



NATIONAL REVIEW INTO MODEL OHS LAWS

Business SA Submission

July 2008

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Business SA's submission | **National Review into Model OHS Laws**

Introduction

Business SA

The South Australian Employers' Chamber of Commerce and Industry, trading as Business SA, is the State's leading business organisation and represents more than 4,000 businesses through direct membership and affiliated industry and association groups.

Business SA is a registered association of employers under the South Australian Industrial and Employee Relations Act 1994 and recognised under that and other legislation as the South Australia's peak business and employer group.

Business SA's submission

In developing this submission, Business SA has drawn significantly on South Australian experience and data as evidence to support the information and recommendations presented.

Business SA's submission is divided into four parts.

The first part outlines the development of OHS legislation in Australia. In looking to the future it is essential that the lessons of the past are understood and incorporated into the future.

The second part presents significant contextual matters that must be understood and considered when developing the national model laws. A failure to address these in the development of the model laws has the potential to result in the model laws having an adverse impact on Australia's OHS performance as well as hindering Australia's economic development

The third part presents a range of principles that must be addressed when formulating national model OHS laws to ensure that the legislation is relevant and appropriate for the future of Australia, both for OHS performance and its economic development.

The fourth part broadly addresses the questions and issues presented in the issue paper.

Consultation

In developing this submission Business SA has drawn upon consultation and interaction with its members and other South Australian based employer associations over many years.

Part One - Historical Context

Historically, Australia's approach to the issue of occupational health, safety and welfare (OHS) has been modelled on British experiences. Early attempts to control and minimise risks and hazards within the workplace closely followed 19th century British legislation. However, this approach was far from desirable, with a multitude of ad hoc industry-specific Acts forming the basis of OHS regulation in the UK.

Regulatory development

Early OHS laws provided only very general obligations and it was left to the process of regulatory development to enhance the effectiveness of these statutes. Specific requirements and obligations were developed over time and these were added to the various regulations accompanying each particular Act. The role of inspectors empowered by the statutes and governed by their regulations, was also crucial to the development of early OHS laws.

As the law developed over time it became narrow in application, specific in nature and frequently difficult to enforce. Employers became disenchanted with OHS laws and due to the extreme complexity of these laws, were often ignorant of their obligations. The law relating to safety at the workplace had become detrimental to the enhancement of good OHS practice and had little actual influence on the formation and development of employer standards on OHS matters. A change was necessary and that change occurred in the form of general duty legislation. Common law and workers' compensation law had considerable impact on the development of new standards, particularly in Australia, where compensation systems have for years been quite different (and considerably more institutionalised) than those found in Britain.

The Robens Report

The establishment of a Committee of Inquiry by the English Government in 1970, under the chair of Lord Robens to review existing OHS provisions and make suitable recommendations to reform their application soon became the impetus for a substantive change in the approach to OHS regulation.

Robens clearly favoured the introduction of a self-regulating system with respect to OHS and this forms the thrust of all his recommendations.

The Ham Report

A similar legislative review initiative was instigated in Canada in 1975 when a Royal Commission was established, chaired by James Ham. The resultant Ham Report as it has become known made an important distinction between the causes of industrial accidents and industrial disease. It was found that 'relatively few accidents were the result of

technical or physical defects that were independent of the personal act of work. The great majority of accidents arise out of the act of work itself (Ham, 1974). It was concluded that few accidents occur because of inherent defects in plant or machinery but most in fact arise from 'human error'. These comments do not infer blame on the injured party but rather indicate that the system and arrangement of work could be improved.

The philosophy that underpinned Ham's strategies was that of a joint approach to OHS at the workplace: "...the worker, the shift boss and management must work together to restore a sense of mutual responsibility for working conditions".

Policy makers and legislators often lose the distinction between the nature of the causes of industrial accidents and diseases and the strategies used to contain them.

The role of Government

The role of government in both Britain and Canada was altered in response to the reform agenda proposed by Robens and Ham from that of inspector/enforcer to that of auditor/resource. The role became more of a monitoring one with governments abandoning previously favoured approaches of intervention and interference for a new approach in which the promotion of self-regulation and voluntary compliance became paramount. Education became necessary to enable self-compliance with OHS regulation and this also became a focal point of government.

Self-regulation

The concept of self-regulation that became the central tenet of OHS reform in both the UK and Canada (where it is called 'internal responsibility') effectively altered the fundamental emphasis of occupational safety and health. The systems were designed specifically to encourage and support industry in addressing its own OHS issues. It was believed that this approach would help reduce the effects of apathy that drew considerable attention from Robens; avoid conflict and disputation; and limit the need for criminal sanctions. The reinforcement of the idea of a mutual moral responsibility between employers and employees was emphasised. The concept provided the ability for greater change, adaptability and a degree of simplification that could never be provided by regulation.

The methods by which self-regulation and moral responsibility were encouraged differ to some degree between the systems, but in essence a number of common elements can be identified:

- > Promotion of consultation and co-operation between the parties at the workplace level

- > Promotion of education and communication as to the nature of hazards and the methods by which they could be overcome, with information being made available to all parties
- > The establishment of bipartisan safety committees and the empowerment of safety representatives to oversee and facilitate the adoption of safer work practices
- > A greater reliance on general duties and less on specific regulation
- > The potential for greater adaptability at individual workplaces.

The Australian experience

The first inquiry held along similar lines to those of the UK and Canada occurred in 1979-80. The findings of the inquiry, which was chaired by NSW Industrial Magistrate TG Williams, reflect the suppositions and conclusions drawn from the Robens and Ham inquiries that preceded it (Williams, 1981).

Williams expressed a similar view to Robens on the concept of self-regulation although he qualified this by also expressing reservations as to the extent to which industrial co-operation could be engendered in this country. However, the Industrial Relations environment has changed radically since the beginning of the previous decade and Williams' concerns as to the ability of Australian employers and employees to co-operate and consult with each other are not as relevant today.

Williams also provided explicit views on the role of legislation and external regulation within a self-regulating system. Legislation should provide a framework for self-regulation of the workplace by a partnership of employees and employers working together. Not a one-sided employer self-regulation, but a co-operative effort working for the common good. There is a need for governmental involvement in the areas of promotion and guidance.

However, the application of such a philosophy has often been confused and clouded with political and emotive rhetoric. This confusion has allowed the issue of safety and health at work, which is of equal concern to all parties to at times become an industrial relations issue. The concept of self-regulation has been limited due to a fundamental misunderstanding as to the nature of interaction between the parties.

As stated in the Ham report, "if the direct responsibility system (self-regulation) is to be effective, the prerogative of managerial responsibility must be recognised by employees and their representatives... *"However, management must recognise that its prerogative in this area carries with it the requirement to consult in a meaningful way"* (Ham, 1974). In Australia, an attitude prevails whereby OHS is seen as a managerial responsibility, but not a managerial prerogative.

