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MANAGING SERIOUS INJURIES AND FATALITIES

A Safety Guide

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INTRODUCTION

Sometimes bad things happen. People are injured or die in the workplace and no one knows what to do.

This Safety Guide will help you to manage any serious injuries and fatalities that may occur in your workplace. In the following chapters, we explain:

1. the general duties of organisations and company officers to provide a healthy and safe workplace;
2. what to do when a serious injury or death occurs; and
3. what to do in the aftermath.

Always feel free to call us on +61 3 8615 9915 should you need immediate assistance.

GENERAL DUTIES TO ENSURE A HEALTHY AND SAFE WORKPLACE

THE HISTORY OF HEALTH AND SAFETY LAW

Modern health and safety law has existed since the 1970s and is largely contained in statute. In Australia, our health and safety law is based on United Kingdom law which stems from “*The Robens Report*” of 1972. This Report set out a general philosophy and framework for health and safety law that has been widely adopted throughout the world.

Despite this common background, health and safety law differs across the Australian jurisdictions and New Zealand. Moves to unify the law have only been partially successful. Where relevant, the differences between each Australian jurisdiction will be highlighted in this Handbook.

Prior to modern health and safety legislation, workplace safety obligations were derived from general principles of negligence that were found in the common law developed by the Courts.

At common law:

- employers are obliged to take reasonable care to prevent foreseeable injury;
- employees must exercise reasonable care to prevent injury to themselves and others;
- employees must be fit to perform the inherent (or ‘key’) requirements of their position; and
- employees must always act honestly and in the best interests of the organisation.

These common law obligations exist alongside modern health and safety law. For example, an employee may have a common law right to pursue personal injury damages whilst the employer is simultaneously being prosecuted for breaching its statutory duty to provide a safe working environment.

GENERAL DUTIES UNDER HEALTH AND SAFETY LAW

The Robens Report recognised that *“the most important single reason for accidents at work is apathy”*. Health and safety law addresses this apathy by imposing ‘general duties’ on various duty holders (both inside and outside the workplace) and penalties for breaching those duties. This reflects the philosophy that workplace health and safety is a shared responsibility. In other words, each duty holder may be independently liable for a health and safety breach which means that several duty holders may be liable for the same incident without there being a reduction in individual penalties. Increasingly, health and safety law is being utilised to punish the individuals within an organisation who fail to meet their duties (which may include imprisonment in serious cases). This is a growing trend throughout the world and is expected to become commonplace within Australia and New Zealand in years to come.

The general duties under health and safety law operate continuously and must be complied with at all times by the relevant duty holders which include:

- individual employees;
- self-employed persons;
- the employer (that is, the organisation);
- the officers of a company;
- third parties present at the employer’s site, such as contractors and volunteers; and
- other parties (for example, those involved in the design, manufacture or supply of plant, substances or structures).

The specific requirements of some of these duty holders are further explained on the following pages.

IMPORTANT!

Breaching your health and safety duties can land you in prison.

Employees

While at work, an employee must take reasonable care for the health and safety of themselves and others who may be adversely affected by their acts or omissions. 'Reasonable care' calls for a comparison between the employee's behaviour and the hypothetical behaviour of a reasonable person in all of the circumstances who has the same knowledge as the employee (that is, a competent employee doing their job competently).

Specifically, employees have a duty to:

- not injure themselves;
- not injure others;
- follow all lawful and reasonable directions of their employer (remember- policies and procedures operate as lawful and reasonable directions); and
- disclose any relevant health issues that affect their capacity to undertake the inherent requirements of their work safely.

CASE EXAMPLE

In *R v Tormey*¹, the manager of a factory attempted to install a 180 kg unit in the ceiling of the factory. The manager disregarded professional advice that the unit should be installed by a crane and instead asked five employees to manually install it. The ceiling was unable to support their weight, causing a collapse that killed one employee and seriously injured another. The manager was found to have breached his duty not to injure other employees and was fined \$3,000.

Note: this case was decided in 1995 and a similar case heard today would likely attract more severe punishment.

IMPORTANT!

ALL employees have duties to protect other employees from harm. This includes supervisors and managers at every level.

¹ Unreported, County Court of Victoria, Judge Morrow (5 September 1995).

