

Review of the *Work Health and Safety Act 2012 (SA)*

DISCUSSION PAPER

November 2016



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STATUTORY REVIEW OF THE WORK HEALTH AND SAFETY ACT 2012 (SA)

OVERVIEW

The National Context

In July 2008, the Council of Australian Governments signed the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA). The IGA sets out the tripartite collaborative process involving Commonwealth, state and territory governments, employer representatives and unions to implement model work health and safety (WHS) laws across all jurisdictions in Australia. Through this process the model WHS Act, model WHS regulations and model Codes of Practice were agreed to, together these make up the model WHS laws.

In May 2009, the former Workplace Relations Ministers' Council agreed that the model WHS laws should be reviewed at a national level at least once every five years after commencement.

Seven of the nine jurisdictions have adopted the model WHS laws. The Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory and Queensland implemented the model WHS laws on 1 January 2012, while South Australia and Tasmania implemented them on 1 January 2013.

There is a high degree of consistency in the WHS Acts of the seven implementing jurisdictions. In most key areas, there is uniformity (for example, duties, offences, penalties and sentencing options). Some local variations were permitted to reflect jurisdictional arrangements, for example, in relation to courts, but some additional variations to the model WHS laws occurred in four jurisdictions, including South Australia.

It is expected that the Commonwealth Government, with the support of state and territory ministers, will soon confirm a deferral of the first significant national review of the model WHS laws until 2018. As the model laws have not been in place for the full five years in all jurisdictions, it is foreseen that there will be insufficient data and evidence available to fully examine the implementation of the model laws.

The South Australian Context

Work-related deaths, injury and illness have a significant impact on workers, the community and businesses. The *Work Health and Safety Act 2012 (SA)* (the WHS Act (SA)), administered by SafeWork SA, provides a framework to protect the health, safety and welfare of workers and others at workplaces.

The key principles and objects of the WHS Act (SA) are consistent with long established workplace safety standards, in that they:

- establish health and safety duties, including the primary duty to protect any person from exposure to hazards and risks that arise from work;
- provide for worker representation, consultation and participation including through Health and Safety Representatives and Health and Safety Committees;

- promote the provision of advice, information, education and training in relation to work health and safety;
- encourage unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assist persons conducting a business or undertaking (PCBU) to achieve healthier and safer working environments;
- enable compliance and enforcement through SafeWork SA, the regulator; and
- provide for the creation of Regulations and Codes of Practice.

Statistically, since the introduction of the WHS Act (SA), South Australia's WHS performance has continued to improve, with consistent reductions in work-related death, injury and illness. In 2014-15 ReturnToWorkSA workers' compensation claim data demonstrates an overall 8.4 per cent reduction in work-related death injury and illness¹.

A statutory review, undertaken one year after the commencement of the Act, pursuant to section 277(1) of the WHS Act (SA), found that overall, the legislation is working as it was intended to. However, the *Report of the 2014 Review of the South Australian Work Health and Safety Act 2012* (the RSC Review), conducted by Mr Robin Stewart-Crompton, RSC Advising Pty Ltd in 2014 did present 23 suggested options that could be implemented to improve the effectiveness of South Australia's WHS legislation, including legislative and operational changes. A copy of the RSC Review is available on the SafeWork SA website: www.safework.sa.gov.au.

In response to the RSC Review, the South Australian Government has actioned a number of these suggestions, most notably, updating guidance material to further assist duty holders in understanding their WHS obligations; reviewing and improving internal processes to reduce red tape and regulatory burden; reducing the time taken for prosecutions to be initiated; promoting awareness of the option for enforceable undertakings instead of prosecutions; and increasing the threshold amount at which a construction project becomes high risk construction work from \$250,000 to \$450,000.

In addition, concerns raised in submissions to the RSC Review that SafeWork SA was not striking the right balance between providing information, education and advice on the one hand and enforcement under the legislation on the other, has been addressed through a transformation in the delivery of SafeWork SA's compliance and education services. The establishment of an Educator and Regulator, effective from 1 July 2016 creates a clear delineation between inspector and educator functions and roles, so that inspectors can focus on ensuring compliance with the laws while educators (who are not inspectors) can concentrate on providing support to businesses to help reduce workplace injuries. This approach is expected to result in further reductions in workplace injuries.

