

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

---

## Legislative Approach:

Question 1 Which regulatory approach or approaches should be taken in the model OHS Act, and why?

The current structure of multiple acts, supported by multiple sets of regulations and codes of practice is confusing, hard to administer and achieve compliance with. The multiple safety acts (workplace, mining, electrical, dangerous goods, rail, port) should be combined into one overarching act which applies to all forms of safety. This should then be supported by one set of regulations, calling upon supporting codes of practice and guidance documents.

Question 2 How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

In term of the principle-based standards (general duties of care) and performance-based standards (outcomes), the Act should be quite explicit. In terms of the process-based standards and prescriptive standards, these should be detailed through the supporting regulations and codes of practices, which are in turn referenced through the Act.

Question 3 What is an appropriate title for the model OHS Act?

The Australian model OHS Act should be titled "*The Australian Model Occupational Health and Safety Act*". This emphasizes the Australia-wide scope and the fact that this is a model on which the state legislatures base their own structure on. The word Occupational is more appropriate than Workplace. A Workplace is perceived to be a static physical location in which people are paid to work. Focusing on occupational recognizes the itinerant nature of some work, and also gives the opportunity to recognize the occupation of volunteer.

Question 4 Should the model OHS Act specify its objectives? If so, how and what should they be?

The model OHS Act should clearly specify its objectives, in order to ensure consistency of application through clear understanding of intent. These should be stated in the text of the Act, in a section titled Objectives. The objectives of the Act should be to provide a clear and consistent structure for occupational health and safety legislation across Australia, which ensures that the health and safety of all persons in Australia are appropriately protected whilst they are about their occupations.

Question 5 Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

The model OHS Act should clearly specify the overarching principles of health and safety protection. These should include :

- The right of all persons in Australia to safety and continued health whilst involved in their occupation
- The right of all workers to consultation in the development and implementation of health and safety in their occupation
- The obligation of all employers to ensure the health and safety of all persons involved in occupations under their care
- The application of a risk management approach to ensure currency and use of best practice to health and safety to a level of ALARP

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

---

Question 6 Are there any other issues that should be considered in the legislative approach of a model OHS Act?

The responsibility of each jurisdiction to ensuring a clear, consistent and well-resourced structure in each jurisdiction to advise, support and enforce the legislation should be clearly outlined in the legislative approach.

### **Scope, Application & definitions:**

Question 7 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 relationships between the model OHS Act and industry specific legislation?

No, the model OHS Act should not maintain the status quo of multiple legislations under different jurisdictions. It is confusing, unclear and difficult to administer. One overarching OHS Act administered by one regulatory body in each jurisdiction, with supporting sets of regulations, would clarify and simplify implementation of health and safety in industry. Thus, less time would be spent on legislative research, interpretation and understanding, allowing more time for actual implementation and activity.

Question 8 Alternatively, should a model OHS Act incorporate an industry specific safety legislation? If so, how and to what extent (eg could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

A model OHS Act should incorporate industry specific safety legislation. This can be done quite simply, by incorporating prescriptive standards in regulations and process-based standards in codes of practice referred to in the regulations. This approach would reduce both duplication and inconsistency in the body of legislation applied. Hence, there would be an overarching Act, a set of General Regulations, and several Industry Specific Regulations which would only contain those aspects of industry which are unique to that industry. For example, the issue of confined space is common to many industries and would thus be prescribed in the General Regulations, whereas issues of ground subsidence are unique to mining industries. It is also important to ensure that issues such as spontaneous combustion of coal are kept in the General Regulations as they apply to both Power Industries and Coal Mines.

Question 9 Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?

Each jurisdiction should only have one regulatory body for health and safety, which would ultimately streamline coordination.. The responsibility of each jurisdiction to ensuring a clear, consistent and well-resourced structure in each jurisdiction to advise, support and enforce the legislation should be clearly outlined in the legislative approach. This should include the requirement of the jurisdiction to maintain appropriate skills sets and bodies of knowledge appropriate to the wide range of industries. Hence, electrical inspectors, dangerous goods inspectors, mines inspectors, etc would still exist, but would come under the one regulatory body. Under this structure, it would be important for the model OHS Act to clearly outline expectations of each jurisdiction of what adequate resourcing might look like. Levels of inspectors and advisors in all jurisdictions are currently far too low to adequately and consistently advise, implement and enforce the requirements of their own legislation. Without legislative support, this model could ultimately be eroded to the point where support of the Act was lip service only.

There is also an opportunity to improve safety coordination between regulators, safety professionals who implement, and union safety personnel.

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

---

Question 10 Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

General duties of care should be tied to the conduct of work, as the nature of work in Australia today is dynamic. Tying it to the workplace currently enables some employers to slide out of their obligations as the definition of workplace becomes more and more hazy in the virtual world of technology.

Question 11 Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

Yes, these general duties of care should be extended to members of the public. This can be done by linking obligations to the 'conduct of the undertaking', rather than to the static concept of a workplace. This also then provides consistency with the environmental 'cradle-to-grave' approach.

Question 12 Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

Yes, the scope and application needs to be sufficiently broad and flexible to accommodate new and evolving work arrangements. This can be done by tying the legislation to occupations and conducting an undertaking rather than to static workplaces.

Question 13 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?

Current duties of care do not require employers to protect against security threats or acts of nature. Hence, remote employees are currently inadequately protected against cyclone. Security is emerging as a new aspect of occupational safety and needs to be incorporated into the legislation.