The ultimate responsibility for work and the manner in which it is carried out rests with the employer. The function of safety committees and safety representatives are to assist and contribute to the decision-making process. In other words, the concept of consultation that is so central to the idea of self-regulation should enable greater and more effective input by employees. It is not an avenue by which employees make the decisions themselves for if this were the case, employees must be held accountable for the results and effects of their decisions – a situation which does not currently exist.

The national agenda for conformity is resulting in increased regulation that only externalises accountability. Robens saw the need to internalise responsibility and accountability and this can only occur with greater employee involvement. However, employees must become more responsible for their actions and accountable for outcomes resulting from their input at the workplace.

Governmental regulatory policies have attempted to turn in the direction of self-regulation by placing an emphasis on decision-making by the worker. The flexibility inherent in self-regulation thus becomes blunted by the practice of placing absolute obligations on employers to recognise and provide resources to ensure thorough consultation at the workplace.

Safety Representatives are an extremely useful conduit by which employees can make a positive impact on the decision-making process. In practice, though, conflicting goals and expectations and misplaced idealism have repeatedly detracted from the potential for positive change to occur.

This situation is not unique to Australia however and the following statement, resulting from a Canadian inquiry into safety in the Ontario mining industry, reflects on the problems associated with the consultative mechanisms promoted by Acts such as Ontario's Occupational Health and Welfare Act, 1978 (Ham, 1974):

The absence of a common understanding with respect to the meaning and application of direct responsibility and contributive responsibility has resulted in role confusion, misplaced expectations and, inevitably, to an unhealthy level of frustration within the system. Perhaps the structure of the Occupational Health and Welfare Act 1978 which deals with consultative mechanisms before specifying the duties and responsibilities of the direct participants has contributed to the misunderstanding.

Such a situation is incongruous with the aims of any OHS system – to improve safety and health at the workplace. Legislative change should therefore, first and foremost, address the deficiencies in the understanding of the roles of various parties, and the ways in which those roles interact.

Issues

Business SA has identified six key issues that provide past performance indicators and underpin the future of occupational health and safety systems in Australia. These are as follows:

- > **Self-regulation:** The appropriateness of the duty of care, consultative mechanisms, performance-based (as opposed to prescriptive) regulation, and education/training in facilitating an effective (self-regulating) OHS system.
- > **Causality and uncertainty:** Can, and should, governments attempt to regulate with respect to potential future hazards, given the enormous pace of technological change and uncertainty relating to that change and where causes of disease cannot be readily determined?
- > **Cost-benefit:** To what extent should (can) risk be eliminated regardless of cost? Should risk economics (the evaluation of risk management techniques based on cost/benefit analysis) form the basis of OHS&W strategies and regulation? The issue and interpretation of ‘practicability’.
- > **Legislation/regulation:** The implications of governmental intervention into OHS issues, trends in regulatory treatment of OHS&W and their effects of inconsistent legislation.
- > **Enforcement:** Strategies for ensuring compliance. Are punitive penalties appropriate and relevant?
- > **Interaction of occupational safety and health with workers’ compensation:** How does compensation influence prevention?

Part two - Matters of context

Australia's and South Australia's OHS performance

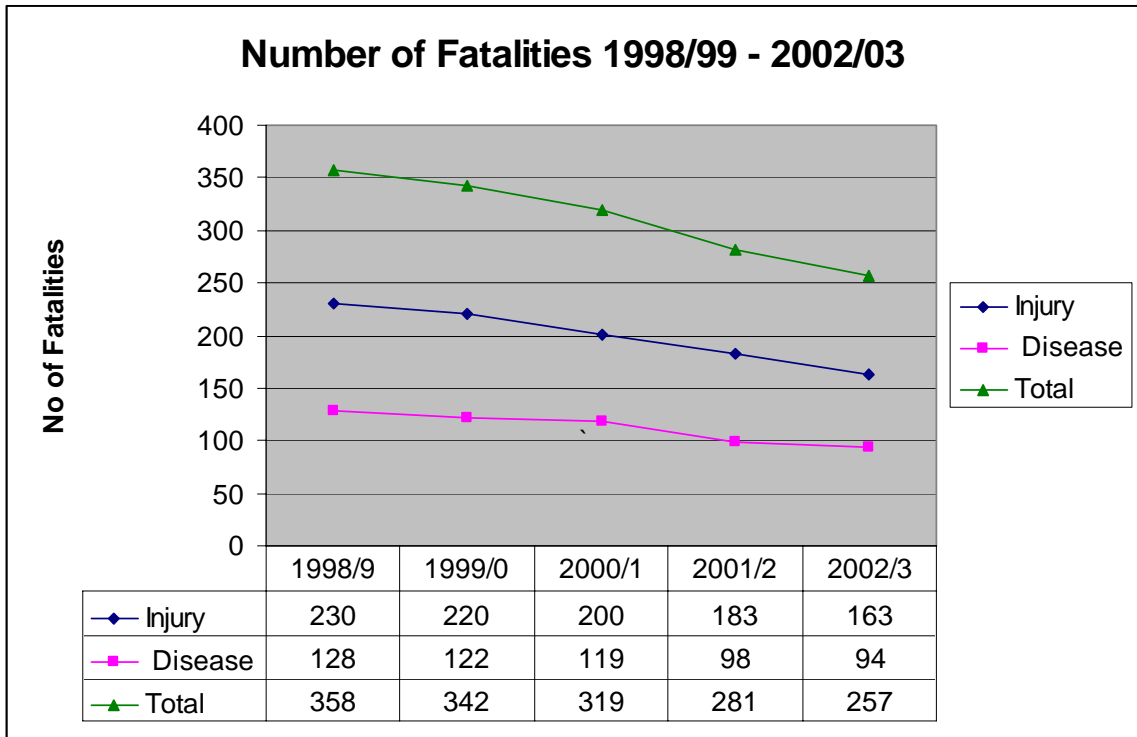
Over the past two decades Australia has witnessed a progressive improvement in the safety performance of most workplaces, resulting in overall lower rates of injury, disease and fatalities being recorded across most industries – and at a time when employment levels have been growing.

Key areas of improvement have occurred through investment in technology, equipment and design, and investment in people through training, skills development and education. Developments in medical treatment, rehabilitation and health systems have also contributed to better outcomes.

Most workplaces now have better designed plants, greater use of safety materials and equipment, higher awareness of safe systems of work, clearer warning signs of danger, labelling of dangerous materials, more regular health and safety monitoring and active safety arrangements.

Australia's OHS and workers compensation performance has continued to improve over the last five years. The incidence of compensated claims in Australia continues a downward trend.

Traumatic workplace fatalities in Australia have decreased by 40 percent over the last five years. In 2003-04 there were 189 compensated fatalities in Australia which is a 21 percent reduction from 2002-3 and 40 percent since 1999-2000. The 2003/04 report of the National Occupational Health and Safety Commission, whilst recognising the need to do more, referred to a "19% overall improvement in the incidence of injury and disease in the previous five years and a 35% improvement in the number of traumatic work-related fatalities". The Data set out in the following graph indicates the trend in fatalities as reported in the 6th CPM Report (dated November 2004) presented to the Australian Workplace Relations Ministers' Council.



