



**Australian Government**

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**Office of the Privacy Commissioner**

# **Model Occupational Health and Safety Legislation**

**Submission to  
Safe Work Australia**

**November 2009**

## Key Recommendations

The objective of the Model Occupational Health and Safety (OHS) legislation package ('Model OHS legislation') is to achieve uniform OHS laws across Australia, replacing the disparate and inconsistent laws currently in place.

Work plays a major role in the lives of most individuals. It is important both that the workplace provides a safe and healthy work environment, and that individuals' privacy is protected through the appropriate handling of personal information.

The Model OHS legislation outlines certain requirements for confidentiality of information and how that information may be used or disclosed. The Office welcomes these requirements, and makes the following suggestions to clarify and enhance privacy protections:

- i. Ensure there are appropriate complaint handling mechanisms for individuals if their personal information is mishandled by an employer, employee association or regulator under the Model OHS legislation. For example, there may be cases where neither the Privacy Act nor state/territory privacy laws provide obligations or remedies. In such cases OHS regulators could consider developing guidance or specific obligations under the OHS scheme.
- ii. Consider the circumstances in which 'sensitive information' about employees may be collected (such as incident notification or workplace monitoring), and whether this warrants specific guidance or guidelines from OHS regulators for those handling this information.
- iii. Clarify the effect of the term *employee records* used in the Model Act.
- iv. Align sections 106-107 of the Model Act with the equivalent right of entry provisions in sections 481-482 of the *Fair Work Act 2009*, to improve legislative consistency and personal information protections.
- v. Clarify the definition of 'disclose' in section 4 of the Model Act (while the proposed scope of the definition may be appropriate, the term 'disclosure' has a more specific usage in the Privacy Act).
- vi. Consider amending section 245 of the Model Act (confidentiality) to:
  - refer to 'personal information' rather than information about 'the affairs of someone else';
  - extend the existing disclosure prohibition to include the inappropriate *use* of information or documents, outside of the 'right of entry' context (covered in section 139);
  - clarify the reference to disclosures 'in the interests of public safety' in subsection 245(3).
- vii. Supplement the proposed criminal penalty regime by adopting civil penalties for breaches of the use and disclosure prohibitions and confidentiality provisions contained in the Model OHS legislation.

## Office of the Privacy Commissioner

1. The Office of the Privacy Commissioner ('the Office') is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office, established under the *Privacy Act 1988* (Cth) ('the Privacy Act'), has responsibilities for the protection of individuals' personal information that is handled by Australian and ACT Government agencies, and personal information held by large private sector organisations, all private health service providers and some small businesses.

## Background

2. The Office welcomes the opportunity to make a submission to Safe Work Australia on the Model Occupational Health and Safety (OHS) legislation ('Model OHS legislation'). This is comprised of the Exposure Draft of the Model Safe Work Act 2009 ('Model Act') and the Model Safe Work Regulations ('Model Regulations').<sup>1</sup> In turn these will be supported by model Codes of Practice.<sup>2</sup>
3. The Office understands that the legislative package reflects the commitment of the Commonwealth, States and Territories to work together to develop and implement model harmonised OHS laws. The Office notes that the Model OHS legislation aims to enhance safety protections for Australian employees and others entering the workplace, and to provide greater certainty for employers. It will also meet the objective of uniform OHS laws across Australia, addressing the disparate and inconsistent OHS laws that currently exist across the jurisdictions.<sup>3</sup>
4. Work plays a major role in the lives of most individuals and it is important that all employees have a right to work in a safe and healthy work environment. In ensuring this, it is also important that the individual privacy is adequately protected and respected, by way of appropriate personal information handling practices, and adequate remedies where that information is mishandled.
5. In many cases the *Privacy Act 1988* (Cth) ('Privacy Act') provides baseline protections in this regard. However, exemptions and jurisdictional boundaries mean that those protections will not uniformly apply to acts and practices under the Model OHS legislation.
6. The need to protect individuals' personal information is recognised in the Model Act's requirements of confidentiality and appropriate use and

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<sup>1</sup> See the *Exposure Draft Model Act for Occupational Health and Safety Discussion Paper*, September 2009, available at [www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/](http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/).

<sup>2</sup> Safe Work Australia website, Model OHS legislation FAQs, [www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/FAQs.htm](http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/FAQs.htm).

<sup>3</sup> Communiqué from Australian State, Territory and New Zealand Workplace Relations Ministers' Council, 18 May 2009, available at [www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/WRMC81MeetingOutcomes.htm](http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Public+Comment/WRMC81MeetingOutcomes.htm).

disclosure of information. In this regard, the Office has outlined below a number of suggestions to enhance and clarify the Model OHS legislation.

