

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

SPECIFIC COMMENTS

In developing this response to the National Review into Model Occupational Health and Safety Laws May 2008 Issues Paper the Tasmanian Government consulted with representatives from Unions Tasmania (UT) and the Tasmanian Chamber of Commerce and Industry (TCCI).

Given the time constraints for preparing this submission it has not been possible to consult wider. These comments therefore may not entirely represent the views of the Tasmanian Government as a whole

It was encouraging to see that there is a high level of convergence on the majority of views amongst those who were consulted.

Notably one issue of convergence, not canvassed by the Issues Paper, was the need to explore future governance arrangements for the administration of OHS regulation. Tasmania would welcome the opportunity to discuss this issue with the Review Panel.

Legislative Approach:

1.1 Regulatory Structure

All jurisdictions have reviewed their workplace health and safety legislation and administrative arrangement in recent years. The outcome of these reviews has been to confirm the relevance of the Robens framework, while recommending amendments to advance greater consistency between jurisdictions and address issues related to contemporary workplaces.

A recent review of the Tasmanian legislation found that, while the legislation is based on the Roben's three tier model, it does not give equal weight to each of those principles. Legislative provisions that attempt to embody the Robens principles of 'good management' and 'involvement of workpeople' need to be clarified and reinforced by other strategies in order to support these principles. It is felt that the legislative framework, particularly the Regulations and approved Codes of Practice, should be flexible enough to allow higher levels of prescription to address specific risks. **(Q1-2)**

1.2 Title, Objects and Principles

Tasmanian does not have a strong view on the title of the model Act. However it is suggested that the title should reflect the fact that the focus of the legislation should be on health and safety in workplaces.

The Tasmanian Government supports the inclusion of objectives that clarify the purpose and scope of the legislation. The New South Wales legislation is suggested as a model to follow.

Tasmanian employers have expressed a preference for objectives in the Queensland legislation. Whilst it was not agreed that this model should be the preferred one, it was agreed that the objectives in a model Act should be framed in such a manner so as to reflect the mutuality of responsibilities, particularly with respect to employers and employees.

It is noted that Victoria is the only jurisdiction whose Act includes a set of principles of health and safety protection. In Tasmania principles have generally be consigned to guidelines. To a large extent this is due to drafting conventions that have discouraged the inclusion of statements of principle. It is acknowledged that a set of principles may provide guidance on how the laws will be administered and how duty holders should conduct themselves. It is felt that the legislative framework should be flexible enough to allow higher levels of prescription to address specific risks.

Given the need to accommodate emerging issues in a dynamic manner and address the problems of adoption of new national standards, the following structure is suggested:

- **Provisions to be contained in the Act**

The model Act should contain all necessary head of power provisions that identify; duties, duty holders and to who those duties are owed. It should also contain common administrative and process provisions.

- **Provisions to be contained in the Regulations**

The primary purpose of the regulations is that they should contain the outcomes that are required to be achieved in meeting the duties that are specified in the Act. The secondary purpose is to specify those prescriptive requirements that cannot be otherwise achieved and to provide any additional detail on the administrative and process provisions that are not appropriate for inclusion in the model Act.


With regards to the primary purpose, the outcome specification, it is proposed that in relation to hazards, current and future national standards specifying those outcomes do so in such a manner that will allow for the reference in the regulations of those national standards thus avoiding the need for each jurisdiction to make new regulations. This should avoid inconsistent adoption and if a provision was incorporated in the model Act that facilitates 'automatic' adoption 6 months following a Workplace Relations Ministerial Council approval, this would also address the inconsistencies in implementation dates.

The model Act would need to specify duties and duty holders in such a manner that does not require the repetition in the regulations. This will avoid the tedious and contentious drafting considerations in the development of national standards.

This concept is similar to that adopted by the Australian Building Codes Board with respect to the adoption of the provisions of the Building Code of Australia (BCA). This approach also recognises that there will be a limited number of issues where a particular jurisdiction needs to apply a different provision as those differences are identified in an appendix until an acceptable uniform solution is developed.

- **Provisions to be contained in the Codes of Practice**

In common with the BCA approach, codes of practice need to be developed to support the regulatory outcome statements by specifying an acceptable solution for achieving the outcome. Application of the codes would need to have a 'deemed to satisfy' or 'deemed to comply' status. This should ensure that where the codes are observed this would be prima facie evidence of compliance with the obligations and outcomes that is addressed by the code.



Once again codes should not re-specify duties and duty holders; they need to address what can be done to achieve the outcome. These solutions need to be drafted in such a manner that they are understandable and useful for all of those at the workplace who need to use them. **(Q3-6)**

Scope, Application & Definitions:

Industry Sectors

Robens style legislation has led to occupational health and safety (OHS) regulation being largely non-prescriptive and in many cases has been criticised for not providing clarity or sufficient direction in meeting requirements. Guidance has been provided through the calling up of standards and in the development of codes of practice.

Since the introduction of the *Workplace Health and Safety Act 1995* (the Act) in Tasmania, there has been industry specific safety legislation enacted. In some cases this was required out of necessity with the *Security-sensitive Dangerous Substances Act 2005* and *Gas Act 2000* because the specific requirements of these Acts were not generally covered in other legislation.

The Tasmanian experience in the area of overlap in responsibility in legislation such as the *Rail Safety Act 1997* and this has been to attempt to accommodate the overlaps through the use of a memorandum of understanding (MOU). This approach does not however provide for the desired legislative certainty.

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?

- Model legislation should be encompassing of all areas relating to health and safety of persons in workplaces. A means of accommodating industry requirements would be through the inclusion of specific divisions in legislation or through the use of separate regulations.

Q9. Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

- Where overlapping responsibilities are unavoidable MOUs must be developed and in place prior to any enactment.
- In an attempt to address conflicting administrative responsibilities, section 3A was added to the Act. This provides that the Act is '*in addition to but does not derogate from any other Act relating to the health and safety of persons in a workplace*'. The intention of this was that legislation should be complementary and that where the OHS legislation was silent on an issue then other safety legislation would provide the specifics. There are differing views on whether this amendment has achieved this objective. Notwithstanding this Tasmania is of the view that any model law should incorporate a provision that gives effect to the above objective.

Workplaces and Non-workplaces

The Tasmanian legislation is broad in its application relating to a workplace. A workplace is defined as:

Any premises or place (including any mine, aircraft, vessel or vehicle) where an employee, contractor or self-employed person is or was employed or engaged in industry.

The definition was amended in 2007 to include premises and places where people **were** employed. The change covers places that are no longer workplaces that may be involved as part of an investigation.

