



Victorian Government
Solicitor's Office

Monash Health managers' meeting



**Monash
Health**

3 June 2020

Jodie Burns

Managing Principal Solicitor
VGSO

I would like to acknowledge the Traditional Custodians of country and their connections to land, sea and community.

I pay my respect to their elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.



Victorian Government
Solicitor's Office

Overview

- Relevant health and safety duties under the *Occupational Health and Safety Act 2004*.
- Managing workplace risks such as occupational violence and aggression; trips, slips and falls and manual handling.
- Things that may trigger a WorkSafe inspector's workplace visit.
- Detail a WorkSafe inspector's powers upon entry.
- How to manage a WorkSafe inspector's workplace visit and how to manage when an inspector indicates that they will issue an improvement and/or prohibition notice
- How to manage a notifiable incident.
- Victoria's workplace manslaughter offences, expected to commence in 1 July 2020.



Do you recognise this?

“Monash Health is committed to providing a healthy and safe environment for all employees, volunteers, patients, visitors and contractors.

Monash Health will implement measures aimed at preventing workplace injuries and illnesses at all Monash Health workplaces”.

Monash Health OHS Operational Policy



Victorian Government
Solicitor's Office

Your role in safety leadership



Change will not come if we wait for some other person or some other time. We are the ones we've been waiting for. We are the change that we seek.

— Barack Obama —

“To be **‘in charge’** is certainly not only to carry out the **proper measures** yourself but to see that everyone else does so too.”

Florence Nightingale



It takes leadership to improve safety.

— Jackie Stewart —



Victorian Government
Solicitor's Office

Reporting an OHS Issue at Monash Health

Report the issue to your manager or supervisor **and**
enter the incident into Riskman.

OHS Advice Line

9594 6140

safety@monashhealth.org



Injury Support Enquiries

9554 1852:

injurysupport@monashhealth.org



Victorian Government
Solicitor's Office



Victorian Government
Solicitor's Office

**Relevant health and safety duties
under the *Occupational Health
and Safety Act 2004***



What is health and safety law and who is responsible for executing Monash Health's duties?

Victorian health and safety law is:

- Criminal jurisdiction (criminal convictions and penalties)
- Risk-based legislation that is not incident dependent – except for workplace manslaughter
- Duties and obligations cannot be given to another person

Monash Health's safety obligations can only be practically met through the actions of its people, supported by an effective framework of systems and procedures. The people who do this include:

- Officers, directors and managers of Monash Health
- Individual employees and contractors



Monash Health's main health and safety duties

Monash Health must, *so far as is reasonably practicable*, ensure the health and safety of its employees and others in the workplace by:

providing/maintaining a working environment that is safe and without risks to health

providing necessary, information, instruction, training and supervision

providing/maintaining plant/substances/systems of work that are safe and without risks to health

providing adequate welfare facilities

monitoring the health of employees and workplace conditions to prevent illness or injury



Employee Duties

While at work an employee must:

Take reasonable care for his or her own safety

Take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions

Cooperate with his or her employer with respect to any action taken by the employer to comply with a legal requirement

Not interfere with or misuse anything provided at the workplace in the interests of health, safety or welfare



Common enforcement options

Remedial Measures

- **Compliance advice**
- **Improvement Notices**
- **Prohibition Notices**

Sanctions

- **Enforceable undertakings**
- **Suspension of licence or permit**
- **Prosecutions**





Victorian Government
Solicitor's Office

**Managing hazards and
risks in Monash Health
workplaces, such as
occupational violence
and aggression; trips,
slips and falls and
manual handling**



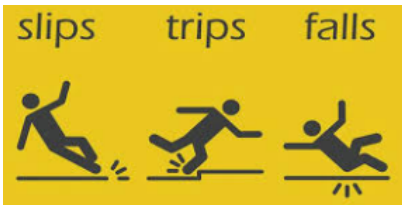
Health and safety obligations

- OHS Act requires that **Monash Health as an employer**, must take all reasonable steps to identify workplace **hazards** and **risks** and eliminate **risks** to health and safety, so far as is **reasonably practicable**.
- If it is not reasonably practicable to eliminate risks to health and safety, **Monash Health** must **reduce** those risks so far as is reasonably practicable.



Hazards and risks

‘Hazard’ is anything with the potential to cause harm, injury, illness, disease or loss.



