

Community organisations and OHS laws in Victoria

A guide to understanding and complying
with occupational health and safety laws

Sep 2023



Contents

Part 1	4
Who do the Victorian OHS laws apply to?	6
Is your community organisation an ‘employer’?	6
Does your community organisation manage or control a workplace?	7
What if your organisation doesn’t employ people and doesn’t manage or control a workplace?	8
Part 2	9
What duties does your organisation have under Victorian OHS laws?	10
Specific information on the key duties owed under Victorian OHS laws	12
Duty to provide and maintain safe and healthy working environment	12
Duty to monitor workplace conditions and health of employees	14
Duty not to expose other persons to risks to health or safety	16
Duty to keep the workplace safe and without risks to health	17
Duties to ensure the design, manufacture, installation, supply, erection or commission of plant, buildings, structures, substances and other materials is safe and without risks to health	17
Duty not to recklessly endanger persons at workplaces	18
Duty to consult on OHS matters	18
Duties to notify WorkSafe of an incident and preserve an incident site	20
Part 3	21
Liability of the community organisation	22
Community organisations	22
The officers of a community organisation	22
When can officers be personally liable?	23
What is a ‘failure to take reasonable care’?	23
Workplace manslaughter	24
Part 4	25



What does ‘reasonably practicable’ mean?.....	26
What are an employee’s obligations?	29
Part 5	30
Initial response to an incident.....	31
Consider notification requirements	31
The immediate reporting requirement	31
The notification procedure.....	33
The 48-hour written notification requirement.....	33
Preservation of incident site	34
Register of injuries	34
Investigate and prevent reoccurrences	35
Part 6	36
An inspector's power to enter	37
WorkSafe inspector entry reports	37
WorkSafe improvement, prohibition or non-disturbance notices	38
Seeking review of WorkSafe decisions	38



Part 1

Applying Victorian OHS laws to not-for-profit organisations

Applying Victorian OHS laws to not-for-profit organisations?



Disclaimer

This guide provides information on Victorian OHS laws. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

Victorian occupational health and safety laws aim to improve the standards of workplace health and safety to reduce the chances of work-related injury and illness from occurring.

In Victoria, occupational health and safety (OHS) in the workplace is principally regulated by:

- the [Occupational Health and Safety Act 2004 \(Vic\)](#) (**OHS Act**) and
- the [Occupational Health and Safety Regulations 2017 \(Vic\)](#) (**OHS Regulations**),

(together called the **Victorian OHS laws**).

The Victorian OHS laws are regulated and enforced by [WorkSafe Victoria](#) or the [Victorian WorkCover Authority](#) (**WorkSafe**), a Victorian government authority.

Employers have duties to provide employees with a safe workplace under both the Victorian OHS laws and under the common law. The common law is the law that has been developed by the courts over time.

Under the common law, all employers have a legal duty to take reasonable care to avoid exposing employees (and others who might be exposed to risks from the business) to reasonably foreseeable risks of injury. These obligations are not exhaustively covered in this guide, and you should seek independent legal advice on these common law duties.



Note

Different occupational or work health and safety laws apply in other states and territories. Your organisation will need to check its obligations under these laws if it operates outside Victoria.

Who do the Victorian OHS laws apply to?

The Victorian OHS laws apply to:

- all community organisations that have employees, and
- all community organisations that are completely volunteer-based where they conduct work or activities at a 'workplace'

To work out the extent to which the Victorian OHS laws apply to your community organisation, you will need to consider whether your organisation:

- is an 'employer', or
- manages or controls a 'workplace'

We address these considerations below.



Caution

The OHS Act includes a criminal offence of workplace manslaughter which aims to prevent workplace fatalities and deter people from breaching their OHS duties.

The workplace manslaughter laws don't create additional OHS duties but do introduce tougher penalties in cases where a person engages in conduct that is negligent, that constitutes a breach of their OHS duties and which causes the death of another person. Both the organisation and relevant people in the organisation may be liable for workplace manslaughter.

You can find more information in **part 3** of this guide.

Is your community organisation an 'employer'?

The Victorian OHS laws apply to all 'employers' in Victoria – both not-for-profit and for-profit employers.

Your community organisation will be considered to be an employer if it:

- employs one or more workers under a contract of employment (this includes a person supplied by a labour hire service provider or agency) (ie. has at least one 'employee'), or
- employs one or more workers under a contract of training (ie. has at least one trainee or apprentice)

Your organisation will **not** be an employer if it operates exclusively on the basis of assistance provided by volunteers (who don't have an employment contract or training contract).



Note

When determining whether a community organisation is an employer:

- it's not relevant if a community organisation relies heavily on volunteers – if an organisation employs even one person (for example, a part-time bookkeeper), it will be considered an 'employer' under the Victorian OHS laws and should comply with all the 'employer duties', and
- it's not relevant if your organisation is an unincorporated entity – the OHS laws apply to unincorporated bodies who are 'employers', and a breach of the OHS laws could mean a committee member is personally liable.

If your community organisation is an employer, you are required to meet obligations under the Victorian OHS laws.

Does your community organisation manage or control a workplace?

Even if your community organisation is not an employer, your organisation may still be required to comply with Victorian OHS laws if it has 'management or control of a workplace'.



What is a workplace?

Under Victorian OHS laws, a 'workplace' is broadly defined as a place, whether in a building or structure, where 'employees' or 'self-employed persons' work.

Whether a person has management or control of a workplace will depend on certain things, including:

- the contractual relationships between the parties at a workplace, and
- the extent of the management or control exercised by a party at the relevant place and at the relevant time.

For example, the factors that will be considered in determining whether a party had management or control over a workplace will include the extent to which a party can influence those on a worksite to maintain and enforce appropriate working practices and to avoid risks.

If your community organisation manages or controls a place where employees or self-employed persons work, the place will be considered a workplace. In these circumstances, your organisation must ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving it are safe and without risks to health.



Note

Even if your community organisation has no employees, is completely volunteer-based and doesn't engage contractors or consultants, it may still be taken to manage or control a workplace.

This is because Victorian OHS laws don't require that your community organisation be involved in the engagement of those persons. All that is required is that your community organisation has a degree of control over the place at which the work is carried out.

This means – if the place at which the community organisation carries out its work has contractors or other self-employed persons who attend the workplace from time to time:

- this place may be a workplace for the purposes of the Victorian OHS laws, and
- your organisation may be subject to statutory duties in relation to that workplace

If another duty holder (an employer or another organisation) has assumed responsibility for an aspect of the workplace, this may impact your organisation's management or control of that specific aspect of the workplace. For example, where a particular party has contractual duties to maintain and repair safety equipment, they would be regarded as having management or control over that aspect of the workplace.

