



RAMSAY
HEALTH CARE

NATIONAL REVIEW INTO MODEL OHS LAWS

Submission by:
RAMSAY HEALTH CARE AUSTRALIA LIMITED

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The National OHS Review Secretariat
Department of Education, Employment and Workplace Relations
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CANBERRA ACT

Specific comments

Ramsay Health Care Australia Limited (**Ramsay**) welcomes the opportunity to make a submission into the National Review into Model OHS Laws.

As an employer which operates across five separate jurisdictions, Ramsay believes there is significant merit in a national approach to harmonised OHS laws, regulation and enforcement.

About Ramsay

- 1 Ramsay is the largest private hospital operator in Australia with in excess of 20,000 employees working for Ramsay in Australia alone and our experience in operating under five separate OHS Acts in the jurisdictions in which we provide healthcare facilities gives us a unique insight into the benefits of various health and safety jurisdictions operating in Australia.
- 2 As a company, we have taken the view that workplace injury is preventable. We have a national safety team which has implemented for our organisation a national safety system. We strive to continuously improve health and safety performance at work. It is a central part of our business culture. Ramsay has thus developed consistent safe work practices and procedures to improve safety performance across the whole organisation - regardless of what might be the minimum performance expectations of individual State OHS regulators. Although commitment for making our workplace safer has reduced workplace incidents, in

accordance with our risk management approach to health and safety, we strive for continual improvement in safety performance.

Legislative approach

- 3 Performance based legislation enables us to develop what we believe are the best solutions to identified problems.
- 4 Ramsay is of the view that to achieve uniformity the model OHS Act should be based upon performance based legislation with detailed regulations underpinned by guidance material such as practical codes of practice. Having such a structure provides flexibility and ensures that a large national employer like Ramsay is in the best position to commit resource to effectively ensure that workplaces are safe and without risks to health.
- 5 We believe that there is merit in the model legislation identifying its objectives at the commencement of the legislation. Ramsay believes that fundamental obligations regarding health and safety should be identified as one of the stated objectives of the legislation. In addition, Ramsay believes that the objectives should also include a requirement to proactively manage risks so far as it is reasonably practicable for an employer to do so.
- 6 As long as principles are easy to understand and do not complicate an employers and other duty holders understanding of their obligations - and hence the best way to achieve compliance - Ramsay considers that principles of health and safety should be drafted. Our view is that the focus of all principles is the requirement for duty holders to easily understand what their health and safety obligations are and that that must be tied into a structured risk management framework.
- 7 The view of Ramsay is that any health and safety scheme that identifies measurable outcomes so that the duty holder can adequately assess its performance and how it might be benchmarked against others should be fundamental. If possible, that should also underpin principles and also objectives of the model legislation.
- 8 One significant benefit of having a system in which there are measurable outcomes is that duty holders are then in the best position to not only monitor the workplace on an ongoing basis, but to also realistically undertake compliance audits to maximise full compliance with OHS requirements and therefore ensure continuous improvement.
- 9 From our experience, we believe that easily understood obligations on employers, occupiers and other duty holders reduces the prospect or likelihood that obligations can be misunderstood. Ramsay also believes that easily understood obligations should lead to a consistent approach by regulators across Australia so that there is true consistency in approach to the same issue regardless of which jurisdiction the workplace is located in.

- 10 In our opinion, the basic OHS Act principles throughout Australia are sound however in addition to uniformity; consistency and transparency, model OHS laws should seek to assist duty holders understand their obligations in plain English. We feel that will be a very valuable positive outcome.
- 11 Streamlining of OHS laws should be the desired outcome. With the significant amount of reporting that currently occurs across Australia, we believe there exists a certain degree of confusion in terms of coverage and that which is required to meet the statutory duties. Having simplified and easy to understand legislation should be a desired outcome.