‘Risk’ is the chance/probability/likelihood that a person will be harmed or experience an adverse health effect if exposed to a hazard.



Victorian Government
Solicitor's Office

What is 'Reasonably Practicable'?



- **No one matter determines what is, or was at a particular time, reasonably practicable in relation to ensuring health and safety.**
- **The reasonably practicable test involves a careful weighing up of each of the matters in the context of the circumstances and facts of the particular case with a clear presumption in favour of safety.**
- **Whether an employer has discharged its duties under the OHS Act, so far as is reasonably practicable, safe and without risks, will depend on the particular facts and circumstances.**



Acquire up-to-date knowledge of OHS matters

Industry knowledge

- OHS Act, Regs, Codes
- WorkSafe information (e.g. guidelines, Safety Alerts)
- Current industry issues
- Government bulletins
- Industry groups, newsletters
- H&S management principles and practices
- Knowledge and accountability of managers, supervisors, workers, experts

What Monash Health can do

- Safety meetings
- Incident reporting
- Regularly updating risk registers
- HSR training
- 'Safety' as a standard agenda item
- Training regarding OHS updates





Risk assessment

Step 1—CONSEQUENCES How severely could it hurt someone? or <i>How ill could it make someone?— Circle it</i>		Step 2—LIKELIHOOD <i>How likely is it for an injury to occur?—Circle it</i>			
		Very likely, could happen frequently	Likely, could happen occasionally	Unlikely, could happen, but rare	Very unlikely, could happen, probably never will
		L1	L2	L3	L4
Kill or cause permanent disability or ill health	C1	Very high risk (1)	Very high risk (1)	High Risk (2)	Substantial Risk (3)
Long term illness or serious injury	C2	Very high risk (1)	High Risk (2)	Substantial Risk (3)	Moderate Risk (4)
Medical attention and several days off work	C3	High Risk (2)	Substantial Risk (3)	Moderate Risk (4)	Acceptable Risk (5)
First Aid needed	C4	Substantial Risk (3)	Moderate Risk (4)	Acceptable Risk (5)	Low Risk (6)



