



# **Discussion paper**

## **Work Health and Safety Regulation 2017**

### **Clause 58 – AUDIOMETRIC TESTING**

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# 1. Executive Summary

The NSW *Work Health and Safety Act 2011* (**WHS Act**) commenced on 1 January 2012. It adopts the national model Work Health and Safety Act (**the Model Act**). The Model Act was developed through the *National Review into Model Occupational Health and Safety Laws*, which undertook an extensive national consultation process.

The NSW Government committed to implement the national model Act under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (**the IGA**). The national model has since been adopted in all jurisdictions other than Victoria.

The WHS Act and Work Health and Safety Regulation 2017 (**WHS Regulation**) provide for a balanced and nationally consistent framework to secure the health and safety of workers and visitors to workplaces in NSW.

In NSW, work health and safety (**WHS**) laws require a person conducting a business or undertaking (**PCBU**) to manage risks to health and safety relating to hearing loss associated with noise. Duty holders are required to work through the hierarchy of controls to identify the measure/s that eliminate or most effectively minimise the risk of hearing loss from hazardous noise in the workplace. As part of this, PCBUs must ensure that workers are not exposed to noise above the prescribed exposure standard and, where required must provide audiometric testing for workers. Designers, manufacturers, importers and suppliers of plant equipment also have obligations in relation to keeping noise emissions low and providing certain noise information about the plant equipment. The health and safety requirements for noise are set out in Part 4.1 (Chapter 4) of the WHS Regulation.

Clause 58 of the WHS Regulation states that if a PCBU frequently supplies personal protective equipment (**PPE**) to a worker as a control measure to protect the worker from the risk of hearing loss associated with an exceedance of the exposure standard for noise, the PCBU must provide audiometric testing for the worker within three months of commencing work. Follow-up testing is to be done at least every two years.

Audiometric testing measures the hearing threshold levels of a person's ears. This provision is intended to ensure that workers exposed to noise above the exposure standard can be monitored through regular audiometric testing.

Since the commencement of the WHS Regulation in 2012, clause 58 has not been in effect in NSW. SafeWork NSW, the WHS Regulator, has issued a series of exemptions under the exemptions power in clause 684 of the WHS Regulation.

The exemption currently in effect commenced on 1 January 2022 and is due to expire on 31 December 2023. As an exemption has been in place since 2012 and issuing of exemptions is ordinarily done on a temporary basis, the NSW Government considers it timely to review clause 58

of the WHS Regulation. The purpose of this Discussion Paper is to seek feedback on whether the NSW Government should:

- continue with the WHS Regulator issuing class exemptions, which prevent clause 58 from taking effect;
- cease issuing exemptions, and allow clause 58 to take effect; or
- repeal clause 58.

It is intended that the consultation will provide greater certainty for businesses as to their WHS obligations for audiometric testing.

This Discussion Paper aims to provide stakeholders with an opportunity to express their opinions about the options set out for consideration. The issues and questions identified in this paper are not exhaustive and are intended to facilitate discussion.

Stakeholder feedback will be integral to assisting the NSW Government making an informed decision. There will be a four-week consultation period on the proposed options outlined in this Discussion Paper.

## 2. Consultation Process

### 2.1 Making a Submission

Interested organisations and individuals are invited to provide a submission on any matter relevant to audiometric testing, whether or not it is addressed in this Discussion Paper.

To assist you in making a submission, an optional online survey is available on the Have Your Say website at [www.haveyoursay.nsw.gov.au/](http://www.haveyoursay.nsw.gov.au/).

Alternatively, you can make a written submission through the Have Your Say website or via post to:

Audiometric Testing Consultation  
Policy & Strategy  
Better Regulation Division  
Department of Customer Service  
92-100 Donnison Street, GOSFORD NSW 2250

We request that documents are provided in an accessible format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (such as visual, physical or cognitive). Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

You can make a submission through following one of these options:

- Completing an online survey at [www.haveyoursay.nsw.gov.au](http://www.haveyoursay.nsw.gov.au)
- Uploading your written submission to [haveyoursay.nsw.gov.au](http://haveyoursay.nsw.gov.au)
- Emailing your written submission to [whspolicy@customerservice.nsw.gov.au](mailto:whspolicy@customerservice.nsw.gov.au)

The closing date for submissions is close of business **Monday 7 November 2022**.

