



Consultation paper

WHS incident notification

Safe Work Australia
29 September 2023





Contents page

Introduction.....	2
General Comments	2
Assumptions in the Consultation Paper	2
A Comprehensive Regulatory Impact Assessment is Needed.....	4
Assessment of the proposed changes.....	5
Periodic Reporting of Incapacity Periods	5
Attempted Suicide, Suicide, and Other Deaths.....	7
Capturing Workplace Violence.....	8
Periodic Reporting of Exposure to Traumatic Events	10
Periodic Reporting of Bullying and Harassment.....	12
Long latency diseases – exposure to substances.....	15
Serious Head Injuries	16
Other Potential Gaps In Serious Injury or Illness	16
Capturing Incidents Involving Large Mobile Plant	17
Capturing the Fall of a Person	17
Current Incident Notification Provisions: gaps & ambiguities	18



Introduction

General Comments

The Housing Industry Association (HIA) takes this opportunity to provide a submission in response to the Safe Work Australia *Consultation paper – WHS incident notification* (the Consultation Paper).

HIA supports a greater emphasis on managing risks to prevent serious physical and psychological incidents in the workplace and acknowledges the emerging challenges when managing psychological incidents in the workplace.

For the past two decades HIA has been undertaking extensive industry training and developing supporting tools and materials for our members and the residential building industry more broadly to support them in managing risks to prevent serious physical incidents and to meet their regulatory obligations.

However, managing psychological incidents in the workplace it is a more complex matter and requires greater industry awareness, education and the development of tailored supporting tools.

With this in mind, and in relation to the proposals contained in the Consultation Paper, HIA considers that an educative approach would better address the issues identified in the Consultation Paper. This approach is also likely to be more effective.

Several of the proposals in the Consultation Paper simply represent more regulatory interventions. Introducing further incident notification requirements is, in most instances, not warranted and would be unlikely to result in improved health and safety outcomes.

Furthermore, it is likely that they would create greater regulatory uncertainty and complexity for PCBU's. A number of the proposals outlined in the Consultation Paper would cross-over, and potentially conflict with other regulatory controls and instruments currently in place that are better equipped to deal with a number of the broad societal matters identified in the Consultation Paper.

Notwithstanding this, HIA remains committed to working with governments to improve industry understanding of workplace health and safety risks and to consider meaningful and practical reforms to improve work practices to safeguard workers as it relates to both physical and physiological risks.

Assumptions in the Consultation Paper

The Consultation Paper makes a number of broad assumptions to support the introduction of additional incident notification provisions.

It is considered that such statements should not be viewed as adequate justification to support such broad and wide-ranging reforms that will add additional cost, regulatory and administrative burden and further complexity on businesses.

For example, the statement:

“PCBU's focus on hazards that pose an immediate threat to physical health and safety and do not adequately identify, assess and control psychosocial hazards”



This in itself does not justify a need to introduce additional incident notification requirements, nor does it necessarily follow that introducing additional incident notification provisions will cause psychosocial hazards to be better identified, assessed, and controlled.

Similarly, the statement:

“Psychosocial hazards are not captured. This includes those that pose immediate risk of harm (workplace violence) and those that pose risk of harm over time (bullying, sexual harassment, harassment, exposure to trauma)”

This again should not in itself be considered to translate to be adequate justification to warrant the need for additional regulatory controls.

Importantly these psychosocial hazards are already captured if they result in ‘death, serious injury or a dangerous incident’.

As such it is not considered accurate to describe them as a 'key gap' the implication being that it supports the need for the introduction of additional and onerous incident notification provisions.

A subset of events arising from these hazards are not currently captured because they are generally not considered serious enough to justify incident notification particularly those that may pose risk of harm over time, which is highly subjective.

This is consistent with the overarching principle outlined in the 2008 National Review that incident notification provisions are intended to capture the most serious events rather than all potentially serious events¹.

This is no different to other hazards that are not captured by the current incident notification provisions but that may pose immediate risk of harm, such for example a missing plank on a scaffold or a missing guard on an item of plant.

Requiring that the additional proposed psychological injuries be notifiable would appear to be at odds with the policy intent behind notification of incidents and substantially extend its application and scope. Furthermore, while the notification triggers for psychosocial hazards that are currently captured are reasonably clear and understood in most instances, other psychological events proposed to be captured may not be as clearcut.

Some are subjective in nature and do not necessarily translate well to the concept of a clearly identified or specific ‘incident’ for notification. Moreover, some do not provide a clear correlation to a breach of WHS obligations.