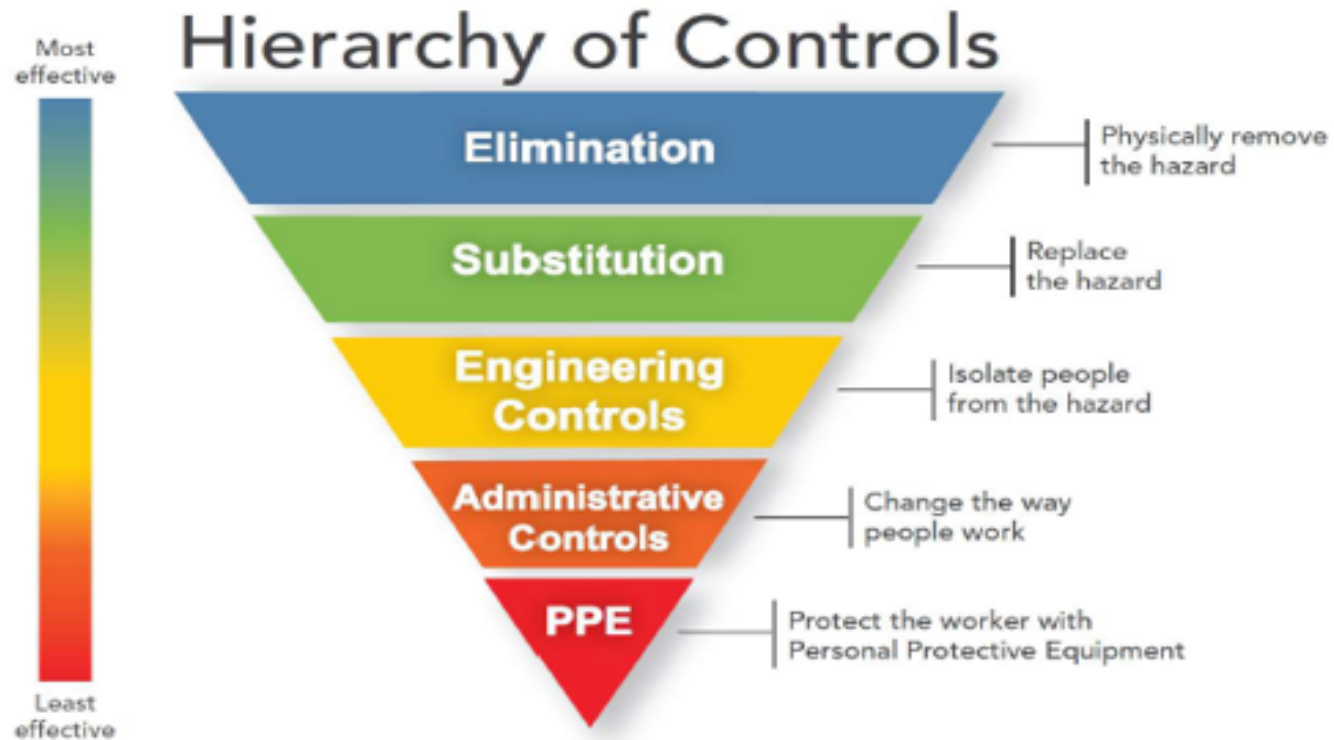


Risk assessment

Step 3—RISK PRIORITY SCORE	Step 4—ACTION AND RESPONSE
1 = Very High Risk	Stop the activity—immediate action is required to ensure safety—safety measures applied must be cleared by the Station Manager before any activity recommences
2 = High Risk	Proceed with caution—immediate reporting of emerging or ongoing risk exposure at this level to the Station Manager for decision is mandatory
3 = Substantial Risk	Be aware—action required as soon as possible to prevent injury or illness
4 = Moderate Risk	Report these risks to the responsible Manager during the current shift or before the next shift
5 = Acceptable Risk	Do something when possible. Manage by routine procedures.
6 = Low Risk	These risks should be recorded, monitored and controlled by the responsible Manager



Risk controls



Hazard and risk management process

Dealing with risk at these stages is best practice

Hazard/Risk Identification

Stage 1

Hazard/Risk Assessment

Stage 2

Hazard/Risk Management

Stage 3

Monitor / Evaluate / Improve

Stage 4

Many do not consider risk until this point



Notifiable Incident

Stage 5





Victorian Government
Solicitor's Office

Things that may trigger a WorkSafe inspector's workplace visit

An overview of a WorkSafe inspector's powers upon entry

Things that may trigger an inspector to conduct a workplace visit

[illegible]

- **Notifiable incident**
- **Random workplace inspection**
- **Inspection as part of a targeted WorkSafe program (e.g. inspections regarding OVA/slips trips, falls/manual handling etc...)**
- **Anonymous complaint to WorkSafe**
- **HSR issued a PIN**
- **Issues with a Return to Work plan**

What to do when an inspector conducts a workplace visit

Ensure that Monash Health has a clear protocol that sets out roles and responsibilities for when an inspector conducts a workplace visit:

- ask for the purpose of the workplace visit
- designate a representative to liaise with inspector
- ensure the inspector is accompanied at all times
- establish a process for the provision of documents
- only talk in facts and do not volunteer information



- Train relevant employees in the protocol
- Be prepared
- Be co-operative



Victorian Government
Solicitor's Office

WorkSafe Inspector powers

Broad powers **of entry** to workplaces (s 98) broad powers **upon entry** to workplaces (s 99) including:

- Inspect and examine the workplace and things (i.e. documents, plant, equipment and substances)
- Coercive powers to obtain documents and ask questions (s 100)
- Take samples for analysis
- Take photos and measurements, make sketches and recordings
- Seize any thing (including a document)
- Seek the assistance of any person
- Direct that a workplace be left undisturbed
- Issue improvement and prohibition notices



Individual obligations and rights

Individuals:

- **Can** be compelled to provide name and address in certain circumstances
- **Must not** without reasonable excuse refuse or fail to provide reasonable assistance to an inspector
- **Do not** have to answer any questions that may tend to incriminate them
- **Can** seek time to obtain legal advice **at any time** (i.e. before and during questioning by an Inspector or Investigator)
- **Cannot** be compelled to *sign* any document including any document shown to them or any record purporting to be a record of the discussion
- **Cannot** be compelled to provide a statement
- **Can** object to any questioning/conversation being audio or video taped

Reasonable excuse: legal advice / distress / time to respond / self incrimination / legally privileged

Reasonable assistance: does not include providing a statement / incriminating yourself



Entry Reports

- **Inspectors have an obligation to provide an Entry Report at the conclusion of a workplace visit.**
- **Request to see a draft of the Entry Report before it is issued.**
- **Is it accurate?**





Victorian Government
Solicitor's Office

Improvement notices and prohibition notices and what to do if a notice is issued



Notices under the OHS Act 2004

Notices that can be issued by an inspector

- Improvement Notices (s 111)
- Prohibition Notices (s 112)
- Non-Disturbance Notices (s 110)

Review of notices

- Internal and external review of notices



What to do if a notice is issued?

