

AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS SUBMISSION

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

LEGISLATIVE APPROACH

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

AICD submits that the model OHS Act (**Model Law**) has to be drafted on a uniform basis, and adopted in each jurisdiction consistent with the Inter-Governmental Agreement for Regulatory and Operational reform in Occupational Health and Safety made as part of the Council of Australian Governments' Meeting on 3 July 2008.

The case for uniformity is overwhelming.

AICD believes that the standard approach of specifying objects at the outset of the legislation is suitable for the Model Law, but has no difficulty if principles were also set out as in section 4 of the Occupational Health and Safety Act 2004 (Vic). This principles-based Model Law should provide the necessary flexibility to meet changing circumstances and unexpected or unanticipated circumstances to avoid frequent changes to the law.

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

We refer to our answer to the previous question. Legislation should set out general duties and not be overly prescriptive. Regulations must be uniform and not provide each jurisdiction with the opportunity to change the law and move back to the stark jurisdictional differences that presently exist.

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

We support the use of "Occupational Health and Safety Act".

This readily translates into the commonly used and well known acronym, OHS. Importantly, we do not see any rationale for the jurisdictional differences in names. It confuses those businesses operating on a national or multi-jurisdictional basis. We express concern that the ACT is proposing to alter the name of its legislation from Occupational Health and Safety Act 1989 to Work Safety Act.

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

Yes and we refer to our answer to Question 1. The objects set out in section 2 of the Victorian OHS Act provide a good example for the review to consider adopting.

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

We refer to our answer to Question 1.

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

The Model Act should adopt a uniform approach.

SCOPE, APPLICATION & DEFINITIONS:

7. 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?

This is a difficult issue. To the extent that industry specific legislation can readily be brought within the Model Act, our answer is yes. However, given the difficulties inherent in a multi-jurisdictional process this should not delay the adoption of uniform OHS laws more generally. For now, the best approach may be to concentrate upon a model OHS Act on a uniform basis and leave industry specific safety legislation as it is.

We are aware that some concern has been expressed about the operation of the heavy vehicle driver fatigue reform proposals scheduled to come into force on 29 September 2008 and their relationship to the current OHS laws. The *National Transport Commission (Model Legislation – Heavy Vehicle Driver Fatigue) Regulations 2006 (Cth)* has not yet been adopted by all jurisdictions and there is apparently some doubt that the proposed implementation date will be met. Whilst the National Transport Commission (NTC) states that its fatigue general duty is consistent with obligations under OHS law, the Bill makes no mention of any exception for OHS law and it is possible that those with responsibility for heavy vehicle driver fatigue may be subject to dual obligations in those jurisdictions which do not reconcile the different statutory regimes.

It is essential that where industry specific legislation operates, it is subordinate to, and not inconsistent with, the Model Law, and should avoid any potential for dual statutory obligations.

8. 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 within regulations, codes of practice or guidance material under the model OHS Act)?

We refer to our answer to the previous question.

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

On the basis that uniform legislation will apply across different jurisdictions, the need for coordination is of great importance and impact.

We note that the Inter-Governmental agreement calls for a nationally consistent approach to compliance policy and enforcement.

There are a number of ways in which this might be achieved. One might be a Schedule to the Model Act which contains a coordination or conduct protocol requiring safety regulators within jurisdictions to consult with each other on a regular basis to share information and to adopt common compliance and prosecution standards. It might also include the adoption of nationally consistent enforcement and prosecution policies for administrative adoption in each jurisdiction.

AICD emphasises its concern at use of the term “nationally consistent” given the NTC’s difficulty in promoting road transport reform on this basis.

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

AICD believes that general duties of care should be tied to the workplace, with the definition flexible enough to take into account different workplace scenarios such as the transmission line or vehicle examples referred to at point 2.2 of the Issues Paper. The definition of “workplace” in section 5 of the Victorian Act is an example of an appropriate definition to be included in the Model Act.

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

No. Liability to members of the public is adequately dealt with by general principles of common law. The Review also needs to be mindful that the indemnity provided by insurance cover such as public liability, product liability professional indemnity is not voided by changes to the law to the detriment of the public. To some extent, existing legislation extends duties of care to members of the public by stealth, for example section 23 of the Victorian Act. This is to be avoided.