For example, allegations or complaints of bullying do not necessarily mean there was a breach by the PCBU or that bullying did in fact occur.

Given that the primary purpose of incident notification provisions in the model Act should be to allow regulators to conduct investigations in a timely manner, only the most serious incidents causing, or which could have caused, fatality and serious injury or illness should be notified.

¹ National Review into Model OHS Laws: Second Report to WRMC – January 2009. Commonwealth of Australia, p185.



Adding further notification requirements will also add significant complexity to the incident notification process and substantial costs to PCBU's.

In relation to the proposed periodic reporting requirements (of incapacity periods, exposure to traumatic events and bullying and harassment) it is considered that these additions are unnecessary and problematic. Such periodic notification proposals would create an undue burden on businesses with unknown WHS benefits.

In our view there is a range of other alternative methods that could be explored to adequately address any perceived lack of visibility for these matters.

A number of these are identified in the individual responses in this submission to those elements identified in the Consultation Paper.

A Comprehensive Regulatory Impact Assessment is Needed

It is of concern that a detailed Regulatory Impact Assessment (RIA) has not been prepared for the proposals outlined in the Consultation Paper particularly given their significance and potential wide ranging reach on businesses.

Nor as we understand it, is a RIA being contemplated for the proposed changes.

This is despite that, prior to its release, the Office of Impact Assessment (OIA) identified this review as requiring RIA, as their assessment was that the proposed changes would have a major regulatory impact.

HIA agrees with the OIA assessment that the potential impacts of the proposed additions to incident notification provisions would be major.

The options as presented in the Consultation Paper, if adopted, will fundamentally change the nature of incident notification, and increase the range of notifiable incidents. This would be likely to create substantial additional regulatory burden for PCBU's.

Additional costs to PCBU's will include for example:

- Additional time and resources being put aside to understand and interpret the new requirements (not an insubstantial task given the definitional vagueness and subjectivities identified in this submission, particularly in relation to psychological incidents),
- gather and record the required data,
- retain records,
- modify management systems, reporting instructions, compliance policies,
- roll-out training and awareness of the new reporting requirements,
- conduct compliance audits, submit reports, etc.

It is also likely that WHS regulators will incur substantial costs due to potentially large number of reports and notifications that will require administration and investigation. Additional compliance activities will also be required for the changes to be communicated and enforced.



As such, the impacts and benefits of the proposed changes to incident notification provisions need to be ascertained and assessed, and a range of viable alternatives considered prior to making any decision to introduce changes.

HIA believes that this can only be achieved in an objective, transparent and accountable manner through the preparation of a robust and comprehensive RIA.

Such an RIA would enable the thorough examination and assessment of the benefits and costs relative to all available alternative options including the status quo supported by enhanced training, education and develop of tailored supporting resources specific to different industries.

Assessment of the proposed changes

Periodic Reporting of Incapacity Periods

This proposal, if implemented, will require PCBUs to periodically (six monthly) report periods of incapacity of ten or more days where a worker is incapacitated for work due to a work-related physical or psychological injury or illness.

HIA does not support the proposed periodic reporting of incapacity periods.

The proposed option is not adequately justified.

It is noted that the proposal to report periods of incapacity was not a recommendation of the Boland WHS model laws review. It was also not a recommendation by the 2008 OHS review.

The 2008 OHS review actually recommended that a period of hospitalisation or absence from work should not be a notification trigger².

A key recommendation of the 2018 Review, as agreed by WHS ministers, is that the review of the incident notification provisions should ensure the provisions meet the intention outlined in the 2008 National Review.

From the stated objective, it appears that the proposed periodic reporting of incapacity periods is premised on the need to collect additional data to enable WHS regulators to increase visibility of supposedly 'serious' work-related injuries and harm, arising from accumulated exposure to hazards.

Data on injuries is already collected and reported on through other mechanisms which is a more appropriate means in meeting that objective rather than imposing additional regulatory burden on PCBUs.

Other alternative options should be considered

The proposed periodic reporting of incapacity periods is presented as the only option to achieve the stated objective. It is of concern that other alternative options are not explored.

It is considered that most workers taking 10 or more days off due to incapacity, whether from an acute or chronic work-related event, are likely to seek workers' compensation.

² National Review into Model OHS Laws: Second Report to WRMC – January 2009. Commonwealth of Australia, p 184.



The information on incapacity periods could be obtained through workers' compensation claims data, and the objective could be addressed to a large extent by implementing appropriate systems for accessing this data.

