Australian Government

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

ISSUES PAPER

MAY 2008

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INTRODUCTION

Every workplace in Australia is subject to laws aimed at preventing workplace death, injury and disease. There are separate national, State and Territory statutes for this purpose.

The Australian, State and Territory governments are working cooperatively to harmonise occupational health and safety (OHS) legislation. The Workplace Relations Ministers have agreed to the use of model OHS legislation as the most effective way to achieve harmonisation.

On 4 April 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, appointed an independent advisory panel (the Panel) to conduct a national review to inform the development of a model OHS Act.

The terms of reference reflect the objectives of harmonisation, including better health and safety, greater regulatory efficiency and effectiveness, more certainty for duty holders and the elimination of unnecessary regulatory compliance burdens.

WHAT IS THIS REVIEW ABOUT?

The Panel has been asked to review OHS legislation in the State, Territory and Commonwealth jurisdictions. The Panel is then to make recommendations to the Workplace Relations Ministers Council on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions. The review includes an examination of the following areas:

a) duties of care, including the scope and limits of duties;

b) the nature and structure of offences, including defences;

c) scope and coverage, including definitions;

d) workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;

e) enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;

f) regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional cooperation and dispute resolution;

g) permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;

h) the role of OHS regulatory agencies in providing education, advice and assistance to duty holders; and

i) other matters the Panel identifies as being important to health and safety that should be addressed in a model OHS Act.

The full terms of reference, including the scope of the review, are at Appendix A.

Although the terms of reference require the Panel to report to the Workplace Relations Ministers' Council in two stages, with specified priority areas to be dealt with first, this document invites submissions on all of the above issues.

While the focus of the review is on the content of principal OHS Acts, the Panel recognises the interdependence of those OHS Acts with their subordinate regulations, as well as the overlap with other safety laws. These operate in areas such as electrical safety; mining safety; rail safety; road transport safety; maritime safety; and dangerous goods.

The review will examine the breadth of regulation required to support a model OHS Act, but will not cover the specific detail found in OHS regulations, codes of practice and guidelines. The

review will also not cover the content of other safety laws, but will examine the extent to which such laws could be accommodated under a model OHS Act.

WHAT IS THE PURPOSE OF THIS ISSUES PAPER?

This document aims to provide information and raise issues about Australia's OHS laws in order to stimulate discussion and encourage written submissions to the review. The submissions will assist the Panel in making recommendations to the Workplace Relations Ministers' Council on the optimal structure and content of a model OHS Act.

The issues identified in this document are based on research conducted by the Panel to date, and on preliminary consultations held with a range of stakeholders in all jurisdictions.

APPROACH TAKEN IN THIS ISSUES PAPER

In developing the Issues Paper, the Panel has considered key elements of a system for the regulation of OHS and the relationships between those elements.

The chapters are intended to highlight – and invite submissions on specific issues relating to – the following concepts and principles:

- the paramount reason for OHS legislation is to protect the health and safety of persons undertaking or affected by work;
- OHS legislation should be designed to facilitate, support and secure that protection;
- the protection of health and safety should be enabled and supported by statutory duties of care and other obligations, which are imposed on those who cause work to be performed and contribute to the processes and means (e.g., plant and premises) for work to be undertaken;
- worker participation, representation and consultation at the workplace assists duty holders to understand OHS issues and make informed decisions;
- the legislation should provide for an effective regulator with sufficient powers and resources to facilitate and ensure compliance with duties of care by various means, including advice and information; and
- because duty holders may not comply with obligations for a variety of reasons, effective and graduated enforcement mechanisms are required for use by the regulator and others.

In the context of the terms of reference, the Issues Paper follows this flow of concepts and principles. The Issues Paper generally describes the approaches taken in the various statutes rather than analysing individual provisions in detail. On the other hand, where a provision may be of particular interest, it is identified and discussed.

HOW CAN YOU CONTRIBUTE?

Your views on the issues raised in this paper are important to ensure that the legislative OHS framework is effective and responsive to the needs and working arrangements of Australian workplaces.

Many of these issues have also been considered in recent reviews of OHS laws in Australia. Persons interested in making a written submission may find the list of resources at Appendix B and on the website at www.nationalohsreview.gov.au useful to gain a broader understanding of the nature of the issues and the various views on how they should be addressed.

Submissions are not limited to the questions raised in this document. The Panel welcomes your comments on any other matters within its terms of reference that you believe should be

considered in the review. In any event, your written submission should, wherever possible, include evidence and examples to justify your position on each issue.

You can provide your comments as an individual or you may wish to contribute to a joint submission through your employer or union organisation, professional association, safety group or community forum.

Submissions should be prepared using the template provided on the review website at www.nationalohsreview.gov.au

Although submissions will be accepted in other formats, use of the template will assist the Panel in analysing submissions.

The closing date for written submissions is Friday 11 July 2008. Submissions may be lodged by email or post:

Email: publicsubmissions@nationalohsreview.gov.au
Mail: National OHS Review Secretariat
Department of Education, Employment and Workplace Relations
64N1 GPO Box 9880
CANBERRA ACT

Once your submission is received, an acknowledgement will be sent to confirm receipt. Each submission will normally be treated as a public document and placed on the review website. If any information in the submission is provided on a confidential basis, it should be clearly marked 'IN CONFIDENCE' and it will not be made publicly available.

WHAT HAPPENS AFTER THE PUBLIC COMMENT PERIOD CLOSES?

The Panel will review and analyse all the written submissions that it receives. Following its analysis of submissions, the Panel intends to hold further targeted consultations with stakeholders, for example, through roundtable discussions of complex issues.

In addition to the submissions it receives, the Panel will take account of a range of material in developing its recommendations for the Workplace Relations Ministers. This includes relevant Australian and international research, and findings and recommendations from recent reviews of OHS laws commissioned by Australian governments.

The Panel has been asked to provide two reports to the Workplace Relations Ministers' Council. The first report, due by the end of October 2008, will deal with matters that Workplace Relations Ministers have identified as requiring priority consideration. The second report, which is due by the end of January 2009, will deal with all remaining matters.

A model OHS Act, based on the Workplace Relations Ministers' response to the Panel's recommendations, is to be provided to the Workplace Relations Ministers Council in September 2009 for decision.

Draft model OHS regulations to support the model Act will be developed progressively, following agreement to the Act. Compliance and enforcement protocols will also be developed to ensure nationally consistent regulatory approaches.

YOUR OPPORTUNITY

This review provides all members of the Australian community – particularly workers, employers, their respective organisations and regulators – with an opportunity to contribute to creating a model OHS Act that will be used to harmonise OHS laws across Australia and improve occupational health and safety.

At this stage of the review, the Panel has not reached conclusions on any issue. However, the Panel is mindful that it will be proposing a model law that will be consistent with Australia's

ratification of the International Labour Organisation's *Occupational Safety and Health Convention 1981* (No 155).

The Panel is keen to receive your views, so that it can make the most of this important opportunity to improve Australia's legislative regime, to promote safer and healthier workplaces, increase certainty for duty holders, reduce compliance costs for business and provide greater clarity for regulators, without compromising safety outcomes.

The Panel acknowledges and values the high level of support and cooperation it has received from all participants in its preliminary consultations and from the Review's secretariat.

Robin Stewart-Crompton (Chair)	Stephanie Mayman (Member)	Barry Sherriff (Member)

30 May 2008

CHAPTER 1: LEGISLATIVE APPROACH

This chapter considers issues that are fundamental to all parts of the model OHS Act, being:

- its objects and whether it should contain a statement of principles – to influence how the Act will be interpreted and applied; and
- how much detail should be provided in it, rather than in regulations, codes of practice or guidelines.

1.1 REGULATORY STRUCTURE

All jurisdictions have a three-tier model regulating OHS, based on the approach espoused by the Robens Committee in the United Kingdom.[1] This involves a principal OHS Act that sets out general duties of care, supported by more detailed provisions contained in regulations. Methods to achieve the requirements of the Acts and regulations are provided for in codes of practice and guidance materials.

There is, however, variation in the approach and the degree of detail in each jurisdiction's hierarchy of Acts, regulations and codes. Within this hierarchy, the following approaches are used to influence behaviour, consisting of:

- principles-based standards (general duties of care);
- performance-based standards (specifying only the outcome to be achieved);
- process-based standards (specifying a process or series of steps to be followed, e.g., risk management); and
- prescriptive standards (describing precisely what measures should be taken and requiring little interpretation).

The challenge is to achieve an appropriate balance in the legislative structure between general duties, prescription, performance and process based standards that can accommodate the needs of small and large businesses, as well as different types of industries, and lead to the best health and safety outcomes.

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?

1.2 TITLE, OBJECTS AND PRINCIPLES

The titles of OHS laws in Australia vary, with 'Occupational Health and Safety Act' the most common. Other titles are:

- workplace health and safety;
- occupational safety and health; and
- occupational health, safety and welfare.

The objects of OHS Acts describe what the laws aim to achieve. It has become common practice to include objects, particularly to assist the courts in considering the purposes of statutes when interpreting them, and to guide officials in exercising their powers and performing their functions.

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[1] *Report of the Committee on Safety and Health at Work*, Lord Robens, 1972, HMSO, London.

On the other hand, when principles are included, they are meant to explain more directly how the law should be administered and understood.

Most jurisdictions have object clauses in their Acts. Others have the objects in the long title of their Act. The objects vary considerably between jurisdictions.

Only one jurisdiction includes a set of principles in its OHS Act following recommendations made by a 2004 review. [2] This proposed a series of 'principles of workplace safety' that could include the precautionary principle, the principle of consultation, representation and participation, the principle of eliminating risk at the source, the principle of systematic risk management, the principle of enforcement and the principle of shared responsibility.

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?

[2] *Victorian Occupational Health and Safety Act Review*, Chris Maxwell QC, March 2004, Chapter 2

CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS

This chapter considers further matters that are relevant to all parts of the model OHS Act, either by determining what it should contain or by assisting in its interpretation. This includes:

- what areas of activity the Act should cover;
- where and to whom it should apply;
- how it can accommodate ongoing changes (e.g., emerging hazards and risks, the changing nature of work); and
- how to define key terms.

