

VACC Submission
in Response to the Issues Paper of the
**National Review into Model Occupational Health and
Safety Laws**



Victorian Automobile Chamber of Commerce
Level 7 464 St Kilda Road
Melbourne Victoria 3004
Telephone 9829 1111 Facsimile 9866 1168
www.vacc.com.au

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INTRODUCTION

The Victorian Automobile Chamber of Commerce (VACC) is an employer organisation representing the interests of more than 5000 members in Victoria and Tasmania in the retail motor industry. VACC members are predominantly small businesses with 90% of the members employing less than 20 employees. The various divisions in the retail motor industry are mechanical repair, body repair, automotive dealers, used car traders, auto electrical, engine reconditioners, tyre dealers, radiator services, farm machinery, motorcycle dealers, service station and convenience stores and towing operators.

VACC provides comprehensive advice and assistance to help members run their businesses more effectively. VACC, on behalf of its members, tenders this submission in response to the Issues Paper on the National Review into Model Occupational Health and Safety Laws.

This submission responds to the questions stated in the Issues Paper that was produced by review panel, Robin Stewart-Crompton (Chair), Stephanie Mayman (member), Barry Sherriff (member), and comments on the Terms of Reference for the National Review into Model Occupational Health and Safety Laws.

The views expressed in this submission have been developed through a number of avenues:

- VACC's OHS and Industrial Relations Department which have extensive experience in the practical application of OHS legislation, and its interaction with industrial instruments and other legislative provisions regulating the employment relationship in the retail motor industry;
- Views of members expressed through day-to-day contact who use VACC's advice, training and consultation services; and
- Discussions with other key stakeholders.

Legislative Approach

Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

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

All jurisdictions have a three-tier model regulating OHS. VACC is of the opinion that the OHS regulatory three-tier structure consisting of the OHS Act, Regulations and Code of Practice should be the regulatory structure required for National OHS Model Laws to be successfully introduced. The continuation of the three-tier structural approach would lead to a smoother progression of change to harmonising OHS legislation across all Australian States and Territories.

The various regulatory approaches that are applied in each jurisdiction's hierarchy of the Act, regulations and codes needs to accommodate small and large employers, as well as different types of industries, and must lead to the best health and safety outcomes.

In order to accommodate the needs of different sized employers and different industries, VACC believes the model OHS Act should take a 'principle based' approach. The 'principle based' approach allows scope, general direction and flexibility to the different industries, while allowing various methods of controlling hazards.

Model OHS regulations and codes require further detailed requirements however, not to the degree where a prescriptive standard approach is required. Model OHS regulations should have a performance-based standard approach which specifies only the outcome to be achieved. Model OHS codes should have a process-based standard approach which specifies a process or steps to be followed.

The model OHS regulations and codes cannot follow a 'principle based' approach as these tiers require the details of the outcomes and how they can be achieved, whilst having the flexibility to accommodate the diversity of industry and size of employers.

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

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

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

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

VACC is of the opinion that the model OHS Act should be titled the 'Occupational Health and Safety Act'. The addition of 'welfare' as stated in some jurisdictions is not required as all OHS Acts encompass the meaning of 'welfare' within the duties of the OHS Act and fits within the 'health' definition.

VACC believes that objectives in the OHS Act are essential in highlighting what the law is set up to do. The objectives of the OHS Act should state:

- All employees and others in the workplace should be protected from risks to health and safety arising during the course of work;
- To eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work;
- To ensure that the health and safety of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
- To provide for the involvement of employees, employers, and organisations representing those persons, in formulation and implementation of health, safety and welfare standards.

The principles of the OHS Act should stem from the objectives of the OHS Act. The principles should outline the main concepts of how the OHS Act should be understood and used to guide regulators and duty holders. VACC recommends the following principles:

- The highest level of health and safety protection, so far as is reasonably practicable for persons at work.

- When controlling or managing risks to health and safety, the person responsible should aim to eliminate or reduce those risks so far as is reasonably practicable.
- Duty holders should be pro-active, and take all reasonably practicable measures, to ensure health and safety in the course of work and in the conduct of undertakings.
- Employers and employees should exchange information and ideas (consultation) in the conduct of undertakings.
- Persons during the course of work are entitled to be represented in relation to health and safety issues.

Scope, Application & Definitions

Q7. Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety 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, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

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

VACC believes that the model OHS Act should cover all industries. The model OHS Act should be general in its application so that it applies, in its duties and principles, to any conduct of work anywhere within Australia.

To accommodate the industry sectors that currently have specific legislation, VACC recommends that the industry sector legislation is better placed at a regulation and code of practice level beneath the model OHS Act. Examples of such industry sectors are mining, construction, offshore oil, rail safety, electrical safety and dangerous goods.

To achieve uniform health and safety results across Australia, the model OHS Act should contain provisions for improving coordination between safety regulators and jurisdictions. In order for this to be successful, the model OHS Act should stipulate:

- The scope of the coordination between the regulators and jurisdictions;
- How the coordination should occur; and
- How decisions would be agreed between regulators and jurisdictions.

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

Currently in all jurisdictions general duties of care encompass the conduct of work and the workplace (i.e. work premises). However, if general duties of care are tied to only the conduct of work it would take into consideration the workplace by default.

VACC recommends that the model OHS Act general duties of care be tied to the conduct of work. Furthermore, the definition of 'work' should be included in the model OHS Act.