12. 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. Flexible definitions provide the most appropriate solution. We refer to our answer to Question 10. We support the need for legislation drafted on a sufficiently flexible basis to take into account changing circumstances and to avoid the need for frequent amendment.

13. 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?

AICD believes that the adoption of a general duty of care will provide sufficient flexibility. As mentioned in our answer to the previous question, where legislation is drafted on a sufficiently flexible basis, this will take into account differing and unanticipated circumstances that arise from time to time. Our views on physiological and psychological health are set out in our covering letter.

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

AICD considers that, to an extent, this question has been superseded by the Inter-Governmental Agreement. Uniformity is now the objective and in that regard all terms are critical.

National uniformity in legislation may be fruitless in circumstances where the Courts in each state and territory adopt their own idiosyncratic interpretations of the key concepts in the legislation. Perhaps, to avoid this, key terms such as ‘reasonably practicable’, ‘control’, ‘hazard’ and ‘risk’ should be **clearly** defined in the legislation.

However, for reasons already stated, AICD has some reservation about defining previously undefined terms. The problem of differing and different interpretive and decisional approaches across jurisdictions has been an issue across many areas of law in Australia, not only OHS law. This is not an issue that might necessarily be solved or alleviated by definitions.

The Victorian Attorney – General’s call for a national judicial system (Media Release, Friday 27 June 2007) is a relevant development.

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

AICD submits that some caution needs to be exercised in drafting the Model Law. Extending duties of care may have unintended consequences and inserting definitions of previously undefined terms also needs careful consideration. That may well limit flexibility.

“Don’t unnecessarily give courts more words to interpret” is the advice AICD often gives as part of a law reform process.

DUTIES OF CARE – WHO OWES THEM AND TO WHOM?:

16. Should the model OHS Act include a ‘control’ test or definition? If so, why and what should it be?

We note that the Review refers to the “chain of responsibility” concept. That is peculiar to transport law reform and we do not believe the term has an appropriate use in OHS law. We are aware that the use of the term and its application are of some controversial status in the road transport area.

The reference to the Road Transport Reform (Compliance and Enforcement) Bill is of some interest. Despite having been approved by the Australian Transport Council on 3 November 2003 it has only been adopted by 3 jurisdictions – New South Wales and Victoria (from 1 September 2005) and South Australia (from 30 April 2007). However there are significant jurisdictional differences. AICD understands that Queensland has passed legislation which has not yet been proclaimed but importantly it has not taken up the chain of responsibility provisions but is relying upon the concept of “influencing person” which is in current legislation.

AICD notes that no jurisdiction presently specifically includes a “control” test or definition in its legislation. We believe that it would be best if the term were subject to consideration on a case-by-case basis rather than include a definition which may prove to be inflexible. We also refer to our answer to the previous Question.

17. 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?

We refer to our answer to the previous question. AICD considers that the duties are clearly allocated in current OHS legislation.

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

Yes, control should be allowed to be delegated under the Model Law. The most obvious case of delegation of control seems to us to be a circumstance in which the owner of the building leases it to a person who carries on business. The owner will still retain some residual control, although in these circumstances the tenant may have the greatest control, dependant upon the terms of the lease and responsibility for maintenance and repair of the building.

In the case of company officers, there may be merit in allowing delegation of control to, or reliance upon, experts. We draw the Review’s attention to section 189 of the Corporations Act 2001.

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

To the extent that delegation may be relevant we refer to our answer to the previous Question. Otherwise we believe it may be too difficult to clarify responsibilities. The situation may best be left on general terms.

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

Yes. This is after all *occupational* health and safety legislation.

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

AICD believes existing legislation deals with these circumstances. For example the duties to other persons contained in section 23 of the Victorian Act.

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

We do not believe so.

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

In general terms the employer's duty should be to ensure the health and safety of its workers as far as reasonably practicable. This approach is in line with the existing legislation in most Australian jurisdictions.

