

Reforming the Occupational Health and Safety (OHS) Legislation in Alberta

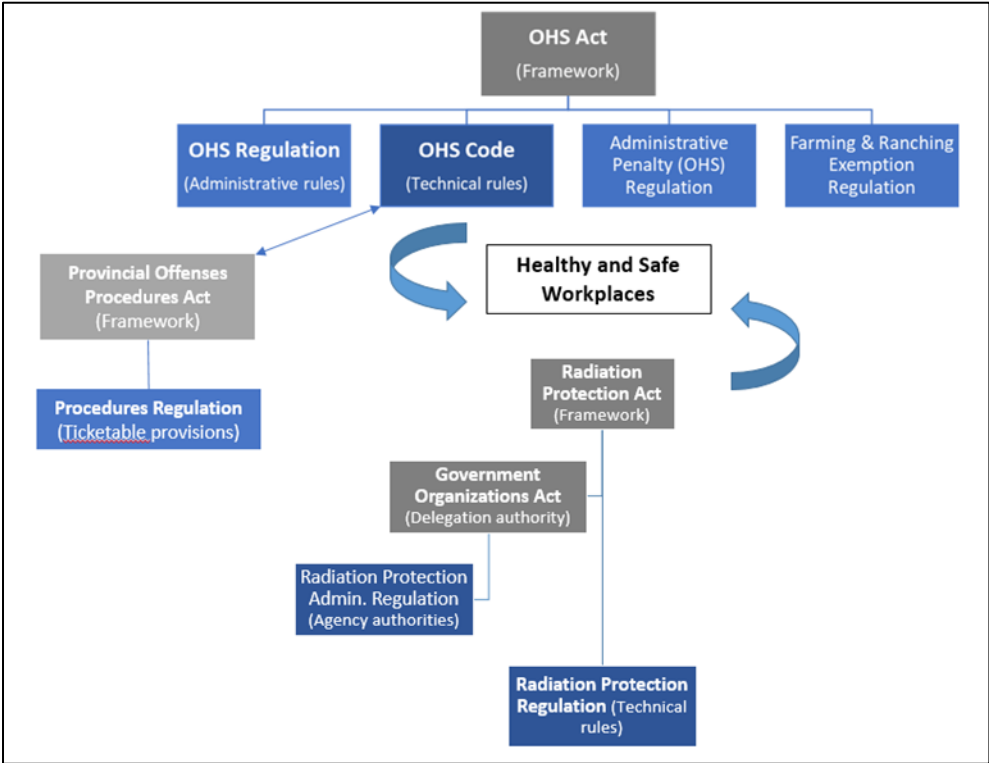
Discussion Guide

Alberta Labour and Immigration

Background

Alberta’s Occupational Health and Safety (OHS) Legislative Framework

Legislation is a foundational pillar of an OHS system. In Canada, and internationally, OHS legislation is grounded on the internal responsibility system (IRS). Everyone in the workplace is responsible, each according to their authority and control, to ensure a healthy and safe workplace. Externally, the IRS is supported by government who develops legislation, monitors for compliance, inspects workplaces, investigates incidents and responds to complaints where the IRS has failed. In Alberta, the legislative framework for the OHS system is split primarily between the OHS Act and the *Radiation Protection Act*.



In 1976, the Gale Commission provided recommendations which provided the groundwork for OHS in Alberta. In response, the OHS Act was passed. Since its inception in 1976, Alberta’s OHS Act has been amended eleven times, the most substantial of which was completed in 2017.

The amended OHS Act, which came into effect in June 2018, represented a significant shift to the OHS system in Alberta. The changes addressed a number of issues,

including changing roles and responsibilities of work site parties, programs for OHS in the workplace, establishment of joint work site health and safety committees and an overhaul of enforcement tools. However, some stakeholders raised concerns that the changes made the OHS requirements more prescriptive and burdensome, and introduced new processes that affect how OHS is addressed in Alberta workplaces and how government services and enforcement are delivered.

Unlike other work site hazards, radiation has its own legislation. The Alberta *Radiation Protection Act* came into force on July 1, 1970. This Act governs the registration, inspection, and control of radiation installations and equipment to ensure the safety of workers and patients. It was revised in 1985 to include general duty clauses for employers and workers identical to those in the OHS Act at the time, as well as provisions for codes of practice, equipment maintenance, and quality-assurance programs for diagnostic X-ray equipment. Except for minor amendments, this legislation has not changed since 1985 and is now out of step with the OHS Act.

OHS Legislative Reform

Legislative reform provides the opportunity to review the OHS legislation and associated Regulations to improve health and safety outcomes while enabling innovation and competitiveness, and streamlining requirements.