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

VACC believes that the general duties of care under the model OHS Act should cover members of public. The model OHS Act would not necessarily need to phrase it as 'members of public' but encapsulate any other non employee or group as 'person/s'.

The duty in section 23: 'Duties of employers to other persons' under the Victorian Occupational Health and Safety Act 2004, states:

'An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer'

VACC supports the Victorian Occupational Health and Safety Act 2004 duties which cover 'persons'.

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?

The scope and application of the model OHS Act should be sufficiently broad and flexible. It needs to be flexible as some strict work arrangements can place some employers in a situation where they either have a lack of control or influence on controls.

Examples of some strict arrangements are seen in some franchises where the purchaser of a franchise business must use the specific equipment and layouts outlined by the franchiser. Another example is regarding home workers where the employer has little influence over safeguards in that person's home.

VACC recommends that flexible provisions should be placed in the model OHS Act. However, an exemption clause on an employer's duty of care should be made in situations stated above where the employer cannot influence health and safety in those areas of work.

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?

VACC is unaware of any current or emerging hazards and risks that are not effectively addressed under general duties of care. Specific hazards and risks should not be addressed within the model OHS Act.

VACC recommends that a general duty in the model OHS Act should continue to take into account the prevention against physical and psychological harm and not be hazard

or risk specific. Current and emerging hazards and risks should be addressed in the regulations, codes and guidance level of OHS legislation.

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?

The OHS Acts across jurisdictions use similar terms, however, the inconsistent definitions of these terms across jurisdictions has led to different interpretations and application of the legislation. This is seen particularly in situations where employers who operate across different states need to modify their OHS systems in each state to comply with the differing interpretations of terms.

VACC recommends that 'uniform' terms and definitions are critical in achieving National OHS legislation. Each jurisdiction should not have the ability to alter terms and definitions. The national reform should not give state leeway to jurisdictions to change any part of the future national OHS legislation. If such leeway is granted it would lead back to a different interpretation and application of the legislation across various jurisdictions as presently applies.

Duties of Care – Who owes them and to whom?

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?

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?

Some of the state jurisdictions contain a form of 'control' test in the OHS Act. A form of control test that exists in some states is the 'reasonably practicable' test or 'practicable'

test. The 'reasonably practicable' test or 'practicable' test provides clarity about the extent of control the duty holder has in the workplace.

In determining who is a duty holder in relation to the role of control, VACC recommends that the duties are made general. In doing so, in every case duty holders must decide, based on facts in their particular circumstances, whether they have a role of control and to what capacity they have control. Furthermore, general duties allow duty holders the freedom to develop their own solutions.

VACC is of the opinion that control should not be able to be delegated or relinquished. If OHS law allowed delegated or relinquished control duties there would be gaps in the protection of health and safety of employees and others.

Q19. Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

VACC believes it would be difficult to clarify the responsibilities in the model OHS Act where multiple duty holders and multiple duties are involved. Some circumstances where multiple duty holders and multiple duties exist can be confusing, based on differing work arrangements. The model OHS Act should have an overlapping of duties to ensure the health and safety of employees and other persons are always considered. If there are common situations that arise and the duties can be outlined then VACC recommend a position paper or guidance material that clarify the responsibilities.

Q20. Is primary reliance on employment relationships a valid basis for framing safety obligations?

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Q22. Is there a broader concept that more effectively covers the various work arrangements?

VACC believes primary reliance on employment relationships is a valid basis for framing safety obligations. All employment relationships should be covered by the same protections and safety obligations.

Self-employed persons in some jurisdictions only have a duty to ensure the health and safety of 'others'. In some cases, the duty only to 'others' has given the impression to some self employed persons that they don't need to take the same safety precautions for themselves.

VACC recommends that the model OHS Act should have a duty on self-employed persons to take reasonable steps to ensure their own health and safety at work. This would ensure safe work practices are conducted consistently across all businesses, whether they have employees or not.

The model OHS Act should have duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons conducting work. VACC propose that the various work arrangements should be covered by an employer duty to other persons. The term 'person' would cover any category outside of the 'employee' definition. Not only would this cover the above mentioned categories but it would also take into account a member of public who may be impacted by the conduct of work.

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

Q24. To whom should these duties be owed?

All OHS Acts include a general obligation which requires an employer to ensure the health and safety of employees. VACC recommends that the general obligation should continue to exist in the model OHS Act, but also clarify what the employer must do to meet the duty of care. The clarification would specify duties to:

- Provide safe systems of work;
- Provide or maintain safe plant;

- Provide for the safe use, handling, storage and transport of substances;
- Monitor the health and conditions of employees in the workplace;
- Provide adequate facilities for the welfare of employees; and
- Provide information, instruction, training and supervision to ensure health and safety.

The duties should be owed to employees to the extent that is reasonably practicable. Furthermore, VACC recommends that employers take reasonable care to ensure their own health and safety as well.

Q25. How, and to what extent, should the model OHS Act specify worker's duties of care?

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?

All jurisdictions contain duties of employees. VACC recommends that the model OHS Act and regulations contain duties of employees. VACC proposes the following employee duties:

- Take reasonable care for his or her own health and safety;
- Take reasonable care for the health and safety of others;
- Co-operate with his or her employer with respect to any action taken by the employer to comply with health and safety requirements; and
- While at work, an employee must not intentionally and recklessly interfere with or misuse anything provided at the workplace in the interests of health and safety.