However, more than one person or organisation may have duties relating to a particular work activity and the circumstances in which the work is taking place.



Example

A community centre or community hub may have a range of organisations that operate in the same building. Some of the community organisations operating out of the centre may be entirely volunteer-based, while others have employees. If this is the case, a volunteer-based organisation with management and control of the centre will still be required to comply with various duties prescribed under Victorian OHS laws.

In this scenario, it's likely that more than one organisation will owe a duty under Victorian OHS laws in relation to certain work activities (for example, shared spaces). The organisations will be required to coordinate to manage OHS risks.

If your community organisation operates in a workplace, you will have obligations under the OHS Act. You can find a summary of these obligations, together with practical examples, in **part 2** of this guide.

What if your organisation doesn't employ people and doesn't manage or control a workplace?

If your community organisation isn't an employer and does not manage or control a place where employees or self-employed persons work, Victorian OHS laws are unlikely to apply.



Example

An entirely volunteer-run group meets in each other's homes regularly to discuss their organisation's progress and plan for the future. Because there are no employees in the organisation and no employees are present in the various homes, Victorian OHS laws will not apply.

However, there may be other laws regulating health and safety matters which apply to your organisation, including common law obligations.

If you are unsure about what laws or duties apply to your community organisation beyond the scope of the Victorian OHS laws, you should seek independent legal advice.



Caution

If your community organisation is not an employer, and does not operate in a workplace, this doesn't mean you can ignore health and safety. Your organisation may not have to comply with the Victorian OHS laws, but will still need to take reasonable care to ensure that volunteers and members of the public who come in to contact with the organisation and its activities are safe.

For example, under the *Equipment (Public Safety) Act 1994 (Vic)* a community organisation which is in control of certain types of equipment must take reasonable care for the health and safety of its volunteers and any other person who may be affected by how the equipment is handled.



Part 2

**Duties of not-for-profit organisations
under the Victorian OHS laws**

Duties of not-for-profit organisations under the Victorian OHS laws

There are many duties under Victorian OHS laws.

This part of the guide outlines:

- the key duties under Victorian OHS laws and who they apply to, and
- what the duties require community organisations do to meet their obligations.

What duties does your organisation have under Victorian OHS laws?

The table below lists key responsibilities under the Victorian OHS laws.

Responsibility under Victorian OHS laws	Section of the OHS Act	Does the responsibility apply?	
		Organisation is an employer	Organisation manages or controls a workplace
Provide and maintain a working environment for employees that is safe and without risks to health	Section 21	Yes	
Monitor the conditions of the workplace and the health of employees (including providing information concerning health and safety in the workplace and keeping relevant records)	Section 22	Yes	
Ensure that other people aren't exposed to risks to their health or safety arising from the organisation's activities	Section 23	Yes	
Keep the workplace (including all entrances and exits) safe and without risks to health	Section 26		Yes
Ensure the design, manufacture, installation, supply, erection or commission of plant, substances, materials (such as machinery and equipment), buildings and structures is safe and without risks to health a safety	Sections 27 to 31	Duties are specific to persons who design, manufacture, supply, install, erect or commission certain types of plant, buildings, structures or substances	
Not to recklessly place another person in danger of serious injury in the workplace	Section 32	Yes	Yes



Responsibility under Victorian OHS laws	Section of the OHS Act	Does the responsibility apply?	
		Organisation is an employer	Organisation manages or controls a workplace
Consult with employees about matters relating to OHS	Section 35	Yes	
Notify WorkSafe immediately about notifiable incidents, preserve the incident site and keep a record of the incident	Sections 38 to 39	Yes	
Hold appropriate licenses, registrations, permits and qualifications where required	Sections 40 to 42	Yes	Yes (if the organisation is carrying out work)
On request, negotiate with employees to establish a designated work group to represent employees on health and safety issues	Sections 43 to 44	Yes	
On request, or if required, establish a health and safety committee	Section 72	Yes	
Attempt to resolve OHS issues with employees (or representative) within a reasonable time frame, or (if required by the nature of the threat and degree of risk) direct that the work is to stop	Sections 73 to 74	Yes	
Not to discriminate against employees or prospective employees who are involved in health and safety matters	Section 76	Yes (also applies to prospective employers)	
Allow access to the workplace by an authorised representative who is acting within their powers	Section 93	Yes	Yes
On request, produce OHS documentation and answer questions put to them by an inspector	Section 100	Yes	Yes
Comply with a non-disturbance notice issued by an inspector	Section 110	Yes	Yes
Comply with an improvement notice issued by an inspector	Section 111	Yes	Yes
Comply with a prohibition notice issued by an inspector	Section 112	Yes	Yes
Comply with a request for name and address issued by an inspector	Section 119	Yes	Yes



Responsibility under Victorian OHS laws	Section of the OHS Act	Does the responsibility apply?	
		Organisation is an employer	Organisation manages or controls a workplace
Comply with a direction given by an inspector at the workplace	Section 120	Yes	Yes
Assist and not intentionally obstruct, mislead, conceal information from or intimidate or threaten, an inspector who is performing their functions or powers	Sections 121 and 125	Yes	Yes



Caution

Further duties and obligations set out in the OHS Regulations apply to certain employers and workplaces.

These duties cover topics such as manual handling, noise, prevention of falls, confined spaces, plant, high risk work, construction work, hazardous substances and materials, hazardous industries, licensing and registration. Community organisations must be aware of and comply with these duties.

Specific information on the key duties owed under Victorian OHS laws

More information about the key duties under the Victorian OHS laws follows.



Note

As you read more about each of the duties, you will notice that many require a community organisation to ensure that risks to health and safety are eliminated or reduced so far as is 'reasonably practicable'.

To find out more about what 'reasonably practicable' means, and what your organisation can do to make sure it complies with this standard of care, see **part 4** of this guide.

Duty to provide and maintain safe and healthy working environment

Who must comply with this duty?

All employers must comply with this duty.

What is the duty?

Employers must, so far as reasonably practicable, provide and maintain for employees a working environment that is safe and without risks to health.

Employers must:

- provide safe systems of work (for example, employees are not required to lift heavy objects in an unsafe manner)



- provide and maintain safe plant and equipment (machinery, equipment, appliances or tools)
- make arrangements for safe use, handling, storage and transport of plant and substances
- provide adequate facilities for the welfare of employees at the workplace (for example, first aid, dining, bathroom facilities), and
- provide appropriate information, instruction, training and supervision to enable employees to perform their work in a way that is safe and without risks to health

Who is the duty owed to?

