

National OHS Review Secretariat  
Department of Education, Employment and Workplace Relations  
64N1 GPO Box 9880  
CANBERRA ACT

Comment on the Federal Government discussion paper on National Review of OHS Model Laws .

The concept of a 'Model OHS Act' is that there is a guideline on which legislation is based. The National Mines Safety Framework legislative framework is very useful example.

**Q1.** Which regulatory approach or approaches should be taken in the model OHS Act, and why  
An effective approach to the model OHS legislation is to use a combination of • principles-based standards (general duties of care) and • process-based standards (specifying a process or series of steps to be followed, e.g., risk management); The limitation of performance-based standards (specifying only the outcome to be achieved) is that it may limit improvement as industry outcomes approach the set standard. The limitation of prescriptive standards (describing precisely what measures should be taken and requiring little interpretation) is that innovative alternative approaches are discouraged.

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

A very useful guide to the level of detail is the National Mines Safety Framework legislative framework. This is simple, brief and concise. The model legislation needs to be understandable by all stakeholders

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

Key words are health and safety. While operational management requires a focus on safety, there is evidence that the major burden of adverse occupational outcomes are occupational health related issues. Our current short term reporting systems under-estimate the long term health cost. In general, the legislation refers to workplace management issues by site managers, however there are a number of important exceptions such as transport industries and contractors. In order to move focus to include these groups, it is necessary to use a title of Occupational health and Safety,

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

It is important to specify objectives of the act as this provides some as to how the Act and subordinate legislation may be interpreted. Reference needs to be made to minimising harm and establishing structures to facilitate improvement of OHS outcomes.

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

The model legislation should include reference to the hierarchy of controls. This important concept in OHS is not always understood by lay-persons.

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

In high risk activities such as aviation, mining, oil and gas and hospitals, reference should be made to alternative approaches to manage risk effectively. The may include safety case, systems of determining competency and establishing that competency has been maintained.

Data collection, storage, analysis and publication should also be the subject of legislation.

**Q7 - Status Quo**

There is a problem with the status quo in each jurisdiction in that is a wide variety of approaches to OHS law. In terms of effective comprehension, efficient management and labour portability, there is considerable benefit in have a OHS law model that applies the same over-arching principles and law structure across jurisdictions.

Because there is a steady evolution in OHS laws, the state based systems should be maintained so that improved legislation can evolve at the state level in response to local needs / events - such as the inquiry into the Moura Mine disasters. This process provides a leap frog effect. New legislation is developed and tested in one state. As appropriate other states adopt the legislation with improvements based on the experience in other states.

**Q8** Incorporation of all Industry specific legislation.

Lord Robens argued all industry could be covered by the same law. The review indicates that the same duty of care principles should apply, but technology specific and high risk industries need special regulatory frameworks. The discussion paper identifies Australian Government employees, seafarers, offshore oil and gas safety, workers in the nuclear industry, mining safety, electrical safety, rail safety and dangerous goods. The issue includes competence of persons who have specialist safety sensitive responsibilities.

**Q9** - Coordination of safety regulators Coordination of state regulators and other stakeholders should be strongly supported without being too specific. There are a number of examples of this approach that have been effective. These include groups in the area of mine safety ( National Mine Safety Framework) and the National roads group.

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

The general duties of care should be tied to the conduct of work and extend to fitness to start work and fitness to leave work (daily or on retirement) without an unacceptable risk of an adverse health outcome.

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

The general duties of care should be extended to members of the public in so far that the public is denied access to places subject to risk or the risk to the public (including students and volunteers) is effectively managed.

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

In the definitions, employers should be taken to mean employers and contractors and employees should be taken to mean employees and contractors

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

In the current legal context, diseases and disorders with long latency periods are not adequately covered by OHS legislation. Where elevated risk is indicated, there is a need to legislate for a comprehensive health surveillance system that is government managed and not employer managed. Such surveillance systems need to include per-employment, periodic and exit health data and exposure data and be able to link the two with adverse health outcomes. The surveillance also needs to have a component that includes analysis and public reporting in a format that informs risk management systems.

**Q14** - Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act? - No Comment

**Q15** Are there any other issues relating to the scope, application and definitions of a model OHS Act? - See question 13

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

The model should include a control test, but this should not provide a defence for employers for their omissions in implementing effective systems.

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

No comment

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

No comment

**Q19 to Q40** No comment

**Q42.** Should 'hazard' and 'risk' be defined in the model OHS Act? - yes **Q43.** Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how? - yes

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

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

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

**Q47.** Should there be different levels of consultation required for different work relationships? Contractors may be at particular risk, so a higher level of consultation should be required for contractors. There is a challenge to define what is adequate consultation.

**Q48.** How should consultation be provided for:

There is a challenge to define how adequate consultation can be provided. - This may lead to an undefendable position in an injury case or prosecution.

**Q49 to Q58** cover health and safety representatives and committees. As a communication tool, they may be effective. Their ability to impact on operations should be tied to their technical competency.

**Q59 to Q62** - rights to enter and industrial powers of authorised representatives (unions) - no comment

**Q63 to Q66** - Dispute resolution - no comment.

**Q67 to Q70** Rights to cease unsafe work - supported

**Q71 to Q78** Protection for persons from discrimination or victimisation. - Support

**Q79 to Q83** Compliance and enforcement policy - support

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

This is covered in the Queensland Coal Mining Safety and Health Act (2001) and appears workable.

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

No. This is generally done, but where a hard line is required, such a provision may be detrimental to ensuring effective health and safety.

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

The management of emergency situations may be compromised if the inspector has to wait to consult the regulator.

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

Occasionally, inspectors make an error in judgement or lack a complete set of facts.. A review process that is objective and transparent is warranted

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

All matters should be subject to review. Further appeal should be discouraged, but there may arise a need to develop new guidelines or regulations to cover emerging issues.

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

Additional powers and mechanisms are required to deal with the collation, analysis and release of confidential health, health outcome and exposure data collected as part of a comprehensive health surveillance program to apply for industries that have a specialised long term health risks.

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

No, but the regulator should have an enforcement policy.

**Q91.** 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?

See above

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

Inspectors should be able to issue them.

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

There should be flexibility for alternative effective measures to be applied. Provision should also be made for enforceable undertakings. This widens the scope of notices and enables more complex issues to be resolved.

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

Inspectors or tripartite committee.

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

No - some are very simple and can be fixed immediately, while others may be very complex. Inspectors should indicate a reasonable time frame

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

Yes, but the more conservative scenario should be implemented until the review is completed.

**Q97. To Q99** infringement notices

No comment

**Q100** Injunctions

No Comment

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

Yes - All offences

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

No - In some cases the undertaking may be research to resolve an emerging issue.

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

Health surveillance programs for industries or sites with elevated risk. Industry programs should be centralised.

**Q104 to Q141** Prosecutions, evidence, defence, liability and sentencing

No comment

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

No

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

No, but high penalties may be specified for certain breaches of regulations

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

A code of practice or equivalent measure may be specified as meeting the requirement of a regulation.

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

Companies should be encouraged to align internal and regulatory incident reporting systems

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

No comment

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

No comment

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

Yes - a ministerial advisory council

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

Yes - a ministerial advisory council

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

Yes in relation to statutory position, but a system needs to be in place to ensure and possibly test strict equivalence.

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

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

Co-regulation with industry trade and professional bodies. Maintenance of competence is tested and assessed by the industry trade and professional bodies.

**Q152.** How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap? In casting the law, the state and federal authorities should agree and notify which authority has precedence in cases of jurisdictional overlap. Alternatively, inspectors might be jointly employed by both authorities.

Bruce Ham