VACC proposes that duties of care for persons who are not performing work should be implemented in the model OHS Act. Although the current OHS Acts generally place most of the onus on the employer to take care of the health and safety of employees or other persons in the workplace, anyone who enters the workplace should also have a duty of care on themselves and others.

VACC members are often faced with situations where customers wander into the mechanical or panel workshop area (sometimes accompanied by their children) to see what is happening with their vehicle. The employers of these workshops post signage to alert customers not to enter, have physical chain barriers, verbally tell customers not to enter and provide safe areas to wait. However, customers still fail to comply with all of these risk controls. Therefore, VACC believes that customers need to be held accountable when they don't comply or even when they fail to control their children in the workplace. The full onus cannot be placed solely on the employer after the employer has done everything that is reasonably practicable to provide and maintain a safe working environment. This is one of many examples where a provision for the duty of care on other persons is required.

Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?

Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?

VACC strongly believes that the model OHS Act should not provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities. A provision such as this would give employers an opportunity to make a person a scapegoat when an OHS incident or prosecution occurs.

VACC supports the model OHS Act which provides for employers to employ or engage persons who are suitably qualified in relation to occupational health and safety. The person would have the ability to provide advice to the employer concerning the health and safety of employees.

Current jurisdictions have duties for senior officers of organisations. These provisions take into account the duties of officers of bodies corporate. VACC believes positive

duties should be implemented into the model OHS Act. Such duties are required for the organisations that entail the board or senior officers of the body corporate to determine expenditure and sign off of health and safety initiatives within the organisation.

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?

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?

Current provisions for persons in control of a workplace are clearly expressed. VACC believes that section 26 of the Victorian OHS Act 2004, 'Duties of persons who manage or control workplaces', covers this duty area. The provision states:

'A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risk.'

The provision clearly expresses the duty of care of the person and the circumstances in which the duty is owed. However, the provision would require an expansion relating to whom the duty is owed. In most cases the duty of care would be owed to non employees, e.g. where an office building owner would have a duty of care on the building tenants. The building owner would also have a duty of care where building, structure or facilities that are controlled by the owner could affect the building tenants.

VACC recommends that the duty be owed to 'persons' in general as it would cover the various categories of work arrangements and non employees.

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

A number of jurisdictions place duties on the designers of buildings and structures to ensure that they are designed to be safe and without risk to the health of persons using them as a workplace.

VACC recommends that the model OHS Act should impose a health and safety obligation on designers. Nevertheless, the health and safety obligation should not cover the construction phase through to the disposal phase of the building or structure. Designers may not have control over the decisions about the construction of the building or structure or be involved or present in the decommissioning process and disposal of the building or structure.

The designer duty should remain in the conceptual and drafting phase of the building and structure. The duties should cover the following:

- Accessibility of a person into and out of the building or structure;
- Types of materials used (i.e. not to incorporate dangerous substances into the design, for example, asbestos);
- Structural integrity is adequate for its intended use; and
- Safeguards (e.g. guard railings for fall hazards).

VACC is of the opinion that the model OHS Act should deal with relevant upstream activities within the national jurisdiction. To cover such upstream activities there is a need to follow the chain of responsibility and codify the duties of those who design, manufacture, import, and supply products used in the course of work. In some situations

the duties will be overlapping or the duty holder could be all of the above duty holders. This would ensure that the duty of care is always present.

VACC believes that the model OHS Act would not have an influence outside of the country. However, this should not mean that an importer or supplier would be responsible for the design and manufacturers' duties for the reason that they cannot influence the design or manufacture of the item. VACC members can be impacted in situations where a vehicle or piece of farm machinery is imported from overseas. However a duty would still exist on the supplier to make the designer and manufacturer overseas aware of any non conformance and seek a solution. Furthermore, the supplier would also have the duty of care to the purchaser.

VACC is of the opinion that 'supply' should be defined by the supply and re-supply by way of sale, exchange, lease, hire or hire-purchase. The definition of 'supply' should apply in all cases of wholesale, retail, second hand, and gratis.

'Reasonably Practicable' & Risk Management

- Q37. Should a test of "reasonably practicable" be included in the model OHS Act?
- Q38. If not, what alternative standard should be included?
- Q39. How should the standard be defined? What level of detail should be provided?
- Q40. Should control be an element of the standard? (see Chapter 3)
- 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?

VACC strongly believes that a test of 'reasonably practicable' is required in the model OHS Act. 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 offers greater transparency about the intent of the law.

The test of 'reasonably practicable' is a well understood concept in common law countries. VACC believes that the test represents an objective standard which has broad community acceptance and to the majority of jurisdictions across Australia.

VACC recommends that the model OHS Act adopts the 'reasonably practicable' elements under the Victorian Occupational Health and Safety Act 2004, section 20, which state:

' 2) To avoid doubt...regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety-

- a) the likelihood of the hazard or risk concerned eventuating;*
- b) the degree of harm that would result if the hazard or risk eventuated;*
- c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;*
- d) the availability and suitability of ways to eliminate or reduce the hazard or risk;*
- e) the cost of eliminating or reducing the hazard or risk.'*

VACC strongly opposes provisions of 'absolute duties' without qualification as currently in place in New South Wales and Queensland.

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

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?

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

VACC is not concerned if the model OHS Act defines or does not define 'hazard' and 'risk' as the definitions would not change the objective, principles or intent of the model OHS Act. Terms should only be defined in the model OHS Act if further clarity is required or if there is the case where the term could be interpreted in different ways.