Offence of reckless endangerment

In all jurisdictions except Western Australia, modern health and safety legislation has lowered the threshold for crimes such as manslaughter by creating the offence of ‘reckless endangerment’ which is specific to the workplace. Under this offence, any person (including a manager, supervisor or employee) who foresees the probable consequences of their actions in the workplace, being serious injury or death, but is indifferent as to whether those consequences may occur, can face up to five years of imprisonment. A similar offence of ‘gross negligence’ exists in Western Australia which has a maximum jail term of two years.

Employers

Employers must do all that is reasonably practicable to provide employees with a safe place and system of work that is without risks to health. What is ‘reasonably practicable’ depends on the circumstances and is influenced by the likelihood of the hazard or risk occurring, the degree of harm that might result from the hazard or risk, what the employer knows or ought reasonably to know about the hazard or risk and any ways of eliminating or reducing it, the availability and suitability of ways to eliminate or minimise the hazard or risk, and the cost of doing so.

CASE EXAMPLE

In *Orbit Drilling*², an employee who had been working with the company for just over a week was told to drive a truck down a steep slope. The truck was known to have defective brakes and the employee was not given sufficient training on how to drive it. The truck rolled and the employee was killed. The supervisor and the company were charged with reckless endangerment. The supervisor was sentenced to 20 months jail (wholly suspended) and the company was fined \$750,000 (at the time nearly 75% of the maximum penalty). The Managing Director (an officer) was also fined \$120,000.

² *Orbit Drilling Pty Ltd v Queen* [2012] VSCA 82.

Employers - *continued*

The specific duties held by employers are to:

- provide employees with a safe working environment that is without risks to health (which includes providing a safe system of work);
- monitor the health of employees and conditions at the workplace; and
- ensure that persons other than employees are not exposed to risks to their health or safety arising from the conduct of the employer's business.

To meet the standard required to provide a safe 'system' of work, employers must:

- develop a safety plan;
- implement the safety plan by creating a safety system that responds to that plan (this includes preparing the documentation necessary to control all identified risks, such as policies and procedures);
- provide training on the safety

system and ensure that all employees are competent;

- provide trained supervisors to oversee the performance of work, including enforcing compliance with the safety system;
- monitor the safety system; and
- report to the board (or the equivalent) on the safety system.

Failure to have in place and do any one of these things could constitute grounds for prosecution in the event of a serious injury or fatality in the workplace.

An employer's duties are derivative. This means that the knowledge of supervisors and other employees will be imputed to the organisation (and therefore their wrongful actions or inactions will be treated as the organisation's actions or inactions) except where it can be proven that:

- the safety system of the organisation has integrity; and
- the supervisor or other employee acted unreasonably in breach of the system.

CASE EXAMPLE

In Elliot Engineering Pty Ltd³, an employee was fatally crushed by a steel panel inside a shipping container. At trial, the organisation (a steel fabricator) was found to have breached its duty to provide a safe place of work because it had failed to provide instruction, training or adequate supervision to the employee. The organisation was fined \$400,000.

³ Unreported, County Court (2014).

Company Officers

Throughout Australia and New Zealand, company officers may be personally liable where the company has been found to be in breach of its health and safety duties. However, an officer will not be liable if they can show that they exercised 'due diligence'.

An 'officer' is a person who exercises control over the organisation, or a substantial part of the organisation⁴. Officer roles include:

- the Chief Executive Officer;
- the Chief Financial Officer;
- company directors;
- the company secretary; and
- senior operational managers.

'Due diligence' means that the officers of an organisation must:

- keep up-to-date with health and safety matters relating to their organisation;

- understand the organisation's operations and associated risks;
- ensure that appropriate resources, including money, are allocated to safety measures;
- develop risk management systems; and
- implement those systems.

Modern corporations law also incentivises officers to proactively address workplace safety. For example, under the *Corporations Act 2001* (Cth), duties are imposed on officers to:

- act in good faith and the best interests of the company; and
- exercise reasonable care and diligence⁵.

⁴Section 9, *Corporations Act 2001* (Cth).

⁵Section 180, *Corporations Act 2001* (Cth).

PENALTIES FOR BREACH OF HEALTH AND SAFETY DUTIES

The following table sets out the maximum penalties that can be imposed on an individual or organisation for breaching their health and safety duties.

