



Department of Consumer
and Employment Protection
Government of Western Australia

National review into model occupational safety and health laws

**Submission of the
Department of Consumer and
Employment Protection**

July 2008



Table of contents

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?.....	1
Legislative Approach:	1
Scope, Application & Definitions:.....	4
Duties of Care – Who owes them and to whom?:	7
‘Reasonably Practicable’ & Risk Management:.....	15
Consultation, Participation and Representation:	17
Regulator Functions, Powers & Accountability:.....	31
Compliance & Enforcement:.....	35
Prosecutions:	40
Other Issues:	49
WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?.....	52
GENERAL COMMENTS	52

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

SPECIFIC COMMENTS

Please complete this template to provide specific comments with supporting reasons against each chapter of the Issues Paper. If you are responding to a specific question in the Issues Paper, please include a reference to the relevant question number.

The Western Australian Government Department of Consumer and Employment Protection (DOCEP) works with the community to ensure high standards of safety and protection for workers and consumers. WorkSafe is a division of DOCEP and has responsibility under the *Occupational Safety and Health Act 1984* (the WA OSH Act) for ensuring compliance with occupational safety and health legislation in Western Australia. DOCEP supports an umbrella approach covering all industries, including mining, where there is one Act applying to all workplaces and specific regulations to deal with industry specific issues.

Legislative Approach:

Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

- DOCEP supports the model OHS Act primarily favouring principles-based standards for general duties of care. It does, however, consider that the model Act may need to use a combination of approaches to optimise health and safety outcomes.
- The model OHS Act should set out the key principles, duties and rights in relation to occupational health and safety as general duties so that it covers a very wide variety of circumstances. This would ensure that it does not readily date and would provide considerable flexibility for a duty holder to determine what needs to be done to comply. All jurisdictions currently use a principles-based standards approach, which has been effective. Such an approach is covered by the International Labour Organisation (ILO) and is considered best practice.

Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

- The Act should to the extent possible be constructed as a principles-based framework document (general duties of care), supported by a streamlined set of regulations and a more extensive use of codes of practice. Performance-based standards, process-based standards and prescriptive standards should be used for the regulations as appropriate.
- Licensing and registration ought to be based on prescriptive-standards.

Q3. What is an appropriate title for the model OHS Act?

- DOCEP does not have a strong view on the title. Its suggestion is *Workplace Safety and Health Act*, which most likely best expresses the intent and there is value in a common nomenclature across the jurisdictions.

Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?

- DOCEP is of the view that the model OHS Act should specify its objectives. The objectives listed in section 5 of the WA OSH Act are suggested as a possible starting point:
 - Secure and promote the health, safety and welfare of people at work;
 - Provide a legislative framework that allows for higher standards with a view to eliminating the burden of injury and disease;
 - Protect people against risks to health and safety arising from the conduct of a business or undertaking;
 - Promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs;
 - Eliminate, at the source, risks to the health and safety of people at work and others; and
 - Foster cooperation and consultation and provide for the involvement of employers, workers, and organisations representing those people in the formulation and implementation of health and safety standards.

Q5. Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

- Yes. DOCEP supports the inclusion of a set of principles. The principles should be consistent with those recommended by the Maxwell review in Victoria.
- DOCEP considers that the WA OSH Act, Victorian OHS Act, and the International Labour Convention No. 155 provide good examples of what principles of health and safety protection could be used.

Q6. Are there any other issues that should be considered in the legislative approach of a model OHS Act?

- Nothing apparent.

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

- No.

Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

- DOCEP supports one Act for all industries. It considers that the model OHS Act should take an umbrella approach covering all industries and apply to all workplaces, including mining.
- DOCEP is of the view that where specific industry based requirements apply, then these could be dealt with by way of industry specific regulation supported by codes of practice.

Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

- Yes. DOCEP has found that in circumstances where there has been overlapping jurisdiction or common areas of interest it is generally not sufficient to rely on cooperation or good will. It has, therefore, traditionally dealt with information sharing through co-agency agreements, memoranda of understanding, or less formal agreements. Such agreements and understandings are, however, constrained by legal issues as to what can and cannot be released to other parties. The model OHS Act should, therefore, include specific mechanisms to provide for appropriate levels of information sharing.
- An example of improved coordination is that in Western Australia the regulators for mining, energy and general industry are now located within the one agency, DOCEP.

Scope, Application & Definitions:

Q10. Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

- The experience of WorkSafe in Western Australia is that the definition of “workplace” is not so limited as to cause problems. The definition of “workplace” in Western Australia means a place where employees or self-employed persons work or are likely to be in the course of their work. This provides substantial flexibility. Any proposed definition should retain some flexibility while at the same time limiting the concept to ensure there remains some connection with work.
- DOCEP supports the view that the general duties of care should be applicable to all workplaces, that is, anywhere work is undertaken. Legal advice in this jurisdiction has consistently indicated that workplace is limited to the physical characteristics.

Q11. Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

- Yes, but this should be limited to situations where the hazard arises from the work performed or system of work undertaken by employees at a workplace or in the course of their work.
- OHS laws in all jurisdictions involve safety duties owed to third parties, who may or may not be members of the public.
- To diffuse the duties too broadly can militate against achieving the broad objects of the Act. There could also be unintended consequences such as disincentives to volunteering if too broad an approach is taken.
- Any extension to members of the public should only be in circumstances where there is some connection with work.
- DOCEP is mindful that care should be taken not to make workplace health and safety of workers being so broad as to be applicable to members of the public in circumstances where the general law of negligence would be more appropriate.

Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

- Yes. DOCEP considers that it is fundamental to the model OHS Act that it should have the capacity to achieve this objective. To ensure such capacity exists, however, may involve a move away from more traditional employer-employee relationships. There is some support for a deeming approach to achieve the broad scope; however, it remains debatable whether that approach is the best option.
- Even with attempts to ensure the broadest possible coverage of the state and territory legislation new and evolving types of employment arrangements result in gaps continuing to emerge. In Western Australia share farming and share fishing are cases in point. In relation to share fishing, parties may sign a joint venture agreement or share fishing agreement for sharing profits. This means that parties do not necessarily meet the definition of employer or employees in the legislation.

- While broadly speaking the 2004 amendments to the WA OSH Act have quite successfully dealt with the complexity of modern working relationships, the expression of the arrangements in the Act is difficult to follow, particularly for a lay person. DOCEP believes that particular regard should be given to ensuring the language used makes it easy for the general public to understand what relationships are covered.
- The approach taken in the model Act should not exclude looking at ways to conceptualise new and evolving relationships. However, the best option and a good starting point to achieve a harmonised approach may be to work from a traditional employer-employee base.

Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

- No. In Western Australia all emerging hazards can be accommodated under the existing health and safety legislation. DOCEP is of the view that maintaining a principles-based approach to duty of care will ensure that emerging hazards and risks can be effectively addressed (e.g. bullying and fatigue). If more specific reference is required, then that should be confined to being dealt with in regulations or codes of practice.

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

- All key terms should have uniform definitions and uniformity of definitions will contribute markedly to improved consistency.
- DOCEP considers the following terms require uniform definitions and considers them to be critical for achieving national consistency: code of practice; control; employee; employer; hazard; import; plant; practicable or what is reasonably practicable; risk; self-employed person; supply trainee/apprentice; and workplace.
- The following are considered important: the types of standards referred to in the Act; improvement notice; prohibition notice; provisional improvement notice; safety and health representative; and the concept of a health and safety group/committee.

- The various superior courts have provided useful consideration that could be used to assist in determining uniform definitions. See for example, the Western Australian decision of EM Heenan J in *Reilly v Tobiassen* [2008] WASC 6.

Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?

- Nothing apparent.

Duties of Care – Who owes them and to whom?:

Q16. Should the model OHS Act include a “control” test or definition? If so, why and what should it be?