Matters to consider:

- **Talk to inspector (pre-issue)**
- **Compliance date (is it reasonable?)**
- **Can you comply? Straight away (avoid the notice)? At all?**
- **Validity of notice and whether it is reasonably practicable to comply?**
- **Should you comply? (implications for rest of business)**
- **Seek legal assistance**
- **Consider review of the notice**
- **If going to comply, consider response to WorkSafe (do you need more time?)**

NOTE: any modifications to a notice including seeking further time to comply, must be by application to WorkSafe's IRU – timeframes apply



Victorian Government
Solicitor's Office

Improvement Notices



If an inspector **reasonably believes** that a person
is contravening a provision of the OHS Act/regulations

OR

has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated, the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities causing the contravention or likely contravention.



Victorian Government
Solicitor's Office

Occupational Health and Safety Act 2004
IMPROVEMENT NOTICE



This notice is issued under section 111 of the Occupational Health and Safety Act 2004. This notice requires the person (which can mean a body corporate) to whom it is issued to remedy a contravention of the Act or its Regulations. Section 115(2) places obligations on the person to whom an improvement notice is issued. If that person is an employee, he or she must give a copy of the notice to the employer. Otherwise, and for an employer given a copy of a notice issued to an employee, the person must:

- * bring the notice to the attention of all persons whose work is affected by the notice,
- * give a copy to each health and safety representative who represents employees whose work is affected by the notice; and
- * display a copy of the notice in a prominent place at or near the workplace or part of the workplace where the affected work is being performed.

Issued by: [REDACTED], an Inspector appointed under the Occupational Health and Safety Act 2004.

Signature: _____

Date of Issue: 25/06/2008

Notice issued to: [REDACTED]

Notice given to: [REDACTED]

Service method: Left for a person

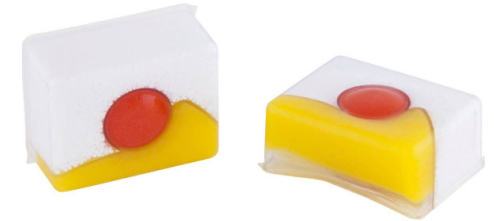
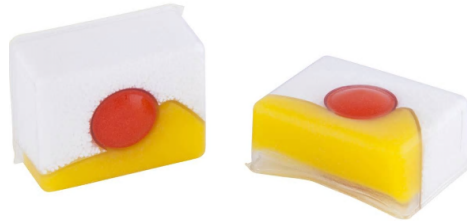
Provision of this Act and / or the Regulations that is being contravened: I reasonably believe that [REDACTED] is in contravention of Regulation 4.1.17(1) of the Occupational Health and Safety Regulations 2007

Basis for this belief: I observed in the dishwasher located in the kitchen area adjacent to the deep fryer that the material safety data sheet for the hazardous substance **Finish Powerball - Lemon** was not readily available to employees. This was determined following discussion with Management Representative [REDACTED] and observing the chemical on site.

The lack of access to the information contained within the **Material Safety Data Sheet (MSDS)** such as first aid requirements, personal protective requirements for example may lead to detrimental health effects for employees using the designated hazardous substance.

It is my belief that this is not in accordance with requirements of regulation 4.1.17 of Occupational Health & Safety Regulations 2007.

Directions as to the measures to be taken to remedy the [REDACTED] must ensure that the material safety data sheet for the hazardous substance **Finish Powerball - Lemon** is readily accessible to employees who may be exposed to the substance.



Victorian Government
Solicitor's Office

Prohibition Notices



If an inspector reasonably believes that:

- a) an activity is occurring at a workplace that involves or will involve an **immediate risk** to the health or safety of a person; or
- b) an activity may occur at a workplace that, if it occurs, will involve an **immediate risk** to the health or safety of a person, the inspector may issue to a person who has control over the activity [usually the employer] a prohibition notice prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector has certified in writing that the matters that give or will give rise to the risk have been remedied.