2.1 INDUSTRY SECTORS

Within each jurisdiction there are a number of laws regulating OHS. The Commonwealth, for example, has separate laws relating to Australian Government employees, seafarers, offshore oil and gas safety, workers in the nuclear industry, as well as laws relating to chemicals. Some States and Territories have separate laws relating to such areas as mining safety (including specific legislation for different types of mining), electrical safety, rail safety and dangerous goods. This fragmentation is compounded by there being various portfolios and agencies at the national, State and Territory levels with policy responsibilities for different, sometimes overlapping, areas of OHS regulation.

New South Wales has a general OHS Act covering all industries, including mining, but also has separate Acts applying to metalliferous and coal mining. Queensland and Western Australia have industry specific laws covering the mining industry, which are exempt from the general OHS law. In Tasmania and Victoria, mines are covered under the OHS Act and are regulated by the OHS regulator. Following the recent review of the Northern Territory legislation, the new *Workplace Health and Safety Act 2007* includes mine safety responsibilities and dangerous goods regulation.

A National Mine Safety Framework (NMSF) was established in 2006, which includes a set of legislative principles as the basis for achieving national consistency in relation to mining regulation.[3] The principles and strategies under the NMSF have generally been consistent with approaches to OHS but have been developed separately from them. While the NMSF and a nationally harmonised OHS framework may each result in greater consistency across State and Territory boundaries for its area of operation, there is a risk of legislative inconsistencies between mining and other industries. This would be an issue for businesses operating in both sectors.

The proposals of Lord Robens contemplated the coverage of all industries under a single law. While recognising that each industry has unique features, Lord Robens saw 'no difficulty in making special provision and special enforcement and advisory arrangements for particular industries' under unified OHS legislation.[4] Britain has since brought most industries under a single system.

While most OHS regulators administer a number of Acts relating to safety (e.g., legislation for dangerous goods as well as OHS), other laws, such as rail safety, are administered by different regulators. This means that, within each jurisdiction, there are instances where more than one safety regulator has responsibilities in relation to a particular matter. This may result in confusion over who has responsibility for what. To deal with this issue, some regulators have chosen to coordinate their activities with those of other regulators through memoranda of understanding.

[3] See http://www.ret.gov.au/General/Resources-MS/Pages/NationalMineSafetyFramework.aspx
[4] *Report of the Committee on Safety and Health at Work*, Lord Robens, 1972, p. 32

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?

2.2 WORKPLACES AND NON-WORKPLACES

Generally, the duties of care in principal OHS Acts are limited so that they cover a 'workplace' or 'premises', though in some circumstances this is extended to areas 'at or near a workplace'. However, the definition of workplace has evolved to mean any place where work is performed, i.e. the focus is on the conduct of work. For example, Queensland's *Workplace Health and Safety Act 1995* defines a 'workplace' as any place where work is, or is to be performed by either a worker or a person conducting a business or undertaking. This approach covers work activities that are undertaken outside the confines of the traditional workplace, for example in private residences, in vehicles or at temporary workplaces (e.g. work on transmission lines, work in public places).

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

PUBLIC SAFETY

There are a number of issues relating to treatment of public safety under OHS laws:

- the duties held to persons other than 'workers';
- the position in OHS (or related) legislation of matters (including plant and dangerous substances) where the associated hazards may not only occur 'off site' but also outside the work context; and
- the appropriate boundary between OHS legislation and public safety regulation.

While OHS laws in all jurisdictions involve safety duties owed to third parties, who may or may not be members of the public, there is significant divergence as to whether the duties are geographically restricted (e.g., to a member of the public at an employer's workplace, a member of the public in the vicinity of the employer's workplace) or more broadly linked to the 'conduct of the undertaking'.

Further, the coverage by OHS regulators of matters such as the regulation of plant (including amusement equipment and lifts) and the safe handling of dangerous substances affects public safety. While the primary focus of OHS regulation is on workplaces and the protection of persons, dangerous goods legislation includes the protection of property and the environment.

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

2.3 RESPONDING TO CHANGE

WORK ORGANISATION

A key issue identified in a number of recent reviews of OHS legislation is how duties of care should extend beyond traditional employment relationships and address contemporary forms of work organisation and labour market arrangements, e.g., contracting, franchising, and labour hire.[5] The manner in which jurisdictions have attempted to deal with these changes in their OHS laws varies considerably.

Australia has experienced unprecedented growth in casual, part-time and temporary work, outsourcing, job-sharing and the use of agency labour and home workers. The use of migrant workers has increased due to skilled labour shortages. These changes in the structure and organisation of work pose regulatory challenges for the duties of care, for effective worker participation in OHS and for compliance and enforcement.

> 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?

EMERGING HAZARDS AND RISKS

It is a feature of the ongoing changes to the economy, technology, work organisation and population demographics that new hazards and risks are emerging. This also affects the prevalence and consequences of existing hazards and risks. For example, more attention is being given to psychosocial and work environment problems, such as stress, fatigue and bullying.

While the duties of care in OHS laws aim to protect persons from all types of hazards and risks arising from work activities, the importance of particular issues is being specifically recognised in some OHS Acts. For example, the objectives of the NSW *OHS Act 2000* refer to promoting a work environment that is adapted to the physiological and psychological needs of people at work (s.3) and the Victorian *OHS Act 2004* includes psychological health in its definition of 'health'.

> 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?

2.4 DEFINITIONS

Although OHS Acts may use the same or similar terms, the definition and interpretation of these terms may vary across jurisdictions, often limiting or broadening the scope and application of the legislation. The need to clarify key terms and concepts is recognised in various sections of this Issues Paper. For example, uniform definitions of key terms may be required, including 'worker', 'workplace', 'undertaking', 'control', 'reasonably practicable' and 'consultation'.

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[5] See, e.g. Queensland 2001; Maxwell, C, 2003 and 2004; ACT OHS Council 2005; Tasmania 2006; WA 2002 ('Laing Review').

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?

CHAPTER 3: DUTIES OF CARE – WHO OWES THEM AND TO WHOM?

This chapter discusses and invites comment on:

- how to determine who should owe duties of care;
- who should owe duties of care and to whom; and
- what the duties should be.

3.1 THE CURRENT APPROACH

Following the principles of the Robens Report, modern OHS laws in Australia require the observance of general duties by employers, employees and various other specified persons. These have been complemented by a number of specific duties.

3.2 CONTROL

The concept of 'control' is well established in Australian OHS law, yet it is not consistently interpreted or applied. All jurisdictions have incorporated the concept of 'control' into their Acts either implicitly or explicitly, which is variously used to:

- determine who has a duty;
- determine the extent of duty owed;
- apportion shared duties between duty holders where there is an overlap of responsibility (e.g., in relation to labour hire employees); and
- provide a defence (where the absence of control is argued).

An issue that emerges across OHS Acts is the differing — and sometimes limited — ways in which the concepts of 'control' and 'persons in control' are addressed. For example, most jurisdictions have a provision which establishes the responsibilities of persons in immediate control of workplaces or premises (including access and egress), plant or substances. This expression, however, is narrower than that of overall command (or control) of a process or undertaking.

Although intrinsic to OHS legislation, 'control' has not been defined or explained in that legislation, resulting in a re-examination of the fundamental meaning of the term whenever such an issue arises. The lack of a clear definition of control, or a test to determine its applicability, creates confusion for duty holders. In the 2004 review of the Victorian OHS Act, it was recommended that 'control' be defined and included in the list of factors to determine what is 'reasonably practicable.' [6]

CHAIN OF RESPONSIBILITY

The concept of a 'chain of responsibility' is implicit in current OHS legislation. By contrast, it has been comprehensively expressed and applied in the national approach to road transport laws.[7] Under these laws, the aim is to ensure that all who exercise control over conduct affecting compliance have responsibility, and are made accountable for failing to discharge that responsibility. Since, the application of the chain of responsibility does not depend on the nature

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[6] *Victorian Occupational Health and Safety Act Review*, Chris Maxwell QC, March 2004, Chapter 11. The recommendation has not been implemented.

[7] See, e.g. the National Transport Commission (NTC), 2004 in relation to the model *Road Transport Reform (Compliance and Enforcement)* legislation.

of the employment or contractual relationship, the provisions apply equally to employees and sub-contractors.

> 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?

Shared Responsibilities

In many situations, a duty for a health and safety matter may fall on more than one person. In addition a person may be subject to more than one duty.[8] The panel's preliminary consultations have highlighted the difficulty in deciding whether or when it is reasonable for a duty holder to relinquish control, or to refrain from exercising control, on the basis that a contractor with particular skills and expertise has been engaged to carry out an activity.

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

3.3 Work Relationships

The broad reach of positive duties of care has been described as the central strength of OHS legislation.[9] However, general duties are commonly couched in terms of the duties that employers owe to their employees. To provide protection to a broader class of workers as well as for members of the public, all OHS laws contain a duty of care for employers to 'others'. In addition, some jurisdictions provide protection to certain categories of workers (e.g. subcontractors or volunteers) through deeming them to be employees.

A more broadly expressed provision is in s.28 of the Queensland *Workplace Health and Safety Act 1995* which requires a 'person conducting a business or undertaking' to ensure that everyone (workers, any other people, and the person concerned) are not exposed to risks to their health and safety arising out of the conduct of the business or undertaking. The Act applies this duty whether or not the person conducts the business or undertaking as an employer, self-employed person or otherwise; whether or not the business or undertaking is conducted for gain or reward; and whether or not the person works on a voluntary basis.

This duty, however, is limited to the extent of control exercised by the person conducting the business or undertaking. This Queensland provision sits above and alongside more specific obligations of particular duty holders, which include those of employers, persons in control of workplaces, principal contractors, and owners of workplaces, fixtures, fittings and plant.