Source: CPM – sixth edition 2004

The improvements in injury rates over the last several decades indicate that there is no evidence that radically onerous and complex legislative standards bring with them radical performance gains. On the contrary, smaller employers particularly find that complex bureaucratic standards leave them with little or no hope of compliance and with diminished faith in the practicality and fairness of regulators or the possibility of improved outcomes. Heavy or inappropriate legislation also inhibits the design of innovative solutions to individual safety problems.

South Australia’s WorkCover Corporation’s Reports illustrates that South Australia’s OHS performance has been steadily improving.

Notifiable fatalities are those which are reported/notified under Regulation 6.6.1 of the South Australian OHS&W regulations. These are fatalities that occurred either in a workplace or in the course of undertaking a work-related activity. Beside workers, they include volunteers, visitors to the workplace, heart attacks at work, suicides or workplace fatalities as a result of criminal activity. Journey accidents involving commuting to and from work or travel during work breaks are not included, however, transport accidents during the course of work are included.

The number of notifiable fatalities in South Australia has not increased dramatically over a seven year period.

Year	Notifiable fatalities
2006-07	6
2005-06	18
2004-05	15
2003-04	20
2002-03	13
2001-02	17
2000-01	12

Given the clear indication from these sources, that Australia's and South Australia's OHS performance is improving, the employer community believes that significant 'draconian' changes to support improvements in OHS performance is not required.

Rather the current strategies, systems and approaches as embodied in South Australia's legislation must be utilised in the national model OHS laws.

'Dramatic' changes such as reverse onus of proof, absolute duty of care, industrial manslaughter and excessive penalties are not required or appropriate.

Business numbers in South Australia as of June 2007

Number of employees	Number of businesses	%
Non employing	89,313	61.9
1-4	31,431	21.8
5-19	17,562	12.3
Total Small Businesses	138,306	96
20-99	5,022	3.5
100-199	552	0.3
200+	342	0.2
Total All Business	144,222	100

Source: Bureau of Statistics, cat. 8165.0 "Counts of Australian Businesses, including Entries and Exits, Jun 2003 to Jun 2007" December 2007, www.abs.gov.au

Clearly, it is evident from the above figures that the great majority of South Australian employing businesses are small business, many of whom are family businesses. This preponderance of small business is also typical across Australia.

Changes in South Australia's OHS&W legislation in the past have all too frequently ignored this unique character of South Australian business. The changes have been premised on the concept of a 'large industrial/manufacturing' organisation (which has substantial resources available to it) thus imposing requirements for record maintenance and other conditions that are not appropriate to a small business with very few resources.

The national model OHS laws that are developed MUST be cognisant of this unique nature of South Australian and Australian business and thus must be relevant to, and not adversely impact on, small business.

Problems with OHS&W Legislation

Over the past decade, qualitative and quantitative research and surveys of Australian business have identified occupational health and safety compliance as a critical issue for industry. Whilst this is welcome in that it reflects a heightened awareness and commitment to OHS outcomes, it also reveals that the compliance and red tape burdens arising from OHS regulation is assuming a high order concern that needs to be tackled by governments and regulators.

Current OHS legislation and the way it is interpreted and implemented, whilst well intended, is counterproductive rather than being a formula for improved OHS performance.

The major problems identified by employers are:

1) *The quantity of legislation (regulation, Codes of Practice and guidelines)*

The volume of OHS legislation (including subordinate materials such as regulations, Codes of Practice and guidelines) that every employer, whether small medium or large must comply with has resulted in the situation **that it has become almost impossible to comply in full with South Australia's OHS&W legislation.**

It is evident that alternatives to legislation or black letter law have not been properly assessed.

2) *Record keeping*

Virtually all of South Australia's OHS&W legislation contains requirements to maintain records. A cursory review of the OHS&W regulations reveal the following record-keeping and documentation requirements that small business must comply with:

- > OHS Policy Statement
- > Policies and procedures for all OHS&W matters at the workplace
- > Certificates of Competency
- > Registration of defined plant and payment of appropriate fee
- > Risk Assessments:
 - § all manual handling tasks assessed
 - § all hazardous substances assessed
 - § all plant assessed
- > Workplace injuries (first aid)
- > RCD test records
- > Workplace inspections
- > Plant pre-use checks
- > Plant Register
- > Hazardous Substance Register (Material Safety Data Sheets)
- > Hazard Report Forms
- > Consultation
- > Standard Operating Procedures
- > Electrical testing and tagging
- > Residual Current Devices – and tested
- > First Aid – maintained
- > Personal Protective Equipment – provided and maintained
- > Training Records (indicative list only)

- § Responsible Officer appointed and trained
 - § OH & S Policy signed and known by all staff
 - § Consultative systems in place and all staff included in systems
 - § All staff trained in manual handling in the last two years
 - § All staff trained in standard operating procedures
 - § All staff trained in emergency evacuation system in last 12 months
 - § Employee induction
 - § Manual handling
 - § Hazardous Substances
 - § Responsible officers (and depending on the size of the organisation – managers, supervisors)
 - § Fire and Evacuation
 - § First Aid training (and re-training)
 - § Standard Operating Procedures
 - § Forklift operator and other specialized equipment training. Documentation
- > Have copies available of OHS&W Act, Regulations and possibly Approved Codes of Practice, Australian Standards and Guidelines
 - > Registration with WorkCover.

The production of these records is now perceived by SafeWork SA OHS inspectors and the Industrial Court as the only system to prove compliance with any OHS&W legislation.

The unfortunate outcome of this focus on record keeping is to create the perception that the focus of OHS&W in SA has shifted from prevention to that of record keeping.

The model OHS act represents a unique opportunity to address this situation.

3) The quality of legislation

The quality of legislation has become a major concern. Concerns that have arisen are that frequently legislation is expressed in complex and legalistic terms and do not allow for adequate defences where conduct has been reasonable. In addition, legislation fails to account for particular circumstances of small and medium businesses.

Also of concern is that legislation is frequently developed and implemented without proper cost or economic impact assessments. ALL legislation must be subject to full legislative impact assessments.

In developing and implementing legislation, it must be mandatory that there is an effective communication strategy to ensure that industry is aware of the new legislative requirement. Feedback from employers is that all too frequently requirements are

changed without a significant, appropriate and effective consultation or communication strategy.

4) *Red Tape: The compliance and red tape burden of legislation*

On 20 November 2007 Business SA released *Reducing Red tape and the cost of compliance* Business SA. This document clearly indicates that today's businesses face a myriad of requirements from all levels of government.

The Australian Chamber of Commerce and Industry estimating regulation and compliance costs Australia \$86 billion a year – or 10 % of gross domestic product.

While many requirements are reasonable and should continue to govern aspects of the way that businesses operate, it is essential that reviews reduce the overall level of legislation by identifying areas where surplus, overlapping or outdated legislation exists. Failure to do so restricts growth and reduces Australia's competitiveness both nationally and internationally.

Part Three - Essential principles

In developing national model OHS laws and in the subsequent adoption of these laws by all jurisdictions it is essential that the following principles are considered.

