experiences of Comcare staff in dealing with the incident notification provisions. Those experiences included their interactions with duty holders about the incident notification provisions, for instance in taking telephone notifications, responding to specific queries or engaging with duty holders through educational activities.

Comcare's observation is that the current incident notification provisions present undue difficulties and complexities. These include:

- The objective test of the need for treatment under section 36 is not well understood. It is difficult to grasp quickly. There is a tendency amongst duty holders to focus on the treatment actually administered, which can lead to delay.
- Section 36(a) relates to immediate treatment as an in-patient in a hospital. This requires knowledge of how emergency department treatment and hospital admission processes work. Many duty holders do not have such knowledge.
- Section 36(b) concerns treatment for specific medical conditions, which in many instances are described as 'serious'. Duty holders without medical knowledge or experience may have trouble distinguishing between conditions that are 'serious' and those that are not 'serious'.
- The introductory words of section 37 contain multiple concepts, and the relationship between them can be difficult to perceive. There must be an 'incident'; the incident must be 'in relation to a workplace'; the incident must 'expose' a worker (or any other person) to a 'risk to the person's health or safety'; the risk must be a 'serious' risk; the risk must 'emanate' from 'exposure' to one of the listed hazards; and the exposure must be 'immediate or imminent'.
- The notification duty in section 38 is imposed in relation to a notifiable incident 'arising out of' the conduct of a PCBU's business or undertaking. The degree of connection between the incident and the business or undertaking is hard to articulate.
- The duty holders for the notification duty in section 38 and the site preservation duty in section 39 may or may not be the same. If they are not the same, there is the potential for added complexity, because there is an extra party whose activities must be coordinated, and the provisions do not expressly set out how this is to occur.

Comcare submits that legislative amendments to improve the incident notification provisions could have considerable impact on duty holders because of factors such as the following:

- Incident notification typically comes into play when something has unexpectedly gone seriously wrong at a workplace. In these circumstances, the reality is that duty holders almost certainly have a myriad of practical issues to deal with as a result of the incident. Legislated amendments could reduce the burden on duty holders at a critical juncture when every second counts. As such, even seemingly minor changes could improve duty holders' ability to achieve the purpose of the incident notification provisions.
- Conscientious duty holders need to invest in developing processes and systems to deal with notification to the regulator when incidents do occur. Legislated amendments could simplify these internal systems and processes, thereby reducing the required investment.
- There are quite a few categories of notifiable incident that are almost never used in notifications (at least in notifications to Comcare). Legislative amendment could streamline the range of categories, reducing the number of provisions that duty holders need to be across.

As such, the impact of legislated amendments to improve the incident notification provisions is potentially wide spread.

In addition, Comcare submits that it is important that amendment of the incident notification provisions in accordance with Recommendation 20 of the Review Report be given priority because:

- The incident notification provisions may be amongst the provisions most frequently referred to in the entire Act.
- Incident notification is the first interaction with the regulator for many duty holders, or one of a limited number of interactions.

- There has been an express public finding that the incident notification provisions are not operating as intended.

It is important in building and maintaining confidence in the regulatory framework that the incident notification provisions are as clear and effective as possible.

In Comcare's view, the key points to be addressed through legislative amendment are:

- to simplify or consolidate the categories of 'notifiable incident'
- to clarify the meaning of 'arising out of', or replace the expression
- to ensure full practical linkage between the notification duty and the site preservation duty, given that the duty holders may be different and that the section 39 duty is triggered by any notifiable incident at the workplace regardless of the 'arising out of' criterion in section 38.

In addition, consideration should be given to introducing one or more new categories of notifiable incident to reflect the changing nature of work, e.g. slower-onset conditions and incidents arising from psychosocial factors. This has clear links to Recommendation 2 (regulations dealing with psychological health) and Recommendation 3 (new industries, hazards and working arrangements) of the Review Report.

Comcare acknowledges that there are some problematic aspects of the existing incident notification provisions that can be ameliorated through changes to guidance material. Comcare submits that making such changes should be a priority, pending legislative amendment.