It is also important to ensure that 'take-home' impacts are included in the obligations. Examples of this are where a refinery worker has to bring home chemically contaminated clothing to be washed in the family washing machine, the same washing machine that washes the children's clothes, thus potentially contaminating them too. Another example is the right of mothers to feed by the method of their choice, thus ensuring the maintenance of family health. These examples could be addressed by extending the duty of care obligations, both of the worker and the employer (see answer to Question 11).

Question 14 Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

The clear definition of the following terms are essential :

- Employer
- Employee
- Workplace
- Conduct of undertaking
- Construction work – this term should not include planned or breakdown repair of plant
- Person in control of a workplace – this can include supervisors as well as management personnel
- Person in control of an undertaking – greater focus on the management approach
- Principal employer
- Safety
- Health
- Major Hazard Facility
- Dangerous Goods Facility
- Mine – clarify whether it includes worked and unworked areas of the lease

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

---

Question 15 Are there any other issues relating to the scope, application and definitions of a model OHS Act?

The role of the union representatives should be clearly defined

### **Duties of Care – Who owes them and to whom?**

Question 16 Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?

It is important for all levels of an organization or chain of organizations to clearly understand who is in control of a workplace and who is in control of an undertaking. A lack of clarity in these definitions is leading to situations in which people do not recognize and thus do not comply with their own obligations. It is my belief that there are two very different levels of control – control of the process or undertaking, which is the management level of control in larger organizations, and control of the workplace – which is the supervisory level of control in larger organizations.

Further, certain aspects of control are currently embedded in statutory appointments in mining legislation. This is an excellent way of ensuring that people truly understand their control obligations.

Question 17 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?

Every person should have some level of duty of care to themselves and others. This is a fundamental tenet of interdependent safety. The level of duty would then increase with the level of control. Thus, a supervisor has a greater duty than a worker, a manager a greater level of duty than a supervisor. The nature of the duty at all levels is simple – to do what can be done to reduce levels of exposure to risk to ALARP, in other words ALARP within than person's level of control to achieve. Hence, the worker would have a duty to comply with all reasonable instructions from persons in control, persons in control have a duty to ensure a safe system of work, adequate resources and reasonable instruction. The defences are then based on a person's sphere of control and application of ALARP.

Question 18 Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

Yes, control should be able to be delegated, but this needs to be done formally, via written notification. For example, a General Manager should be able to delegate control if he/she is planning to be absent for a significant period of time (ie several weeks). An organization should be able to delegate a measure of control to another organization as part of a contractual arrangement such as construction, where the control of the construction site is delegated to the principal contractor. An organization should be able to delegate control in situations when they bring in a specialist organization to provide skills which are not a normal part of the first organisation's core business, for example hiring an asbestos removal company or a demolition company,. However, it would be important that the person or organization delegating control always maintains a responsibility to ensure that the party to whom they are delegating that control responsibility has the skills, abilities, resources and understanding to adequately fulfil those responsibilities. In other words, the primary organization or person always retains a due diligence obligation, even when the control has been delegated.

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

---

Question 19 Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

Yes, the model OHS Act should clarify responsibility. The WA Mining legislation contains a definition of a principal employer, recognizing that there is always a person or body at the top of a chain of contractual relationships. Thus, while each link in this chain has a level of control and a level of duty to exercise, the principal employer retains an ultimate duty to ensure that all levels of the chain are working to the intent of the legislation.

In addition, the OHS Act needs to clearly state that a person or organization may owe multiple duties under the legislation and that all of these should be fulfilled.

Question 20 Is primary reliance on employment relationships a valid basis for framing safety obligations?

Primary reliance should not be on employment relationships, rather it should be on control relationships. In this way, an organization which uses a lot of casual workers has the same obligations to those people as an organization which uses a lot of direct employees. Further, this approach would then be flexible enough to include the many and varied working arrangements now in place, as well as those a yet unknown working arrangements in the future.

Question 21 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?

It should be clearly stated that a duty of care is owed by persons in control to ensure the safety, health and continued wellbeing of all persons within that control, regardless of their status as contractor, labour hire personnel, volunteer, apprentices/trainees/work experience, visitors, members of the public, or other persons who might be exposed to hazards in some way as a result of the undertaking.

Question 22 Is there a broader concept that more effectively covers the various work arrangements?

Yes, focusing on the level of control available provides a greater flexibility than focusing on the work arrangements. Therefore the definitions of control, as outlined in Questions 16 and 17 above become essential.

Question 23 How and to what extent should the model OHS Act specify an employer's duty of care?

An employer's duty of care should be specified very very clearly as an obligation under the Act for a person in control of an undertaking. This duty should be to provide a safe system of work in terms of equipment, resources, time, procedures to reduce the identified risk to ALARP. With regard to design and manufacturing, it should also encompass the cradle to grave approach, so that products and services are designed and manufactured to provide ongoing safety for their lifecycle to the best knowledge of the person or organization at the time.

Question 24 To whom should these duties be owed?

These duties should be owed to all persons within that control, regardless of their status as contractor, labour hire personnel, volunteer, apprentices/trainees/work experience, visitors, members of the public or other persons who might be exposed to hazards in some way as a result of the undertaking.

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

---

Question 25 How and to what extent should the model OHS Act specify workers' duties of care?