As stated in the answers to questions 37 to 41, VACC supports the test of reasonably practicable. A definition of 'reasonably practicable' would further assist employers and courts in its interpretation. The elements of the test and similar guidelines as explained further as per the Victorian OHS Act 2004 section 12 guidelines, provide enough definition and guidance.

VACC is of the opinion that risk management principles and processes are not required in the national OHS laws. The current path taken by the Victorian OHS legislation addresses all risks, cuts red tape and time wasting for employers.

Risk management principles and processes have some value as they offer tools and methods of analysis and priority. Some issues associated with risk management processes are:

- Risk management processes don't always allow for low risks to be addressed;
- The processes are not suitable for small sized employers;
- Substantial amount of red tape;
- Risk assessments are only as good as the people conducting them; and
- Risk management processes can be subjective from person to person or dependent on the group dynamics.

VACC recommends the model OHS Act does not include risk management principles and processes. The model OHS Act should follow the course adopted in section 20 of the Victoria Occupational Health and Safety Act 2004. Furthermore it contains a general duty of identifying hazards and controlling hazards by eliminating the risk to health and safety or reducing the risk so far as is reasonably practicable.

Consultation, Participation and Representation

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

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

Q47. Should there be different levels of consultation required for different work relationships?

Q48. How should consultation be provided for:

- a multi-employer worksite;
- an employer with operations across more than one worksite;
- small business;
- remote workplaces;
- precarious employment; and
- workers from culturally and linguistically diverse backgrounds.

All Australian jurisdictions currently place a consultation duty on employers in their OHS Acts. Although the provisions vary in the particulars from one jurisdiction to the next, the intent of consultation is for employers and employees to exchange information and ideas about risks to health and safety and measures that can be taken.

VACC believes consultation provisions should be incorporated in the model OHS Act. The provisions should highlight who and what should be consulted. The model OHS Act should not prescribe how consultation should occur as there are various methods an employer could utilize. On many occasions either the size or dynamics of the operations of the business would impact on how consultation could occur. VACC recommends that consultation provisions are flexible to allow employers to adapt to different work relationships and arrangements.

VACC is of the opinion that the consultation provisions should apply to employees of the employer. The consultation provision should include contractors, however only in situations where the contractor/s work more than a day's work for the employer.

The consultation provisions for Health and Safety Representatives (HSRs) should not differ to that of the employees and not place a priority on HSRs to be consulted prior to employees. The provisions for consultation should remain general and not prolong the consultation process.

Q49. Should there be a requirement for establishing HSRs and Health and Safety Committees (HSCs)?

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?

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

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

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?

Q56. Are there alternative mechanisms that should be considered?

Q57. To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

Q58. Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

The OHS Acts in most jurisdictions contain provisions which provide for HSRs and Health and Safety Committees (HSCs). VACC supports comparable provisions in the model OHS Act. These provisions should be flexible to take account of changing workplace circumstances and arrangements.

VACC recommends that HSRs should be appointed or elected by the employees that the HSR will be representing in the workplace. The election process should be prescriptive in the model OHS Act so it provides for a fair election process. Furthermore, conducting the election process should not be solely left in control of the employees and should involve the employer in the process.

VACC believes any person in the workplace and in the designated work area that is deemed as an employee of the employer should be entitled to vote in the election of a HSR for the area he/she will be representing.

VACC agrees that the HSR should have rights and powers. The rights and powers of a HSR should be to:

- Represent employees on health and safety issues;

- Inspect any part of the workplace where a member of the designated work group works;
- Accompany an inspector during an inspection;
- Attend HSCs;
- Be present at an interview concerning an OHS issue with an inspector or between a member and employer, if a member of a designated work group consents;
- Consult with the employer and employees on OHS issues;
- Conduct a cease work in the event of an immediate risk;
- Place a notice on the employer in the event of a non-immediate OHS issue; and
- Attend relevant OHS training courses.

A HSR of a designated work group should only hold office for a limited period so it gives other employees an opportunity to be elected to the role. VACC recommends that a HSRs role should not exceed 3 years and that the HSR cannot be re-elected for the next term, unless no other employee wants to do the role. Furthermore, the model OHS Act should specify that short term employees or in-frequent employees such as casual workers or people employed for a short set period of employment cannot become HSRs. The reason for this is that a short term employee or in-frequent employee could not adequately represent its members as they would not be present most of the time. Also by the time the adequate training is sourced the employee may have finished their job.

The HSCs structure should not be prescribed in the model OHS Act as flexibility is needed to suit different work arrangements and size of businesses. The functions of the HSC should be set out in the model OHS Act to give clarity to what HSCs should focus on. VACC is of the opinion that training for HSC members should not be mandated, however, guidance material could be provided to HSC members on the content and conduct of HSCs.

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

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

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

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

The authorised representatives that most jurisdictions entitle to exercise the right of entry provisions are the unions. The powers of unions to exercise their right to enter workplaces are predominately to inspect, observe and consult for the purpose of enquiring into a suspected contravention of the OHS Act or regulations. VACC believes that right of entry should be provided for unions in the model OHS Act, however, with limitations.