AICD does not support the 'reverse onus' in NSW and QLD where an 'absolute' standard is set, subject to some very limited defences. This not appropriate and provides little guidance for employers and directors on the extent of this duty.

24. To whom should these duties be owed?

This duty should principally be owed to employees and extend to others who may be in or about the workplace in line with existing legislation.

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

In line with the mutuality of obligations approach, we think it important that a worker's duty should be specified. Section 25 of the Victorian act provides a suitable model.

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

No. AICD believes this is outside the scope of OHS law, and properly dealt with by other legislation or the common law.

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

If this question refers to the mandatory appointment such as under section 61 of the *Occupational Health Safety and Welfare Act 1986* (SA), the AICD's answer is no.

This is an interference in the internal management of a company and imposes an impossible statutory burden upon the appointee.

Of course in larger companies, and dependant upon industry, there will often be a specific appointment of a qualified person with specific OHS duties to undertake an overview role. In those circumstances such an appointment is appropriate, but should not be mandated under the Model Law. Companies should be allowed the flexibility to make arrangements for OHS compliance which best meets their size and circumstances.

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

We refer to our answer to the previous Question.

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

We refer to our answer to the previous 2 Questions.

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

No. A duty will be imposed upon the body corporate to ensure safety, to the applicable standard. Employees and those officers who may directly be involved in any contravention, should also owe personal duties arising from their personal failings.

Imposing a liability upon an officer by virtue of position alone is unfair and prejudicial. Companies vary in size, and the ways in which they comply with OHS law will vary and responsibility for OHS compliance will also vary.

31. 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 this owed? If not, how could this be clarified?

We believe existing legislation satisfactorily covers this area.

32. 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?

We have no strong views on this issue and refer to our answer to Questions 16-18.

33. 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?

We consider that this would be too prescriptive and remove flexibility.

34. 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?

This is a complex issue. In the absence of negligence or some other fault, a manufacturer should not in principle be responsible for the failings of a designer, and in any event this liability should not arise under the Model Law. We draw the Review's attention to Part VA of the Trade Practices Act 1974 which imposes liability upon manufacturers and importers for defective goods. Section 75AK(1) (d) does provide a defence for defects in finished goods.

35. 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)?

We do not believe it is necessary to define the activity.

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

We do not believe so.

'REASONABLY PRACTICABLE' & RISK MANAGEMENT:

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

Yes. As the Review points out a body of case law has been developed in Australia and Britain which provides guidance on the term. Whilst concern may have been expressed that there is some inconsistency in interpretation and application, this is simply a by product of the multi – jurisdictional legal system we have in Australia. We refer back to our answer to Questions 14 and 15.

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

We refer to our answer to the previous Question.

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

We refer to our answer to Question 37.

40. Should control be an element of the standard? (see Chapter 3)

AICD considers that it should be.

41. 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?

No. This would make the legislation too prescriptive.

42. Should ‘hazard’ and ‘risk’ be defined in the model OHS Act?

No. We refer to our answers to Questions 14 and 15. AICD believes it would be best to leave these terms open to interpretation on a case-by-case basis.

43. 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?

We refer to our answer to Question 37.

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

No. This would make the legislation too prescriptive.

CONSULTATION, PARTICIPATION AND REPRESENTATION:

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

Consultation is of high importance and there should be an obligation to consult in the legislation.

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

AICD considers that the obligation should be limited to the employer/employee relationship. Requiring consultation with contractors who may only be on site on a single or infrequent basis would be too onerous and of limited benefit. However if a contractor is to be on site for a protracted period then the position changes and there might usefully be some mechanism for consultation.

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

This may be warranted and we refer to our answer to the previous Question.

48. 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.

We recommend that a general obligation to consult would best suit the range of circumstances referred to in the Question. AICD stresses that the legislation should not become too prescriptive.

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

This question brings into sharp focus the differences between smaller and larger businesses and the variety of workplace circumstances. If employees request the appointment of an HSR and HSC, that is entirely appropriate.

We do not believe that an HSR should have the right to issue a PIN.

50. 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?

AICD recommends looking at drafting the Model Law to include the best of the current jurisdictional provisions, whilst retaining the emphasis on flexibility referred to in Question 48.

