Organising is a matter of life and death: A brief guide to health and safety organising and law (July 20)

1. Introduction – work and the pandemic

On June 9, there were zero new Covid-19 cases announced in Victoria. In the week before that there had been 24 cases, most of them people in hotel quarantine, but with a small number "community transmission, unknown source".

Just over a month later, we're in the midst of a renewed surge. On July 19 there were 368 cases in Victoria. In just seven days, more than 2,000 new infections have been detected, Melbourne is back in lockdown, and a worrying number of cases are emerging in regional Victoria and New South Wales.

At least as worrying as the number of cases in Victoria is their breakdown: the huge majority were not immediately identified with any known cluster, indicating there is widespread uncontrolled spread of the virus.

Eighty percent of Victorian cases since mid May have been associated with workplace transmission, according to Daniel Andrews on 19 July. Many of these cases have been in aged care, health care, meatworks and distribution centres (there's a regularly updated compilation of clusters here).

There have been significant outbreaks in education settings: Al Taqwa College in western Melbourne is the centre of a cluster of 164 cases, with the Victorian Chief Health officer saying that senior students (e.g. year 11 and 12) have driven at least some of this spread. RMIT recently announced that three

students on campus had tested positive within a fortnight (stories here, here) – which is extraordinary given that so few students have been on site due to remote learning, semester break, and the shutdown in Melbourne.

There's also, rightly, a lot of concern in regional Victoria and New South Wales where the trend in community infections as of 20 July looks pretty much the same as in Melbourne a month ago – low but trending up, and with a small but worrying number of community transmissions from unknown sources.

The resurgence of the pandemic in Victoria coincides with a scheduled return to working on site for many businesses, including universities, where management is keen to resume "business as usual" in whatever form possible – which brings their priorities into direct conflict with the needs of workers.

In these circumstances, plans to return to on-site work in areas with widespread community transmission should be immediately put on hold as a public health measure. Workers at some sites have been resisting an end to remote working, using whatever methods available - existing health and safety machinery or consultative mechanisms, open letters, and just plain digging heels in.

This has been happening in secondary schools, where Daniel Andrews has pushed ahead with face to face teaching for years 11 and 12, regardless of evidence that anyone over 10 years old can transmit the virus as effectively as an adult (see this recent study of 60,000 cases in South Korea). By the end of the first day back for term 3, on July 20, at least twelve Victorian schools had to be shut again following positive tests. An online petition and some media (here and here) have highlighted teacher opposition to the reopening: the more public campaigning on the issue of enforced on site working, the better.

For those forced back to work regardless of the resurgent pandemic, there's an urgent need to campaign for, and implement, the most stringent health and safety measures. To that end, NTEU Fightback has compiled these notes on workers' rights under health and safety law, and how we can organise using these legal rights.

Knowing relevant clauses from laws and regulations can help in pushing back against management, and can give some heart to workers that we're justified in insisting on health and safety measures. A bit of knowledge can help in organising our workmates to change work procedures to keep ourselves safe, and to refuse unsafe work.

However, the most important thing to make clear is that health and safety laws are NOT a silver bullet for dealing with the negligence of our governments and employers. We can't rely on any saviour from Worksafe charging in on a white horse to save us. We're going to have to organise to keep each other safe, and to push employers not to cut corners.

The bottom line is that no one is going to save us, except ourselves. This brief compilation will hopefully assist in this task.

Every State in Australia apart from Victoria and WA has identical, "harmonised" health and safety laws (WA laws following this model are being passed this year). These national laws are based pretty closely on the Victorian laws. So every jurisdiction in Australia has a legal framework which provides for

- the duty of the employer to provide a healthy and safe workplace
- the duty of the employer to consult with workers on health and safety matters
- the right of workers to elect worker health and safety reps with legal powers and rights

This compilation has borrowed pretty freely from the *Beginner's Guide to Organising and Workplace Rights in the Pandemic*, published in March this year by Workers Organising Resistance (available [here](#)). The *Beginner's Guide* also includes a useful "how to", for starting off in totally unorganised workplaces.