VACC believes that the limitations for the right of entry should be only for a workplace that has employees who are members of a registered employee organisation. The model OHS Act should specify that authorised representatives must undertake training by the Authority and apply for an entry permit through the courts. The power of an authorised representative to enter a workplace is to inspect, observe and consult for the purposes of enquiring into a suspected contravention of the OHS Acts or regulations. The model OHS Act should stipulate the process a union representative must use when exercising a right of entry. VACC recommends the following steps should be inserted in the model OHS Act:

- The authorised representative must give 24 hour notice to the employer;
- The authorised representative can only enter during working hours;
- The authorised representative must show their permit to the employer upon entry;
- Notice must also be in the form approved (in writing) by the Authority and include a description of the suspected contravention; and
- Must comply with health and safety requirements of the workplace while onsite, (this includes the accompanying of a site visitor at all times).

VACC opposes the power of an authorised representative to issue a provisional improvement notice (PIN) to the employer. HSRs of the designated work group should only be given this power.

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?

VACC supports the inclusion of provisions in the model OHS Act to assist the effective resolution of health and safety issues. The model OHS Act should clearly specify the issue resolution procedure and should formulate the procedure within the model OHS Act to be used by the workplace with or without HSRs. The model OHS Act should not allow for an issue resolution procedure to be modified and agreed upon between employer and employees. Some of the current jurisdictions allow for an agreed procedure and it has been found that some agreed procedures do not comply with the OHS Act or regulations.

The model OHS Act should also define the term 'issue resolution' to ensure there is no misinterpretation of the provision. Furthermore, guidance material would be needed to assist all key stakeholders to understand the function and use of the procedure and to outline key definitions within the issues resolution process. Often there has been debate regarding what is an 'immediate risk' which could justify a cease work. Furthermore, there have been circumstances where HSRs have exercised their powers through issue resolution where it was not warranted due to a misinterpretation of the procedure.

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?

OHS laws around Australia are directed to ensuring that persons are not required to undertake work that may put at risk the health and safety of themselves and others. VACC believes that the model OHS Act should provide for the right of workers or any person to either refuse or cease work where they consider the work is either a threat to health or is unsafe. The model OHS Act should further clarify the steps a person should take when either refusing or ceasing work due to health or safety concerns. VACC recommends similar steps for workers and/or HSRs:

1. Once the worker or person has reasonable justification to believe that he or she is faced with imminent and serious danger, he or she may refuse or cease work.
2. The worker is required to make the employer aware of the situation immediately and if need be, simultaneously alert other workers in the area of the serious danger.
3. The employer, worker or any person is to follow the issue resolution procedure going forward.

The process should not differ in circumstances of imminent and serious danger regardless whether it applies to a HSR or worker. The additional power a HSR has is the issuing of a provisional improvement notice to the employer.

VACC believes the model OHS Act should require the payment of wages to workers who have exercised the right to cease work in accordance with the Act but only if the cessation of work was a reasonable and genuine risk to danger. If the cease work was not reasonable and genuine the employer should not be required to make payment to the worker for the time lost. This provision is required to safeguard an employer and place a monetary loss to an employee who uses a 'cease work' for the wrong reasons.

Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?

Q72. Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?

Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?

Q74. Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?

Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

Q76. What remedies should be available to the victims?

Q77. Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

VACC strongly believes that the model OHS Act should not include provisions which deal with discrimination against employees or prospective employees. The insertion of discrimination in the model OHS Act would duplicate provisions which already exist in current equal opportunity legislation across Australia.

In Victoria there is duplication of discrimination legislation. The Equal Opportunity Commission of Victoria can investigate claims of alleged discrimination on the grounds of industrial activity and employment activity (comparable discrimination grounds), and can thus express the view that a non-compliance with the *Equal Opportunity Act 1995* ('EO Act') occurred, cannot use any instrument that would apply a remedy that ordinarily would only be available to a court of competent jurisdiction under the EO Act. However, the Victorian Occupational Health and Safety Act 2004 contains a provision against discrimination which is inconsistent with the EO Act in that:

- The penalties under the Victorian OHS Act are currently tried through criminal law;

- The penalties under the Victorian OHS Act are vastly different in that they carry a 6 month jail term, a \$250,000 fine or both.
- The regulators protocol regarding discrimination stipulates that a WorkSafe Inspector can apply a remedy by issuing an improvement notice (which may include employee re-instatement); this protocol disregards the principles of natural justice.

VACC considers that discriminatory conduct in the workplace is adequately dealt with by Equal Opportunity and Discrimination legislation (both through Commonwealth and State Legislation). This is the most appropriate avenue for a person to pursue a claim for discrimination. Furthermore, having more than one avenue for a worker to access damages for alleged discriminatory conduct encourages forum shopping if the worker doesn't achieved their desired outcome in a particular jurisdiction.

Regulator Functions, Powers & Accountability

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

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

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

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

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

VACC believes that the model OHS Act should provide for the establishment, functions, powers and accountability of the regulator. VACC recommends that the roles and powers of the OHS inspectors should be to:

- Have general powers of entry into a workplace or to a scene where work is conducted;

- Inspect any workplaces;
- Provide advice and information to duty holders;
- Use enforcement measures, such as improvement and prohibition notices, to ensure that duty holders rectify breaches of OHS laws;
- Issue a search warrant;
- Acquire documents and take samples;
- Announce their entry into a workplace; and
- Give a report concerning the reasons for the entry to the duty holder, occupier and HSR.