A community organisation which is an employer owes this duty to:

- its employees
- any independent contractors or consultants it engages, and
- any employees of those independent contractors or consultants

Under the OHS Act, this duty is not owed to volunteers. However, there is a common law duty to provide and maintain a safe and healthy working environment for volunteers.



Case example

A grounds worker employed at a private school and registered charity in Melbourne was found dead on school grounds with a wound to the right side of his head. A large eucalyptus tree branch was positioned next to his body, with a section of large branch and a pile of smaller cut branches nearby. Two chainsaws were located near the dead worker, one of which was still running when they were found. The dead worker wasn't wearing a safety helmet at the time and there were no eyewitnesses to the incident.

The Court found:

- it was reasonably practicable for the school to reduce the risks associated with falling branches by providing a system to determine whether tree works ought to be completed by external contractors or by its employees
- the school failed to provide information, instruction and training to its employees in relation to the risks associated with cutting a branch from a tree with a chainsaw, and
- the school failed to ensure that the workplace was safe and without risks to health

The school pleaded guilty to the charges and was ordered to pay a fine of \$140,000.

Director of Public Prosecutions v Haileybury [2022] VCC 166



Case example

A disability support worker employed by the Department of Health and Human Services was sexually assaulted by a resident at a disability service residential facility. The resident was a convicted sex offender and had prior convictions, including for indecent assault.

The employer was charged with failing to provide necessary information about the resident's risk of violence (including sexual violence) to staff working directly with the resident and exposing the staff to risks to their health and safety.

The employer pleaded guilty and was sentenced without conviction to an adjourned undertaking for twelve months with a special condition that they pay \$50,000 to a charity.

Director of Public Prosecutions v The Crown in the right of State of Victoria (Department of Health Human Services) [2018] VCC 886



Case example

A support worker at a not-for-profit, non-government organisation was injured while travelling in a car with a client with autism. The client had previously assaulted a staff member. The organisation made no changes to the way it provided transport for clients following the previous incident.

The court found the organisation failed to maintain a safe working environment and fined it \$15,000. On appeal, the fine was reduced to \$10,000. The organisation now uses a vehicle to transport the client which has a row of seats separating the client and the workers.

DPP v Golden City Support Services (Unreported, Bendigo County Court, Patrick J, 26 August 2016)

Duty to monitor workplace conditions and health of employees

Who must comply with this duty?

All employers must comply with this duty.

What is the duty?

Employers must, so far as reasonably practicable:

- monitor the health, including the psychological health, of employees
- monitor the conditions at any workplace under the employer's management and control, and
- provide information to employees concerning health and safety at the workplace, including in other languages if appropriate

This information must include the name of people who employees may file an enquiry or complaint about health and safety with.

Where reasonably practicable, community organisations must also:

- keep information and records on employee health and safety (for example, first aid records and relevant employee medical information), and
- engage or employ a suitably qualified person to provide advice to the organisation on its employees' health and safety

The monitoring and information which an employer must provide will differ according to the nature of work and the environment in which employees perform that work.



Examples

- Where employees are exposed to high noise levels, an employer may be required to regularly test the hearing of those employees, the volume and duration of that noise, and to provide information to employees regarding the safe performance of work in a noisy environment.
- Where employees work long shifts, an employer may be required to monitor fatigue in those employees.
- If employees are regularly exposed to certain substances, an employer may be required to arrange medical tests for those employees, monitor levels of those substances and provide relevant information about the safe performance of work.

When asking yourself whether certain actions are required, remember that the employer must monitor and provide information so far as is reasonably practicable.



Who is this duty owed to?

Employers owe this duty to its employees.



Caution

Community organisations should ensure that they monitor the mental health of their employees.

This may involve consulting with employees about mental health, discussing mental health issues with the health and safety committee (where one exists, or even establishing such a committee) and using focus groups and regular employee surveys.

Employers engaged in areas that pose obvious risk to mental health are considered to be 'on notice' of mental health risks, even if an employee doesn't show signs of mental health issues.



Tip

Community organisations should consider engaging a suitably qualified person to advise on OHS:

- during periodic OHS reviews of the operations of the organisation
- when developing and implementing systems for the long-term management of OHS
- when establishing OHS consultative and issue resolution structures for the workplace
- when planning to modify the work premises, plant, substances or materials for use at work
- before changes to work practices and systems of work are introduced
- when establishing new operations or projects
- when new OHS information becomes available from an authoritative source
- when a hazardous exposure or incident, injury, illness or adverse result of environmental or health monitoring indicates that risk control measures are inadequate, and
- when managing complex issues related to psychological health such as bullying and stress



Caution

Employing or engaging a suitably qualified person to provide OHS advice does not guarantee legal duties and responsibilities under Victorian OHS laws will be met. Legal duties and responsibilities can't be transferred or delegated to a consultant.

If an employer is found to be in breach of their duties, it's not a defence to have relied on the advice or recommendations of a consultant. Therefore, it's important for community organisations that employ or engage a person for advice to stay actively involved in OHS issues, including monitoring and reviewing risk controls.



Duty not to expose other persons to risks to health or safety

Who must comply with this duty?

All employers must comply with this duty.

What is the duty?

Employers must, so far as reasonably practicable, ensure that persons other than employees are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer. This may include:

- any activity which is done in the course of carrying on the organisation's activities (for example, holding a fun day at a community kindergarten)
- any risks to health and safety that may arise when performing work or providing services at one or more locations (regardless of whether these are carried out at the ordinary place of work), and
- any activity which is ancillary to the organisation's operations (for example, a subcontractor's employees cleaning a workplace after hours)

Who is this duty owed to?

This duty is owed to volunteers, independent contractors and consultants, the employees of contractors or consultants, clients, and any other members of the public that might be affected by an organisation's activities.

Employers should ensure that all people are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer.

This will reduce the likelihood of an employer contravening section 21 or section 23 of the OHS Act.



Example

Scouts Victoria was charged by WorkSafe with contravening section 23 of the OHS Act in relation to an incident involving a volunteer.

The volunteer suffered an injury to their hand when using a wood splitter during maintenance works at a campsite used by Scouting groups. WorkSafe alleged that Scouts Victoria had failed to supply the volunteers with safe plant, adequate training or adequate supervision.

Scouts Victoria entered into an Enforceable Undertaking valued at \$42,150 in November 2014 as an alternative to prosecution.



Example

A council allowed 21 volunteer members of a cricket club to remove cement render and sheeting from the walls of its premises. Members of the club were exposed to asbestos in the process.

Before conducting the work, the council failed to make enquiries about the presence of asbestos in the walls of their buildings.

The court found that the council failed to ensure that people (volunteer members of a community organisation) were not exposed to risk. The council was found to have breached Victorian OHS laws and fined \$20,000.