The coverage of the legislation relates to the conduct of work i.e. regardless of where the place of employment is, it includes where work activity is taking place. The legislation also includes volunteers in that if someone performs work gratuitously in connection with an employers business they are taken to be employed by that employer. Consideration needs to be given to contemporary working arrangements where people work from home and the general duty of care provisions that would apply in that situation.

The Tasmanian legislation requires that an employer must appoint a responsible officer 'for each workplace at which the employer carries on a business'. Consideration needs to be given to the meaning of 'business' as, in some circumstances it might be argued that no business was being carried on and therefore no requirement to appoint a responsible officer for that location. For example, field research may not be regarded as work in the nature of a business but instead a community service activity with no element of the organisation or commercial activity of a business.

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

- General duties of care should be tied to the conduct of work. Much activity in many trades and occupations occurs away from the workplace. This could include, for example, an electrician performing work at a residence or sales representatives visiting clients. The Panel needs to ensure that public administration is appropriately captured.

Public Safety

Model legislation should provide requirements extending duty of care to the public not only as a visitor at a workplace but also to situations where hazards generated in a workplace extend to persons outside of that workplace. The rationale and development of the Robens style legislation evolved as a result of the impact of activity at a workplace on a community. Environmental legislation also covers many aspects that may affect the public in the same way as there is overlap with dangerous goods legislation.

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

- Yes, through the inclusion of specific provisions

RESPONDING TO CHANGE

Work Organisation

Since the enactment of the Tasmanian legislation we have seen the evolution of the use of labour hire organisations providing staff in many industries. There has also been the increased casualisation of the workforce and the opportunity to use home based work. With the political environment advocating an increase in the use of migrant workers to address skill shortages this may bring forth additional problems such as retraining on the job and expanded use of Languages other than English (LOTE) requirements.

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?

- Yes it is needed given history of recent changes. Some issues may be covered through the use of approved Codes of Practice that have evidentiary status.

Emerging Hazards

An emerging risk or hazard in some workplaces in Tasmania is an increase in the level of protest activity (such as forest protests at controversial logging sites) which in some ways is addressed through the use of a specific provision in the Act. Whilst the Interference and misuse provisions of section 20 of the Act have not been tested in the courts, the ability is there to do so. Whilst Tasmania is of the view that the provisions contained in section 20 of the Act should be incorporated into the model OHS laws, it is acknowledged that those provisions are capable of being used for unintended purposes.

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?

- Specific provisions may be included in the model act but there may be overlap with public nuisance provisions in Acts such as Police Offences.

DEFINITIONS

Over time there has been some confusion and uncertainty regarding the 'chain of responsibility' relating to duty holders. This may not be suitable for clarification by definition but should be addressed in the establishment of model legislation. Likewise the 'reasonable practicability' test has caused confusion and should be explained by definition or the regarding factors should be detailed.

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

Clarification of 'chain of responsibility' to address loopholes that could lead to abrogation of duty.

Q15. Are there any other issues relating to the scope, application and definitions of a model OHS Act?

The model laws should bind the Crown and there should be no immunity from prosecution. Protection provisions need to be considered to cater for reasonable actions undertaken by government OHS inspectors.

Duties of Care – Who owes them and to whom?

The Robens legislative framework provides the conditions within which workplace parties themselves must take necessary action to prevent injury, illness or death occurring – based on the legal and moral principle that in our actions we must take reasonable care not to do harm to others.

The legislative framework should augment the duties and obligations of the parties in the workplace, traditionally employers and employees, but extended to persons in control of the workplace (those to whom the day to day responsibility for managing affairs at the workplace is given).

The duties extend to those ‘upstream’ of the workplace (such as designers, manufacturers, suppliers and installers) whose activity may affect the health and safety of those who must work with plant, substances etc., in the workplace. The duty also has extension to those who may be visitors to the workplace and limited extension to those outside the workplace so that they are protected from injury or illness resulting from activities at the workplace.

The legislative framework should ensure that in managing for health and safety, employers make workplace health and safety an aspect of the business that needs to be managed routinely and adopt a systematic approach designed to control risks to health and safety that arise from the workplace and the performance of work.

The legislative framework should reinforce three major principles (general duties, good management and involvement of workpeople) and provide precise and succinct guidance on the steps necessary for taking ‘reasonable care’ in the fulfilment of the general duties.

The legislative framework should augment the above principles and the duty of care with subordinate duties– for example, ‘duty to provide information’; ‘duty to provide instruction and training’, ‘duty to provide supervision’ ‘duty to monitor working conditions’ , ‘duty to provide facilities for the welfare of employees’ etc. This would not necessarily change the substantive duty, but would break up the employer’s duties so that they may be better understood and would reduce the risk that employers would overlook important aspects of their duty. The legislative framework should also stipulate the duty of employers to responsible officers, managers and supervisors.

The legislative framework should require that employers must, so far as is reasonably practicable, ensure that the health and safety of any person other than an employee of the employer or a contractor or any person employed or engaged by a contractor, is not adversely affected as a result of activities carried on at a workplace.

The legislative framework should extend the employers duty of care to include for instance a person in a neighbouring business, or a resident, or a consumer, or a pedestrian, or a volunteer. It therefore provides a duty of care to anyone who may be adversely affected (uncontrolled noise, smoke, heat, vapours, gases, dusts, liquids, wastes, falling objects, etc) as a result of the work carried on at the workplace occupied by the business.

Any employer who exercises, or is in a position to exercise, management or control over a workplace must ensure that, so far as is reasonably practicable, any person at that workplace is safe from injury and risks to health.

The legislative framework should require that a person who is a principal but is not an employer owes a duty of care to independent contractors engaged to perform work at a workplace over which they exercise, or is in a position to exercise, management or control. A principal who is not an employer owes a duty as if they were employers, and must ensure

that, so far as is reasonably practicable, any person at that workplace is safe from injury and risks to health.

The legislative framework should reflect the principle that parties in control of work processes have responsibility for controlling the hazards and risks in the workplace. A consistent approach is required for the purpose of the model OHS Act.

Recently the Australian Safety and Compensation Council (ASCC) has proposed that the OHS framework should move away from placing duties on key persons such as the employer, to the concept of 'person in control' or a 'person with control' of 'work' or 'a workplace'. This concept is a departure from the current OHS laws and it does not add clarity. OHS law in Tasmania has developed to a point where the nature of an employer's obligations is well understood. It is also important to note that the consultation and representation provisions of many statutes hang off the employer/employee nexus. There is also a significant body of case law, which help to clarify where a duty of care resides, which would be lost if it were replaced by these proposed concepts. This may well lead to a situation where there is an artificial delegation of control for the sake of avoiding occupational health and safety responsibilities and shifting of the duty of care. In the development of any model law, duty holders and to whom those duties are owed must be clearly enunciated. Considerable caution is recommended if new concepts or duty holders are being considered as this will have to be balanced against the potential of losing the considerable amount of case law that has been developed over many years.