The proposed reporting of incapacity periods is unnecessary. It does not meet the important consideration criteria at 4.1 of the Consultation Paper to: address a clear gap in WHS regulator visibility that cannot be adequately addressed through other sources.

Most importantly, an alternative option exists that will achieve the stated objective. The WHS regulators should seek and implement suitable ways to access workers' compensation data rather than place a reporting burden on PCBU's.

Other issues

There are also a range of issues with the proposed reporting of incapacity periods.

This includes that it is unclear what detail would need to be reported other than the 10 or more days of incapacity. If it is only the length of incapacity that is to be reported, it is unclear how this would assist the WHS regulators to ascertain whether the absence arose from an accumulation of exposure or from a chronic event.

It is clear however that the proposed option would pose an unnecessary administrative burden on PCBU's and would be highly problematic in practice.

Work-relatedness is an issue, as not all incapacities may be work-related.

The forms of evidence of work-relatedness listed on page 12 of the Consultation Paper are vague and provide little certainty to PCBU's. For example, a worker may be incapacitated due to stress brought about by factors other than workplace factors.

The PCBU may not know the cause of the absence. A medical certificate is unlikely to include the cause and the worker may not be willing to provide information that is of a personal nature.

In addition, the Consultation Paper notes that some reportable incapacity periods would capture work-related incapacity that is unrelated to whether a PCBU may have breached its WHS duties.

For example, workers' absences in response to reasonable management action where psychosocial risks have been managed so far as is reasonably practicable.

In such instances, PCBU's would need to make their own assessment of the situation and exclude these types of absences. This would introduce subjectivity and complexity to what should instead be a clear and unequivocal requirement not requiring subjective assessment by the PCBU.

What is proposed to be reportable is also problematic.

The proposed reporting of incapacity periods would apply in relation to all worker absences meeting the criteria, including absences of workers that are not employees of the PCBU, such as contractors, and volunteers.



This will introduce privacy issues if the PCBU seeks to obtain information about the absence from the employing PCBU.

Another problem is that of potential for multiple reporting of the same absences. For example, by the PCBU engaging the workers as well as by the PCBU who is the employer of the workers.

How are the day periods to be determined in the case of casual workers, given they may only work a few hours a day and not work consecutive days?

PCBUs will need to design, develop and implement compliance systems to capture and keep the relevant incident notification data and to submit reports to the WHS regulator. PCBUs will need to roll out substantial training and awareness initiatives to enable incidents to be reported to the PCBU.

Attempted Suicide, Suicide, and Other Deaths

This proposal, if implemented, will require PCBUs to immediately notify of attempted suicide, suicide, and other deaths due to psychological harm arising out of the conduct of the business or undertaking.

As stated in the Consultation Paper, the suicide of a person or death due to psychological harm is notifiable under s 35(a) ('death of a person') if it arises out of the conduct of the business or undertaking.

In addition, it is acknowledged that a suicide attempt 'arising out of the conduct of the business or undertaking', requires notification in circumstances where the person requires immediate treatment as an inpatient in a hospital (s 36(a)) or immediate treatment for specific injuries listed in s 36(b) or (c).

In relation to notification of suicide, the proposal appears to be premised on the assertion that: "There is currently underreporting of suicide and other death due to psychological harm arising out of the conduct of a business or undertaking".

The Consultation Paper does not provide evidence to justify this, but if this is the case, Option 1 - the option of clarifying the guidance – would be the most appropriate option.

HIA does not though agree with the following concepts as triggers for notification suggested for the guidance:

- "there have been recent difficulties at work", or
- "any reasonable suspicion that work may have contributed"

These indicators are vague and subjective and should not be included in guidance that is designed to provide more certainty to PCBUs.

Option 2 would require PCBUs to notify the suicide of a worker, even if the suicide did not arise from the conduct of the business or undertaking.

The concept proposed by Option 2 to amend the WHS Act to capture the suicide of a worker, even if the suicide did not arise out of the conduct of the business or undertaking, is inconsistent with the duties of the model WHS Act being linked to the conduct of a business or undertaking.

As such, it is far reaching and beyond what the control of a PCBU is and should be. It is therefore not considered suitable or proportionate requirement to be placed on a business.



In addition, it is not considered necessary. All such suicides would be notified to the police, so WHS regulators can obtain the necessary information and examine the circumstances involved. There is no need for this to be prescribed by amending the definition of a notifiable incident.

Attempted suicide

HIA does not agree with the options presented in relation to notification of attempted suicide.

It is not considered necessary or appropriate to amend the definition of a notifiable incident to include attempted suicide where the attempt carries a high risk of death or serious harm. Most attempted suicides, if not all, would carry a high risk of death or serious harm since death or serious harm is the intended outcome of a deliberate act.