¹ It is noted that this measure lags by 12 months, meaning that the figure measured at 30 June 2015 was the true injury rate at 30 June 2014.

2016 REVIEW OF THE WORK HEALTH AND SAFETY ACT 2012 (SA)

Section 277(3) of the WHS Act (SA) provides that a second review of the operation of the Act (the SA Review) be conducted as soon as practicable after the expiry of three years from the commencement of the Act, (1 January 2016).

The national review of the model WHS laws is now likely to occur in 2018. Consequently, the SA Review will predominantly examine the operation of the South Australian provisions that differ from the model WHS laws to ensure the continued effectiveness of the nationally harmonised WHS laws in this State.

The WHS Act (SA) contains a number of variations from the model WHS laws, these include provisions that were amended or inserted through the Parliamentary process in South Australia.

The following table outlines the variations to the WHS Act (SA) as compared to the model WHS laws.

	Model WHS Act/Regulations	WHS Act (SA)
1	Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (section 17 (1), model WHS Act).	Provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (section 17(2), WHS Act).
2	Provides for prosecution exceptions for: <ul style="list-style-type: none">- volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; and (section 34 (1), model WHS Act).- unincorporated associations (although unincorporated associations may be PCBU's for the purposes of the model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty)(section 34(2), model WHS Act).	The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (section 34, WHS Act).

	Model WHS Act/Regulations	WHS Act (SA)
3	Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought (section 68 (2)(g), model WHS Act).	As per the model WHS laws a HSR can seek assistance from any 'person'. However, the WHS Act (SA) provides that 'any person' is limited to: <ul style="list-style-type: none"> - a person who works at the workplace; - a person who is involved in the management of the relevant business or undertaking; or - a consultant who has been approved as required by the legislation² (section 68(3) and (6)), WHS Act).
4	Provides that an HSR is entitled to five training days in the first year, one in the second and one in third (regulation 21, model WHS Regulations).	The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third (section 72(9), WHS Act).
5	Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering for this purpose. (section 117, model WHS Act). Prior to recent changes, the model WHS laws provided that an EPH was not required to give notice before entering a workplace. However, amendments to the model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place.(section 68 (3B), model WHS Act).	The WHS Act (SA) includes certain policies and procedures relevant to when a EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act). This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (section 117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (section 117(6)), WHS Act).

² This includes a consultant that has been approved by the Industrial Relations Consultative Council; or a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or the person conducting the business or undertaking at the workplace or the person's representative.

	Model WHS Act/Regulations	WHS Act (SA)
6	<p>Provides that for the purposes of an inquiry into a suspected contravention, an EPH may enter any workplace for the purpose of inspecting, or making copies of:</p> <ul style="list-style-type: none"> - employee records that are directly relevant to a suspected contravention; or - other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. <p>Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (section 120, model WHS Act).</p>	<p>As per the model WHS laws, an EPH can enter a workplace for the purpose of inspecting or making copies of employee records and other documents directly relevant to a suspected contravention.</p> <p>However, The WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (section 120(6), WHS Act).</p>
7	<p>The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for use immunity.</p>	<p>The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act).</p> <p>The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.</p>
8	<p>Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP (section 274(1), model WHS Act).</p> <p>However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (section 274(2), model WHS Act).</p> <p>An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (section 274(4), model WHS Act).</p>	<p>As per the model WHS laws, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP.</p> <p>However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include:</p> <ul style="list-style-type: none"> - a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3)), WHS Act); - a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (section 274(2), WHS Act); and - a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act).

YOUR FEEDBACK

SafeWork SA would like your feedback on how effectively the *Work Health and Safety Act 2012 (SA)* is operating. **We're particularly interested in seeking your views on what extent, if any, have the South Australian variations impacted on the operation of the WHS laws in the State.**

Your feedback will be valuable in ensuring that WHS laws continue to provide adequate protections for workers while meeting the needs of workplaces and those doing business in South Australia. All feedback we receive will also be used to inform the national review of the model WHS laws (likely to occur in 2018).

Submissions to the review of the *Work Health and Safety Act 2012 (SA)* are open throughout November: Tuesday, 1 November 2016 to Wednesday, 30 November 2016.

Submissions in writing are welcome by email titled **WHS Review** to webmaster.safework@sa.gov.au or by post to

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