- See also Q17 below. DOCEP considers that there should be an expansive meaning so that any person whose influence amounts to “control” has a duty to act, so far as they can, to ensure safe working practices. Control is assumed when there is an employment relationship. Control is also used to determine when a non-traditional employer-employee relationship exists (for example see section 23D of the WA OSH Act). In the absence of certainty the duty related to control should revert to the principal contractor.
- DOCEP acknowledges that the general public/business operator may not always easily understand the term “control” and certainty of the term would be ideal. It does, however, consider that the concept as it is currently understood in Western Australia works reasonably effectively and is not convinced that control can be defined with clarity and certainty. DOCEP is concerned that the possible result of an attempt to define control could potentially risk limiting it.
- DOCEP is of the view that in any approach in a model Act consistency will best be achieved if there is a broad understanding of when the concepts of control, ensure and practicability are applicable.
- DOCEP would, however, be amenable to an appropriate definition being included in the model OHS Act if one can be developed.

Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

- As above for Q16; it is a well-established principle that a party in control of work processes has responsibility for controlling the hazards and risks in the workplace.
- In determining the relationship, it is the ultimate authority to control, rather than the actual exercise of control, which is the determinant of whether someone “employs” any other person. But the total relationship may need to be considered to determine the issue.
- Control includes the notion of “chain of responsibility” and involves the principle that the way work is organised can influence the hazards faced by a worker, even when there is no direct working relationship. DOCEP supports inclusion of the concept in the model OHS Act to ensure that all those exercising control affecting compliance have responsibility and are accountable.
- All persons who share in the control of work at a workplace, even though areas of control may overlap, or may be at different levels in a hierarchy of control, should have the obligation to exercise that control by taking practical measures to ensure that the workplace does not expose other persons to hazards (EM Heenan J in *Reilly v Tobiassen* [2008] WASC 6).
- And (where overlap) the degree of obligation and the nature and extent of the duty should vary according to whether the influence of the particular person who bears the designated duty is greater or less.
- Potentially the model OHS Act could provide a defence for where cause was outside control (as in Qld, NSW). However, the legislation in those two jurisdictions are absolute duties without the qualification of what is “practicable” or “reasonably practicable”. General duties that are limited by what is “reasonably practicable” make the extent of duty holder’s duties and what is expected of them clear.
- The view expressed in the Maxwell Review was that it is preferable for control to be addressed at the threshold, when the duties are imposed, so that the scope of individual duties can be determined.¹ He said that in

¹ Maxwell, C, *Occupational Health and Safety Act 2004 Review*, State of Victoria, March 2004, p119 (Maxwell Review).

this way, control issues are integrated with the other factors which determine what is “reasonably practicable”.

Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

- No. The concept of non-delegable duties underpins the implicit obligation on each duty holder to exercise control.² There should be no capacity to contract out of legislative responsibilities under the model OHS Act. Control is fundamental to ensuring the appropriate application of occupational health and safety to the workplace and it should not be capable of being delegated or relinquished.
- DOCEP considers that care needs to be taken to ensure that the concept of control is not inadvertently limited. The extent to which a duty holder has control or the capacity to exercise control should remain fundamental to their duties.

Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

- The layers of contractual relationships, respective responsibilities and levels of expertise where there are multiple duty holders would make the complexity of such situations extremely difficult to clarify in the model OHS Act. Each duty holder should be responsible for what they reasonably and practically control. And if the intent of the legislation is understood, the current expression should remain appropriate.
- Duties and control may overlap and the degree of the obligation should depend on the level of control. In particular, the model OHS Act should not subdivide and compartmentalise the duties and responsibilities of the various people and trades working on a site (EM Heenan J in *Reilly v Tobiassen* [2008] WASC 6).
- While a legislative solution is not immediately apparent to the difficulty of clarifying complex arrangements, the possibility of finding one should not be disregarded. DOCEP is, however, mindful of the possibility that the

² Maxwell Review, p111.

result could be enforcement processes becoming even more complex and being frustrated.

Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?

- Yes. In all jurisdictions workplace relationships have evolved and there are now many different types of working relationships. DOCEP is of the view that primary reliance on employment relationships is valid because the employment relationship is the most readily understood concept and relates to control and responsibility.

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteer, apprentices/trainees and other persons performing work?

- In all of the examples given, except volunteers, there is either a contract for employment or contract of employment and this should suffice. DOCEP considers that volunteers should be owed a duty if they are under the control of a person in paid employment e.g. volunteer fire fighters.
- Provision should also be made for certain workplace situations to be treated as employment (e.g. as in Division 3 of the WA OSH Act). See response to Q12 above in relation to share fishing.
- Another example is an owner-builder. An owner-builder will usually have control of the workplace, and consequently has a duty of care to provide a safe and healthy work environment for those whom they engage to perform various tasks.

Q22. Is there a broader concept that more effectively covers the various work arrangements?

- DOCEP is not aware of any broader concept that would be more effective. The Queensland legislation has gone some way toward covering the various work arrangements, but it is not without its problems. Consequently it may be best to begin with a more traditional employer-employee legislative approach and build from there.

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

- DOCEP believes that its OSH Act delivers appropriate duty of care requirements together with the four dot points mentioned in item 3.4 of the Issues Paper.
- It considers that an employer's duty of care should be specified through a general obligation, and with more precise duties specified. Such as, for example, that an employer must ensure the health and safety of employees and others in the workplace to the extent that it is reasonably practicable (the scope would depend on how employee and workplace are defined).
- The standard should be objective – i.e. an objective standard of knowledge in the relevant industry about the risks to safety identified in the particular circumstances and the means by which that risk could be removed or reduced.

Q24. To whom should these [employer's] duties be owed?

- DOCEP is of the view that the duty should be owed to persons who may be affected by the conduct of the business or undertaking. In Western Australia, the duties of care extend beyond employees to include groups such as customers, visitors to the workplace, voluntary workers, an employee's family, and any other person who may be affected by the work activity. The main point here is that it is not confined to the workplace. Employers are required to take measures that are practicable and all of the points raised in the discussion on 'the meaning of practicable' should be taken into account.
- An additional matter not adequately covered in the WA OSH Act, but should be, is share fishing. In share fishing arrangements parties sign a contract for the sharing of profits rather than have a traditional employer-employee relationship.

Q25. How, and to what extent, should the model OHS Act specify worker's duties of care?

- In the model OHS Act the duties should also be placed on people to ensure their own safety at work and that of others who are at the workplace or who might be injured by the work. Employees have a role to play in achieving healthy and safe workplaces and this should be specified. DOCEP considers that the approach taken in the current WA OSH Act works effectively and would support a similar approach being included in the model OHS Act.

Q26. Should the model OHS Act include duties of care for persons who are not performing work (e.g. visitors to the workplace, members of the public)? If so, what should the duties be?

- Yes, in certain circumstances which cover situations where the conduct of visitors to the workplace constitutes a hazard to any person. In such circumstances the visitor must comply with directions given by an authorised person to cease the conduct of concern or to immediately leave the workplace. This situation is covered by section 57A of the WA OSH Act and failure to comply is an offence.

Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

- Yes, in certain circumstances (see question 29 below) and in particular a person who has control or is a principal contractor or main contractor.
- DOCEP is of the view that care would need to be taken not to limit the responsibilities of an employer or person in control. It considers that duties under the model OHS Act should require people who have any extent of control of a workplace to ensure, so far as is practicable, that the workplace and all access ways used to enter and exit are kept clear and in good condition so that people who use the workplace are not exposed to hazards. The duty should only apply if the person has control of the workplace in connection with a trade, business or undertaking of theirs. And then only to the extent of the area they control, with areas of control clearly defined in contracts between the parties.

Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?

- Such appointed persons assume duty of care responsibilities. This should not, however, diminish the employer's obligations.

Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

- Concepts such as mine manager, principal contractor and main contractor appear to work well and warrant further consideration based on the experience of those jurisdictions where these provisions for appointment of workplace health and safety officers exist. The appointment of such a person has significant potential in complex workplaces where there is more than one employer (e.g. large construction projects).

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?

- Yes, but may not be necessary if the duty of care prevails.

Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

- DOCEP is concerned that greater clarity would be beneficial but may be difficult to achieve.

Q32. Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

- No, DOCEP does not consider it necessary for the model OHS Act to specify such a distinction as there appears to be no need to do so.

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

- Yes. DOCEP has found that section 23 of the WA OSH Act is very effective in communicating the intent in this regard.

