

## Article Information

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## Updates to psychosocial regulations in Australia

***Following significant increases in WorkCover claims relating to mental health, state and territory governments in Australia are adopting a stricter approach to the regulation of psychosocial risks in the workplace, in an attempt to reduce this category of claim.***

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Mental health conditions are the most expensive work-related injury/illness claims, both in terms of the financial compensation paid to employees and the loss of productivity experienced by employers. According to Safe Work Australia, in 2020-21 the median compensation paid for mental health conditions was \$58,615 per serious claim compared to \$15,743 per serious claim for all injuries and diseases. In addition, mental health conditions are associated with increased loss of productivity: over the same period, the median time lost for mental health conditions was 34.2 working weeks per serious claim compared to 8.0 working weeks per serious claim for all injuries and diseases.

### **Safe Work Australia: model psychosocial regulations**

The Safe Work Australia model work health and safety regulations include regulations that specifically address psychosocial risks in the workplace (**model psychosocial regulations**). The model psychosocial regulations were added to Safe Work Australia's model regulations on 14 April 2022. The model psychosocial regulations require that employers identify reasonably foreseeable psychosocial risks and take all reasonably practicable steps to eliminate psychological risks related to:

- The design or management of work;
- The work environment;
- Plant at a workplace;
- Workplace interactions of behaviours.

In contrast to obligations with respect to physical hazards, employers in jurisdictions that have adopted the model psychosocial regulations are not required to control psychosocial hazards in accordance with a hierarchy of controls. A hierarchy of controls is a system for controlling risks in the workplace that ranks methods to protect employees from "most effective" (substituting the hazard which gives rise to the risk with something that gives rise to a lesser risk, isolating the hazard and engineering controls) to "least effective" (using information, instruction or training). If an employer is obliged to apply a hierarchy of controls in relation to certain risks, the employer would need to be able to show why it chose to use a control with lower effectiveness (such as training) instead of a more effective control (such as an engineering control).

Under the model psychosocial regulations, employers must have regard to the following matters when implementing measures to protect employees from psychosocial risks in the workplace:

- the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards;
- how the psychosocial hazards may interact or combine with each other;
- the design of work, including job demands and tasks;
- the systems of work, including how work is managed, organised and supported;
- the design and layout, and environmental conditions, of the workplace;
- workplace interactions or behaviours;
- the information, training, instruction and supervision provided to workers.

As at the date of this article, all Australian states and territories have adopted the model psychosocial regulations, except for Victoria.

### **New South Wales: Work Health and Safety Regulation 2017**

New South Wales adopted the model psychosocial regulations in October 2022.

Since then, SafeWork NSW has charged one employer for exposing two workers to psychosocial hazards, in the form of “poor organisational justice”. SafeWork NSW alleged that the employer poorly handled an investigation into the actions of the two employees and did not comply with the relevant policies, thereby exposing those employees to psychosocial hazards. Both of the employees died in the months following the incident that was the subject of the investigation. SafeWork NSW recently withdrew the charges against the employer, which means we will not have the Court’s consideration of the matter. The withdrawal of the charges by SafeWork NSW suggests that regulators are still coming to terms with how they might prosecute employers in relation to the management of psychosocial risks.

In May 2024, SafeWork NSW published its “2024-26 Psychological Health and Safety Strategy” paper. The paper noted that inspector visits relating to psychosocial risks were expected to increase by 25%, and that organisations with 200 or more workers could expect to receive a visit from an inspector, which would include a psychosocial WHS check.

### **Queensland: *Work Health and Safety Regulation 2011***

Queensland adopted the model psychosocial regulations in April 2023.

Queensland has since implemented additional regulations that impose obligations on employers that exceed those set out in the model psychosocial regulations:

- Employers must proactively identify psychosocial hazards and risks, including risks associated with sexual harassment and sex or gender-based harassment at work;
- Employers are required to prepare and implement plans to manage psychosocial risks associated with sexual harassment or sex or gender-based harassment at work.

### **Victoria: *Draft Occupational Health and Safety Amendment (Psychological Health) Regulations***

The Victorian government has confirmed that the final version of its regulations will be made by October this year and go into effect in December 2025. If the final version of the regulations is the same as the draft regulations, the regulations will impose significant obligations on employers to manage psychosocial risks in the workplace.

- What is considered a psychosocial hazard in Victoria will likely be much broader than in other states and territories. For example, the draft regulations specifically identify ‘high job demands’ as a psychosocial hazard that employers must prevent, and include the poor communication of a restructure/redundancy decision as an example of a psychosocial hazard.
- The draft regulations require employers to proactively identify, assess and control psychosocial hazards in the workplace.
- The draft regulations require that, for certain psychosocial hazards (aggression or violence, bullying, exposure to traumatic content or events, high job demand and sexual harassment), employers will have to document a prevention plan that identifies the risk, measures to control the risk, an implementation plan for the control measures and details of the consultation undertaken by the employer with employees regarding the proposed control measures.
- The draft regulations require employers to provide a written report to WorkSafe, outlining any psychosocial complaints in relation to aggression or violence, bullying, or sexual harassment received by the employer during the 6-month reporting period. The report must detail each psychosocial hazard involved in the complaint, the gender of the people involved in the complaint and the workplace relationship between the people involved in the complaint.
- In a departure from the other states and territories, the draft regulations do not remove the hierarchy of controls for managing psychosocial risks. This means that Victorian employers will have to be able to explain why they have chosen to use training as a control measure instead of engineering controls or other control measures higher up the hierarchy of controls. Further, the draft regulations state that training cannot be the primary way that employers control risks associated with psychosocial hazards.
- Many of the obligations under the draft regulations extend to independent contractors engaged by the employer and not just direct employees.

### **Key takeaways for employers**

What can employers do to prepare for the incoming psychosocial regulations?

- Employers should ensure that risk assessments are up to date, taking into consideration any psychosocial hazards in the workplace and how they can be managed or controlled.
- Employers should consult with employees and independent contractors in relation to risks associated with psychosocial hazards and before implementing any control measures to manage those psychosocial risks.

- Employers should review the Federal *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* for further guidance in relation to identifying and controlling psychosocial risks.
- Given the potential criminal liability associated with the management of psychosocial risks in the workplace and the express limitation in the Victorian regulations against using training to manage such risks, employers should consider how recruitment practices can be updated to limit the risk of hiring workers who:
  - lack the experience, skills and qualifications to perform the roles they have been hired into (because such employees may have difficulty with the demands of the job); and
  - may pose a psychosocial risk to other workers.