Historically, Alberta's approach to OHS was to develop a performance-based framework and provide detailed, including prescriptive where appropriate, requirements in Regulation. Moving towards a prescriptive framework in the OHS Act has helped increase clarity around expectations, but has increased administrative burden and decreased flexibility on how to apply requirements. Legislative reform provides an opportunity for the government to re-examine the framework for OHS and rebalance it with the aim of improving health and safety outcomes while reducing regulatory burden.

In addition, OHS requirements for radiation hazards are split in separate legislation creating potential duplication and discrepancies in compliance and enforcement approach. The legislative reform provides an opportunity for the government to integrate and consolidate requirements for OHS under one umbrella.

Amending the OHS Act

Some stakeholder's and government experience under the new OHS Act has suggested areas for improvement. Examples include:

- New reporting provisions for injuries and incidents (“potentially serious incidents”) are unclear, resulting in inconsistent application of the requirements.
- Requirements for joint work site health and safety committees (HSCs) and health and safety representatives (HSRs) are prescriptive and may result in duplication, particularly for multi-employer work sites.
 - The government made changes in December 2019 to move from work site to employer based requirements, as well as consolidated training requirements. However, there may still be duplication, particularly where a prime contractor is also required (construction and oil and gas work sites).
 - Providing a robust, but less complex and prescriptive framework for these requirements may help promote compliance as well as allow workplaces to develop committees and programs that better align with their workforce, hazards, and organizational structure.
- Compliance and enforcement provisions do not allow for flexibility in addressing non-compliance.
- The new OHS Act is significantly longer with more duplication, creating confusion about requirements.

The government is proposing to look at potential changes to the OHS legislation, falling within three general themes:

1. **Strengthen the IRS** to give greater control of OHS issues to the parties responsible for them.
2. **Enable innovation** by providing flexibility to work site parties and government to determine how best to achieve health and safety outcomes through a performance based approach, while also providing clarity.
3. **Clarify accountability** by shifting ownership of OHS issues from government to those who are responsible for them, and improve enforcement tools to address situations when work site parties are not meeting their responsibilities.

1. Strengthen the Internal Responsibility System

The IRS is the basis for OHS legislation in Canada. The premise is that everyone at a work site has a shared role in keeping their workplace healthy and safe, each according to their authority and control. While legislation establishes and sets basic standards, the government is responsible to develop and enforce the law but not manage OHS in individual workplaces. Legislation sets the framework to ensure the health and safety of a work site through the direct participation of work site parties.

Under the IRS, most jurisdictions recognize that workers have three fundamental rights:

- The right to know about workplace hazards which may impact their health and safety,
- The right to participate in health and safety matters in the workplace, and
- The right to refuse work which is unsafe or for which they are not competent to do safely.

Health and Safety Committees, Health and Safety Representatives and OHS Programs

HSCs are groups of worker and employer representatives working together to identify and solve health and safety problems at the work site. The primary purpose of the committee is to facilitate communication and participation in health and safety. Participation in OHS has been shown to improve health and safety outcomes.

In Canada, HSCs are the mechanism used for participation in OHS by work site parties. HSCs are supported through OHS programs which set the framework for how OHS is managed in the workplace. In 2018, HSCs and OHS programs became mandatory in Alberta for employers of a certain size.

Both inside Canada and out, when an HSC is the mechanism for worker engagement, there are a number of variations used to determine the thresholds for when one is required. For example, in some places in Canada, HSCs are required only for certain industries, while some states in the United States base thresholds for HSCs on the number of workers and/or workers' compensation statistics. In the European Union, a framework has been developed to mandate worker consultation and participation in health and safety, but they are left with the flexibility to determine how to address this.

While most Alberta stakeholders support the importance of engagement in OHS, some stakeholders have raised concerns that the prescriptive nature of Alberta's requirements for the structure of committees, function, training, conduct of meetings, and even the management of meeting minutes, has resulted in challenges. For example, a number of employers have reported the lack of flexibility as onerous, making it difficult to find volunteers and meet training requirements. In construction, where prime contractors are required to coordinate OHS at multi-employer work sites, establishing an HSC for the work site can be challenging due to the transient nature of the workforce and changing activities on the work site as construction progresses.

Providing a robust, but less complex and prescriptive framework for worker engagement may help promote compliance as well as allow workplaces to develop processes and programs that better align with their workforce, hazards, and organizational structure.