The words 'practicable' or 'reasonably practicable' in the OHS statutes are intended to limit the general duty.

General duties that are limited by what is 'reasonably practicable' make it clear to duty holders about the extent of their duties and what is expected of them. This approach offers greater transparency about the intent of the law than absolute duties which then include defences.

'Reasonably practicable' is a well understood concept in common law countries and has been the subject of considerable guidance and case law. It embodies an objective standard which has broad community acceptance.

As discussed above, the general duties in OHS statutes are limited by the extent of control the duty holder has in the workplace and these duties are concurrent and overlapping. **(Q 16-36)**

Suggested principles: Duties of Care - Who owes them and to whom?

- In our actions we must take reasonable care not to do harm to others.
- The legislative framework should establish the duties and obligations of the parties in the workplace, traditionally employers and employees, but extended to persons in control of the workplace.
- The duty of care extends to all persons in the workplace and has limited extension to those outside the workplace affected by the activities of the workplace.
- The general duty of care should be considered in the context of what is reasonably practicable.

- All employees and others should be protected from risks to health and safety arising from workplace activities.
- Duties must be capable of enforcement.

‘Reasonably Practicable’ & Risk Management:

4.1 Concept of ‘Reasonably Practicable’

Ratification of Article 4 of the International Labour Organisation’s (ILO), *Occupational Safety and Health Convention No. 155* requires the formulation and implementation of a national policy on occupational health and safety (OHS) issues. The intent of Article 4 is that all signatories to the Convention agree that hazards and risks to health and safety in the workplace must be minimised as far as reasonably practicable. Australia, in agreeing to ratify this Convention must comply with Article 4. It should be noted that all States and Territories have supported ratification.

This principle is incorporated in Tasmanian legislation.

The Issues Paper released by the National Review into Model OHS Laws notes that, within the majority of Australian jurisdictions, the obligation for a duty holder to comply with the duties of care is subject to considerations of ‘practicable’ or ‘reasonably practicable’. The terms ‘practicable’ and ‘reasonably practicable’ are interpreted within the Tasmanian jurisdiction to mean that employers must do everything that they reasonably can to ensure that their employees and, any persons at a workplace under their control or management, are safe from injury and risks to health.

The Issues Paper notes that there is uncertainty surrounding the definition of ‘reasonably practicable’; however ‘reasonably practicable’ is a well understood concept associated with systematic assessment and control of risk and has broad acceptance in most jurisdictions.

Tasmania defines ‘reasonably practicable’ as:

- taking into account: the nature of the employment or, as the case may be, the particular aspect of the employment concerned; and
 - (a) the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation to such potential injury or harm; and
 - (b) the state of knowledge about the injury or harm to health or safety that may be involved; the risk of the occurrence of that injury or harm to health or safety; and any methods of preventing, removing or mitigating that injury, harm or risk; and
 - (c) the availability and suitability of ways to prevent, remove or mitigate that injury or harm to health or safety or risk; and
 - (d) whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances. As the risk increases, it is reasonable to increase substantially the time, effort and cost needed to reduce or eliminate that risk.

The language surrounding workplace health and safety is often quite complex and difficult for a layperson to understand. Incorporating an involved definition of ‘reasonably practicable’ would only serve to add more complexity to workplace health and safety legislation. Very simply, it means that a person must do whatever they reasonably can do in the circumstances to minimise risks associated with hazards in the workplace.

It is not recommended that a 'reasonably practicable' test be introduced, because 'reasonably practicable' must be interpreted in individual circumstances. It must be applied to each individual hazard and associated risks. It is impossible from a legislative point of view to prescribe or to meet all concerns. It is therefore not recommended that a 'reasonably practicable' test be included in the model OHS Act. **(Q37)**

Whilst it may be attractive to seek greater consistency by including a definition of 'reasonably practical' in the model laws, it is considered that this could jeopardise the value of the considerable amount of case law that has been developed. The Tasmanian government is of the view that the Panel needs to carefully consider the likely benefit when determining if a definition should be included.

The concept is well understood by some industries as 'ALARP' or AFARP. 'ALARP' stands for 'as low as reasonably practicable' and AFARP stands for 'as far as reasonably practicable'. ALARP and AFARP are the basis of the National Standard for the Storage and Handling of Workplace Dangerous Goods and the National Standard for the Control of Major Hazard Facilities. These National Standards are implemented in national dangerous substances and major hazard facilities legislation.

The achievement of ALARP and AFARP may be prescribed in subordinate legislation according to relevant industry standards (such as Australian/New Zealand or International Standards without the need for a 'reasonably practicable test' being included in the primary legislation. **(Q38 – 40)**

It is also not recommended that a test for assessing compliance with the standard be included in the model OHS Act. Performance criteria for measuring a minimisation of risk are very clearly specified in industry standards and national standards. Regulations refer to relevant standards for any definitions of minimisation of risk (for example the manual handling standard). **(Q 41)**

4.2 Risk Management

The principles of risk management, including definitions of 'hazard' and 'risk' are already well defined and there is no reason for them to be defined in the model OHS Act. Within their own individual OHS legislation, States and Territories have provided a good understanding of these concepts. To further define these concepts could create unnecessary confusion. Similarly, principles of risk management are well defined in existing OHS Acts and regulations. They do not need to be defined as they are already well defined and understood at a State level.

Whilst the principles of risk management and the hierarchy of control need to be a feature of the model law, it should be done in such a manner that in no way limits the flexibility that currently exists. **(Q 42- 43)**

Consultation, Participation and Representation:

5. 1 Duty to Consult

The involvement of workpeople in health and safety is essential to achieving the outcomes of the legislation. The model Act should create a statutory obligation for employers and persons in control of the workplace ('responsible officers') to consult with relevant persons at the workplace – employees, on-hired employees and contractors – in fulfilling their statutory duties. Consultation is important in satisfying the following existing obligations:

1. identification of hazards, assessment of risk and selection and application of control measures
2. provision of information, including, in particular, the development of workplace health and safety policies
3. induction
4. changed work practices, change management or organisation of work.

In certain circumstances the employer or responsible officer may need to consult with persons outside the workplace, such as the responsible officer or employer of adjoining businesses, property owners, community members etc. For example, in a shopping complex where there are many single small to medium sized businesses, the risks associated with a hazard present in one workplace may be compounded by the presence of hazards and associated risks in an adjoining workplace. In these circumstances consultation with other relevant persons would include the employers or responsible officers of those other businesses. **(Q 45 - 48)**

5.2 Participation and Representation

Right of Entry

Right of entry provisions exist in a number of jurisdictions. Notably, NSW, Victoria and the ACT have provisions that allows right of entry without notice. In Victoria since July 2005 there have been 451 union officials appointed and there has not been a need to de-register any of those appointees.