Jurisdiction	Employee	Employer	Officer
VIC	Failing to take reasonable care for safety of self and others: 1,800 penalty units	Breach of duty to provide a safe place of work: 9,000 penalty units	Breach of officers duties: 1,800 penalty units
	Reckless endangerment: 5 years imprisonment and/or 1,800 penalty units	Reckless endangerment: 9,000 penalty units⁶	Reckless endangerment: 5 years imprisonment and/or 1,800 penalty units
ACT NSW NT QLD SA TAS	Failing to take reasonable care for safety of self and others (<i>category 3</i>): \$50,000	Failing to provide a safe place of work (<i>category 3</i>): \$500,000	Failing to take reasonable care (<i>category 3</i>): \$100,000
	Failing to take reasonable care exposing another to serious risk (<i>category 2</i>): \$150,000	Failing to provide a safe place of work exposing another to serious risk (<i>category 2</i>): \$1,500,000	Failing to take reasonable care exposing another to serious risk (<i>category 2</i>): \$300,000
	Reckless endangerment (<i>category 1</i>): \$300,000 and/or 5 years imprisonment	Reckless endangerment (<i>category 1</i>): \$3,000,000	Reckless endangerment (<i>category 1</i>): \$600,000 and/or 5 years imprisonment
NZ	Failing to take reasonable care for safety of self and others (<i>level 2</i>): \$10,000 \$12,500 for subsequent offences	Failing to provide a safe place of work (<i>level 2</i>): \$200,000 \$250,000 for subsequent offences	Failing to provide a safe place of work (<i>level 2</i>): \$100,000 \$125,000 for subsequent offences
	Failing to take reasonable care causing death or serious harm (<i>level 3</i>): \$20,000 \$25,000 for subsequent offences	Failing to provide a safe place of work causing death or serious injury (<i>level 3</i>): \$400,000 \$500,000 for subsequent offences	Failing to provide a safe place of work causing death or serious injury (<i>level 3</i>): \$400,000 / \$500,000 for subsequent offences
	Acting with gross negligence causing death or serious injury (<i>level 4</i>): \$25,000 \$31,500 for subsequent offences	Acting with gross negligence causing death or serious injury (<i>level 4</i>): \$500,000 \$625,000 for subsequent offences	Acting with gross negligence causing death or serious injury (<i>level 4</i>): \$250,000 and/or 2 years imprisonment \$312,500 and/or 2 years imprisonment for subsequent offences
WA			

⁶ As at the date of publication, the Victorian Lower House passed the *Treasury and Finance Legislation Amendment Bill 2016*. The effect of the Bill is to increase the maximum penalty for 'reckless endangerment' under section 32 of the *Occupational Health and Safety Act (Vic)* to 20,000 penalty units.



**WHAT TO
DO WHEN A
SERIOUS INJURY
OR FATALITY
OCCURS IN THE
WORKPLACE**

In the event of an incident in the workplace, particularly incidents resulting in serious injury or death, the first few hours following the incident are critical for the organisation and its management. It is important to remember that the risk of prosecution following a serious injury or death in the workplace is real. Following the procedure in this chapter, including engaging a lawyer to gain 'legal professional privilege' (discussed further below), can significantly minimise the risk of prosecution or, if prosecution does occur, reduce the potential penalties imposed.

EMERGENCY PLANNING – BEFORE AN INCIDENT HAS OCCURRED

The procedure set out in this chapter can only succeed if the organisation has an emergency plan in place. Remember, a safe system of work involves training and implementation of the organisation's safety plan. Emergencies, such as serious safety incidents, are foreseeable, so there must be a sensible and accessible process in place for responding to them.

Your emergency plan should outline the steps to be taken in the event of a workplace incident and should include the appointment of a person

as the primary contact between the organisation and affected parties. In particular, one person should be appointed to be the primary contact for:

- the injured person and their family;
- others who witnessed or have otherwise been affected by the incident and who may need support; and
- the health and safety regulator (for example, WorkSafe Victoria or WorkCover NSW).

PROCEDURE

– AFTER AN INCIDENT OCCURS

After a workplace incident occurs, the actions set out in the table below should be taken. Where there is more than one action item listed at a particular stage, each action should be taken at the same time (or as close to the same time as possible).

Stage	Action
1	Assist any injured person involved in the incident and provide immediate first aid
	Take any essential action to make the site of the incident safe or to prevent a further incident (but it must not otherwise be disturbed)
2	Secure and isolate the site of the incident and introduce interim control measures until an inspector of the regulator arrives at the site or such other time as directed by them
3	Engage a lawyer
4	Determine if the incident is a 'notifiable incident' under the relevant health and safety legislation
5	If a notifiable incident has occurred, notify the regulator in accordance with the requirements of the relevant health and safety legislation.
6	Assist the regulator with its investigation and control the flow of information

Stage 1

ASSIST ANY INJURED PERSON

You must immediately assist any injured person involved in the incident. Any person skilled in first aid should be called to the scene and the injured person taken to a hospital or medical centre if necessary. If the injured person requires immediate treatment as an in-patient in a hospital, the incident will become 'notifiable' (see the table on the following page for more information).