Scope, application and definitions

- 12 It is our view that one suite of model legislation and regulations across Australia is achievable and thus for OHS compliance and regulation, there does not need to be industry specific legislation. Ramsay believes that industry specific issues can be adequately addressed in prescriptive and specific regulations and codes of practice with a view to simplifying compliance across Australia without in any way affecting the quality, nature and extent of safety regulation that currently exists.
- 13 With modern working conditions and where workplaces are continuously changing, Ramsay believes that the general duties of care should be tied to the place where employees perform their work. That should capture the variable nature of where work can currently be undertaken for an employer - such as at the employer's physical premises of work; working from home; undertaking business travel; and the like. This is particularly pertinent to industries, such as ours, that 'never sleep' and operate 24 hours a day.
- 14 It is our view that there are specific duties on an employer such as Ramsay concerning its employees and, in some jurisdictions, those who can be affected by the business activity undertaken by Ramsay. As a good corporate citizen, Ramsay believes that members of the public should also be covered by general duties.
- 15 In relation to changing work arrangements, an employer such as Ramsay must be in a position to flexibly and adequately discharge its obligations to provide and maintain a safe place and system of work. It is also fundamental to have the ability to enforce the obligations upon its employees in relation to their requirements as duty holders to take reasonable care for their own safety and follow the employer's policies and procedures. This will support the risk management foundation where each party is integrally linked to supporting the other via participation and compliance.
- 16 Our view is that to address our own workplaces and practices, we have adopted a risk management approach to risks arising in connection with our business and the healthcare service that we provide to patients. Ramsay has taken this approach to identify, assess and control work related risks. We acknowledge that working arrangements and systems have changed and continue to do so. Our national safety system remains flexible so that we believe new risks can be proactively identified and addressed swiftly. We believe that approach has assisted in

managing our responsibilities to the different types of working arrangements that are now more commonplace in our organisation.

- 17 Having regard to the changing nature of risks in the workplace Ramsay believes that in uniform legislation, psychiatric or psychological injury should be specifically brought within the cover provided by the OHS Act. We otherwise believe that the response to workplace harm is adequately covered under risk management principles which are fundamental to proactively minimising risks at the workplace.
- 18 In uniform legislation, key terms should be appropriately defined so that they actually mean the same thing in each jurisdiction. Ramsay believes that is effectively having standard definitions for which judicial interpretation and guidance will be beneficial - regardless of the jurisdiction of the court. Key terms which Ramsay would like to be defined include - the meaning of reasonably practicable; in control; undertaking of the employer; consultation; health and safety representative; worker; contractor; issue and workplace.

Duties of care

- 19 It is the view of Ramsay that the model OHS Act should include a 'control' test which is easily defined. Our preference is for control to be 'practical control' and not 'legal control'. Having practical control as the basis of the test will overcome some of the real difficulties which arise on a day to day basis - such as consequences of the decision of the Full Bench of the AIRC in the *Telstra* decision (30 May 2007).
- 20 Our view is that the entity or person in practical control is in the best position to ensure OHS compliance where the work is being done. Ramsay accepts that there can be multiple duty holders in the one workplace and that the duties overlap and co-exist. We accept that the concept of concurrent and overlapping OHS duties ensures the maximum opportunity for health and safety protection at our workplaces. Despite that, our focus in practice has been to improve health and safety in a meaningful way and thus in a proactive and performance based fashion, risks arising in the workplace can be reduced, assessed and monitored.
- 21 The employment relationship should, in the assessment of Ramsay, be the basis of primary reliance for safety obligations. That underpins the duties as the primary connection is between the employer and its employees and the work requirements which flow in accordance with a contract of service. Given the very significant changes in working conditions, we believe the duties should extend beyond direct employees and capture those who are providing their service in accordance with a contract for services to the employer - in circumstances in which an entity such as Ramsay has practical control. Ramsay also believes that apprentices and volunteers who perform work at a Ramsay workplace should have the same level of protection as directly engaged employees.
- 22 We believe the current extent of duty holders is sufficient to cover that which occurs in, and relates to, the business activity of the employer.