Duty to keep the workplace safe and without risks to health

Who must comply with this duty?

All people and organisations that control or manage a workplace to any extent must comply with this duty.

What is the duty?

People and organisations who manage or control a workplace must ensure, so far as is reasonably practicable, that the workplace, and the means of entering and leaving it, are safe and without risks to health.

This duty applies regardless of whether that person or organisation is the owner of the premises. If a number of parties jointly 'manage and control' the workplace (or an aspect of the workplace), they may each owe duties under this section.

Who is the duty owed to?

This duty applies to any person who enters the premises at any time. This could include volunteers, clients, customers, service providers, contractors and others who enter the workplace.



Example

A community organisation leases office space. The organisation has been made aware that the front doormat is damaged and protrudes from the ground, but does not remove the tripping hazard.

A maintenance person arrives to fix the air-conditioning unit and trips on the mat, causing injury. The community organisation may be liable under section 26 as it was in control of the workplace and the means of entering it at the time, even though it doesn't own the premises.

Duties to ensure the design, manufacture, installation, supply, erection or commission of plant, buildings, structures, substances and other materials is safe and without risks to health

Who must comply with these duties?

These duties apply to any person or organisation that designs, manufactures, supplies, installs, erects or commissions:

- equipment used in a workplace (for example, machinery, appliances or tools)
- substances used in a workplace (for example, natural or artificial substances, whether in solid, liquid, gaseous or vapour forms), or
- plant, structures or buildings that comprise a workplace

What are the duties?

These are complex duties that may require a person or organisation engaged in the manufacture, design, supply, installation, erection or commission of plant, substances, equipment, structures or buildings to:

- ensure the safety of the design
- carry out testing and examination to ensure safety, or
- provide adequate information to other persons who are provided with the relevant plant, substance or equipment

If you think your community organisation may be involved in the design, manufacture, supply, installation, erection or commission of substances, plant (which includes equipment and machinery), structures or buildings, you should seek legal advice about your obligations under the Victorian OHS laws.

Who are the duties owed to?

These duties are broad and owed to all people who might use or be affected by the design, manufacture, installation, supply or commission of plant, substances or materials.

Duty not to recklessly endanger persons at workplaces

Who must comply with this duty?

All people and organisations must comply with this duty. This includes employers, persons who control or manage a workplace, employees, volunteers, clients, contractors and anyone else who could endanger a person at a workplace.

What is the duty?

All people have a duty not to recklessly engage in conduct that places or may place another person who is at a workplace in danger of serious injury, without lawful excuse.

A person will be reckless where they do an act (or fail to do something) in circumstances where that person can foresee their act or omission will probably place, or may place, another person at the workplace in danger of serious injury. A serious injury includes an injury that endangers someone's life.

Who is the duty owed to?

This duty is owed to everyone who is at a workplace, including employees, independent contractors (and their employees), volunteers and any other members of the public who would be affected by the community organisation's conduct.



Example

A volunteer-based, environmental lobby group protests outside a science laboratory and engages in a picket line, effectively blocking the entrance. Inside the building, an experiment being carried out causes toxic fumes to escape. An emergency evacuation of the building is called. When attempting to exit the building, the employees inside are blocked at the exit by the group. The lobby group delays the evacuation procedure and some employees are rushed to hospital because they have inhaled toxic fumes. The lobby group members may be found guilty of an offence under section 32 of the OHS Act in these circumstances.



Example

An employee of a community organisation directs a volunteer to drive a truck carrying donated furniture to one of the organisation's stores. The truck that the volunteer is instructed to drive has defective brakes and the employee knows this. While driving to the store, the volunteer attempts to apply the brakes, but the brakes fail. The volunteer swerves to the left side of the road to avoid traffic and collides with the support column of a road sign. The volunteer dies because of injuries sustained in the collision. The employee who directed the worker to drive the truck may be found guilty of an offence under section 32 of the OHS Act in these circumstances.

Duty to consult on OHS matters

Who must comply with this duty?

All employers must comply with this duty.

What is the duty?

Employers have a duty to consult with their workers regarding matters that affect, or are likely to affect their health and safety.

Employers are required, so far as is reasonably practicable, to consult with employees about the following matters:

- identifying or assessing hazards or risks to health and safety at the workplace
- making decisions about ways to control risks to health and safety

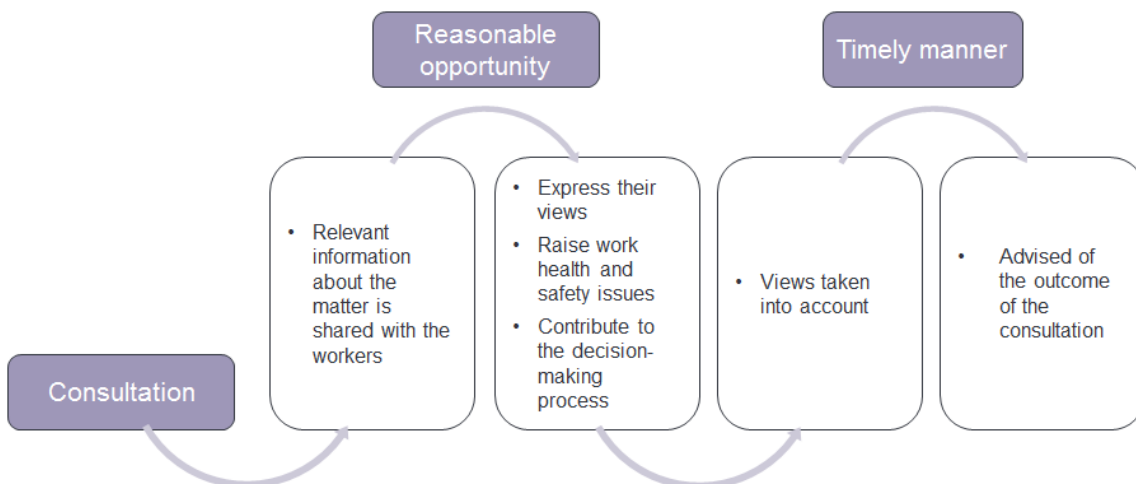
- making decisions about the adequacy of facilities for the welfare of employees
- making decisions about various health and safety procedures, including:
 - resolving health and safety issues
 - consulting with employees
 - monitoring the health of employees and workplace conditions, and
 - providing information and training to employees and contractors
- determining the membership of a health and safety committee
- proposing changes that may affect the health or safety of employees
- establishing designated work groups represented by health and safety representatives (see sections 54, 67 and 70), and
- establishing health and safety committees (see section 72)

Consulting with employees requires the employer to:

- share information with the employees
- give the employees a reasonable opportunity to express their views about the matter, and
- take those views into account

In some circumstances, it may be necessary to arrange members of designated work groups to elect a health and safety representative from among the group. The views of employees can be effectively communicated to an employer through a health and safety representative. If the employer and employees have agreed to consultation procedures, these procedures must be followed to properly consult employees.