## Coverage of the *Privacy Act 1988* (Cth)

7. The Privacy Act protects the personal information of individuals through the application of binding privacy principles. The Information Privacy Principles (IPPs) in section 14 of the Act regulate the personal information handling practices of Australian Government and ACT agencies. The National Privacy Principles (NPPs) in Schedule 3 of the Privacy Act regulate the personal information handling practices of private sector organisations with an annual turnover greater than \$3 million, all private health service providers, and some small businesses.
8. There are some exemptions to the application of the Privacy Act. The Act does not extend to most small businesses, or to State and Territory authorities. A number of States and Territories have enacted privacy legislation to regulate the public sector and some parts of the private sector. However, these regimes are sometimes inconsistent with each other and the Privacy Act.<sup>4</sup> Depending on the level of privacy protection operating in the relevant jurisdiction, the extent to which small businesses and state and territory authorities can provide individuals with privacy protections under the proposed Model OHS legislation will vary.
9. A further Privacy Act exemption relates to employee records held by employers. When the NPPs were introduced into the Privacy Act in 2001, it was acknowledged that employee records deserved privacy protection. However, it was envisaged that workplace relations law was the appropriate mechanism for such regulation, rather than the Privacy Act.<sup>5</sup> Consequently employee records held in private sector organisations were exempted from the Privacy Act's coverage.<sup>6</sup>
10. The Privacy Act defines an employee record as a record of personal information relating to the employment of the employee. The definition includes examples, such as information about an employee's terms and conditions of employment, salary, leave details, taxation, banking or superannuation affairs, as well as the employee's trade union membership.<sup>7</sup>
11. The employee records exemption only applies to those acts or practices directly related to the employment relationship between the employer and the employee.<sup>8</sup>

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<sup>4</sup> This was noted by the ALRC in Chapter 3, paragraphs 3.3-3.6 of *Report 108: For Your Information: Australian Privacy Law and Practice*, May 2008, located at [www.austlii.edu.au/au/other/alc/publications/reports/108/3.html](http://www.austlii.edu.au/au/other/alc/publications/reports/108/3.html).

<sup>5</sup> Attorney General, the Hon Daryl Williams QC, Second Reading Speech for the *Privacy (Private Sector) Amendment Bill 2000 (Cth) Parliamentary Debates (Hansard)*, House of Representatives, 12 April 2000, p. 15075.

<sup>6</sup> Note that the IPPs cover Australian and ACT Government agencies employee records.

<sup>7</sup> Section 6(1) of the Privacy Act.

<sup>8</sup> Section 7B(3) of the Privacy Act. The information may relate to a current or former relationship.

12. In examining the effect of these exemptions, the Office understands that employers' handling of an employee's personal information for certain activities under the Model OHS legislation may not be covered by the Privacy Act (such as the monitoring obligations of employers<sup>9</sup>). In addition, any personal information handled by exempt small businesses and state or territory authorities (potentially including some unions) will also fall outside the Privacy Act's jurisdiction.
13. In 2008, the Australian Law Reform Commission (ALRC) recommended the removal of the employee records exemption (among others) from the Privacy Act in its *Report 108: For Your Information: Australian Privacy Law and Practice* ('ALRC Report'). In submissions to the inquiry that led to the ALRC Report, the Office, on balance, supported the removal of the employee record exemption given the desirability of national consistency of privacy regulation, and community expectations of workplace privacy.<sup>10</sup>
14. The Government will consider this ALRC recommendation and other proposals to clarify or remove certain exemptions from the Privacy Act in its second stage response to the ALRC report.<sup>11</sup>

## Information protections in the OHS context

15. Employers collect personal information about employees to manage the obligations and responsibilities that arise out of the employment relationship. It is reasonable for individuals to have an expectation that the personal information about them held by their employer will generally only be used for the purpose for which it was collected. Extra care may be expected when sensitive personal information, such as an individual's medical condition or history, is handled.<sup>12</sup> It is therefore important to ensure that any OHS regulatory framework provides appropriate privacy protections.
16. The Office notes that the Model OHS legislation provides certain protections around personal information. The right of entry powers set out in section 107(1) of the Model Act limit access to records and documents to only those that are 'directly relevant' to the suspected contravention. Further, section 139 protects against the unauthorised use or disclosure of information or documents obtained through right of

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<sup>9</sup> Under section 18 of the Model Act employers have a general duty of care towards employees including, as far as reasonably practicable, the monitoring the health of workers and workplace conditions for purpose of preventing illness or injury arising out of the conduct of the business.