Self-employed persons

Most jurisdictions make a distinction between an employer and a self-employed person. The self-employed person's primary duty is to ensure the health and safety of 'others'. Some jurisdictions

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[8] See s.24(3) and s.25 of the Queensland *Workplace Health and Safety Act 1995*

[9] See Johnstone, R., Quinlan, M. and D. Walters (2004), *Statutory OHS Workplace Arrangements for the Modern Labour Market*, National Research Centre for OHS Regulation, ANU, Canberra.

also require self-employed persons to take reasonable steps to ensure their own health and safety at work.

THE TREATMENT OF WORKERS IN OHS LAWS

Employees and workers

Most jurisdictions that use the term 'employee' in their legislation define an employee as a person employed under a contract of service (as opposed to a contractor, who is a person engaged under a contract for services). The definition of employee is sometimes extended to include trainees and apprentices. In Tasmania, the definition also includes persons who use substances or plant in an educational institution.

The Queensland *Workplace Health and Safety Act 1995* applies the term 'worker', which is defined as a person who performs work for or at the discretion of an employer but excludes persons who are employed under a contract for services. The new Northern Territory *Workplace Health and Safety Act 2007* also uses the term 'worker', but has a very broad definition which operates to cover all persons who perform work for another person.

Contractors and Labour Hire

Jurisdictional approaches vary in relation to independent contractors and subcontractors who provide services under contracts for services. Some jurisdictions treat the contractor as an employee through the use of 'deeming' provisions and other jurisdictions rely on provisions for the protection of 'others'.

Some jurisdictions deem a contractor to be an employee when applying the general duty of an employer. This obligation is limited to matters over which the employer has control or would have had control if not for any agreement claiming to remove the control. Alternatively, the contractor may be understood as someone who is self-employed.

Some jurisdictions have express provisions under which 'principals' (who engage persons other than employees to perform work) are taken to have the responsibilities of employers in relation to contractors and employees of contractors.

It is clear from recent case law that the duty of care owed by labour-hire and group training agencies to their workers is that of an employer.[10] These duties can overlap with those of a host employer. Western Australia has provisions specifically dealing with labour hire personnel, whereby the agent and the client are taken to be employers of the worker.

Outworkers

The definition of employee can operate to exclude some categories of precarious and contingent workers, such as outworkers and seasonal workers, who are seen to be particularly vulnerable to risks of injury and occupational diseases. The review of the NSW *OHS Act 2000* recommended that clothing outworkers be provided with the same protections and responsibilities as other types of employee.[11]

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[10] See e.g. *Ankucic v Drake Personnel Limited* [1997] NSWIRComm 157 (25 November 1997) and *Drake Personnel Ltd v WorkCover* [1999] NSWIRComm 341 (12 August 1999), both of which are discussed by Maxwell (2004:116-117).

[11] *Report on the Review of the Occupational Health and Safety Act 2000,* May 2006, WorkCover New South Wales

Volunteers

There are various legislative approaches under the principal OHS Acts that deal with volunteer workers. They range from express provisions to relying on the duties of care owed to other persons.

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?

3.4 DUTIES OF EMPLOYERS

All OHS Acts include a general obligation which, however worded, requires an employer to ensure the health and safety of employees, to the extent that is reasonably practicable. The Acts clarify what the employer must do to meet the duty of care. More specific duties are spelled out, for example, duties to:

- provide and maintain safe plant;
- provide for the safe use, handling, storage and transport of substances;
- provide and maintain safe systems of work; and
- provide information, instruction, training and supervision to ensure health and safety.

Some jurisdictions include additional specific duties for employers in their OHS Act. Such duties are usually owed to employees or workers (however defined), and other persons deemed to be employees. Under the Queensland *Workplace Health and Safety Act 1995*, such duties are owed to any persons who may be affected by the conduct of the business or undertaking, including contractors and labour hire personnel.

Queensland and South Australia require employers to take reasonable care to ensure their own health and safety at 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?

3.5 DUTIES OF WORKERS AND OTHERS

All jurisdictions have obligations for employees and other workers to contribute to workplace health and safety by requiring them to take reasonable care to avoid harming any other persons through an act or omission at work. In most jurisdictions, workers are also required to take care for their own health and safety at work. Some jurisdictions include additional specific obligations for workers.

The Queensland *Workplace Health and Safety Act 1995* extends the duties of workers to not wilfully placing at risk the workplace health and safety of other persons at a workplace. Some jurisdictions have specific provisions whereby 'a person' must not misuse things provided for health, safety and welfare at work.

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?

3.6 APPOINTED PERSONS AND OFFICERS

Some OHS laws require the appointment of an individual to hold responsibility for OHS at a workplace or site.

In Queensland, all employers with 30 or more workers must appoint a Workplace Health and Safety Officer (WHSO) to provide expert advice to employers to help them meet their obligations under the Act. WHSOs receive training to identify health and safety hazards and to conduct risk assessments in the workplace, amongst other duties.

The Queensland *Workplace Health and Safety Act 1995* also requires a principal contractor to be responsible for OHS at a construction site. Some jurisdictions include such a requirement in their OHS regulations.

Tasmania requires all employers to appoint a 'responsible officer' at each workplace where the employer carries on business. This person is responsible for performing the duties of the employer at the workplace. The responsible officer can be prosecuted for breaching their obligations, irrespective of whether proceedings are brought against the employer. Further, the appointment of responsible officers does not relieve employers of their duties under the Act.

The requirement to assign specific responsibility for OHS to individuals is also a prominent feature of health and safety laws applying to the mining industry.

While most jurisdictions extend liability for breaches of companies to directors, managers and other company officers (this is raised further in Chapter 8), two jurisdictions place a positive duty on officers to ensure that the company complies with the Act.

The Queensland *Workplace Health and Safety Act 1995* provides that company executive officers must ensure that their corporation complies with the Act (s.167).

The South Australian *Occupational Health, Safety and Welfare Act 1986* requires every company carrying on business to appoint one or more 'responsible officers' who are then required to take reasonable steps for ensure that the company complies with its obligations under the Act (s.61). If the company fails to appoint a responsible officer, then all officers of the company will be deemed to be the responsible officers. The provisions do not derogate from any other rule of law relating to the duties of officers of bodies corporate.

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?

3.7 DUTIES OF PERSONS IN CONTROL

Provisions assigning duties to persons in control of a workplace are generally consistent. The duties are primarily aimed at persons who control a workplace where people who are not their employees are working. For example, where a building is leased by a business, both the building owner and the business have a duty to ensure, relative to their respective levels of control, that the workplace is safe for workers. In most jurisdictions, the provision assigning a duty to persons in control of a workplace has replaced the duties for owners and occupiers of workplaces.

Some jurisdictions have applied the concept of 'persons in control' to include duties for persons in control of:

- plant;
- substances;
- fittings and fixtures;
- temporary public stands; and
- workplace areas.

These provisions apply in the same way as those for persons in control of a workplace, in that they generally attempt to assign a duty to persons who control the item or area where people who are not their employees will use them for work.

> 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?

3.8 ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

An important underlying principle in OHS laws is the elimination of risks to health and safety at source. This is the basis for following the chain of responsibility 'upstream' and codifying the duties of those who design, manufacture, import, and supply products used in the course of work.

DESIGN

Most jurisdictions have enacted duties of care for designers in relation to plant, but not all cover buildings and structures, or substances. Those OHS Acts that do not have specific duties for designers place the duty on manufacturers to ensure that the design enables safe use. Some jurisdictions place an additional duty on designers of buildings and structures to ensure the safety of those who construct, maintain, repair or service the building or structure, as well as for those who use it. By contrast, the Victorian *OHS Act 2004* only requires the design of buildings and structures to be safe for persons using them as a workplace (s.28).

MANUFACTURE

Duties of care for manufacturers are generally consistent in the OHS Acts in relation to plant and substances to be used at work. Two jurisdictions place an obligation on manufacturers of materials to be used in a structure. In South Australia, the provision also requires that the materials are manufactured so that persons erecting a structure are safe from injury or risk.

SUPPLY

The duties of care for suppliers are also generally consistent in relation to plant and substances, but not structures. Only two jurisdictions address the supply of buildings and their components. The specific duties for suppliers also generally replicate those set out for designers and manufacturers. Significant issues arise in respect of how ‘supply’ should be defined, when it is considered to have occurred, and who should have a duty of care as a supplier.

Definition of supply

Not all jurisdictions have specified when the activity of supply is considered to have occurred. Some use a definition of supply which states that it involves ‘supply and re-supply by way of sale (including by auction), exchange, lease, hire or hire-purchase, whether as principal or agent’. In Queensland, the duties for a supplier of plant are based on whether the plant is supplied as new or used plant, or by hiring.

Financiers

Some jurisdictions exclude financiers from the duties of a supplier. Financiers are considered to be those persons who are engaged in the business of financing the acquisition of plant, substances or structures for a third party. In these cases, the legislation provides for the duties of a supplier to be owed by the party from whom the items were purchased (i.e. the original supplier) and not the financier. These provisions operate so that the duty is owed by the original supplier to the third party, as if the financier were not involved in the transaction. While not expressly stated, these provisions appear to allocate the duties to those persons with knowledge and control of the items when supplying them.

IMPORT

All jurisdictions apply duties of care to importers of plant and substances. For the purposes of applying the duties, some jurisdictions deem importers to be manufacturers.

The Queensland *Workplace Health and Safety Act 1995* states that an importer has the duties of a supplier at the point at which the plant or substance is supplied to another party. Two jurisdictions address importation in their regulations rather than their principal OHS Acts.

Another point of variation between jurisdictions is the definition of import. Some jurisdictions consider importation to have occurred when items are brought into Australia from overseas, while others consider importation to have occurred when items are brought into the State or Territory from another jurisdiction, whether in Australia or elsewhere.

INSTALLATION AND ERECTION

All jurisdictions have duties of care relating to the installation and erection of plant for work. However, only three jurisdictions extend this obligation to the installation and erection of structures to be used at, or as, a workplace.

Unlike holders of other upstream duties, persons installing and erecting plant do not have a specific duty to test or examine plant, or provide adequate information with the plant.

In South Australia, the plant must also be installed or erected so that it is safe when subjected to foreseeable forms of misuse and when maintained. The definition of ‘use’ in relation to plant includes maintenance.