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

We refer to our answer to the previous two Questions.

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

We are not sure what circumstances the Question has in contemplation.

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

AICD has no fixed views on this, except that we do not believe that an HSR should have the right to issue a PIN.

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

AICD has no fixed views on this.

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

To the extent that there are approved training courses and recognised qualifications completion of those courses for the obtaining of those qualifications may be useful. However it should not necessarily preclude those employees who may be suitable based upon experience or knowledge of relevant issues whether or not qualified in some other discipline.

56. Are there alternative mechanisms that should be considered?

HSRs and HSCs may not work well in all businesses and in all circumstances. Given the range of businesses and their activities, AICD suggests that the Review consider a general provision in the Model Act which encourages employers and employees to adopt such practices and procedures as may best suit their circumstances and contribute to optimum health and safety outcomes.

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

For reasons previously stated AICD does not believe the legislation should become too prescriptive. We also caution against use of the regulations. We would not like to see a circumstance where the regulation making power is used by jurisdictions to move away from uniform legislation.

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

We do not believe so.

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

Yes. However it should be subject to some qualification such as some reasonable suspicion that a contravention has occurred, is occurring or might occur.

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

We refer to our answer to Question 55.

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

We refer to our answer to the previous Question 59.

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

Section 89 of the Victorian Act provides a suitable model.

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

Overall there should be an obligation to resolve issues by consultation.

64. When should issue resolution procedures be activated?

This is an issue of detail upon which we have no comment beyond stating the obvious; when there is some form of impasse.

65. 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?

In general, AICD's view is that issue resolution procedures should be specified in the legislation rather than the regulations. They should be expressed in a form which provides the greatest flexibility to the parties in the workplace to determine the detail of their own procedure.

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

It is not possible to make people agree, but if the legislative framework provides encouragement that is perhaps the best that may be done. This depends upon goodwill and relies on the 'mutuality of obligations' approach.

67. 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.

68. 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?

AICD considers that section 74 of the Victorian Act contains suitable provisions.

69. 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?

This is not an issue upon which we feel we are able to make meaningful comment.

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

It should provide for the resolution of disputes and, in the absence of resolution, it should go to a court of competent jurisdiction.

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

Clearly provision should be made to prevent victimisation or discrimination. As the Issues Paper says, there is widespread agreement that none of the current provisions is completely satisfactory. We draw the Review's attention to the review by Mr Bob Stensholt MP: *A report on the Occupational Health and Safety Act 2004 Administrative Review December 2007 page 64* and the response by the Victorian Government – www.worksafe.vic.gov.au .

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

AICD submits that the regulator alone should be able to bring an action for unlawful discrimination. We do not believe the Model Act should allow for representative actions. We note, for example, that the provisions of section 76 of the Victorian Act are stringent and the court has a wide discretion. It may be possible for an employee who claims discrimination to bring an action in his or her own name under some other statute.

We draw the Review's attention to the whistleblower protection provisions in Part 9.4AAA of the Corporations Act 2001 as a point of comparison.

73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?

The answer to this question depends upon the seriousness of the breach. Section 76 of the Victorian Act, for example, contemplates particular scenarios on a criminal liability basis. However, there may be other forms of discrimination and civil proceedings may be the more appropriate process.

74 Who should have the burden of proving relevant elements of 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?

Intention is not generally relevant in proceedings for OHS offences. However if the Model Act is to have civil and criminal offences AICD submits that the burden of proof should always be upon the prosecuting authority.

In civil matters it should be on the balance of probabilities and criminal matters beyond a reasonable doubt.

We submit that a provision such as section 77 of the Victorian Act should not appear in the Model Law.

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

In principle, yes. However there is some potential overlap is here between OHS law and the Workplace Relations Act or relevant state legislation which might best be avoided.

76. What remedies should be available to the victims?

A difficult question because it would depend upon circumstances. AICD believes the main thrust should be to penalise the employer who discriminates or victimises. Section 76 of the Victorian Act invests the court with a wide discretion and these are the remedies that might be appropriate.

77. 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?

