

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

SPECIFIC COMMENTS

Please complete this template to provide specific comments with supporting reasons against each chapter of the Issues Paper. If you are responding to a specific question in the Issues Paper, please include a reference to the relevant question number.

SUBMISSION

It is recognised that the Issues Paper poses some 152 questions, whilst all are seen as critical, the focus of this submission is on matters which may directly influence the management and control of safety and health at an organisational level. Therefore, responses have been framed around specific questions or groups of questions.

Legislative Approach:

Consistent with modern legislative drafting principles, any new legislation should be written in plain English. The new ACT Work Safety Bill 2008, recently released as a consultation draft, provides an example.

A nationally consistent system should incorporate formal recognition of the appropriate national standards, but there should be a clear method (e.g. by Regulation as determined by a national body) as to which standards apply and, once determined, such standards must apply nationally, i.e. there should be no variations by state or local governments allowed.

Scope, Application & Definitions:

2.4 Definitions

- Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?
- Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?

Response

Definitions are critical as they allow for direct interpretation and the aligning of responsibilities to key stake holders. In this instance, definitions with respect to:

- i) control;
- ii) reasonable and practicable; and
- iii) supervisor,

are seen as important. It is recognised that other than (iii), the other two are addressed later within the paper. However, it may be appropriate to offer some guidance with respect to “Who is my supervisor” when defining control, e.g. the person that provides direct instructions/supervises activities.

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

The duty of care should be a shared duty and linked to the chain of responsibility. That duty should extend to manufacturers. There is a need to ensure that, in unusual cases (e.g. students in some professional work placements, visiting academics and other “outworkers”), the duty of care is clear.

3.2 Control

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

Response

A control test/definition should be included into the model OHS Act. When aligning OHS accountability and responsibility, the broad nature of the duty of care needs clarification. The lack of clear definition creates ambiguity and therefore some guidance is required like for example a control test.

The matter of control with respect to who is the duty holder could be a tiered application and this should follow a typical HR management structure of delegation and reporting.

- 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?

Response

The principles of assigning persons accountability/responsibility in the work place is essentially aligned to their personal accountability and performance. This responsibility cannot be delegated nor transferred to a 3rd party and the model OHS Act should reflect the same principle towards control.

3.5 Duties of workers & others

- Q26. 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?

Response

Yes it should: All persons at a designated workplace have a common law duty of care to themselves and others at that workplace. If persons deliberately and knowingly without authority interfere with, change or modify process or physical aspects of the workplace then they should be accountable for such.

3.7 Duties of persons in control

- Q31. 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 owed? If not, how could this be clarified?

Response

Although the OS&H Act of Western Australia does to some extent attempt to address this issue the current provisions do not clearly address Question 31. As stated previously the responses offered at Questions 16 and 17 offer guidance to this matter.

Q32. 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?

Response

This Question is irrelevant, the definition of a workplace is such that it applies to that workplace irrespective if it is temporary or not. The matter of control is the same as above in Question 31.

'Reasonably Practicable' & Risk Management:

4.1 Concept of reasonable & practicable

Q37. Should a test of “reasonably practicable” be included in the model OHS Act?

Response

Yes the concept must be retained. Reasonable and practicable allows for the measurement and evaluation of practice, process and provides for a subjective and evidentiary based decision making strategy.

However, like most jurisdictions the concept must not be based on costs alone. The documentation produced by WorkSafe Victoria offers a reasonable mode; for the interpretation and application of this concept. Further, it is suggested that the decision handed down by the British High Court be considered regarding their justification to retain this concept when challenged by the European Union.

Q38. If not, what alternative standard should be included?

Response

No response refer to Question 38.

Q39. How should the standard be defined? What level of detail should be provided?

Response

Refer to the Guidance Note offered by WorkSafe Victoria.

Q40. Should control be an element of the standard? (see Chapter 3)

Response

Yes: An employer/employee should be measured and assessed against those matters over which they can effectively control or have been delegated the responsibility to control. Of importance however, the concept of reasonable must embrace the principles of risk management and that of the undertaking of risk assessments and if the probability/likelihood ration is aligned to matters over which the person has no control the process should indicate caution to proceed.