Discussion Questions

1. What are options, outside of HSC and HSR that could be considered to ensure workplace engagement in OHS in Alberta?

2. What aspects of HSC, HSR and OHS programs are most critical to best support the IRS?
3. Which areas, for example function, duties, training, meeting conduct, would benefit from more flexibility? Why is this the case?
4. What challenges have been observed in complying with the requirements for HSCs, HSRs and OHS programs?
5. Are there other options for low risk work sites other than a HSC? What would be considered a 'low risk' work site?
6. For work sites where there is a prime contractor, or multi- employer work sites, how could OHS requirements ensure effective engagement in OHS?

Right to Refuse Unsafe Work

The right to refuse is intended to address situations where the right to know and the right to participate have failed to address a health and safety concern. In Alberta, workers have the right to refuse work that presents a danger. Employers cannot penalize workers for refusing to work or otherwise complying with their obligations under the OHS Act. A worker may refuse work that may endanger themselves. However, the OHS Act does not define "danger" or place limitations on refusals where other workers or the public may be endangered. Providing more clarity in the OHS Act will help balance the protection of workers and others who may be impacted by a work refusal.

Discussion Questions

1. How can "danger" be better defined to provide more clarity as to when the right to refuse unsafe work applies?
2. Are there circumstances in which the right to refuse unsafe work should be limited? Please explain and provide examples.
3. How can the process outlined in the OHS Act be streamlined to provide work site parties with more flexibility to address work refusals in the workplace?

2. Enabling Innovation

Innovation is a process that enables improvements by implementing creative ideas to improve health and safety outcomes and to generate value. Providing an OHS framework that allows for innovation can promote problem solving to address issues and inspire work site parties to comply with legislative requirements. The challenge is to find and remove barriers that inhibit innovation and create challenges to compliance, while empowering work site parties to work together to find solutions that enhance OHS.

Enhancing Flexibility and Clarity

The government is committed to improving health and safety outcomes while reducing unnecessary regulatory burden. Legislative requirements should be clear so work site parties understand their obligations without the need to ask for clarification from the government or a lawyer.

Some examples stakeholders identified of ways the OHS legislation could be made clearer include:

- Simplifying language, for example, “discriminatory” versus “disciplinary” action.
- Adding clarity to definitions, for example “prime contractor” and incidents that must be reported.
- Removing duplication, for example provisions already covered elsewhere such as the obligations or authorities of government staff and a work site party having to comply with the legislation.
- Removing obligations that create burden but may not create value, for example, mandatory consultation as part of a request to vary from legislative requirements (acceptances).

Some examples stakeholders identified of ways the OHS legislation could increase flexibility include:

- Streamlining process steps, for example simplifying processes for work refusals or discriminatory action, compliance actions by OHS officers.
- Allowing for flexibility on how to address work site noncompliance.
- Simplifying the processes to appeal compliance orders.
- Allowing for flexibility where multiple employers are engaged at a workplace.

Discussion Questions

1. How can the OHS Act be amended to support flexibility and innovation?
2. What areas in the OHS Act require additional clarification?
3. What are areas within the OHS Act that would benefit from being less prescriptive to enhance flexibility and innovation?
4. Are there areas of the OHS Act that should remain prescriptive? If yes, please explain how and why. If not, please explain.

Providing Advice to Government

Within the OHS legislation, there are a number of provisions which require the formation of advisory bodies, for example the OHS Advisory Council, Mining Expert Panel, Joint First Aid Training Standards Board. Having the ability to create advisory bodies to provide technical advice and recommendations to government and stakeholders is invaluable and allows the extensive expertise of industry, health and safety professionals, workers, and academics to be leveraged to help develop better legislation and programs. However, the current legislation only provides for advisory bodies in specific areas, in some cases with mandates limited to narrow topics. Changing to a less prescriptive framework will allow government to establish advisory bodies when they are required, ensure the membership reflects the needs for advice, and allow the mandates of the bodies to be tailored to the circumstances or issues that need to be addressed.

Discussion Questions

1. Should OHS legislation specify advisory bodies to address particular issues? If yes, for which issues and why? If not, please explain.
2. What are other ways government could leverage the expertise of stakeholders and specialists to get advice?

Consolidating Alberta's Radiation Safety Requirements

OHS encompasses a wide variety of hazards, including radiation. In Alberta, like many other jurisdictions, radiation safety in the workplace has additional legislation. This creates the potential for overlap and duplication in requirements. At the same time, it can create issues where the radiation requirements are not updated in step with requirements in OHS legislation. Integrating radiation safety into the OHS legislation has the potential benefits of:

- Removing duplication.
- Aligning requirements and simplifying subsequent legislative amendments.
- Treating radiation hazards in a manner consistent with how Alberta's OHS legislation addresses other workplace hazards – for example, similar approaches to controlling hazards and similar enforcement tools.