Business SA strongly believes that legislation which is not based on these principles will be substantially flawed, will not contribute to improvements in Australia's OHS performance and may actively hinder Australia's future economic development

Globalisation, microeconomic reform and OHS&W

Globalisation is a largely irresistible force. What it amounts to is the rapid *integration of economies* worldwide through trade, financial flows, technology spillovers, transnational networks and cross-cultural currents.

Globalisation, in the sense of "integration of economies", isn't new: it has been happening since trade between differently located people began. What makes the present surge in the scope and scale of globalisation unprecedented is that rapid advances in technology, especially information and communications technologies, and significant reductions in the real cost of transport, have extended the reach of businesses to a fully global scale.

Nations and organisations may attempt to resist the impacts of globalisation - but the long-term costs of doing so are substantial. These organisations in attempting to 'turn back the clock' can render themselves irrelevant in a modern context and can in their endeavours hold back the critical development of regional economies.

Faced with the pressures of globalisation and the need to be export-oriented and/or to meet intensified import competition, businesses have had to become more innovative in what they do and how they do it. Some innovation is focussed on improving process technologies, some on the nature and quality of products and some (perhaps the bulk) on finding better ways of doing things within the production process (eg, just-in-time systems for parts and accessories).

The bottom line is that adaptability, flexibility and inventiveness are the keys to being innovative and hence to being competitive in a challenging and uncertain environment, and they require the capacity for businesses to substantially change traditional patterns of production and work, skill uses and organisational systems - in fact, most facets of the workplace. The need for restructuring of work processes will be continually changing - and different in various firms even in the same industry.

This is where OHS legislation is particularly important. This is an especially sensitive but very important component of Australia's microeconomic capacity to respond to the pressures of globalisation.

- > It is *sensitive* because the OHS legislative framework must be such that it can provide a framework that will enable workplaces to develop new and creative ways of undertaking activities. It must not be so inflexible that it prevents change. Some organisations would use the OHS legislation to actively inhibit change at the workplace
- > It is *important* because it contributes to other microeconomic reforms: it directly relates to productivity and innovation which are the key elements in successfully meeting the pressures of globalisation and hence sustaining economic growth and job creation.

If Australian businesses are to be competitive - flexible, adaptable and innovative, then reforms to OHS must enable Australia to maintain a competitive edge in national and international markets.

Continuous improvement through collaboration and consultation

Over the past decade South Australia has been identified in the Australasian area for its ability to continuously improve its OHS structures and systems through a collaborative process (including input from all key stakeholders) leading to changes based almost entirely on consensus.

This unique South Australian experience has been achieved by the key stakeholders working together to achieve significant improvement in OHS and has avoided the problems encountered in other Australian jurisdictions where OHS is increasingly perceived as an area of 'politicisation' and contention.

Improvements in OHS performance will only occur where there is full consultation and support for change, whether this is for Australia, a jurisdiction, or at individual workplace level.

It is essential therefore that the model OHS laws do not create a culture of confrontation and do not 'politicise' OHS thus eliminating a decade of collaboration and consultation.

It is essential that improvements in Australia's OHS systems and structures be developed through consultation and collaboration and not by unsupported 'dramatic' change.

Duty of care

The duty of care represents a moral or ethical concept whereby employers and employees are encouraged to exercise consideration for the safety and health of each other. It has long been an essential element of the contract of employment, forming an implied duty of employers and of employees. As far as employers are concerned, the duty primarily manifests itself in the obligation to provide a safe workplace, safe plant, tools and machinery and safe practices or systems of work.

For employees this duty translates into an obligation to obey reasonable instructions made by the employer in order to protect the safety and health of the employee, to wear and/or utilise protective clothing or equipment, to report any damage or potential hazards and to exercise consideration for the safety and health of their fellow employees.

The duty of care is central to the whole notion of occupational safety and health. Any regulatory system or legislative framework relating to occupational safety and health should therefore attempt to reinforce rather than supplant the duty of care in the employment relationship. It has been argued that safety and health are not industrial relations issues, and are thus more conducive to agreement and cooperation. There is an inherent mutual agreement as to the benefits of safety in the workplace.

There is a need, therefore, for the model OHS Act to help foster and facilitate the duty of care within the workplace. Utilising the natural tendency of the parties to an employment relationship to look to and consider each other's safety and health is inherently more desirable than imposing arbitrary unilateral obligations and standards, which they may or may not understand (or have ownership of). The common law duty of care thus forms an appropriate basis on which to build statutory or legislative obligations in relation to occupational safety and health. Its importance should not be denied, and consideration of the safety and health of others should be a notion reinforced at all levels of society - not just within industry.

It must be realised that decision-making at the workplace level, through consultation between employers and employees, is the only appropriate means by which to foster optimal OHS outcomes. The focus of OHS, like that of other industrial issues, should be moved as close to the workplace level as possible.

Causality

The fairness and sustainability of any effective OHS system depends to a certain degree on the extent to which the nature and direction of causality can be determined in relation to the health and well being of individuals. However, given that they spend only a portion of their day at work, an evaluation of causality is extremely difficult. It is an onerous and, some may argue, an impossible task to attempt to separate the nature and

level of exposure to health-damaging substances and practices outside as well as those at the workplace. Given that individuals spend a considerable amount of time in places other than their homes when they are not at work, this task becomes more complex.

It is difficult to justify a system that holds employers strictly accountable for health problems whose source cannot always be determined.

Employers do not have the right to interfere with the manner in which an individual employee lives his or her life when not at work and correspondingly, employers should not then be held accountable for the consequences of lifestyle habits over which they have no control.

The question of causality is a key problem in relation to occupational safety and health. It is imperative that a determination is made as to the extent to which work process, practices and environments lead to or ultimately cause workplace injuries or illnesses.

It has been shown that there are many individual habits and practices that stem directly from the fact that we live in a modern western industrialised society. These habits relate primarily to patterns of lifestyle (nutrition or poor diet, lack of exercise, alcohol and other drugs) and also the sedentary nature of modern life. It has also been shown that there are many diseases and degenerative processes occurring in the human mind and body that directly result from the nature and structure of our society. Therefore, there is a need to determine the extent to which one group of people, such as employers, can be fairly held responsible for the way in which the nature of society has affected the health of its individual members.

In today's society there seems to be a fundamentally conflicting agenda that is compounded by the perceived need to apportion blame for one's own misfortunes. Society demands that employers consider the safety and health of their employees, to the degree that employers may be held responsible for the results of an individual's habits and practices over which they have no control. Yet at the same time, society demands that employers not interfere with the right of individuals to live their lives, when outside work hours, in the manner in which they see fit.

Drug and alcohol tests and compulsory medical examinations are viewed by many in society as intrusive and symptomatic of an insidious 'big-brother' attitude on the part of employers, yet employers are then expected to account for the health problems of their employees.