Most attempted suicides that do not result in a death are likely to involve circumstances where the person requires immediate treatment as an inpatient in a hospital or immediate treatment for specific notifiable injuries and would already require incident notification.

The concept proposed by Option 2 to amend the WHS Act to capture the attempted suicide of a worker where the attempted suicide did not arise out of the conduct of the business or undertaking would be inconsistent with the recommendation of the 2008 National Review of WHS laws that notification obligations should apply where there is a causal link to a work activity performed in the conduct of the business or undertaking.

It would also be inconsistent with the duties of the model WHS Act also being linked to the conduct of a business or undertaking.

As such, Option 2 is not supported.

Other alternative options should be considered

The proposed reporting of suicide and attempted suicide are presented with only one option in each case. It is of concern that other alternative options are not explored.

It is considered that a more suitable mechanism to address this matter would be for WHS regulators looking to obtain the necessary information and examine the circumstances of suicides and attempted suicides from police and hospital admission records.

Capturing Workplace Violence

This proposal, if implemented, will require PCBU's to immediately notify the WHS regulator of an incident involving sexual assault, serious physical assault, deprivation of liberty, or threat of serious violence.

Whilst the matters requiring notification as presented under Option 1 are clear, others are not, and would be problematic.

Sexual assault reporting triggers are problematic

In relation to the proposed reporting of sexual assault, proposed trigger terms such as 'coercive' or 'exploitative' are highly subjective and open to wide interpretation.



Although, as the Consultation Paper acknowledges, that in some cases the proposals pose difficulties for PCBUs to determine if notification is required, this provides no certainty to PCBUs, and must not be included.

Another identified problem in relation to reporting of sexual assault is that of ensuring the PCBU does not inappropriately seek information about the incident.

However, the proposal includes notification of “sexual behaviour or act which is threatening, violent, forced, coercive or exploitative and to which a person has not given consent or was not able to give consent”.

It would therefore require PCBU to ascertain whether any for these factors were present, including consent. Aside from the subjective nature of some of these terms, this is highly inappropriate and could result in PCBUs seeking information of a personal and private nature, with serious ramifications for the relevant persons and for PCBUs.

In relation to the proposed reporting of express or implied threats of serious violence that causes genuine and well-founded fear of death, serious sexual assault or serious injury or illness, terms such as “implied threat”, “genuine” and “well-founded fear” are again too broad and subjective.

These terms must not be included. Such terms will pose difficulties for PCBUs to determine if notification is required and provide no certainty of compliance to PCBUs.

Behaviours captured can be broad and subjective

In addition, the concept of workplace violence that creates a serious risk is a subjective concept. For example, it could be interpreted to capture any behaviour that is perceived to affect a person that creates a psychological risk to health and safety.

Highly subjective terms perceived to affect a person, such as gestures, comments, insinuations, exclusion, intimidation, verbal abuse, and crude language, are listed as types of gendered violence causing serious risks such as anxiety and stress in some regulator publications and union publications.

De-identification does not ensure confidentiality

Although, it is proposed that notifications of incidents of violence, aggression and threats will be de-identified, ensuring appropriate confidentiality of individuals is protected will be a challenge that may be of great concern to some workers and for PCBUs.

Depending on the incident, it may not be entirely possible for PCBUs to report the incident information in a way that will not enable someone to indirectly ascertain the identity of the person(s) involved in the incident.

If workers know that they could be indirectly identified, they may not be too keen to raise an issue that will have to be reported to the WHS regulator. This is because, if indirect identification is possible, the proposed notification of violence, aggression and threats could well have adverse impacts on the persons involved.

Given that the proposed notification of violence, aggression and threats would, in many instances, depend on the willingness of workers to raise the issue with the PCBU, any perceived chance of identification and adverse impacts that could flow on, could discourage workers from doing so.



For example, if a worker fears that it may jeopardise their career, or that there is a potential for retribution, or that they could be seen as ‘whingers’ or ‘whistle blowers’.

It is also noteworthy that PCBU's are also required to consult with HSRs about hazards and risks. PCBU's must also allow the HSR access to information that the person has relating to hazards and risks at the workplace. This would include information about incidents involving violence, aggression or threats as defined in the proposed incident notification changes.

Making incident information available to HSRs could have serious repercussions for a complainant of a violence, aggression or threat incident, or for the alleged perpetrator. It could also jeopardise the undertaking of investigations in a fair and equitable manner.

