

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

SPECIFIC COMMENTS

This submission is respectfully submitted on behalf of Lutheran Education Australia, the education sector of the Lutheran Church of Australia, employing some 2834 teachers and countless volunteers serving 32994 students in every State of Australia.

Legislative Approach:

Response 1

Education as a service sector employer aligns best with process-based standards type legislation working within a risk management framework. Performance-based standards are difficult to apply to the sector because of measurement difficulties. Prescriptive standards would be difficult to define for the breadth of the industry and are not flexible enough to cover what is required. However, “life and death” matters legislation, e.g., asbestos-related issues will always have a place in model legislation.

Response 3

The title for the model Act should be OHS. The title has a more “human” process focus in comparison to the term “workplace” which has a non-human “facilities” type of connotation. There should be a common term nationally and the regulating body should be uniquely named. There is a lot of confusion when dealing across States, e.g., Workcover in Queensland, NSW and Victoria have different jurisdictions.

Scope, Application & Definitions:

Response 8/9

Some progress in this area has been made but OHS practitioners still find themselves scanning local, State and Federal as well as industry-specific jurisdictions for intrastate employers, let alone interstate situations. There is much duplication of work and precious resources in the non-profit sector are used. Scarce resources are directed to research and compliance interpretation rather than hands-on, direct end-user benefits to create a safer work/school environment.

Response 10

General duties need to be tied foremost to the conduct of work albeit not negating the “upstream” elements of the system. “Safety is everyone’s responsibility”.

Response 11

A school, like many service organisations, by nature has to “invite” members of the public into its place of work and interact closely with them. While employers and employees have duties that are clearly defined, members of the public are less obliged. Short of criminal offence, generally only social mores and good manners protect the workers from aberrant behaviour by members of the public at the site. In many service communities, the “rules” that have been made for safety and good order are considered by the public as not applying to them. Added to this is the fact that in many instances, because “infringements” occur on “private property”, some of the normal jurisdictions have little or no authority. Examples of this are harassment and vehicle infringements which are two issues that are constantly being addressed in schools. Some legal provision has been made in Queensland’s legislation framework for education in a specific act but it would be better covered and less duplication to have a public general duty under OHS to mesh with other like compliances. General public compliance expectations could well form a good educational perspective – “everyone is responsible for safety”.

Response 12

The scope and application of a model OHS has to be broad and flexible to accommodate not only emerging risks but also the sheer breadth in the nature of workplaces. Subordinate legislation should then be tailored, through consultation, to more specific needs.

Response 14

Critical terms should be defined by the Act. All too many terms only become clear when an alleged breach is brought before the court. It seems a somewhat “unfair” process to define terms critical to an event after the fact – the expectations have to be made clear upfront. It is somewhat disheartening to hear from an officer in a jurisdiction in responding to a point of clarification, “we are not sure how the courts will define this – it hasn’t been tested yet”.

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

Response 16

The model OHS Act should include a “control test”. In the OHS jurisdiction, it would seem the only common test is “to ensure safety”. The fact that a prosecution comes about because there has been an injury in a workplace means the defendant is considered “guilty” since there is no defence against the absolute term “ensure” - “reasonably practicable” is only then a mitigation instrument to try to modify the penalty. The presumption of “guilt” until proven “partly innocent” as compared with the accepted practice of “innocent until proven guilty” could be seen as an impediment to encouraging good practice in safety processes.

A control test of “reasonably practical” provides some encouragement in articulating a more graduated and realistic set of goals.

Response 21

Volunteers and members of the public pose substantial problems to the service environment in terms of safety. This group are invited into the workplace, the workplace has generally very broad acceptance of who enters, and has somewhat limited control on the actions of those who enter. While every effort should be made to facilitate a safe environment, there are aspects of human behaviour which may compromise the workplace's best efforts. Legislation should reflect some responsibility for safety issues, both individually (including members of the public) and on a corporate level.

Response 30

Officers of bodies corporate need positive duties described in model OHS legislation. Unless this is the case, duties of corporate officers are interpreted essentially by subordinates, e.g., WHSO's reporting "this is what you have to do to comply".

Due to corporate culture, few corporate officers accept the interpretation of their duties by subordinates. Positive duties directed specifically at corporate officers may, in fact, energise leadership in promoting safety. They are directly responsible for certain aspects, e.g., provision of resources, etc. and legislation should highlight this.

Response 34

With design and engineering being higher-order control processes in risk management, emphasis should be given to these in legislation. Specific examples of this in the school environment (and in the service sector generally), often relate to buildings. Designers of buildings need to be duty-bound to give attention to needs in terms of safety. While BCA requirements are a start, they do not necessarily control the risks in terms of aberrations in behaviour young people bring to the context. There are also the issues of safe access for ongoing maintenance and the like. Safety should be easily achievable in these circumstances and not complicated unnecessarily by aesthetic elements. They should be designed with safety in mind, rather than as an after-thought.

'Reasonably Practicable' & Risk Management:

Response 42

The differentiation between a hazard and a risk is a very important conceptual element in safety if control processes are to be correctly prioritised. The emotional "outrage factor" inevitably promotes a hazardous situation to risk status. Therefore, differentiation of the terms gives definition to the issue and it can be tackled in a realistic way. One aim of legislation is to give instruction (education) in what has to be achieved. "Hazard" and "risk" are very important terms so should be included in model legislation. Training experience regarding risk management would suggest that many participants are ignorant of the differences between "hazard" and "risk", and the ensuing consequences of each.