2. Right of a worker to cease work

Every worker in Australia has the right to cease unsafe work. In the early phase of the pandemic, many counters were shut down by workers simply refusing to work them because their safety could not be assured.

National laws (not applicable in Vic)

> ***Right of worker to cease unsafe work***
>
> *A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.*

--Clause 84, [Work Health and Safety Act](#), NSW

(Exactly the same clause is in the Work Healtha and Safety Act in Qld, SA, Tas, NT, ACT, and an identical law in WA is in progress)

The key words here (for the paper wars which often break out around these issues) are **serious** and **imminent**.

Victorian law

Victorian workers also have the right to refuse unsafe work – both in legislation and in common law.

Unfortunately, Victorian law doesn't have a clause as clearly straightforward as the nationally "harmonised" law quoted above.

However clause 25 (1) (a) and (b) of the [Victorian Occupational Health and Safety Act](#) makes it clear workers have a duty to take reasonable care for our health and safety, and those of others.

> *OCCUPATIONAL HEALTH AND SAFETY ACT 2004 - SECT 25*
>
> *25   Duties of employees*

> *(1)   While at work, an employee must—*
>
> *(a)   take reasonable care for his or her own health and safety; and*
>
> *(b)   take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and*
>
> *(c)   co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.*

Workers in all jurisdictions also have the right to refuse unsafe work under "common law". Our employers aren't legally entitled to tell us to jump off a cliff, for instance. If they do, we're legally entitled to refuse. The same applies to other reasonable concerns for our health and safety.

Victorian Trades Hall Council's health and safety unit have a [useful explainer](#) on this:

> *Does a worker have the right to refuse dangerous work?*
>
> *The answer is YES, every individual worker has the right to refuse to do dangerous work. Workers have this right under the Common Law Contract of Employment. This applies to all employment relationships, irrespective of what is written down. Common Law was set by judges in courts and comes from hundreds of years of history (mainly in Britain). Common Law lays down very basic rights and duties for both the employer and employee. …*

Short of stopping work, of course, there are all sorts of measures we can and should be pushing for in our workplaces.

3. Safework guides and their limits

Each state has a different workplace safety regulator (e.g. SafeWork NSW, Worksafe Victoria, etc.) These bodies issue guidance notes around specific issues and industries, and are responsible for enforcement. This guidance is of variable quality, to put it politely. Victorian Worksafe put out a [publication](#) back in February: *A guide for employers: Preparing for a pandemic*, which has some useful material.

Overlaying this state-based guidance, on April 17 the National Cabinet approved a set of guidelines developed by [Safework Australia](#).

None of this guidance is law, but it still matters: it will often be regarded as what should be common practice, or at least a minimum standard. If an employer has ignored guidance, it will count against them if the matter comes to court. So it can be useful for active unionists to know a bit about it.

However there are significant problems, especially with the national Safework Australia guidelines. First, they are seriously out of date: the Safework Australia guidelines [repeat](#) several times that the federal

Department of Health "does not generally recommend the wearing of face masks by healthy people in the community". This view was mistaken to start with, and is now clearly out of step with current advice.

Along with this, the guidance is usually quite general and non-prescriptive. The national guidance is weak on crucial issues like screens and ventilation. The specific advice on education and training is in four paragraphs which say nothing. Tertiary education has more extensive advice, but to give an idea of the limits of this: the page explaining physical distancing contains the word "possible" (eg "where possible", "as much as possible", etc) no fewer than 18 times!

So these official guidelines should be regarded as a rock bottom minimum, to be improved on through consultation and agitation in the workplace, not as commandments chiseled into stone tablets. They should also be regarded as agitational tools: for instance, the "if possible" phrasing in guidance should be taken as an opening for debate and agitation in the workplace about what is or should be possible, if workers were to organise our workplaces in the safest way - and then we should push for that.

4. Specific safety measures

New evidence on aerosol transmission and what it means

The most significant recent development in the developing knowledge of the pandemic is the role of aerosol transmission (ABC news summary here). Previously, most attention had been paid to hand hygiene, and to large droplets (from sneezing and coughing), which could land on people or hard surfaces and be transferred to mouth, nose or eyes.