Q41. 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?

Response

Yes: Refer to the WorkSafe Victoria Guidance Note.

4.2 Risk management

Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?

Response

Yes: The concept of hazard and risk is not widely understood. A clear unambiguous definition should be provided along with an example and its application. Refer to the response at Question 40 & 41.

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?

Response

Refer to Questions 40 & 41. In addition a simple example to demonstrate the application should be provided.

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

Response

Yes: The application of the principles of risk management provide a framework for objective decision making as well as due diligence. In addition, it provides for a more holistic approach to OHS matters and resolution which embraces consultative processes.

Consultation, Participation and Representation:

The available structures for consultation should be nationally consistent. However there should be flexibility on how consultation is carried out to deal with differing circumstances in particular workplaces.

5.1 Duty to consult

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

Response

There should be a provision for the election of safety and health representatives and a duty imposed on the holder to consult and communicate with representatives and employees on all health and safety matters. Refer to the provisions of s35(10 (a) to (g) inclusive of the Western Australian OS&H Act.

5.2 Participation & representation

Q49. Should there be a requirement for establishing HSRs and HSCs?

Response

Yes this should be mandatory. However, a provision needs to be made whereby small business may adopt an alternative approach if the process would significantly impose hardship or business interruption. Verification for the adoption of alternatives should be required.

Q50. 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?

Response

There should be a provision that provides for elected safety and health representatives to issue Provisional Improvement Notices (PINs) in the event that the employer refuses to consult. In addition, the model Act should adopt a process for the resolution of issues at the workplace along with the refusal to work.

Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

Response

Refer to the provisions of the Western Australian OS&H Act.

Q52. Where an election is required, who should be entitled to vote?

Response

All persons at that workplace to whom the elected representative will be elected to represent.

Q53. What should the powers and functions of HSRs be?

Q54. What should the structure and functions of HSCs be?

Q55. What training and qualifications should members of HSRs and members of HSCs have?

Response

Refer to the provisions of the Western Australian OS&H Act. Importantly, the composition of a committee must include a senior management representative that has the power and authority to make decisions and allocate funding. The Chair should not have an operational vote.

With respect to training and qualifications, as per the Western Australian OS&H Act elected representative are required to have undertaken a 5 day introductory training course, the Act should provide provisions and be mandatory that management representatives complete as a minimum day 1 of the representatives training.

Right of entry

Q59. Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?

Response

Right of entry should be available to persons who:

- hold occupational health and safety qualifications;
- are not affiliated with the employer;
- provide written notice of the alleged breach to the employer; and
- are invited to the workplace by the employer.

The matter must be an OHS matter alone and not aligned to other organisational issues. Should an employee request such a matter and not consult with the employer in the first instance, critically, the employer must reserve the right to refuse entry if:

- they are unaware of the issue (not reported);

- the issue is under consultation with all groups (yet to be resolved);
- the matter if frivolous or of a vexatious nature.

Q60. Should the model OHS Act specify training and qualifications for such persons?

Response

Yes: This will remove any ambiguity and provide for objective decision making.

Q61. In what circumstances should the right of entry be exercisable?

Response

Refer to Question 59.

Q62. What powers should be exercisable upon entry, and subject to what conditions or limitations?

Response

Refer to Question 59.

Issue resolution

Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

Q64. When should issue resolution procedures be activated?

Q65. 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?

Q66. How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

Response

Refer to the provisions of the Western Australian OS&H Act.

Right to cease unsafe work

Q67. Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

Q68. 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?

Q69. 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?

Q70. In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

Response

Refer to the provisions of the Western Australian OS&H Act.

Regulator Functions, Powers & Accountability:

6.2 Inspectors

- Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?
- Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

Response

Where Inspectors are requested to investigate workplace complaints they must:

- ensure that the employer is aware of the matter; and
- that all agreed resolution procedures have been applied and exhausted.

If the above processes have not been applied the Inspector should not visit the workplace and the person making the complaint should be notified of such. Additionally, the employer reserves the right to refuse entry to the inspector.