The proposed notification of incidents of violence, aggression and threats could well be counterproductive in its effect by discouraging workers against reporting to a PCBU issues that they are not comfortable making, when in the absence of the proposed amendments, workers could raise the relevant matters with the PCBU in less confronting and more confidential ways.

The proposed notification of incidents involving violence, aggression and threats also fail to consider the potential impacts on the workers compensation system. This should be examined and assessed prior to any changes being made.

Site preservation

In regards to the proposed site preservation requirements the Consultation Paper states that “The duty to preserve the incident site for the purpose of WHS investigations is likely to be less relevant for incidents of workplace violence.”

Whilst HIA would agree with this statement, the Consultation Paper does not propose an exclusion from site preservation, so it is not clear what is proposed.

Other alternative options should be considered

The proposed reporting of workplace incidents involving sexual assault, serious physical assault, deprivation of liberty, or threat of serious violence is presented as the only option to achieve the stated objective. It is of concern that other alternative options are not explored.

For these reasons, HIA opposes the proposal to amend the model WHS Act to require immediate notification of incidents involving violence, aggression and threats unless it amounts to a notifiable incident under existing provisions.

It is considered that there is no need to introduce further incident notification prescription and confusion. Any incident involving workplace violence that results in the outcomes already prescribed by the incident notification provisions of the model WHS Act would be notifiable and should remain unchanged. There is no need to introduce more complexity.

The proposed obligations are unnecessary and problematic and should not go ahead.

Periodic Reporting of Exposure to Traumatic Events

This proposal, if implemented, will require PCBU's to notify the WHS regulator every six months of instances where workers, or other persons at the workplace, are exposed to serious injuries, fatalities,



instances of abuse or neglect that are likely to be experienced as traumatic by the worker or other person, where the exposure arises out of the conduct of the business or undertaking.

Once again, the proposed periodic reporting is presented as the only option to achieve the stated objective. It is of concern that other alternative options are not explored.

HIA agrees with the following matters identified in the Consultation Paper (pages 23 and 24):

- “not all exposures pose a serious health and safety risk. Exposures are more likely to be experienced as traumatic when they are unexpected or perceived as uncontrollable, or are accompanied by other psychosocial hazards
- some occupations encounter these events as part of their routine work – volume is unlikely to provide useful insights for WHS regulators (but rather confirm what is already known), and
- exposure in other occupations may not be foreseeable and/or may not be reliably correlated with a with a failure to manage the risks so far as is reasonably practicable.”

HIA also agrees with the key challenges and costs set out on page 24:

- “For most PCBU, reporting of exposure may not provide a strong correlation with a breach of WHS duties.
- Difficulties in some cases for PCBU to determine if notification is required.
- Resources impacts for PCBU and WHS regulators, particularly for occupations where volume will be high.
- Potential overlap with current and proposed notification requirements (e.g. fatalities, serious injuries, workplace violence).”

It is considered that these statements indicate that the proposed change would be of limited value. There are also some matters that would need to be clarified if the proposed change is implemented. Firstly, the concept of ‘exposure’ needs to be refined to provide more context.

For example, it should be refined to mean that the worker experienced the traumatic event directly, rather than through telling someone else i.e. hearsay, which may not be accurately represented or exaggerated, or that the worker was exposed to it by being involved with the work that led to the serious injury or fatality.

Secondly, it is not clear what is meant by “instances of abuse or neglect”. The terms ‘abuse’ and ‘neglect’ are not defined and can be subjective.

Thirdly, the requirement to periodically report incidents “that are likely to be experienced as traumatic” is vague and subjective.

How can PCBU easily identify how a worker, or another person, is likely to ‘feel’ following a potentially traumatic event? Once again, any proposal of this nature should not require subjective assessment by PCBU.

The 2008 WHS review recommended that notification of incidents should not require subjective assessment by the obligation holder.



Finally, the Consultation Paper states that exposures to “situations, materials and reports” would be included. It is unclear what is intended by the terms ‘materials’ and ‘reports’ in the context of abuse and neglect.

What is intended to be captured needs to be clear and unequivocal.

Periodic Reporting of Bullying and Harassment

This proposal, if implemented, will require PCBUs to periodically report (every six months) to the WHS regulator on (de-identified) cases of bullying and harassment behaviours that expose workers to a risk to health and safety.

HIA does not support the proposed periodic reporting of these behaviours for the following reasons.

The proposed options are not justified

HIA notes that the periodic reporting of bullying and harassment was not a recommendation of the Boland review.