Employers should not have the right to dictate patterns of behaviour to employees outside the workplace, so, for the sake of rationality and fairness, employers should not

then be obliged to take responsibility for the effects of these behavioural patterns. It should always be remembered that (assuming an eight-hour day) the majority of employees spend less than a quarter of each week at the workplace. Why should the assumption be made that negative health effects, such as those cited above, automatically stem from exposure to hazards during work time? Ultimately, accountability for the health and well being of individual members of society needs to be considered by all members of society, rather than just one component (such as the employer).

Employee responsibilities

The major trend in contemporary labour relations in Australia is a shift in focus from decision-making at institutional levels to the workplace level. Occupational health and safety should be treated no differently. A safe workplace can never depend entirely on employer action. Employees must take some responsibility for their own actions and behaviour. The model OHS Act must reflect this responsibility.

Distortion by Other Agendas: The undermining of objectives in OHS legislation by non OHS laws

Beyond specific statutory occupational health and safety systems, other laws also impact on the rights and obligations of employers and employees. Workers compensation laws impose duties associated with the management and compensation of injuries. The common law tort of negligence also establishes a basis for litigation, although statutory workers compensation schemes have limited (and in some cases) wholly excluded employee based negligence actions (but generally not third party actions against employers).

Further, employment and workplace relations law also adds to rights and obligations, whether through binding workplace agreements made during enterprise or industry bargaining, or through orders and decisions of industrial tribunals in industry-wide or company specific awards.

Other laws that bind employers can also affect occupational health and safety policy – but not always in a consistent manner. For example, some laws limit the capacity of employers to control conduct in their businesses or take action against employees or other parties that put the health and safety of others at risk, such as unfair dismissal laws, privacy laws and some discrimination laws.

The increasingly absolute interpretation of the employer duty of care necessarily requires employers to have full control over the conduct of all staff, contractors and third parties on or within their businesses.

However, employment law, discrimination law and privacy law is increasingly encroaching upon and denying employers that right of control. Laws which prevent employers from dismissing or disciplining staff for OHS breaches or inadequate attention to safe work practices, and laws or guidelines that shield employees from employer scrutiny under the guise of privacy (such as property searches, information technology control, or drug and alcohol testing in appropriate circumstances) are counterproductive and contrary to OHS objectives.

These legislative problems are manifested in a variety of ways.

First and foremost, they can make the system unworkable, unbalanced or unfair. If confidence in the OHS framework is undermined, the capacity to use the framework as a basis for delivering prevention and compliance is eroded, especially amongst smaller and medium businesses.

Secondly, they can distort incentives amongst people in the workplace to achieve safer workplaces by requiring a focus on process rather than outcomes. Process driven compliance activities and associated red-tape, bureaucracy and reporting obligations absorb time, cost and resources that deflect the attention of business owners, managers and employees away from active outcome based prevention programs and awareness-raising.

An example of the problem of OHS legislation being distorted by other agendas is with respect to trade union right of entry into some workplaces. Whilst properly accredited trade union officials can, in a representative role of union members, constructively contribute to dialogue and awareness raising of OHS issues, it is important that trade unions do not use the cover of OHS right of entry to pursue industrial relations agendas. Union officials whose right of entry permits have been withdrawn under general industrial laws as a consequence of inappropriate conduct should not be allowed to use OHS laws as a back-door means of securing entry.

Third party involvement

High standards of OHS are only achieved where there is genuine consultation and commitment of both employees and the employer at the workplace. It is essential that a culture of 'working together' be developed rather than a 'confrontationist' culture if OHS&W issues are to be identified and controlled.

The Paper *Workplace Health and Safety in the Building and Construction Industry* prepared by Barry Durhan (Peopled Pty Ltd) for the Cole Royal Commission into the Australian Building and Construction Industry, clearly reflects the problems that occur when OHS is used for industrial relations or other purposes.

The employer community is strongly of the opinion that OHS must not be used as an industrial relations tool or able to be used for the agendas of other parties such as Unions.

The employer community has confidence in this system, whereby an independent non-biased party (SafeWork SA) is responsible for the enforcement and prosecution of OHS&W legislative breaches.

Part Four - Responses to specific questions from the Issues Paper

Regulatory structure

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?

The principal source of law for workplace safety in each of the jurisdictions is OHS legislation. That legislation is supplemented by regulations, codes of practice, guidance material and by specialist statutes.

Statutory authorities, government agencies and government inspectorates administer the systems. The courts have a continuing role. As with other statutes made law, the parliaments make the law but the courts interpret and enforce it.

The legislative design adopted in most Australian systems is known as ‘performance based’ legislation. It is a model where a primary statute exists which imposes general and specific duties on employers, employees and some third parties. The primary duty is the duty of care. In theory at least, this model does not specifically direct employers and employees how they should meet their duty of care but requires management in each workplace to undertake active prevention activities, risk assessments, and training in conjunction with employees.

The primary legislative objects of all of the systems are based around prevention of injuries and the identification and elimination of risks. The underlying philosophy is to impose an active responsibility on employers, managers and supervisors to maintain a safe and healthy workplace and for employees to work safely within that environment. Put simply, occupational health and safety laws require the employers to treat occupational health and safety as a core business issue. It is not possible to contract out of statutory occupational health and safety obligations, although employment contracts can impose additional duties.

Beyond specific statutory occupational health and safety systems, other laws also impact on the rights and obligations of employers and employees. Workers compensation laws impose duties associated with the management and compensation of injuries. The

common law tort of negligence also establishes a basis for litigation, although statutory workers compensation schemes have limited (and in some cases) wholly excluded employee based negligence actions (but generally not third party actions against employers).

Further, employment and workplace relations law also adds to rights and obligations, whether through binding workplace agreements made during enterprise or industry bargaining, or through orders and decisions of industrial tribunals in industry-wide or company specific awards.

Other laws that bind employers can also affect occupational health and safety policy – but not always in a consistent manner. For example, some laws limit the capacity of employers to control conduct in their businesses or take action against employees or other parties that put the health and safety of others at risk, such as unfair dismissal laws, privacy laws and some discrimination laws.

The role of governments and regulators is to focus on what is reasonable, practical and achievable and to make the right interventions if and when they are needed. This means a framework that facilitates strategic OHS awareness and culture in workplaces and not the micro-management of OHS in workplaces. For the framework to be effective, it must be consistent with the realities of operating businesses in the modern economy and mobile labour force. Poorly established frameworks detract from the achievement of safer workplaces.

Just as workplace safety matters, so does the quality of workplace OHS legislation and its framework. Poor legislation or bureaucratic frameworks set by governments, parliaments or regulators can hinder, not help, the delivery of safe workplace outcomes.

Put simply, delivering safety, including the legislative framework, must be realistic, affordable and for the scale and nature of resources available to different businesses and employees, able to be designed and implemented in a practical manner.

To attempt to change a workplace culture by simply introducing more legislation, or to see regulation as a first or ideal response, is inconsistent with modern workplace management and good human resource practices.

Legislation should not be an end in itself. Legislation can establish rights and obligations. It can act to educate, to change behaviour, to deter and in some cases, to punish.

Legislation must be a step to a broader end objective. To justify legislating activity between private individuals and private businesses, strong underlying public interest considerations must exist. Whilst the prevention of workplace injury and fatality is obviously in the public interest, legislative objectives can be achieved in many different ways.

