

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

## GENERAL COMMENTS

We have chosen to begin our submission with the General Comments below, as they provide the context for the specific comments which follow.

### OUR COALITION

Please see more information at our website [www.ashaust.org.au/SF'03](http://www.ashaust.org.au/SF'03)

Formed in 2002, SmokeFree Australia consists of eleven national organisations:

Liquor, Hospitality and Miscellaneous Workers' Union; Musicians' Union of Australia; Media, Entertainment and Arts Alliance; Australian Council of Trade Unions; Action on Smoking and Health Australia; The Cancer Council Australia; National Heart Foundation of Australia; Australian Council on Smoking and Health; Non-Smokers' Movement of Australia; Australian Medical Association; Asthma and Allergy Research Institute.

Our member organisations include:

- Employee organisations – the ACTU and trade unions representing hospitality and entertainment industry workers, including bar and gaming workers, cleaners, musicians and other entertainers, whose health is directly threatened by secondhand tobacco smoke (SHS) in their workplaces.
- Major health-related non-government groups, including:
  - those seeking prevention of, and assistance for people suffering from or working with, heart disease, cancer and asthma; and
  - other health groups representing doctors, public health advocates, and non-smokers.

**Our coalition aims to achieve the removal of SHS from all Australian workplaces, irrespective of their degree of enclosure.**

While other Australian workers have been protected by OHS laws for decades, thousands have not – and are as a matter of common practice subjected in their workplaces to repeated or continuous exposure to SHS. This constitutes a *de facto* exemption of SHS from the normal OHS practices for elimination of toxic workplace hazards. It is an unacceptable and discriminatory anomaly and should be addressed effectively by all governments. The exceptionally lenient treatment of SHS (*vis a vis* other toxic hazards) under the workplace laws and practices of some jurisdictions requires a specific legislative response to correct this anomaly.

### SECONDHAND TOBACCO SMOKE (SHS): AN ACUTE WORKPLACE HAZARD

See recent research on health harm at [www.ashaust.org.au/SF'03/health.htm](http://www.ashaust.org.au/SF'03/health.htm) and specific harm in partly-enclosed areas at [www.ashaust.org.au/SF'03/partly.htm](http://www.ashaust.org.au/SF'03/partly.htm)

SHS is known to cause health harm, even in small amounts. It contains more than 4,000 compounds, hundreds of them toxic - including 43 known human carcinogens, some of these rated as Class A – that is, among the most carcinogenic substances known. There is substantial and conclusive worldwide independent research evidence that SHS causes preventable illnesses, some of which may be fatal, in non-smokers - including:

- respiratory conditions including COPD – emphysema, chronic bronchitis;
- heart attacks, strokes and other cardiovascular disease;
- lung and some other cancers;
- sexual, reproductive and pre-natal harm;
- many other diseases including dementia, diabetes, meningococcal disease, osteoporosis, sexual/reproductive harm, genetic damage and more.

It is important to note that these harms can result from exposure to SHS, irrespective of the enclosure or otherwise of the area in which it occurs. Health harm from SHS has a dose-response relationship and tends to be cumulative – so it is a particular concern for workers continuously or repeatedly exposed. Links to research at [www.ashaust.org.au/SF'03/partly.htm](http://www.ashaust.org.au/SF'03/partly.htm) shows:

- Significant exposure can occur in fully outdoor spaces, resulting harm depending on proximity, frequency, weather conditions and vulnerability (e.g. of children, sufferers of heart or respiratory conditions). Employees are especially indicated as being at risk. *Klepeis et al, Stanford University*
- Exposure at up to four times the WHO-recommended safety limits can occur in partly-enclosed “outdoor” smoking areas of licensed venues, even in winter. *Otago University study*

## **THOUSANDS OF AUSTRALIAN WORKERS CURRENTLY IN UNSAFE WORKPLACES**

In Australia, many thousands of workers (the exact number unknown) are currently required to work in areas where they are routinely exposed to harmful levels of SHS. These workers include:

- Many workers in the Northern Territory, where smoking even in totally enclosed working areas is widespread and the government has shown little interest in legislating to protect them.
- People working in totally enclosed “high roller”, “premium” and “private” gaming rooms exempted from state/territory smokefree areas laws in NSW, Queensland, Victoria and WA. These workplaces are smoky “black holes” subjecting staff working in them and adjacent to them to high levels of exposure and health risk.
- An unknown number of workers in non-government workplaces not accessible to the public – currently exempted from smokefree areas laws in some jurisdictions including NSW.
- People (including food or drink servers, entertainers, gaming machine supervisors or maintenance workers, cleaners and others) required to work in partly-enclosed smoking areas of hotels, clubs and eating places in most states and territories. These crowded smoky areas subject workers to high-level exposure, especially where they are continuously or repeatedly entering these areas.
- Workers in many corrective and mental health settings, often fully or partly enclosed.
- People working in many crowded outdoor areas - including transport stations, eating places, sporting facilities, entertainment venues and more – where the risk of harm will depend on factors shown in the Klepeis study, above.

In dealing with this hazard, we should apply the “precautionary principle”: since the substance is known to be harmful, anyone proposing to permit it in a workplace should be required to produce evidence that in the particular circumstances it is safe to do so.

## **COMPOUNDING PROBLEMS**

### **Vulnerability of workers and reluctance to complain**

Many of the workers most at risk (for example, bar and gaming workers, entertainers and cleaners) are employed on a casual or contract basis and are reluctant to make any kind of individual complaint for fear of losing shifts or opportunities. Many are working in situations where the employer is not required to give a reason for such a decision, or where a bogus reason can easily be substituted. Confidential complaint processes may not protect a complainant because in small workplaces it is easy for an employer to identify the source of a complaint and to disadvantage a suspected complainant.

### **Confusion and inconsistency**

There is wide disparity between Australian jurisdictions with regard to legislative protection from SHS in workplaces. Protection of workers in Queensland is strong; on the other hand it is almost non-existent in the Northern Territory. Other jurisdictions vary between these extremes.

See summary and links to legislation at [www.ashaust.org.au/SF'03/law.htm](http://www.ashaust.org.au/SF'03/law.htm)

Generally speaking in most jurisdictions, workers are not clear as to their rights to protection from SHS under OHS law, and are reluctant to pursue this for fear of losing work or position. Venue patrons in most jurisdictions are also unclear about the scope of their (varying) rights to protection under OHS law. Evasion of even existing weak laws is reportedly widespread in some jurisdictions; but since regulations are so complex, little public complaint ensues – and employees are reluctant to complain for reasons outlined above.

### **Undermining disability discrimination laws**

Smoky workplaces discriminate in access and employment against people with disabilities including heart disease, emphysema, asthma, diabetes 2 and many other conditions – in contravention of the Disability Discrimination Act. In the landmark 1997 Meeuwissen decision, it was noted by HREOC that a smoky room was as much of a barrier to an asthmatic as is a flight of steps to a person in a wheelchair. OHS laws should not allow employers to permit the presence of a clear-cut workplace hazard which creates such a barrier and perpetuates such discrimination.

### **OHS takes a back seat to weak smokefree places laws**

In some jurisdictions there exists a harmful anomaly: despite OHS laws stating that they cannot be overridden by other laws, this has been effectively ignored in practice. Organisations such as SmokeFree Australia have found it very difficult to persuade some governments to address this issue under OHS priorities. In NSW for example, we have sought to address this matter with the Premier and senior ministers including the Minister for Industrial Relations, seeking meetings with them in vain since late 2002. We have been routinely referred to junior ministers or to WorkCover NSW. Our meetings and communications with WorkCover officials have been unhelpful in terms of improving worker protection, since they have expressed to us that they see their role as putting into place the policies of the government – which appears to have been persuaded by powerful gaming and hospitality interests to allow smoking in many working areas to continue under weak regulations. In practice, with regard to SHS this has led in NSW to the Smoke Free Environment Act effectively overriding the duty of care under the OHS Act to provide safe workplaces. Many workers remain exposed to this serious toxic workplace hazard and have expressed to us their frustration at being unable to have this known hazard removed from their workplaces. Many have told us they fear their health is suffering daily.