In Tasmania in the recent past a trial was undertaken where 2 union officials were appointed to undertake inspections at mine sites and 2 other officials were authorised in the construction sector. The trial placed significant restrictions on how the officials were allowed to conduct their delegated authority. These restrictions were such that with respect to the mining area the trial was ineffective and the merits could not be assessed. This is because the union official had to have reasonable grounds that a breach had occurred. It was difficult to hold that view when the workplace is underground. In the construction sector the trial resulted in a significant number of 'breaches' being observed and rectified. While the union officials would not direct that the breaches be rectified, reporting the breach to the attention of the responsible officers was sufficient to effect rectification.

Where external inspectors hold demonstrated competence and are held accountable for their actions, a case for the rejection of this concept cannot be sustained.

At a recent Mine Safety Workshop held in Hobart it became apparent that progressive companies in that sector embraced union participation and formal right of entry was a non-issue as no barriers existed. The workshop heard that even in the top performing companies there was a minor albeit real reluctance to raise 'minor' issues with either management or the regulator. These companies have facilitated the role of the local union official to being one of a sounding board that allows effective communications between individual workers and management. Without this 3rd party carrier, this communication would simply not happen.

Right of entry provisions should be included in the model OHS Act and should apply to persons who have been accredited by the regulatory authority on the basis of competence and preparedness to comply with agreed inspection protocols. Access to sites should not be limited unless there is a conflict with inspection activities being undertaken by the regulatory authority. Powers should be limited to inspection, observation and consultation within any confines detailed in the agreed inspection protocols. **(Q59 – 62)**

Issue Resolution

It is a fundamental principle that workpeople must be involved in matters that may affect their health and safety.

The principles of involvement and co-operation are currently contained in the *Tasmanian Workplace Health and Safety Act 1995* (the Act) which requires an employer to establish a health and safety committee or a health and safety representative on the basis of the size of the workplace.

The important aspect for workplace health and safety is not that there must be health and safety representatives or committees established, but that the employer, responsible officer, etc., involves the relevant persons in the workplace in ensuring that the risks to health and safety are minimised as far as reasonably practicable.

The provision does not need to prescribe how consultation must be conducted since the provision must be broad and flexible enough to be applicable to all workplaces. There is no advantage in prescribing in detail in regulation the how, who and when, consultation must occur, or how representatives must be elected, what their powers and functions must be, and so on. These are matters that the workpeople themselves must decide and they must be suitable and relevant to them and to their workplace. The key obligation is that the employer and/or his responsible officer(s) must consult. Compliance with the obligation may be demonstrated by records kept of the occasions of consultation – purpose and outcome.

If there are persons who may have language difficulties (e.g. persons who come from a non-English speaking background or persons with hearing difficulties, the employer/responsible officer must clearly employ an interpreter or signer to assist in undertaking the consultation.

This is common sense and an important aspect of good management of a workplace. It should not need to be made a statutory obligation. The health and safety obligations extend to all relevant persons, so for this reason, the employer must ensure that all employees, on-hired employees, contractors etc know and understand the workplace policies and other risk reduction measures in place at the workplace so that those people can meet their own statutory obligations. Consulting is an effective way of ensuring that the workplace health and safety policies are known and understood. These comments would also apply to section 5.3 regarding protection from discrimination and victimisation **(Q 63- 70)**

5.3 Protection from Discrimination and Victimisation

Please refer to above comments. In addition the Panel's attention is drawn to section 18 of the Act and the fact that Tasmania believes that these provisions should be incorporated into the model laws.

Tasmania has a unique provision that empowers employees to refuse to work in dangerous situations. Tasmania is of the strong view that the provision contained at section 17 of the *Workplace Health and Safety Act 1995* should be incorporated into the model OHS laws.

Regulator Functions, Powers & Accountability:

6.1 Role and Functions of Regulators

Q79. Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?

- YES. All of the above mentioned

Q80. Should the model OHS Act require regulators to publish enforcement and prosecution policies?

- The enforcement and prosecution policy of the regulator should be in the public domain so that there is a clear understanding when a prosecution is to be considered. The matter is one for each jurisdiction to consider and it is believed that this is an administrative issue and would not need a legislative Head of Power. Tasmania publishes these policies and believes it is appropriate to continue to do so.

Q81. Should the model Act include provisions that allow the making of interpretative documents?

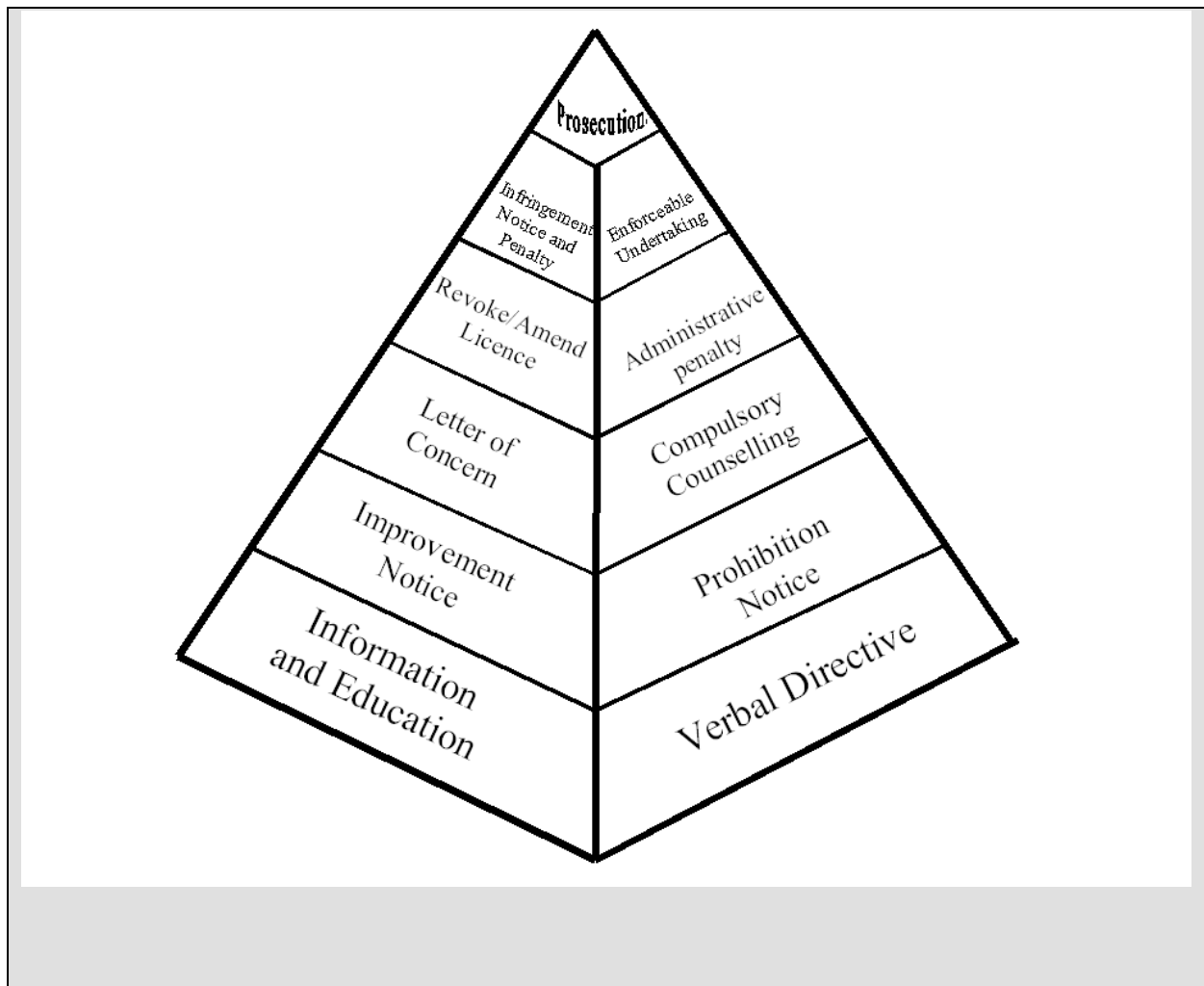
- Any information that creates transparency and assists the duty holders understand their obligations are supported. This appears to be the role of interpretative documents and as such this concept is supported.