- 23 A focus of the Ramsay submission is that uniform legislation should be easy to understand. The employer's statutory duty of care should be presented in an easy to understand fashion. Those duties should not be 'strict liability' but should all be subject to a requirement of 'reasonably practicable'. Ramsay accepts that the primary statutory duty of care should extend beyond directly engaged employees, and cover a class of person (such as contractors) who will be deemed covered where Ramsay has practical control over those individuals.
- 24 In terms of duties of workers, Ramsay believes that employees must have responsibility to ensure that they take reasonable care for their own safety and anyone else who may be affected by their acts or omissions at the workplace. Employees must also not tamper with or misuse anything that is provided for purposes of safety at work. As with other provisions, Ramsay recommends that the model legislation has easy to understand provisions for employees' duties so there can be no doubt about their obligations and the duty that they have when they are at work.
- 25 If there are additional provisions inserted in the model legislation to deal with aspects such as 'wilful and reckless conduct', our submission is that such terms should be carefully defined so that duty holders are left in no doubt about their duties and the consequences of their actions.
- 26 Ramsay encourages model legislation to have a Workplace Health and Safety Officer appointed to each workplace. From our experience, on this issue the Queensland legislation works well. We have a WHSO at every facility and as each and every one of our sites has such a designated person, we believe that adds to ensuring there is proactive compliance. Having consistent terminology across all jurisdictions will assist a national employer such as Ramsay in maintaining best practice documentation uniform throughout all of our facilities in Australia. That can only help Ramsay and its staff fulfil statutory duties.
- 27 In our assessment, having an individual who has designated responsibility for workplace health and safety is fundamental. Such a person should not have any liability under the model OHS law as long as they are acting in a reasonably practicable fashion. Ramsay accepts that it has an obligation as an employer to train personnel so that they have the appropriate skills to discharge their duties. We, the employer, then rely on that individual to fulfil the health and safety role to the best of their skill and ability.
- 28 Ramsay believes that the most senior person in any facility (the CEO) can delegate responsibility and functions of workplace health and safety to an appropriately trained manager who then acts as the delegate of the CEO. The person who is delegated the task must be suitable - in other words, they must have received adequate training and be provided with resource to fulfil the function correctly. As long as that person then acts responsibly and within the course and scope of their employment, they should not have any additional liability or responsibility under model legislation. Ramsay also believe that the CEO of the organisation should not have any additional responsibility on the basis that he/she has discharged duties by appointing a suitable person to fulfil the health and safety officer role and ensuring that the individual is trained and appropriately resourced to fulfil the functions.

Reasonably practicable and risk management

- 29 At the outset, Ramsay states that from our experience in utilising a risk management approach to workplace risk, we believe that we achieve a best practice outcome. Accordingly, in the submission of Ramsay, model legislation should have as a guiding focus a requirement to enshrine risk management principles and framework as part of meeting workplace health and safety risks.
- 30 'Reasonably practicable' should, in our opinion, be included as the objective test for compliance in the model OHS Act. The concept of what is 'reasonably practicable' should be defined. Whilst accepting that some jurisdictions include a requirement to have regard to factors which a good risk management approach to risks follows, Ramsay believes that having a definition of 'reasonably practicable' will assist duty holders understand that expected of them. The more detail in definitions that can be provided, the better.
- 31 Ramsay acknowledge that having a practical right of control is important in identifying that which is reasonably practicable. In other words, if there is a practical right to control - as distinct to simply having a legal right to control - the elements of discharging that which it is required to meet the reasonably practicable test becomes clearer.
- 32 In terms of risk management, as identified above, in our view, risk management is core and fundamental to meeting statutory duties of care. In our assessment, national legislation should follow the accepted path of the Australian Standards in this area. From our discussion with others, many employers like us adopt a risk management approach to various aspects of the business undertaking. The concepts are understood as are the practical implications in achieving success in the workplace by adopting risk management principles at all levels of an organisation.
- 33 Our experience is that those State regulators which have a risk management focus are more suitably concerned with the way a specific risk is addressed at the workplace - that is, adopting a true performance approach to managing workplace risks.
- 34 Accordingly, we believe the focus of compliance in terms of that which is reasonably practicable must include clear reference and acceptance of risk management principles and processes.
- 35 Given the way Ramsay believes risk management should be undertaken in workplaces across Australia, we believe a requirement for there to be risk management principles and processes incorporated as part of the general statutory duties will be a positive step forward.