The meaning of consultation



Source: Michael Tooma, *Due Diligence; Horizontal and Vertical Consultation* (CCH Australia Limited, 2012)

Who is this duty owed to?

Employers must consult with their employees, any independent contractors they engage, and the employees of those independent contractors. This duty does not strictly extend to volunteers; however it is best practice for community organisations to include volunteers in these consultations.



Tip

While the duty to consult is not owed to volunteers, it's a good idea to involve all people involved in a community organisation in health and safety work practices.

Volunteers will often have some great ideas about how to reduce the risk of injuries and make the workplace safer.



Duties to notify WorkSafe of an incident and preserve an incident site

Who must comply with this duty?

All employers who have the management and control of a workplace must comply with this duty.

An employer (for example, your community organisation) has the ultimate responsibility to ensure it has appropriate procedures in place to enable its employees to notify notifiable incidents to WorkSafe in a timely manner and ensure the incident site is not disturbed .

What is the duty?

This duty creates an obligation on employers to immediately notify WorkSafe of certain incidents. For further information on this duty, including the types of incidents that will require notification and the process for notifying WorkSafe, see **part 5** of this guide.

There is also an obligation on an employer to preserve the site where the incident occurred until a WorkSafe inspector arrives on site, or until such other time WorkSafe directs.

Who is this duty owed to?

This duty is owed to WorkSafe following an incident, which may relate to the health and safety of any person, whether an employee, volunteer, contractor or any member of the general public who is involved in an incident.



Part 3

**Who can be legally responsible
under Victorian OHS laws?**

Who can be legally responsible under Victorian OHS laws?



Note

Who may be legally responsible depends on the circumstances – both your organisation and its individual officers could be liable for a failure to comply with the Victorian OHS laws.

WorkSafe can prosecute the organisation, its officers, or in some circumstances, both. This includes prosecution for the offence of workplace manslaughter.

Liability of the community organisation

Community organisations

Whether your community organisation is incorporated (such as an incorporated association or a company limited by guarantee) or unincorporated, the organisation is a ‘person’ for the purposes of Victorian OHS laws and can be found guilty of breaches of the Victorian OHS laws.

This means that an incorporated or unincorporated organisation can be held responsible for breaches of the OHS Act by its officers, employees, or agents, where those officers, employees or agents are performing tasks within the scope of their authority.

The maximum fines for a breach of the Victorian OHS Laws by a not-for-profit organisation are the same as they are for for-profit organisations, and they are significant (maximum penalties are approximately \$1.6 to 3.7 million, and up to \$18.5 million in cases of workplace manslaughter).

In addition to prosecuting the community organisation as an entity, WorkSafe may also prosecute the organisation’s individual officers personally (see below for more information on ‘officers’ of a community organisation).

The officers of a community organisation

Under certain circumstances, WorkSafe can also look to prosecute the officers of a community organisation when there has been a breach of Victorian OHS laws.

Who is an officer?

Under Victorian OHS laws, ‘officers’ of a community organisation will include any of the following:

- a director or secretary of an incorporated community organisation
- a partner or officeholder of an unincorporated community organisation
- a person who makes decisions that affect the whole or a substantial part of the operations of a community organisation
- a person who has the capacity to significantly affect the community organisation’s financial standing
- a person who commonly instructs the committee of management on how to perform its functions, and



- various people who may be involved in a community organisation as a receiver, administrator, liquidator or trustee of a community organisation

When can officers be personally liable?

Paid officers

An officer of a community organisation may be found personally liable for a breach of Victorian OHS laws if:

- the organisation contravenes Victorian OHS laws and the contravention arises because the officer failed to take reasonable care, and
- the officer is not a volunteer who, when they failed to take reasonable care, was acting as a volunteer

Volunteer officers

Volunteer officers of an organisation will generally not be held liable for breaches of Victorian OHS laws for anything done by them in a volunteer capacity, even where they fail to take reasonable care.

However, they should:

- always act in good faith in that capacity, and
- not recklessly or negligently engage in conduct that may place another person who is at a workplace at risk of injury

So, if your community organisation is made up of officers who are volunteers, those volunteer officers can't be held personally liable for breaches of the organisation's duties under Victorian OHS laws. However, as noted earlier in this guide, a volunteer officer may still owe duties under Victorian OHS laws in their personal capacity. There are also other common law duties that require volunteer officers to exercise a reasonable standard of care.

What is a 'failure to take reasonable care'?

In determining whether an officer of an organisation has failed to take reasonable care and may be guilty of an offence, a court will consider:

- what the officer knew about the matter concerned
- the extent of the officer's ability to make, or participate in the making of, decisions that affect the organisation in relation to the matter concerned, and
- whether the contravention by the organisation can be attributed to an act or omission of any other person



Tip

If you take on a paid position as an 'officer' in a community organisation, you may have responsibilities under Victorian OHS laws and are potentially liable if something goes wrong.

It's a good idea to make sure you are aware of your organisation's obligations under Victorian OHS laws and the measures being put in place to eliminate or minimise risks.

In many cases, a breach of a duty under Victorian OHS laws will only be found when a community organisation (and its officers) didn't take reasonably practicable steps to eliminate or reduce a risk.

Make sure OHS is discussed regularly at committee meetings so you can satisfy yourself that all reasonably practicable steps are being taken to ensure a safe working environment for people involved in your community organisation.



Tip

An officer who receives reimbursement from the organisation for out-of-pocket expenses will still be classified as a volunteer for the purposes of Victorian OHS Law if they are acting on a voluntary basis.

Workplace manslaughter

Where a death occurs in a workplace, an organisation or its officers may be charged with the offence of workplace manslaughter (see sections 39A – 39G of the OHS Act).

Workplace manslaughter can give rise to a fine of up to \$18.5 million for an organisation or a 25-year prison sentence for an individual.

Who can be charged with workplace manslaughter?

As long as they owed the victim an ‘applicable duty’ under the OHS Act:

- a person (including an incorporated or unincorporated organisation), who is not a volunteer, or
- an officer of an organisation (the organisation may be incorporated or unincorporated), who is not a volunteer,

may be charged with workplace manslaughter.



Note

The applicable duties encompass almost all the OHS duties set out in the OHS Act, with some very limited exceptions relating to duties owed by employees.

For more information on the OHS duties owed by employees, see **part 4** of this guide.

