

Consultation RIS – 2018 Review Recommendations

Submission template

Submission from The Australasian Faculty of Occupational and Environmental Medicine (AFOEM) of The Royal Australasian College of Physicians (RACP)

What is your name?

Thank you for the opportunity to provide AFOEM's feedback on the Recommendations of the 2018 Review of the Model Work Health and Safety Laws.

We note that of the six areas where the 2018 Review recommendations seek to address problems, three are within the expertise of occupational and environmental medicine physicians, as reproduced below from the consultation document (*italics added for emphasis*):

- **Legal framework** – *duty holders have difficulty navigating the three aspects of the model WHS laws (Act, Regulations and Codes of Practice), understanding which requirements are relevant to them and how to comply with those requirements, particularly in relation managing psychological risks in the workplace.*
- **Duties of care** – the principles-based approach of the model WHS laws provides flexibility, *but many duty holders are confused about how the principles apply in practice.*
- **Consultation, representation and participation** – while the model WHS Act clearly requires consultation, representation and participation, *stakeholders reported confusion and difficulty understanding these requirements in practice, particularly in relation to the current right of entry regime, health and safety representative (HSR) arrangements and training, and the WHS issue resolution process.*

We would therefore recommend to SafeWork Australia that the opinion of specialist occupational and environmental physicians, as the leading authority on occupational and environmental medicine, be sought to provide independent advice on these three aspects to stakeholders or in the case of dispute.

AFOEM has provided feedback on issues relevant to its expertise in the table below as requested.

Psychosocial risks (Recommendation 2)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

The key issue with regard to psychosocial risks is that many PCBU's, particularly small businesses, often do not understand what they are required to do to comply with the model WHS laws regarding workplace psychosocial risks amongst other risks.

AFOEM suggests that whilst there is a pressing need to address this issue, it is not clear that added regulation in this context will be particularly effective specifically in instances where the owner/manager of a business is himself or herself the source of the psychosocial risk to its employees.

Whilst there is no straightforward solution to this complex issue, AFOEM would advise SWA refers to AFOEM's material for the Health Benefits of Good Work campaign¹ to inform its recommendations in this area. In addition, AFOEM sees merit in better education through resources and codes of practice in addition to better data collection to identify problematic workplaces.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Although it is difficult to legislate, specialist occupational and environmental physicians are available to provide expert and independent advice to stakeholders on these often complex psychosocial issues.

- Is the state of knowledge on psychosocial hazards, risks and control measures widely accepted and well established? Please support your answer with evidence.

Not in our opinion. The RACP is endeavouring to improve awareness of these issues through its Health Benefits of Good Work campaign.

- Do you have suggestions for what prescriptive psychosocial regulations might look like?

Type answer here

Work Groups and HSRs in small businesses (Recommendation 7a)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
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- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

This is about simplifying processes and AFOEM does not have any concerns regarding the options proposed.

- If you are part of a business with 15 or fewer workers, are workers in that business represented by HSRs? If so, how many workgroups, HSRs and deputy HSRs are there?

Type answer here

- If you are part of business or undertaking with 15 or fewer workers, would a default position of one work group, an HSR and a deputy HSR suit your workplace? Please provide evidence of the costs and benefits of the default position at your workplace.

Type answer here

¹ Available online: <https://www.racp.edu.au/advocacy/division-faculty-and-chapter-priorities/faculty-of-occupational-environmental-medicine/health-benefits-of-good-work>

Workplace entry by HSR assistants (Recommendation 8)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

This is an industrial relations matter and AFOEM understands the interest for SWA pertains to increased compliance costs for health and safety representatives (HSRs) who need assistance. From AFOEM's perspective, it is essential that HSRs are enabled to access the best advice, which in practical terms tends to be from union representatives. We therefore support Option 2 (Work to clarify union officials may assist an HSR without a Fair Work permit).

Cancelling a Provisional Improvement Notice (Recommendation 9)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

In AFOEM members' experience, instances where inspectors cancel PINs on technical grounds without resolving the WHS issue underlying the PIN most often arise in relation to complex, expensive, difficult or otherwise 'unfixable' WHS hazards. In such complex cases, the most likely outcomes are either that the business finds a technical workaround for the PIN or that the issues result in the closure of the business.

In these instances, it is likely that workplaces and inspectors having access to better advice to solve these difficult WHS hazards (e.g. from occupational and environmental medicine physicians and other relevant experts), would be most beneficial.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
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Type answer here

Choice of HSR training course (Recommendation 10)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings? What do you consider to be the cause and extent of disagreement over HSR training?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

AFOEM supports HSRs having access to appropriate training, however, we do not have a view on how this training should be obtained in practice.