6.3 Internal review of inspectors' decisions

- 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?

Response

Yes: Refer to response at Question 85.

Compliance & Enforcement:

7.2 Measures exercised at the workplace

- Q92. What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?
- Q93. Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?
- Q94. What provisions should be made to allow for the review of PINs, improvement and prohibition notices?
- Q95. Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?
- 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?

Response

Refer to the requirements of the Western Australian OS&H Act. Of importance, the regulator should implement a process to collect data on the number of PINs:

- issued;
- resolved in the given time frame;
- appealed;
- discounted; and
- that result in Improvement Notices.

Infringement notices

Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Response

No: A process for the resolution of issues should be included into the model Act and refusal to participate or refusal to resolve in a reasonable time frame should carry a penalty.

7.3 Measures exercised beyond the workplace

Enforceable undertakings

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?

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

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

Response

The model OHS Act should provide for the use of enforceable undertakings such as:

- shaming and blaming;
- community work;
- public identification;
- public apologies; and
- presentations of failures/error to peer groups.

Prosecutions:

8.3 Who may commence prosecutions & relevant procedures?

Q110. Who should be entitled to commence criminal proceedings'?

Response

This action should remain the prerogative of the regulator in consultation with the relevant department of public prosecutions. The NSW model for example where unions have this authority raises questions where the prosecutor has a share in the penalty.

Q113. 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?

Response

The conduct for prosecutions should be left to the rules of criminal law and rules of the relevant court or tribunal

8.5 Burden of proof & defences

Q117. Is 'reasonably practicable' an appropriate standard for the model OHS Act?

Response

Yes: Refer to response provided at Question 37.

Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

Response

As the responsibility to manage and control hazards in the workplace the responsibility to demonstrate due diligence and the onus of proof should remain with the employer (duty holder). Given that the duty holder has the ability to exercise control and expend funds it is only reasonable that they be afforded this responsibility. In light of what would the reasonable person do this is appropriate.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

Response

No: Employees' are held accountable and responsible for their actions with respect to organisational requirements and they are either rewarded or penalised as such. On the grounds that they have done what is reasonable and practicable the assessment regarding the burden of proof should be aligned to Question 118.

8.6 Liability of officers

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

Q124. 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?

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

Response

Yes: However, a qualifier is required and it should be aligned to control. If the officer had no ability to exercise or influence control or the outcome there should be no liability.

If evidence supports that an officer erred, knew of the matters, incidents were likely and foreseeable and elected to do nothing they should be accountable to the judiciary for their actions. They and the corporation should be guilty of the offence.

Sentencing and industrial manslaughter should be considered where it is proven that the officer was grossly negligent.

Q123. How should officer be defined?

Response

Refer to the United Kingdom Corporate manslaughter & Corporate Homicide Act 2007

8.7 Sentencing options

Q130. Should the level of fines be different for the various offences? If so, for what offences and at what levels?

Q131. Should there be a statutory minimum fine for some offences? If so, what?

Q132. Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?

Response

It is not a question as to the quantum of the fine. It is recognised that jurisdictions have significant variations between fines but it is the level of the fine imposed by the courts that raises the question. In NSW a fatality for example will incur a fine of \$200, 00 and a similar offence in Victoria or Western Australia will attract a fine of \$20,000. It is the consistent application and severity that needs to be addressed.

Other sentencing options

Q134. What penalty options should be available in addition to or instead of fines?

Q135. Should the model OHS Act provide for terms of imprisonment for specified offences?
If so, which offences and what maximum periods of imprisonment?

Response

The matter of enforceable undertakings raised in Chapter 7 Compliance & Enforcement Section 7.3 Measures exercised beyond the workplace – Enforceable undertakings are supported.

Other Issues:

Management of hazardous substances

Whilst this matter will not be addressed in the model OHS Act, the prescriptive use and handling of hazardous substances in research laboratories requires discussion. It is appreciated that a high standard of care must be applied however for example the requirement to provide comprehensive labelling and information on a substance of minute volume that will be used by a single person in that shift is onerous.

END OF SUBMISSION