These methods of transmission are not disputed. However recent medical scholarship has highlighted the important role in transmission of tiny aerosols, a product of human breath and speech, which can stay airborne for long periods.

As this detailed article in *Nature* explains, there is a lot of evidence that aerosols are an important mode of transmission for the virus. 230 doctors and others have written to the World Health Organisation urging them to take this evidence seriously. Recently the WHO has for the first time acknowledged that there is "evidence emerging" of the role of small aerosols in transmission.

Aerosols build up over time in any enclosed space. This means that measures around working remotely, not having face to face meetings, ventilation and masks are crucial anywhere the virus is present. These have to be added to the guidance on physical distancing, cleaning, and hand hygiene.

Masks

Masks will be made mandatory in Melbourne from July 23 for anyone outside their home. As Victoria's Chief Health Officer Brett Sutton recently noted:

> *A big* Lancet *meta-analysis, so a study of a number of other studies' data, showed that masks make a significant difference, potentially even understanding that people don't always wear*

them perfectly that they don't provide perfect protection, but when they are worn very broadly across a population where people can't distance that 1.5m then they can make a difference, they can reduce transmission by up to two-thirds.

The point of masks is not just that it keeps any individual safer, though it does that to some extent. It's that universal wearing of masks stops asymptomatic people who have the coronavirus from spreading as many droplets and aerosols around.

Masks should be standard practice in a pandemic situation. It's arguable that early adoption of masks was the key public health measure that distinguished countries that got on top of the virus early from those that failed – and are still failing – to do so.

Ventilation

Given the role of aerosols in spreading the virus, it's a big problem that official guidance on ventilation is generally quite weak.

Victorian Worksafe's guide for employers states: "All internal spaces should be well ventilated and if possible, fresh air should be allowed to flow."

The Safework Australia guide underplays the role of recycled air in potentially spreading the virus through heating, ventilation and air conditioning systems, stating "there is currently no evidence that Covid-19 can be spread through HVAC [Heating, Ventilation and Air Conditioning] systems" – but then contradicts itself by stating that:

having your HVAC system set to allow more air circulation in common areas and limiting or not using recirculated air and increasing outside air intake, if possible, may help minimise the risk of COVID-19 spreading in your workplace.

The *Nature* article on aerosol transmission documents cases where the virus seems very clearly to have spread through air conditioning, for instance on a long distance bus trip.

Temperature checks and the problem of asymptomatic transmission

Infrared thermometers are being issued to every school in Victoria and will surely soon be standard issue across Melbourne and further afield soon.

Importantly, repeated studies have clearly shown that around 40% or more of all positive cases of Covid 19 show no symptoms at all – no cough, no fever, nothing. (References here, here and here). It's now universally recognised that there can be significant transmission from asymptomatic cases. So though temperature checks will pick up some cases, by themselves they are far from an adequate health and safety measure.

Working from home

In Melbourne, the [government direction](link) is clear: "If you can work from home, you must work from home." This should encompass most teaching and admin roles at a university. As of 20 July, however, there is still no certainty for many workers regarding previously announced plans to resume some on-campus work.

There are also significant carve-outs from the working at home guidance for some categories of worker, for instance year 11 and 12 teachers as noted in the introduction of this guide. And many categories of worker doing non essential work are still required to go to work each day.

The Safework [guidance](link) around working from home and [vulnerable workers](link) isn't very strong: for instance it doesn't extend to workers who have vulnerable people in their household. In the absence of better guidance or direction from public health authorities, any decent measures on this will have to come about through using consultation mechanisms to put pressure on management to keep workers at home in situations of vulnerability and/or community spread.

Cleaning and disinfecting

Cleaning does not just mean a cursory wipe once in a while. There are quite detailed guidelines on cleaning on the Safework Australia site [here](link), with more detailed supplementary information [here](link).

