

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

SPECIFIC COMMENTS

Legislative Approach:

Q1 A combination of principles-based, performance-based and process-based regulatory approach would be appropriate.

Q2 A prescriptive approach seems more appropriate to the regulations with more detail being provided in Codes of Practice on alternative options to meet compliance.

Q3 An appropriate title would be the Occupational Health & Safety Act.

Q4 and Q5 The Act should specify its objectives along the lines of the current Queensland WHS Act 1995. The principles outlined in the Victorian Review of the OHS Act seem appropriate.

Scope, Application & Definitions:

Q7-Q9 Maintaining the status quo in each jurisdiction for industry specific safety legislation will merely prolong the difficulties currently experienced by organisations with operations in more than one State. Efforts by some states to harmonise a number of their requirements to minimise duplication for these organisations should be applauded and may encourage more businesses to expand their operations across borders. Ideally, all industry-specific safety legislation should be incorporated into a single act with the specific issues dealt with in regulations and codes of practice e.g. Mining Safety Regulations, Dangerous Goods Safety Management Regulations, Electrical Safety Regulations, Plant Safety Regulations, etc.

Q10 General duties of care should be tied to the conduct of work, no matter where it is performed. (Queensland WHS Act 1995 defines this well.) Tying the duties in this way will subsequently make Q19 and Q32 easier to address.

Q11 Duties of care should not be extended to members of the public as such. Most state legislation currently seems to refer to 'others' and this is taken to mean visitors, contractors, parents, children, students, etc according to the context in which it is used. Public Safety legislation should be kept separate from workplace safety or occupational safety as it generally applies in a different context, e.g. crowds in public places such as stadiums, sporting events, entertainment venues and street parades and relates more specifically to safe dispersal in emergencies and adequate control and access by emergency services.

Q12 Scope and application of the model should accommodate different work arrangements. Most state legislation seems to address workers as those engaged under a contract 'of service' and thus covers full-time, part-time and casual, as well as volunteers. Labour-hire workers have been addressed well in some jurisdictions. Tying duties of care to the conduct of work rather than to specific workplaces, helps to simplify the duties in relation to the wide variety of work arrangements.

Q13 Current or emerging hazards and risks not effectively addressed well are those relating to psychosocial issues such as workloads, shiftwork, multiple jobs, family care, financial pressures, bullying, harassment and discrimination. If the model OHS Act addresses hazards and risks in a consistent manner (e.g. defining the five-step risk management process) then these psychosocial issues should be capable of being recognised and dealt with alongside other more common hazards.

Q14 Critical terms are, 'work', 'workplace', 'worker' and 'person conducting a business or undertaking', 'person in control'. Effective definitions are included in the Queensland WHS Act 1995.

Q15 No further issues.

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

Q16 A control test could relate to who has the decision-making power in relation to how the work is performed. This may be easier to define if duties are tied to conduct of work (Q10).

Q17 The person conducting the work on the spot has control over how (and to some extent, when) they perform the work and how the way they perform their work affects others in the vicinity. The person conducting the business or undertaking has control over what work is to be performed, who will perform the work, the conditions under which they will perform the work, when they will perform the work, the training of themselves and/or their workers and the tools or equipment provided to perform the work in a healthy and safe manner.

Q18 Control can be delegated or relinquished according to competency or lack thereof. Competency would have to be demonstrated and documented.

Q19 A person in control may control a work environment but not the way a contractor, for example, performs the work. In such cases, the contractor is in control of the work they perform and the work space in which they perform it. The person who engages the contractor may need to satisfy themselves that the contractor will perform the work in a healthy and safe manner (e.g. observing, asking questions, testimonials/referrals).

Q20 Reliance on employment relationships seems a valid basis for framing safety obligations where work is performed in employment.

Q21 See Q19. All these people are still 'employed' by someone, even if they are working for a host employer or on someone else's premises. Both employer and host employer should owe duties. The former to ensure the person is trained and equipped to do the work in a healthy and safe manner and the latter to ensure that the work environment is healthy and safe in which to perform the work.