When will a breach of an OHS duty be workplace manslaughter?

Workplace manslaughter will arise if:

- the applicable OHS duty was breached by negligent conduct (ie. conduct which fell greatly short of the standard of care that would have been taken by a reasonable person in the circumstances)
- there was a high risk of death, serious injury or serious illness, and
- the breach of the duty caused the death of the victim

In the case of a body corporate, the conduct may be considered negligent regardless of whether any of the officers were involved in any part of the conduct. The standard of care expected is the one which would have been taken by a reasonable body corporate in the circumstances.



Part 4

Complying with Victorian OHS laws

Complying with Victorian OHS laws

What does ‘reasonably practicable’ mean?

Many of the duties in Victorian OHS laws require that employers and other persons do what is ‘reasonably practicable’ in the circumstances to make sure they have met their obligations to provide a safe and healthy working environment.

This standard of care requires employers and other persons to eliminate risks to health and safety, or where this is not reasonably practicable, reduce the risks so far as is reasonably practicable.

In this context, what is reasonably practicable will depend on:

- the likelihood of the hazard or risk concerned eventuating
- the degree of harm that would result if the hazard or risk eventuated
- what the person concerned knows, or ought reasonably to have known, about the hazard or risk and any ways of eliminating or reducing the hazard or risk
- the availability and suitability of ways to eliminate or reduce the hazard or risk, and
- the cost of eliminating or reducing the hazard or risk

In Australia, the courts have confirmed that:

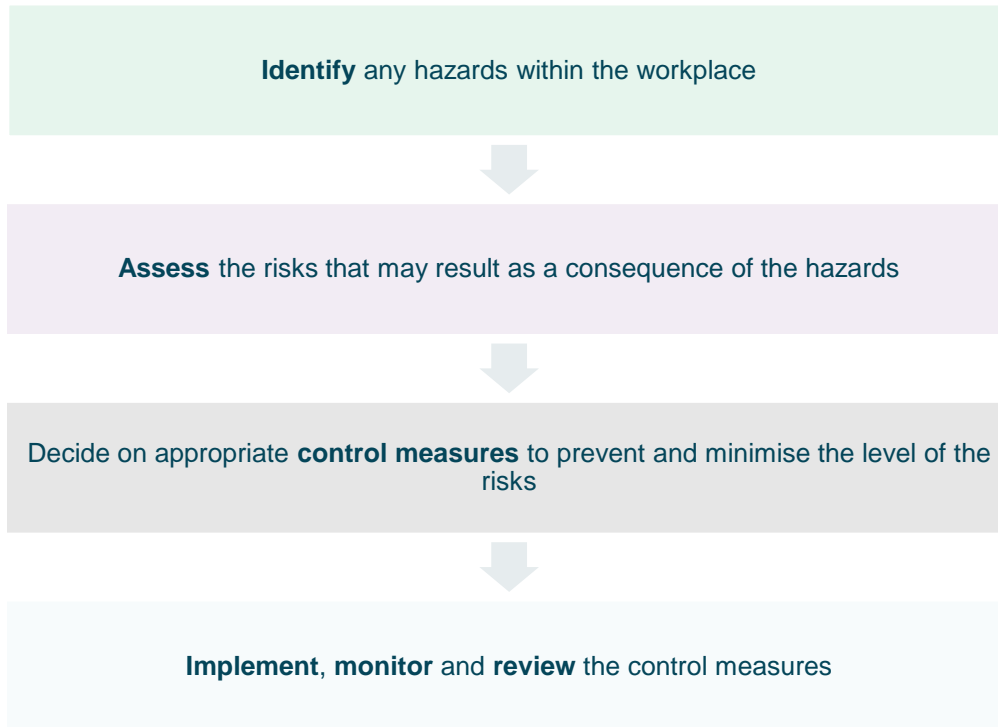
- something will not be ‘reasonably practicable’ simply because it is physically possible
- what is ‘reasonably practicable’ is judged objectively according to what was known at the time of the alleged breach, including relevant trade or industry knowledge, and the subjective knowledge of the person, and
- to determine what is ‘reasonably practicable’, it is necessary to balance the likelihood of the risk occurring against the cost, time and difficulty involved in removing that risk

Importantly, an organisation or officer can meet a duty or obligation if they comply with any specific regulations or codes related to the duty or obligation.



WorkSafe has published a useful guide for workplaces [‘Controlling OHS hazards and risks’](#) which sets out methods for organisations wishing to identify and limit OHS hazards in the workplace.

WorkSafe advises duty-holders to undertake a four-stage process to control OHS risks which requires community organisations to:



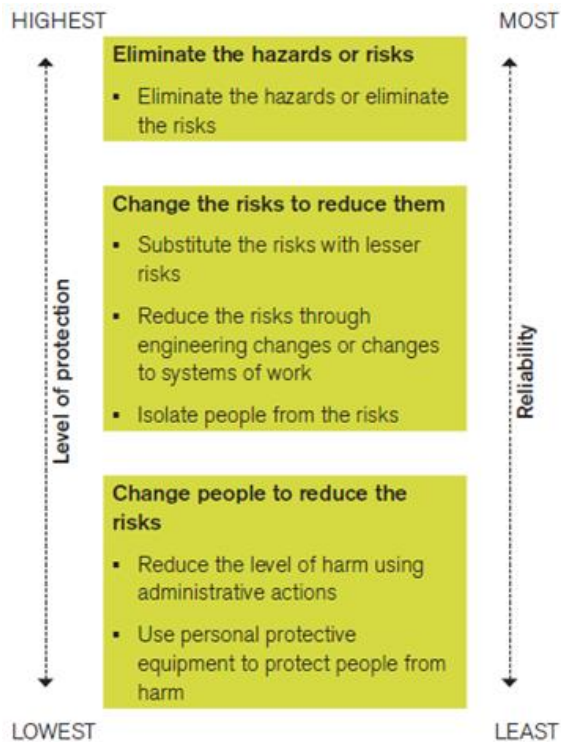
The risk management process



Source: Worksafe Victoria, [Controlling OHS hazards and risks](#). (June 2017)

When determining what controls are appropriate, Victorian OHS laws require you to eliminate risks so far as reasonably practicable, and if they cannot be eliminated, to change the risk so as to reduce it. If the risk cannot be removed or changed, the risk should be otherwise limited through protective equipment, use of policies, training and any other reasonably practicable measure.