In New South Wales, persons installing or erecting plant have the duties of a manufacturer, therefore they must ensure that the plant is safe when used and provide information about the way the plant is to be used.

DECOMMISSION AND DISPOSAL

Duties covering decommission of plant and disposal of substances do not currently feature in principal OHS Acts as a separate duty. However, the definition of 'use' in OHS Acts includes decommission of plant and disposal of substances. Through this definition, all parties in the chain of responsibility should ensure that items can be safely decommissioned and disposed.

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?

CHAPTER 4: 'REASONABLY PRACTICABLE' & RISK MANAGEMENT

This chapter considers:

- how far a duty holder should go towards ensuring health and safety protection in complying with the duties of care;
- how that standard should be defined; and
- whether the process of risk management should be included in the model OHS Act.

4.1 CONCEPT OF 'REASONABLY PRACTICABLE'

Article 4 of the International Labour Organisation's *Occupational Safety and Health Convention No.155* states that national policies should focus on the prevention of 'accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment'.

In nearly all Australian jurisdictions, the obligation to comply with a duty is subject to considerations of what is 'practicable' or 'reasonably practicable'[12], either as part of the duty or as a defence. The burden of proof is raised further in Chapter 8.

However, most OHS Acts do not clarify what 'reasonably practicable' means in relation to ensuring health and safety and leave this up to the courts to decide. The OHS Acts in Victoria and Western Australia provide that, in determining what is reasonably practicable, regard must be had to:

- the likelihood of the hazard or risk occurring;
- the degree of harm that would result if the hazard or risk occurred;
- the state of knowledge that exists about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- the availability and suitability of ways to eliminate or reduce the hazard or risk; and
- the cost of eliminating or reducing the hazard or risk.

These definitions are consistent with cases interpreting what 'reasonably practicable' means, even in jurisdictions that do not include a definition in the OHS legislation. While the definitions do not clearly say so, the courts have made it clear that each of these factors must be weighed up, to determine what can be done and whether it is reasonable not to do all that can be done.

A body of case law has developed in Australia and Britain providing guidance on what is meant by 'reasonably practicable' and how it is applied. Some stakeholders have, however, expressed concern that the courts and regulators do not consistently interpret and apply this standard.

Concerns have also been expressed at the need for duty holders to obtain legal advice to gain a clear understanding of what is meant by 'reasonably practicable' and how to apply it.

Attempts have been made in some jurisdictions to provide guidance on what is meant by 'reasonably practicable'.[13]

Q37.	Should a test of "reasonably practicable" be included in the model OHS Act?
Q38.	If not, what alternative standard should be included?

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[12] The Queensland *Workplace Health and Safety Act 1995* refers to taking 'reasonable precautions' and exercising 'proper diligence'. (s.37)

[13] See *How WorkSafe applies the law in relation to Reasonably Practicable*, a guideline made under s.12 of the *Occupational Health and Safety Act 2004*, WorkSafe Victoria, www.worksafe.vic.gov.au

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?

4.2 RISK MANAGEMENT

Most OHS laws in Australia require a process of risk management, whereby duty holders must identify the hazard, assess the risk and, where appropriate, take the necessary steps to eliminate or reduce the risk. Each jurisdiction has, however, addressed the requirement for a duty holder to manage risks via different avenues. Only two jurisdictions, the Commonwealth and Queensland, set out the risk management principles in relation to the general duties. For example, the Queensland *Workplace Health and Safety Act 1995* specifies in detail the process of managing exposure to risks, including the hierarchy of control.[14] This is reinforced by a Risk Management Code of Practice. Other jurisdictions have the detailed risk management provisions in their regulations and in codes of practice.

In the determination of OHS cases, courts have referred to both 'reasonably practicable' in qualifying the general duties and to risk management practices. Cases interpreting the employer's general duty of care indicate that the employer should not just be responding to demonstrated risks, but should have a system of identifying and assessing all possible risks, and instituting reasonable and appropriate measures. Effectively the general duties require duty holders to engage in systematic OHS management. However, the relationship between the reasonably practicable and risk management concepts in most OHS Acts is unclear.

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?

[14] Section 27A.

CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

This chapter considers the various issues associated with the exchange of information and achieving health and safety improvement in the workplace by its participants, including:

- consultation obligations and processes, including the identification of those who should be involved;
- the means for effective representation of workers in consultation and workplace enforcement of duties and obligations;
- when workers are entitled to stop work that they consider unhealthy or unsafe and when their representatives may direct such work to stop, and associated conditions; and
- the protection of individuals from victimisation or discrimination because of their involvement in OHS matters.

5.1 DUTY TO CONSULT

It is widely agreed that consultation between employers and workers is essential for effective OHS management and for enabling participation of workers in health and safety. All jurisdictions have, in various ways, adopted the Robens recommendation to place a statutory duty on every employer to consult with their employees or their representatives at the workplace on measures for promoting health and safety at work, and to provide arrangements for the participation of employees in the development of such measures.[15]

However, work relationships have changed significantly since the Robens Report, and some jurisdictions have recognised the need to extend consultation provisions beyond the employer and employee relationship to include contractors. There is a great deal of variation across jurisdictions in relation to:

- the inclusion in legislation of the concept of consultation or a definition of that term;
- specifying the nature of consultation, when it is required and how it should be undertaken;
- who should be consulted and the means by which consultation may or must be facilitated; and
- whether consultation is an explicit obligation for employers.

Some jurisdictions allow employers and employees to agree on arrangements for consultation and representation that suit the needs of the particular workplace.

The Northern Territory *Workplace Health and Safety Act 2007* includes a reciprocal duty for workers to participate in consultation and contribute their own insights to that consultation.[16]

Some jurisdictions have specific provisions that facilitate consultation on multi-employer worksites.

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?

[15] *Report of the Committee on Safety and Health at Work*, Lord Robens, 1972, p. 22

[16] Section 32.

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.

5.2 PARTICIPATION AND REPRESENTATION

There is considerable evidence that the effective participation of workers and the representation of their interests in OHS are crucial elements in improving health and safety performance at the workplace. No two jurisdictions have the same provisions for representative arrangements. The requirements vary in relation to how and when such arrangements can be initiated and who can be represented.

The main mechanisms to facilitate participation in Australian OHS laws are the provisions relating to Health and Safety Representatives (HSRs) and Health and Safety Committees (HSCs), which tend to limit participation to the employer and employee relationship at the workplace. Some provisions provide for a threshold number of employees in the workplace before an HSR or HSC can be established. The effectiveness of these mechanisms is challenged by the shifts in the labour market, growth in precarious and contingent employment and the decline in union membership and influence.

HEALTH AND SAFETY REPRESENTATIVES

All jurisdictions except the Northern Territory provide for HSRs, however, they have been provided for in the new *Workplace Health and Safety Act 2007*, which is still to come into effect. Generally, HSRs are required when requested by the employees. In Victoria, where a Designated Work Group (DWG) is established, there must be at least one HSR for the DWG.

Employer obligations to employee representatives, including paid leave for training, access to relevant information, time off with pay to exercise powers, provision of facilities, etc, are largely consistent across jurisdictions. The extent of the role, functions, entitlements and powers also varies across jurisdictions, with the most inconsistency being in the power to issue provisional improvement notices (PINs) (see Chapter 7) and to direct cessation of dangerous work. In some jurisdictions, unions may have a role in supporting representative processes, by consultation or by employee request. Some jurisdictions also provide for deputy HSRs.

HEALTH AND SAFETY COMMITTEES

All OHS jurisdictions allow for employees to request the establishment of a Health and Safety Committee (HSC). Functions of HSC typically include:

- facilitating consultation and cooperation between employers and workers;
- making recommendations relating to the health and safety of the workers;
- maintenance and monitoring of programs, training and education; and
- keeping information regarding hazards at the workplace.

Prescription relating to the composition of an HSC is generally limited to requiring that the number of members representing employees equal the number of members appointed by the employer. Some jurisdictions recommend HSRs have membership of an HSC.

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

RIGHT OF ENTRY

Some Australian OHS laws confer powers on authorised representatives of unions to enter workplaces to inspect, observe and consult for the purposes of enquiring into a suspected contravention of the OHS Act or regulations.

Only Victoria, New South Wales, Queensland and the Australian Capital Territory provide for such a right of entry under OHS legislation; however, the powers vary. The New South Wales, Victorian and Australian Capital Territory laws confer a right of entry without notice and with varying investigative powers (e.g. make searches, obtain documents and evidence, request assistance from an inspector). In some jurisdictions the provisions are based on the right of entry powers in the industrial relations laws. In Victoria, the representative seeking entry must 'reasonably suspect that a contravention of the Act or the regulations has occurred or is occurring at a workplace…' (s.87). In Victoria and Queensland, written notice must be given prior to entry with details about the suspected contravention.

Right of entry provisions have been included in the new Northern Territory *Workplace Health and Safety Act* 2007. In Queensland, Victoria and the Australian Capital Territory, an authorised representative must have satisfactorily completed approved training, while the Northern Territory requires appropriate qualifications and experience.

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?

Issue Resolution

Traditionally, State and Territory OHS laws have promoted the setting up of workplace procedures for circumstances where opinions differ between workplace participants on various health and safety related matters. Such differences need to be resolved to ensure that health and safety protection is pursued in a timely and effective manner. OHS laws require in various ways that OHS issue resolution procedures be implemented as agreed or in accordance with regulations.

Different terminology is used in the various Acts ('issue' in Victoria, Queensland, and Western Australia, 'matter' in New South Wales), and issue resolution is dealt with in both Acts and regulations. Some jurisdictions do not include a process for resolving issues by consultation, focusing instead on employee representatives' powers to issue notices on contraventions of the Act, or workers' right to cease work in cases of immediate threat to safety. Some jurisdictions provide for the involvement of health and safety committees in issue resolution.

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

Q64. When should issue resolution procedures be activated?

Q65. If issue resolution procedures are to be specified, in whole or in part, should they appear in the model OHS Act or in the regulations?