Response 44

The model legislation should include a risk management process and weight should be given to describing it as "a process" of achieving safety. However, if risk management is done as an exercise only, and no credence is given to the resultant outcomes, then there is a problem. There are workplaces which have vast quantities of risk assessments done but they never flow into active controls. They are just an academic exercise. Emphasis in the risk management process has to be on the control of risks.

There is a perception among employers that it is better not to have an identifiable, documented risk management process as the immediate identification of risks exposes them more in terms of prosecution. Of course, this is only true if the process of risk management is not completed and reduction of risk is not achieved. Such a view is “catastrophizing”, and it can and does paralyse the safety management effort. Of course this view doesn’t take into account that almost any attempt at risk management will in some way promote a better safety outcome by decreasing risk and therefore the probability of prosecution is consequently decreased.

Consultation, Participation and Representation:

Response 45

Consultation provisions are essential and the NT Act that includes a reciprocal duty for workers to participate is commendable. The more active and positive expectations are across all stakeholders, the more likely it is that safety can be promoted.

Response 55

Training of HSR’s is essential for consultation to be effective, but this has to be balanced to the related training costs - the smaller the employer, the greater the financial burden.

Regulator Functions, Powers & Accountability:

Response 81

Interpretative document construction should be part of the regulatory framework. Some aspects of safety are a mystery to employers. They look to the peak body for pointers on how they might solve their problems. They haven’t the resources to experiment or gain individual advice. If the aim of model legislation is to prevent injury, etc., it cannot be silent on avenues of interpretation. Some jurisdictions historically maintained their silence in advice using the argument that their advice might be used against them in legal proceedings. Silence in advice by jurisdictions which have “the experts” denies the community help and may ultimately be detrimental. Safety input might be neglected in the pursuit of having a successful prosecution record. Legal proceedings are necessary but too great an emphasis leaves them little more than the “road kill” method of dealing with the situation.

The emphasis needs to be on understanding situations and changing the outcomes rather than on being threatened with prosecution. The latter does little to motivate in issues being worked through and any confusion builds the “us and them” mentality.

Response 83

If there is a separation between advisory and enforcement departments, it would overcome the jurisdictional excuse that a jurisdiction cannot advise anyone in case they are held accountable in a legal proceeding. Everyone in the private sector is held accountable for advice – internal or external. Why not the Government as well?

Compliance & Enforcement:

Prosecutions:

Response 114

Employers such as Workplace Health & Safety Officers and representatives (who operate in that capacity in a workplace) should be protected by law. If this does not happen, then no employee will fill safety positions. This type of participation by employees is essential.

Even though many jurisdictions protect the HSR and WHSO from discrimination and vilification, they can still find themselves in a precarious position with their employers in legal proceedings.

It is not uncommon for WHSO's to be called by the prosecution to give evidence about the actions of the employer. After the event, regardless of the outcome and what the situation is legally, professional isolation can be experienced.

(WHSO's in Queensland are employees who are mandated to promote safety and they advise the employer directly. With their training and operational responsibilities, these compliance officers have intimate knowledge of the safety performance of their workplace).

Other Issues:

Comments

- A. Under model OHS legislation, the Crown should be held responsible in the same way that private enterprise is. It would seem different tests of accountability apply. Private enterprise deals with the whole enforcement framework whereas the Crown deals with issues in a less than transparent way. While it is acknowledged that the Crown can hardly prosecute the Crown, there should be an equally strict and transparent enforcement procedure for elements of the Crown.

- B. Schools could be a more significant agency in promoting an increased awareness of safety within their communities. Curriculum elements already provide all manner of units on developing health and safety. Another way is to provide facilities and resource safety systems in schools to model good practice safety procedures. What better way of learning than being surrounded by what is the right way of doing things and it doesn't take any more curriculum time that is already taxed to the limit. This model of education has already been very successfully used by many private enterprise suppliers. They want big business to use their product so they provide schools with low cost versions and then, when the students join the workforce, they will choose to buy and use what they already know from their school experience.

Maybe governments, through the safety authorities, could work more with the school sector.

- C. If nothing else, national OHS legislation will provide efficiencies in resource utilisation for Lutheran Education Australia (LEA). Working with different compliance regimes across all states multiplies the burden.

Some of the benefits of a national framework for LEA would include:

1. Workload for the co-ordination of OHS across the system would be reduced to a third.
2. One group of external advisors could be employed to consult with the enterprise across Australia instead of a number of State-oriented consultants.
3. One set of policies and the like to construct and maintain.
4. Employees moving from one State to another would not have to be retrained and would already be knowledgeable about safety expectations.
5. Communication would be less difficult not having to deal with all the States exceptions which tend to confuse.

To this organisation, model national OHS legislation would mean more resources could be assigned to “grass roots” safety issues rather than the situation now where appreciable time and effort is put into duplicate tasks. These duplicate “paperwork” compliance tasks detract from providing operational safety requirements to build a safer work environment, which is the ultimate goal.