Consultation, participation and representation

- 36 Ramsay actively participates in consultation with its workforce. It agrees that doing so is part of the risk management approach to addressing workplace risks.

- 37 Our workplace manuals have been developed as a result of an extensive consultation process with staff. We believe that the best results in the workplace are achieved when there has been that type of consultative process undertaken.
- 38 We accept as a clear principle that employees should be consulted on relevant health and safety matters.
- 39 In our own experience, we have not seen the need to consult with contractors specifically in every area of OHS compliance although we acknowledge that in some workplaces such a requirement might prove beneficial. We have found that effective contractor management and specific appropriate consultation has been sufficient to ensure that workplace issues are properly addressed in a proactive fashion.
- 40 We have found that having health and safety committees at each workplace ensures that all employees have an ability to ensure that issues of concern or feedback can be brought to the attention of management.
- 41 Ramsay has taken a collaborative approach to health and safety at work. We regularly consult with workplace representatives to ensure that the diverse range of personnel within our facilities and workplace - both large and small - have input, and are very much part of, the way we ensure our work environments remain safe.
- 42 Ramsay accepts that individuals who raise health and safety issues or carry out such functions should not be victimised or discriminated against in any way. Our approach has been to ensure that HSRs are given appropriate training, education and flexibility so that they can perform their role effectively. In addition, senior managers are also made aware of their duties so that the workplace safety culture is driven from management. By having a collaborative approach to safety in the workplace, we have found that sustainable outcomes are achieved. That is why Ramsay would endorse model legislation which protected employees from discrimination and victimisation and from employees raising health and safety issues or carrying out health and safety functions at work.

Regulator functions

- 43 We endorse a transparent system of managing, monitoring and overseeing health and safety at work.
- 44 In our view, State regulators should consult with employers more effectively than occurs at this time.
- 45 Our view is that whilst there is consultation with key employer bodies and industry groups, there should be more. From our experience, the outcomes of the education function of the regulator are variable across the jurisdictions. Similarly, guidance provided across the jurisdictions varies enormously.
- 46 Our opinion is that a significant role of the regulator must continue to be educating employers via guidance material and the role and functions of inspectors.

- 47 What Ramsay would hope to have achieved over a period is a uniform approach by inspectors to similar workplace issues across Australia. We acknowledge inspectors have independence and a need to be flexible in their approach, but under harmonised legislation, we would expect more consistency on a regular basis.
- 48 From our experience, the inspector's approach in Victoria where documented entry reports are provided at the time of the site visit should be the approach adopted across the jurisdiction. The reason for that is because we believe there is no room for misunderstanding following an inspector's visit at a workplace. In addition, follow up dates are clearly documented and matters can be followed up and, most importantly, finalised.
- 49 We thus support a system under which there is documentation provided by the inspector in a timely fashion. That also gives us an opportunity to consider appeal options if we think that is the appropriate path to take. Having an independent review of the inspector's decision in a quick and cost effective fashion is, in our opinion, essential. We believe it is crucial to have a first layer of independent review without the need or expense of having to engage lawyers. Ramsay submits that there should be the second level of appeal so that from the outcome of the independent appeal of an inspector's decision we then have a right to take the matter to an external court or tribunal - with an acknowledgement that there are cost and time implications in doing so.

Compliance and enforcement

- 50 Concerning outcomes, as an employer across Australia we seek consistency and certainty of outcomes if enforcement action might be taken in any jurisdiction. We accept that there should be both transparency and fairness in the way enforcement decisions of the OHS regulator are undertaken.
- 51 The graduated enforcement process undertaken in most jurisdictions is, in our opinion, the most appropriate way of proceeding with a response which is measured to the issue being investigated.
- 52 We agree that the model OHS Act should specify the inspector's powers and obligations. We consider that will provide greater accountability and transparency.
- 53 In relation to the inspector's role, we believe the powers to issue improvement and prohibition notices to be fair and reasonable. We do not favour inspectors having the power to issue infringement notices. In our experience, greater OHS compliance is achieved when there is a collaborative approach between the employer and the primary inspector who attends the workplace on a regular basis. If that inspector also has the power to issue on the spot fines, the relationship may become less collaborative than that we consider to be optimal.
- 54 Our view is that inspectors must be able to provide compliance advice to all duty holders without liability for that advice. If they are not given that power (and

immunity) pursuant to statute, we believe the relationship with individual inspectors at workplaces will be less than optimal.