TAKE ANY ESSENTIAL ACTION TO MAKE THE SITE SAFE OR TO PREVENT A FURTHER INCIDENT

You must immediately take any essential action to ensure the site is safe or to prevent a further incident (**but it must not otherwise be disturbed**). This is because the duty to provide a safe workplace continues during and after an emergency. Remember, it is important to avoid injury to another employee who is trying to help the injured person.

Stage 2

SECURE AND ISOLATE THE SITE OF THE INCIDENT AND INTRODUCE INTERIM CONTROL MEASURES

You should evacuate the site, prevent access to it and implement any necessary interim control measures until an inspector of the regulator arrives. Remember, it is an offence under health and safety law for any person to disturb the site of an incident before an inspector arrives or such other time as directed by them.

Stage 3

ENGAGE A LAWYER

If a workplace death or serious injury has occurred, you should obtain legal advice immediately (**this should be done prior to notifying the regulator**).

A lawyer will assist by:

- providing immediate advice regarding whether the regulator must be notified of the incident;
- providing advice regarding potential liability of individuals and the organisation;
- ensuring legal professional privilege will protect certain communications, the organisation and individuals;
- engaging a health and safety expert to conduct an investigation of the incident under legal professional privilege and secure the site to reduce the risk of a prohibition or improvement notice being issued when the regulator attends; and
- helping the organisation avoid prosecution and minimising liability through the development of a mitigation strategy.

Stage 4

DETERMINE IF THE INCIDENT IS A 'NOTIFIABLE INCIDENT'

Throughout Australia and New Zealand, the relevant health and safety regulator must be notified of notifiable incidents in accordance with the requirements of the applicable legislation. 'Notifiable incidents' fall into two categories:

- incidents that cause a fatality or serious injury (in some jurisdictions, this includes the contraction of an industrial disease or infection); and
- dangerous incidents that create an immediate risk to a person's health or safety (for example, the fall from a height of any object or an explosion).

The table on the following page summarises the different definitions of 'notifiable incident' across the jurisdictions.

IMPORTANT!

Whether an incident is a 'notifiable incident' is a question of law, not fact. Don't notify the regulator without immediately seeking legal advice first!

Jurisdiction	Notifiable incidents
<p>VIC (Occupational Health and Safety Act 2004)</p>	<p>An incident that results in</p> <ul style="list-style-type: none"> a. the death of a person; b. a person requiring medical treatment within 48 hours of exposure to a substance; c. a person requiring immediate treatment as an in-patient in a hospital; or d. a person requiring immediate medical treatment for: <ul style="list-style-type: none"> i. the amputation of any part of his or her body; ii. a serious head injury; iii. a serious eye injury; iv. the separation of his or her skin from an underlying tissue (such as de-gloving or scalping); v. electric shock; vi. a spinal injury; vii. the loss of a bodily function; viii. serious lacerations; or e. any other injury to a person or other consequence prescribed by the regulations. <p>An incident that exposes a person in the immediate vicinity to an immediate risk to the person's health or safety through:</p> <ul style="list-style-type: none"> a. the collapse, overturning, failure or malfunction of, or damage to, any plant that the regulations prescribe must not be used unless the plant is licensed or registered; b. the collapse or failure of an excavation or of any shoring supporting an excavation; c. the collapse or partial collapse of all or part of a building or structure; d. an implosion, explosion or fire; e. the escape, spillage or leakage of any substance including dangerous goods (within the meaning of the Dangerous Goods Act 1985); f. the fall or release from a height of any plant, substance or object; or g. in relation to a mine: <ul style="list-style-type: none"> i. the overturning or collapse of any plant; ii. the inrush of water, mud or gas; iii. the interruption of the main system of ventilation; or h. any other event or circumstances prescribed by the regulations.

