

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations
Work Health and Safety Act 2011

Notice of a Disallowable Instrument

Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024

The *Work Health and Safety Act 2011* (the Act) and accompanying *Work Health and Safety Regulations 2011* (the Regulations) provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on the model Work Health and Safety laws (model laws) developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

The Act provides for a framework to secure the health and safety of workers and workplaces, in part, by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

Section 274 of the Act provides that the Minister may approve codes of practice for the purposes of the Act. Section 275 of the Act provides that an approved code of practice is admissible in proceedings under the Act as evidence of whether or not a duty or obligation under the Act has been complied with. A court may have regard to the code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates and may rely on the code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

The purpose of this instrument is to approve the new *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* (the Code). The Code provides practical guidance to duty holders on meeting their obligation to manage psychosocial risks under the Act and the Regulations.

The Code supports new Part 3.2, Division 11 of the Regulations, implemented by the *Work Health and Safety Amendment (Managing Psychosocial Risk and Other Measures) Regulation 2022* (the Amendment Regulations). The Amendment Regulations provide clarity and detail for persons conducting a business or undertaking on how to meet their existing duty under the Act to manage risks to psychosocial health at work. The Amendment Regulations require that persons conducting a business or undertaking in the Commonwealth apply the ‘hierarchy of controls’ when managing psychosocial risks:

- The hierarchy of controls is a step-by-step approach to eliminating or reducing risks and it ranks risk controls from the highest level of protection and reliability through to the lowest and least reliable protection. The hierarchy of controls requires that higher order control measures are implemented first unless it is not reasonably practicable to do so.

The Amendment Regulations pertaining to psychosocial risk commenced on 1 April 2023.

In accordance with paragraph 273B(1)(d) of the Act, this instrument is a legislative instrument within the meaning of the *Legislation Act 2003* (Legislation Act).

Consultation

Prior to approving a code of practice, the Minister must be satisfied that the Code has been developed by a process that involved consultation with the Commonwealth, State and Territory governments, unions, and employer organisations (Act subsection 274(2)).

The Code substantially adopts the model *Code of Practice: Managing psychosocial hazards at work* (model Code) which was developed through Safe Work Australia's tripartite consultation process. Safe Work Australia is comprised of representatives from the Commonwealth, each State and Territory, the Australian Council of Trade Unions, Australian Industry Group and the Australian Chamber of Commerce and Industry.

To ensure the Code is fit for the nature of the Commonwealth jurisdiction, including the requirement to use the hierarchy of controls when managing psychosocial hazards, targeted departures from the model Code were necessary. The Commonwealth conducted further consultation to develop these amendments, including:

- Consulting with the Australian Capital Territory and Queensland jurisdictions who are similarly applying the hierarchy of controls to psychosocial risk management.
- Consulting on departures from the model Code with Commonwealth stakeholders including the Australian Council of Trade Unions, Australian Industry Group, the Australian Chamber of Commerce and Industry, Comcare, the Department of the Prime Minister and Cabinet, the Australian Public Service Commission, the Attorney-Generals' Department and the National Indigenous Australians Agency and incorporating feedback as appropriate.

Incorporated documents

Subsection 274(3) of the Act provides that approved codes of practice made under the Act may apply, adopt, or incorporate material from other documents in force at a particular point-in-time or from time to time. This displaces the presumption under subsection 14(2) of the Legislation Act in relation to documents incorporated from time to time. The Code references a number of other documents to provide guidance to readers about where to find additional information on particular hazards and risks. These include other codes of practice, and guidance material developed by Safe Work Australia.

Codes of Practice

The Code references a number of other codes of practice, which under paragraph 273B(1)(d) of the Act are legislative instruments and available on the Federal Register of Legislation and on the website of the Commonwealth WHS regulator, Comcare at <https://www.comcare.gov.au/scheme-legislation/whs-act/codes-of-practice>. As legislative instruments, these codes of practice are incorporated from time-to-time.

Safe Work Australia Guidance Materials

The Code also refers to a number of guides published by Safe Work Australia. These documents provide detailed practical guidance to duty holders about how to manage specific hazards and risks. These materials are subject to ongoing review, are incorporated from time-to-time, and are available on the Safe Work Australia website at <https://www.safeworkaustralia.gov.au/resources-publications/guidance-materials>.

Sunsetting

The *Legislation (Exemptions and Other Matters) Regulation 2015* at section 12, item 68, provides that an instrument made under subsection 274(1) of the Act is a legislative instrument that is not subject to sunsetting. The Code is a legislative instrument made under subsection 274(1) of the Act and is therefore exempt.

Commonwealth approved codes of practice are exempt from sunsetting because they form part of an intergovernmental scheme for a national framework to secure the health and safety of workers and workplaces. The Commonwealth and all states and territories formally committed to the harmonised system of national work health and safety laws by signing the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. As such, the codes form part of an intergovernmental scheme and it is appropriate to exempt them from sunsetting.

The Code applies the model Code with targeted amendments to appropriately reflect the Commonwealth jurisdiction. The model Code was developed through the tripartite Safe Work Australia process.