It was also not a recommendation by the 2008 OHS review. It is therefore inconsistent with the key recommendation of the 2018 Review, as agreed by WHS ministers, that the review of the incident notification provisions should ensure the provisions meet the intention outlined in the 2008 National Review.

From the stated objective, it appears that the proposed options for the periodic reporting of bullying and harassment are based on the need to improve WHS outcomes by ensuring WHS regulators have appropriate visibility of the prevalence of bullying and harassment in workplaces to inform targeted compliance and education activities.

This is considered insufficient justification for imposing additional regulatory burden on PCBUs and one that is completely at odds with the intention outlined in the 2008 National Review.

Other alternative options should be considered

Although the Consultation Paper puts forward two options for periodic reporting of bullying and harassment, both options are similar, differing only in how the reporting requirement is triggered.

Both require the same type of reporting (six-monthly, de-identified data) and could not be said that they are true alternatives to the proposed periodic reporting of bullying and harassment.

It is of concern that other alternative options, such as the option of using other potential sources of data that would not require reporting by PCBUs are not explored. Other sources are identified on page 27 of the Consultation Paper but appear to have been dismissed on the basis that they do not actively identify individual PCBUs.

One potential option could be providing enhanced guidance and tools to assist PCBUs, including practical advice, training programs, awareness raising and promoting education about workplace bullying and harassment, plus developing improved conciliation and resolution options for parties.

Another potential option is to provide better mechanisms for workers to make the complaint to the WHS regulator. After all, workers already have a right to do this and the WHS regulators can triage, investigate complaints, and pursue effective resolution or remedial measures in response.



An example of this is a bullying pack developed by WorkSafe Victoria in 2008. This featured a **Workplace Bullying Summary of Events** form that a worker can use to submit a complaint that WorkSafe would then assess and follow-up where necessary.

This would not only avoid introducing further regulatory burden on PCBU's but would enable more comprehensive assessment of all the criteria or triggers that would qualify a complaint as notifiable.

It is considered that these should be more comprehensively explored for the periodic reporting of bullying and harassment to meet the important consideration criteria at 4.1 of the Consultation Paper to: address a clear gap in WHS regulator visibility that cannot be adequately addressed through other sources.

Other issues

There are also a range of issues with the proposed periodic reporting of bullying and harassment. These issues render the proposed options as highly problematic in practice.

Reporting details are not specified

The level of detail to be included in notification reports to be submitted to the WHS regulators is not specified.

For example, if a number (X) of workers complained of periodic bullying at different times during the relevant reporting period would each complaint need to be reported separately, or could it be reported as X workers complained of periodic bullying?

Would dates, and times need to be reported? Would succinct details of the complaint need to be reported, such as what workers were involved and their gender? Would the PCBU need to report what actions were undertaken?

Without this information it makes it extremely difficult to provide support or to be able to adequately consider the suitability and practicality of this option.

Behaviours captured can be broad and subjective

Option 1 at (b) captures unreasonable behaviour that a person would consider is abusive, aggressive, offensive, humiliating, intimidating, victimising or threatening. This also includes sexual harassment or harassment of any other kind.

Apart from the similar issues associated with sexual harassment discussed earlier, the above terms are far too subjective and could be subject to broad interpretation, even by a reasonable person.

The way bullying is captured does not require that the bullying 'create a risk' as set out under the Fair Work Act, instead all that is required is that a worker is exposed to a risk of bullying. Using the exposure qualifier is subjective and cannot be supported.

Furthermore, unlike the behaviours captured at (a), the behaviours captured at (b) need not be repeated. A single instance could trigger a complaint. This could potentially attract all kinds of vexatious or frivolous claims.



Vexatious or frivolous claims are excluded by the proposed options. However, even though it seems that this will help PCBU's to omit these complaints, the terms 'vexatious' and 'frivolous' are also highly subjective and open to interpretation.

From experience, workplaces include people with varying personalities and they may react or interpret matters or work styles differently, for example someone may be more sensitive to a certain issue whereas a co-workers style and personality may be more reserved or practically focused.

This potentially leaves PCBU's open to disputes with workers and their representatives. Worse still, it leaves PCBU's liable to prosecution for failure to notify of a complaint, the outcome of which will turn on the subjective judgement of the decision maker perhaps ruling that the complaint was not vexatious or frivolous.

Another issue is that subjective interpretations often cause misunderstandings that are in many instances successfully resolved by the PCBU through open discussion and to the satisfaction of all parties involved. However, these will also have to be needlessly notified.