A key distinction between OHS and radiation legislation is that OHS legislation primarily focuses on protecting workers, whereas radiation legislation has an equal balance of protecting workers and the public. For example, radiation legislation provides maximum exposure limits for both workers and the public. Properly operated radiation equipment provides the lowest dose possible for patients undergoing medical and dental procedures. Maintaining this balance is an important consideration if the legislation is to be consolidated.

Discussion Questions

1. How does the radiation safety legislation impact your workplace?
2. How can current radiation safety legislation be revised to improve health and safety outcomes?

3. Enhancing Accountability

Work sites parties are responsible under the law, within their sphere of control, for addressing the hazards in the workplace and ensuring the health and safety of those affected by the hazards. The government is responsible to develop and enforce the law but not manage OHS in individual workplaces. As such, it is important that the legislative framework attribute responsibility to the parties who are accountable. At the same time, processes and requirements should be straightforward and clear so all parties understand their responsibilities.

Reporting Potentially Serious Incidents (PSIs)

PSIs are events which could have resulted in a serious injury or fatality under slightly different circumstances. Research has shown relationships between PSIs and serious incidents; efforts to address PSIs can reduce the potential for serious incidents or fatalities. Under the OHS Act, employers and prime contractors must report PSIs to Alberta Labour and Immigration. Employers and prime contractors are responsible to investigate these occurrences and ensure the appropriate controls are in place to ensure worker protection. The reporting requirement was added when the OHS Act was amended in 2017.

The legislation does not define the types of injuries or incidents that must be reported as PSIs. This has led to inconsistency in the application of the requirements and limits the ability of government to conduct follow-up. Some employers have identified the requirement to report as an administrative burden; where legislation imposes administrative burdens on employers, the corresponding value of the requirement should be clear.

Discussion questions

1. How should work site parties be accountable for PSIs?
2. Is there value in mandating reporting for PSIs? Please explain and provide examples
3. How should a PSI be defined? Where should it be defined?
4. If the reporting requirement were to be maintained, how should government use information from PSIs?

Due Diligence

The Alberta OHS Act, similar to corresponding legislation in the rest of Canada, is “strict liability” legislation. This means work site parties are responsible for the consequences of a workplace incident or non-compliance, even where they were not at fault or negligent. The work site party’s defense in such a case is that they took all reasonable measures to prevent the incident or non-compliance (“due diligence”). Often, the legal term “reasonably practicable” is used in law in conjunction with strict liability requirements to make it clear that the work site party’s responsibility is to take all reasonable actions under the circumstances. The intent is to balance what is needed to ensure the highest level of protection with what is reasonable and possible under the circumstances. In many jurisdictions, the “due diligence” defense is codified (an onus statement) in legislation to further reinforce how accountability is applied.

Discussion question

1. Should the due diligence onus on work site parties be codified in the OHS legislation? Please explain.

4. Conclusion

Thank you for participating in the consultation process. The answers provided will help inform changes in the OHS Act and *Radiation Protection Act*. The discussion questions are shaped by what we have heard are the concerns from some of our stakeholders. However, we recognize that we may not have heard everything. If there are other ways the OHS framework could be improved, stakeholders are encouraged to provide suggestions and ideas.

Discussion question

1. Are there any other ideas or suggestions for improving the OHS Act?

How to Get Involved

Alberta's government is committed to supporting job growth and Alberta's economic future, while ensuring the health and safety of Alberta's workers. The review of the OHS legislation is intended to improve health and safety outcomes while reducing administrative burden, contributing to meet the needs of Alberta today and into the future.

Alberta Labour and Immigration is asking for input on OHS legislative reform from employers, workers and OHS professionals through facilitated roundtable discussions. Stakeholders who are unable to attend will have the opportunity to provide a written submission. This feedback will be summarized and provided to the Minister of Labour and Immigration, and will be considered as the OHS legislation is reviewed.

The purpose of this consultation will be to gather input from employer, labour, and professional organizations to:

1. Explore areas where health and safety outcomes can be improved while reducing administrative burden;
2. Ensure changes to the legislative framework improve health and safety outcomes; and
3. Better understand the impacts of OHS legislation on stakeholders.

Stakeholders are invited to provide an online written submission with their feedback at the following location: <https://extranet.gov.ab.ca/opinio6//s?s=OHS>. Written submissions will be accepted until midnight August 12, 2020. We look forward to your submission and encourage you to share the link with your partners and members.