A worker's duty of care should be specified very very clearly as an obligation to follow reasonable instructions from the person in control, to use safe systems of work as directed, to work towards the health and safety of themselves and those around them, to actively and constructively participate in consultation programs, to identify and report hazards and incidents, to not willfully misuse or in other ways violate known procedures and safety systems of work. Where willful misuse or conscious violation is done, an employer should be able to dismiss the employee, in an auditable manner.

Question 26 Should the model OHS Act include duties of care for persons who are not performing work? (eg visitors to a workplace, members of the public). If so, what should the duties be?

Yes, both persons in control and workers owe a duty to members of the public and to visitors. These duties are to not knowingly expose those persons to risk to their health and safety, and to ensure that protection measures are communicated where required. In addition, for persons in control, the duties should also encompass the cradle to grave approach, so that products and services are designed and manufactured to provide ongoing safety for their lifecycle to the best knowledge of the person or organization at the time.

Question 27 Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Yes, in two forms, both a WHSO on the Queensland model to provide advice to the management on safety matters, and a responsible officer from amongst the management (eg Registered Manager on the mining model) to ensure that the appropriate resources, time and systems are available and implemented. The responsible officer role would not reduce the responsibilities of other persons in control, but rather focus those responsibilities into a management role senior enough to provide funds and resources. These two roles of responsible officer and WHSO should be separate in larger organizations.

Question 28 What should the liabilities of such appointed persons be if the responsibilities are not met?

The management responsible officer (eg Registered Manager) should be liable if the responsibility for appropriate resources, time and systems are knowingly not fulfilled to a level to reduce exposure to health and safety to ALARP. The WHSO role, as an expert advisor, should, as per the Queensland model, be protected from prosecution, unless committing a deliberate violation such as a refusal to communicate a known hazard to the management responsible officer.

Question 29 What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

The duty holder or management responsible officer should be a senior management person from amongst those in control, eg registered manager on the mining model. The WHSO role should be fulfilled by a senior safety professional with sufficient access to the appointed management responsible officer to be able to communicate advice and recommendations. The two roles should be separate in larger organizations.

Question 30 Should the model OHS Act include positive duties for officers of bodies corporate?

Yes, they also have a duty of care to protect the health and safety of the members of the body, as well as to protect the health and safety of any person who is contracted to perform work on behalf of the body corporate.

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

---

Question 31 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?

While the actual duty itself is usually clearly expressed, who owes it to whom is not. The definition of a person in control of a workplace needs to be clarified, to clearly include supervisory personnel.

Question 32 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?

Yes, the model OHS Act should clearly set out that persons in control of a work area or a temporary workplace also have a duty to, as far as possible within their control, reduce the risk of exposure to hazards to health and safety to ALARP for all persons who come into that work area or temporary workplace.

Question 33 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 (ie conception to disposal)? If so, what should the duties be in relation to these activities?

Yes, the model OHS Act should clearly establish health and safety obligations for the various activities of design, manufacture, supply, import, installation, erection, decommissioning and disposal for the whole life of an item, structure or system. With regard to design and manufacturing, it should encompass the cradle to grave approach, so that products and services are designed and manufactured to provide ongoing safety for their lifecycle to the best knowledge of the person or organization at the time. This would then be consistent with the environmental approach.

Question 34 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?

Under the model OHS Act, ultimately, all designers and manufacturers would be subject to the same obligations and expectations no matter where they are jurisdictionally within Australia, so within Australia, the designer or manufacturer should be liable for their own obligations. However, where a designer is outside the Australian jurisdiction, the manufacturer holds the obligation, as the person or organization who has scoped or purchased the design, it should be up to them to meet the obligation to ensure it complies and does not knowingly introduce a hazard to health and safety, or that hazards to health and safety within the design or product are controlled to ALARP.

Question 35 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).

The activity of supply should be defined to include every time an item changes hands, to ensure that a product continues to be safe to be used. To do otherwise allows the possibility of items which knowingly contain hazards being passed on to another user or work environment, thus introducing hazards there. This is especially possible in relation to the disposal of dismantled plant.

Question 36 Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

No other issues identified.

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

---

### **'Reasonably Practicable & Risk Management:**

Question 37 Should a test of "reasonably practicable" be included in the model OHS Act?

Yes, a test of "reasonably practicable" should be clearly included in the model OHS Act, and not left to be explained in guidelines. This key principle should be explicit in the highest level of statutory document. It would also be important then to ensure that supporting documentation such as Codes of Practice and Guidelines do not contradict that test.

Question 38 If not, what alternative standard should be included?

N/A

Question 39 How should the standard be defined? What levels of detail should be included?

A test of "reasonably practicable" will and must vary according to circumstances. What is reasonably practicable for a large multi-national corporation to achieve may not be reasonably achievable for a small to medium organization. Hence the standard should lead to a flexible consideration of the points which make up practicability, not a set specific criterion. However, like the Victorian and Western Australian legislation, regard must be had to the hazard or risk in terms of likelihood, consequence, foreknowledge and quality of knowledge of the hazard or risk, an assessment of potential control measures and the cost in relation to the size and nature of the organization.

Question 40 Should control be an element of the standard?

Yes an assessment of potential control must be an element of the standard of reasonably practicable, without assessing the cost and "reasonableness" of control options, it is not possible to determine what extent is reasonably practicable in regards to managing or controlling a hazard or risk for a particular organization or circumstance.

Question 41 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?

As set out in question 39 above, the criterion should be established in the Act. However, examples of application of those criterion should be provided in guidance documentation, such as a Code of Practice for Risk Management. These examples should provide a range of examples appropriate to different circumstances relating to industry, organization size, geographical location (remote vs regional vs metropolitan).