<sup>10</sup> See the Office's submission to the ALRC's Discussion Paper 72, Ch 36, p 461 at [www.privacy.gov.au/materials/types/download/9111/6748](http://www.privacy.gov.au/materials/types/download/9111/6748) and its submission to ALRC Issues Paper 31, Ch 5, para 111 at [www.privacy.gov.au/materials/types/submissions/view/6757](http://www.privacy.gov.au/materials/types/submissions/view/6757). The Office's *Community Attitudes to Privacy* surveys (2007 and 2004) have canvassed Australians' views of on workplace privacy. See [www.privacy.gov.au/materials/types/research](http://www.privacy.gov.au/materials/types/research).

<sup>11</sup> The Australian Government has stated it will implement the First Stage reforms prior to considering a second stage response. See the Australian Government's First Stage Response, 'Enhancing National Privacy Protection – the Australian Government First Stage Response to the Australian Law Reform Commission Report 108: *For Your Information Australian Privacy Law and Practice*', October 2009, available at [www.pmc.gov.au/privacy/alrc.cfm](http://www.pmc.gov.au/privacy/alrc.cfm).

<sup>12</sup> Section 6(1) of the Privacy Act defines sensitive information as including information about an individual's health, racial or ethnic origin, criminal record or trade union membership.

entry powers. The general provision in section 245 of the Model Act dealing with confidentiality also protects against the secondary disclosure by a person of information obtained about the affairs of someone else. While the Office welcomes these protections, we would also suggest a number of further enhancements outlined below.

## Complaint Handling Mechanisms

17. It is not clear the extent to which individuals may have access to complaint and dispute resolution processes to deal with concerns about the way employers, employee associations or regulators handle their personal information under the Model OHS legislation.
18. In the Model Act, section 133 provides that OHS regulators may deal with right of entry disputes. However, it is not clear whether it is intended that the OHS regulators will deal with privacy related disputes, or if these will be handled by the jurisdiction's privacy regulator (where there is one).
19. Where an organisation or agency must comply with either the Privacy Act or state privacy legislation, these mechanisms may be adequate alongside any offence provisions adopted in the Model Act. Where no privacy legislation applies, Safe Work Australia may wish to consider further how such complaints may be handled. For example, this may be an area for OHS regulators to play a role, including by way of complaint handling, and/or 'guidelines' on information handling for entities whose personal information handling practices are otherwise unregulated (Discussion Paper, 7.1 refers).
20. Clarifying complaint handling roles will benefit employees, employers, employee associations and regulators, by reducing the complexities associated with cross jurisdictional complaint handling regimes (see also 'Right of Entry Powers' below).

## Handling of Sensitive Personal Information

21. The circumstances in which 'sensitive information'<sup>13</sup> may be handled under the Model OHS legislation are unclear. However, employers may be obliged to disclose sensitive information (particularly health information) when complying with the incident notification requirements.<sup>14</sup> Similarly, employers' monitoring obligations could involve the handling of employees' health information, for example, through drug or alcohol testing.<sup>15</sup>
22. OHS regulators could consider preparing guidelines or guidance material on the appropriate way employers should handle such information. This could be done in consultation with the jurisdiction's Privacy or

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<sup>13</sup> 'Sensitive information' is defined under section 6 of the Privacy Act. 'Health information' (also defined) is a subset of 'sensitive information'. Information about trade union membership is also sensitive information.

<sup>14</sup> Model Act, Part 3, Division 1.

<sup>15</sup> Part 2 of the Model Act deals with safety duties including monitoring of workplace safety and workers' health (see s 18). See also section 47 ('When consultation is required').

Information Commissioner, or where there is not one, with the Australian Privacy Commissioner.

23. As a point of comparison, the NPPs under the Privacy Act provide higher privacy standards for 'sensitive information'. For example, NPP 10 generally requires that organisations must not collect sensitive information without the individual's consent. Exceptions to this include where a law requires the collection; or to prevent or lessen a serious and imminent threat to life or health where an individual is incapacitated.<sup>16</sup> However, the Privacy Act itself would not cover sensitive information held by employers where it falls within the employee records exemption.