Specialist occupational and environmental physicians are available to provide expert and independent advice to stakeholders on training-related issues.

- What do you consider as the main cause of disagreements over HSR training? How often do these disagreements occur, and to what extent do they affect you, your workplace or your stakeholders?

Type answer here

Referral of disputes (Recommendation 13)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Whilst AFOEM does not have a preferred option for Recommendation 13, we support any effective measure which resolves disputes faster whilst getting the right outcome.

- If Option 2 is adopted, would you seek to refer issues that are not resolved under s 82 or 89 of the model WHS Act to a court or tribunal? Please explain why.

Type answer here

WHS entry permit holders – prior notice of entry (Recommendation 15)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent? In your experience, is the extent of the problem different across industry sectors?

Type answer here

- What practical impact, including the costs and benefits, would requiring or not requiring a WHS entry permit holder to provide prior notice of entry have on you, your organisation or your stakeholders? Do you think the impacts would be different across industry sectors? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

AFOEM sees this as mostly a political issue pertaining to the rationale for the Fair Work Act and does not have a specific view on the proposed options.

Inspectors' powers (Recommendation 17)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings outlined above?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Not relevant to AFOEM's expertise

- If Option 2 is adopted, should exercise of the power within 30-days after entry by an inspector be limited to only obtaining information that is related to the reason that inspector first entered the workplace?

Type answer here

The Category 1 offence and industrial manslaughter (Recommendation 23a & b)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

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- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

AFOEM understands from the CRIS that there have been very few successful Category 1 prosecutions under the WHS laws, in part due to difficulties associated with proving the fault element of 'recklessness' (i.e. that the accident had an element of intent). Part of the problem is that the WHS Act does not specify what 'recklessness' means at present.

Although there is currently a lack of evidence in this area, AFOEM supports Option 2 as this is likely to be the most effective option to improve accountability for the more egregious forms of preventable serious accidents.

- What do you see as the main limitations of the model WHS laws in deterring breaches of the health and safety duties?

Type answer here

- What benefits and costs are associated with Category 1 offence including two alternative fault elements? If available, please provide evidence of these costs and benefits.

Type answer here

- What do you consider the practical impacts of industrial manslaughter to be for you, your business and your stakeholders? What need, if any, would they address? Please provide evidence of how an industrial manslaughter offence would address this need.

Type answer here

Prohibit insurance for WHS fines (Recommendation 26)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

At present, there is nothing in the model WHS laws that expressly prohibits a company, its directors or employees from entering into arrangements that provide insurance or indemnity against paying penalties in relation to breaches of that law. AFOEM supports changes in this area to remedy this situation.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Type answer here

- In your experience, how common are insurance policies or arrangements that provide indemnity for breach of the WHS laws? Please support your answer with evidence.

Type answer here

- Do you consider that health and safety is affected by the availability of these arrangements? How?

Type answer here

The risk management process (Recommendation 27)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

There are tensions between the need for flexibility in the laws and certainty in what to do to manage risks: larger organisations tend to prefer flexibility whilst smaller organisations tend to prefer having requirements and processes clearly stated.

Option 2 would include the hierarchy of controls in the WHS Act. The problem we foresee with this option is that it is likely to increase costs with no real benefits.

We feel this is mostly a teaching / education issue for PCBUs and occupational and environmental medicine physicians among others clearly have a role helping these businesses ascertain how best to comply with the WHS Act.

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

Type answer here

Safe Work Method Statements (Recommendation 29a & b)

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

Type answer here

- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here

- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

AFOEM's preferred option to improve the efficacy and value of SWMS is Option 4 (implement both Recommendation 29a and 29b to add a SWMS template to the model WHS Regulations and develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS).

- Do you already have systems in place for developing customised (workplace specific) SWMS?

Type answer here

- What barriers may prevent you using an online SWMS tool in your workplace?

Type answer here

- Does your business derive an income from developing SWMS? If so, do you expect to incur a financial loss if Safe Work Australia develop an on-line interactive tool to assist in developing SWMS? Can you predict the extent of this loss?

Type answer here

Appendix A – Recommendations likely to have nil or minor impacts

- If you do not agree that one or more of recommendations in Appendix A will have minor or no impacts, please provide your assessment of the impacts for each, supported with evidence if possible.

Type answer here

- Do you have suggestions for other options to address the problems identified in the 2018 Review for recommendations in Appendix A? Please provide information or evidence on the impacts of your suggested option, if possible, including how it would improve the WHS outcomes or reduce compliance costs.

Type answer here