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

Right to Cease Unsafe Work

OHS laws around Australia are directed to ensuring that persons are not required to undertake work that puts at risk the health and safety of themselves or others. The common law recognises that an employee has the general right to refuse unsafe work.

Some OHS laws provide for the right of an individual to cease work considered to be unhealthy or unsafe. Others only refer specifically to the cessation of work in provisions conferring power on a health and safety representative to direct that such work cease.

Article 13 of the International Labour Organisation's *Occupational Safety and Health Convention No. 155* requires that a worker, who has removed him or herself from a work situation that the worker has reasonable justification to believe presents an imminent and serious danger, be protected from undue consequences.

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?

5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION

OHS laws have recognised the potential for persons to be victimised or otherwise dealt with adversely for:

- raising a health and safety issue; or
- carrying out health and safety functions; or
- refusing to undertake work they consider to be unhealthy or unsafe.

As noted, OHS laws provide for measures by which health and safety issues may be raised by workers or their representatives and resolved. Any such rights and measures provided in the model OHS Act should also be protected. Workers and their representatives should not be reluctant to raise health and safety issues for fear of consequences, particularly in relation to their engagement.

Some jurisdictions provide statutory protection against discrimination for employees and/or HSRs who raise or have raised health and safety issues or otherwise carried out their functions. However, the laws are couched in differing terms (e.g. discrimination, dismissal, unfair dismissal, victimisation) and variously seek to protect those who raise or have raised health and safety issues as employees or workers, as members of health and safety committees, as health and safety representatives, and (in Western Australia) as contractors and contractors' employees.

There are widely held views that none of the current provisions is completely satisfactory. There are concerns that workers in precarious employment are not well protected. Particular issues have been raised about the effectiveness of such provisions for workers who are temporarily in Australia under work visas[17].

Under the Western Australian *Occupational Safety and Health Act 1984*, provision is made for the formal resolution of such issues by the Occupational Health and Safety Tribunal (see Chapter 9).

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?

[17] The Temporary Skilled Migration Review was announced by the Minister for Immigration and Citizenship (Senator Chris Evans) on 14 April 2008. Its terms of reference include examining the health and safety protections and training requirements that apply in relation to temporary skilled migration workers' visas.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

This chapter recognises the significant role of the regulator and invites comment on:

- what the role of the regulator should be;
- what powers should the regulator and its inspectors have; and
- what processes should there be for accountability of the regulator, including review of decisions.

(Chapter 7 considers specific elements of the compliance and enforcement role and powers of the regulator.)

6.1 ROLE AND FUNCTIONS OF REGULATORS

OHS regulators are central to the successful operation of OHS regulation. Each jurisdiction has established such bodies, normally under its principal OHS legislation. The powers and functions of the regulators are usually specified, to varying degrees, in those Acts[18] and generally include:

- administering and enforcing the Act;
- making recommendations and providing advice on the Act and other supporting laws to the responsible Minister;
- monitoring standards of OHS;
- advising employers, workers and others on their rights and obligations under the Act;
- formulating and disseminating standards, guidance and other information to assist persons to comply with their duties and obligations under the Act;
- fostering cooperative and consultative relationships between employers, workers and others on OHS;
- promoting education and training in OHS by facilitating the development and provision of OHS training courses;
- promoting public awareness of OHS;
- initiating and encouraging research into OHS improvements; and
- collecting and publishing OHS statistics and data.

ACCOUNTABILITY

Good public administration requires accountability. This requires, among other things, the exercise of powers and the performance of functions to be transparent, readily identifiable and capable of being challenged in a fair process. Some stakeholders have questioned how effectively the current accountability arrangements for OHS regulators and their officials (including inspectors) operate. Against that background, the internal reviewability of acts and decisions by OHS regulators and their officials is discussed in this chapter. External reviewability and appeals are considered in Chapter 9.

EDUCATION, ADVICE AND ASSISTANCE

Australian OHS regulators encourage and facilitate compliance with OHS legislation through the provision of education, advice and assistance to duty holders.

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[18] In New South Wales, this is provided for in the *Workplace Injury Management and Workers Compensation Act 1998*

This function is not explicit in all OHS Acts. Three Acts specifically empower inspectors to provide advice for the purpose of facilitating compliance with the legislation. Other laws are less specific. Inspectors are permitted or required under the laws to include directions and advice in improvement and prohibition notices.

COMPLIANCE AND ENFORCEMENT POLICIES

Most regulators have a published compliance and enforcement policy that typically identifies the circumstances in which the regulator is likely to apply the various available enforcement approaches.

Compliance and enforcement policies guide the inspectorate's use of enforcement options (see Chapter 7) and assist the regulator to enforce OHS laws in a consistent manner.

The Victorian *OHS Act 2004* allows for the making of interpretative documents to assist duty holders and others to understand how the regulator will interpret key issues and provisions in the Act and regulations. The legislatively mandated power to issue interpretative documents is similar to the non-mandated practice in other jurisdictions of issuing 'position papers' or 'enforceable notes'.

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?

6.2 INSPECTORS

Inspectors are recognised as essential to securing the objectives of OHS legislation (although different titles are used for such officials, 'inspector' is the most common). All OHS Acts provide for their appointment, powers and functions and set out various conditions and limitations on the exercise and performance of those powers and functions. However, there are differences in the detail of provisions for inspectors in relation to:

- who may be appointed as inspectors – qualifications, temporary appointments, the authorisation of other persons, such as mines inspectors or police officers, and cross-jurisdictional appointments;
- inspectors' competence – understanding of particular industries or work environments, capacity to provide guidance;
- responsiveness of inspectors – the balance between proactive and reactive investigations;
- the scope and nature of inspectors' investigative powers and functions – conduct searches and inspections, obtain information and collect evidence;
- how inspectors' powers should be exercised and performed – production of identity cards, right of entry; and
- the internal and external reviewability of inspectors' decisions.

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?

6.3 INTERNAL REVIEW OF INSPECTORS' DECISIONS

All jurisdictions allow for the review of decisions made by inspectors. The degree of detail varies, ranging from allowing improvement or prohibition notices to be appealed, to detailed schedules outlining reviewable decisions and those eligible to request the review.

Appeals must be provided in writing, generally within a specified timeframe. Upon reviewing an appeal, the regulator must make a determination to affirm, vary, revoke or substitute another decision for the original decision.

Where applicants for a review are not satisfied with the outcome, they may appeal the decision further to an external body (e.g. a Magistrate's Court or OHS tribunal).

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?

CHAPTER 7: COMPLIANCE & ENFORCEMENT

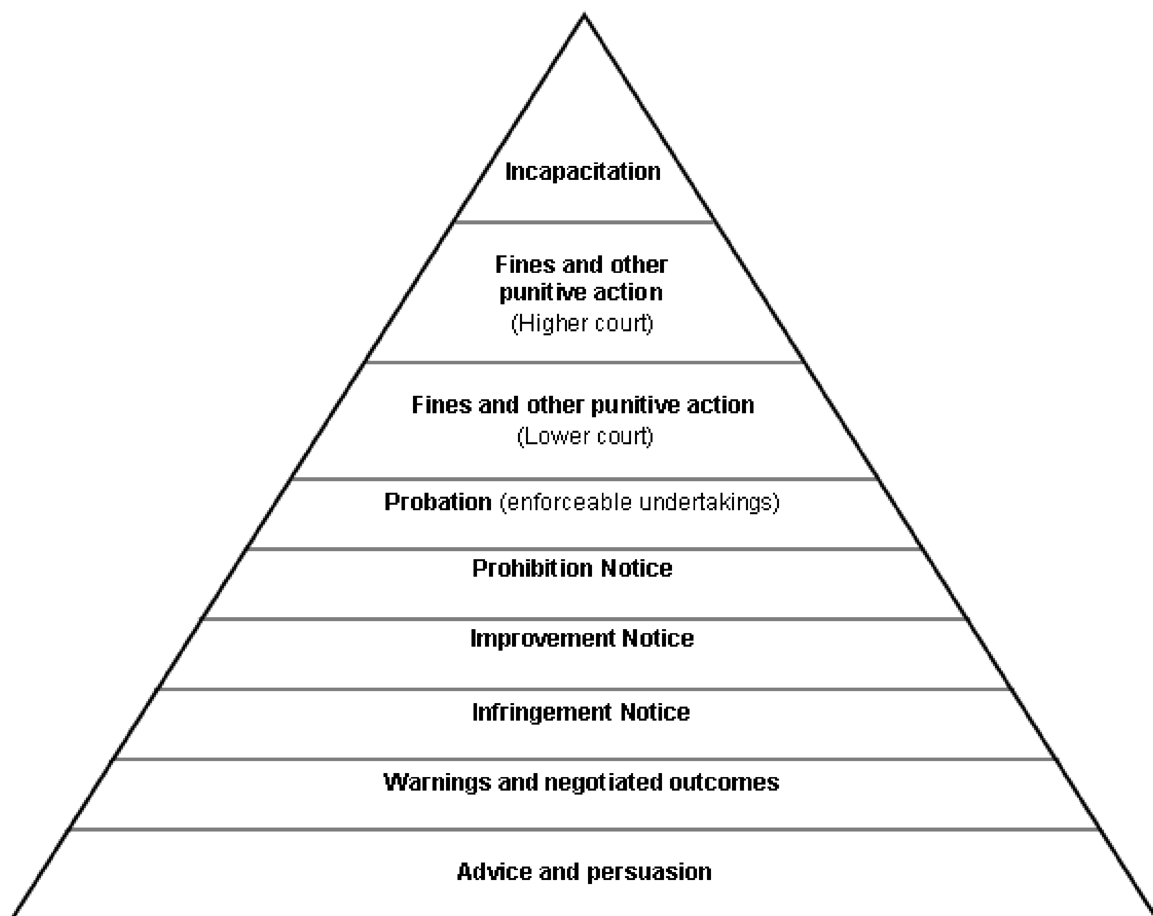
This chapter considers how the duties and obligations imposed by the model OHS Act may be enforced by the regulator and worker representatives, including:

- what compliance and enforcement powers should be available;
- who should have those powers;
- when should the powers be exercised;
- processes for review of the exercise of such powers; and
- alternatives to prosecution.