To avoid complexity, AICD does not necessarily favour additional mechanisms. Perhaps the use of enforceable undertakings may be a better approach.

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

We do not believe so.

REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY:

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

Yes. This is a matter of detail upon which we are not able to comment.

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

Yes. The AICD supports nationally consistent enforcement and prosecution policies. The Inter-Governmental Agreement would appear to have some possible application in this area.

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

We refer to our answer to the previous Question.

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

A decision to prosecute, for example, should not be up to an Inspector, but should be a matter for decision at senior regulator level.

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

There can be an inherent conflict between the two functions. For example, the regulator may issue an interpretative document. They might then commence proceedings based upon that document and lose the case because court finds the interpretative document is incorrect.

This might be a matter for administrative rather than legislative response.

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

AICD has no fixed views upon these issues apart from the fact that inspectors should be subject to a proper appointment process and have appropriate qualifications or experience. Their powers and functions should be sufficient to carry out their functions with the stated object in mind.

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

AICD does not believe that this is necessary.

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

AICD does not believe so.

87. 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.

88. 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?

There should be a good quality and transparent internal review process. This may be a matter of taking the best features of the process in place in each jurisdiction. Clearly there should be an appeal process from the internal review process and this should go to a court of competent jurisdiction.

89. 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?

We do not believe so.

COMPLIANCE & ENFORCEMENT:

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

Yes, provided the hierarchy model is reflected in practice (the hierarchy model does not seem to reflect contemporary experience).

91. Should these 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?

The Inter-Governmental Agreement appears to answer this question.

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

Current legislation provides a suitable model.

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

There may be circumstances in which recommendations are appropriate and circumstances in which they may not.

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

Each form of notice has different consequences. An appropriate internal review process subject to appeal to a court of competent jurisdiction, according to the character of the notice and the circumstances, should be available.

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

In principle yes, although there may be circumstances in which no timeframe is appropriate or possible, for example where the prohibited conduct cannot be rectified.

96. 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?

AICD submit that an application for an internal review or an appeal should not affect the continued operation of notices in cases where there is a serious safety issue (that is, where a prohibition notice has been issued).

Determining what is a serious safety issue could have its difficulties but OHS breaches have such significant consequences that perhaps some disadvantage to the applicant has to be tolerated.

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

The use of such notices should depend upon the level of offence. They should be at the lower end of the scale and at the discretion of inspectors.

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

Under OHS law.

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

This is a matter for the legislature to determine.

100. 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?

Injunctive relief should be available where there is an actual breach or risk of serious breach. Injunctive relief should be applied for upon standard court procedures including the provision of an undertaking as to damages.

101. 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. They have a number of benefits including quick and effective resolution and saving of court time and costs. They should be available to resolve all safety issues.

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

AICD suggest it is good policy to encourage enforceable undertakings.

If an enforceable undertaking is entered into it should have no other consequences other than may flow from a breach of the enforceable undertaking. A person may enter into an enforceable undertaking without making any admissions or to avoid the time, expense and disruption to the business associated with a prosecution.

Although the entry of an enforceable undertaking may be suggestive of fault or liability, the Model Law should specifically preclude any admission of fault or liability giving rise to any civil or criminal consequences.

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

We do not believe so.

PROSECUTIONS:

104. 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?

OHS offences have traditionally been criminal in character. AICD has no difficulty with that being maintained, provided the burden of proving the offence rests with the prosecution, there is no reversal of the onus of proving the elements of the offence, and there is no provision for automatic liability.

Although AICD has no essential difficulty with a mix of civil and criminal liability, we do not want this to make the Model Act more complex than is necessary.

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

We are unable to provide a specific answer to this question beyond stating that if there is to be a mix of civil and criminal liability, it has to be based upon the nature and seriousness of the offence.

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

The mainstream common law courts in each jurisdiction should be able to hear prosecutions. We emphasise that OHS should not be an industrial relations responsibility. We submit in that no industrial relations court or tribunal should have the power to hear or preside over civil or criminal prosecutions in the OHS area.

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

We refer to our answer to the previous Question.