Jurisdiction	Notifiable incidents
ACT NSW NT QLD SA TAS <i>(Work Health and Safety Act)</i>	<p>An incident that results in:</p> <ol style="list-style-type: none"> a. the death of a person; b. a serious injury or illness of a person; or c. a dangerous incident. <p>“Serious injury or illness of a person” means an injury or illness requiring the person to have:</p> <ol style="list-style-type: none"> a. immediate treatment as an in-patient in a hospital; b. immediate treatment for: <ol style="list-style-type: none"> i. the amputation of any part of his or her body; ii. a serious head injury; iii. a serious eye injury; iv. a serious burn; v. the separation of his or her skin from an underlying tissue (such as degloving or scalping); vi. a spinal injury; vii. the loss of a bodily function; viii. serious lacerations; or c. medical treatment within 48 hours of exposure to a substance- and includes any other injury or illness prescribed by the regulations but does not include an injury or illness of a prescribed kind. <p>A “dangerous incident” means an incident in relation to a workplace that exposes a worker or any other person to a serious risk to a person’s health or safety emanating from an immediate or imminent exposure to:</p> <ol style="list-style-type: none"> a. an uncontrolled escape, spillage or leakage of a substance; b. an uncontrolled implosion, explosion or fire; c. an uncontrolled escape of gas or steam; d. an uncontrolled escape of a pressurised substance; e. electric shock; f. the fall or release from a height of any plant, substance or thing; g. the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with the regulations; h. the collapse or partial collapse of a structure; i. the collapse or failure of an excavation or of any shoring supporting an excavation; j. the inrush of water, mud or gas in workings, in an underground excavation or tunnel; k. the interruption of the main system of ventilation in an underground excavation or tunnel; or l. any other event prescribed by the regulations- but does not include an incident of a prescribed kind.

Jurisdiction	Notifiable incidents						
<p>WA <i>(Occupational Safety and Health Act 1984 and Occupational Safety and Health Regulations 1996)</i></p>	<p>Under the Act, the duty to notify arises when, at a workplace, or at residential premises to which section 23G(2) applies, a person incurs an <u>injury</u>, or is affected by a <u>disease</u>, that results in the death of the employee or is of the kind that is prescribed in the regulations.</p> <p>Under the Regulations, the kinds of 'injury' incurred by an employee to be notified by an employer are:</p> <ol style="list-style-type: none"> a. a fracture of the skull, spine or pelvis; b. a fracture of any bone: <ol style="list-style-type: none"> i. in the arm, other than in the wrists or hand; ii. in the leg, other than a bone in the ankle or foot; c. an amputation of an arm, a hand, finger, finger joint, leg, foot, toe or toe joint; d. the loss of sight of an eye; e. any injury other than an injury of a kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred. <p>Under the Regulations, the kinds of 'disease' affecting an employee to be notified by an employer are the diseases set out in column 1 of the following table that have been contracted in the course of the kind of work set out in column 2:</p> <table border="1" data-bbox="255 751 994 1050"> <thead> <tr> <th data-bbox="255 751 527 788">Disease</th> <th data-bbox="527 751 994 788">Work</th> </tr> </thead> <tbody> <tr> <td data-bbox="255 788 527 919"> Infectious diseases: - Tuberculosis - Viral hepatitis - Legionnaires' disease - HIV </td> <td data-bbox="527 788 994 919"> Work involving exposure to human blood products, body secretions, excretions or other material which may be a source of infection </td> </tr> <tr> <td data-bbox="255 919 527 1050"> Occupational zoonoses: - Q fever - Anthrax - Leptospiroses - Brucellosis </td> <td data-bbox="527 919 994 1050"> Work involving the handling of or contact with animals, animal hides, skins, wool, hair, carcasses or animal waste products </td> </tr> </tbody> </table>	Disease	Work	Infectious diseases: - Tuberculosis - Viral hepatitis - Legionnaires' disease - HIV	Work involving exposure to human blood products, body secretions, excretions or other material which may be a source of infection	Occupational zoonoses: - Q fever - Anthrax - Leptospiroses - Brucellosis	Work involving the handling of or contact with animals, animal hides, skins, wool, hair, carcasses or animal waste products
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Infectious diseases: - Tuberculosis - Viral hepatitis - Legionnaires' disease - HIV	Work involving exposure to human blood products, body secretions, excretions or other material which may be a source of infection						
Occupational zoonoses: - Q fever - Anthrax - Leptospiroses - Brucellosis	Work involving the handling of or contact with animals, animal hides, skins, wool, hair, carcasses or animal waste products						