The emphasis of legislative frameworks must be on encouraging the development of this culture of mutual responsibility in the workplace and open and active communication.

An effective OHS legislative framework will, over time, help improve OHS awareness and behaviour. The principal focus needs to be outcome oriented – by encouraging safe design of workplaces, plant and equipment in the first instance and then by due diligence; effective risk management and injury prevention. Scope must exist for enterprises and their employees to establish business specific commitments and approaches.

The national model OHS law must therefore

- > *continue to focus on both a ‘performance-based’ and ‘principles-based’ approach. That is the law must provide a framework to facilitate strategic OHS awareness and culture in workplaces. It must not attempt the micro management of OHS in workplaces. It is only through this framework, performance and principles based approach that the national model OHS laws will be relevant to Australia as we continue to move through the 21st century.*
- > *be relevant and applicable for small business.*
- > *have the flexibility to accommodate major changes in both labour employment patterns and technology as well as emerging work-related health issues.*

The national model OHS law would be supplemented by regulations, codes of practice, guidance material and by specialist statutes.

OHS legislation is frequently represented as a pyramid.

The peak of the pyramid is the OHS Act.

The Act outlines the general duty of care for all workplace parties. This includes for example:

- > Employers
- > Employees (and their representatives)
- > Self-employed
- > Designers
- > Occupiers of buildings
- > Owners of buildings used as workplaces
- > Owners of plant

- > Other people
- > Manufacturers and suppliers of machinery.

Subordinate to the Act are:

The second level of the pyramid is the Regulations.

The OHS Regulations are made under the OHS Act and set out general principles, providing the practical steps which should be followed in order to prevent injuries and illness at work. The regulations should be read in conjunction with the Act. Regulations may be either prescriptive or performance based. The nature of the regulation will be determined by the nature of the hazard/issue being addressed.

The third level of the pyramid is the Approved Codes of Practice.

These provide practical guidance on how to comply with the legal requirements. They must be followed unless there is another solution that is equal to or better than that in the Code. Frequently Codes of Practice (CoP) are process-based. They specify a process or a series of steps to be followed to achieve the outcome specified in the regulation. A key principle with CoP is that there is flexibility in their application whereby an organisation may choose alternative processes/steps more suitable to the context of their organisation so long as the desired outcome is achieved.

The fourth level is Guidelines and Other Information.

Information sheets and guidelines are available on a number of topics to provide assistance in meeting the requirements of regulation or the general duty of care.

These must be:

- > workplace based:
- > industry/hazard/risk specific
- > focussed on what to do and how to do it
- > brief, simple easy to read and understand
- > easily accessible either in hard copy or electronically

Wherever possible regulations, codes of practice and guidelines must be nationally consistent, be based on those core issues that lend themselves to common national outcomes and must be developed in close consultation with industry.

They must also be developed against the following principles:

- > scientific evidence, including appropriate, sound, measured statistical data
- > a Regulatory Impact Statement (including employment impact)

- > reasonable and practical standards designed to deal with identified and foreseeable hazards
- > standards to be developed by a tripartite body (such as the ASCC) comprising senior representatives of the main organisations representing employers, employees and government, being ACCI, the ACTU and the jurisdictions
- > core national standards and codes to be adopted and implemented consistently or uniformly across Australia by the jurisdictions
- > an employee's role in understanding and working to a standard, code or procedure to be reflected in the drafting and to include clear enforceable employee statutory duties
- > objectively-based and focussed on OHS outcomes devoid of subsidiary industrial or political agendas
- > they should be written in plain English and have a focus on 'what to do' and 'how to do it' at the workplace level. Nationally consistent material should be easy to understand, presented in brief form, be industry and workplace focussed and be readily accessible and available to employers, employees and their workplace representatives
- > wherever possible duplication between the OHS Act and the regulations should be removed. This will assist in reducing the apparent volume of the regulations and ensure a focus on workplace hazards and risks.

The model OHS Act must provide the framework. Details such as processes and steps would be through subordinate regulations, codes of practice and guidance material.

Attempts to include detail which must be addressed in regulations and codes of practice in the model OHS laws must be resisted.

Title, objects and principles

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?

The model OHS laws must include appropriate objectives. The inclusion of these will remove the need for a title which provides direction as to the purpose/objective of the legislation. This approach will enable each jurisdiction to use their own title rather than attempting to prescribe a title.

South Australia has five objectives in its legislation. These should act as a model when developing national model OHS laws. They address the key concepts/focus of OHS namely:

- > *the outcome that is health and safety of persons at work*
- > *eliminate risks at their source risks*
- > *protect the public*
- > *the need for consultation at the workplace*
- > *recognising the role of employer and employee associations*

By ensuring that the objectives are relevant and focussed there is no requirement for including 'principles of health and safety' in the legislation. Where appropriate, principles can best be addressed in regulation. This approach will also ensure that the OHS legislation remains a framework and does not endeavour to address all matters.

CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS

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

Q8. Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

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

As discussed above, the model OHS Act will provide the framework. Regulations, codes of practice and guidelines are the best structures to use for industry specific requirements.

It is not appropriate or feasible to include industry specific safety legislation in the model OHS Act.

In South Australia, OHS Inspectors are appointed by the Governor through the Government Gazette. It is currently possible therefore that an interstate Inspector could be appointed by South Australia's Governor to be an OHS Inspector in SA for a specified period of time if this should be required. There is no requirement therefore for specific provisions in the model OHS laws to improve co-ordination between jurisdictions.

Co-ordination is best achieved through administrative systems and structures.

Workplaces and non-workplaces

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

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

The general duty of care must be tied to the conduct of work, that is, where work is being performed and the duty holder has the capacity to control either the work environment, system of work or plant and substances being used.

An example of where care must be taken in developing the model OHS laws on the above duty of care, is where an employee works from home. In this and similar situations how much ‘control’ is the employer going to be considered to have. An employee could rightfully object to ‘controls’ that an employer may seek to impose such as control of animals, potential of slips and trips etc.

Public safety

OHS Acts and Regulations are formulated to prevent accidents at workplaces and to prevent members of the public being injured due to workplace activities. OHS Acts are not formulated to ensure general public safety in all circumstances. The model OHS laws must contain provisions to ensure that the public is protected from work activities.

The current provisions in South Australia’s OHS&W Act in particular Section 22, adequately protects the public from work related activities. In addition, South Australia’s OHS&W Act addresses public safety in Section 3 ‘Object of Act’. These should be considered when developing model OHS laws.

Also all forms of workers at a workplace, including volunteers are covered under the OHS&W Act.

The model OHS Act is not the appropriate vehicle for addressing general issues of public safety.

Responding to change

Work organisation

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?

There have been ongoing changes in the labour market as a result of global and national forces. It is evident that changes in the labour market will continue due to economic and technological forces.

The phrase ‘precarious employment’ has frequently been used to describe alternatives to full time permanent employment. It must be noted that many employees enjoy the flexibility that is provided through the various alternative forms of employment, whether casual, part time etc. and prefer these forms of employment. This emotive term, developed by those who are opposed to alternative, flexible employment arrangements, is of no value and must not be used.