It should not be left to management and the cost-cutting cleaning businesses they usually contract, to ensure these guidelines are known and followed. Union or HSR oversight of the cleaning should be standard practice.

The guidelines state that cleaning must be undertaken at least once per day. All surfaces that are touched should be cleaned and disinfected, with high touch areas must be cleaned more often.

Best practice is that cleaning should happen before disinfecting, to remove grease and grime that make disinfectant less effective, though a combined two-in-one cleaning and disinfectant agent can also be used. Most disinfectants don't work instantly. "If no time is specified, the disinfectant should be left for ten minutes before removing."

Physical distancing

Physical distancing of four square metres for each worker, and a minimum 1.5 metre distance between workers, is one of the clearer [guidelines](link) in the Safework Australia package, though there are various exceptions made – for lifts, for instance.

It's important to note that both the appropriate number of workers and any exceptions to the guidelines cannot be simply imposed by management: workers are entitled to have a say through consultation and their health and safety reps. There is more information about health and safety reps below.

Hygiene

Yes, we should all be washing our hands regularly for 20 seconds, and using paper towels rather than air dryers. The Safework guidance is [here]. Incredibly, months into the pandemic, large number of workplaces still lack functioning hot and cold water, soap, flip top bins (so you don't have to touch them) and regularly restocked paper towels. It's worth starting by demanding the basics.

Mental health and overwork

Occupational health and safety laws also apply to psychological harm. The Safework Australia [guidelines] recognise that increased workloads can be a serious workplace health and safety issue, as can insufficient consideration of the impact of Covid-19 on health and safety and job performance. So these are also issues which can and should be raised with management.

Consultation

In industrial law, consultation is not just management saying "here's what we're doing". The main legal precedent on the meaning of consultation is CEPU v Vodafone Network (2001) which states:

> *Consultation is not perfunctory advice on what is about to happen. This is a common misconception. Consultation is providing the individual or other relevant persons with a bona fide opportunity to influence the decision maker.*

From the Victorian Worksafe's [guide] to employers:

> *3.2 Consultation with employees*
>
> *Employers must consult with their employees when assessing a risk to the health and safety of employees at any workplace under the employer's control.*
>
> *Consultation is also required in the selection and application of control measures. In assessing the risks posed by a pandemic, employers should consult widely using existing workplace arrangements.*
>
> *The involvement of health and safety representatives (HSRs) and the health and safety committee is central to a consultative approach to risk management.*

These rights around consultation give an important opportunity to organise and develop collective strength.

5. Getting organised

A collective response is always a stronger one. It's hard to be too prescriptive, given the enormous range of workplace situations, but a few dot points can outline a good, collective approach.

As an example, it's worth looking at the really excellent open letter to management initiated by some staff at RMIT, which NTEU Fightback has made available on the resources page of our website as *RMIT OHS Letter* (we've shared with permission, and removed names).

Apart from the various specific measures – around social distancing, access, working from home options, cleaning and quarantining of equipment and consultation, the letter is also a good example of a general approach.

- Make it collective. Don't just raise your individual concerns with management – find workmates who share your concerns, write a joint letter, and take it around for others to sign.
- Use the proper channels, but in the most collective way possible. There are all sorts of "proper channels" available to workers to start organising around health and safety – this is a great example of moving through these "proper channels" in the most collective way possible.
- The employer has an obligation to consult – let's make this more than just a box ticking exercise.
- Put it in writing. Having things in writing make it a lot harder for management to fob workers off. If management know that any negligence on their part will be documented, this increases the pressure on them to take health and safety seriously. A lot of health and safety activity in workplaces involves paper wars over what measures to put in place, who has or hasn't been consulted, whether that consultation has been taken into account, etc. Document it all.
- Insist that workers are in the best position to make a call on what health and safety measures are needed, whether what's in place is adequate, and to use their legal right to cease work if this isn't happening.
- Insist that management has meetings – both all staff, and with those most interested and active on health and safety matters. Prepare for these meetings: management is often going in with a "strategy" of ticking boxes and getting on with doing what they want. Going in with a team prepared with authoritative health and safety advice and a strategy.