- 55 The experience of Ramsay is that having a respectful relationship with inspectors results in better workplace outcomes. Where a more authoritarian approach underlies the inspector's (sometimes unannounced) visit, we find the outcome can be less than what we believe might be best practice. We accept that inspectors must follow a particular process to adequately discharge their duties, but in a health sector where we specialise, we believe that having best practice solutions (for example our internal patient manual handling program) is the very best outcome for our staff and patients. That may not be an approach of a particular inspector. We therefore believe it will be beneficial for inspectors to be sufficiently skilled in particular industry sectors when they attend various workplaces as we believe that will improve the quality of advice that can be provided and also assist a greater number of employers achieve and maintain best practice.
- 56 We accept the right of HSRs to issue a PIN - but within reason. First, we believe HSRs need to have undertaken appropriate training and education so that they are well aware of their role, rights and responsibilities associated with issuing a PIN. In addition, we believe there must be consultation with the employer before the HSR can actually issue a PIN to reduce the prospect of there being misunderstanding or confusion about what actually is a workplace health and safety issue. We fully support an initial right of appeal to an inspector so that in a quick, efficient and no cost fashion an inspector can attend the workplace if the employer does not agree with the PIN which has been issued.
- 57 Although as a company we have not had personal experience of entering into an enforceable undertaking, we believe model legislation should have, as part of the hierarchy of enforcement measures, a right to enter into suitable enforceable undertakings. Under performance based legislation, employers who are truly committed to providing safe work places and systems of work should have an ability to enter into an enforceable undertaking rather than facing a formal prosecution. Entering into an enforceable undertaking should not require an admission of liability or breach of the Act. We believe the terms of the enforceable undertaking themselves are more than sufficient for follow up action by the regulator.

Prosecutions

- 58 It is the view of Ramsay that a breach of the model OHS Act should be considered to be criminal in nature. Offences are either summary or indictable and thus fall within accepted regimes of criminal law. That includes a fundamental acceptance of the prosecution needing to establish all the elements of the offence beyond a reasonable doubt.
- 59 Given our view that enforcement action is criminal in nature, prosecutions should only be commenced or continued with by a prosecutorial authority such as the State OHS regulator or DPP/OPP.

- 60 As it is our opinion that enforcement action is criminal in nature, liability of corporate officers should also be assessed in light of the same burden of proof - that is, the prosecution must, beyond a reasonable doubt, establish each and every element of the offence. Thus, if there are separate 'corporate officer offences', the officer should be presumed 'innocent' unless the prosecution succeeds in establishing its case beyond a reasonable doubt. Ramsay does not support a reverse onus of proof on this issue.
- 61 Flexible sentencing options should, in the submission of Ramsay, be considered. In addition to fines that should be standardised under model legislation, Ramsay encourages the review to consider penalties which are alternatives to fines but which are still considered reasonable. In addition to enforceable undertakings and publicity orders, the model legislation could capture matters such as a requirement to undertake training or make payment of the prosecutor's costs.

Ramsay has been very pleased to be part of this review process and look forward to a future which embraces harmonisation and uniformity for all work places.

The submission presented by Ramsay will hopefully assist the National Review into Model OHS Laws. Should there be any issues arising which you would like to discuss or seek clarification or elaboration upon, please contact Chanelle McLennan, National Safety Manager and National Workers Compensation Manager via email mclennanc@ramsayhealth.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'GO', followed by a horizontal line extending to the right.

Gavin O'Meara
Group Human Resources Manager
Ramsay Health Care