The current South Australian OHS&W legislative framework clearly addresses and accounts for all forms of employment (including voluntary workers and ‘on hire’ labour). For instance, the legislation is clear that both those who provide, and those who use ‘on hire’ staff have responsibilities with respect to OHS and the safety of these workers. On hire companies have a clear responsibility not to place their employees at risk. If there are any concerns with respect to safety, the on hire companies should not place employees in these identified risk situations.

As discussed in response to Question 10 the focus of the model OHS laws will need to be on where work is being performed rather than on the concept of the ‘traditional large manufacturing workplace’.

The scope and application of the model OHS Act must be sufficiently broad and flexible to accommodate new and evolving types of work arrangements. This can only be achieved by ensuring that the model OHS laws are a framework and not prescriptive in structure.

As mentioned earlier in this submission the focus of the model OHS laws must be both on a ‘performance-based’ and ‘principles-based’ approach.

Emerging hazards and risks

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?

It is recognised that there is the potential for ‘new’ hazards or risks to emerge that will need to be addressed at the workplace. Unfortunately, there is evidence to demonstrate that ‘new’ or ‘emerging’ hazards can become highly emotive issues and used by organisations to promote other agendas than improved OHS.

At present there is a trend on developing prescriptive legislation for every hazard and risk that may occur in a workplace. This trend has been supported by those who look to the past rather than to the future.

As workplaces are evolving to respond to the constantly changing business environment (including such aspects as technological change and globalisation) it is impractical to expect OHS laws to address all hazards and risks. Imposing a rigid prescriptive legislative framework will constrain and inhibit business development in Australia at a time when there is an imperative need for the Australian economy to be responding to the challenges of a modern global economy.

Legislation must provide a performance based framework that will assist businesses in achieving high OHS outcomes without inhibiting business flexibility and change. This process of developing model OHS laws provides a unique opportunity to reverse the current prescriptive trend and to focus on the future.

The model OHS law is NOT the vehicle to address specific hazards, risks or issues associated or perceived with changing or emerging work arrangements. As discussed previously the regulations, codes of practice and preferably guidelines are the mechanisms by which specific hazards or risks can be and must be addressed.

*As discussed in the response to Question 1, the national model OHS law must continue to focus on both a 'performance-based' and 'principles-based' approach. That is the law must provide a **framework** to facilitate strategic OHS awareness and culture in workplaces. It must **not** attempt the micro management of OHS in workplaces. It is only through this framework, performance and principles based approach that the national model OHS laws will be relevant to Australia as we continue to move through the 21st century.*

CHAPTER 3: DUTIES OF CARE - WHO OWES THEM AND TO WHOM?**Control**

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

Q17. What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

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?

As discussed above in this submission, it is impractical and inappropriate to include all perceived issues and definitions in the model OHS Act.

It is impossible to provide a definition of control that will be appropriate for all situations, events and activities. The model OHS Act must focus on those who have a duty of based on what is 'reasonably practicable'. It is through this approach that the model OHS Act will provide a framework for the future.

Shared responsibilities

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

The model OHS act cannot clarify all potential situations where there may be multiple duty holders and multiple duties. Concerns about multiple duty holders and duties are best addressed through industry sector based guidelines or perhaps approved codes of practice which can provide appropriate direction and guidance on specific activities.

Work relationships

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

The primary focus of the model OHS law must be on 'work' activities. If care is not taken in drafting the legislation then there is the risk the legislation will become one of public safety.

As discussed previously, one of the key objectives of the model OHS laws must be to secure the health and safety of persons at work and ensure the health and safety of those who could be affected by work activities. In this context employment cannot be the sole basis for framing safety obligations.

Safety obligations must extend to a range of others who must provide information, equipment, substances and even the work environment. Thus the legislation must 'so far as is reasonably practicable' extend to other duty holders such as manufacturers, importers suppliers etc.

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?

Duties are owed by employers to non-employees such as contractors, labour hire and volunteers only so far as it is reasonably practicable for the employer to exercise control. If the employer provides the work 'environment, plant, substances, tools', then the employer could be reasonably expected to ensure that these are safe so far as is reasonably practicable for those work who with them or in the work environment.

Duties of employers

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?

The model OHS laws must include provisions specifying the employer's duty of care. It is this duty of care that is central to all of Australia's OHS legislation.

In framing this duty of care in the model OHS law the responses to other questions in this submission must be considered. It is critical that the term reasonably practicable is included in the employer's duty of care. The concept of an absolute duty of care as utilised by some jurisdictions is totally inappropriate and

completely unacceptable. The Australian justice system, and community perception of fair play, is based on being innocent until proven guilty.

The employer's duty of care must also reflect that they are only responsible for matters that they have direct control of.

Duties of workers and others

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

Section 21 of the South Australian OHS&W Act states that employees must take reasonable care to protect their own health and safety at work. Other clauses of the same section make reference to following reasonable instruction, use of equipment etc. Since the Act was proclaimed in 1987, few employees have been prosecuted for failing to protect their own health and safety.

The majority of employers have implemented safety rules and provide safety equipment however it is clear that it is not possible to supervise every employee, every minute of their working time. The situation can therefore arise where employees do not use safety equipment or obey safety rules. If employees are disciplined or dismissed for failure to use safety equipment or follow safety rules and procedures, the employee frequently claims unfair dismissal in the Industrial Relations Court and in too many instances, wins the case with re-instatement and costs to the employer.

This lack of prosecutions, coupled with employees being re-instated through the Industrial Relations Court has resulted in the perception that the employer is responsible and accountable for workplace safety but that employees are not. In addition in South Australia, the workers compensation system is a 'no fault' system. The outcome is an unbalanced system, where employees can disregard safety rules, fail to use safety equipment and are not readily or easily held accountable.

The model OHS Act must contain enforceable provisions with respect to employees ensuring their own safety and ensuring that no other person is affected by their acts or omission (that is failure to act).

This provision MUST be applicable to ALL employees in an organisation whether Chief Executive Officer, manager, supervisor, trade person or 'shop floor' employee.

If there is to be an improvement in Australia's OHS performance, employees must also be held responsible and accountable.

Of particular concern are the reports of the percentage of employees attending work while potentially under the influence of drugs and alcohol.

The Phase One Summary Report: Literature Summary of ‘The Impact of Alcohol and Other Drugs in the Workplace’ – Reference Group states that

- > ‘Alcohol is a contributing factor in an estimated 4 percent of work-related fatalities whilst other drugs are estimated to contribute to 2 percent of work-related fatalities. In total, alcohol or other drugs are involved in at least 5 percent of work-related fatalities in Australia.
- > Alcohol use is associated with 3-11 percent of workplace injuries, whilst the involvement of other drugs is likely to be approximately 2 percent
- > Alcohol and other drug use results in reduction in the workforce and absenteeism which exceeds \$2.9 billion.