The hierarchy of risk controls



Source: Worksafe Victoria, [Controlling OHS hazards and risks](#) (June 2017)



Tip

The cost of eliminating or minimising risks may be a relevant factor for many community organisations with limited resources. However, if there is an incident in the workplace, it's not a defence to claim, 'We're a not-for-profit group and we couldn't afford to reduce that risk.' **If you can't eliminate or minimise the risk, you should stop the activity which gives rise to the risk.**

To reduce your chance of breaching Victorian OHS laws, your organisation needs to be able to show that it has identified and considered risks and taken practical steps to eliminate or reduce those risks. Documented proof is best.

Often these practical steps don't need to be expensive measures. For example, if your volunteers are engaging in manual handling, such as lifting items, you are not obliged to buy an expensive hydraulic lifting machine, but instead you could train volunteers in safe manual handling practices and post notices around the premises as reminders to encourage the use of the safe manual handling practices they have been taught.



Your community organisation may wish to review its approach to risk management, as well as review the appropriate insurance options. See our [guide to risk management and insurance](#) for more information.

What are an employee's obligations?

Under Victorian OHS laws, an employee is a person employed under a:

- contract of employment, or
- contract of training

While at work, employees have a duty to take reasonable care for their own health and safety and for the health and safety of others who may be affected by their actions or omissions at a workplace. Employees must also co-operate with their employer's efforts to comply with Victoria's OHS laws.

In determining whether an employee is complying with their duties under the OHS law, your organisation should consider what the employee knew about the relevant circumstances. This may include:

- whether the employee acted in a manner consistent with the skills and expertise of a reasonable person in the employee's position, and
- whether the employee acted within the scope of the organisation's OHS policies and procedures



Remember

Everyone also has a duty not to recklessly engage in conduct which places or may place another person in danger of serious injury.



Part 5

Responding to a workplace incident

Responding to a workplace incident

There is no 'one size fits all' response to an OHS incident or complaint.

The best and most appropriate response will largely depend on the nature of the incident. Some incidents require immediate responses and notification to WorkSafe under the Victorian OHS laws.



Note

There are significant penalties for employers who fail to follow the correct procedure in immediately reporting certain workplace incidents to WorkSafe.

'Incidents' include situations where no one was hurt, but people were exposed to a serious risk to their health or safety from an immediate or imminent exposure to a hazard. These procedures, together with the types of incidents that require notification, are discussed below.

Initial response to an incident

Immediately after a workplace incident, the first thing a community organisation should do is assess the seriousness of the incident and find out whether an injury has occurred to any person or someone has been exposed to a serious risk to their health or safety, irrespective of whether they are an employee or not.

If an injury has occurred, you should apply or seek immediate and appropriate medical treatment for the injured person.



Tip

It's a good idea to have one or two people in your organisation (an officer or a manager) who agree to be responsible for the co-ordination of the response to a workplace incident.

This does not mean that the person is solely responsible – just that it is helpful to have one person to co-ordinate the response so that the incident can be dealt with appropriately. That person should be aware of the responsibilities of the organisation under the Victorian OHS laws (including notification and preservation requirements, as outlined below).

Consider notification requirements

While all workplace incidents should be recorded by all community organisations no matter how large or small, there are particular legal obligations on community organisations as employers to report incidents which result in death or serious injury or pose a serious risk to health or safety from an immediate or imminent exposure to a hazard.

The immediate reporting requirement

An employer must notify WorkSafe immediately after becoming aware of certain kinds of incidents at a workplace under the management and control of the employer.

**Note**

A 'workplace' will include any place, whether a building or not, where employees work.

This could include sporting fields, vehicles and any other places that employees of your community organisation undertake their duties. Serious incidents occurring in these places may require notification to WorkSafe by your organisation.

Injury

WorkSafe requires notification of incidents that lead to certain injuries including (but not limited to) incidents which result in:

- death
- medical treatment within 48 hours of exposure to certain substances
- immediate treatment in hospital as an in-patient, or
- immediate medical treatment for injuries including amputation, a serious head or eye injury, serious laceration or removal of skin, electric shock, a spinal injury, or loss of a bodily function

**Note**

It's important to remember that an organisation's duty to notify WorkSafe of incidents causing serious injury will apply in relation to any person, not just employees. So this will include volunteers and members of the public.

Duty to report specific incident types

The duty to notify WorkSafe also applies to incidents that expose a person (which includes employees, volunteers or members of the public) to a serious risk to their health or safety, emanating from an immediate or imminent exposure to specific incidents, regardless of whether an actual injury has occurred.

A 'serious risk' to someone's health or safety occurs where:

- exposure to the incident create a risk which, if it had been realised, could have resulted in the death or a serious injury or illness of a person, and
- the risk was not minor and there was a real possibility the risk could have eventuated

These types of incidents include:

- the collapse, overturning, failure or malfunction of, or damage to, any plant that must not be used without a licence or registration
- the collapse or failure of an excavation or of any shoring supporting an excavation
- the collapse or partial collapse of all or part of a building or structure
- an implosion, explosion, or fire
- electric shock
- the escape, spillage or leakage of certain substances, or
- the fall or release from a height of any plant, substance or object



Note – imminent exposure

'Imminent' exposure means a person was, or would have been, exposed to a serious risk to health or safety when the incident occurred.

This includes where a person was not in the vicinity when an incident occurred, but:

- was in the vicinity prior to the incident
- ordinarily would have been in the vicinity, or
- was nearby when the incident occurred

The notification procedure

If you believe that an incident has occurred which requires notification to WorkSafe (see above), your organisation must telephone WorkSafe as soon as it becomes aware of a notifiable incident. Any delay in reporting the incident could mean that your organisation has breached its obligations under the Victorian OHS laws.

It's recommended that you seek legal advice in relation to any notifiable incidents.

The 48-hour written notification requirement

In addition to telephoning WorkSafe to report a notifiable incident, an employer must provide the regulator with a written record of what occurred within 48 hours of becoming aware of the incident.

This record must be kept by the employer for at least five years. Written notification is required to be in a form specified by WorkSafe. You can download copies of the required form from the [WorkSafe website](#).



Case example

An organisation operated residential home care sites for the elderly and people with a disability.

A resident of the organisation was performing routine exercises on a tilt table under the supervision of his carer. During the exercises another resident called out to the carer for assistance and the carer left the patient on the tilt table in a squatting position. As he left he told the patient he would be back in five minutes and gave him the controls. While alone the patient pressed a button to change the angle of the tilt table. The button he pressed in fact changed the angle of the table so that a significant amount of pressure was placed on his legs.

Unable to support his own weight, he fell to the floor and broke both his legs. He required a significant hospital stay after the incident. The organisation failed to notify WorkSafe immediately after becoming aware of the incident in writing within 48 hours of the incident. The organisation entered into an enforceable undertaking with the regulator.

