

To: - all participants in the 'National Cabinet' dealing with the COVID-19 crisis
- all health and safety regulators

From: Max Costello LLM, on behalf of the Refugee Action Collective (Victoria), as authorised during its most recent (Zoom) meeting 13/4/20

15 April 2020

Dear all

Custody/care workplaces need: COVID-19 compliance/enforcement; a WHS/OHS Code of Practice

One situation, concerning COVID-19 at immigration detention facilities, needs addressing forthwith; the other, concerning OHS at custody or care facilities, needs addressing soon via (in effect) COAG.

1. *Re COVID-19 rules: Commonwealth non-compliance and non-enforcement must end forthwith*

I refer to:

- (a) the widely reported non-compliance with COVID-19 rules by SERCO guards at immigration detention facilities, non-compliance that has occurred for weeks and is *legally attributable* to the Commonwealth Department of Home Affairs, whose Australian Border Force (ABF) unit is (i) "responsible for the health ... of detainees", and (ii) controls contractors such as SERCO;
- (b) the failure by the Australian Federal Police (AFP) to enforce the COVID-19 rules at those facilities, all of which are Commonwealth workplaces; and
- (c) workplace regulator Comcare's failure to enforce the associated health-related duties imposed on Home Affairs/ABF by the *Work Health and Safety Act 2011* (Cth) (the Act).

Given the ethos of 'we are all in this together', given the high level of compliance by the people of Australia with COVID-19 social distancing and isolation rules, and given that most people in contact with the public now use masks and gloves, the fact that three Commonwealth government entities have, for weeks, totally failed to ensure compliance and similar behaviour at workplaces *within their own areas of legal responsibility* is both inexcusable and reprehensible – the more so because detention facilities have been officially identified as high risk COVID-19 settings.

Minister for Home Affairs Dutton, who has loudly 'talked the talk' – "No-one is above the law", and "I'll come after you" (if you buy too much toilet paper) – must forthwith tell his department's entities to 'walk the walk'. That is, he must instruct ABF to comply with COVID-19 rules and the Act; and instruct the AFP to enforce COVID-19 compliance across all Commonwealth settings.

Similarly, Attorney General Christian Porter, who has portfolio responsibility for the Act, and thus its regulator, must forthwith instruct Comcare, in relation to detention centres, to fulfil its section 152(b) function, which is "to monitor and enforce compliance with this Act".

2. *A WHS/OHS 'Code of Practice for custody or care accommodation workplaces' is needed*

In the WHS/OHS context, what distinguishes 'custody or care accommodation workplaces' – including detention centres, prisons, aged care facilities, and places that care for people with severe mental and/or physical disabilities – from all other workplaces, is the huge scope of the legislative duty to ensure the health (including psychological health) and safety of workplace persons *other than workers*. In 'ordinary' workplaces, the time spent at the workplace by those "other persons" – such as customers, clients, and (pre-COVID-19) visitors – is typically shortish, and almost never for a whole day. But in custody or care accommodation workplaces, those other persons are typically present 24/7, 52 weeks a year, and perhaps for many years – or, in the case of aged care residents and some immigration detainees, for the rest of their natural lives.

Yet almost no 'other persons-related guidance' is provided for the operators of such workplaces. The websites of all State and Territory regulators, and Comcare, provide much guidance material about ensuring the health and safety of "workers"/"employees", in various kinds of workplaces and in relation to various kinds of workplace-related risks. Admittedly, *some* worker-related advice can apply to "other persons"; and, in *some* custody or care accommodation workplaces, the *workers* can face risks (such as assault) *from* the detainees/residents/patients. But overwhelmingly, it is the *operators* of such workplaces that need advice on how to comply with their onerous and unremitting duty to safeguard the health and safety of *other persons*.

All WHS/OHS Acts set out the processes by which Codes of Practice are to be developed and issued. The WHS Act formulation (at section 274) is apt: it involves consultation with employers and unions, then, ultimately, the all-jurisdictions Ministerial approval of the proposed Code.

Max Costello, RAC (Vic) member, former WorkSafe Victoria prosecuting solicitor (now retired)
0425 701 690