Q22 No comment

Q23 Refer to Queensland WHS Act 1995 for obligation of person who conducts a business or undertaking.

Q24 Duties should be owed to self, workers and others.

Q25 and Q26 Refer to Qld WHS Act 1995 for obligations of workers and others.

Q27-Q29 Refer to QLD WHS Act 1995 regarding 'a qualified person' or Workplace Health & Safety Officer. This is the only jurisdiction which specifies this as well as determines the curriculum, sets the examinations, defines and approves the criteria for training and competency demonstration and issues the qualification. The liability should still rest with the person conducting the business or undertaking (or directors of a corporation).

Q30 Cannot comment re bodies corporate.

Q31 and Q32 These should be easier to answer if duties are defined in relation to work.

Q33-Q36 Obligations assigned to different aspects in whole of life of an item are preferred. For imported items, the obligation holder may be the importer and/or supplier. (See Qld WHS Act 1995)

'Reasonably Practicable' & Risk Management:

Q37-Q41 A test of 'reasonably practicable' could be included along the lines of the Victorian and Western Australian legislation though Qld WHS Act 1995 requirement to take 'reasonable precautions' and exercise 'proper diligence' seems to be easy to understand and apply. Control should not be an element nor should a test for assessing compliance be included. These terms were introduced to permit some flexibility in ensuring health & safety where the act, regulations or codes of practice did not prescribe or state ways to eliminate or minimise risk. Introducing control and tests into the standard will substantially reduce that flexibility.

Q42 'Hazard' and 'risk' are adequately defined in the relevant Australian Standard, to which most jurisdictions refer in their respective codes of practice.

Q43 Refer to Q37

Q44 The risk management process should be outlined and required in relation to the general duties (as in Qld WHS Act 1995).

Consultation, Participation and Representation:

Q45-Q47 Refer to Qld WHS Act 1995 re consultation at an industry level and consultation at a workplace level. Queensland's Industry Sector Standing Committees could be broadened to include additional industries e.g. mining. The concept of elected representatives and committees seems universal in all jurisdictions and should be continued. All workers, irrespective of their work relationship should be entitled to vote for a representative but ideally, any elected representative should be full-time or substantially part-time to adequately represent their constituents in the workplace and be available for advice when needed.

Q48 The situation described is not unlike that in many CSIRO sites. There is often more than one Division on site and there may be staff from other organisations on site e.g. in a CRC, hence is multi-employer. They also have more than one site for their operations, including one or more major laboratory sites, sometimes in different states, and several field stations attached to each in remote locations. Representation from each employing entity and each major site with a single representative for a number of field stations was usual and worked well. In addition, representatives were sought from different types of work e.g. office work, chemical laboratories, biological laboratories, IT, Libraries and workshop. The major criteria for effective consultation are balance between appointed and elected members and fair representation of the types of work, geographic distribution and/or different employing entities.

Q49-Q55 Refer to Qld WHS Act 1995. HSR and HSC should be provided for. If trained health & safety persons are elsewhere provided for in the model OHS Act (e.g. Workplace Health & Safety Officers – WHSOs), these people should be providing advice and guidance to the employer and all staff. The HSRs should have some training in health & safety and are important contact persons for initial advice and/or for reporting matters of concern. If WHSOs are in place, HSCs should not need the power to impose PINs on their employer. A senior person with decision-making power and a budget should be on a HSC but otherwise structure should not be too precisely defined other than to have balance as mentioned under Q48.

Q56-58 No comment

Q59-Q62 Recent provisions in Qld WHS Act 1995 re 'authorised representatives' appear satisfactory.

Q63-Q66 Issue resolution is a major function of HSCs. The Model OHS Act should specify.

Q67-Q70 It should be a right for workers to refuse or cease to perform work that they consider unhealthy or unsafe but the Act must include a requirement for consultation and a documented reassessment of risk prior to any widespread cessation of work. Conditions for payment of wages and benefits should be incorporated into Industrial Relations legislation or agreements and should not be part of the model Act. Any person in the workplace, including HSRs, should have the ability to direct that work cease if there is imminent risk of death or serious injury or illness. Provisions should be included to prevent victimisation or harassment of anyone who directs such cessation.