### 2.2 Release of Submissions

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient.

Even if you state that you do not want us to publish certain information, we may be required by law to release that information, for example, to comply with the *Government and Information (Public Access) Act 2009*.

### 2.3 Evaluation of submissions

We will carefully consider each submission. If necessary, legislative amendments will be prepared to address the issues identified in the consultation process.

## 3. Background

### 3.1 Objectives of the WHS Regulation

The primary objective of the WHS Regulation is to provide legislative support and administrative detail for the operation of the WHS Act. The WHS Regulation is a detailed component of the WHS regulatory framework in NSW and forms a critical link between the Act and monitoring compliance. It is integral to the effective operation and achievement of the Act's objects. The objects of the Act are:

- protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and
- providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety, and
- encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment, and
- promoting the provision of advice, information, education and training in relation to work health and safety, and
- securing compliance with this Act through effective and appropriate compliance and enforcement measures, and
- ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act, and
- providing a framework for continuous improvement and progressively higher standards of work health and safety, and
- maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

### 3.2 Noise in the workplace

A noisy workplace can lead to temporary or permanent hearing loss, or tinnitus (ringing in the ear). Damage to hearing can take place gradually over time, usually from extended exposure to noise. It can also happen immediately from exposure to a sudden intense impulse sound, such as an explosion. Exposure to hazardous noise can destroy the ability to hear clearly. The inability to hear clearly can have significant impacts for a worker in a work environment, particularly where it may be necessary for working safely, such as hearing instructions or warning signals.

Hearing loss can occur in a number of ways, usually through noise, vibration and ototoxic substances (i.e., certain chemicals). Noise-induced hearing loss may result from working in a noisy environment where the cumulative exposure is greater than 85 decibels over an 8-hour day, or when exposed to impact noise levels of 140 decibels or greater. Hearing loss is more likely to occur if a worker is exposed to both noise and ototoxic substances. Noise-induced hearing loss cannot be cured, and it worsens as noise exposure continues.

Research has found that noise-related injuries are most common in the manufacturing, construction and automotive industries, with technicians and trades workers, machinery operators, drivers and labourers most exposed.

### 3.2.1 Statistics

National data from Safe Work Australia (**SWA**) indicates that noise-induced hearing loss is the single greatest cause of permanent hearing loss in Australia. It is also the most preventable.

National data also indicates that between 28 to 32 per cent of the Australian workforce are likely to work in an environment where they are exposed to loud noise at work. This is the key reason why WHS provisions are in place: to ensure the risks from workplace noise are eliminated or minimised so far as reasonably practicable.

This national data also shows that on average, there are approximately 4,700 workers compensation claims made each year for noise-induced hearing loss. Of these claims, 16 per cent were lodged by automotive and engineering tradespersons. Statistics from 2015 show that 1,070 claims for noise induced hearing loss were lodged by males aged between 60 and 64 years of age. Most hearing loss claims are caused by a gradual process, with the hearing loss a result of exposure over time to a noisy workplace.

NSW data indicates that over the last four years more than 10,000 workers have been affected by noise-related injuries in NSW workplaces, with more than 90 per cent left with a permanent disability.

## 3.3 Audiometric Testing

Audiometric tests are hearing tests which measure the hearing threshold of a person. This type of testing is required in any work environment where workers are required to frequently use PPE as a control measure for noise that exceeds the exposure standard – that is, where noise levels are above 85 decibels.

Audiometric tests in Australia are undertaken in accordance with AS1269.4:2014 *Occupational Noise Management*. On average, an audiometric test takes approximately 15 minutes to conduct, and costs approximately \$150 to \$200 per person.



### **3.3.1 Clause 58 – Audiometric Testing**

Audiometric testing was introduced as a regulatory requirement in NSW with the introduction of the agreed national model WHS laws. Previously no mandatory requirement for audiometric testing existed under the former Occupational Health and Safety Regulation 2001 in NSW.