Q82. Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

- YES. The regulator needs to have the authority to issue, suspend or cancel licences, certificates of competency, certificates of appointment, e.g. Employee Safety Representatives (ESR).

Q83. Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

- The enforcement pyramid indicates the hierarchy of potential actions that an inspectorate can use.



6.2 Inspectors

Provisions for the appointment of inspectors need to have flexibility built into it so that if circumstances arise persons other than employees of the regulator may be appointed. It may be necessary to include the ability to place limitations on powers or functions. Recent experiences in Tasmania relating to the Beaconsfield mine inquiry saw the appointment of a specialist in the mining field as an inspector for the purposes of the 'Mellick' investigation.

Tasmania has recently trialled the appointment of some union officials as inspectors (with limited roles) to determine the workability of these types of provisions. The right of entry or arrival at a workplace relied upon observation of breaches, risks or dangerous situations and was therefore limited by this.

Recent Tasmanian experience has seen the introduction of an Advisory Unit working separately from the Inspectorate. The Advisory Unit provides education and awareness to small to medium size business (fewer than 200 employees).

The service assists business to;

- identify and fix the hazards in the workplace
- communicate with workers
- create policies and simple procedures with the view to make the workplace safer
- understand and meet legal workplace health and safety requirements

- deal with new worker issues, and help new workers understand the importance of safety.
- The service is a free, practical and in-confidence advice that is specific to the workplace.

The Inspectorate still provides advice but the use of the Advisory Unit avoids the conflict that may occur for an inspector in circumstances where a visit to a work place reveals breaches of legislation or possible non-compliance.

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

- There should be a level of qualification for those other persons appointed as inspectors that are not employed by the regulator, as these persons have not had the benefit of the induction and training that other inspectors have had. The appointment of other persons should also have the ability to have limitations applied to their role.

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

- One of the key and critical functions of the inspectorate is to provide advice. This however does not infer that the inspectorate should be the only source of advice to industry stakeholders. There are many other sources of advice that are appropriate from within and external to governments.

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

- There are no circumstances that Tasmania is aware of where an inspector would need to have the level of independence that is suggested. Perhaps a situation where the inspector found it necessary to enforce compliance within the regulatory authority would lead to a need to have this independence
- At the end of the day the reliance placed on the independence of the office of the Director of Public Prosecutions results in this not being a substantive issue.

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 circumstance?

- Yes modification or amendment of a notice by an inspector is essential given situations that may arise through incorrect completion of a notice or one that requires clarification. The rider may be that it can only be amended in consultation with management within the regulatory authority.

6.3 Internal Review of Inspectors Decisions

Tasmania legislation allows for three levels of review, the Director level, the Secretary of the Department and at the level of the Administrative appeals. Only certain decisions such as notices are reviewable with some of these stages but all decisions are reviewable under the Administrative Appeals process.

In addition to improvement and prohibition notices a decision by the regulator ordering the recall, destruction or prevention of use of plant, substances or structures may be issued but only at management level. These types of decisions are currently reviewable by the Secretary of the Department and then may go through the administrative appeals process.

Legislation that has been recently introduced has led to the removal from the OHS Act, of a right to a review of an infringement. This now exists in legislation administered by a separate area of government.

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?

- Provision should be made for the internal review of decisions made by inspectors. Matters that are reviewable would be improvement or prohibition notices that have been issued. Further appeal should continue with an administrative appeals process through the legal system.

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?

- No. An inspector is an 'authorised officer' representing the agency that administers the legislation.

Compliance & Enforcement:

7.1 Enforcement Measures

Q90. Should the model OH&S Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of? provisions should be made for the transparent internal review of decisions in the?

- Some of those measures included in the hierarchy example provided are unlikely in the current enforcement regime to be available in Tasmania e.g. Fines and Other Punitive Action (Higher Court) and may be difficult to implement if they were required. The only action available in a higher court under the existing legislation is an action taken to the Supreme Court to enforce compliance with a notice.

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?

- The measures should be statutory principles rather than requirements as all jurisdictional legal systems may not be able to accommodate them as requirements. Therefore the principles should be included as part of guidance documents.

7.2 Measures Exercised at the Workplace

Safety Directions, Warnings and Cautions

Cautions or warnings issued to employers or workers under the Tasmanian scheme are formalised by providing them in writing. The purpose of this is so that a permanent record is kept and that any future action will likely be at a higher level

Under Tasmanian legislation a written notice identifying a risk (provisional improvement notice) or a direction to cease work may be issued by an Employees' Safety Representative to an accountable person at a workplace. This notice may be subject to review by an inspector if the accountable person so requires

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

- Provision should be made under the model legislation for the use of notices to address OHS issues in workplaces. Notices should in the least provide for the modification of processes or behaviour and also the cessation of work or actions should the circumstances require it.

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

- In order to provide clarification of the issues related to the notice, provision should be made to provide recommendations or in some cases specific direction may be warranted

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

- Provisions should be made for the internal review of notices in the first instance and allow further review through and independent administrative process.

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

- Minimum timeframes for compliance should be provided together with penalty for non-compliance. Flexibility needs to be included to extend the timeframe due to reasons beyond the control of the recipient of the notice.

