



# Submission

## Consultation on options to improve WHS incident notification

### Introduction

The Department of Employment and Workplace Relations (the Department) welcomes the opportunity to provide feedback on Safe Work Australia's (SWA's) Consultation Paper – WHS incident notification (Consultation Paper).

The Department has responsibility for administering and providing policy advice on the application of the model WHS laws in the Commonwealth jurisdiction, which are given effect through the *Work Health Safety Act 2011* (Cth) (WHS Act) and the *Work Health Safety Regulations 2011* (Cth). Comcare has statutory functions and powers in relation to work health and safety under the WHS Act.

The incident notification provisions require persons conducting a business or undertaking (PCBUs) to immediately notify the Work Health and Safety (WHS) regulator of certain workplace incidents being the death of a person, a serious injury or illness, or a dangerous incident. The Department notes that incident notification provides a critical function of the model WHS laws by alerting WHS regulators to serious workplace incidents, and breaches of WHS duties while supporting compliance with WHS laws.

The Department makes the following general comments in relation to the Consultation Paper:

- The existing purpose of incident notification, to enable the regulator to investigate serious incidents and potential WHS contraventions in a timely manner<sup>1</sup>, is well established and care needs to be taken in departing from this purpose. The relevant provisions in the model WHS Act reflect the purpose of incident notification, which requires site preservation and attracts significant penalties for non-compliance.
- The discussion paper identifies potential gaps in the current approach to incident notification. In particular, the Department agrees that there are gaps in visibility by regulators of psychological illnesses and injuries, and suicide, attempted suicide, and incidences of serious self-harm arising out of the conduct of the business or undertaking. Visibility over hazards which result on long latency diseases is also an issue.

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<sup>1</sup> Explanatory Memorandum, Model Work Health and Safety Bill.

- The Department supports consideration of measures, other than broadening existing incident notification, that would improve regulatory visibility over work health and safety issues in workplaces.

The benefits of additional reporting requirements need to be balanced with the regulatory burden associated with record keeping and notification. In particular:

- The Department does not support broadening incident notification to capture incidents, illnesses or injuries not arising out of the conduct of the business or undertaking.
- Incident notification provisions should be easy for duty holders to understand and apply, particularly given the significant penalties for failing to comply with incident notification requirements. It may be challenging for PCBU's to comply with reporting requirements where the nature of the incident is such that it involves a complex assessment of whether the incident arose out of the conduct of the business or undertaking.
- Any proposal to impose further reporting obligations on PCBU's should take into account the capacity of regulators to use the information received. The broader the reporting criteria, the higher the volume of notifications that the regulator is likely to receive.
- It is important to consider whether any proposed additional reporting requirements would be effective in identifying WHS risks in a workplace and whether they would provide meaningful data for regulators. For instance, there is some doubt about whether the proposal to require PCBU's to report periods of incapacity from work would be effective in identifying psychosocial risks.
- It is also important to consider any unintended consequences that may arise as a result of expanded reporting obligations, particularly in relation to worker privacy and sensitivity. For example, it is desirable to avoid situations where the relevant reporting requirement leads the PCBU to intrude on the worker's privacy, and in a manner that does not necessarily improve WHS outcomes.
- The Department is generally supportive of proposals that involve amending the guidance material to clarify the meaning of the existing provisions.
- **Attachment A** responds to areas of the Consultation Paper where the Department has substantive views.

## Attachment A – Departmental responses to key issues

Issue	Option	Response
<i>Chapter 5 - Periodic reporting of incapacity periods</i>		
WHS regulators have limited visibility of work-related psychological injuries or illnesses under the incident notification framework which limits their ability to identify where these injuries are occurring and take appropriate action. Some other serious physical injuries and illnesses missed under the current definition of serious injury or illness	1. Amend the model WHS Act to require periodic reporting (six monthly) of periods of incapacity from normal work for ten or more consecutive days due to a psychological or physical injury, illness or harm arising out of the conduct of the business or undertaking	<p>The proposed reporting requirements would result in a significant volume of notifications.</p> <p>This approach may not be effective for identifying psychosocial risks in a workplace. For example:</p> <ul style="list-style-type: none"> <li>• It may be difficult to determine whether a period of absence is work-related, or whether the period of incapacity is due to psychological or physical injury (note that medical certificates often do not specify the reason for the absence).</li> <li>• Focusing on 10 or more consecutive days would not capture situations where someone has a significant amount of time off, but it is irregular.</li> <li>• Reporting incapacity periods is unlikely to capture casual or gig workers.</li> </ul>
<i>Chapter 6 – Attempted suicide, suicide and other deaths</i>		
Underreporting of suicide and other deaths due to psychological harm arising out of the conduct of a business/undertaking, suggested to be due in part to the lack of clarity in the information sheet.	<b>1 (Suicide and other deaths)</b> Amend the guidance material to clarify that the ‘death of a person’ (s 35(a)) captures: <ul style="list-style-type: none"> <li>• suicide of a person due to psychological harm arising out of the conduct of the business or undertaking</li> <li>• other death of a person due to exposure to psychosocial hazards (e.g. heart attack from work stress) arising out of the conduct of the business or undertaking</li> <li>• suicide of a person at a workplace where there is an identified risk of suicide in the workplace.</li> </ul>	The Department supports the proposal.
	<b>Add-on (Suicide of a worker)</b> Amend the definition of notifiable incident (s 35) in the model WHS Act to specifically capture: <ul style="list-style-type: none"> <li>• the suicide of a worker, whether or not the suicide arose out of the conduct of the business or undertaking.</li> </ul>	<p>The Department supports strengthening the guidance material to clarify that suicide due to psychological harm arising out of the conduct of the business or undertaking would be captured under s 35(a).</p> <p>However, the proposal to amend the definition of notifiable incident to capture suicide of a worker regardless of whether it</p>