Clause 58 of the WHS Regulation requires a PCBU to provide audiometric testing for a worker who is carrying out work, if they are required to frequently use PPE as a control measure, for noise that exceeds the prescribed exposure standard. Where a worker is in such an environment, the PCBU must provide the worker with an audiometric test within three months of commencing work, with follow up testing to be undertaken at least every two years. Commencing audiometric testing early, before people are exposed to hazardous noise, provides a baseline as a reference for future audiometric tests.

#### **History of clause 58 in NSW**

Although clause 58 is part of the NSW WHS Regulation, the provision has been prevented from taking effect since its commencement on 1 January 2012. This is due to SafeWork NSW issuing class exemptions from compliance under the exemptions power in clause 684 of the WHS Regulation.

During the development of the model WHS legislation, there was considerable discussion about the inclusion of mandatory audiometric testing. Such a provision had not previously been in place in NSW, and concern was expressed about the possible financial and administrative burden on businesses.

NSW is party to the IGA and supports the harmonisation of WHS laws, but implementation of this provision has been inconsistent across harmonised jurisdictions. In NSW, a class-based exemption from compliance with clause 58 of the WHS Regulation was applied to PCBUs. NSW has continued to apply exemptions since 1 January 2012, with the current exemption due to expire on 31 December 2023.

### **3.3.2 Comparison with other jurisdictions**

Audiometric testing requirements have been applied differently between jurisdictions across Australia, and effective harmonisation has not been achieved. Currently, the only jurisdictions that require PCBUs to conduct audiometric testing of their workers are the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and the Commonwealth Government. The Queensland Government repealed the requirement for a PCBU to conduct mandatory audiometric testing of their workers in 2014, and Western Australia has not adopted clause 58.

A complete interjurisdictional analysis is provided in **Appendix 1**.

### **3.3.3 Workers Compensation**

As part of their review processes, PCBUs are encouraged to check whether their workers have:

- made any workers compensation claims for hearing loss or tinnitus
- been found to have hearing loss during repeat audiometric testing.

If a worker's hearing has been affected and this has been attributed to a particular task, then a hazard may exist that could affect other workers.

It is acknowledged there is often a long latency period associated with gradual hearing loss claims. This makes it unlikely that commencing clause 58 would have any immediate material impact on the number of claims for gradual hearing loss.

## 4. Current Regulatory Framework

### 4.1 The Work Health and Safety Regulation 2017

Part 4.1 (Chapter 4) of the WHS Regulation sets out the health and safety requirements for noise. Duty holders, including persons conducting a business or undertaking (PCBUs), designers, manufacturers, importers, suppliers and installers of plant, substances or structures, and officers have a role in managing the risks of noise.

Managing the risks related to noise helps:

- protect workers from hearing loss and tinnitus
- improve the conditions for communication and hearing warning sounds
- creates a less stressful and more productive work environment.

The current regulatory framework for managing hazardous noise in the workplace is outlined below.

#### 4.1.1 Clause 56 – Meaning of Exposure Standard for Noise

This clause details the meaning of the exposure standard for noise.

The decibel (**dB**) is the unit for measuring sound levels. The exposure standard for noise has two criteria.

- $L_{Aeq,8h}$  of 85 dB (A)<sup>1</sup> or
- $L_{C,peak}$  of 140 dB (C)<sup>2</sup>.

There are two parts of the exposure standard for noise, because noise can either cause gradual hearing loss over time or be so loud that it causes immediate hearing loss. The first exposure standard, 85 dB(A), relates to the sound and pressure level a person is exposed to in the course of their working day. It considers both the noise level and the length of time the person is exposed to it.

The second exposure standard, 140 dB(C), relates to a peak exposure to loud, sudden noises such as a gunshot or hammering which can cause immediate damage to hearing.