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

Appeals should lie according to court hierarchy in the relevant jurisdiction (an ultimately the High Court of Australia). In particular, there should not be any privative clause that prevents a superior court from reviewing a decision of an inferior court. We also refer to our answers to Questions 14 and 15.

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

In the case of indictable offences defendants should be entitled to trial by jury. We refer the Review to section 80 of the Commonwealth Constitution which provides for trial by jury in the case of indictable offences. Whilst the section only applies to offences against Commonwealth law it does provide a principle of law and procedure of overriding application. In any event, where there are nationally consistent laws, the principles applying to OHS in the Commonwealth jurisdiction should apply to all.

110. Who should be entitled to commence criminal proceedings?

Only the regulator or DPP (or equivalent) should be entitled to commence criminal proceedings.

We also draw the Review's attention to the Maxwell Report which makes it quite clear that there is no justification for any other person to have this right.

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

We refer to our answer to the previous Question. Our position is the same with civil proceedings.

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

Two years seems to be the accepted standard and we do not disagree with that.

113. 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?

The Inter-Governmental Agreement provides for a nationally consistent compliance and enforcement policy and the answer largely lies within this framework, although there will be differences in the rules of court across jurisdictions.

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

AICD submits that the only specific evidentiary procedures to be set out relate to the onus of proof resting with the prosecution on the relevant criminal or civil burden of proof.

115. 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?

Provided that the onus of proof rests on the prosecution it may be that elements of proof will vary between offences.

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

If codes of practice have recognised status under the legislation compliance with any such code of practices should be evidence of compliance with the relevant provision in the Model Act. If the onus of proof rests upon the prosecution, the prosecution may lead evidence to show that a relevant code of practice was not complied with as evidence of the offence.

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

This is the standard in most jurisdictions and we believe that it is entirely appropriate. We also refer to our answer to Question 37.

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

We refer to our answer to Question 37.

119. 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. Our position has already been made quite clear.

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

We express concern that this Question suggests that the Review has already made up his mind about the burden of proof.

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

No.

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

No. Liability should only depend upon active involvement or active contribution to the offence. That is, there should be a failure of the officer to exercise their duty of care to a prescribed standard. The standard commonly used amongst the jurisdictions is to take all 'reasonable care' to ensure that the company does not breach its obligations. Where the officer had control over the relevant conduct, AICD submits that this is an appropriate standard to adopt. This failure should be a matter for the prosecution to prove. This position should not be reversed such that it becomes necessary for an officer to argue that their actions did in fact constitute reasonable care.

123. How should officer be defined?

We believe that the definition should follow that in section 9 of the Corporations Act 2001

124. 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?

We refer to our answer to Question 122. The alternative question is the same as Question 122 and again we refer to our answer to that Question.

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

The case for determining liability should be based upon active involvement or contribution to the offence by the corporation. It might also include criminal negligence on the part of the officer.

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

If the burden of proof rests upon the prosecution there is no need for specific defences to be available to an officer. An officer may defend a charge by successfully arguing that the elements of the offence (a failure to take reasonable care, control over the relevant thing, etc.) have not been made out.

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

We believe they should be treated differently and note that they are exempt from the operation of the Victorian Act. We submit that Model Act should follow the Victorian provision.

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

Monetary penalties are appropriate for most if not all offences. It is a matter for the legislature to determine what an appropriate level the penalty for each offence may be, but we emphasise the penalties should become uniform across all jurisdictions in line with the Inter-Governmental Agreement.

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

We submit that fines are an appropriate approach and that maximum fines should be specified.

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

Yes, but this is a matter for the legislature.

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

No. In the interests of flexible sentencing options, the Model Law should not propose minimum penalties. This is a discretionary matter for the courts and should not be curtailed.

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

AICD has no comment on this, except to refer to our answer to questions 128 and 129.

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

A national register of decided cases would be useful but that will not stop jurisdictional differences in interpretation or punishment. Once uniform legislation is in place that would help, but not necessarily eliminate difference. The hierarchy of courts within each jurisdiction and the fact that inferior courts will be bound by decisions of superior courts within that hierarchy is another factor.

