

WorkSafe Victoria Submission

2018 Review of the Model Work Health Safety Laws

SafeWork Australia

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Introduction



WorkSafe Victoria's (WorkSafe's) vision is to ensure that Victorian workers return home safely every day and its mission is to actively work with the community to deliver outstanding workplace safety and return to work, together with insurance protection.

In its role as the regulator of workplace health and safety, WorkSafe's key responsibilities include the prevention of workplace injuries, illness and fatalities and the enforcement of Victoria's occupational health and safety laws. WorkSafe also assists employers to meet their occupational health and safety (OHS) obligations and to implement effective systems to prevent workplace injuries. .

WorkSafe's role, and the requirements that apply to Victorian businesses are set out in the *Occupational Health and Safety Act 2004* (the OHS Act) and the *Occupational Health and Safety Regulations 2017* (OHS Regulations).

WorkSafe welcomes the opportunity to provide comment on the 2018 Review of the Model WHS Laws. The following submission particularly focuses on aspects of the Victorian OHS framework that may establish higher health and safety standards than equivalent components of the model WHS framework. It is important to highlight that the scope of this submission will not extend to include detailed responses to the questions raised in the discussion paper.

Victoria's OHS legislative framework in comparison to the Model WHS legislative framework



Health and safety representative (HSR) training requirements

- The provisions dealing with the powers of health and safety representative (HSR) under the Model WHS Act are broadly consistent with those under the OHS Act. The key difference is that under the Model WHS Act, HSRs must first complete the specified training before they can exercise powers to issue provisional improvement notices (PINs) or direct work to cease (directions). Training is not mandatory for HSRs under the OHS Act.
- Victoria recognises that the provision of training to HSRs is key to supporting and enabling them in the performance of their functions. However it has been WorkSafe's experience that HSR's who have not undergone training, may still be able to identify serious health and safety risks that may warrant the issuing of PINs or directions. Disqualifying HSRs from issuing PINs or directions in these circumstances may mean that identified risks to health and safety are not addressed or that actions to address these risks may be delayed.

Display of PIN

- The Model WHS Act and the OHS Act both require a person who receives a PIN to display the notice, for example, in a prominent place at or near the workplace. However, the OHS Act contains additional requirements not found in the Model WHS Act, namely:
 - if a person receives a PIN and is an employee, they must bring the notice to the attention of their employer, or
 - if a person receives a PIN and is not an employee or is an employer who is given a copy of the PIN, they must bring the PIN to attention of each other person whose work is affected by the notice.
- These additional requirements operate to ensure that all parties who may be affected by a PIN are made aware of it and are therefore enabled to take any necessary action to address the risks to health and safety that are the subject of the PIN. In this regard, the additional requirements may facilitate higher standards of health and safety.

Entry to enquire into a suspected WHS contravention

- The Model WHS Act and OHS Act allow a WHS or OHS entry permit holder or authorised representative of a registered employee organisation (ARREO) to enter a workplace where they suspect a contravention of the Act is occurring or has occurred. However, the Acts impose different procedural requirements on entry permit holders and ARREOs. Under the Model WHS Act, entry permit holders are required to give notice at least 24 hours but no more than 14 days prior to entry. There is also a process by which a regulator can grant exemption from these notice requirements. In contrast, under the OHS Act, an ARREO must,

immediately on entry, give notice and produce their entry permit for inspection. There is no requirement to give notice prior to entry.

- Victoria recognises the positive role that WHS/OHS entry permit holders and ARREOs play in supporting employees and employers to identify and resolve health and safety matters. Requiring WHS entry permit holders and ARREOs to give prior notice, or to seek exemption from this requirement, before entering a workplace may inhibit their ability to responsively deal with urgent health and safety matters.

Determining an employee's exposure to noise

- The *Occupational Health and Safety Regulations 2017* (Vic) (OHS Regulations) require Victorian employers to determine an employee's exposure to noise if there is uncertainty whether the noise exposure standard is or may be exceeded. The OHS Regulations also specify the factors that must be taken into account when determining an employee's exposure to noise.
- In contrast, while the WHS Regulations specify that a person conducting a business or undertaking (PCBU) must ensure that workers are not exposed to noise that exceeds the noise exposure standard, there is no explicit requirement for PCBU's to determine whether the noise exposure standard is exceeded.
- Victoria's experience has been that the explicit requirement to determine an employee's exposure to noise provides duty holders with a clear framework for compliance with the overarching duty to ensure the noise exposure standard is not exceeded.

Trigger for audiometric testing

- The OHS regulations require that, where personal protective equipment (PPE) is adopted as a means for reducing exposure of noise, audiometric testing must be provided at specified intervals. The WHS Regulations contain an equivalent requirement however the requirement is only triggered if a worker is *frequently* required to use PPE.
- Victoria's experience has been that the objective nature of the test under the OHS Regulations provides duty holders and employees with a greater degree of certainty and allows for a more consistent application of the requirement.

Audiological examination requirement

- Under the OHS Regulations, if two consecutive audiometric tests indicate hearing loss the employer must ensure the relevant employee undergoes an audiological examination. If the results of that examination indicate that the employee has or is likely to suffer hearing loss

due to exposure to noise, the employer must review and revise the risk control measures that are in place.