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<sup>2</sup>  $L_{Aeq,8h}$  means the eight-hour equivalent continuous A-weighted sound pressure level in decibels (dB(A)) referenced to 20 micro pascals

<sup>3</sup> and  $L_{C,peak}$  means the C-weighted peak sound pressure level in decibels (dB(C)) referenced to 20 micro pascals (determined in accordance with AS/NZS 1269.1:2005; *Occupational noise management—Measurement and assessment of noise immission and exposure*).

#### **4.1.2 Clause 57 – Managing Risk of Hearing Loss from Noise**

This clause requires a PCBU to manage the risk of workers suffering from hearing loss from noise in the workplace by using a risk management approach and focusing on the hierarchy of controls. Within the hierarchy of controls, personal protective equipment (PPE), including hearing PPE, is the least effective control. A PCBU must try to eliminate or reduce, so far as is reasonably practicable, any health and safety risks in the workplace. This includes risks associated with exposure to hazardous noise.

PPE should only be used to manage any risk that remains after the PCBU has implemented higher-level controls, for example:

- substituting quieter plant or processes
- isolating the noise source using sound suppression material
- locating noise sources further away from workers.

The risk of occupational noise-induced hearing loss may be increased by relying too much on, and improperly using personal hearing protection such as earmuffs and plugs.

#### **4.1.3 Clause 37 – Maintenance of Control Measures**

This clause requires a PCBU who implements a control measure to eliminate or minimise risks to health and safety to ensure that the control measure is maintained. This is so that it remains effective, fit for purpose, suitable for the nature and duration of the work, is installed, set up and used correctly.

#### **4.1.4 Clause 38 – Review of Control Measures**

This clause requires a PCBU to review and revise the control measure implemented as necessary. This includes:

- before a change occurs at the workplace that is likely to create a new or different risk
- when a new hazard or risk has been identified
- when requested by a health and safety representative.

#### **4.1.5 Clause 59 – Duties of Designers, Manufacturers, Importers and Suppliers of Plant**

This clause requires designers, manufacturers, importers and suppliers to control risks and provide information.

Designers of plant must ensure the plant emits as little noise as possible. They must provide design specifications and information about:

- the noise emission values
- operating the plant to measure noise emissions
- how noise emissions were measured.

Manufacturers must provide similar information during, and after the manufacturing process to ensure the plant emits as little noise as possible. Importers and suppliers must also give this information to their workers and customers.

#### **4.1.6 Code of Practice on Managing Noise and Preventing Hearing Loss at Work**

The *Code of Practice on Managing Noise and Preventing Hearing Loss at Work* (**Code of Practice**) is an approved code of practice under section 274 of the WHS Act.

As an approved code of practice, it provides practical guidance on how to achieve the standards of work health and safety required under the *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulation 2017* (WHS Regulation) and effective ways to identify and manage risks.

Codes of practice are admissible in court proceedings under the WHS Act and WHS Regulation. Courts may regard a code of practice as evidence of what is known about a hazard, risk, risk assessment or risk control. The Court may rely on the code in determining what is reasonably practicable in the circumstances.

The Code of Practice includes a hazard identification checklist, a ready reckoner of different sound levels, and examples of control measures.

A copy of the Code of Practice can be accessed on the SafeWork NSW website.

## 5. Consideration of Options

In considering options to address the objectives in chapter 3.1 of this Discussion Paper, SafeWork NSW has been conscious that any proposed changes to the NSW *Work Health and Safety Regulation 2017* (WHS Regulation) may materially affect the operation of the model work health and safety (WHS) laws.

Clause 58 of the WHS Regulation is due to become operational on 1 January 2024, at the expiration of the current exemption. Stakeholder feedback is needed to inform a decision on whether to allow the provision to come into effect.

SafeWork NSW is seeking feedback on three options:

- status quo: continue to issue class exemptions for clause 58
- take no action before 1 January 2024 and allow clause 58 to come into effect
- repeal clause 58.

These three options were assessed and are summarised below:

### 5.1 Option 1 – maintain the status quo

SafeWork NSW would continue to issue a class exemption, on an annual basis, to prevent clause 58 from coming into effect. No amendment to the WHS Regulation would be required for this option. The WHS Regulation would remain in alignment with the model WHS Regulation.