Jurisdiction	Notifiable incidents
<p>NZ <i>(Health and Safety at Work Act 2016)</i></p>	<p>A notifiable injury or illness, in relation to a person, means:</p> <ol style="list-style-type: none"> a. any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid): <ol style="list-style-type: none"> i. the amputation of any part of his or her body; ii. a serious head injury; iii. a serious eye injury; iv. a serious burn; v. the separation of his or her skin from an underlying tissue (such as degloving or scalping); vi. a spinal injury; vii. the loss of a bodily function; viii. serious lacerations; b. an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment; c. an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance; d. any serious infection (including occupational zoonoses) to which the carrying out of work is a significant contributing factor, including any infection that is attributable to carrying out work: <ol style="list-style-type: none"> i. with micro-organisms; ii. that involves providing treatment or care to a person; iii. that involves contact with human blood or bodily substances; iv. that involves handling or contact with animals, animal hides, animal skins, animal wool or hair, animal carcasses, or animal waste products; v. that involves handling or contact with fish or marine mammals; OR e. any other injury or illness declared by regulations to be a notifiable injury or illness for the purposes of this section. <p>A notifiable incident means an unplanned or uncontrolled incident in relation to a workplace that exposes a worker or any other person to a serious risk to that person's health or safety arising from an immediate or imminent exposure to:</p> <ol style="list-style-type: none"> a. an escape, a spillage, or a leakage of a substance; b. an implosion, explosion, or fire; c. an escape of gas or steam; d. an escape of a pressurised substance; e. an electric shock; f. the fall or release from a height of any plant, substance, or thing; g. the collapse, overturning, failure, or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with regulations; h. the collapse or partial collapse of a structure; i. the collapse or failure of an excavation or any shoring supporting an excavation; j. the inrush of water, mud, or gas in workings in an underground excavation or tunnel; k. the interruption of the main system of ventilation in an underground excavation or tunnel; l. a collision between 2 vessels, a vessel capsize, or the inrush of water into a vessel; or m. any other incident declared by regulations to be a notifiable incident for the purposes of this section.

Stage 5

IF A NOTIFIABLE INCIDENT HAS OCCURRED, NOTIFY THE REGULATOR AND CALL AN AMBULANCE, THE FIRE BRIGADE AND/OR THE POLICE

In all jurisdictions, organisations are required to verbally notify the relevant regulator as soon as becoming aware that a notifiable incident has occurred. As mentioned above, you should immediately obtain advice from a lawyer about whether the incident is notifiable under the relevant health and safety legislation before notifying the regulator. The lawyer can also assist with preparing the contents of the notification to avoid including any unnecessary triggers for the regulator.

Organisations are also usually required to provide written notification to the regulator by completing and submitting the prescribed form.

Where necessary, an ambulance, the fire brigade and/or the police must be called. Remember, the regulator will be notified about the incident by the ambulance and the police/coroner attending the site. However, the organisation still has an obligation to notify the regulator too as outlined above.

Stage 6

ASSIST THE REGULATOR WITH ITS INVESTIGATION AND CONTROL THE FLOW OF INFORMATION

Immediately following a notifiable incident in the workplace, you should appoint an individual at the organisation to be the primary contact for:

- the injured person and/or their family and friends;
- other employees; and
- the regulator.

This appointment should ideally be made pursuant to a pre-existing emergency plan (see the “Emergency Planning” section). The primary contact does not need to be someone with an in-depth understanding of what occurred. However, they should be a leader within the organisation who has authority to speak on behalf of the organisation.

a. Interactions with the injured person and/or their family and friends

Despite what some people think, the best approach following a serious injury or fatality in the workplace is to provide genuine support and

IMPORTANT!

In most jurisdictions, you must keep a copy of the written notification to the regulator (or a ‘record of each notifiable incident’ in Workplace Health and Safety Act jurisdictions) for at least five years otherwise there are significant penalties.

Stage 6 - continued

maintain constant communications with the affected people (this includes the injured person and, if relevant, their family and friends). Failing to share information may result in those who are affected turning to other sources for information which may be inaccurate, speculative and not in the best interests of the organisation. This could include turning to the regulator or unions to seek redress against the organisation.

In addition to providing updates to the affected people, support should be freely offered and may include:

- regular phone conversations to offer assistance and inquire if there is anything that is needed by the affected persons;
- visits by management to the hospital or home of the injured employee and their family (unless refused);
- offering professional psychological, counselling or other related services;
- providing taxi fares for the injured employee and family to get to and from the workplace and any medical appointments;
- monitoring the mood and mental health of the affected person and their family; and
- facilitating communications between the affected family and other employees.

b. Interactions with other employees

Support should also be provided to all other employees. Friends of the injured person and witnesses to the incident may be in shock. It is therefore important to ensure that those who are most affected by the incident (mentally and emotionally) have friends and family who can support them. The organisation should also offer professional psychological support to these employees.