The value of a graduated approach to enforcement (ranging from advice and persuasion through to prosecution) is recognised. Particular attention is given to measures used at the workplace and those exercisable beyond the workplace. Prosecutions and penalties are dealt with in the next chapter.

7.1 ENFORCEMENT MEASURES

Many jurisdictions recognise the value of graduated enforcement measures that allow regulators to tailor their enforcement responses based on the behaviour and cooperation of the regulated persons. Enforcement of OHS generally reflects an enforcement pyramid or a hierarchy of measures in order of escalation. For example, a model that has been advocated is as follows[19]:



[19] *Regulating Workplace Safety – Systems and Sanctions*, 1999, Gunningham, N. and Johnstone, R., Oxford University Press, New York. In this model 'incapacitation' means preventing the offender from continuing to operate.

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?

7.2 MEASURES EXERCISED AT THE WORKPLACE

SAFETY DIRECTIONS, WARNINGS AND CAUTIONS

Most OHS laws provide for inspectors to give oral directions to rectify unsafe situations. Oral directions can typically only be given where there is a serious and immediate risk to a person's health and safety and it is not practical to issue a written notice. In some provisions the oral direction must be followed up in writing at the earliest convenience.

While it is not in the legislation, a number of jurisdictions also allow for inspectors to issue warnings or cautions for minor offences under the relevant OHS Act, if they can be easily rectified in the inspector's presence. The ability of inspectors to provide warnings or cautions is usually addressed in the regulator's compliance and enforcement policy.

In one jurisdiction, inspectors and employers can enter into voluntary 'compliance agreements' to rectify unsafe situations and practices in a co-operative fashion without resorting to formal enforcement and prosecution.

PROVISIONAL IMPROVEMENT NOTICES (PINS)

In a majority of jurisdictions, there are specific statutory powers for HSR to issue a PIN (known as a 'Default Notice' in South Australia) if the HSR believes that a person at the workplace is breaching or has breached the relevant OHS Act. Failure to comply with a PIN is an offence.

Before issuing a PIN, the HSR must in all cases first consult with the persons involved in the breach and attempt to rectify the problem. Under some Acts, a PIN cannot be issued in relation to matters that are the subject of an improvement or prohibition notice.

If the person to whom the PIN is issued does not agree with the notice, the person may request an inspector to attend the workplace to review the circumstances and either affirm or cancel the notice. The timeframe for seeking review varies under the different OHS Acts.

IMPROVEMENT NOTICES

The power of inspectors to issue improvement notices is consistent across all jurisdictions. An improvement notice is a written direction requiring a person to remedy a breach of OHS legislation. Failure to comply is an offence under all OHS Acts.

Improvement notices generally refer to a specific regulation or duty of care provision in the relevant OHS Act and set a time limit within which the duty holder must carry out the improvement. OHS laws vary in that they either require or permit improvement notices to include directions to achieve compliance. There are also differences across jurisdictions in the minimum timeframes specified for compliance. In one jurisdiction, a person issued with an improvement notice must notify the regulator (by a 'statement of compliance') when the matters to which the notice relates have been remedied.

Where an appeal has been lodged against the issuing of an improvement notice, most jurisdictions provide that the notice is suspended pending the outcome of the appeal. However, in

two of these jurisdictions the suspension depends on either a decision of the authority or a specific request of the appellant to do so.

There are also differences in relation to action taken regarding non-compliance with improvement notices. For example, some jurisdictions can apply an on-the-spot fine ('expiation fee' or 'infringement notice'). But others are restricted to prosecution.

Prohibition Notices

Prohibition notices are one of the most consistently applied enforcement measures and are provided for in all jurisdictions. Prohibition notices are issued for a contravention of the OHS Act, usually involving an immediate or serious threat to health and safety. The notice prohibits or stops a specific activity from occurring, and can in some cases shut down a workplace while remedial action is taken.

OHS laws vary in that they either require or permit prohibition notices to include directions to achieve compliance. The OHS Acts in most jurisdictions require that prohibition notices be displayed in a prominent position at the workplace and brought to the attention of, or copies provided to, each person affected by the notice.

While all OHS Acts provide an appeals process against the issuing of a prohibition notice, the time frame in which an appeal may be lodged varies. In all cases prohibition notices remain in force throughout the period of appeal.

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

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

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

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

Q96. Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices,? If so, what should the effect be?

Infringement Notices

Infringement notices, also known as on-the-spot fines, can be issued by inspectors in all but two jurisdictions. There are significant differences in when they can be used, for what offences they can be issued and to whom they can be issued. In some instances, the offences are general, such as a failure to comply with a general duty to ensure the health and safety of employees. In other cases, the offences relate to more specific obligations such as a failure to display an improvement or prohibition notice.

Under the South Australian *Occupational Health, Safety and Welfare Act 1986*, infringement notices (expiation notices) can only be issued for a failure to comply with an improvement notice.

In some jurisdictions, infringement notices can be issued for offences against the Act and regulations, whereas in others the fines only apply to offences against the regulations. In Queensland and the Australian Capital Territory, infringement notices are administered under separate Acts.[20]

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[20] Issued under the Queensland *State Penalties Enforcement Act 1999* and under the ACT *Magistrates Court Act 1930*

There are also significant differences between jurisdictions as to the size of the monetary penalties that can be imposed under infringement notices.

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?

7.3 MEASURES EXERCISED BEYOND THE WORKPLACE

REMEDIAL ORDERS AND INJUNCTIONS

The ability to request an injunction (or compliance order) is available under most OHS Acts.

Injunctions are generally required to be sought by the authority (but in some cases can be sought by others), can only be issued by a court, and operate to compel a person to take, or refrain from taking, a specified action.

In some jurisdictions, an injunction can only be sought to seek compliance with an improvement or prohibition notice. Other jurisdictions allow injunctions to be sought if a person has, is or is likely to commit an offence against the relevant OHS Act, but do not specify evidentiary requirements.

One jurisdiction also allows interim injunctions to be granted by the court pending the court's approval of an application for a final injunction.

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?

ENFORCEABLE UNDERTAKINGS

Enforceable undertakings are provided for in various forms by the majority of jurisdictions. In general, enforceable undertakings provide an alternative to prosecution for an offence against the relevant OHS Act. They require the offender to agree to take action to remedy the offence. Once entered into, undertakings can only be varied or withdrawn with the consent of the regulator or court.

Proceedings may not be commenced for an offence for which an undertaking has been accepted and is operating. Where proceedings have been commenced prior to an undertaking being given, the proceedings are generally required to be suspended. If an offender contravenes the undertaking it may be enforced through the courts.

The Queensland *Workplace Health and Safety Act 1995* does not require an offender to admit fault or liability as a condition of entering into an enforceable undertaking[21].

[21] The person concerned is required to recognise that the regulator alleges that the person has contravened the Act (s.42D).

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?

CHAPTER 8: PROSECUTIONS

This chapter deals with the enforcement of OHS laws through prosecution, where other compliance and enforcement options have been unsuccessful or are considered to be inappropriate. A discussion of such options is contained in chapter 7.

It is generally accepted that the prosecution of breaches of legislative requirements is necessary to support those requirements. The health and safety objectives of the legislation, particularly prevention, may be assisted by the process of prosecution and the imposition of penalties. This may include deterring the offender from re-offending, deterring others from offending and requiring specific action to be taken. There are other public policy grounds for prosecution of offences against legislation.

This chapter discusses the procedures by which prosecutions are undertaken and the outcomes of prosecutions, including penalties and other sentencing options. While it is possible for safety related offences to be prosecuted as breaches of a Crimes Act, the focus here is on prosecutions under a model OHS Act.

8.1 CRIMINAL OR CIVIL LIABILITY

Offences under OHS legislation have traditionally been considered to be criminal in nature. However, the Commonwealth OHS Act provides for civil penalties for some types of breach with specific consequences, with proof of breaches on the balance of probabilities rather than the criminal standard of beyond a reasonable doubt.

While civil and criminal penalties are considered in the discussion below, the differentiation is relevant to which particular court the matters are heard in and the prosecution procedures and burdens of proof that apply.

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?

8.2 WHERE PROSECUTIONS SHOULD BE HEARD

The jurisdictions vary as to where OHS prosecutions may be brought, including the Magistrates, County, Supreme or Federal Courts. Some jurisdictions have the prosecutions heard in their Industrial Relations Commission or Industrial Court. Most jurisdictions ultimately follow the standard appeals procedure of each jurisdiction flowing from the Magistrates Court to the Supreme Court or the Federal Court and finally the High Court.

The procedure to be adopted in the particular court or tribunal is in part determined by its rules. The powers of the court or tribunal to make orders or impose penalties may be limited. In some jurisdictions, the powers of the court are in part specified in the OHS legislation.

Certain offences in some OHS legislation are ordinarily heard in a higher court and may only be heard in the lower court by consent or order of the court. In some jurisdictions, prosecutions are dealt with in the court system under general criminal law principles, with a right to trial by a judge and jury.

The entitlements and processes for appeal against conviction are also subject to the jurisdiction in which the prosecution is heard.

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?

8.3 WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

The procedures for commencing and conducting a prosecution will depend on the court or tribunal in which it is to be heard and whether it is a civil or criminal matter. There is currently a wide range of procedures provided for across Australia.

Prosecutions are generally brought by inspectors, the regulator or by the Minister. Some states provide for a prosecution to be brought by an authorised person, who may be the Secretary of a union. In one state, a victim may commence a prosecution.

A separate prosecuting authority (e.g. the Director of Public Prosecutions) may consider whether a prosecution should be taken and proceed with it.

The jurisdictions differ as to the time limit within which a prosecution must be commenced, varying from six months to three years after the offence occurs, or after the regulator becomes aware of it.

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?