In addition to the above, in Victoria, most decisions (or non-decisions) by an inspector can be internally reviewed by WorkSafe (section 127 of the Victorian Occupational Health and Safety Act 2004). VACC supports a provision which makes an inspector's decision liable to the internal review as this promotes transparency in OHS decision making and the process is quick and cheap for employers to access.

VACC believes the model OHS Act should require the regulator to make interpretative documents to assist duty holders and others to understand how the regulator will interpret key issues and provisions. The interpretative documents should be made in simple terms and should set an expected standard for duty holders.

- 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?
- Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?
- Q87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

VACC believes that the model OHS Act should provide for the appointment, qualifications, powers, functions and accountability of inspectors. The role of an inspector is pivotal in the enforcement of OHS legislation. OHS inspectors need to be

qualified and experienced in OHS in order to make the right decision that will impact the health and safety of employees at work and the operation of businesses.

VACC opposes the temporary appointment of inspectors, for example, the authorisation of a mines inspector or police officer. The appropriate qualifications and experience needed in OHS legislation is essential. Wrong decisions and advice could financially impact on an employer.

When an inspector issues any notice or instrument, this decision should be binding and not be capable of being modified, amended or cancelled. The only method that should allow for the modification, amendment or cancellation of a notice or instrument should be through an internal review process. The internal review process should be accessible to any duty holder. The only circumstance VACC could envisage where a notice or instrument could be modified by an inspector is where a compliance date may need to be extended.

If the model OHS Act allows for binding notices and instruments it should also allow inspectors access to the internal review. The purpose of this is in the situation where an inspector changes his or her mind regarding the decision made on a notice. This would ensure that an inspector is held accountable for the decisions he or she makes and a process is followed which investigates the situations where an inspector may have made a mistake.

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?

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?

In Victoria, most decisions (or non-decisions) by an inspector can be internally reviewed by WorkSafe (section 127 of the Victorian Occupational Health and Safety Act 2004). VACC supports a provision which makes an inspector decision liable to the internal

review as this promotes transparency in the OHS decision making and the process is quick and cheap for employers to access.

The matters that VACC believe should be reviewable are:

- Dispute of an improvement notice or prohibition notice issued by an inspector;
- Cancellation of a notice;
- Forfeiture of seized items or articles;
- Terms and conditions on the return of seized items or articles;
- Determination of unresolved particulars concerning designated work groups;
- Appointment by an inspector of a person to conduct an election of a health and safety representative;
- Applying for a variation of a decision with a notice; and
- Complaint regarding the conduct of an inspector in the workplace.

Compliance & Enforcement

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

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?

VACC believes the model OHS Act should include a hierarchy of enforcement measures in order of escalation. The measures VACC recommends from lowest to highest should be:

1. Advice and persuasion
2. Warnings and negotiated outcomes
3. Improvement notices
4. Prohibition notices
5. Probation (enforceable undertakings)
6. Fines and other punitive action (lower courts)

7. Fines and other punitive action (high courts)

Further guidance documents should be established for duty holders to comprehend the arrangements of enforcement measures.

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 time frame 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?

Most jurisdictions have statutory powers for HSRs to issue Provisional Improvement Notices (PIN) if the HSR believes that a person at the workplace is breaching or has breached the relevant OHS Act. The power of inspectors to issue improvement notices and prohibition notices is consistent across all jurisdictions. VACC is of the opinion that the model OHS Act should have provisions for such powers and enforcement measures.

VACC believes that improvement notices and prohibition notices should contain recommendations on how to achieve compliance as these notices are enforced through regulators that have the power to offer such advice. If recommendations are contained in notices, the duty holders would need to have access to the internal review provisions that would allow a duty holder to request they have another means of compliance to the non conformance.

Recommendations made on a PIN by a HSR should not be made compulsory to undertake. The duty holder who receives the PIN may disagree with the PIN in general or believe there is another means of actioning the issue. If the PIN recommendation

was made compulsory to undertake the HSR could misuse and abuse the provision to obtain something the employees wanted but is not necessarily needed.

The model OHS Act should provide minimum time frames for compliance with PINs. This would provide fair and reasonable time frames for both employees and persons receiving the PIN. Furthermore, the time frames should be referenced back in the issue resolution provisions.

VACC recommends that improvement notices and prohibition notices issued by inspectors should not have a minimum time frame for compliance. If there was a minimum time frame on a prohibition notice it could have detrimental effects on a business. In a scenario where a prohibition notice was put on a key piece of equipment in a business, the employer would want to rectify the machine as soon as possible and have the inspector return at their earliest convenience so that the operation of the business could continue. If in the same scenario a prohibition notice had a minimum compliance date of two weeks and the inspector does not return within two weeks then it could cripple a business financially. VACC further recommends that the compliance timeframe should be decided by the inspector on a case by case basis and in consultation with the duty holder who receives the notice.

The model OHS Act should have a provision consistent with the Victorian Occupational Health and Safety Act 2004 for the lodging of an application for an internal review regarding the continued operation of the notice. Section 128 of the Victorian Occupational Health and Safety Act 2004, internal review stipulates:

(6) An application under this section does not affect the operation of the reviewable decision or prevent the taking of any action to implement it unless the Authority, on its own initiative or on the application of the applicant for review, stays the operation of the decision pending the determination of the review.

(7) The Authority must make a decision on an application for a stay within 24 hours after the making of the application.

(8) *If the Authority has not made a decision in accordance with sub-section (7), the Authority is taken to have made a decision to grant a stay.*

(9) *The Authority may attach any conditions to a stay of the operation of a reviewable decision that it considers appropriate.*

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

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

Q99. What amounts should be specified as fines for infringements?