### 5.2 Option 2 – take no action before 1 January 2024 and allow clause 58 to come into effect in NSW

Taking no action would mean that clause 58 of the WHS Regulation will come into effect in NSW on 1 January 2024. This means audiometric testing requirements will, where applicable be mandatory. No amendment to the WHS Regulation is required.

Should clause 58 come into effect, SafeWork NSW may still grant an exemption to a person conducting a business or undertaking (PCBU) or PCBUs under clauses 684 or 688 of the WHS Regulation, in appropriate circumstances. Such an exemption may be subject to certain conditions, such as monitoring and recordkeeping (clause 691 WHS Regulation). The granting of an exemption is at the discretion of SafeWork NSW.

### 5.3 Option 3 – repeal clause 58 of the WHS Regulation

Amend the WHS Regulation to repeal clause 58 and remove altogether the obligation for a PCBU to provide audiometric testing for workers. Other provisions in the WHS Regulation will continue to require a PCBU to introduce and maintain control measures that minimise exposure to hazardous noise (as described in chapter 4 above).

## 5.4 Assessment of Options

Option	Costs	Benefits
<p><b>Option 1 – Maintain the Status Quo</b></p> <p>Continue issuing an exemption, preventing clause 58 from coming into effect</p>	<ul style="list-style-type: none"> <li>• The costs on industry, PCBUs and NSW Government would remain the same.</li> <li>• Ongoing uncertainty for industry, PCBUs and workers, as well as the WHS regulator as exemptions are intended to be utilised as a short-term solution.</li> <li>• No obligation on PCBUs to provide audiometric testing to workers so concerned workers will need to seek testing themselves.</li> <li>• Risk of missing a sign that noise is not being effectively managed in the workplace.</li> </ul>	<ul style="list-style-type: none"> <li>• No increased costs for PCBUs in the sector (noting that costs would be \$150-200 per worker).</li> <li>• No operational changes.</li> </ul>
<p><b>Option 2 – Allow clause 58 to take effect in NSW</b></p> <p>resulting in mandatory audiometric testing requirements</p>	<ul style="list-style-type: none"> <li>• Increased financial and administrative impact on business:             <ul style="list-style-type: none"> <li>• providing periodic audiometric testing (approx. \$150 per test)</li> <li>• maintaining accurate records of any audiometric tests performed by a competent person that can be produced to the regulator upon request as evidence of compliance</li> <li>• training and education for PCBUs and workers about new requirements.</li> </ul> </li> <li>• Increased financial and administrative impact on government / regulators, including development of a compliance and enforcement strategy for the new regulatory requirement.</li> </ul>	<ul style="list-style-type: none"> <li>• Provides a permanent position on the requirements regarding audiometric testing in NSW, enabling clear guidance for PCBUs and industry in the sector on how to manage health and safety risks associated with workplace noise.</li> <li>• Mandatory audiometric testing for workers exposed to hazardous noise may assist PCBUs with identifying any temporary hearing loss among their workers.</li> <li>• There may be long term benefits for workers, with potential early detection of any hearing loss.</li> <li>• The Regulator can still issue an exemption at their discretion under WHS Regulation in appropriate circumstances.</li> </ul>

Option	Costs	Benefits
<b>Option 3 – Repeal clause 58 of the WHS Regulation</b>	<ul style="list-style-type: none"> <li>• This may materially affect the operation of the model WHS laws, noting other States have adopted testing.</li> <li>• The costs on industry, PCBU's and NSW Government would remain the same, as PCBU's have been exempted from compliance with clause 58 in NSW.</li> <li>• Potential costs to workers in terms of hearing loss not detected.</li> </ul>	<ul style="list-style-type: none"> <li>• Provides a permanent position on the requirements regarding audiometric testing in NSW, removing the need for the regulator to issue an exemption and provides PCBU's with certainty.</li> <li>• No operational changes as the sector are already familiar with current regulatory requirements.</li> <li>• Reduces costs associated with mandatory audiometric testing for businesses (approx. \$150 per audiometric test and take approx. 15 minutes per person). PCBU's can choose to undertake audiometric testing, on a needs basis.</li> <li>• Removal of duplicative provisions which minimises costs. The WHS Regulation contains other requirements to minimise the risk of harm to workers from exposure to hazardous noise.</li> </ul>



## 6. Discussion Paper Questions

You can respond to these questions or use these questions as a guide to making a written submission or provide a written submission in your own format.