Regulation Impact Statement and other matters

The Office of Impact Analysis advised that a Regulation Impact Statement was not required to implement the Code in the Commonwealth jurisdiction (OBPR ID: OBPR22-03708).

A Statement of Compatibility with Human Rights has been completed for this Legislative Instrument, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the instrument is compatible with human rights. A copy of the Statement is attached.

In accordance with the Act, the Minister is required to notify the approval of the Code in newspapers. Copies of the Code (and applied, adopted, and incorporated documents) are available for inspection, without charge, at Comcare offices during normal business hours. Copies are also published on the Comcare website www.comcare.gov.au.

The Code commences on the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument, to which this Human Rights Compatibility Statement relates, approves the *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* (the Code). The Code provides practical guidance to duty holders on meeting their obligations under the *Work Health and Safety Act 2011* (the Act) and the *Work Health and Safety Regulations 2011* (the Regulations).

The Act and accompanying Regulations provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on the model Work Health and Safety laws (model laws) developed by Safe Work Australia under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

Section 274 of the Act provides that the Minister may approve codes of practice for the purposes of the Act. Section 275 of the Act provides that an approved code of practice is admissible in proceedings under the Act as evidence of whether or not a duty or obligation under the Act has been complied with. A court may have regard to a code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates and may rely on a code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

The Code has been developed to support the implementation of new regulations on managing psychosocial risks in the Regulations, provided by the *Work Health and Safety Amendment (Managing Psychosocial Risk and Other Measures) Regulations 2022* (the Amendment Regulations).

Human rights implications

This Disallowable Legislative Instrument engages the following human rights:

- the right to just and favourable conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and
- the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Right to just and favourable conditions of work

Article 7 of the ICESCR provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular...[s]afe and healthy working conditions.’

The prevention and management of workplace hazards and risks is a fundamental aspect of the right to just and favourable conditions of work. Australia complies with its obligation under Article 7 of the ICESCR through its system of Commonwealth, state and territory work health and safety laws.

The Act provides the Commonwealth framework to secure the health, safety and welfare of workers engaged in businesses and undertakings conducted by the Commonwealth, public authorities, and non-Commonwealth licensees.

In 2018, an Independent Review of the model Work Health and Safety laws found that psychological health (although covered by the law) was neglected in the Australian model work health and safety framework and that businesses and undertakings were uncertain about how to best address

psychological health in their workplaces. To address this finding, the Commonwealth has made the Amendment Regulations which demonstrate how to identify workplace psychosocial risks associated with psychological injury and the appropriate control measures to utilise to manage those risks.

The Code promotes the right to safe and healthy working conditions by providing practical guidance for duty holders on how to meet their obligations to manage psychosocial hazards under the Act and Regulations. The Code provides practical guidance to persons conducting a business or undertaking in the Commonwealth jurisdiction on how to:

- identify psychosocial hazards
- assess psychosocial risk
- implement appropriate control measures for psychosocial hazards
- maintain and review control measures for psychosocial hazards
- respond to reports, complaints, or incidents regarding psychosocial hazards, and
- conduct investigations into reports of incidents involving psychosocial hazards.

The Code is intended to provide guidance to persons conducting a business or undertaking on how to meet their work health and safety duties and effectively ensure a psychologically safe environment. This will operate to enhance the right to safe and healthy working conditions by ensuring that psychological health is prioritised and managed to the same standard as physical health.

Right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, and correspondence. This includes the respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person's reputation.

The Code at Part 3.2 provides guidance to persons conducting a business or undertaking on how to handle and respond to reports, complaints, or incidents regarding psychosocial hazards. This includes keeping records of reports, complaints or incidents relating to psychosocial hazards. Information regarding psychosocial hazards could be personal information or sensitive personal information under the *Privacy Act 1988* (Privacy Act).

To the extent that this guidance may limit the right to privacy, it would be a permissible limitation. There are a range of protections which apply to the information once it is received:

- The Commonwealth WHS jurisdiction is unique in that it applies to the Commonwealth, public authorities, and non-Commonwealth licensees (large companies). These entities would be subject to the Privacy Act. There may be scope for contractors to be provided information where the Commonwealth entity and the contractor are both responsible for a worker's health monitoring. Whether the Privacy Act applies would be a question of fact.
- Information obtained by Comcare in performing functions under the Act is subject to strict confidentiality provisions (section 271). Information collected by Comcare that is personal information is also subject to the requirements of the Privacy Act which governs its collection, use, disclosure, storage, and disposal.

The guidance in the Code is reasonable and proportionate to the extent that it seeks to ensure that reports and complaints about psychosocial hazards are addressed seriously and confidentially. Recording information on psychosocial hazards is reasonable, necessary, and proportionate to achieving the legitimate object of maintaining safe and healthy working conditions, as described in Article 7 of the ICESCR above.

Conclusion

This Legislative Instrument is compatible with human rights because it promotes the right to safe and healthy working conditions by providing practical guidance to persons conducting businesses and undertakings on how to manage psychosocial hazards at work. To the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

Minister for Employment and Workplace Relations, Senator the Hon Murray Watt