Question 42 Should 'hazard' and 'risk' be defined in the model OHS Act?

Yes, without a clear definition of these two terms, it is not possible to determine when they have been eliminated or controlled.

Question 43 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?

The definition of 'reasonably practicable' should include a reference to risk management principles and processes, as, without these principles and processes, it is not possible to determine whether a 'reasonably practicable' reduction in the exposure of persons to health and safety hazards or risks has been achieved. The reference to risk management principles should be in the form of an obligation on persons in control to conduct or have conducted, enterprise wide risk assessments and ensure that hazards and risks are controlled to ALARP.

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

---

Question 44 Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

Yes. The reference to risk management principles should be in the form of an obligation on persons in control to conduct or have conducted, enterprise wide risk assessments and ensure that hazards and risks are controlled to ALARP.

### Consultation, Participation and Representation:

Question 45 What provisions should be made in the model OHS Act for consultation?

It should be an obligation for persons in control of an undertaking to ensure that consultation is an intrinsic part of the safety management process. Consultation processes need to be flexible enough to include the many different forms of employment arrangements now in place. Specific provisions for facilitating consultation on multi-employer worksites would assist with this. It should also be an obligation for a worker to constructively, actively and positively participate in consultative processes.

Question 46 What are the work relationships to which a consultation provision should apply?

Persons in control of an undertaking should ensure that all persons who are involved in the workplace have access to a mechanism of consultation, regardless of their work status. Therefore, short term labour hire contractors and casual employees should attend safety meetings and have the opportunity to raise concerns and suggestions in the same way as long term employees. Contractors should also have access to consultation processes which feed information back to the principal employer. Workers must also be protected from the possible impacts of telling management about hazards or concerns that management may not wish to know about.

Question 47 Should there be different levels of consultation required for different work relationships?

Differing levels of consultation should be required appropriate to the levels of probability of exposure to risk to health and safety. As an example, in a chemical plant, maintenance workers and operators should be able to participate in a greater level of consultation than administration workers. Therefore the risk exposure level rather than the work relationship becomes the deciding factor for consultation.

Question 48 How should consultation be provided for ?

Consultation should be provided for through reporting, meeting and risk assessment processes. It is most commonly done through meeting processes.

A multi-employer worksite	A tree structure of regular safety meetings, each feeding to the other, with an over-arching site wide safety committee with multi-employer/worker representation, so that each person has the opportunity to attend and communicate at some level
An employer with operations across more than one worksite	A tree structure of safety meetings, each feeding to the other, with a, over-arching operation-wide safety committee with representation from each of the worksites, so that each person has the opportunity to attend and communicate at some level
Small business	A single process of regular safety meetings giving all employees the opportunity to attend
Remote workplaces	Technology could provide opportunities for

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

	people at remote workplaces to attend safety meetings and consultative processes in a virtual manner, alternatively reporting processes could be used, or a one-on-one approach
Precarious employment	Anonymous reporting processes may be most appropriate for this group. This is a delicate situation, but these are people often in the most exposed group.
Workers from culturally and linguistically diverse backgrounds	Safety meetings may require the presence of an interpreter, often one is already present in amongst the workers of linguistically diverse backgrounds

Question 49 Should there be a requirement for establishing HSRs and HSCs?

Yes

Question 50 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?

HSR's and HSC's should be required for minimum numbers of persons in either a workplace or an undertaking. This should recognize that at times there may be more than one HSC process to be part of, for example a company with persons on several multi-employer sites may have its own safety committee structure as well as participating in the committee structure of each of the multi-employer sites. Where there is less than the minimum number of persons, then they should all be part of the one safety meeting process which then becomes a de facto HSC. By focusing on the number of persons rather than workers, and an undertaking more than a workplace, the changing nature of work arrangements is eliminated as a factor. By setting up a de facto HSC in situations where smaller groups are involved, the possibility of a group not getting the opportunity to be consulted is eliminated.

Question 51 How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

There should be an HSC for every workplace or undertaking. Where there is only a small number of people involved, all members become part of a de facto HSC. HSRs should be elected for every 40 persons (this would be persons of all status – employee, contractor, apprentice, trainee) in a workplace or undertaking. In large organisations, a cascading structure of committees or meetings may be implemented. Election processes of nomination and anonymous ballot should be followed for HSRs. All persons in a workplace should be eligible to stand for election to the role of HSR, with the exception of the responsible management officer and the WHSO, as these two roles have their own separate responsibilities within the consultation process, and to be both management appointee and workplace nominee is a conflict of interest.

Question 52 Where an election is required, who should be entitled to vote?

Anyone present in the workplace should have a single vote. Persons absent due to holidays, shift rosters or long term sick leave should have the opportunity to submit an absentee vote.

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

---

Question 53 What should the powers and functions of HSRs be?

HSRs should be able to inspect, request to participate in or review incident investigations, and direct suspension of dangerous work pending advice. They should also be obliged to participate constructively in consultative processes. HSRs should be advised of incidents involving the persons they represent and also be advised of the presence of regulators in their area. HSRs should also be obliged to report to management any incidents or hazards of which they become aware. They should not have the right to issue a provisional improvement notice. Should they believe that an organization or undertaking is not making reasonable efforts to reduce risk in relation to a specific issue, they should have the right to advise the regulatory body if all other methods of resolution have failed.