- In contrast, the WHS Regulations do not require audiological examinations for employees. Victoria considers that the requirement for audiometric testing is an important measure for the employer's duty to consider risk control measures.

Hierarchy of controls for risks of falls

- Both the OHS Regulations and the Model WHS Regulations require the following risk control measures to be used to control risks of falls: elimination of risk, passive fall prevention device, work positioning system, fall arrest system.
- However, unlike the model WHS Regulations, the OHS Regulations specify additional lower level controls to be used where portable ladders and administrative controls are adopted. This greater degree of specificity operates to ensure that the risks to health and safety associated with these controls are effectively and appropriately mitigated.

Trigger for emergency and rescue procedures under falls regulations

- Under the OHS Regulations, duty holders are required to prepare, test and provide information about emergency and rescue procedures where elimination of falls risks is not reasonably practicable and any control measures from the hierarchy of control are used. Under the model WHS Regulations, the equivalent requirement only applies where a fall arrest system is used as a control measure.
- The broader scope of the duty under the OHS Regulations is a reflection of the serious risks that all parties involved in an emergency response may be exposed to, where the risk of a fall has not been eliminated.

Personal hygiene requirements for workers performing lead risk work

- The OHS Regulations prohibit eating, drinking and smoking in areas where lead processes are undertaken. Employees are also required to remove lead contaminated clothing and equipment before entering eating and drinking areas and must wash their faces and hands prior to eating and drinking. The Model WHS Regulations do not specify equivalent obligations.
- These personal hygiene requirements under the OHS Regulations help prevent exposure of employees working in other areas, of employees' families and the general public.

Emergency procedures for construction work involving a risk of engulfment

- The OHS Regulations explicitly require duty holders to establish emergency procedures for construction work where there is a risk of a person becoming engulfed by soil or other materials. The Model WHS Regulations do not contain an equivalent requirement.
- A number of recent incidents in Victoria have highlighted the serious risks associated with construction work where engulfment by soil is a possibility. This requirement in the OHS Regulations is intended to ensure that appropriate controls are in place for the health and safety of all persons who may be involved in an emergency response where engulfment does occur.

Major hazard materials and their thresholds

- Victoria reviewed and incorporated revisions to the Scheduled major hazard materials and thresholds as part of the 2017 review of the OHS Regulations. Victoria's materials and thresholds are now more closely aligned with current European major hazard facilities (MHF) standard, Seveso III. Whereas the Model WHS materials and thresholds are still largely based on the old European MHF standard, Seveso I.
- Risks associated with MHFs are significant due to the potential for extremely serious consequences in the event of a major incident, not only for workers at the facility but also for people in the general vicinity, and for the environment. Victoria's major hazard materials and thresholds reflect the current state of knowledge regarding risks associated with the mass storage of hazardous materials.

WorkSafe's corporate model for enforcement

The key aim of WorkSafe's OHS enforcement model is to deter non-compliance with Victoria's OHS legislation and to prevent workplace and work-related deaths, injuries and disease. During 2016/17, WorkSafe completed 103 OHS prosecutions, with a success rate of 90 per cent, 12 enforceable undertakings were entered into pursuant to the OHS Act and a total of \$3,460,000 in fines was imposed. During the 2017/18 year to date, WorkSafe has commenced 124 prosecutions, completed 85 with a total of \$8,241,525 in fines.

Over the past 10 years WorkSafe has responded to changing community expectations about WorkSafe's role in regulating complex issues such as workplace bullying and occupational violence. During this time, WorkSafe has completed 16 prosecutions relating to workplace bullying, including two instances where WorkSafe has prosecuted individuals for engaging in bullying behaviour.

Target areas for enforcement by WorkSafe include:

- Work-related fatalities.

- Incidents involving serious injury or an immediate risk to health and safety where there appears to be a high degree of culpability. For example, incidents involving reckless conduct that endangers or may endanger persons at work or failure to control risks despite previous warnings or knowledge and significant departures from widely known or accepted safe systems of work.
- WorkSafe's focus areas for prevention are stated in its published strategies and business plans.
- Failure to comply with a notice or direction given by an inspector or WorkSafe, especially where the risk that was the subject of the notice or direction still exists at the workplace
- Offences against WorkSafe inspectors, HSRs or ARREOs
- Discrimination or threats to discriminate against employees or potential employees for any action in relation to occupational health and safety
- Coercion in negotiations relating to the establishment of designated workgroups of workers
- Failure to notify WorkSafe of 'notifiable incidents' and failing to preserve incident sites when required to do so

WorkSafe Victoria has streamlined its way of operating to complete investigations and progress matters to prosecutions more quickly. Investigators and prosecutors work collaboratively and are often physically located together.

WorkSafe Victoria also aims to ensure that injured workers and families of deceased workers are treated with the dignity and respect that they deserve, recognising that the litigation process can often be incredibly straining. To this end, WorkSafe provides a single point of access for families of injured or deceased workers.

WorkSafe also employs a dedicated social worker. Once an investigation has commenced, the social worker will make contact with the injured worker or a family member of the deceased worker and ensure that they are properly informed of all stages of the process, including the Court process. The social worker also provides information, assessment and referral to other relevant health and community services.