Q71-Q78 I do not sufficiently qualified to answer.

Regulator Functions, Powers & Accountability:

Q79-Q83 Certainly the Act should provide for establishment, etc of the regulators. I don't believe the Act should require regulators to publish their policies nor should the Act include provisions for interpretive documents. These should be at the discretion of the regulators and nothing in the Act should restrict the regulators' flexibility to vary their strategies to achieve their goals in reducing workplace death, injury and illness. The regulators should be able to provide advice.

Q84-Q89 The Act should clearly define the role, powers, functions and accountability for inspectors. They should be able to provide advice and they should be able to modify, amend or cancel any notice or instrument they issue, pending further information being supplied by the non-compliant party. Provision for internal review of decisions appears to be standard in most legislation having inspectors or authorised officers enforcing the legislation.

Q90-Q91 While the enforcing agency may have a hierarchy of enforcement at its disposal, I do not believe this needs to be defined in the Act. See comment at Q79-Q83.

Compliance & Enforcement:

Q92-Q99 Wholly agree with provisions for Improvement and Prohibition Notices in the Act but not PINs, as I prefer trained WHSOs to lesser-trained HSRs to be coordinating continuous improvement of health & safety in workplaces. Application of the notices should be at the discretion of an inspector, including what they consider reasonable timeframes for compliance. Infringement Notices are merely another means available to the regulator to encourage compliance. Provision should be made for them but their use should not be prescribed as it reduces the discretion of an inspector. The application of penalty units to different breaches reinforces the importance of some aspects of the legislation. Having the value of penalty points varied by a separate piece of legislation enables one parliamentary change to effect increased penalties in many pieces of legislation in a very efficient and cost-effective way. This system is used in Queensland.

Q100 I don't believe injunctions are necessary. If compliance with a Notice is not made within the specified timeframe, the punishment can be escalated to a higher order penalty.

Q101-Q103 Enforceable Undertakings are a valuable alternative to prosecutions, reducing costs on courts while still requiring effective commitment of resources by the offending organisation to improve health and safety on a broader scale. Considering this, I think requiring admission of fault or liability can be counter-productive and unfair as it may leave the offender open to further offences under different legislation and to common law claims. It would thus minimise the value of an alternative to prosecution.

Prosecutions:

Q104-Q109 I believe breaches under OHS legislation should remain subject to civil proceedings and be heard by Magistrates. Appeals may be escalated to a higher court, where the entitlement to trial by jury might apply.

Q110-Q113 The regulator should be entitled to commence civil proceedings. A one year time limit should apply for commencement of proceedings. Rules of the relevant courts should apply.

Q114-Q116 Refer to Qld WHS Act 1995 for adequate handling of each of these questions.

Q117-Q141 Do not feel qualified to answer.

Other Issues:

Q142-Q144 Power to make regulations should not be limited, given earlier suggestion that all industries should be covered by the Model OHS Act. Different regulations may be made for different industries. Some breaches of the regulations may be taken to be a breach of the Act e.g. Queensland WHS Regulation in relation to hazardous substances and also to noise. Power to make Codes of Practice should be provided in the Act. This reinforces their value in evidentiary matters.

Q145 National harmonisation of reporting requirements should ease the burden of reporting when an organisation operates in more than one state.

Q146-Q147 Provision for external review of decisions may be unnecessary if an effective appeal process is available, external to the regulator, such as to an Industrial Court.

Q148-Q149 Tripartism should be a part of all such legislation. In the section on Consultation, I referred to 'Industry Consultation' and the expansion of Queensland's Industry Sector Standing Committees.

Q150-Q151 The eastern states of Australia are currently recognising each others licences of operators of certain plant. This should be expanded. The introduction of a formal qualification requirement to safety officers in a similar manner to Queensland's WHSOs would contribute to more consistent approaches to health & safety improvement across the jurisdictions.

Q152 do not feel qualified to comment.

Optimal structure and content of a model OHS Act might be along the lines of the Queensland Workplace Health & Safety Act 1995

No further comments.