8.4 EVIDENCE

In some jurisdictions ordinary rules of evidence dealing with the proof of relevant matters in court proceedings are varied for the prosecution of OHS offences, including by:

- allowing the report of an expert witness to be admitted into evidence without requiring their presence in the court; and/or
- allowing certain facts, such as who is an employer, employee, inspector, in control of the premises to be presumed unless proven otherwise; and/or
- providing for certified copies of codes of practice and other documents published by authorities to be evidence as to their contents; and/or
- imputing conduct or intention of an employee, agent or officer to a body corporate to prove that element of an offence.

The relevance of codes of practice or compliance codes in proceedings for a breach of OHS legislation varies between jurisdictions. The legislation variously provides that:

- a failure to comply with a relevant code is deemed to represent a breach of the Act, unless the duty holder demonstrates how they complied with the Act by other means; or
- compliance with the code is deemed to be compliance with the Act to the extent that the code is relevant; or
- compliance with a code is a defence to a prosecution for breach of a relevant duty; or
- the code may be used as evidence of what could be done to meet the duty or obligation.

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?

8.5 THE BURDEN OF PROOF AND DEFENCES

In all jurisdictions in Australia, the obligation to comply with a duty is subject to considerations of what is 'practicable' or 'reasonably practicable'. In some jurisdictions this is provided as an element of determining the duty and compliance with it, while in others it is an element of a defence. The burden of proving all elements of a criminal offence is ordinarily borne by the prosecutor, beyond reasonable doubt. The burden of proving a defence is ordinarily on the defendant, on the balance of probabilities.

The burden of proving whether or not the duty holder did all that was reasonably practicable will depend on whether this is an element of the duty or a defence.

In Britain the requirement to do what is reasonably practicable is part of the duty but the legislation imposes the burden of proof on the duty holder.

Some stakeholders maintain that the duty holder, not the prosecutor, is in the best position to establish reasonable practicability. Others maintain that the rules applying to the proof of criminal offences should apply to OHS prosecutions.

OHS Acts in some states include specific defences that relate to:

- having done all that was reasonably practicable (or taking reasonable precautions or exercising due diligence); and/or
- that the offence was due to causes over which the person had no control or could not make provision; and/or
- an officer not being able to influence the relevant conduct of the corporation; and/or
- the defendant having a reasonable excuse for failing to do something required under the Act (e.g. provide information); and/or
- the following of a requirement in a specific regulation, ministerial notice or code of practice.

OHS legislation does not provide for the delegation or transfer of obligations by a duty holder to another person. Some stakeholders propose that a duty holder should be able to comply by relying on the expertise or conduct of another person. Although OHS legislation does not

currently provide for that, it may be a factor relevant to determining whether the duty holder has done all that is reasonably practicable in the circumstances.

> 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?

8.6 LIABILITY OF OFFICERS

A corporation can only make decisions and act through the people who ‘run’ it. OHS legislation recognises that compliance by a corporation depends on the conduct or omissions of those people and provides that they may be personally liable where the corporation commits an offence. These people are referred to as ‘officers’.

The determination of liability for corporate officers differs between jurisdictions, both as to who are officers and how they may be liable.

All jurisdictions provide for officers to be those who are involved in decision making, but they differ as to how far down the management chain the definition of officer may go. Three jurisdictions follow the definition of ‘officer’ in the *Corporations Act 2000* (Cth). Definitions generally include:

- executive officers;
- directors and secretary;
- those on whose wishes or instructions the directors ordinarily act;
- individuals concerned in management of the corporation or making decisions that affect the whole or a substantial part of the corporation; and
- members, if the entity is controlled by members.

The definition of an officer also applies in some jurisdictions to those involved in a similar manner in the management of an unincorporated association or partnership.

In South Australia, the Act provides for the appointment of a ‘responsible officer’ with the specific duty to take reasonable steps to ensure compliance by the corporation. In the absence of that appointment, all officers of the corporation have the duty.

Some jurisdictions provide that an officer has committed the same offence as the corporation, unless the officer proves a relevant defence (e.g. exercise of due diligence or lack of influence). The burden of proving the defence lies with the officer, which is commonly referred to as a ‘reverse onus of proof’.

Others provide for a breach by the officer where the offence by the corporation was attributable to an act or omission of the officer. The prosecution must prove the relevant act or omission and that the offence of the corporation was attributable to it. In some jurisdictions the officer must be shown to be guilty of wilful neglect, consent or connivance – that is, they knew of the relevant matters and either caused or permitted the offence to be committed by the corporation. In other jurisdictions, the prosecution must prove the offence by the corporation was attributable to the failure of the officer to exercise reasonable care.

In some jurisdictions an officer commits an offence if failing to take reasonable steps to ensure compliance by the corporation.

In Victoria, officers who are volunteers are not liable to prosecution.

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?

8.7 SENTENCING OPTIONS

After a finding of guilt, a court must consider what orders to make or penalties to impose on the offender. The objectives of the court may be specifically directed to the promotion of compliance and improvement of OHS outcomes, or may be for other criminal justice considerations.

OHS legislation across Australia differs in the sentencing options available to the court, ranging from imprisonment and fines through to orders directing positive action to be taken for the enhancement of health and safety.

FINES

Fines are the most commonly imposed penalty, but Courts rarely impose the maximum amount.

Most jurisdictions have differing levels of fines that can be imposed depending on the severity of the breach of duty. Some of these jurisdiction set higher maximums for repeat offenders. The ranges of maximum fines are:

- for an offending corporation – from $180,000 to almost $1,000,000;
- for causing death, a corporation – between $180,000 and $1,650,000; and
- for an offence by an individual – between $10,000 and $250,000.

There are increased fines for repeat offenders in some jurisdictions with the maximum fine increasing by 25% to 100%.

In the soon to commence Northern Territory *Workplace Health and Safety Act 2007*, a statutory minimum fine is imposed for aggravated OHS offences. An individual will be fined between $27,500 and $275,000 and a corporation will be fined between $137,000 and $1,375,000.

The fines actually imposed, in dollar amounts and percentage of the maximum, vary across Australia.

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?

OTHER SENTENCING OPTIONS

OHS legislation in Australia currently includes a range of penalty alternatives to fines. Enforceable undertakings or restoration (undertaking projects of a general or remedial nature), compensation and publicity orders are found in many jurisdictions, as are orders to pay for investigation-related costs.

Two jurisdictions have provisions to allow orders for the undertaking of training to be imposed.

Imprisonment is an option in more serious circumstances where:

- there is death or grievous bodily harm, or
- a risk of such through reckless endangerment, or
- for specific offences such as impeding or assaulting an inspector, or
- unlawfully discriminating against a person because of their involvement in OHS activities.

Maximum periods of imprisonment range from six months to seven years, with the longest terms reserved for instances of multiple deaths and repeat offences.

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?

8.8 WORKPLACE DEATH AND SERIOUS INJURY

Some jurisdictions have provisions dealing specifically with workplace death and serious injury, or the risk of it, from recklessness of a duty holder. In some jurisdictions the breach and/or penalties are directly related to the outcome, rather than only the degree of culpability.

The Australian Capital Territory is the only jurisdiction to have offences described as industrial manslaughter, which are contained in the *Crimes Act 1900* (ACT).

Legislation recently enacted in Britain, the *Corporate Manslaughter and Corporate Homicide Act 2007*, deals specifically with workplace death offences by corporations. That is separate from the operation in that country of its OHS legislation.

Proponents of legislation relating to death and serious injury in the workplace, suggest that a specific crime for this particularly serious workplace offence should be available, with more substantial penalties. Others suggest that such matters should be dealt with as part of the broader criminal law.

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?

8.9 ENFORCEMENT OF PENALTIES

A significant objective for imposing fines on an offender is to deter the offender from a repeated breach. A further objective is to deter others from offending. These objectives are not met, however, where the court or regulator does not collect the fine or is unable to do so.

Many stakeholders have referred to circumstances in which companies are wound up during or following a prosecution, thereby avoiding the payment of a penalty. In many cases, the directors or managers of the company have then recommenced business, operating through another company.

Some stakeholders have referred to perceived low levels of activity in the collection of penalties that have been imposed.

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?

Chapter 9: Other Issues

In this chapter, a number of important issues not previously dealt with are considered. They relate to:

- various aspects of the regulatory regime that are necessary for its efficient and effective operation (regulations, codes of practice, notification of incidents, external appeals and issue resolution, and tripartism); and
- how OHS legislation may operate more effectively between jurisdictions (mutual recognition, permits and licensing, and cross-jurisdictional interaction).

9.1 Regulation Making Powers

While all OHS laws enable the relevant jurisdiction to develop subordinate legislation dealing with OHS matters, the scope of such powers vary. A wide regulation making power provides broader scope to address OHS issues quickly, flexibly and in more detail than may be appropriate in an Act. Regulations also contain penalties for non-compliance.

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?

9.2 Codes of Practice

All Australian OHS statutes allow for the development of codes of practice or compliance codes to provide duty holders with practical guidance in managing exposure to risk and achieving legislative compliance.

Requirements for approving a code vary across the jurisdictions. Some of the requirements include:

- consultation and advertising arrangements;
- consideration of recommendations from the OHS authority or advisory body;
- submission to Parliament; and
- specific expiration clauses.

The use of codes in proceedings varies across the jurisdictions (see chapter 8).

In addition to codes, some OHS Acts allow ministerial notices and/or guidelines that prescribe methods of work to prevent or minimise exposure to risk.

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

9.3 Notification of Incidents and Reporting

Notification of incidents and reporting requirements enable OHS authorities to target their compliance and enforcement efforts and to collect, interpret, analyse and report information and statistics relating to health and safety.

Current data sets all have limitations which negatively affect the capacity of governments and industry to appropriately identify and address OHS issues.

All Australian OHS regimes include incident notification requirements. The compliance burden is added to where the requirements vary from jurisdiction to jurisdiction.

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

9.4 EXTERNAL APPEALS AND ISSUE RESOLUTION

Where a person is not satisfied with the outcome of an internal review of a regulatory decision (see chapter 6), the person may appeal the decision. All Australian OHS laws allow for external review of a range of decisions, but with different appellate bodies. These may be a court or a tribunal.[22]

In Western Australia, the Occupational Safety and Health Tribunal is empowered to deal not only with certain decisions of the regulator made in internal reviews, but also at first instance with specified OHS issues. The latter include such matters as:

- circumstances where workers assert that they have not received pay or entitlements while attending OHS training or stopping unsafe work;
- assertions that workers have been discriminated against for raising health and safety matters; and
- where licences or permits have been suspended or revoked.