Question 54 What should the structure and functions of HSCs be?

In small organizations, an HSCs should consist of all members of the undertaking or workplace. In larger organizations, HSCs should be a cascading structure of representative groups, with the highest level group for the organization containing a representative from each of the main participating groups on the site or within the undertaking (see Question 48). The HSC should be chaired by the designated responsible officer or the WHSO, and also contain at least one other management representative. The numbers of general representatives should outweigh the numbers of management representatives. The functions of the HSC should be to review the safety direction of the undertaking, safety incident trends, safety incident outcomes, provide advice and recommendations on safety issues that have a wider impact on the organization or undertaking and have not been able to be resolved at a work level.

Question 55 What training and qualifications should members of HSRs and members of HSCs have?

Members of HSRs should be specifically trained as Safety Representatives, as per the Western Australian model. Members of HSCs should have the same minimum training as HSRs. This training should include an understanding of legislation, an understanding of the purpose, intent and outcomes of good investigations, a recognition and understanding of the key elements of a good safety system, an understanding of trend analysis.

Should an HSR deliberately violate a work rule, eg attending the work under the influence of illegal drugs, then they should be removed from their role as HSR and a new election held.

Question 56 Are there alternative mechanisms that should be considered?

Yes, a similar structure of Industry Safety Committees and Regional Safety Committees so that consultation and learning can be shared more widely. This would also enable the regulatory body to disseminate information.

Question 57 To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

The HSR and HSC requirements should be clearly and explicitly outlined in the model OHS Act, not left to regulations. Although this would be a prescriptive standard, it is such an essential part of the consultation process, it should be at the highest level of statutory documentation.

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

---

Question 58 Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

Casual workers and workers in precarious employment are not currently sufficiently involved in consultative processes. Many shift workers are also disadvantaged in terms of consultation. The model OHS Act could address such problems by making it an obligation on the person in control of the undertaking to ensure that every person accessing the undertaking has the opportunity to participate in some form of consultative process.

Question 59 Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?

Yes, right of entry provisions should be clearly spelt out in the model OHS Act. Authorized representatives of unions should have these rights.

Question 60 Should the model OHS Act specify training and qualifications for such persons?

Yes, these people should have training and qualifications to ensure that they understand the use of this right, to ensure that they are able to conduct an appropriate inspection or investigation.

Question 61 In what circumstances should the right of entry be exercisable?

Right of entry should only be exercised after the union has supplied written notice in advance to the persons in control of the undertaking that provides details about the suspected contravention. Right of entry should only be exercised on sites where the union represented by the authorized representative actually has members. In addition, where a site has entry provisions such as visitor inductions and escorts of visitors, persons exercising the right of entry must comply with these provisions. However, although escorted, they have the right to be escorted to areas they wish to investigate.

Question 62 What powers should be exercisable upon entry, and subject to what conditions or limitations?

Authorised representatives of unions should be able to request assistance from an inspector, talk to persons in the workplace, inspect the workplace in aspects relating to the suspected contravention, request copies of information or documents associated with the suspected contravention. They should not use these types of "right of entry" visits to promote membership. They should not be able to seize equipment or obtain copies of documents or information not associated with the suspected contravention. Documents protected under processes such as medical confidentiality, privacy laws or legal privilege should be remain protected. They should not have the right to issue a provisional improvement notice.

Question 63 What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

The model OHS Act should specify that workplace processes should be used where possible to resolve health and safety issues. Where these fail, issues should be referred to the HSC for further consultation. If appropriate progress is not made by this mechanism, external mechanisms such as mediation should become available. If all else, fails, advice from the regulatory body should be sought.

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

---

Question 64 When should issue resolution procedures be activated?

Issue resolution procedures should be considered for situations in which an organization is not making appropriate attempts to reduce exposure to a health or safety risk to ALARP and workplace processes have not resolved the issue.

Question 65 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?

Issue resolution procedures should appear in the model OHS Act.

Question 66 How best can the model Act ensure resolution procedures are, where possible, agreed at a workplace level?

It should be an obligation on all persons in a workplace to constructively participate in consultation and issue resolution processes. To fail to meet this obligation should be an offence under the Act.

Question 67 Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

Yes. All workers should have the right to refuse or cease to undertake work they consider unhealthy or unsafe. They should then participate in a consultative process aimed at reducing exposure through a risk assessment approach, so that, once appropriate controls are in place as constructively agreed by all involved parties, work can resume. Such issues should progress through the workplace resolution process, if necessary involve external mediation or regulatory advice. As the person in control also has an obligation to not knowingly place persons in situations of exposure to risk to their health and safety until the risk is reduced to ALARP, they therefore also have to participate constructively in the risk reduction process.

Question 68 Should a model OHS Act provide for the right of a HSR to direct that work ceases? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

The HSR should have the same right of any worker to refuse or cease to undertake work they consider unhealthy or unsafe. Should they have further concerns, they have the same right of any worker to request workplace consultation on the specific issue, or regulatory intervention. Further rights to direct the cessation of work should not be required.

Question 69 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?

If they have exercised the right to cease work in accordance with the Act, they are then directly involved in the consultation and risk management process to determine a resolution to the issue. If they are involved in this process, they are working to improve the safety performance of the organization and should therefore continue to be paid to their normal working conditions. Should they consciously decide to not be a part of the consultation process and not seek further resolution through external processes then they are not actively working to improve the safety performance of the organization and should not therefore be paid.