For places without an existing health and safety structure, the task will be bigger and more difficult but the approach remains the same. The first task is to find a group of people you can work with to make health and safety a collective discussion, and start some small steps in the task of putting pressure on management to meet their obligations.

Management have a legal obligation to consult with you on health and safety whether or not there are official structures in place. However establishing formal structures, in accordance with our legal rights, can be a significant step forward.

6. Health and Safety Reps

The best thing in both Victorian and national health and safety legislation is that workers can elect Health and Safety Representatives. HSRs have legal powers to (after consultation) direct unsafe work to cease if there is a serious and imminent risk, and to direct unsafe work processes to be changed. HSRs are also entitled to "reasonable time" to consult with workers and perform their duties. There is also more legal protection given to HSRs compared to union delegates, which can be very useful.

The legal rights of HSRs are very important, but are not absolute. Employers can and will involve a Worksafe inspector in any dispute, who will often rule in favour of the employer.

Also note that, precisely because HSRs have legal powers, there is often a lot of foot dragging and pushback from employers, taking every opportunity to ignore the law, slow things down etc. Bosses will commonly get their favourite employees to stand for HSR positions. So, pushing for HSRs is usually the start of a serious contest over health and safety at the workplace – not an instant solution to every concern.

Despite all that, HSR structures are definitely worth having, especially when backed by a strong union membership – as on many construction sites etc. It makes a big difference when the HSR is staunch and super persistent, and involves the maximum number of workers in consultation, agitation, and the sort of "paper war" over health and safety which often results. HSRs can play a crucial role in organising workers to protect our health and safety at any time – and doubly so in the current crisis.

Workers who want to set up elect HSRs should consult the guides below. It's also very useful to involve union branch offices in this process, especially due to the likelihood of employer pushback.

The process in brief is

- Worker (or workers) notify an employer in writing that they want to establish designated work groups and elect HSRs. There's no set form. Just a simple letter is fine.
- Employers have 14 days to initiate discussions with workers about what the scope of designated work groups are. DWGs are the particular groups of workers who elect HSRs. So there might be one DWG per floor of an office building, electing two HSRs each, for instance.
- DWGs must be established by agreement. That is, the employer can't just unilaterally decide. If there is no agreement, Worksafe can be asked in to arbitrate.
- Once the DWGs are agreed, workers meet and elect HSRs. Again, there's no set form.
- Then you can form a Health and Safety Committee for your workplace, which must have at least 50% representation from workers.

Sometimes, the employer will say that there are already HSRs, and it turns out that they were established 15 years ago and some middle manager has the HSR position. A letter signed by the majority of workers in the DWG saying they want to remove an HSR and hold fresh elections legally removes the old HSR. Employers are also legally obliged to renegotiate DWGs if requested.

It's a lot of work to establish DWGs and elect HSRs, and sometimes a lot more work to get the whole setup working effectively. If you're doing it from scratch, you'll need assistance from your union branch to overcome management pushback. See below for a couple of useful resources.

Despite the hard work, the process of establishing a health and safety structure can be a useful point of organisation and agitation in many workplaces: and having HSRs then opens up new possibilities for systematic agitation and enforcement around health and safety.

7. Additional resources

General guidance on Covid-19

VTHC has a useful and up to date website for HSRs, with a large section on Covid-19, here. Remember that the OHS law in Victoria is slightly different to elsewhere in the country, but national law is based on the Victorian law. So though the clauses will be different, the principles are the same.

Safework Australia guidance for office work here.

NTEU resources

General advice here (note the information about when you can and cannot refuse to work).

Notes for HSRs here, OHS Session Presentation Slides (15 July) available in the NTEU Library

Establishing Designated Work Groups and HSRs

A useful guide from VTHC here.

Victorian Worksafe has an explainer here, and a more comprehensive guide here.

The NSW Safework guide to electing HSRs is here (brief explainer, and more detailed). Laws in NSW are identical in the nationally "harmonised" laws that apply in NSW, ACT, Qld, NT, SA and Tasmania.