As mentioned above, part of the primary contact's role is to provide sufficient information about the incident and the injured person to all other employees. This is important because the organisation needs to maintain its status as the primary source of information and demonstrate that it is genuinely willing to communicate.

IMPORTANT!

'Health information' about a person is private information requiring the consent of the injured person and/or their family. Make sure you have their informed consent before sharing any health-related information.

Stage 6 - continued

However, the information that is shared should first be negotiated with the injured person or their family (where possible) and their consent must be obtained before disclosing any 'health information'. If the organisation fails to do this, the employees will inundate the injured person or their family with questions which may impact their recovery and lead to inaccurate accounts being spread throughout the workplace.

Remember, if the organisation is seen as stonewalling or ignoring its employees, they will turn to other sources for information. These sources may include the injured person and their family, other witnesses, the regulator and possibly unions. Decentralised communications of this kind are often inaccurate and can lead to damaging gossip directed at the organisation following a serious incident.

c. Interactions with the regulator

Upon the arrival of the inspector(s), the primary contact should greet them, introduce themselves as the primary contact between the organisation and the regulator pursuant to a pre-existing emergency plan, and indicate a willingness to cooperate with the investigation.

It is also important to keep the inspector(s) 'onside' as much as possible throughout the investigation. Although they must cooperate with the investigation, they should not

assist any more than is required by law.

The inspector(s) will want to speak with key personnel who witnessed the incident or are responsible for management and supervision. Inspectors have statutory powers to seek information in a variety of ways, including through interviews or demanding documents. The organisation or a person's ability to refuse to answer questions or produce documents (including on the grounds of privilege against self-incrimination) varies from jurisdiction to jurisdiction.

If you are at all concerned about answering a question or producing a document, you should ask to seek legal advice – it is unlikely that the inspector(s) will refuse.

DEFINITION: PRIVILEGE AGAINST SELF- INCRIMINATION

Privilege against self-incrimination is a rule of law which entitles a person to refuse to answer a question if the answer would provide evidence that the person has committed a criminal act or omission. In a health and safety context, this could be any information regarding the organisation's operations.

Stage 6 - continued

In South Australia and New Zealand, if inspectors ask you questions, you may refuse to answer them if the answers would incriminate you. However, you cannot refuse to answer questions on the grounds that they may incriminate the organisation or someone else within the organisation.

In Western Australia and the other *Work Health and Safety Act* jurisdictions (New South Wales, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory), you must answer questions put by the inspector even where the answers may incriminate you. However, if the answers are incriminating, they cannot be used as admissible evidence in a civil or

criminal proceeding against you (except a proceeding arising out of the false or misleading nature of the answer). The answers can be used as evidence to prosecute the organisation or other individuals within it.

In Victoria, WorkSafe has no power to compel you to answer questions (other than a request to state your name and address). If interviewed, you are entitled to refuse to answer any question on the basis that it may incriminate you.

In all jurisdictions, the privilege against self-incrimination can only be claimed by individuals – the organisation is never entitled to claim this privilege.

HOW TO CLAIM THE PRIVILEGE AGAINST SELF-INCRIMINATION

In South Australia, New Zealand and Victoria, the privilege against self-incrimination can be claimed by responding to a question of an inspector by saying:

“I refuse to answer that question on the grounds that the answer may incriminate me”.

In Western Australia and the other Work Health and Safety Act jurisdictions (New South Wales, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory), the privilege against self-incrimination can be claimed by responding to a question of an inspector by saying:

“I am concerned that answering the question may tend to incriminate me. I would like to claim the privilege against self-incrimination and I would like an opportunity to obtain advice before I respond”.

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege may also be relied upon to allow an organisation, its officers and employees to refuse to answer questions of the regulator in respect of certain communications and documents.

This privilege has limited application during the immediate aftermath when inspectors are conducting interviews.

However, it becomes important when the regulator demands that documents be provided. This topic is discussed in greater detail in Chapter 3.

Note that any attempt to claim legal professional privilege using an in-house lawyer is likely to fail⁷.



⁷ *Powercor Australia Ltd v Perry* [2011] VSCA 239.

OFFENCES IN RELATION TO INSPECTORS

You must not intentionally hinder or obstruct an inspector in the performance of their duties or act aggressively towards them. The table below sets out the inappropriate acts that are prohibited by the legislation and the maximum penalties that may follow.