Victorian Government
Solicitor's Office

**A workplace incident
occurs...now what?**



Incident response - first steps

Administer first-aid & make safe



Non-disturbance



Seek advice (internal and external)



Notify the Regulator



Notifiable incident

- **Notification in writing is also required, within 48 hours of immediate notification, using the form approved by the Authority.**



Reference Number Ring 132 360 to obtain a Reference Number. <small>The Reference Number is your proof of attendance notification. Immediate notification is required under section 38(1) of the Occupational Health and Safety Act 2004.</small>	<div style="border: 1px solid black; padding: 2px; display: inline-block;"> - - - - - - - - - - - - - - - </div>
--	--

ORIGINAL

OCCUPATIONAL HEALTH AND SAFETY ACT 2004

WORKSAFE VICTORIA

INCIDENT NOTIFICATION FORM

OCCUPATIONAL HEALTH AND SAFETY ACT 2004

(To be used only)

Person Submitting Details (Please print in BLOCK letters)

Name	Position Title	Telephone Number
Date	Date of Incident	Time of Incident
Name of Employer / Self Employer		
Business Address (Not P.O. Box)		Postcode
Name of Employer of Deceased / Injured Person(s), if any, if different from above		
Address of Premises where Incident Occurred		
Brief Description of Incident (Give Details of the type of Injury, Illness, caused by the Incident)		

Details of Deceased / Injured Person(s)

Name	<input type="checkbox"/> Male <input type="checkbox"/> Female
Residential Address	Postcode
Date of Birth	Telephone Number
Occupation / Job Title / Description	Employee / Contractor / Member of Public
Work / Activity being undertaken at Time of Incident (Identify any Plant, Substance, Equipment Involved)	
Person(s) who saw Incident or first came to Scene	
Action Taken / Intended, if any, to prevent recurrence of Incident	

The above information is to be provided to the extent that it is known at the time of writing

Declaration

I declare that where I provide personal or health information to the Victorian WorkCover Authority (VWA) about any other individual, I am authorised to provide that information. The information has been collected in accordance with applicable privacy legislation and the individual has been or will be made aware of the VWA's identity and how to contact it and of the other matters of which an individual is required to be made aware when personal or health information is collected about them.

Signature _____ Date _____ / ____ / ____

Name _____

Optional

WorkCover ID _____

Establishment No _____

Why is incident management so important?

- **Safety matters – People matter** - managing the welfare of your people is integral to your people going home safely every day
- Ensuring business continuity
- Maintaining your reputation and the reputation of your sector/industry
- Instilling market confidence
- Mitigating legal (civil & criminal) and commercial risk to your business AND your people



Legal Professional Privilege

- Communication of a confidential nature.
- Between the lawyer and client or their agents.
- Made for the **dominant purpose** of providing **legal advice** or for use in **reasonably contemplated judicial proceedings**.



Considerations for engaging independent legal advice

- Where you require **legal advice** OR there are **reasonably contemplated judicial proceedings**.
- **Notifiable incidents** (ss 37 and 38).
- When you are unsure whether an incident is notifiable.
- When **notices have been issued** and you consider them to be unworkable.
- **Requests for documents and information** by virtue of coercive powers.





Victorian Government
Solicitor's Office

An overview of Victoria's workplace manslaughter offences



Proposed 'employer' workplace manslaughter offence

New section - 39G(1) Workplace manslaughter (aimed at employers)

- (1) **A person**, who is not a volunteer, must not engage in conduct that—
- (a) is **negligent**; and
 - (b) constitutes a **breach of an applicable duty** that **the person owes** to another person; and
 - (c) **causes the death** of that other person.

PENALTY: Imprisonment for 20 years (soon to be 25 years) for a natural person
100,000 penalty units for a body corporate (\$16.5 million).

NOTE: An offence against section 39(G)(1) is an indictable offence.



Proposed 'officer' workplace manslaughter offence

New section - 39G(2) Workplace manslaughter (officers)

- (2) A person who is an 'officer' of an applicable entity, and who is not a volunteer, must not engage in conduct that—
- (a) is **negligent**; and
 - (b) constitutes a **breach of an applicable duty** that **the person owes** to another person; and
 - (c) **causes the death** of that other person.

PENALTY: Imprisonment for 20 years (soon to be 25 years) for a natural person

NOTE: An offence against section 39(G)(2) is an indictable offence.