VACC believes that employers will be burdened financially with the introduction of infringement notices often referred to by industry as “*on the spot fines*” and there is no justification for change. Infringement notices will only broaden the current range of penalty options available to the regulator, rather than make the workplace safe and may be used primarily for raising revenue. Inspectors already have access to a range of options to ensure compliance. Currently, inspectors can apply an improvement notice or a prohibition notice or even pursue prosecution. For these reasons, VACC questions the need to introduce infringement notices. There is no evidence across any jurisdiction that current options have failed to ensure compliance.

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?

VACC totally opposes the inclusion of injunctions to ensure compliance within the model OHS Act. By allowing injunctions, an applicant could take action against an employer although they have not committed an offence against the OHS Act, and there is no specific evidence found that the employer would commit an offence against the relevant OHS Act or regulation.

VACC would only endorse the inclusion of injunctions in the model OHS Act if the injunctions were based on specific evidentiary requirements, which is based on the serious risk to health and safety. Furthermore, it should limit the power of injunction to certain aspects of the model OHS Act. Injunctions could be misused to achieve other industrial purposes such as the selling of a business, implementation or change of an employee's roster or changing of other work arrangements.

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?

VACC supports the adoption of enforceable undertakings into the model OHS Act. The benefit of enforcement undertakings is that the terms can be tailored to suit particular circumstances and can bring about internal change in the offender's business to either secure or at least encourage future compliance with the OHS Act. Furthermore, enforceable undertakings can have a greater benefit to the community and industry in comparison to fines.

VACC recommends that enforceable undertakings as a sentencing option in OHS prosecutions should be available to any level of breach. For more serious offences, a court should be able to impose a combination of fines or adverse publicity orders in addition to an enforceable undertaking, in order to lower the monetary penalty so it doesn't force an employer into liquidation, as large fines currently do.

Prosecutions

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

Q105. Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

OHS offences should be tried in the criminal jurisdiction, either in the Magistrates' or County Courts. VACC believes civil proceedings or a mixture of both criminal and civil do not fit as a breach of an OHS Act duty is a criminal offence and does not give rise to civil remedy.

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

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

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

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

VACC believes the courts that should have jurisdiction to hear prosecutions for OHS offences are the Magistrates, County, Supreme and Federal Court. As most jurisdictions follow the standard appeals procedure of each jurisdiction flowing from the Magistrates Court upwards to the County Court, Supreme Court or the Federal Court and finally the High Court, the model OHS legislation should follow in the same manner.

VACC supports that defendants be entitled to trial by jury in the County Court for only the serious indictable OHS offences. VACC recommends that the indictable offences should be for the following areas:

- general duties of employers and employees
- duties of persons who manage or control workplaces
- duties of designers of plant
- duties of designers of buildings or structures
- duties of manufacturers of plant or substances

- duties of suppliers of plant or substances
- duties of persons installing, erecting, commissioning or decommissioning plant
- duty not to recklessly endanger persons at workplaces
- failure to comply with prohibition notices

VACC strongly opposes indictable offences under the following areas:

- failure to comply with a provisional improvement notice
- failure to comply with improvement or non-disturbance notice
- discrimination by an employer against an employee by virtue of his or her role in OHS matters
- failure to comply with the direction of an inspector

The failure to comply in any of the above scenarios is not serious enough to justify an employer being charged for an indictable offence. The use of indictable offences should be confined to breaches of duties where an employee or person could sustain serious harm or death.

Q110. Who should be entitled to commence criminal proceedings?

Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

Q112. What should appropriate time limits be for the commencement of a prosecution and why?

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?

The model OHS Act should give the Authority the exclusive right to bring proceedings for offences against the OHS Act. There is no justification for bestowing any other party, whether it is a union, worker or another party, a statutory right to initiate a prosecution. The prosecution of duty holders for criminal offences is a matter of the utmost seriousness, and for this reason the prosecution functions should remain with the Authority. Furthermore, there is considerable potential for conflict if third parties have a

right to prosecute for offences where the local OHS Authority has already used or intends to use other enforcement tools.

Q114. Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

Q115. Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?

Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

The model OHS Act should contain specific evidentiary procedures for the OHS prosecutions as some of the current jurisdictions are varied.

VACC believes that failure to comply with relevant codes is not deemed to represent a breach of the OHS Act. The duty holder can demonstrate compliance with the OHS Act by other means and prove the other means as the defence to the prosecution.

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

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

Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?

Q120. What, if any, defences should the model OHS Act provide?

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

VACC believes that the 'reasonably practicable' standard is appropriate for the model OHS Act and currently exists with most jurisdictions (local and international jurisdictions).

VACC is of the opinion that the prosecutor should bear the onus of proving all of the elements of an offence. This is consistent with the criminal law principle and with human

rights principles. Furthermore, a person who is charged with a crime has the right to be presumed innocent until proven guilty according to the law.

VACC recommends there should not be any differences between the prosecution of a corporation and an individual (officer or employee) under the model OHS Act.

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

Q123. How should 'officer' be defined?

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?

Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

Q127. What should the approach to officers of unincorporated associations or volunteer officers be?