		<p>arose out of the conduct of the business or undertaking is potentially too broad and raises privacy issues.</p> <p>The Department notes that the proposed option may capture suicide of a worker for reasons that are unrelated to work which would not be within the remit of the regulator to investigate. This would also likely raise privacy concerns where a PCBU is required to seek information from sources unrelated to work i.e. a workers' family members.</p> <p>The Department suggests where there is a specific need to address all suicides for workers of a particular PCBU (e.g. veterans), that this be considered separately to incident notification. As outlined in the consultation paper, there may be benefit in considering approaches in other jurisdiction, such as the French model whereby suicide is presumed to be work-related in certain specific circumstances.</p>
	<p><b>1 (Attempted Suicide)</b></p> <p>Amend the definition of notifiable incident (s 35); or serious injury or illness (s 36) in the model WHS Act to capture:</p> <ul style="list-style-type: none"> <li>• attempted suicide of a person due to psychological harm arising out of the conduct of the business or undertaking, and</li> <li>• attempted suicide of a person (where the attempt carries a high risk of death or serious harm) at a workplace where there is an identified risk of suicide in the workplace.</li> </ul>	<p>The Department notes complexities in the proposal to extend incident notification to capture attempted suicide, specifically whether a PCBU can reasonably determine that an attempted suicide by a worker has occurred in the absence of a threshold of harm.</p> <p>There may be benefit in considering a complementary reporting framework which manages these complexities, possibly by adapting the French model to attempted suicide.</p>
	<p><b>Add-on (Attempted Suicide)</b></p> <p>Amend the definition of notifiable incident (s 35); or serious injury or illness (s 36) in the model WHS Act to specifically capture:</p> <ul style="list-style-type: none"> <li>• attempted suicide of a worker whether or not the attempted suicide arose out of the conduct of the business or undertaking.</li> </ul>	<p>The Department notes that the proposed option may capture attempted suicide of a worker for reasons that are unrelated to work which would not be within the remit of the regulator to investigate. This would also likely raise privacy concerns where a PCBU is required to seek information from sources unrelated to work i.e. a workers' family members.</p> <p>The Department suggests where there is a specific need to address all attempted suicides for workers of a particular PCBU (e.g. veterans), that this be considered separately to incident notification. As above, there may be benefit in adapting the French</p>

		model (whereby suicide is presumed to be work-related in certain specific circumstances) to attempted suicide.
<i>Chapter 7 – Capturing workplace violence</i>		
Current laws only capture a subset of incidents involving serious workplace violence, those that result in death or serious physical injury or illness requiring 'immediate' treatment. However, even if an incident doesn't meet the threshold, it can still cause serious psychological harm.	<p>1 Amend the model WHS Act to require immediate notification (de-identified) to the WHS regulator of:</p> <p>a. a sexual assault</p> <p>- including any 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</p> <p>b. a serious physical assault</p> <p>- including where a worker or other person in the workplace is assaulted with a weapon, punched, kicked, struck, beaten, shoved or bitten by another person</p> <p>c. the deprivation of a person's liberty</p> <p>- including being trapped, confined or detained by another person, and</p> <p>d. an express or implied threat of serious violence that causes genuine and well-founded fear of death, serious sexual assault or serious injury or illness arising out of the conduct of the business or undertaking and that exposes a worker or any other person to a serious risk to a person's health and safety.</p>	<p>The Department supports the proposal and notes the use of the approach taken by the ACT Government in relation to reporting for a 'sexual assault incident', including provisions under which a PCBU must not disclose the identity of the person involved in the incident to the regulator and only needs to provide limited details of the incident to the regulator. The duty to preserve incident sites doesn't apply to sexual assault incidents.</p> <p>The Department also supports amending the model WHS Act to require immediate notification (de-identified) to the WHS regulator of serious physical assault, the deprivation of liberty and threats of serious violence, as proposed.</p>
	Add on: Introduce a power to permit WHS regulators to approve alternative reporting arrangements for certain PCBUs with specific conditions.	<p>The Department notes that further consultation is required to design tailored reporting requirements to ensure consistency and that these professions are captured by incident notification provisions, without creating an unreasonable regulatory burden for PCBUs or overloading regulators with information.</p> <p>Allowing regulators to decide what is appropriate and make case by case exceptions is preferable. A national approach would not be binding.</p>