### **AUSTRALIA'S INTERNATIONAL TREATY OBLIGATIONS**

Our coalition in February 2008 asked the Australian Government to play an active role in protecting Australian workers from SHS, in line with Australia's international treaty commitments.

In our April submission to the Australia 2020 Summit we asked the federal government to co-ordinate steps to ensure all states and territories adopt measures consistent with Australia's obligations under the World Health Organisation's Framework Convention on Tobacco Control (FCTC). Australia has ratified this treaty and played a leading role in the treaty negotiations.

See the FCTC at [www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf)

Under the FCTC, Australia is obliged to make "strong political commitment" to reduce exposure to SHS, particularly in indoor workplaces and other public places.

Australia recognises (Article 4.2(a), p. 4): "... the need to take measures to protect all persons from exposure to tobacco smoke"; and we agree (Article 8.2, p.6) to "...actively promote.... the adoption and implementation of effective legislative, executive, administrative and/or other measures, for protection from exposure to tobacco smoke in indoor workplaces.... and, as appropriate, other public places."

See also Article 8.6, Principle 1:

*Effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment. There is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence. Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific or otherwise, that engineering approaches do not protect against exposure to tobacco smoke.*

See also Principles 2-7 which follow, outlining how legislation should operate in this area.

We have asked the Federal Government to initiate a nationally coordinated process for ending this cynical and irresponsible avoidance of smokefree and OHS laws - and for ensuring that Australia not only complies with, but continues its leadership role in relation to, the landmark international treaty on tobacco and public health.

Australia and all its states and territories are also signatories to the International Labour Organisation convention no. 155 on Occupational Health and Safety (1981) which obliges member states (Obligation 10) to "... formulate, implement and periodically review a coherent national policy on occupational safety and health in the working environment... to prevent accidents and injury to health by minimising so far as is reasonably practicable, the causes of hazards inherent in the workplace."

SHS is clearly a "hazard"; total indoor smoke bans have been demonstrated by other countries (Ireland, Norway etc) to be quite "reasonably practicable"; and any policy exempting SHS or allowing smokefree workplace laws to be evaded by elaborate exemptions can hardly be called "coherent."

## **SPECIFIC COMMENTS**

### **Legislative Approach:**

Q. 1: With regard to protection of workers from SHS, we would support performance-based standards which specify the outcome – in this case, the effective separation of smoking and working areas.

Q.2: With regard to the detail of model OHS legislation, we would suggest that separation of SHS from working areas is universally necessary and practicable, and is more likely to be achieved if this particular hazard, and the need to separate it from working areas, is specifically included in legislation. If this is not possible then such a provision should be specified in regulations. Process-based and prescriptive standards could also specify this problem and effective means of dealing with it.

### **Scope, Application & Definitions:**

Q.7: We do not believe maintaining the industry-specific legislative status quo, for example in the hospitality industry, can adequately address the problem of SHS. It is essential that legislation be strengthened in this regard and SHS be specified as a workplace hazard necessitating separation from working areas.

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

Q. 10: We believe "workplaces" should be taken for model OHS legislative purposes to include all areas where a person is required to work – including partly-enclosed or unenclosed spaces, working vehicles and where appropriate, fieldwork or home visit scenarios – allowing for regulation and practice guidelines to address such situations appropriately to ensure that workers are not required to face exposure to SHS except in extreme or emergency situations.