Victorian WorkCover Authority v Australian Home Care Services Pty Ltd (Unreported, Moorabbin Magistrates' Court, Clifford M, 11 May 2017)



Tip

Your organisation should keep copies of blank Incident Notification Forms on hand to minimise delays in providing written notice should a notifiable incident occur in your workplace.

You can download the Incident Notification Form from the [WorkSafe website](#).

Preservation of incident site

The Victorian OHS laws require that incident sites be preserved to allow WorkSafe to investigate (if required). If a notifiable incident does occur in your organisation, the site should not be disturbed until a WorkSafe inspector arrives at the workplace, unless you have been directed otherwise by WorkSafe.

Site preservation means ensuring the site whether the incident occurred is not disturbed. However, there are exceptions which allow a site to be disturbed, including where disturbance is required in order to:

- protect a person's health or safety
- help someone who is injured, or
- make the site safe or prevent further occurrence of an incident

If you are unsure as to whether you are allowed to enter the incident site, or the extent to which you can disturb the incident scene, you should phone WorkSafe on 132 360 to discuss your concerns.

Register of injuries

Under the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*, an employer must keep a Register of Injuries in which a worker, or any person acting on the worker's behalf, may record any workplace incidents or injuries, no matter how minor they appear to be at the time. The employer must also ensure that the Register of Injuries is readily accessible at all reasonable times by workers and persons acting on a worker's behalf.



Note

A 'worker' includes anyone who performs or agrees to perform work at an employer's direction, instruction or request. This could include employees, interns, work experience students, contractors, employees of contractors and volunteers.

The information in in the Register of Injuries includes:

- the worker's name and job title
- the date and time of the worker's injury
- the worker's exact location when they were injured
- the names of any witnesses to the injury
- the date on which the entry into the Register of Injuries is made, and
- the name of the person making the entry



Tip

Download the [Accidents and Incidents Register template](#) from the [WorkSafe website](#). When filled out, the register should be filed in a central place.



Investigate and prevent reoccurrences

- Following an incident, an employer should investigate the circumstances in which the incident occurred. Notes should be recorded and witness accounts should be taken to provide the employer with a clear picture of how and why the incident occurred. Legal assistance and advice should be sought in relation to the process.
- The Victorian OHS laws require an employer to consult with employees, their independent contractors and the employees of those independent contractors regarding the identification of any risks and possible resolution of any health and safety issues. In the context of an investigation, employers should work with employees, contractors and volunteers to put measures in place (both remedial and precautionary) to ensure that a similar incident does not occur in the future.
- These health and safety systems, including any plans to prevent incident occurrence, should be regularly reviewed and updated by the employer.



Part 6

**Entry and inspection powers of
WorkSafe inspectors**

Entry and inspection powers of WorkSafe inspectors

WorkSafe inspectors have various powers of entry into, and inspection of, places under the Victorian OHS laws. These powers apply to places that community organisations might occupy, control, manage or conduct work at, and are briefly summarised below.

An inspector's power to enter

A WorkSafe inspector may enter a place that the inspector reasonably believes is a workplace at any time during working hours. Note that working hours is any time at which the workplace is usually open for work, and may be different from standard business hours.

A WorkSafe inspector may also enter a place where they reasonably believe that there is an immediate risk to a person's health and safety, regardless of whether it is outside working hours, and regardless of whether the inspector believes the place to be a workplace.

There are some limits to this power – for instance, an inspector may not enter a place used only for residential purposes without either the consent of the occupier or a warrant.

Immediately upon entering a workplace, a WorkSafe inspector must take all reasonable steps to notify the occupier of the place and any health and safety representatives of their presence, and produce appropriate identification.

Once inside a workplace, a WorkSafe inspector is permitted to:

- inspect, examine and make enquiries at the place
- inspect and examine anything at the place, including documents
- bring any equipment or materials that may be required
- seize anything that may provide evidence of an offence
- seize anything that requires further testing offsite
- take photographs, samples or measurements, or make sketches or recordings
- exercise any powers available to them under the Act or regulations
- do anything that is reasonably necessary to perform their functions, and
- require a person to produce documentation or answer questions

WorkSafe inspector entry reports

After any visit, a WorkSafe inspector must detail their findings in a written report to the place's occupier and any health and safety representatives.

This report must include:

- the time of entry and departure
- the purpose of entry
- what was done during the visit
- a summary of the inspector's observations

- the procedures for obtaining further details from WorkSafe
- how to seek review of any decision by the inspector during the visit, and
- whether any photographs, sketches or recordings were made and where they may be inspected

WorkSafe improvement, prohibition or non-disturbance notices

A WorkSafe inspector has the authority to issue an Improvement Notice or Prohibition Notice if they reasonably believe that a person (whether or not an employer) has contravened the Victorian OHS laws or there is an immediate risk to health and safety. An inspector also has the authority to issue a Non-disturbance Notice if they believe it is necessary to facilitate the inspector's role under the OHS Act.

An Improvement Notice may include directions on how to remedy a breach of Victorian OHS laws. If your community organisation receives an Improvement Notice, you should take it very seriously. There are penalties for failing to comply with an Improvement Notice, and any directions provided in an Improvement Notice to your community organisation should be followed as soon as possible. If you disagree with the Improvement Notice, you may seek review of the decision by WorkSafe, the Victorian Civil and Administrative Tribunal (**VCAT**) or both (see below).

A Prohibition Notice prevents a person or organisation from, for example, undertaking certain work or operating specified plant until the alleged immediate risk is remedied. Again, a community organisation should seek to comply with the directions contained in a Prohibition Notice within the prescribed timeframe, and again, you may seek review of the decision by WorkSafe, VCAT or both.

A Non-disturbance Notice requires a person or organisation to stop using, moving or interfering with specific plant, substances or other things at a specific site. The Non-disturbance Notice can only last for seven days, but an inspector can continue issuing notices, to prevent disturbance of the site. As above, a community organisation should comply with the directions contained in a Non-disturbance Notice within the required timeframe. If you disagree with the Non-disturbance Notice, you may seek review of the decision by WorkSafe, VCAT or both.



Tip

Your organisation may wish to speak to a lawyer if it receives an improvement, prohibition or non-disturbance notice.

Seeking review of WorkSafe decisions

Your organisation, its officers or other eligible persons can seek a review of certain decisions by WorkSafe. There are avenues available for both internal review by WorkSafe and external review by VCAT.

There are strict timeframes for seeking a review of a WorkSafe decision (generally within 14 days after receiving a notice). If your organisation disagrees with a WorkSafe decision, you should seek independent legal advice immediately to discuss your review rights. However, an application for review does not affect the operation of the decision unless WorkSafe stays the operation of the decision pending the review.



WorkSafe has published [guidelines](#) to help organisations bring an application for internal review.