*Chapter 8 – Periodic reporting of exposure to traumatic events*

<p>WHS regulators are notified of notifiable fatalities, serious injuries or dangerous incidents that arise out of the conduct of the business or undertaking. These incidents are notifiable due to the physical harm or risk, rather than psychosocial risk to those involved or who witness it and are likely to experience those incidents as traumatic.</p> <p>However, the provisions do not specifically capture:</p> <ul style="list-style-type: none"> <li>• exposures to other fatalities and serious injuries (not arising out of conduct of business or undertaking)</li> <li>• exposure to cases of abuse and neglect.</li> </ul>	<p>1 Amend the model WHS Act to require periodic reporting (six monthly) to the WHS regulator 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.</p>	<p>The Department is concerned that this amendment could:</p> <ul style="list-style-type: none"> <li>• place a heavy reporting burden on PCBU's and result in a high volume of reports to regulators.</li> <li>• would be difficult to enforce due to the broad scope of potentially reportable exposures, e.g. possible inclusion of second-hand exposures that could result in 'vicarious trauma'?</li> <li>• require more specificity if it is to be effective and enforceable.</li> <li>• potentially duplicate existing reporting requirements for workplace violence</li> </ul> <p>In addition, a one-off event does not indicate an ongoing WHS risk at the workplace which needs to be managed.</p>
	<p>Add on: Assess the need for WHS regulators to have the ability to approve alternative reporting arrangements for certain PCBU's with specific conditions.</p>	<p>The Department notes that further consultation is required to design tailored reporting requirements to ensure consistency and that these professions are captured by incident notification provisions, without creating an unreasonable regulatory burden for PCBU's or overloading regulators with information.</p> <p>Allowing regulators to decide what is appropriate and make case by case exceptions is preferable. A national approach would not be binding.</p>

<i>Chapter 9 – Periodic reporting of bullying and harassment</i>		
While all instances of bullying and harassment require PCBU's to respond in a timely and appropriate way, it is broadly accepted that individual instances do not require immediate mandatory notification to WHS regulators (unless it amounts to a notifiable incident). The incident notification review considered options to improve WHS regulator visibility under periodic reporting	<p>1 Unreasonable Behaviours: Amend the model WHS Act to include a duty to periodically report (six-monthly, de-identified data) to the WHS regulator on complaints OR instances, arising out of the conduct of the business or undertaking</p> <p>Of</p> <p>a) repeated and unreasonable behaviour (bullying) towards a worker or group of workers, or</p> <p>b) unreasonable behaviour towards a worker(s) that a reasonable person would consider is abusive, aggressive, offensive, humiliating, intimidating, victimising or threatening [including sexual harassment or harassment of any other kind] where the behaviour may reasonably be considered to have occurred (excluding vexatious or frivolous claims), and that exposes a worker(s) to a risk to their health and safety.</p>	<p>Option 1 - the Department notes that this kind of notification has significant limitations, as identified in the discussion paper. For example, it may identify workplaces where workers have clear complaints mechanisms and feel comfortable making a complaint (i.e. good practice workplaces) but not workplaces which have poor practices.</p> <p>The Department does not support option 2. The behaviour and its impact on the worker are what should be captured not why the behaviour occurred (protected attributes).</p>
<i>Chapter 10 – Long latency diseases (exposure to substances)</i>		
The 2018 Review of the model WHS laws suggested that consideration be given to whether the notifiable incident provisions should capture 'adverse health reports (disease notification) due to exposures to a substance that may require medical treatment sometime later than the current 48-hour provision after exposure (long latency)'. However, due to a long period between exposure and diagnosis, it was considered that there might be more appropriate mechanisms.	Further consider ways to improve regulator visibility of air and health monitoring data, including requiring PCBU's to notify WHS regulators of workplace exposure exceedances.	The Department supports in-principle the objective to improve regulator visibility of long latency diseases caused by exposure to substances. The Department notes that while WES exceedances do not, in of themselves, result in an immediate injury nor may it result in an onset of disease, they may function as important lead indicators allowing PCBU's, regulators and workers, to appropriately respond and address any reported WES exceedances.
<i>Chapter 12 – Other potential gaps in 'serious injury or illness'</i>		
Other potential gaps in 'serious injury or illness'. E.g. re bone fractures and crush injuries (e.g. hands and fingers).	1 Amend the model WHS Act (s 36) to require immediate notification of all work-related injuries and illnesses requiring treatment as an outpatient in an emergency department.	The Department notes that in the Commonwealth jurisdiction, there are a range of other facilities that may conduct the work generally performed at a hospital, but do not have the status of a hospital and/or may be temporary.