Q. 11: Yes, we support the extension of duties of care in workplaces under the model OHS Act to members of the public as well as to employees (including casual and contract workers). With regard to the hospitality industry, employers should be under a duty of care to members of the public entering workplaces, not to expose them to SHS without their full and prior knowledge and consent, and then only in clearly designated smoking areas effectively separated from all non-smoking (including working) areas.

Q. 13: There is an emerging awareness of the serious health harm of SHS exposure, and this is not effectively addressed under general duties of care. Work safety authorities in some jurisdictions have interpreted existing duties of care as being met by adherence to other legislation, e.g. in NSW the Smoke Free Environment Act. This has led to the situation outlined under General Comments above.

Q. 15: We believe a model OHS Act or regulations under it should include specific inclusion of SHS as a high-level toxic hazard which should be separated from all working areas.

Q. 21: Contractors and others performing work should be covered under employers' duties of care. For examples, musicians or other entertainers coming into a hospitality venue to perform for its patrons should not be required to perform in any area where secondhand smoke is present; neither should cleaners, gaming machine maintenance technicians or any others entering a venue be subjected to

such risk. These workers are especially vulnerable because they are often reluctant to make an individual complaint for fear of losing work.

Q. 36: All situations in which SHS is an issue should be adequately and specifically covered in a model OHS Act to achieve the result of total separation of SHS from all working areas.

#### **'Reasonably Practicable' & Risk Management:**

Q. 39: In all circumstances it should be assumed that total separation of SHS from working areas is "reasonably practicable", since it has been shown to be so in working areas all over the world – including in Australia, for example in licensed venues in Queensland.

Q. 42: "Hazard" and "risk" should be defined to specifically include SHS. This should not be necessary but is so because legislation and work safety authorities' practices in some jurisdictions have sought to treat SHS far more permissively than comparable health hazards, with disastrous OHS outcomes.

#### **Consultation, Participation and Representation:**

Q. 45: Given the degree to which workers and their representatives have felt sidelined in some governments' consultations on regulations affecting their OHS situation – e.g. in the framing of the Smoke Free Environment Act regulation in NSW – we strongly suggest strengthening the processes of consultation with affected workers and their representatives in matters of SHS exposure. In such processes it should be recognised that some workers at highest risk are reluctant to speak out because they feel confused as to their rights and vulnerable to workplace retribution if they are even suspected by their employer of having made a complaint.

Q. 67: Yes, a model OHS Act should provide for the right of workers to refuse or cease work they consider unhealthy or unsafe – specifically, where they are called upon to work in any situation where they might be significantly exposed to SHS. Given the well-evidenced health risk involved, this right should be proactively communicated to all employers – who should be required to separate the hazard from the working area and to offer the work to the same employee in a smokefree space.

Q. 71: Provision should be made in a model OHS Act to prevent discrimination against any person by their being prevented by a relevant disability from working in an area in which smoking is permitted or into which SHS is drifting significantly. The employer should be required to immediately designate the working area as non-smoking. There should be strong provisions preventing any kind of victimisation against any worker complaining of SHS in their working area, or refusing to work in SHS-exposed conditions. Because of the vulnerability of many such workers, these provisions should be communicated strongly and proactively to all employers and should be diligently enforced.

#### **Regulator Functions, Powers & Accountability:**

Q. 84: A model OHS Act should specify the power of inspectors to order the immediate separation of SHS from any working area, in line with comparable toxic hazards, normally by the designation of the working area as non-smoking.

#### **Compliance & Enforcement:**

Q. 92: Provision for PINs and prohibition notices should specifically include SHS as a toxic hazard and provide for its immediate separation from any working area, irrespective of other legislation e.g. smokefree places laws. Full separation should remain in place pending any appeal process.

#### **Prosecutions:**

Q. 104: Given the seriousness of health and safety risk, there should be a strong obligation on the employer not to allow for any significant exposure of workers to SHS. Wilful disregard of this obligation should be grounds for criminal prosecution.

Q. 117: It should be assumed by a model OHS Act that total separation of working and smoking areas is “reasonably practicable” and that no other method of dealing with SHS is acceptable.