The tribunal is given a range of powers to resolve the issues.

> 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?

9.5 TRIPARTITE MECHANISMS

Tripartism is a key element in the OHS context and is fundamental to many aspects of policy development. Tripartite advisory structures or oversight bodies are common, but there are differences in their operation and mandates. Generally, the primary function of such bodies is to provide advice to the relevant Minister on a range of OHS matters.

> 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?

[22] Two jurisdictions allow certain aspects of decisions following internal reviews to be appealed to the Supreme Court.

9.6 MUTUAL RECOGNITION

Areas of OHS that could benefit from mutual recognition include:

- training, education and competence requirements;
- authorisations, licences, permits and registrations;
- incident notification and reporting requirements; and
- plant and equipment.

PERMITS AND LICENSING ARRANGEMENTS FOR WORKERS ENGAGED IN HIGH RISK WORK

Australian OHS statutes include various licensing and permit arrangements for workers engaged in high risk work. This creates:

- compliance burdens for employers operating across jurisdictions;
- permit and licence administration by multiple OHS authorities;
- inefficiencies in enforcement and compliance measures; and
- exposure of workers engaged in high risk work to different levels of risk across the jurisdictions.

For example, conditions or sanctions (such as suspension or cancellation) applied to a licence or permit holder by the issuing authority may not be recognised by other jurisdictions. Additionally, a non-issuing authority may not be able to apply or enforce sanctions where the licence/permit has been issued by another jurisdiction.

A further complication is the variation across jurisdictions in the class of high risk work or worker required to be in receipt of a licence or permit.

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?

9.7 CROSS-JURISDICTIONAL COOPERATION

Currently, inspectors act under the authority of another jurisdiction's legislation on a case by case basis. Cross-jurisdictional recognition, cooperation and information sharing might create a number of positive enhancements to enforcement and compliance including:

- strengthening cross-border interventions where enforcement of OHS requirements might otherwise be difficult. For example, where plant is designed in one jurisdiction, manufactured in another and used in a third, it would be difficult to prosecute up the chain of responsibility to the manufacturer and designer without cooperation between jurisdictions;

- enabling holistic investigation of incidents or activities occurring across jurisdictions; and
- promoting the exchange of information and expertise to enable OHS authorities to support regulatory activities in all jurisdictions such as education, compliance and awareness campaigns.

9.8 INTERACTION OF FEDERAL AND STATE LAWS

There is overlap between a number of state and Commonwealth laws. Under current arrangements, a workplace may not only be subject to more than one state or territory OHS law, but also federal safety laws. For example, some duty holders at a particular site maybe subject to the Commonwealth *OHS Act 1991* while others may be subject to the principal OHS Act of the jurisdiction in which the work is being performed. Some may be subject to both. Similarly, persons who have right of entry powers may require a permit under the Commonwealth *Workplace Relations Act 1996* as well as under the principal OHS Act of the jurisdiction in which the work is being performed.

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?

APPENDIX A – TERMS OF REFERENCE

National Review into Model Occupational Health and Safety Laws

Terms of Reference

Background

1. The health and safety of Australian workers is a key concern of Australian governments at all levels. All workers have the right to a safe and healthy workplace and employers have the right to expect that workers and visitors to their workplaces will cooperate with occupational health and safety (OHS) rules.

2. OHS regulation affects every workplace in Australia. All States, Territories and the Commonwealth have OHS laws that aim to prevent workplace death, injury and disease. Industry specific laws covering workplace safety and laws regulating particular hazards, for example the transport and storage of dangerous goods, also exist in certain jurisdictions.

3. All Australian governments have taken a broadly similar approach to regulating for safer workplaces. The approach involves a principal OHS Act codifying common law duties of care, supported by detailed regulations and codes of practice, and a system of education, inspection, advice, compliance activities and, where appropriate, prosecution.

4. Despite this commonality, there remain differences between jurisdictions as to the form, detail and substantive matters in OHS legislation, particularly in regard to duty holders and duties, defence mechanisms and compliance regimes, including penalties.

5. The importance of harmonised OHS laws has been recognised by the Council of Australian Governments, the Productivity Commission and the States and Territories in their work in this area to date.

6. The Australian Government has committed to work cooperatively with State and Territory governments to achieve the important reform of harmonised OHS legislation within five years. Following the recent meeting of the Workplace Relations Ministers' Council, all States and Territories have agreed to work together with the Commonwealth to develop and implement model OHS legislation as the most effective way to achieve harmonisation.

7. The model legislation will consist of a model principal OHS Act, supported by model regulations and model codes of practice that can be readily adopted in each jurisdiction.

8. Harmonising OHS laws in this way will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties.

9. As the first step in this process the Australian Government has appointed an advisory panel to conduct a national review of current OHS legislation across all jurisdictions, and recommend to the Workplace Relations Ministers' Council the optimal structure and content of a model OHS Act.

Scope of the Review

10. The panel is asked to review OHS legislation in each State, Territory and Commonwealth jurisdiction for the purpose of making recommendations on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions. The panel is asked to make its recommendations in two stages, to allow matters critical for harmonisation to be considered by the Workplace Relations Ministers' Council as a matter of priority (refer paragraphs 12 and 13).

11. In undertaking the review, the panel will:

   a) examine the principal OHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency;

b) take into account relevant work already undertaken in this area by the Australian Safety and Compensation Council and others (including international developments), and consider recommendations from recent reviews commissioned by Australian governments relating to OHS laws;

c) take into account the changing nature of work and employment arrangements;

d) consult with business, governments, unions and other interested parties, and invite submissions from the public and other stakeholders on matters relating to the review; and

e) make recommendations on the optimal structure and content of a model OHS Act that promotes safe workplaces, increases certainty for duty holders, reduces compliance costs for business and provides greater clarity for regulators without compromising safety outcomes.

12. The panel should examine and make recommendations on the optimal content of a model OHS Act in the following areas as a matter of priority, and report to the Workplace Relations Ministers' Council by 31 October 2008:

a) duties of care, including the identification of duty holders and the scope and limits of duties;

b) the nature and structure of offences, including defences.

13. The review panel should also examine and make recommendations on the optimal content of a model OHS Act in the following areas, and report to the Workplace Relations Ministers' Council by 30 January 2009:

a) scope and coverage, including definitions;

b) workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and/or committees;

c) enforcement and compliance, including the role and powers of OHS inspectors, and the application of enforcement tools including codes of practice;

d) regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional cooperation and dispute resolution;

e) permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;

f) the role of OHS regulatory agencies in providing education, advice and assistance to duty holders;

g) other matters the review panel identifies as being important to health and safety that should be addressed in a model OHS Act.

Principles for the Review

14. The review will be guided by the following principles:

a) an inclusive approach to the harmonisation process, where the concerns and suggestions of all jurisdictions and interested stakeholders are sought and properly considered;

b) that the development of model OHS legislation be accompanied by an increase in consistency of monitoring and enforcement of OHS standards across jurisdictions;

c) consideration of the resource implications for all levels of government in administering harmonised laws;

d) the observance of the directive of the Council of Australian Governments that in developing harmonised OHS legislation there be no reduction or compromise in standards for legitimate safety concerns.

Methodology and timeframe

15. The review will be undertaken by:

a) Mr Robin Stewart-Crompton – Chair

b) Mr Barry Sherriff – Member

c) Ms Stephanie Mayman – Member.

16. The advisory panel will be supported by a secretariat resourced by the Commonwealth Department of Education, Employment and Workplace Relations. State and Territory governments may also provide practical support and assistance to the advisory panel.

17. The following timeframe will apply to the review:

Information gathering, research and consultation with key stakeholders	April – May 2008
Publish issues paper and invite submissions	May 2008
Provide a progress report to Workplace Relations Ministers' Council meeting	May 2008 (expected)
Provide report and recommendations to Workplace Relations Ministers' Council on priority areas outlined in paragraph 12 (duties of care and the nature and structure of offences)	31 October 2008
Provide report and recommendations to Workplace Relations Ministers' Council on remaining matters	30 January 2009

Appendix B – Reference documents

OHS Act Reviews

New South Wales

- Report on the Review of the *Occupational Health and Safety Act 2000* – May 2006
- Advice in relation to workplace death, occupational health and safety legislation & other matters – Report to WorkCover Authority of NSW, June 2004, McCallum, R. Hall, P. Hatcher, A. Searle, A.

Victoria

- *Occupational Health and Safety Act 2004* Review, Chris Maxwell – March 2004
- A report on the *Occupational Health and Safety Act 2004* – Administrative review, Bob Stensholt, December 2007

South Australia

- Review of Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia, Brian Stanley, December 2002
  Volume 1
  Volume 2
  Volume 3

Western Australia

- Review of the *Occupational Safety and Health Act 1984*, Richard Hooker, December 2006

Tasmania

- Review of Workplace Health and Safety in Tasmania, Interim Report – February 2006

Northern Territory

- Review of the NT Work Health Act and Mining Management Act – June 2007

Australian Capital Territory

- *Occupational Health and Safety Act 1989* Scope and Structure Review, Final Report – September 2005

Appendix B – Reference documents

OHS Legislation

New South Wales

- Occupational Health and Safety Act 2000

Victoria

- Occupational Health and Safety Act 2004

Queensland

- Workplace Health and Safety Act 1995

South Australia

- Occupational Health, Safety and Welfare Act 1986

Western Australia

- Occupational Safety and Health Act 1984

Tasmania

- Workplace Health and Safety Act 1995

Northern Territory

- Work Health Act 2007
- Work Health and Safety Act 2007 (not yet commenced)

Australian Capital Territory

- Occupational Health and Safety Act 1989

Commonwealth

- Occupational Health and Safety (Commonwealth Employees) Act 1991