Prohibited Act	Penalty in VIC	Penalty in WHS jurisdictions and NZ	Penalty in WA
Assaulting, intimidating or threatening inspector	240 penalty units and/or 2 years imprisonment for individuals 1,200 penalty units for corporations	\$50,000 and/or 2 years imprisonment for individuals \$250,000 for corporations	\$5,000 for individuals \$50,000 for corporations
Hindering or obstructing inspector (including concealing documents)	60 penalty units for individuals 300 penalty units for corporations	\$10,000 for individuals \$50,000 for corporations	\$5,000 for individuals \$50,000 for corporations

**WHAT TO DO IN
THE AFTERMATH
FOLLOWING A
SERIOUS INJURY
OR FATALITY IN
THE WORKPLACE**

Once the process outlined in Chapter 2 is complete and the workplace begins returning to normality, your focus will shift to reducing the chances of a successful prosecution against the organisation and individuals within it, or mitigating the effects of a successful prosecution.

CONDUCT AN INTERNAL INVESTIGATION

You should conduct an internal investigation and produce a brief report outlining the causes of the incident. This report will be available to the regulator as evidence in any future prosecution.

The internal investigation should include:

- photographs of the site where the incident occurred;
- brief notes taken by the investigating employee as to how the incident occurred;
- brief notes of the interview with the injured person and other witnesses;

- references to the relevant policies and procedures that govern how the work ought to have been carried out; and
- identification of whether relevant employees have complied with the policies and procedures of the organisation and the lawful directions of their supervisors.

If you follow the above points, you may rely on the report later should the investigation show that an employee breached the organisation's policies and procedures (see 'The Disciplinary Process' section on page 37).

HAVE YOUR LAWYERS PRODUCE A LEGALLY PRIVILEGED REPORT

Upon engagement, your lawyers will engage a health and safety expert on your behalf to investigate the root causes of the incident and produce a report. This report is in addition to the internal notification or report described above. Because this report will be obtained by your lawyers, it will be covered by legal professional privilege which means that you will not be obligated to disclose it to the regulator.

Care must be taken to ensure that legal professional privilege over the report, and all other communications

with your lawyer continues to be maintained and is not inadvertently waived.

The best way to protect your privilege is to ensure that reports, documents and communications with your lawyers are only disseminated to authorised people within the organisation. If you do not treat information as confidential, it may lose its status as legally privileged. Further, each recipient of confidential documents or information must be inducted in legal professional privilege protocols.

IMPORTANT!

All correspondence with your lawyer should be marked:
Confidential and subject to legal professional privilege: for the purpose of obtaining legal advice.

IMPLEMENT CONTROL MEASURES

Based on the findings of the reports mentioned above, you will be able to remove the interim control measures, implement permanent controls and take other necessary steps to ensure that a similar incident does not occur again. This may involve updating policies and procedures, as well as making structural changes in the workplace.

When amending documentation, you should consult your lawyer to ensure that you do not jeopardise your legal position in the event of a prosecution. It is critical that any introduction of change involves consultation with the affected employees, documentation of the change, training in the change and associated amendments to the safety system.



THE DISCIPLINARY PROCESS

It will not always be appropriate to discipline employees following a workplace death or serious injury, depending on the circumstances. You should therefore consider the true cause of the incident and any contributing or mitigating factors. For example, if the organisation's safety system caused the incident, then disciplinary action may be inappropriate.

If your organisation has established and enforced 'golden rules', a breach of such rules linked to the incident may warrant disciplinary action.

It is essential that, in the months leading up to the incident, golden rules were actually enforced. Failure to do so may be seen as acquiescence on the part of the organisation and any discipline may be considered unfair.

You should also consider the effect that disciplinary action may have on

your workforce. You do not want to generate ill-will that could result in union involvement or your employees providing more assistance in a potential prosecution than is legally necessary. Nor do you want to further burden someone who feels the weight of responsibility for another's injury or death. It must be a very considered approach.

If you decide that the circumstances require disciplinary action, it is important to:

- act quickly;
- provide procedural fairness (in particular, explain the allegations, invite the employee to respond and consider what they have said); and
- make sure the punishment fits the crime – for example, dismissal may be too harsh a punishment if the employee has an otherwise unblemished employment record.

DEFINITION: GOLDEN RULES

Health and safety rules that:

- are fundamental for a safe working environment without risks to health;
- employees have had training on; and
- employees know may lead to termination of employment without further warning.



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