Q. 132: It should be noted that exposure to SHS can have fatal consequences, particularly for workers or patrons suffering from ischemic heart disease, acute respiratory conditions or other relevant health conditions. Penalties for allowing exposure to SHS should be determined accordingly.

## COMMENT ON RELEVANT TERMS OF REFERENCE OF THE REVIEW

1. *The health and safety of Australian workers is a key concern of Australian governments at all levels. All workers have the right to a safe and healthy workplace and employers have the right to expect that workers and visitors to their workplaces will cooperate with occupational health and safety (OHS) rules.*

**Comment:**

All Australian workers do not currently enjoy safe, healthy workplaces – under current practice in some jurisdictions, thousands of them are routinely required to work in toxic, health-harming conditions.

8. *Harmonising OHS laws in this way will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties.*

**Comment:**

National consistency in laws and regulations to protect from SHS will certainly achieve this – replacing present inconsistency and confusion for employers, employees and public.

11. *In undertaking the review, the panel will:*

- a. *examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency*

**Comment:**

See comments above. Great disparity between best-practice Qld and worst NT.

- b. *take into account relevant work already undertaken in this area by the Australian Safety and Compensation Council and others (including international developments), and consider recommendations from recent reviews commissioned by Australian governments relating to OHS laws.*

**Comment:**

The National Occupational Health and Safety Commission advised all states and territories in its Guidance Note on ETS in October 2003 that smoky workplaces were unhealthy and inconsistent with OHS laws. A guideline from the national body advised jurisdictions to ban indoor smoking from all workplaces - including pubs and clubs - immediately. This was effectively ignored by most jurisdictions.

- c. *take into account the changing nature of work and employment arrangements*

**Comment:**

Smokefree places laws in various jurisdictions have changed workplace arrangements; so have increasing employment of workers on casual/contract basis in some areas relevant to our concerns.

- d. *consult with business, governments, unions and other interested parties, and invite submissions from the public and other stakeholders on matters relating to the review;*

**Comment:**

Our member unions and the ACTU represent workers directly threatened by unhealthy workplaces; other member health groups deal with consequences of unsafe loopholes in present laws. Our position conforms with strong community support for smokefree working, eating and drinking areas.

See evidence at [www.ashaust.org.au/SF03/support.htm](http://www.ashaust.org.au/SF03/support.htm)

- e. *make recommendations on the optimal structure and content of a model OHS Act that promotes safe workplaces, increases certainty for duty holders, reduces compliance costs for business and provides greater clarity for regulators without compromising safety outcomes.*

**Comment:**

We support these outcomes and express our concern that existing legislation has in some areas seriously compromised safety outcomes.

12. *The panel should examine and make recommendations on the optimal content of a model OHS Act in ... :*

- a. *duties of care, including the identification of duty holders and the scope and limits of duties;*  
b. *the nature and structure of offences, including defences.*

**Comment:**

Our comments above address these issues.

13. *The review panel should also examine and make recommendations on the optimal content of a model OHS Act in ... :*

- a. *scope and coverage, including definitions;*

**Comment:**

We believe there is a strong case for clearly defining SHS either in legislation or regulations as a toxic workplace hazard to be treated in the same way as other such hazards.

- e. *permits and licensing arrangements for those engaged in high risk work and the use of... hazardous substances;*

**Comment:**

SHS should be specifically included in such provisions.

- g. *other matters the review panel identifies as being important to health and safety that should be addressed in a model OHS Act.*

**Comment:**

Any of our comments above could be dealt with if necessary under this provision.

14. *The review will be guided by the following principles:*

- a. *an inclusive approach to the harmonisation process, where the concerns and suggestions of all jurisdictions and interested stakeholders are sought and properly considered;*  
b. *that the development of model OHS legislation be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions;*  
d. *the observance of the directive of the Council of Australian Governments that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.*

**Comment:**

See our relevant comments above.