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

---

Question 70 In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with the cessation of work?

Yes. The model OHS Act should specify that workplace processes should be used where possible to resolve health and safety issues. Where these fail, issues should be referred to the HSC for further consultation. If appropriate progress is not made by this mechanism, external mechanisms such as mediation should become available. If all else fails, advice from the regulatory body should be sought.

Question 71 What provision should be made in the model OHS Act to protect persons from discrimination or victimization and who should be protected?

Everyone should be protected from discrimination or victimization regarding raising a health and safety issue, carrying out a health and safety issue or refusing to undertake work they consider to be unhealthy or unsafe. It should be an offence under the Act to discriminate or victimize people for any of these.

Question 72 Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?

Anyone should be able to bring an action. Representative actions need to be allowed for to protect those in precarious employment.

Question 73 Should a breach of the provisions be the subject of criminal or civil proceedings or both?

Depending on the breach, it could be either criminal or civil proceedings. Deliberate violations or omissions may require criminal action, whereas lapses or unintentional violations may require civil proceedings.

Question 74 Who should have the burden of proving relevant elements of offences (eg 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?

Our justice system is built upon the principle of "innocent until proven guilty", therefore the regulatory body should have the burden of proving conduct and intention. They should be proven beyond a reasonable doubt.

Question 75 Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimization pending proceedings?

Yes

Question 76 What remedies should be available to victims?

No answer

Question 77 Should there be mechanisms in the model OHS Act for resolution of discrimination or victimization disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?

Using the mechanisms of conciliation and arbitration may be less adversarial and therefore more constructive and more appropriate to a collaborative approach.

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

---

Question 78 Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

It is important that the emphasis is placed upon constructive consultation, leading to a collaborative approach. Ultimately, the aim of all parties is the same, to reduce the risk of exposure to hazards affecting health and safety, so that everyone goes home safely each shift.

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

---

### Regulatory Functions, Powers & Accountability:

Question 79 Should the model OHS Act provide for the establishment, functions, powers, and accountability of regulators? If so, what should be provided?

Yes, the model OHS Act should clearly set out the establishment, functions, powers, accountability, adequate resourcing and training standards of regulators. It is essential that regulators are adequately resourced, which they are not at the moment.

Question 80 Should the model OHS Act require regulators to publish enforcement and prosecution policies?

Yes, a requirement for the publication of enforcement and prosecution policies would improve transparency. It would also enable regulators to make a clear statement to industry in the event of a policy change.

Question 81 Should the model OHS Act include provisions that allow the making of interpretative documents?

Yes, including provisions that allow the making of interpretative documents and providing some clear instruction to regulators on the definitions of the various types, would improve consistency of the development of guidance material between the states and industries.

Question 82 Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

Yes, an inspector alone should not be able to bring a prosecution, but this should be available to the regulator.

Question 83 Should the advisory and enforcement functions of an OHS regulator be separated? If so, why?

Whilst I can see benefits for these functions being separated, I believe it could also generate problems. If advisory and enforcement functions remain combined in regulators it enables positive relationship-building. Separating advisory and enforcement functions would require additional resources, especially in regional areas, at a time when these areas are already significantly under-resourced. I would recommend the functions remain combined.

Question 84 How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

The requirements for the appointment, qualifications, powers, functions and accountability of inspectors should be clearly stated in the model OHS Act. They should be appointed by the Regulator's Director. They should be qualified in safety and also have a requirement to have practical experience in an industry-safety role. The division of inspectors should be by industry and inspectors should have relevant practical experience, for example mines inspectors require experience in the mining environment, construction inspectors should have construction experience. They should be qualified and experienced to a standard similar to that of a "superintendent safety" and recompensed accordingly. Their powers and functions should be clearly stated to include proactive advice and assistance as well as investigative powers and functions. Processes such as proof of identity and right of entry, as well as their obligation to comply with site visitor requirements where such exist, so that their safety can also be protected, should all be clearly stated.

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

---

Question 85 Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

One way in which the role and capacity of inspectors to provide advice and assistance is to appoint inspectors with good, clear industry-relevant competence, so clarification of minimum qualifications and experience is a must. A second way is to state as one of their duties that they must provide advice and assistance when asked by any person, be they worker, safety professional or management responsible person. It should also be a duty that they disseminate proactive information.

Question 86 Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?

No, there are no circumstances in which an inspector should be completely independent of some form of review by the regulator.

Question 87 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?

Yes, an inspector should be able to modify, amend or cancel any notice or instrument issued by the inspector. This should be available to inspectors to use if they receive new information, if they discover that original information supplied had been incorrect (such as company structures or organizational details). It should only be possible with a full audit trail, perhaps a notice of amendment or cancellation.

Question 88 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?

Any notice, decision or advice should be able to be appealed, by request in writing within 28 days of the decision. Further review processes should include conciliation or mediation with a Tribunal.

Question 89 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?

None of the Acts currently in force in any jurisdiction provide a formal mechanism for recognition of good practice when it is found. While this is to some extent covered by Safety Awards in various jurisdictions, these award programmes are outside the legislation and must be entered. There are situations where organizations are performing safety standards of leading standard and may not know it. These should be able to be recognized by inspectors by a commendation notice.

Positive feedback is a key principle of behavioural safety and if a consultative, collaborative approach is to be used by the regulator, a mechanism needs to be in place to achieve positive feedback.