There is no certainty for PCBU's in introducing periodic notification requirements for matters that are subjective and open to interpretation. It is also pertinent that the proposed periodic reporting of bullying and harassment does not meet the recommendation of the 2008 National WHS review that the notification of such incidents should not require subjective assessment by the obligation holder³.

De-identification does not ensure confidentiality

Although, it is proposed that periodic notification of complaints of bullying and harassment will be de-identified, ensuring appropriate confidentiality of individuals is protected will be a challenge that may be of great concern to some workers and for PCBU's.

Depending on the incident, it may not be entirely possible for PCBU's to report the information in a way that will prevent someone from indirectly ascertaining the identity of the person(s) involved in the complaint.

If workers know that they could be indirectly identified, they may not be too keen to raise an issue that will have to be reported to the WHS regulator.

This is because, if indirect identification is possible, the proposed periodic notification of bullying and harassment could well have adverse impacts on the persons involved.

Given that the proposed periodic notification of bullying and harassment would, in many instances, depend on the willingness of workers to raise the issue with the PCBU, any perceived chance of identification and adverse impacts that could flow on, could discourage workers from making a complaint.

For example, if a worker fears that making a complaint may jeopardise their career, or that there is a potential for retribution, or that they could be seen as 'whingers' or 'whistle blowers'.

³ National Review into Model OHS Laws: Second Report to WRMC – January 2009. Commonwealth of Australia, p183-184.



It is also noteworthy that PCBU's are also required to consult with HSRs about hazards and risks. PCBU's must also allow the HSR access to information that the person has relating to hazards and risks at the workplace.

This would include information about complaints or instances of bullying and harassment that require notification, due to the fact one of the triggers for notification is that such incidents must expose a worker or workers to a risk to their health and safety.

Making incident information available to HSRs could have serious repercussions for a complainant of bullying or harassment, or for the alleged perpetrator. It could also jeopardise the undertaking of investigations in a fair and equitable manner.

The proposed periodic notification of incidents of bullying or harassment could well be counterproductive in its effect by discouraging workers from making complaints that they are not comfortable making, when in the absence of the proposed amendments, workers could raise the relevant matters with the PCBU in less confronting and more confidential ways.

The proposed periodic notification of bullying and harassment also fail to consider the potential impacts on the workers compensation system. This should be examined and assessed prior to any changes being made.

Site preservation

The Consultation Paper does not discuss site preservation in relation to the proposed periodic notification of bullying and harassment.

Site preservation is specifically mentioned as not being appropriate in relation to the proposed reporting of incapacity periods.

HIA considers that it would also not be appropriate for the proposed periodic notification of bullying and harassment if this is implemented.

Administrative burden

The proposed periodic reporting of bullying and harassment will impose significant administrative burden on PCBU's and WHS regulators. However, these burdens are not identified in the summary of potential impacts for this proposal.

The burdens are like the burdens previously identified for other periodic reporting proposals. PCBU's will need to design, develop, and implement compliance systems to capture and keep the relevant incident notification data and to submit reports to the WHS regulator. PCBU's will need to roll out substantial training and awareness initiatives to enable incidents to be reported to the PCBU.

These burdens need to be identified and considered by a RIA.

Long latency diseases – exposure to substances

No options are put forward under this heading. Instead, feedback is sought to further explore options to improve knowledge of exposure to hazardous substances in the workplace that cause long latency diseases.



It is considered that current arrangements for managing risks of exposure to hazardous substances in the workplace that cause latent diseases are appropriate.

In addition, it is noted in the Consultation Paper that additional national and jurisdictional initiatives are underway to improve WHS with regards to hazardous chemicals that cause long latency diseases. Given these initiatives are likely to be implemented soon, no additional recording or reporting of exposures is warranted or justified.

The revised list of deemed diseases adequately captures hazardous substances that could cause latent disease and associated guidance includes how the substances can be reliably linked to work and occupations. Disseminating this guidance more widely should be explored.

Reporting of WES exceedances is not a practical proposition and is not supported. What industry needs, and particularly small and micro businesses need, are practical methods to assist them to achieve compliance with the WES.

Ideally, such methods should seek to minimise the need for expensive air monitoring while providing reasonable certainty of compliance.

Serious Head Injuries

This proposal includes three options to improve the notification of serious head injuries.

The first two options are based on amending the WHS Act to require notification of either serious head injuries regardless of whether the person required immediate treatment (Option 1), or suspected serious head injuries requiring immediate treatment (Option 2).

The third option is to address the potential gap through other options, including updating guidance and capturing such injuries through an incapacity period.

Of these options, HIA would support Option 3. However, amending of the WHS Act to require reporting of an incapacity period is not supported as it would not assist the WHS regulator to immediately investigate the incident.