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

Jail may be appropriate in extreme circumstances, specifically in cases involving workplace death or serious injury. It might also be appropriate in cases where there have been serious and repeated offences by a duty-holder.

AICD also supports the use of enforceable undertakings.

However AICD has voiced its opposition to alternative sentencing procedures such as adverse publicity orders on many occasions in the past.

AICD maintains the firm position that the inclusion of any matter in a company's annual report or requiring notice to shareholders should be the sole province of the Corporations Act 2001 or the Listing Rules of Australian Securities Exchange Limited.

Publicity orders seem to be based on the principle that offences by employers are inherently more heinous and should be subject to greater penalties than offences committed by an individual.

It introduces the concept of denunciation, a new concept in the criminal law aimed quite discriminately at employers for reasons that are not explained.

Nor is it explained why the standard penalties together with usual media publicity, print or electronic, are insufficient as an attendant consequence.

The application of events of default clauses in a range of financial, trading and commercial contracts cannot be ignored.

If a company's share price drops as a result of, for example, an adverse publicity order, shareholders may dispose of shares, employees may be embarrassed, suppliers and clients may cease doing business etc. Accordingly, the consequences for the company and its employees may be serious indeed.

The punishment may go well beyond the company itself and have unintended consequences totally unrelated to the achievement of safety outcomes.

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

We refer to our answer to Question 134. Generally, specification of offences and periods of imprisonment are matters for the legislature.

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

AICD considers that the ACT 'Industrial Manslaughter' legislation is generally adequate to deal with such serious circumstances subject to any comments we have made about the burden of proof and automatic liability. The Model Act should contain specific provisions dealing with penalties for workplace deaths where there is a high degree of criminal culpability.

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

We refer to our answer to the previous Question. The Crimes Act in some jurisdictions might still allow prosecution in some cases.

138. 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?

This is another difficult issue. It is probably most in focus on the cases of workplace death or serious injury. Criminal liability for individuals should certainly focus upon the degree of culpability.

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

We are not aware that existing collection procedures are inadequate. If there has been some failure to enforce penalties that does not require a change in the law, just a change in practice and procedure.

We note that the issues paper brings out the common argument that some companies avoid payment of penalties by going into liquidation. It is not possible for a solvent company to go into liquidation to avoid payment of a penalty. A company can only go into liquidation and avoid payment of a penalty if it does not have the funds to meet that penalty. Directors of companies have obligations under the Corporations Act. The use of “*phoenix*” companies is referred to and this is a matter under the jurisdiction of Australian Securities and Investments Commission (ASIC). We draw the Review's attention to the ASIC Report of Operations 2006-07, page 17.

140. 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. The principle of limited liability remains paramount.

Company officers are not and should not be considered to be guarantors for the obligations of their companies.

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

We believe that the issues raised in the immediately preceding Questions are comprehensive.

OTHER ISSUES:

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

The power to make regulations should be limited so that jurisdictions do not have the capacity to make substantive changes to the legislation and dilute the uniformity principle.

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

Our view is that all offences should be set out in the Model Act.

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

Codes of practice form an important part of the OHS framework. The Inter-Governmental Agreement provides for national uniformity. Part 12 of the Victorian Act provides a model the Review might consider.

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

This is a matter for the legislature.

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

As a general principle all regulatory decisions should be subject to full appeal in a court of appropriate jurisdiction.

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

We have no firm views about this proposal but have some reservations. We would not want to see it adding another layer of complexity to OHS law beyond the consultative arrangements that are in place between employers and employees.

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

The Issues Paper does not deal with this matter in great detail and we note that it is dealt with in Chapter 7 of the Maxwell Report. AICD's view is that this would be best dealt with as an administrative matter rather than in the Model Act.

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

We refer to our answer to the previous Question.

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

The areas referred to in paragraph 9.6 of the Issues Paper should be subject to mutual recognition. Uniform laws will make a difference and perhaps alter the position.

151. 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?

A uniform system is the obvious solution. The Inter-Governmental Agreement is now relevant.

152. 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?

The Inter-Governmental Agreement now provides the answer.

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:

AICD refers to its covering letter dated 11 July 2008 which forms part of this submission.