### **Compliance & Enforcement**

Question 90 Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

Yes, there should be a hierarchy of compliance measures in the model OHS Act. This should consist of Inspection, Advice and Persuasion, Warnings and negotiated outcomes, Infringement Notice, Improvement Notice, Prohibition Notice, Probation, Fines and other punitive action, Fines and other punitive action, Incapacitation.

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

---

Question 91 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 document?

These enforcement measures should be requirements for the appropriate use of enforcement measures and be in the Act.

Question 92 What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

HSRs should not be able to issue PINs under the model OHS Act. Enforcement measures should only come from the regulator. The requirements for improvement notices and prohibition notices should be clearly provided in the Act, they should only be able to be issued by Inspectors. Inspectors should also be able to issue Commendation Notices.

Question 93 Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?

Yes, Improvement and prohibition notices should contain recommendations about how to achieve compliance.

Question 94 What provisions should be made for the review of PINs, improvement and prohibition notices?

Improvement and prohibition notices should be subject to review after a given period of time, this period of time would need to be determined at the time of notice issue, depending on the nature of the offence and the lead-time to achieve compliance. This then enables the person in control to provide direct evidence that they have complied, or that the conditions have changed such that the requirements of the prohibition notice or improvement notice no longer apply.

Question 95 Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

Yes, there should be a specified minimum timeframe to allow for compliance with improvement and prohibition notices. This time frame should be at least 24 hours, but may need to be specified or extended by the inspector at the time of the notice issue, depending on the nature of the offence and the lead time to achieve compliance.

Question 96 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 affect be?

No, the notice should continue to apply until the result of the review or appeal is known.

Question 97 Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Yes, the model OHS Act should provide for infringement notices. They should be issued for a failure to comply with an improvement or prohibition notice.

Question 98 Should the administration of infringement notices occur under OHS law or individual state legislation?

The administration of infringement notices should occur under OHS Law.

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

---

Question 99 What amounts should be specified as fines for infringements?

No answer.

Question 100 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?

No, the model OHS Act should not provide for injunctions. If persons other than the regulator have concerns, they should contact either the person in control or the regulator. If the regulator has concerns as to the safe operation of an undertaking, they already have mechanisms (prohibition, improvement and infringement notices) to enable them to take action.

Question 101 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?

Yes, the model OHS Act should provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? This option should be available to regulator, especially in first offence situations of a serious nature, where an organization has demonstrated a good previous reputation.

Question 102 Should the giving of an enforceable undertaking result in an admission of fault or liability?

No, the giving of an enforceable undertaking should not result in an admission of fault or liability.

Question 103 Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?

There needs to be a mechanism where excellent compliance, or "better than compliance" is recognized. I have mentioned this a few times, a Commendation Notice. An inspector should be able to issue a Commendation Notice to recognize on the spot, positive safety performance.

Current enforcement policies are purely reactive and seem to focus upon the reporting of incidents. This is seen in some organizations as a discouragement to accurate reporting and investigation. A proactive enforcement approach, looking at trends in industries or organisations, observing high-risk planned activities, a programme of regular, planned inspections for high risk operations or industries are all compliance tools which are currently under-utilised by the regulators, mainly because they are under-resourced. In addition, the application of some formal audit tools by the regulator could also be of assistance.

Perhaps some of these proactive issues could be addressed by the regulator's policy documents or other guidance and support processes, but required by regulations.

### **Prosecutions:**

**Question 104 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?**

**The model OHS Act should provide for breaches of duties or obligations to be a mixture of both criminal and civil proceedings and penalties.**

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

---

**Question 105** Which duties or obligations should be the subject of criminal offences or penalties and which may appropriately be heard as civil matters?

No answer

**Question 106** Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences.

No answer

**Question 107** Is it appropriate for prosecutions to be heard by specialist courts or tribunals or (specialist divisions in the courts)? Why?

Having OHS prosecutions heard by a specialist division in the courts would be useful, as it would allow a good allocation of court time, prevent OHS cases from blocking the hearing of other cases, and ensure a consistent approach to decisions.

**Question 108** To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

No answer

**Question 109** Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

The right of a defendant to trial by jury is one of the underpinning tenets of Australia's justice system. The rights of a defendant in an OHS case should be no different.

**Question 110** Who should be entitled to commence criminal proceedings?

Prosecutions should be able to be brought by an inspector, the regulator, the Minister, or the regulator's legal arm.

**Question 111** If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

Civil proceedings should be able to be brought by the victim, an inspector, the regulator, the Minister, or the regulator's legal arm.

**Question 112** What should appropriate time limits be for the commencement of a prosecution and why?

6 months is an appropriate time limit for the commencement of a prosecution. A lapse of a greater period of time than this allows too much memory of the incident and the investigation process to erode. In addition, in serious incidents, the supervisory personnel responsible for an injured worker are often already traumatized by the injury to a member of their team, and to wait longer than this causes both them and the injured worker unnecessary reinforcement of this traumatic time, long after the emotional pain should have started to heal.

**Question 113** 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.

No answer.

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

---

Question 114 Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?

No answer

Question 115 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?

No answer

Question 116 What should be the evidentiary status of codes of practice, regulations and other subordinate instruments.

Regulations should have the force of law and shall be complied with. Codes of practice and other subordinate guidance material should be considered "best practice", to be complied with unless there is a good reason.

Question 117 Is 'reasonably practicable' an appropriate standard for the model OHS Act?