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 that effect be?

- The general provision should be that a review will not affect the operation of the notice but provision should be made to allow for an application to be made to allow a stay of operation of a notice. This currently exists under Administrative Appeals legislation

Infringement Notices

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

- Infringement notices (IN) have been introduced as an additional tool for inspectors to address non-compliance in areas when it is appropriate. IN should apply to those offences that have strict liability and not have 'shades of grey' about them. Therefore those offences that have a reasonable practicability test attached to them would be inappropriate

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

- A combination of the two would be ideal as there are new legislative mechanisms in place in Tasmania whereby the notice is issued under the OHS Act and subsequent payment and enforcement is covered under separate legislation

Q99. What amounts should be specified as fines for infringement notices?

- Tasmania used a rule of thumb of 5% of the maximum payable under the Act or regulation. There should be a heavier penalty levied on the body corporate than an individual.

7.3 Measures Exercised Beyond the Workplace

Q100. 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?

- Inspectors may seek a court order to enforce compliance with a notice or direction given by an inspector

Prosecutions:

CRIMINAL OR CIVIL LIABILITY

As mentioned in the Issues Paper, offences under OHS legislation have traditionally been considered to be criminal in nature. This has certainly been the case in Tasmania and there is no evidence that this should be changed. Tasmania supports this State's current approach in this regard. Further, in Tasmania, there is a preparedness to consider stronger deterrence measures. For too long penalties for a serious breach of OHS legislation have been insignificant when compared with sanctions such as those being handed out under corporation's law. Whilst Tasmania does not recommend that the Panel introduce sentencing guidelines, it is suggested the Review Panel give consideration to proper corporate accountability by introducing significantly higher penalties in order that the judiciary can award penalties that are appropriate for the full spectrum of businesses that are covered by the model law. The introduction of civil penalties is not supported.

It follows then that Tasmania considers all duties and obligations should be subject of criminal offences and penalties and none should be heard as civil matters.

In making the above statements the differentiation is drawn between OHS offences which are criminal offences although they are not offences under the Criminal Code (the *Criminal Code Act 1924* in Tasmania). Whether or not Criminal Code offences should apply is dealt with under a later question. **(Q104-105)**

WHERE PROSECUTIONS SHOULD BE HELD

The issue of where best to bring prosecutions has been considered in Tasmania on a number of occasions and unlike the situations in the larger jurisdictions Tasmania is not in a position to consider hearing cases in other than the Magistrates Courts.

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

- In Tasmania, Magistrates Courts should hear OHS prosecutions

Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

- In the larger jurisdictions it may be appropriate for prosecutions to be held in specialist courts or tribunals and it is recognised that this allows for the OHS law specific expertise to be accumulated in those forums thus assisting the resolution of future cases.

Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

- In Tasmania appeals relating to prosecution deliberations are held in the Supreme Courts and this appears to satisfy our needs.

Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

- Given our size and existing judicial infrastructure any move from the status quo may be problematic, as such, for Tasmania, trial by jury is not supported. Further, trial by jury has a significant disadvantage in that it could be expected the outcome would not be accompanied by detailed considered reasons for decision that are currently given by Magistrates (whether oral or in writing). These reasons for decision are valuable in furthering the interpretation of the legislation and they allow appeals to be made when it is considered that an error of law has been made. The loss of these reasons for decision would be detrimental to the administration of occupational health and safety law, and should be resisted.

WHO MAY COMMENCE PROSECUTIONS

Proceedings in Tasmania are normally commenced by the Director of Public Prosecutions (DPP) or their agents. Briefs are prepared for the consideration of the DPP by the Regulator. Once the prosecution briefs are provided to the DPP whether or not the case proceeds is entirely at the discretion of the DPP and they will consider the merits and likely outcome of each specific brief prior to making their decision to commence proceedings.

Tasmania supports this protocol and believes that any decision to commence proceedings should be initiated by the regulator as to allow other parties to commence proceedings has the potential to undermine or skew the regulator's overall enforcement strategy as it may relate to targeted enforcement and the use of infringement notices and enforceable undertakings.

In particular, the concept of private prosecutions, whether by an individual or a representative organisation, is not supported. Tasmania, like other jurisdictions, has a prosecution policy (applicable to OHS prosecutions) based on guidelines published by the DPP. DPPs across Australia apply similar principles. Private prosecutors are not bound by such requirements and to allow prosecutions to occur without the application of the 'tests' incorporated in the DPP's guidelines defeats the purpose of the regulator applying them. Further, duty holders are entitled to know the basis on which decisions to prosecute will be made, and this cannot be known with any certainty if private prosecutions are to be part of the framework. Related to these matters is the potential for inconsistency should private prosecutions occur. Other difficulties with respect to private prosecutions pertain to the lack of separation of the investigatory and prosecutorial functions, and the lack of impartial review of the decision to prosecute. **(Q110)**

Civil breaches are not part of the current Tasmanian OHS legislation. The current approach, whereby all breaches are 'criminal' (but not part of the Criminal Code), works satisfactorily and Tasmania sees no benefit in changing this approach. If civil breaches were to be included in the model OHS laws, Tasmania would support, for the abovementioned reasons, the initiation being undertaken only by the regulator. **(Q111)**

Until recently proceedings have to be lodged with the courts within 12 months of the date of the alleged breach having occurred. This provision had created problems with respect to the limitation this created in finalising the complaints. An issue that had proven problematic was that relating to design breaches where the designs had occurred in the past. A recent amendment addressed this issue by extending the time for lodging complaints to 12 months from the date on which the breach became evident to an authorised officer. This timeframe has been demonstrated to be appropriate and as such supported by Tasmania as the minimum limitation period. **(Q112)**

Tasmania does not have a view on the incorporation of specific provisions for the conduct of prosecutions except that there is a need to retain the evidentiary provisions such as those contained at section 54 of the *Workplace Health and Safety Act 1995*. The rules applicable to criminal law and the courts work satisfactorily and there is no evidence of any need to make new rules specifically applicable to OHS matters. In fact it is likely that such an approach would prove confusing to the courts. **(Q113)**

EVIDENCE

Tasmania strongly supports the inclusion in the model OHS laws of all the following evidentiary provisions contained at section 54 of the *Workplace Health and Safety Act 1995*. **(Q114 -116)**

Workplace Health and Safety Act 1995

- **Section 54. Evidentiary provisions**

(1) In proceedings for an offence against this Act, an allegation in the complaint that, at a specified time-

- (a)** a person was an employee at a specified workplace; or
- (b)** a person was an employer at a specified workplace; or
- (c)** a person was a contractor at a specified workplace; or
- (d)** a notice was given under this Act; or
- (e)** a notice required to be given under this Act was not given; or
- (f)** a prescribed fee has not been paid; or
- (g)** a person was an inspector; or
- (h)** a specified building, structure, mine or place was a workplace –

Is evidence of those facts.