## Employee Records and OHS

24. For the purposes of the 'OHS right of entry' provisions in the Model Act, the Office's view is that the use or disclosure of personal information by employers would not appear to be covered by the 'employee record' exemption in the Privacy Act. Such handling of employees' personal information would therefore be protected by the Privacy Act, where that Act applies to the organisation concerned.<sup>17</sup>
25. The Model Act defines the term 'employee record' as having the same meaning given by the Privacy Act. The Office notes this definition of 'employee records' has also been adopted in the *Fair Work Act 2009 (Cth)* (Fair Work Act). The Office understands and supports the need for consistency between these two pieces of legislation. However, the use of the term 'employee records' in the Privacy Act is for the purpose of excluding the Privacy Act's application to these records. In contrast, the use of the term in the Model Act is for the purpose of including those records in the OHS right of entry regime.
26. To avoid potential confusion between these distinct purposes, the use of the term 'employee records' in the Model Act could be clarified. For example, by noting that where the Privacy Act generally applies to an entity (such as a relevant employer or union), certain acts and practices of that entity under the OHS model legislation do not fall within the employee records exemption (such as personal information handling under 'right of entry' provisions). This is consistent with the approach in the Fair Work Act.<sup>18</sup>

## Right of Entry Powers

### (1) *Personal information handling by Right of Entry permit holders*

27. Section 6E(1C) of the Privacy Act ensures that all employee associations registered under the *Fair Work (Registered Organisations) Act 2009* are subject to the Privacy Act when they collect and handle

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<sup>16</sup> See NPP 10, available at [www.privacy.gov.au/materials/types/infosheets/view/6583#npp10](http://www.privacy.gov.au/materials/types/infosheets/view/6583#npp10).

<sup>17</sup> This approach has been adopted in the 'right of entry' provisions contained in Part 3-4 of the Fair Work Act.

<sup>18</sup> See, eg, the *Fair Work Act 2009*, s 482 (Rights that may be exercised while on premises):

*Note 2: The use or disclosure of personal information obtained under this section is regulated under the Privacy Act 1988.*

personal information in the course of their activities.<sup>19</sup> Consequently, the Office understands that all federally-registered employee associations that apply under Part 6 of the Model Act for OHS entry permits will be covered by the Privacy Act when exercising right of entry powers.

28. The Office notes that under Part 6 of the Model Act, an association of employees or independent contractors registered or recognised under a State or Territory industrial law may apply for an OHS entry permit.<sup>20</sup> While it is likely a number of State or Territory employee associations (unions) will fall within the Privacy Act's jurisdiction, some of those unions may not have a turnover in excess of \$3 million per year. These entities will not fall within the Privacy Act's jurisdiction. It is not clear from the Discussion Paper how many such entities may exist.
  29. Safe Work Australia may wish to consider how complaints about personal information handling by these entities would be handled. For example, regulatory authorities could provide guidance material to ensure good privacy practice; or guidelines that require those entities to abide by the Privacy Act or state/territory privacy laws when exercising right of entry powers. A further option for consideration could be to bring those state-registered unions into the Commonwealth Privacy Act (by regulation or amendment), as occurred for federally-registered unions under the Fair Work Act regime.<sup>21</sup>
- (2) *Sections 106-107 of the Model Act: Consistency with the Fair Work Act*
30. The Office believes that where practicable, a consistent approach to right of entry powers under both the Model Act and the Fair Work Act is preferable. This would minimise fragmentation and uncertainty about applicable information handling obligations and procedures, reducing the risk of any inadvertent mishandling of employees' personal information.
  31. The drafting of section 106 of the Model Act (which confers right of entry powers on OHS entry permit holders) differs slightly from the equivalent provision in section 481 of the Fair Work Act. The Model Act would confer the right to enter a workplace for the purpose of 'inquiring' into a suspected contravention of the Act that relates to, or affects, a relevant worker. Section 481 of the Fair Work Act uses the term 'investigating' rather than 'inquiring'.
  32. The Office believes the term 'inquiring' may be interpreted more broadly than 'investigating', and could allow the OHS right of entry power to be applied more widely than intended. In the absence of particular reasons for this distinction, the Office suggests the terminology in the Model Act be aligned with the Fair Work Act.
  33. Section 107 of the Model Act also differs from the equivalent provision in section 482 of the Fair Work Act. The Model Act provision does not include a requirement that OHS entry permit holders seek written

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<sup>19</sup> The subsection was inserted into the Privacy Act earlier this year by Schedule 16 of the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*.

<sup>20</sup> Part 6 of the Model Act allows unions to apply for OHS entry permits. Unions are expressly defined in section 4 to include both federal and state registered employee associations.

<sup>21</sup> See above, note 19.

consent from relevant non-members, before inspecting or making copies of any record or document that is directly relevant to a suspected contravention.