Yes, 'reasonably practicable' is an appropriate standard for the model OHS Act. A test of "reasonably practicable" will and must vary according to circumstances. What is reasonably practicable for a large multi-national corporation to achieve may not be reasonably practicable for a small to medium organization. Hence the standard should lead to a flexible consideration of the points which make up practicability, not a set specific criterion. However, like the Victorian and Western Australian legislation, regard must be had to the hazard or risk in terms of likelihood, consequence, foreknowledge and quality of knowledge of the hazard or risk, an assessment of potential control measures and the cost in relation to the size and nature of the organization.

Question 118 Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

Under the principle of "innocent until proven guilty", the burden of proof should be on the prosecutor to prove that the standard was not met.

Question 119 Should the burden of proving elements of an offence differ between different types of offences (eg duties of care and procedural obligations)? If so, why?

Under the principle of "innocent until proven guilty", the burden of proof should be on the prosecutor, no matter what the offence.

Question 120 What, if any, defences should the model OHS Act provide?

Where merely non-compliance is the issue, it should be a defence that a different method was used because it was a higher standard.

Question 121 Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

Under the principle of "innocent until proven guilty", the burden of proof should be on the prosecutor.

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

---

Question 122 Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

This option should be available, but it should not automatically be the case that an officer is liable. If the officer has done everything within their power to prevent the offence, they should not be liable if other persons within the organization consciously and willfully fail to follow those systems or instructions.

Question 123 How should officer be defined?

Officer should be defined as the person in control of the undertaking, or as the responsible officer nominated by the person in control of the undertaking.

Question 124 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?

Under the principle of "innocent until proven guilty", the burden of proof should be on the prosecutor to prove that an act or omission by the officer contributed to the offence of the corporation.

Question 125 Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

No answer

Question 126 Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

No answer

Question 127 What should the approach to officers of unincorporated associations or volunteer officers be?

No answer

Question 128 For which offences should monetary penalties (fines) be imposed?

No answer

Question 129 Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

There is an effective alternative approach that would automatically take into consideration the different size of organizations. Fines should be calculated upon percentages of gross annual turnover, so that fines are proportionately fair.

Question 130 Should the level of fines be different for the various offences? If so, for what offences and at what levels?

No answer

Question 131 Should there be a statutory minimum fine for some offences? If so, what?

Yes, but it should be based upon a minimum percentage of gross annual turnover.

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

---

Question 132 Should the level of penalties depend on the culpability (recklessness) or outcome (death) or repeat offences?

All three of the above criteria should be considered when allocating penalties. A sliding scale of percentages would address these issues.

Question 133 Are there options that could facilitate more consistent outcomes across jurisdictions, such as a national register of decided cases?

A national register of decided cases as a register of precedents to call upon would provide a basis for a more consistent judicial approach.

Question 134 What penalty options should be available in addition to or instead of fines?

Alternative penalty options could include actively participating in safety research, so that in addition to some form of penalty, the body of safety knowledge is advanced.

Question 135 Should the model PHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

Wilful negligence which is proven to lead to the death of a person in a workplace should carry the same periods of imprisonment as manslaughter or murder charges.

Question 136 Should there be specific offences relating to workplace death or serious injury? If so, what?

No answer

Question 137 Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act

No answer

Question 138 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?

Yes, consequences of the breach should be taken into consideration, using a risk based model. If the breach was administrative, and no further consequence is likely, then that is different to a situation in which the breach was significant and although no one was injured, the breach had the potential to lead to a fatality.

Question 139 What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

No answer

Question 140 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?

No answer

Question 141 Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

No answer

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

---

### Other Issues:

Question 142 Should the power to make regulations be limited and if so, in what?

No answer

Question 143 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?

Regulations should provide for summary offences with lower penalties. In addition, some breaches under regulations should also be taken to be a breach of the model OHS Act.

Question 144 What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

Codes of practice should be required to go through consultation and advertising arrangements, consideration of recommendations from the OHS authority or advisory body and specific expiration clauses. Codes of practice should not need to be submitted to Parliament. Ministerial notices and guidelines should also be options available to regulators.

Question 145 How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?

A consistent approach to definitions of reportable incidents would assist in reducing the compliance burden. Currently, in complex operations, multiple and different standards of reports may apply, or an undertaking may be required to report an incident to more than one regulatory body.

Question 146 What provisions should be made in the model OHS Act for the external review of regulatory decisions?

No answer

Question 147 Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

Yes, the model OHS Act should include provisions for the resolution of OHS issues by conciliation or arbitration, in order to promote constructive consultation rather than just merely enforcement.

Question 148 Should the model OHS Act facilitate tripartism in the administration of OHS regulation and if so, how?

No answer

Question 149 Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

No answer

Question 150 What areas should be subject to formal mutual recognition provisions in the model OHS Act?

The model OHS Act should provide for mutual recognition in the areas of training, education, competency requirements, authorizations, licences, permits, registrations, incident notifications, plant and equipment. This should also include requirements for generic inductions.

Question 151 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:

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

---

- Better OHS outcomes
- Greater efficiency and effectiveness
- Lower regulatory compliance and enforcement burdens; and
- Improved harmonization of the requirements for such permits and licensing for industry across Australia

Permits and licensing should have consistent requirements across jurisdictions, be mutually recognized, and have a 5 year validity period, with maintained competency requirements an essential part of renewal so that currency of competence is maintained.

Question 152 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 minimize the difficulties of such overlap?

If all jurisdictional structures followed the same model OHS Act structure, then overlap would not matter because the requirements would be the same.