Q34 How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

- DOCEP is of the view that it is open for the model OHS Act to deal with activity that occurs in another jurisdiction. How the legislation should be drafted to deal with the issue would require considerable discussion. The High Court has held that states can legislate extra-territorially. There is a presumption that legislation does not have extra-territorial effect. However, there is no question that a state may legislate extra-territorially if it expressly, or by clear implication, states that it is doing so, and thereby displaces the presumption. But there must be some connection between the subject-matter of the legislation and the state. It is then for the legislature to decide how far it will go: *Director of Public Prosecutions for Western Australia v Hafner [2004] WASC 32* and cases referred to at paragraph 42.
- An example of legislation in Western Australia providing for territorial application is section 12 of the *Criminal Code Act 1913*. It provides that 1) An offence under this Code or any other law of Western Australia is committed if — (a) all elements necessary to constitute the offence exist; and (b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.

Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

- Yes, DOCEP is of the view that “supply” should be defined. It also considers that “supply” should occur every time an item changes hands:

see the definition of supply in section 3 of the WA OSH Act; and section 5 of the Victorian OHS Act.

Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

- DOCEP recommends the inclusion of a duty regarding employer provided accommodation in keeping with section 23G of the WA OSH Act.
- The intent of section 23G is to restrict its application to very limited circumstances. Such application should be limited to accommodation in remote locations where the employee has no choice other than to reside in the employer provided accommodation. For example, shearers' quarters on a remote pastoral property or a camp in the development of a mine or railway line.
- The section only requires the premises to be "maintained" and does not impose an obligation to make safety improvement modifications, for example installing residual current devices. DOCEP recommends a similar provision be included in the model OHS Act, but for it to be extended to cover reasonable improvements.

'Reasonably Practicable' & Risk Management:

Q37. Should a test of "reasonably practicable" be included in the model OHS Act?

- DOCEP has found that the concept of "reasonably practicable" as provided for in the WA OSH Act is effective. It also considers that the concept as used in the Victorian OHS Act provides useful guidance.

Q38. If not, what alternative standard should be included?

- See below.

Q39. How should the standard be defined? What level of detail should be provided?

- See below.

Q40. Should control be an element of the standard?

- See below.

Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

- DOCEP considers that there should be no departure from the concept as it is dealt with in the WA and Victorian Acts. In this context, when the Act imposes a general duty which one person owes to another it does not require that the person do absolutely everything possible to ensure the safety and health of the other person. Instead the Act requires that the person do what is practicable.
- What is practicable is determined by weighing the time, difficulty and expense of ensuring the other person's safety and health against the likelihood and seriousness of the harm to the other person. For example, section 3(1) of the WA OSH Act specifically sets out the factors that must be considered. And a factor cannot be ignored unless, after considering what a reasonable person at the time would have known, the factor is clearly not relevant.
- DOCEP is not convinced that the element of control should be introduced to the test of practicability. The meaning of reasonably practicable is well established in case law and the concept appears to be well understood.
- Tests or examples should not be included in the model OHS Act. Western Australia currently has explanatory text plus examples contained within a guidance note on the general duty of care in Western Australian workplaces. It has found this to be an effective approach.
- DOCEP is of the view that often the requirement to do what is practicable will require a higher standard of care than will a requirement to take reasonable care.

Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?

- Yes, DOCEP strongly supports "hazard" and "risk" being defined in the model OHS Act.

Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

- No. DOCEP considers that the concept of "reasonably practicable" is well understood and is opposed to the definition being altered in any way.

Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

- In Western Australia the general duty legislative obligations, by their very nature, are capable of covering all workplace hazards.³ The model OHS Act should require a process of risk management where duty holders must identify the hazard, assess the risk and, where appropriate, take the necessary steps to eliminate or reduce the risk. Specific risk management principles and processes are contained in the regulations, and this method is effective.⁴ DOCEP is of the view that there does not appear to be a need for specific and detailed inclusion of risk management principles and process in the model OHS Act.

Consultation, Participation and Representation:

Q45. What provisions should be made in the model OHS Act for consultation?

- Consultation and co-operation between employers and employees is the key to providing and maintaining a safe and healthy workplace. DOCEP considers that the model OHS Act should, therefore, prescribe a duty to consult. However, how, when and with whom should be dealt with in codes of practice.
- DOCEP is of the view that provision should be made in the objects of the model OHS Act to foster cooperation and consultation between the employer and employee. For example, to identify or assess hazards or risks to health or safety; to make decisions about the measures to be taken to control risks to health or safety and procedures to be followed; for monitoring health; providing information and training.

³ Hooker, R , Review of the Occupational Safety and Health Act 1984, 6 December 2006, pp134-135; WA OSH Act sections 3(1) "practicable" and s19.

- The general duty imposed on employers should also include a particular obligation to consult and cooperate with safety and health representatives. The consultative provisions should encourage resolution of matters at the workplace. They should require a process of referral to be established so that issues can be dealt with appropriately, with default procedures provided for in regulations. Provision should also be made for referral to an inspector where no resolution can be achieved and there is a risk of immediate or imminent and serious injury or harm.

Q46. What are the work relationships to which a consultation provision should apply?

- DOCEP considers that consultation provisions should require employers to consult and cooperate with safety and health representatives, where they exist in the workplace, and with other employees on occupational health and safety matters. Details of the *employer and employee relationship*, and this should include the safety and health representative where such a position exists. Details of the working relationships to which a consultation provision should apply ought to be contained in codes of practice.
- In circumstances where workplace situations are to be treated as employment, then the consultation provisions should also apply. For example, there is an extended meaning of employer and employee in the WA OSH Act in relation to sections 23D, 23E and 23F. Also, regulation 1.4 provides that responsibility of employers extends to any other person who may be affected wholly or in part as a result of the work done or caused to be done by the employer or their employee. Regulation 1.6 does, however, limit responsibility to matters over which the main contractor has control or can reasonably be expected to have control at the site. Responsibility is also limited to where the person may be affected wholly or in part as a result of the work done at the site.
- In the Victorian OHS legislation a reference to an employee of an employer includes a reference to an independent contractor engaged by the employer and any employees of the independent contractor. But this

⁴ Occupational Health and Safety Regulations 1996, regulation 3.1.

is only so far as the employer has control over, or would have if not for any agreement purporting to limit or remove that control

- Multi-employer worksites where the workplace has more than one employer working, primarily under a contractor relationship, creates a complex situation. There will be overlapping responsibilities and whether consultation provisions should apply will depend on their level of control. For example, the provisions should apply to the employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite (i.e. has the authority for ensuring that the hazardous condition is corrected). And to the employer who has the responsibility for actually correcting the hazard. Establishing designated workgroups, as provided for under the Victorian OHS Act, could assist consultation at multiple employer worksites.

Q47 Should there be different levels of consultation required for different work relationships?

- DOCEP considers that there should be different levels of consultation depending on the level of control. However, this issue may be too complicated to deal with in the model OHS Act and should most likely be contained in codes of practice.

Q48. How should consultation be provided for:

- *a multi-employer worksite;*
- *an employer with operations across more than one worksite;*
- *small business;*
- *remote workplaces;*
- *precarious employment; and*
- *workers from culturally and linguistically diverse backgrounds.*

- The duty to consult and general principles should be contained in the model OHS Act, and more specific provisions for different situations detailed in codes of practice. Examples of provisions that DOCEP considers appropriate may be found in the NSW Code of Practice on Consultation for Mining, and the National Mine Safety Framework Consultation Code.

Q49. Should there be a requirement for establishing HSRs and HSCs?

- Yes.

Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

- DOCEP considers that it would be appropriate to provide a framework in the model OHS Act. Such a framework should cover: health and safety representatives and committees; heads of powers; role, functions and duties. The detail in relation to the framework should be provided in regulations. Taking such an approach would enable workplaces to exercise the greatest flexibility.
- *Health and Safety Representatives*: election (they initiate a requirement); determine area of coverage with employer; term of office; training and who pays; detail functions including protection from civil liability; power to issue PINs; and disqualification provisions.
- *Health and Safety Committees*: request to establish for employees; employees to appoint representative and include health and safety representatives; obligation of employer to establish a Health and Safety Committee; power for employer to establish; function of Committee; and function of Committee to cover more than one workplace.

Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

- DOCEP is of the view that election and consultation on matters relating to the election of health and safety representatives ought to be included in the model OHS Act: see sections 29 and 30 of the WA OSH Act. For example, workers should be able to request their employer to hold elections for health and safety representatives. Employers should also be able to require the election of a health and safety representative at their workplace. It would be beneficial for the model OHS Act to provide for consultation on the matters relevant to elections: number of health and safety representatives and the areas they will represent, how vacancies are to be filled, and who will conduct the election.

- The composition and the manner in which members of a safety and health committee for a workplace are to be selected should be determined by agreement in writing between the employer and any safety and health representatives for the particular workplace. At least half of the members should be employees (and so far as is practicable they should be safety and health representatives or their deputies).
- A committee should be established if requested to do so by a health and safety representative, or if required by the regulations to do so.
- In Western Australia most businesses tend to be small where formal consultative mechanisms, such as safety and health representatives or committees, are not a feature.

Q52. Where an election is required, who should be entitled to vote?

- The nature of contemporary workplaces presents some challenges for providing a mechanism for the election of safety and health representatives. DOCEP is of the view that while the provisions in the WA OSH Act have attempted to deal with these issues, it is not necessarily the best model.
- DOCEP considers that the Victorian legislation provides a more appropriate model for elections of health and safety representatives and would endorse those provisions for use in the model OHS Act.

Q53. What should the powers and functions of HSRs be?

- DOCEP is of the view that the functions of a health and safety representative should include the following:
 - *inspect* the workplace, or any part of it, at which they have been elected — at any time after giving reasonable notice to the employer; or immediately, in the event of an accident, a dangerous occurrence, or a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person, to carry out any appropriate investigation in respect of the matter;
 - *keep themselves informed* as to the safety and health information provided by the employer in accordance with this Act and liaise as

necessary with the department and other Government and private bodies;

- *immediately report to the employer any hazard or potential hazard* to which any person is, or might be, exposed at the workplace that comes to the representative's notice;
- *refer matters to a safety and health committee* for the workplace (where there is one) that they think should be considered by the committee;
- *consult and cooperate with the employer* on all matters relating to the safety or health of persons in the workplace;
- *liaise with the employees* regarding matters concerning the safety or health of persons in the workplace;
- *potentially issue provisional improvement notices*, but only in certain circumstances: see sections 51AB – 51AH of the WA OSH Act; and sections 60-65 of the Victorian OHS Act

Q54. What should the structure and functions of HSCs be?

- Refer to Q51 in relation to structure. DOCEP considers that the WA OSH Act provides suitable functions of a safety and health committee and should be considered in developing a model OHS Act. It is of the view that the model OHS Act should also include provisions that cover the following:
 - to facilitate consultation and cooperation between an employer and the employees of the employer in initiating, developing, and implementing measures designed to ensure the safety and health of employees at the workplace;
 - to keep itself informed as to standards relating to safety and health generally recommended or prevailing in workplaces of a comparable nature and to review, and make recommendations to the employer on, rules and procedures at the workplace relating to the safety and health of the employees;
 - to recommend to the employer and employees the establishment, maintenance, and monitoring of programmes, measures and

procedures at the workplace relating to the safety and health of the employees;

- to keep in a readily accessible place and form such information as is provided under this Act by the employer regarding the hazards to persons that arise or may arise at the workplace;
- to consider, and make such recommendations to the employer as the committee sees fit in respect of, any changes or intended changes to or at the workplace that may reasonably be expected to affect the safety or health of employees at the workplace;
- to consider such matters as are referred to the committee by a safety and health representative; and
- to perform such other functions as may be prescribed in the regulations or given to the committee, with its consent, by the employer.

Q55. What training and qualifications should members of HSRs and members of HSCs have?

- In Western Australia appointment to the position of HSR is by peer election within the workplace. The HSR is deemed competent by the outcome of that election. However, in Western Australia HSRs must complete a mandatory 5 day training course. The specified outcomes for this 5 day course have been mapped to six OHS units of the national BSB30707 Certificate III in Occupational Health and Safety (Cert III in OHS). HSRs are therefore able to attain these six units after completion of their 5 day training course but actual attainment of the competencies is not required for the role of HSR. Thus there is no mandatory requirement for assessment of competencies and the decision as to whether to seek skills recognition into the Cert III in OHS is entirely at the discretion of the HSR.
- In Western Australia there is no specified training for HSCs. However, it is desirable that they are trained to at least the same level as HSRs.
- On the basis of the above, a 5 day training course based on six OHS units of the national BSB30707 Cert III in OHS would compromise appropriate initial training for HSRs and HSCs but it would be essential that

attainment of competencies for HSRs be entirely at the discretion of the HSR.

- DOCEP considers that specific training and qualifications are best prescribed in regulations.

Q56. Are there alternative mechanisms that should be considered?

- DOCEP is not aware of any.

Q57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

- DOCEP considers that specific requirements may best be dealt with in regulations.

Q58. Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

- Yes, temporary labour (migrant and hire). In Western Australia the current scheme has been difficult for workplaces to apply with good effect as the provisions only operate where all parties agree to the scheme. In the experience of DOCEP all parties agreeing to a scheme has been rare.

Q59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?

- In Western Australia right of entry is currently dealt with under industrial relations legislation. However, DOCEP considers that it would be appropriate for the model OHS Act to include right of entry provisions.
- DOCEP is of the view that the right of entry ought to be limited to an authorised representative of a registered employee organisation who holds a valid entry permit. Sections 81 and 87 of the Victorian OHS Act appear to provide a useful benchmark to build on for the model OHS Act.

Q60. Should the model OHS Act specify training and qualifications for such persons?

- No. DOCEP considers that training and qualifications are best prescribed in regulations. This is because approved courses must be regularly reviewed to ensure they are appropriate for the purposes required. The model OHS Act itself should make provision for the issue of an entry permit to be limited to where the person has satisfactorily completed a prescribed course of training.

Q61. In what circumstances should the right of entry be exercisable?

- If there is to be a right of entry, then it should be for enquiring into occupational health and safety – and only where reasonably suspects that a contravention of the Act or the regulations has occurred or is occurring at a place that is a workplace. Western Australia is of the view that the provisions in Part 8 of the Victorian OHS Act provide reasonable power and qualifications for exercising a right of entry. It would, therefore, support similar provisions in the model OHS Act.

Q62. What powers should be exercisable upon entry, and subject to what conditions or limitations?

- DOCEP is of the view that there should be some conditions limiting the powers exercisable. Sections 89 and 90 of the Victorian OHS Act provide reasonable conditions and limitations.

Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

- DOCEP considers that the model OHS Act should prescribe some formal requirement for the employer and employees to attempt to resolve the issue in accordance with an agreed procedure, or if there is no such procedure, then a procedure prescribed by the regulations: sections 24-28 of the WA OSH Act provide for resolution of workplace issues and provide a useful benchmark to build on.

Q64. When should issue resolution procedures be activated?

- DOCEP considers that issue resolution procedures should be activated only when attempts to resolve the issue do not succeed within a reasonable time and the workplace has exhausted normal processes. It should also be activated where there is a serious and imminent threat, which is the test used by the International Labour Organisation (ILO). For example, exposure to asbestos is serious but not necessarily imminent, and it therefore fails the present test in the legislation, which refers to the ILO test.

Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?

- DOCEP believes that the general requirement should be in the model OHS Act, and more specific procedures prescribed in the regulations: for example see sections 25 and 26 of the WA OSH Act.

Q66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

- DOCEP is of the view that the model OHS Act should specify a hierarchy of resolution procedures. In the first instance, workplaces should attempt to resolve the issue at the workplace. If procedures are agreed to at the workplace and followed, then resolution has a better chance of succeeding. However, if there is no workplace procedure agreed, then there should be a mechanism in the model OHS Act to follow. Greater detail and guidance should be provided in codes of practice. In the experience of DOCEP those procedures agreed to at a workplace level are generally not actioned and workplaces refer to the Act: for an example see sections 25 and 26 of the WA OSH Act.

Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

- Yes. DOCEP considers that the model OHS Act should specifically provide for workers to refuse/cease work where they have reasonable grounds to believe that to continue to work would expose them or any

other person to a risk of imminent and serious injury or harm. In the experience of Western Australia, sections 26 and 28A of the WA OSH Act have proved effective.

Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

- No. The WA OSH Act provides that a HSR may issue a Provisional Improvement Notice (PIN) in certain circumstances. In Western Australia a PIN cannot require a site or operation to be shut down. A minimum of seven days must be provided for a problem situation to be remedied before a PIN can take effect. Also, a PIN can only be issued by an elected safety and health representative who has completed an approved course of training to become qualified to issue a PIN. Before issuing a PIN, the safety and health representative must consult with the person to whom the notice is to be issued about the matter that needs to be remedied. That consultation is designed to provide an opportunity for the problem to be fixed without the need to issue a PIN.
- In Western Australia the provisions in the OSH Act allow employees the right to refuse to work when there is a risk of causing imminent and serious injury or immediate and serious harm to a person's health. Those provisions are independent of the provisions that relate to PINs and include sanctions for refusal to work when an employee leaves a workplace without authorisation or refuses to do reasonable or alternative work: see section 28A

Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

- Yes, DOCEP is of the view that the same pay and other benefits, if any, to which they would have been entitled to if they had continued to do their usual work should be required. However, there should be conditions on the entitlement. For example, subject to reasonable grounds for believing there is a risk of imminent and serious injury or harm to their health or safety, not leaving without authorisation of the employer or an inspector,

and has not refused to do reasonable alternative work: see for example sections 26-28A of the WA OSH Act.

Q70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

- Yes.

Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?

- DOCEP considers that protection for workers who are discriminated against for reasons relating to something they have done in the interests of occupational safety and health should be provided for in the model OHS Act. It considers that an appropriate process to protect persons from discrimination or victimisation is contained in sections 35A-35D and 56, and new sections sought to be inserted (56A and 56B) of the WA OSH Act. Something similar could be used in developing the model OHS Act.
- *The Industrial and Related Legislation Amendment Bill 2007* is currently before the Western Australian Parliament (initiated in the Legislative Assembly and with the Second Reading Speech in the Legislative Council on 14 November 2007). It will amend the *Occupational Safety and Health Act 1984 (WA)* to provide a remedy for workers who are discriminated against for something that they have done in the interests of occupational safety and health. The amendment will also provide consistent terminology in sections 35A(1) and 56(1) by replacing the reference to “less favourably than would otherwise be the case” with “causes disadvantage to an employee or prospective employee. Inserting new sections 56A and 56B is sought to protect employees and provide an adequate means of redress. The sections will give employees, prospective employees and contractors the right to seek redress in the Tribunal where they have been disadvantaged (to provide for reinstatement of a dismissed employee or any other means of rectifying or compensating the effects of discrimination).

Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?

- DOCEP is of the view that the person who claims to have been subjected to unlawful discrimination (victim) or an inspector should be able to bring an action for unlawful discrimination. It does not believe that the model OHS Act should allow for representative actions (the WAIRC has recently confirmed the view that representative actions are not allowed under current legislation in this state).

Q73. Should a breach of the [discrimination] provisions be the subject of criminal or civil proceedings or both?

- The WA OSH Act currently makes breaches of the discrimination provisions an “offence” and proceedings will therefore be criminal. DOCEP does not have a strong view on whether breaches of the discrimination provisions ought to be criminal or civil proceedings and will be interested in the views of other jurisdictions. It would, however, support the model OHS Act providing for civil proceedings in relation to resolution of certain issues. In particular, it considers that there should be alternatives, such as conciliation or arbitration, whether or not prosecution action is also taken: see response to question 77 below.

Q74. Who should have the burden of proving relevant elements of [discrimination] offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?

- As for Q73, DOCEP does not have a strong view on whether discrimination provisions ought to be criminal or civil. The regulator who is prosecuting should have the burden of proving elements of offences. There is, however, some merit in the reverse onus of proof in relation to the “reason” as in the Victorian provision: the defendant bears the onus of proving that the reason alleged in the charge was not the dominant reason why the defendant engaged in the conduct. The standard of proof will depend on whether the proceedings are criminal or civil.

Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

- Possibly, but DOCEP does not have a strong view on this issue.

Q76. What remedies should be available to the victims?

- Reinstatement if the person was dismissed from employment or compensation for loss of employment or loss of earnings or both.

Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

- Yes. In Western Australia Clause 45 of the *Industrial and Related Legislation Amendment Bill 2007*, referred to in Q71, will insert new sections 56A and 56B into the OSH Act. DOCEP considers that these provisions should be considered in developing the model OHS Act.
- Section 56 of the WA OSH Act currently protects employees and prospective employees from discrimination for reasons relating to something they have done in the interests of safety and health. However, these provisions do not provide for reinstatement of a dismissed employee or any other means of rectifying or compensating the effects of discrimination. In order to protect employees and provide an adequate means of redress, the Bill will insert new sections 56A and 56B to give employees, prospective employees and contractors the right to seek redress in the Tribunal where they have been disadvantaged. Such a right will exist whether or not prosecution action is taken. The new sections are consistent with current sections 35C and 35D of the WA OSH Act, which deal with discrimination against safety and health representatives.
- New section 56A(1) of the OSH Act will enable employees, prospective employees and contractors to refer a claim to the Tribunal that they have been disadvantaged in contravention of section 56(1) or new section 56(1a). New section 56A(2) of the OSH Act will clarify that a claim may be referred to the Tribunal under new section 56A(1) regardless of whether the employer, prospective employer or principal in question has been convicted of an offence under section 56(1) or new section 56(1a).

- New section 56A(3) of the OSH Act will enable a referral under new section 56A(1) to be made on a person's behalf by an agent or legal practitioner referred to in section 31 of the *Industrial Relations Act 1979* (IR Act). An agent could include an employee or officer of a union. New section 56A(4) of the OSH Act will provide that section 80E(1) of the IR Act does not apply to a claim referred under new section 56A(1) of the OSH Act by a government officer. This will enable the Tribunal to deal with claims by government officers which could otherwise be within the exclusive jurisdiction of the Public Service Arbitrator under the IR Act.
- New section 56B(1) of the OSH Act will enable the Tribunal to remedy a contravention of section 56(1) by an employer. The Tribunal will be able to order the employer to: (a) reinstate the employee if the employee has been dismissed from employment; and/or (b) pay the employee compensation for loss of employment, loss of earnings and/or any other detriment (compensation could potentially be payable for one or more of these things).

Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

- DOCEP is presently not aware of any.

Regulator Functions, Powers & Accountability:

Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?

- No. DOCEP considers that the functions within the Inter-Governmental Agreement are most likely sufficient. Western Australia is of the view that the establishment, functions, powers and accountability of regulators are, therefore, matters best left to each jurisdiction rather than being included in the model OHS Act. It should be left to the states and territories to develop their own specific powers. If this is to be the case, then it may be suitable for the model OHS Act to include a general provision such that each jurisdiction shall appoint inspectors and that they shall have such powers as provided for by each state and territory.

Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?

- No, DOCEP does not believe that it is necessary to have a provision in the model OHS Act to “require” in circumstances where all jurisdictions publish their enforcement and prosecution policies in any event. It considers that an Inter-Governmental Agreement is the appropriate place to provide mechanisms to ensure the greatest possible consistency in policies.

81. Should the model Act include provisions that allow the making of interpretative documents?

- No. DOCEP supports the making of interpretative documents in accordance with the intention of both COAG and WRMC for further clarity to be provided to duty holders regarding interpretations of OHS statutory instruments. DOCEP does not, however, believe that such provisions should be in the model OHS Act.

Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

- Yes, but these should not be contained in the model OHS Act. Examples of functions and powers available to an OHS regulator but which should not be exercisable by an inspector include: cancelling or suspending licenses; deregistration; review of improvement and prohibition notices; and the authority to prosecute.

Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

- No. DOCEP is strongly opposed to the advisory and enforcement functions of an OHS regulator being separated.

Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

- DOCEP considers that the model OHS Act should not. It is of the view that the appointment, qualifications, powers, functions and accountability

of inspectors are issues that need to be addressed within each jurisdiction.

Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

- In the experience of DOCEP the present capacity of inspectors under the WA OSH Act is satisfactory and there appears no need to strengthen their role and capacity under the model OHS Act.

Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?

- No, not in Western Australia's view. Inspectors are officers of the regulator, and exercise their powers on its behalf. They must be accountable to the regulator for the discharge of their functions.
- As said by Maxwell⁵ "to speak of "independence" in relation to an inspector means, in my view, that the inspector must be able to exercise his/her powers "without fear or favour". That is, a decision whether or not to issue a prohibition notice (or an improvement notice) must be made impartially, without bias or favouritism. The inspector must be independent of the person under inspection. There can be no conflict between duty and interest. But independence does not mean – and, in my view, cannot mean – that the inspector is independent of the Authority, if this means being free of direction from or control by the Authority. It could never have been intended that an inspector was to be an autonomous public official, the exercise of whose powers would be subject to no restriction other than the (universal) requirement that statutory powers must be exercised in accordance with law and for the purposes for which they are conferred."

Q87 Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

- Yes, but it should not be in the model OHS Act and ought to be addressed within each jurisdiction. DOCEP is of the view that inspectors should be

⁵ Maxwell Review, p286.

able to modify or amend a notice or instrument but in very limited circumstances only. For example, minor typographical errors, or incorrect date or section of the Act referred to.

- The regime of improvement and prohibition notices is a very important component of the capacity to enforce occupational health and safety legislation. The capacity to restrain certain action is a powerful regulatory tool. While it is recognised that there may be times when an inspector makes a “mistake”, that should be an extremely rare occurrence. As a general rule an “inspector” should not be able to modify, amend or cancel any notice/instrument (unless there is an obvious error and then the *Interpretation Act* could possibly be used to correct the error, which would depend on the type of error). It might be more appropriate for any modification, amendment or cancellation to only be done on review at a higher level than the inspector. Such a process would protect an inspector from any potential pressure from the recipient to change the notice in any way. It would also prevent any uncertainty or concern about different versions of a notice and whether there have been changes (and any question about how any changes came to be made).

Q88. What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?

- DOCEP considers that making provisions in relation to review of decisions should be left to each jurisdiction.
- Improvement and prohibition notices should continue to be reviewable. Although consistency across the jurisdictions is desirable, it is possible that the process may need to vary due to different structures. In Western Australia review is on application of the affected person (person issued with the notice or the employer of the person issued with the notice) within a set timeframe if they are dissatisfied: initially by review to the Commissioner, and then to the Tribunal. Both have power to inquire into the circumstances in relation to the notice and to affirm, affirm with modifications or cancel the notice. Western Australia considers that its current system works particularly well.
- In the experience of DOCEP the provisions in the WA OSH Act are satisfactory: see sections 51, 51A and 51AA. Another example is the

provisions in Part 10 of the Victorian Occupational Health and Safety Act, which provide a comprehensive coverage for review of decisions.

Q89. Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

- No.

Compliance & Enforcement:

Q90. Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

- No. If there is to be consistency across the jurisdictions in relation to any hierarchy of enforcement measures, then DOCEP considers that the Inter-Governmental Agreement should suffice to achieve this aim.

Q91. Should these [there] be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

- DOCEP is of the view that there should be statutory principles for the appropriate use of enforcement measures, but these should not necessarily be included in the model OHS Act.
- Western Australia considers that each jurisdiction should operate with the same set of tools. In this regard it would support basic principles being included in the model OHS Act and with the technicalities being left to each jurisdiction. It considers that the most appropriate place for publication of the statutory principles is in policy or guidance documents within each jurisdiction.

Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

- DOCEP is of the view that the current provisions in the WA OSH Act provide satisfactory power for inspectors to issue improvement and prohibition notices. These could be used in developing the model OHS

Act. It considers that practical guidance should be provided in codes of practice. It should also be made clear that a HSR issuing a PIN has the same protection as an inspector, such as under section 56 of the WA OSH Act.

Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?

- In principle, Western Australia believes that providing directions in a notice is important. DOCEP considers that whether notices contain recommendations is an operational matter appropriately left to each jurisdiction to determine. For example, section 50 of the WA OSH Act provides that a notice may include directions on measures to be taken to remedy the risk, activities or matters to which the notice relates, or the contravention or likely contravention mentioned.

Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?

- In the experience of DOCEP the process for review of notices provided for under the WA OSH Act works effectively. In WA an improvement or prohibition notice may be referred to the WorkSafe Western Australia Commissioner for review: section 51, and if the recipient remains dissatisfied with the outcome, then they may apply to the Industrial Relations Commission sitting as the Occupational Health and Safety Tribunal for review: section 51A. See also the Victorian OHS Act at section 114.
- A provisional improvement notice should, in the first instance, be reviewed by an inspector: see section 51AH of the WA OSH Act. If the affected person remains dissatisfied, then the process set out in relation to a notice issued by an inspector may take effect. In Western Australia the use of provisional improvement notices has been a positive measure and the low number of requests for review suggests that the process is effective.

Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

- Prohibition Notices relate to situations where there is a risk of imminent and serious injury or harm to the health of any person and, therefore, require the activity to cease immediately. The activity should then be prohibited until an inspector is satisfied that the matter giving rise to the risk has been remedied or dealt with on review.
- Improvement notices should have a minimum timeframe expressed, however, that should not be in the model OHS Act. The notice itself should specify the time by which the person is required to remedy the contravention or likely contravention. The time specified should be negotiated on what is reasonable having regard to an assessment of the seriousness and risk of the hazard in the particular circumstances.
- PINs are intended as a tool for encouraging OSH issues to be resolved at the workplace. In Western Australia, a minimum of 7 days must be provided for a problem/situation to be remedied before the PIN can take effect.

Q96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices? If so, what should the effect be?

- Yes, but whether the operation of the notice should continue should depend on the type of notice. DOCEP is of the view that, pending the decision of a review or appeal, the operation of an improvement notice should result in the notice being suspended. However, this should not apply to prohibition notices. A prohibition notice is only issued where the risk of an activity is serious and imminent and, therefore, should remain in force subject to the decision of the review or appeal.

Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

- DOCEP would support the model OHS Act making provision for issuing infringement notices. The types of offences for which they could be issued would need careful consideration. Section 139 of the Victorian OHS Act appears to provide a suitable provision.

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

- DOCEP considers that the administration of infringement notices should be under occupational health and safety law.

Q99. What amounts should be specified as fines for infringements?

- The general standard for fines for infringements in other legislation appears to be one-fifth of the maximum penalty that could be imposed by a court for the offence (or 20% of the monetary penalty provided for in the Act depending on what method is used). If it is to be included in the model OHS Act, then DOCEP sees no reason why the same standard should not apply in the model OHS Act up to a maximum of \$5,000.

Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?

- DOCEP does not have a strong view on whether the model OHS should provide for injunctions. Potentially including the power to obtain injunctions could be advantageous.
- In Western Australia a failure to comply with a provisional improvement notice, an improvement or prohibition notice is an offence against the Act: sections 48, 49 and 51AG. Applicable penalties for first offences are: as an employee \$5,000; an individual \$25,000; and a body corporate \$50,000.
- The WA OSH Act has not had provision for an inspector whose notice is not complied with to seek injunctive relief to enforce the notice. In Western Australia this capacity is available under general law and does not necessarily require a specific provision in the OSH Act. There is other consumer protection legislation in Western Australia that has specific injunctive power: see for example the *Fair Trading Act 1987* ss74-76. In Victoria, section 118 enables the regulator to apply to the Supreme Court for an injunction to either compel or restrain a person in relation to notices.
- The potential benefit of obtaining an injunction is the deterrent effect in that failure to comply is a contempt of court and the penalty can be

imprisonment. Additionally, an injunction might carry the added weight of being granted by the Supreme Court rather than by an inspector.