(2) Where in any proceedings under this Act it is alleged that a person contravened or failed to comply with a provision of this Act in relation to which an approved code of practice was in effect at the time of the alleged contravention or failure to comply –

- (a)** a document purporting to be a code of practice is admissible in evidence in those proceedings; and

(b) if the court is satisfied, in respect of any matter that it is necessary for the prosecution to prove in order to establish the alleged contravention or failure to comply, that –

(i) any provision of the code of practice is relevant to that matter; and

(ii) the person failed at any material time to observe that provision of the code of practice -

the matter is taken as proved unless the court is satisfied that, in respect of that matter, the person complied with the provision of this Act otherwise than by way of observance of the provision of the code of practice.

(3) A document purporting to be published by or under the authority of a prescribed authority is, on its production in a proceeding, evidence of the matters appearing in the document.

LIABILITY OF OFFICERS

Tasmania is of the view that the fundamental issue is one of holding accountable those persons who exercise or are in a position to exercise management or control over situations and as such they should be responsible for their acts or omissions. If this is accepted as being the appropriate test then it will be a matter of fact for each individual situation if an officer of a corporation has breached this requirement and if they have then there needs to be an effective avenue for legal recourse. Tests of reasonable practicability would need to apply and if, due to say budget constraints, a situation existed that could not be rectified then there would need to be a mechanism where a 'supply chain' concept of accountability applied to those who by their actions caused the situation. The model laws need to capture these concepts and if this is done it is quite conceivable that corporate officers could be captured. These concepts should equally apply to unincorporated associations and volunteer offices. Refer section 3(2) of the *Workplace Health and Safety Act 1995* that deems gratuitous workers to be employees.

Tasmania does not advocate further specific corporate officer provisions above the following that exist at section 53 of the *Workplace Health and Safety Act 1995*. The provisions outlined below capture the principle of individual responsibility for a person's own actions or inactions when the person is a director of a body corporate. Tasmania does not support the concept that a person should be held liable merely because of his or her position as a director. The concepts of knowledge, diligence and personal responsibility all need to be taken into account in holding a person liable for a breach by a body corporate. (Q122 - Q127)

Workplace Health and Safety Act 1995

- **Section 53. Offences by bodies corporate**

(1) If a body corporate contravenes or fails to comply with any provision of this Act, each director of the body corporate is taken to have contravened or failed to comply with the same provision unless the director satisfies the court that –

(a) the body corporate contravened or failed to comply with that provision without the director's knowledge and that the director was not reasonably able to have acquired that knowledge; or

(b) the director used all due diligence to prevent the contravention or failure to comply by the body corporate

(2) A director may be proceeded against and convicted under a provision in accordance with subsection (1) whether or not the body corporate has been proceeded against or has been convicted under that provision.

(3) Nothing in this section affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act.

SENTENCING OPTIONS

Offences and penalties must be such that an effective deterrence regime is in place. This can only be achieved where a wide range of options are available and these need to include imprisonment, for the most serious of offences, and significant fines, that are compatible with corporation law offences.

Consideration needs to be given to the ability of a fine recipient's ability to pay. The effect of the same fine applied to a large successful multi-national corporation will be vastly different to the same fine applied to a small business operator. It is suggested the Review Panel give consideration to introducing significantly higher penalties in order that the judiciary can award penalties that are appropriate for the full spectrum of businesses that are covered by the model law.

The Review Panel should bear in mind that general sentencing practices (eg how a court chooses between available sentencing options or the considerations to be applied to a particular option) within a jurisdiction may be governed by specific sentencing legislation applicable to all offences (or all offences of a particular type) in that jurisdiction. For Tasmania, refer to the *Sentencing Act 1997*. It should also be noted that the Tasmanian Law Reform Institute released its final report on sentencing (Final Report No. 11) in June 2008.

WORKPLACE DEATH AND SERIOUS INJURY

It is recognised that other jurisdictions have specific offences relating to workplace death and serious injury, and/or have introduced concepts such as reckless indifference or gross

negligence. To date, Tasmania has not identified a need to introduce such concepts in this jurisdiction or to link the offence to the outcome. Tasmania has not formed a view on whether reckless indifference/gross negligence should attract higher maximum penalties but makes the observation that outcomes are not necessarily linked to level of culpability or recklessness.

An equitable way of addressing this issue would be if the breach were considered in the context of the potential outcome as opposed to the actual outcome and evidence was admissible to support that potential.

ENFORCEMENT OF PENALTIES

Where penalties have been awarded by the courts there need to be provisions that ensure those penalties are paid and corporate re-structuring must not allow individuals to escape that obligation. Nevertheless, this does not mean that the provisions should be included in OHS legislation. In fact, Tasmania does not support penalty enforcement provisions being added to the model OHS laws. OHS enforcers are not fines enforcers and OHS regulators should have no role in this regard.

The panel's attention is drawn to the provisions of the *Monetary Penalties Enforcement Act 2005* that contains provisions that ensure, as far as is possible, that debts to the Crown are honoured. Legislation such as this is the appropriate place for provisions dealing with fines enforcement.

Other Issues:

9.1 Regulation Making Powers

In order to regulate effectively and to do so with efficiency, the broader the regulation making power under the Act the better. However, there must be that nexus between primary legislation creating a head of power to do something and the legislation being drafted in such a way as to make it legally enforceable. It would not be sufficient to draft a power for an inspector for example that says '*an inspector may do all things necessary in order enforce the requirements of the legislation*' without putting some parameters around what an inspector can do and circumstances in which it can be done.

With the move to non-prescriptive regulation there has been increased doubt as to what actions constitute compliance with requirements so a move back to prescriptive legislation or an increase in the use of standards and guidelines may be required.

In any regulations that are proposed National Competition Principles need to be borne in mind.

The Tasmanian experience limits the level of penalty that can apply to an offence under the regulations. Currently \$30,000 for a body corporate and \$12,000 for a person compared with \$180,000 and \$60,000 under the Act.

Regulation making powers should not be limited except insofar as any National Competition Policy Principles may apply. That is not to say that Tasmania supports a proliferation of regulations. Tasmania does not. It is accepted that there is a role for regulations, and that their scope should not be limited. Nevertheless National Competition Policy Principles dictate that excessive regulation should be avoided. In Tasmania, the *Subordinate Legislation Act 1992* contains guidelines for the preparation of subordinate legislation, such as regulations. Some key features of the guidelines are:

- objectives for the legislation must be clearly formulated in accordance with the objectives, principles, spirit and intent of the enabling Act;
- alternative options for achieving those objectives, including the option of not proceeding with any action, must be considered;
- consideration must be given to the advantages and disadvantages expected to arise from each option as compared with the advantages and disadvantages of proceeding with the subordinate legislation; and
- consideration must be given to the impact of the proposed subordinate legislation on competition.