34. From a privacy perspective, it is important that individuals have appropriate control over their personal information. One of the best ways to achieve this is to seek an individual's consent to collect, use or disclose their personal information.<sup>22</sup> The Office therefore recommends that section 107 of the Model Act be aligned with the equivalent provision in the Fair Work Act. If the workplace safety context requires, an exception could be considered where it is impracticable to seek consent because the individual is incapacitated (for example, following a workplace accident).

## Use and Disclosure Prohibitions

35. The Office supports the Model OHS legislation incorporating prohibitions against the unauthorised use or disclosure of personal information collected for specific purposes under the Model Act. Any exceptions to the prohibitions which permit secondary uses or disclosures should be clearly defined, and align with community expectations.
36. The Office makes the following comments about the privacy implications of the use and disclosure prohibitions in the Model Act:
  - (1) *Definition of 'Disclosure'*
  37. The Model Act defines the term 'disclose' to include divulging or communicating information to any person, or publishing (section 4). It is not clear whether this definition would encompass the disclosure of information *within* an employer's business, employee association, or a regulator. The concept of disclosure is not expressly defined in the Privacy Act. However, under the Privacy Act, divulging or communicating personal information to another person *within* the organisation would be regarded as a 'use' of the information rather than a 'disclosure'. It may be useful for the Model Act to clarify that disclosure includes the divulging of information within an entity, as well as externally, if that is the intention.
  - (2) *Section 139 of the Model Act*
  38. The Office supports the prohibition contained in section 139 of the Model Act against the unauthorised secondary use or disclosure of information or documents obtained through the right of entry powers. This provision appears to substantively mirror section 504 of the Fair Work Act, and aligns with relevant Privacy Act exceptions in NPP 2.
  - (3) *Section 245 of the Model Act*
  39. Section 245 of the Model Act imposes a general obligation of confidentiality on any person exercising a power or function under the Model Act that obtains information about the affairs of someone else, or

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<sup>22</sup> The Privacy Act does not define the concept of 'consent' nor does it distinguish between written or other forms of consent.

has gained access to a document about someone else. Section 245(2) expressly prohibits the person from disclosing the information or document to anyone else, unless an exception in subsection (3) applies. The Office welcomes the intent of this provision, although the following amendments could be considered.

40. Firstly, for consistency it could be considered whether the section should use the term 'personal information' as defined in the Privacy Act (section 6), rather than referring to information or documents about the 'affairs of someone else'.
41. Secondly, as currently drafted, the section only prohibits the disclosure of information or documents. It does not appear to prevent persons from *using* the information or documents for 'secondary' purposes. Section 139 provides protection against use and disclosure in the 'right of entry' context. Safe Work Australia could consider other contexts in which personal information may be handled, and whether section 245 should similarly prohibit secondary uses more generally (particularly for purposes other than those in sections 139 and 245(3)). In any case, the interaction between sections 245 and 139 could be clarified.
42. Thirdly, under section 245(3)(e), a disclosure can occur if it is necessary to administer or enforce another Act or law, and is in the interests of public safety. It is not clear when such disclosures may be contemplated, and the term 'interests of public safety' is quite broad. By contrast, NPP 2.1(e)(ii) requires a higher threshold – a reasonable belief that the use or disclosure is 'necessary to lessen or prevent a serious threat to public health or public safety'.<sup>23</sup> The terminology in section 245(3)(e) could be more clearly justified, or could be aligned with NPP 2.1(e)(ii) in order to reduce inconsistencies and maintain appropriate privacy protections.

(4) *Civil and Criminal Penalty Regimes*

43. The Office notes that information protections in sections 139 and 245 attract criminal penalties. This may be a deterrent to mishandling personal information provided there is sufficient capacity for enforcement.
44. To supplement this penalty regime, the Office would also support the imposition of civil remedies for breaches of the use and disclosure and confidentiality prohibitions. The Office understands this would be consistent with the approach adopted under the Fair Work Act.<sup>24</sup> It could also complement the Australian Government's stated intention to introduce civil penalties into the Privacy Act for serious breaches where other compliance oriented enforcement methods are not sufficient.<sup>25</sup>

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<sup>23</sup> NPP 2 is at [www.privacy.gov.au/materials/types/infosheets/view/6583#npp2](http://www.privacy.gov.au/materials/types/infosheets/view/6583#npp2).

<sup>24</sup> For example, section 504 of the Fair Work Act is part of a civil remedy regime under that Act.

<sup>25</sup> See the *Australian Government First Stage Response*, p 97, at [www.pmc.gov.au/privacy/alrc.cfm](http://www.pmc.gov.au/privacy/alrc.cfm).