



Public Consultation Summary

This summary identifies the key topics and issues raised during the public consultation process for the 2018 review of the model Work Health and Safety (WHS) laws.

Thank you to everyone who contributed a written submission or comment on the discussion forums and who attended a meeting with me. All your input is extremely valuable and I am considering it carefully for my report.

The consultation process

On 19 February 2018, I published a discussion paper which called for written submissions (136 were received) and opened a series of online discussion forums (127 comments were posted). Over eight weeks, I travelled to every capital city and two regional centres: Tamworth and Cairns. I met with safety regulators, businesses, workers, unions, industry organisations, health and safety representatives, health and safety and legal practitioners, academics and community organisations (387 people attended 81 face to face consultations). Unless otherwise requested by the authors, written contributions are publicly available on the [Safe Work Australia's Engage page](#)¹. I continue to consider everything I have heard and read through the filter of the terms of reference and my key questions: what is working?; what isn't working?; and what can we do to make it work?

Legislative framework

An overwhelming view was that the model WHS laws are working and are settling. Support for harmonisation remains strong with many calling for Western Australia and Victoria to adopt the model. There is concern about some jurisdictions making variations to the model, the confusion caused by overlapping laws and the blurring of lines between WHS, public safety and public health.

The three-tiered legislative framework incorporating the model WHS Act, the model WHS Regulations (Regulations) and the model WHS Codes of Practice (Codes) is widely supported, though there is some concern about the length and complexity of the Regulations and Codes. It is generally considered that the definitions of a 'person conducting a business or undertaking' (PCBU), 'worker' and 'workplace' are sufficiently flexible to cover emerging industries and new working arrangements. Feedback suggests a tension between the principles based approach of the model WHS laws which larger businesses value for providing the flexibility to tailor safety solutions to their specific workplaces and the consistent call from small businesses to just 'tell us what to do'.

Technical issues were highlighted in relation to specific regulations. More broadly, concerns were raised about Safe Work Method Statements, high risk work licensing, hazardous chemicals and major hazard facilities.

Most of those I consulted raised the management of psychosocial risks as a key issue. The common view is that the model WHS laws do not sufficiently focus on psychological health and that the 'how' part of ensuring the psychological health and safety of workers is not clear.

Duties of care

There was general agreement that the duties framework is working well with the most positive responses relating to the due diligence duties for officers. For big businesses, this was seen as helping to drive safety from the top of an organisation. However, for small business and government the issue of who is an officer can still be problematic. Big businesses are very supportive of the definition of 'reasonably practicable'; small businesses less so. The extent to which cost determines what is reasonably practicable was raised by both workers' and business representatives. There was a common view that greater emphasis should be placed on upstream duty holders particularly in the context of safety by design. The principles applying to duties were supported, although there was

¹ <https://engage.swa.gov.au/review-consultation>

extensive feedback that they were not being consistently applied or enforced. The question of a PCBU's 'control' over safety issues and ability to rely on expert contractors to manage them was raised by many businesses and their representatives.

Consultation, representation and participation

There were consistent messages that neither the duty of PCBUs to consult with other PCBUs holding a concurrent duty, nor the duty to consult with workers were operating as intended, were clearly understood or were being enforced.

PCBUs with 'traditional' employment arrangements generally indicated support for the Health and Safety Representative (HSR) framework. Many small businesses viewed it as impractical and unnecessarily prescriptive. Workers and their representatives reinforced the importance of the HSR framework and examples were provided of where it was working well. Equally there were examples where it was not working effectively, with disputes arising relating to HSR training and HSR rights to request assistance and to issue Provisional Improvement Notices. Workers and their representatives raised concerns with the lack of enforcement of the discrimination provisions by regulators. Both PCBUs and unions raised frustrations with the inability of inspectors to resolve issues definitively when assistance is requested under the issue resolution provisions of the model WHS Act.

The importance of right of entry for WHS purposes was emphasised by unions. Many business representatives considered these provisions worked well where they were used for genuine safety purposes, however, significant concerns about misuse were raised, mainly in the construction sector.

Compliance and enforcement

The lack of consistency in application and interpretation of the model WHS laws within and across jurisdictions was also a strong message. An authoritative regulatory voice and definitive decision making were highlighted by unions and business representatives as being essential particularly in relation to resolution of safety disputes, right of entry disputes and the enforcement of key legislative provisions. Differences of opinion emerged about the balancing of the education and enforcement functions of the regulator provided in the model WHS laws, with business representatives calling for more education and worker representatives calling for more enforcement.

Problems were identified by regulators with the mutual recognition of licenses and the ability of regulators to share information across jurisdictional boundaries.

Everyone participating in the face to face consultation said that the incident notification requirements needed clarification, with many expressing confusion around what constitutes a 'serious injury or illness' and 'dangerous incident'. The lack of a notification trigger for psychological injury and occupational diseases was criticised. Suggestions were provided for other incidents that could trigger a notification included those arising from exposure to occupational violence, direct exposure to bodily fluid and the suicide of a worker.

National Compliance and Enforcement Policy

There was significant feedback that the desired outcome of consistency of regulatory approach intended by the National Compliance and Enforcement Policy (NCEP) has not been achieved. It was suggested that many current uncertainties, confusion and concerns could be addressed by a revised NCEP. Most of those consulted suggested that there would be benefits in improving the NCEP's readability, useability and applicability particularly in relation to what PCBUs, HSRs and workers can reasonably expect to occur in specific situations, including the issuing of notices, the actions to be taken in the event of a notifiable incident occurring, requests from HSRs for assistance, how investigations will be undertaken and how stakeholders will be engaged.

Prosecutions and legal proceedings.

The current debate about the need for an industrial manslaughter offence in the model WHS Act was reflected during consultation. Business groups support the retention of the current offence and penalty regime; unions support higher penalties and the introduction of an industrial manslaughter offence. Unions also advocated for a right to prosecute and a reverse onus of proof as a means of ensuring successful prosecution outcomes. Some family advocates suggested a holistic approach which

reconsiders the package of provisions relating to offences, penalties and sentencing. Some legal academics considered that there is a disconnect between the model WHS laws and local criminal laws which is undermining the policy intentions of the model WHS laws. Examples given were reduced fines for early guilty pleas and claims of incapacity to pay and findings of guilt with no recorded conviction. Most of those consulted didn't support PCBUs accessing insurance to cover payment of WHS fines.

Enforceable undertakings were generally supported, but with improved consistency in their terms and transparency in their application. There were mixed views on whether they should be available when there has been a fatality. There were also mixed views on the merits of infringement/penalty notices: regulators generally considered them effective with some advocating for their availability for a broader range of breaches.

Next steps

All of your contributions continue to be considered as I progress towards the finalisation of my report which will be delivered to Safe Work Australia by the end of this year and to WHS Ministers early in 2019.