Other Potential Gaps In Serious Injury or Illness

This proposal includes two options to capture the notification of serious work-related physical injuries such as bone fractures and crush injuries and illnesses.

Of the options presented, it is considered that Option 1 would, in addition to achieving the intent to capture serious bone fractures/ crush injuries, it will needlessly capture many minor injuries and illnesses that are treated as an outpatient in an emergency department.

For example, it could capture minor cuts, wounds, splinters, sprains, bruises, infections, even nosebleeds and other minor injuries that may not have been caused by work.

Option 1 goes well beyond the stated objective and well beyond the intention outlined in the 2008 National Review to only capture the most serious events.

Option 2 on the other hand does not have such problems and appears to be the more appropriate option.



Capturing Incidents Involving Large Mobile Plant

This proposal, if implemented, will require PCBU's to notify additional incidents involving the malfunction or loss of control of powered mobile plant that exposes a person to a serious risk to their health and safety. It is proposed that the provision capture:

- the plant overturning.
- a person being pinned by or ejected from the plant
- the plant colliding with any person or thing, and
- roll-aways.

Once again, no alternative options are presented and additional the proposed option for the notification of plant incidents is based on a perceived 'gap' in current arrangements and the need to improve WHS outcomes.

It is considered that this is an insufficient justification for imposing additional regulatory burden on PCBU's.

It is also noted that the types of powered mobile plant are not specified. The provisions could capture plant for which serious risks exist but that could be adequately controlled by the PCBU, such as for example, overhead protective structures on demolition plant that may be constantly colliding with structures. Such plant should be excluded.

If this proposal goes ahead, it should also be further qualified by the words "emanating from an immediate or imminent exposure to..." as for all other dangerous incident provisions of the WHS Act.

Capturing the Fall of a Person

This proposal, if implemented, will require PCBU's to notify the fall of a person, which exposes the person to a risk of death or serious injury.

Once again, no alternative options are presented. And once again, the proposed option is based on a perceived 'gap' in current arrangements and the need to improve WHS outcomes, which is an insufficient justification for imposing additional regulatory burden on PCBU's and cannot be supported. An alternative option could be to modify guidance to state that the fall of a 'thing' includes the fall of a person and with additional guidance about the types of falls that expose a person to a risk of death or serious injury.

To be supported, this would need to include practical information that excludes low level falls and a two-metre threshold so that only high-risk situations are captured.



Current Incident Notification Provisions: gaps & ambiguities

Causal link principle

The proposal to amend the WHS Act to prominently reflect the causal link principle cannot be supported without seeing the specific wording of the proposed change.

Moreover, HIA considers that the matter would be better clarified through guidance.

Objective test

The option to amend the WHS Act cannot be supported without seeing the specific wording of the proposed change.

It is considered that the matter would be best addressed through guidance.

However, care should be taken to avoid using terms based on 'reasonableness', such as that used in the second paragraph on the right-hand column. Such terms are subjective and will only exacerbate the problem.

Amending the description of immediate treatment in guidance

HIA supports the amending the guidance to clarify this issue.

Immediate treatment as an inpatient in a hospital

HIA would support the amending the guidance.

Improving understanding of 'loss of bodily function'

HIA would support the amending the guidance.

Medical treatment for exposure to a substance

HIA would support the proposed amendment to section 36 (c)

Exposure to human blood and body substances

HIA would support improving the guidance.

Infections and zoonoses

HIA would support improving the guidance.

Dangerous incident provisions – reducing complexity and improving PCBU understanding

HIA supports the amending the guidance to clarify this issue.

The option to amend section 37 of the WHS Act cannot be supported without seeing the specific wording of the proposed change.

Improving the electric shock provision

The option to amend section 37(c) of the WHS Act to include 'electrical explosion and arc flash explosion' cannot be supported. The intent of current provisions is to capture electric shock, rather than to capture electrical hazards. If an 'electrical explosion' or an 'arc flash explosion' cause serious injury it will be notifiable under current provisions.



HIA would support amending the guidance material to clarify the types of incidents involving electric shock that are notifiable.

It is agreed that this should not include shocks from static and other shocks from extra low voltage electricity.

Duty to notify site preservation requirements

The option to amend the WHS Act cannot be supported. The intent of the duty to notify is to inform the WHS regulator so they can investigate the incident. Requiring notification to other parties is not needed to fulfill this purpose.

It is considered that the matter would be best addressed through guidance that encourages PCBU's to inform other relevant parties to the occurrence of the incident and site preservation requirements.