1. Do you think SafeWork NSW should continue issuing an exemption for all businesses in NSW, on an annual basis, to prevent clause 58 from coming into effect?
  - a. Yes – please tell us why
  - b. No – please tell us why
2. Do you think clause 58 (audiometric testing) of the WHS Regulation should come into effect in NSW?
  - a. Yes
  - b. No – please tell us why
3. What do you think the benefits would be if clause 58 of the WHS Regulation came into effect in NSW?
  - a. Provide certainty for the sector
  - b. Provide increased protection for workers exposed to hazardous noise
  - c. Results of audiometric testing may help identify further hazards in the workplace
  - d. Other – please specify
4. Do you think there would be any regulatory difficulties for business or industry if clause 58 came into effect in NSW?
  - a. Yes –
    - i. Difficult for businesses to understand the requirements
    - ii. other - please specify
  - b. No
5. If clause 58 came into effect, do you think it would result in increased compliance costs for businesses?
  - a. Yes – please quantify (if possible) – can choose more than one option
    - i. costs of introducing audiometric testing
    - ii. costs of setting up appropriate systems and reporting
    - iii. other (please specify)
  - b. No
6. Do you think that requiring mandatory audiometric testing will reduce the likelihood of workers developing noised-induced hearing loss from exposure to hazardous noise?
  - a. Yes – please specify
  - b. No – please specify
7. Do you support the repeal of clause 58 even if it may affect the operation of the model WHS laws?
  - a. Yes – please specify
  - b. No – please specify

8. Do you think that the Work Health and Safety Regulation 2017 already contains provisions that adequately protect workers from hazardous noise, without clause 58 (audiometric testing) having effect in NSW?
  - a. Yes
  - b. No – please specify
9. Do you have any other feedback on the Discussion Paper?

## 7. Appendix 1: Interjurisdictional Analysis

The table below outlines the current regulatory framework for each state and territory in Australia with respect to audiometric testing requirements.

**Table 1: Jurisdictional Analysis**

Jurisdiction	OHS/WHs Legislation	Cl. 58 Enacted
NSW	NSW adopted the WHS model laws which commenced on 1 January 2012. SafeWork NSW administers the laws. WHS Regulation 2011 updated to WHS Regulation 2017. Clause 58(2) not enforced since enactment in 2011 due to repeated exemptions.	No
ACT	The ACT adopted the WHS model laws and commenced on 1 January 2012. WorkSafe ACT administers the laws.	Yes
QLD	Queensland adopted the WHS model laws and commenced on 1 January 2012. Workplace Health and Safety Queensland administers the laws. In 2014, Queensland conducted a review of WHS legislation and clause 58 no longer forms part of their laws.	No. Repealed.
VIC	Victoria did not adopt the WHS model laws. WorkSafe Victoria continued with OHS legislation. Enacted the OHS Act 2004 on 1 July 2005 and OHS Regulation 2017 on 18 June 2017. OHS Regulation 2017 contains four clauses dedicated to audiometric testing (cl 37-40)	N/A
SA	South Australia adopted the WHS model laws and commenced on 1 January 2013. SafeWork SA administers the laws.	Yes
NT	The Northern Territory adopted the WHS model laws and commenced on 1 January 2012. WorkSafe NT administers the laws.	Yes
TAS	Tasmania adopted the WHS model laws and commenced on 1 January 2013. WorkSafe Tasmania administers the laws.	Yes
WA	Western Australia has recently introduced the Work Health and Safety legislation. Audiometric testing (regulation 58) has not been adopted in WA.	No
COMMONWEALTH	The Commonwealth Government adopted the WHS model laws and commenced on 1 January 2012. Comcare administers the laws.	Yes