- The courts of equity have no general duty to enforce the law, including the criminal law. The primary rule is that the criminal law is enforced by appropriate procedures in the criminal courts. The courts will exercise restraint in providing injunctive relief. There will always be a number of factors which militate for and against the grant of an injunction, whether the application is made under statutory or general law. In particular, proof that there is a deliberate flouting of the law is fundamental in an application, or that the potential consequences of the threatened action are so serious that urgent action is required to stop it (see *Minister for Indigenous Affairs v Catanach & Ors* [2001] WASC 268 paragraphs 55-56 and cases referred to).

Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

- Yes. DOCEP supports the option of a wider range of sanctions and is keen to explore alternatives to those available in this state. It considers that enforceable undertakings, as provided for in other jurisdictions, could play a useful role in improving occupational safety and health outcomes. There are two main reasons why enforceable undertakings have not been successfully used in this state. First, the WA OSH Act requires that the offender has been convicted of a relevant offence *before* they can elect to enter into an undertaking rather than pay the fine. And second, enforceable undertakings may only apply to offences against the regulations and relate to level 1 penalty. Therefore, there is no incentive to enter into an undertaking instead of paying a fine.
- DOCEP considers that the model OHS Act should provide the power to accept an enforceable undertaking from an alleged offender as *an alternative to prosecution*. This view is consistent with that expressed in the Maxwell Review⁶. The mechanism is provided for in the Tasmanian and Queensland OHS legislation, and has for some years been available to the ACCC and ASIC. An enforceable undertaking enables a tangible,

⁶ Maxwell Review, p361.

forward-looking outcome to be achieved, such as the implementation of an appropriate health and safety management system.

Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?

- DOCEP does not consider an admission of fault or liability to be necessary. The basis of an undertaking should be to produce a better occupational safety and health outcome rather than any admissions.

Q103. Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?

- DOCEP is not aware of any.

Prosecutions:

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

- Western Australia does not have a strong view either way. However, given the complexity of the issues related to determining a preference with regard to the different offences, at this stage at least, DOCEP prefers to maintain the current legislative process under the WA OSH Act. Breaches of occupational health and safety are subject to criminal proceedings.
- DOCEP is mindful of the importance to note that these are regulatory offences being invoked by the state. It also considers it significant that civil proceedings are characterised by a variable standard of proof at or above the balance of probabilities accompanied by a loss of other procedural protections of a defendant, such as privilege against self incrimination. Where there are both criminal and civil procedures, this can result in confusion and overlap even where the civil and criminal penalties are clearly distinguished and articulated in the legislation.⁷

⁷ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No. 95, October 2002, [2.78].

Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

- If there is to be a mixture of both criminal and civil penalties, then DOCEP considers that all offences to do with breaches of duty of care and obstruction or abusing an inspector ought to remain criminal offences. On the other hand procedural and discrimination matters could be dealt with as civil matters.

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

- Western Australia favours the traditional approach. Currently OSH prosecutions in this state are heard by a Magistrate in the Magistrates Court and are heard on appeal in the Supreme Court. There has at times been some support for proceedings being commenced in a higher court as it is considered that a higher court may be best suited to deal with the complexity of issues raised in OSH prosecutions. However, that view does not have strong support. Since 1998 the Crown Solicitor's Office (now State Solicitor's Office) has consistently supported the Magistrates Court retaining jurisdiction for occupational safety and health matters.

Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

- In the experience of Western Australia there are shortcomings in the current system. DOCEP does not, however, consider it necessary to have specialist courts or tribunals. It has previously been suggested that the establishment of a specialised OHS Court, or a specialist Division of the Magistrates' Court, would improve consistency in sentencing for OHS offences. This is said to be made necessary by the unique nature of OHS offences, and the need for familiarity with the concepts used in the legislation and with the whole gamut of issues associated with workplace safety.⁸ At one stage a specialised Magistrates Court was attempted in Western Australia, but that attempt was not successful. It remains unlikely there would be a sufficient number of prosecutions to warrant one or more magistrates being allocated full-time to hearing OHS prosecutions.

⁸ Maxwell Review, pp384-5.

- While there may be shortcomings in the current system there is no clear alternative which would not also have problems.

Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

- DOCEP considers the Supreme Court to be the appropriate court for appeals to be heard on occupational safety and health matters. It does not support a change to the present process in this state. It also considers that the right to appeal should continue to be by leave of the Supreme Court on a question of law.

Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

- No, DOCEP is opposed to occupational safety and health prosecutions being heard by a jury. Western Australia's view is that it is inappropriate to have jury trials for occupational safety and health matters because: proceedings involve evidentially complex OSH Act offences; reasons for decision are not provided in jury trials and would remove the deterrent and educational advantage of the current process for hearings requiring written reasons; and an acquittal would be almost impossible to appeal.

Q110. Who should be entitled to commence criminal proceedings?

- The regulator/authority only (WorkSafe) or the local Director of Public Prosecutions should retain the exclusive right to prosecute for breaches of OHS Act. The prosecution of persons for criminal offences is a matter of the utmost seriousness and is properly the exclusive function of the State. DOCEP supports the conclusion expressed in the Maxwell Review that there is no justification for conferring on any other party a statutory right to bring a prosecution.

Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

- As above.

Q112. What should appropriate time limits be for the commencement of a prosecution and why?

- In Western Australia the limitation period for instituting a prosecution under the WA OSH Act is three years. For reasons of general deterrence and responsiveness to breaches of the Act prosecutions are, however, expected to be commenced as soon as possible and well before the three years.
- While DOCEP acknowledges the distress that an investigation and proceedings can cause everyone involved, it does not consider three years to be unreasonable. It is a standard time limit for many Acts and provides the regulator with adequate time to investigate complex and difficult matters properly and commence prosecution proceedings where the circumstances justify such action. There are also circumstances where a contravention does not come to the attention of the regulator until some time after its occurrence. It would be unfortunate for a regulator to be prevented from prosecuting a breach involving a high degree of culpability and serious consequences because a shortened general limitation period on instituting a prosecution has expired.

Q113. Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?

- No, provisions relating to the conduct of prosecutions should be left to the rules of the relevant court or tribunal.

Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

- Yes, where appropriate to assist with proving cases and not wasting a court's time.

Q115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?

- In Western Australia section 53 of the WA OSH Act provides that, in the absence of evidence to the contrary, certain facts are taken to be proved.

As a minimum similar specific provision should be made in the model OHS Act.

Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

- Regulations have evidentiary status in any event.
- In Western Australia codes of practice are approved by the Minister and are given significant status. Under section 57 of the WA OSH Act the stated purpose of codes of practice is to provide guidance to those who are subject to a duty under the Act. And a code of practice is specifically admissible in evidence in proceedings.
- The evidentiary status of other instruments may depend on the origin and status of the instrument. DOCEP considers that it should be left to the relevant court or tribunal to attribute to codes of practice and other subordinate instruments whatever evidentiary weight it considers appropriate in the circumstances of a particular case.

Q117. Is 'reasonably practicable' an appropriate standard for the model OHS Act?

- Yes.

Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

- The prosecutor should be required to prove the elements of the offence to the required standard.⁹

Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?

- No.

⁹ This is in accordance with the leading High Court decision in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

Q120. What, if any, defences should the model OHS Act provide?

- None. DOCEP is of the view that the obligation should be on the prosecution and whether it can prove that something was within the employer's control and was reasonably practicable to fix.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

- No.

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

- Yes, In Western Australia this occurs where it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of the officer: see section 55 of the WA OSH Act.

Q123. How should officer be defined?

- By reference to the definition in the Corporations Act. Any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity: see section 55 of the WA OSH Act.

Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

- As above. DOCEP considers that an officer of a corporation should also be liable where a corporation is found guilty of an offence and the contravention is proved to be attributable to that officer or occurred with their knowledge. Section 55 of the WA OSH Act has been effective in this regard. Section 144 of the Victorian OHS Act also appears appropriate.

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

- Perhaps by having regard to knowledge or neglect being attributable to the officer (as above).

Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

- No.

Q127. What should the approach to officers of unincorporated associations or volunteer officers be?

- In Western Australia this is currently not applicable. Perhaps in line with section 145 of the Victorian OHS Act an officer of an unincorporated association should only be guilty of the offence if it is proved that the commission of the offence is attributable to the officer failing to take reasonable care.
- Volunteers should not be liable.