VACC opposes the insertion of a provision in the model OHS Act which provides for an offence because the corporation has committed an offence. 'Duties of Officers' should not be included in the model OHS Act. There is no doubt that the inclusion of 'Duties of Officers' in the model OHS Act would constitute an unreasonable extension of 'Duties of Employers'. The Duties of Employers is totally explicit. Employers must provide a safe place and safe system of work. The only possible justification for such an extension would be to place an increased onus on individuals. There is already a perceived bias against employers in most OHS Acts because of the Authority's failure to prosecute employees for breaches under the 'Duties of Employees' provision. The inclusion of 'Duties of Officers' will only add to the perception that the legislation is aimed solely at employers.

Another justification for not supporting the provision of 'Duties of Officers' in the model OHS Act is due to the fact that the definition of 'officer' across jurisdictions can vary so much that in many cases the definition can apply to most manager roles in the management chain. Throughout the management chain of an organisation the 'decision making' process and determination of who has the duty to control will vary. VACC recommends the Duties of Employers and the duties of persons who manage or control workplaces adequately cover such provisions.

VACC believes that unincorporated associations, volunteers or members of an entity that are deemed as officers are not liable for prosecution.

Q128. For which offences should monetary penalties (fines) be imposed?

Q129. Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

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?

Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

VACC is of the opinion that the level of fines should be different for the various offences. Offences which have no direct serious impact on the health and safety of employees should have lower fines; for example, failure to consult. Offences that have a serious impact on the health and safety of a person at work which results in serious injury or death should attract higher fines.

There is no justification for imposing statutory minimum fines for any offence under the model OHS Act if an alternate non-monetary penalty is available.

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?

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

Q139. What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

Q140. Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?

Q141. Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

VACC supports the adoption of some “other” enforcement tools such as community service and probation orders. Such tools are already provided for in some jurisdictions, but Magistrates are reluctant to use them.

Consideration should be given to “fines” being allocated to direct expenditure on OHS by the employer, rather than payment into consolidated revenue. Such expenditure could be used in the employer’s workplace or in the community and other services.

VACC supports the adoption of enforceable undertakings into the model OHS Act as expressed under Q101, Q102 and Q103.

VACC strongly opposes the imprisonment of individuals for any offences under the model OHS Act.

Other Issues

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

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?

VACC believes that the case for developing regulations must be evidence based. Where the evidence indicates a need for regulation, the new national body (replacing the Australian Safety Compensation Council) should consult stakeholders and perform regulatory impact statements.

VACC opposes regulations that provide for summary offences. Breaches under regulations should be taken as a breach of the model OHS Act and prosecutions should only occur through the model OHS Act. If prosecutions were to occur both through the regulations and model OHS Act then the duty holder could potentially be prosecuted twice for the same breach.

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

VACC believes that the model OHS Act should make provisions relating to the development and approval of codes of practice. VACC recommends the following requirements for the ratification of codes:

- National codes are developed by the new national body in consultation with stakeholders;
- Gap analysis of existing codes is performed;
- Public comment, consultation and advertising arrangements occur;
- Consideration of recommendations from the OHS authorities in each state;
- Submissions to Parliament; and
- Specific expiration clauses.

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

Notification of incidents and reporting requirements provide valuable data for the OHS authority to target their compliance and enforcement efforts. Bearing in mind that the current data sets have limitations, other data from other reporting sources is required to adequately identify the accuracy of the data.

VACC believes that the model OHS Act could not provide for incident notification without compliance burden, however, a mechanism could be provided for where duty holders can raise new or emerging issues with the regulator where there is no compliance requirement to do so. One example of such a mechanism is where employers complete an anonymous census on health and safety performance in their workplace annually. The census could contain incident data, hazards in the workplace, common controls used, potential emerging issues and other key performance indicators.

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

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

VACC supports a provision being included in the model OHS Act for the external review of regulatory decisions. In most cases an internal review would handle most decisions.

VACC believes there would be limited use in introducing a conciliation process for the resolution of OHS issues as most jurisdictions would resolve the majority of such issues through the Authority's inspectors. If any party has a dispute as to what the inspector has determined it could be dealt with through the internal review process.

VACC supports the Victorian OHS provision for the Victorian Civil and Administrative Tribunal to review the outcomes of internal review panel.

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

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

VACC strongly supports tripartism in the administration of OHS regulation in the model OHS Act. VACC's opinion with regard to this topic is that some of the current jurisdictions that have tripartite mechanisms in place only function on the principles of consultation rather than agreement through voting processes. The administration should be agreed upon through a voting system where there is an equal vote between Government, Employers and Unions.

VACC believes that provisions should be made to establish tripartite committees which deal with OHS matters. These tripartite committees should encompass all industries rather than specific industries.

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

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

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

In relation to issues such as training, licensing, permits, registration and competency requirements, there should not be a provision for mutual recognition. Mutual recognition defeats the purpose of national consistency.

The principles for a provision on licensing etc should be proportionate to the risk, with a defined and achievable safety benefit resulting from the duty placed on the regulator.

Instead of a mutual recognition provision, a provision in the model OHS Act should deal with Permits, Licensing and Registration and contain the following:

- Requirements for license or registration.
- Requirements for prescribed qualifications or experience.
- Requirements for permit or certification of competency

Part 6 of the Victorian OHS Act 2004 adequately deals with licenses, registration, permits and other requirements.

VACC believes that improved harmonisation most likely will occur if there are no provisions for mutual recognition.

Q152. How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

VACC strongly supports that the model OHS Act be framed to reduce and remove the extent of overlap between Federal and State or Territory OHS laws.