Victorian Government
Solicitor's Office



What is an 'applicable entity'?

An entity is an 'applicable entity' for the purposes of the 'officer' workplace manslaughter offence:

- (a) if it is—
 - (i) a body corporate; or
 - (ii) an unincorporated body or association; or
 - (iii) a partnership; and
- (b) whether or not it represents the Crown.

As such, it will apply to the Crown and Victorian public sector entities



Exemptions from prosecution of 'workplace manslaughter'

The following people cannot be charged with 'workplace manslaughter':

- employees (who are not 'officers').
- volunteers.



- Despite these exemptions, Victoria Police can still charge an employee or volunteer with common law manslaughter.





'Officer' criteria

Section 9 of *Corporations Act* defines 'officer':

A person:

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
- (ii) who has the capacity to affect significantly the entity's financial standing.

WorkSafe's policy statement is that:

only persons who have the capacity to make decisions - or to participate in making decisions that have a real or direct influence on an organisation's policy and planning or financial standing will be considered 'officers'

A person who only has responsibility for implementing those decisions is not considered to be an officer.



Victorian Government
Solicitor's Office



What does 'conduct' mean?

Both new offences of workplace manslaughter involve 'conduct' that—

- (a) constitutes a **breach of an applicable duty**; and
- (b) is **criminally negligent**; and
- (c) **caused the death**.

- '**Conduct**' will include any act or an omission to perform an act.
- An act or an omission to perform an act, which caused a death after the commencement of the offences, will be considered conduct for the purposes of proving the offences.
- E.g. suicide after 1 July 2020 due to bullying before that date



What is an 'applicable duty' under the OHS Act?

An applicable duty is anything under Part 3 of the OHS Act except sections 25 and 32.

The most relevant Part 3 duties for Monash Health will be :

- Section 21 – to provide a safe workplace for its employees
- Section 22 – to monitor its health and conditions at its workplaces.
- Section 23 - to persons other its employees
- Section 26 – as a manager and controller of workplaces

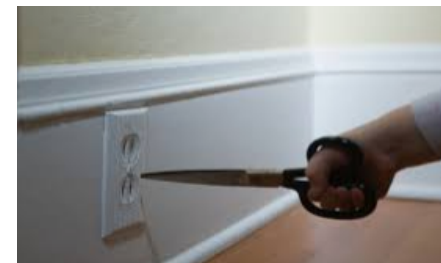


When will conduct be considered to be 'negligent'?

- (a) deliberate and voluntary
- (b) a great falling short of the standard of care that would have been taken by a reasonable person in the circumstances in which the conduct was engaged in; and
- (a) a high risk of:
 - (i) death; or
 - (ii) serious injury; or
 - (iii) serious illness.



Not the civil standard of negligence,
but the much higher 'criminal negligence' standard.



Victorian Government
Solicitor's Office

Causation

The Explanatory Memorandum states that:

“the mere fact that an organisation's or officer's conduct contributed causally to the death, or was a necessary cause of it, is not sufficient. It must have contributed significantly to the death or have been a substantial and operating cause.”

The Explanatory Memorandum confirms that it is not intended for employers to be found guilty of workplace manslaughter solely because a ‘rogue’ employee, agent or officer acted contrary to steps taken or things provided or directed by the company (a principle recently reinforced in Victoria by the Court of Appeal in [DPP v JCS Fabrications Pty Ltd & Anor](#) [2019] VSCA 50).



Victorian Government
Solicitor's Office



Procedural matters

- Unlike other indictable offences in the OHS Act, workplace manslaughter offences **cannot be heard and determined summarily**, as section 28 of the *Criminal Procedure Act 2009* does not apply.
- WorkSafe Victoria will investigate the new offences of workplace manslaughter using their **existing powers under the OHS Act**.
- the **privilege of self-incrimination** will be able to be claimed by an individual only.
- there will be **no statutory time limit** within which WorkSafe can bring a charge of workplace manslaughter.



Key messages



- Be a safety leader
- If you can eliminate risks to health and safety you must do that first
- If you cannot eliminate risk, you must reduce risks so far as is reasonably practicable
- Conduct risk assessments regularly
- Consult employees about workplace hazards and risks
- Provide clear and unequivocal information to employees on what is expected of them



Questions



Jodie Burns
Managing Principal Solicitor
0437 568 289
jodie.burns@vgso.vic.gov.au



Victorian Government
Solicitor's Office