Q128. For which offences should monetary penalties (fines) be imposed?

- The approach taken in Western Australia in using penalty levels with associated monetary amounts has worked effectively: see section 3A of the WA OSH Act.

Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

- DOCEP is of the view that maximum fines should be provided, however, they should most likely be higher than they currently are in Western Australia.

Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?

- Yes, there should be different levels of fines for various offences depending on culpability and whether repetitive offending. See the response to question 128 above.

Q131. Should there be a statutory minimum fine for some offences? If so, what?

- No, DOCEP considers that the sentencing discretion of courts should not be fettered in relation to offences under OHS legislation. It should be left to the courts to determine what the fine will be in any given case based on all the circumstances of that case.

Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?

- Yes.

Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

- The outcome of a case will always depend on the facts and circumstances of each individual case and the court deciding the matter. It is unlikely that a national register of decided cases will affect a court outcome.
- One obstacle to consistency in sentencing recognised in the Maxwell Review is that magistrates seldom give written reasons for their decisions. The publication of written reasons would enhance consistency, as well as enabling the regulator to maximise the educative benefit of the Court's decisions. These are matters for the Chief Magistrate and the Attorney-General.

Q134. What penalty options should be available in addition to or instead of fines?

- DOCEP is of the view that appropriate additional penalty options include imprisonment for gross negligence and reprimands or enforceable undertakings in suitable circumstances where the conduct and consequences are at the lower end of a scale of seriousness.

Q135. Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

- Yes. DOCEP considers that imprisonment is an appropriate sentencing option for serious breaches of the legislation. It is of the view that the model OHS Act ought to provide for terms of imprisonment for specified offences, such as for gross negligence causing death or grievous bodily harm. Western Australia currently has a term of 2 years imprisonment available in relation to where a person is liable to a level 4 penalty. It is, however, beyond the scope of DOCEP's expertise to undertake the analysis necessary to specify an appropriate maximum period of imprisonment in respect of each offence.

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

- The question of whether there should be an offence such as industrial manslaughter under the state and territory criminal laws is a contentious issue. It appears that the strongest support is for workplace death to remain under OHS legislation. It may, therefore, be more appropriate for matters relating to workplace death to be left to the decision-makers' discretion in sentencing offenders and whether that should be to a term of imprisonment. In any event, there are already offences under the criminal law in each state or territory under which a prosecution could be commenced against an employer for manslaughter - if that is considered the most appropriate option in any given case.
- The Maxwell Review considered that it follows from the nature of OHS offences that no question of industrial manslaughter can arise under the OHS legislation.¹⁰ An employer may be in breach of its safety duties under the OHS legislation irrespective of whether death or injury results. It is the breach of duty not the causing of a death, which gives rise to the offence. With manslaughter, on the other hand, it is the causing of a death which constitutes the offence, and that properly remains within the province of the general criminal law.

¹⁰ Maxwell Review, pp13-14.

Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

- As above – and depending on the circumstances, DOCEP considers that breaches resulting in death or serious injury should be dealt with under OHS legislation. This is a matter for the Western Australian Attorney General to consider.

Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

- Yes, see above. Culpability is considered to be more important.

Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

- None, this is a matter for other relevant enforcement legislation in each jurisdiction and the courts.

Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?

- No, as above.

Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

- DOCEP is not aware of any.

Other Issues:

Q142. Should the power to make regulations be limited and if so, in what way?

- No, the regulation making power should be broad and flexible and should provide for flexible approaches to achieving compliance (such as tiered approaches).

Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

- DOCEP considers that the model OHS Act should maintain the current functions of regulations. That is, that they are to specify, in greater detail, what steps are required for compliance with the general duties in relation to particular hazards. Practical guidance or compliance regulations may, of course, be supplemented by prescriptive regulations. However, the regulations should not create parallel offences except where they impose obligations where they can properly be regarded as additional to the general duties imposed by the Act.¹¹
- Serious offences should not be created by regulation. And where a penalty must apply for breach of an additional hazard-specific obligation in the regulations, then regulations ought not to impose significant criminal penalties. In Western Australia the current penalties are provided for in Regulation 1.16: \$25,000-\$31,250 for an individual and \$50,000-\$62,500 for a corporation.

Q144. What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

- DOCEP considers that the model OHS Act should make provision for codes of conduct in relation to – definition, approved by WRMC, gazetted, and evidentiary status.
- Section 57 of the WA OSH Act approval process operates well in this state. The main difficulty relates to the code of practice not being sufficiently kept up to date.

Q145. How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?

- DOCEP supports the view that there should be a requirement in the model OHS act to notify of a death, and serious injuries and incidents.
- Western Australian notes that it is difficult to obtain high compliance with the requirements on notification.

¹¹ Maxwell Review, pp364-5.

Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?

- DOCEP is not clear on what “regulatory” decisions are being referred to and is unable to comment.

Q147. Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

- No, health and safety requires decisions to be made to ensure workers are protected. DOCEP does not support conciliation of health and safety issues. In Western Australia conciliation is only available in relation to limited matters regarding: whether an employee’s entitlements are to continue after refusal to work; entitlements, consultation and election of health and safety representatives; election scheme establishment; and establishment of a safety and health committee where an employer considers they should not be required to: see sections 28(2), 30(6), 30A(4), 31(11), 35(3) and 39G of the WA OSH Act.

Q148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?

- It does not need to be in the model OHS Act, but tripartism should be an underlying principle and could be specified as such.

Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

- See above.

Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

- DOCEP is of the view that licensing, training, certification, and plant design and registration should be subject to mutual recognition provisions.

Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- *better OHS outcomes;*
- *greater efficiency and effectiveness;*
- *lower regulatory compliance and enforcement burdens; and*
- *improved harmonisation of the requirements for such permits and licensing for industry across Australia?*

- DOCEP believes that these matters should be dealt with by way of regulations or standards.

Q152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

- There should be no attempt to deal with any overlap between federal and state or territory OHS legislation. Such matters are best dealt with in an Inter-Governmental Agreement.

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

GENERAL COMMENTS

Please list any general comments you would like to make on any other matters not already highlighted in the Issues Paper. Ensure your general comments fall within the Terms of Reference of the National Review into Model OHS Laws (refer to Appendix A of the Issues Paper).

General Comments:

Suggestions for what ought to be in a model OHS Act

- Western Australia considers that the model OHS Act is intended as a framework which each jurisdiction will adopt with a view to developing and maintaining a national consistency. DOCEP anticipates that each jurisdiction will supplement the model with its own specific provisions for the establishment, functions, powers and accountability of regulators and inspectors, and will provide for review processes appropriate to their own jurisdiction.

- The model OHS Act should set out specific objectives, key principles, duties and rights as general duties using a principles-based standards approach, and provide for a consistent compliance and enforcement model. The scope and application ought to be sufficiently broad and flexible so as to accommodate new and evolving types of work and current and emerging hazards and risks. DOCEP is of the view that critical terms ought to be defined. For example: control, employee, employer, hazard, practicable or what is reasonably practicable, risk, and workplace.
- In relation to the range of duty holders, which is a point not covered elsewhere in this submission, the approach taken in the current WA OSH Act works well in terms of the specification of duties. Western Australia is especially keen to ensure the range of duty holders is adequately captured, and in particular designers, manufacturers and suppliers. DOCEP considers that those people currently having general duties under the WA OSH Act provide a useful benchmark to build on for the model OHS Act:
 - Employers;
 - Employees;
 - Self-employed;
 - Persons who have control;
 - Principals (people who engage contractors in the course of their trade or business);
 - Designers, manufacturers, importers or suppliers of plant or substances to be used at workplaces;
 - Contractors and persons engaged or employed by the contractor;
 - Designers or constructors of buildings or structures for use at a workplace;
 - Agents who are in the business of hiring out workers (labour hire organisations) and their clients (host employers);
 - Workers who are hired out to a host employer by a labour hire company;
 - People who are in a working relationship that mirrors a contract of employment but is not a contract of employment;
 - Corporate bodies that engage workers under one of the labour relationships covered by the Act;
 - Government of Western Australia;
 - People employed by the Government of Western Australia; and
 - Bystanders (to follow directions where required).