The above requirements are additional to the need to identify whether regulations place a significant burden, cost or disadvantage on any sector of the public and the need to prepare a regulatory impact statement if they do.

While regulations are a necessary part of the legislative regime, the above guidelines emphasise the need to consider the need for each regulation against appropriate criteria.

(Q142)

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?

Traditionally regulations provide for lesser penalties but in most cases the charges faced by a company would fall under the Act as in the majority of cases a breach of a regulation is 'prima face' evidence of a breach of a duty of care obligation. Tasmania has no concerns about there being lower penalties.

9.2 Codes of Practice

The use of a tripartite approach in the development of Codes of Practice (COP) has been successful in the development of COPs in Tasmania. This has led to the development of COPs that provide the desired practical guidance that has specific application to Tasmania. While this may be contrary to the concept of national harmonisation it is the belief that other instruments such as some National Standards and COPs may fall short of giving the necessary practical guidance.

COPs should be given the status of 'deemed to comply' with requirements if adopted properly and associated regulations should also continue to include the 'reverse onus' of proof to a person who chooses to use means other than the COP.

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

- Approved COPs developed with tripartite consultation and include 'reverse onus' of proof for those that choose to use other means to comply.

9.3 Notification of Incidents and Reporting

Notification of serious incidents (as defined) in workplaces (with a time threshold) to the regulator are an essential part of the day to day operational activity of an inspectorate. Without these requirements there is a danger that regulators could be hindered in performing their role or that major incidents affecting the wider community could go undetected. Such requirements enable inspectors to properly investigate matters especially in the preservation of sites and in the gathering of evidence.

The model OHS law should define what events need to be notified. In Tasmania 'serious bodily injury or illness' is one of the key triggers for notification and this is defined as meaning:

An injury or illness that disables a person to the extent that as a consequence of that injury or illness the person is subject to a period of admission to hospital as an in-patient.'

This notification trigger works well in Tasmania and is recommended for consideration.

Reporting of accidents (leading to compensation) as a general rule is not a requirement of the Tasmanian OH&S legislation but falls under the *Workers Rehabilitation and Compensation Act 1988*. Under the *Workplace Health and Safety Act 1995* the only requirement relating to the maintenance of records of work related injuries and illness is that at section 9(2)(b)

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

- Any injury involving lost time should be reported to a regulatory authority and all other incidents should be recorded with those records retained by the employer at the workplace. The management of these records is not burdensome but makes sense in the application of risk management practices.

9.4 External Appeals and issue Resolution

Tasmanian legislation currently provides for two levels of review of particular decisions relating to notices made by an inspector. In the first instance a review may be undertaken by the Secretary of the Department and subsequently by the Magistrates Court (Administrative Appeals Division). There is also an avenue for the regulator to take a matter to the Supreme Court to force compliance.

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

- External review of decisions is an important feature as part of a system underpinned by natural justice. Such review should be independent and have a requirement to comply (in some cases) until a matter has been heard. Administrative Appeals forums would be best placed to manage such matters.

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

- The issue was raised during the Review of Workplace Health and Safety in Tasmania. There were polarised views to the proposition that there may be occasions when independent mediation or conciliation would resolve certain health and safety issues in the workplace.
- It is recognised that some health and safety issues, particularly some psycho-social health issues, are closely related to work organisation, work practices and conditions of work. Industrial relations and health and safety become closely inter-related, and where one issue is not resolved, it may have effects in other areas

- For this reason the mechanism of seeking independent mediation or conciliation was seen to be a means of finding a timely resolution of issues. State based industrial commissions have a huge range of experience in dealing with people, especially people who are at their `last resort'. Their expertise could be put to good effect in ensuring that workplaces are safe from injury and risks to health by providing a forum where issues, that cannot satisfactorily be resolved by the workplace itself or the regulator, may be taken. It should not be used lightly or as a first resort. It should be seen as a service or mechanism that provides an alternative for workplace parties who have reached a deadlock or stalemate in resolving a workplace health and safety issue. The detail of how it should be provided for is very important and it needs to be framed very carefully.

9.5 Tripartite Mechanisms

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

- Tripartism manifests itself in the involvement of administration of Tasmanian OHS legislation through the participation of persons in the development of COPs under the Act. The output of these working groups regulates, in part, the compliance of people in workplaces.
- The WorkCover Board of Tasmania which, as part of its role provides advice to the Minister on OHS and Workers Rehabilitation and compensation, has a composition that is prescribed as including representatives appointed from nominations received from employer and employee organisations. Other members represent the interests of the Government, insurance, legal and medical sectors.

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

- Unsure if this would be warranted in a Tasmanian working environment and whether it would be of benefit. In some industries there may be a danger that different factions have inconsistent views with main representative bodies.
- The issue of how to best gather balanced views on OHS issues has been considered in Tasmania on a number of occasions and unlike the situations in the larger jurisdictions Tasmania is not in a position to consider mandating formal tripartite representation requirements
- In the larger jurisdictions this may be appropriate. Whilst the Tasmanian perspective should not act as an impediment for the larger jurisdictions, given our size and industry mix any move from the status quo in Tasmania would be problematic.

9.6 Mutual Recognition

General mutual recognition of licences obtained in one jurisdiction and required to be used in another may be covered under existing mutual recognition laws. Recognition of plant registered in another jurisdiction is specifically catered for in the Act as is the licensing of persons involved in high risk work. The catalyst for the cooperation in the drafting of legislation that manages this is brought about through involvement of jurisdiction participants on national working groups.

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

- Generally mutual recognition laws apply in Tasmania, subject to meeting the necessary requirements for specific types of licences or actions i.e properly obtained, current registration etc. Perhaps specific provisions should be built into model legislation requiring any licence, or registration, or permit that is granted under a National Standard is to be recognised across jurisdictions and the standard called up through prescription in regulations. Mutual recognition will pick up any others

9.7 Cross-jurisdictional Cooperation

The wording of some current Tasmanian legislation that is meant to enable the sharing of information between jurisdictions as part of the provisions has been found to be flawed. Drafting of information sharing requirements that may relate to offences regarding licences or permits or registration would need to be carefully worded to avoid conflicts with legislation.

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:

The Tasmanian occupational health and safety act is designed to ensure that when workplace injury or illness does occur, that the inspection powers and processes are designed to maximise *understanding and prevention*, as opposed to a focus on prosecution and punishment, (as evidenced by section 36 which empowers an inspector to 'require any person to answer any question or to provide any information relating to the health or safety of persons at any workplace'). Model OHS laws should keep this focus on understanding and prevention.