South Australia’s Section 21 1(b) (d) states “...ensure that the employee is not, by the consumption of alcohol or a drug, be in such a state as to endanger the employee’s own safety at work or the safety of any other person at work”. This responsibility must be included in the model OHS Act with appropriate substantial penalties.

The consumption of drugs and alcohol in the workplace clearly has the potential to contribute to accidents and injuries in the workplace. The ‘no fault’ workers compensation system does not discourage employees from using drugs or consuming alcohol at the workplace, or from coming to work in an unfit state because of prior consumption.

Employers must be able to implement drug and alcohol testing programs free of industrial disputation. This must be assisted by amendments to legislation.

For all accidents which result in hospital treatment OHS Inspectors must have the capacity to and be required to request drug and alcohol tests of relevant parties, including injured workers. The relevant section of the OHS Act must then be enforced.

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?

South Australia’s OHS&W Act Section 25 refers to ‘Duties responsible to all persons’. This Section endeavours to provide duties for non-employers. This Section has never

been used in a prosecution. Any person guilty of an offence under this Section could also be charged with criminal offences by the Police.

Given this, then there is no requirement to include duties of care for persons not being an employee in the model OHS Act.

Appointed persons and officers

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?

While some jurisdictions have mechanisms for persons to be appointed to a position that has specific responsibilities, there is little evidence to indicate that these appointments have significantly enhanced workplace safety. These mechanisms and appointments are based on a false assumption that all workplaces are similar and that one model fits all. As indicated previously in this submission there is a great diversity in the size nature, operation and activities of workplaces and it is impossible to foresee what the future structure and nature of workplaces will be.

Court cases across all jurisdictions over many years have clearly defined that those with a duty of care are also accountable with respect to workplace safety.

The model OHS Act must focus on duty holders and their responsibilities. Workplaces must have the flexibility to determine what are the most appropriate systems and structures to manage workplace safety.

The model OHS Act must be a framework and not endeavour to address all matters.

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

South Australia has recently passed amendments to its OHS&W Act that relates to 'imputation of knowledge' and thus responsibility of officers of the body corporate. The

result of this poor amendment is a growing reluctance of the business community to participate on voluntary boards etc. It must be recognised that there is already substantial legislation dealing with responsibilities for officers of the body corporate.

If the Section in the model OHS Act focussing on the duty of care of all employees is significantly robust then there is no requirement for additional sections focussing on officers of the body corporate.

Duties of persons in control

Q31. Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

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?

The current provisions in OHS legislation such as in South Australia's OHS&W Act (Sections 22 to 24) clearly express who owes a duty of care. This covers self employed, manufacturers, importers suppliers, erectors, installers, owners, occupiers etc. There is no requirement for greater clarification.

Regulations and other supporting material are the best mechanisms for addressing specific issues such as temporary workplaces.

The model OHS Act must be a framework and not endeavour to address all matters.

Activities which impact on health and safety

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?

The attempt to legislate for all activities and for the life of an item, structure or system is fraught with danger. It has the potential to significantly restrict development, innovation and even creativity. If architects are forced to design to ensure safety on demolition what would be the consequences?

Current provisions in South Australia's legislation are adequate to cover the issue presented in the questions above.

If cross jurisdictional matters are unable to be efficiently resolved by the jurisdictions, then it is clearly time that OHS is removed from the jurisdictions and be given to Federal Government so that Australia has a truly national system.

The model OHS Act must be a framework and not endeavour to address all matters.

CHAPTER 4: 'REASONABLY PRACTICABLE' & RISK MANAGEMENT

Concept of 'Reasonably Practicable'

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

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

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

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

Q41. Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

To be effective, OHS legislation must focus on the practical and achievable management of foreseeable risks. The concept of reasonableness that underpins so much of our law and the notion of ‘a fair go’ has traditionally applied to the legislation of workplace safety. This requires the application of a statutory, general OHS ‘duty of care’ pitched at:

- > reasonable care
- > identification of foreseeable hazards
- > implementation of reasonably practicable measures to eliminate/control hazards/risks.

These are not novel propositions, nor are they outside of well established international approaches. Yet, too often, the Australian experience of legislative and judicial approaches does not evidence this character. The concepts of ‘reasonably practicable’, ‘foreseeable’ and ‘control’ have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practical or reasonably practicable.

The ‘Strategy for workplace health and safety in Great Britain to 2010 and beyond’ released by the United Kingdom Health and Safety Executive (HSE) puts it succinctly:

“HSE continues to believe that sensible health and safety is about managing risks, not necessarily eliminating them. Recognising this, it has re-emphasised its commitment to making sound judgements based on balancing harm against cost and risk against benefit, and adhering to the concept of reasonable practicality.”

The legislative framework must recognise that, in the real world, no matter how committed employers and employees are to workplace safety or what level of resources are directed to occupational health and safety, neither an employer or an employee can predict or control every activity or event around them. It cannot mandate that employers guarantee safety; the standard set should be the requirement to take all reasonable steps to prevent the foreseeable risk of injury.

Obligations, where specified, should be clearly defined and allow defences based on the development of practical and effective safety systems. Unless legal duties are realistic and fair in their application, then the regulatory system becomes untenable.

OHS legislation also needs to be assessed in terms of its conflicting demands and impact on an organisation's compliance with the requirements of other statutes, notably employment protection, disability, privacy and discrimination regulation. Organisations should not be subject to a multiplicity of conflicting and competing demands. For example:

- > OHS laws cannot logically expect management to control the activities of employees beyond their control, whilst unfair dismissal law limits the right of management to sanction inappropriate employee behaviour
- > OHS law cannot logically compel every reasonable step be taken by management to eliminate risks to OHS when privacy and discrimination law increasingly impose limits on the capacity of employers to know the OHS risks that employees may present to each other.

In applying nationally consistent OHS standards, employers use differing approaches. Performance based standards can be used to develop corporate plans and in house safety systems to comply with legislation. Some international companies will seek to achieve world's best practice.

In the case of small and medium sized companies, approaches will differ. Some businesses with a high level of resource will be able to develop in-house safety systems whilst smaller under resourced enterprises will use industry guidance materials developed through tri-partite consultation. These can be more detailed and provide information on 'what to do' and 'how to do it' in order to comply with relevant legislation.

The 'explanation' of what is reasonably practicable as included in Victoria's and Western Australia's OHS Acts must be included in the model OHS Act.

It is strongly recommended that an additional dot point be included, that is, as to whether there was control over the risk or situation.

Risk management

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?

The definition of ‘reasonably practicable’ does not need to include a reference to hazard or risk management processes. The most appropriate system for addressing this process is through regulation.

CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

Duty to consult

- Q45. What provisions should be made in the model OHS Act for consultation?
- Q46. What are the work relationships to which a consultation provision should apply?
- Q47. Should there be different levels of consultation required for different work relationships?
- Q48. How should consultation be provided for:
- a multi-employer worksite;
 - an employer with operations across more than one worksite;
 - small business;
 - remote workplaces;
 - precarious employment; and
 - workers from culturally and linguistically diverse backgrounds.

Previously in this submission it was recommended that there be an object supporting consultation at the workplace.

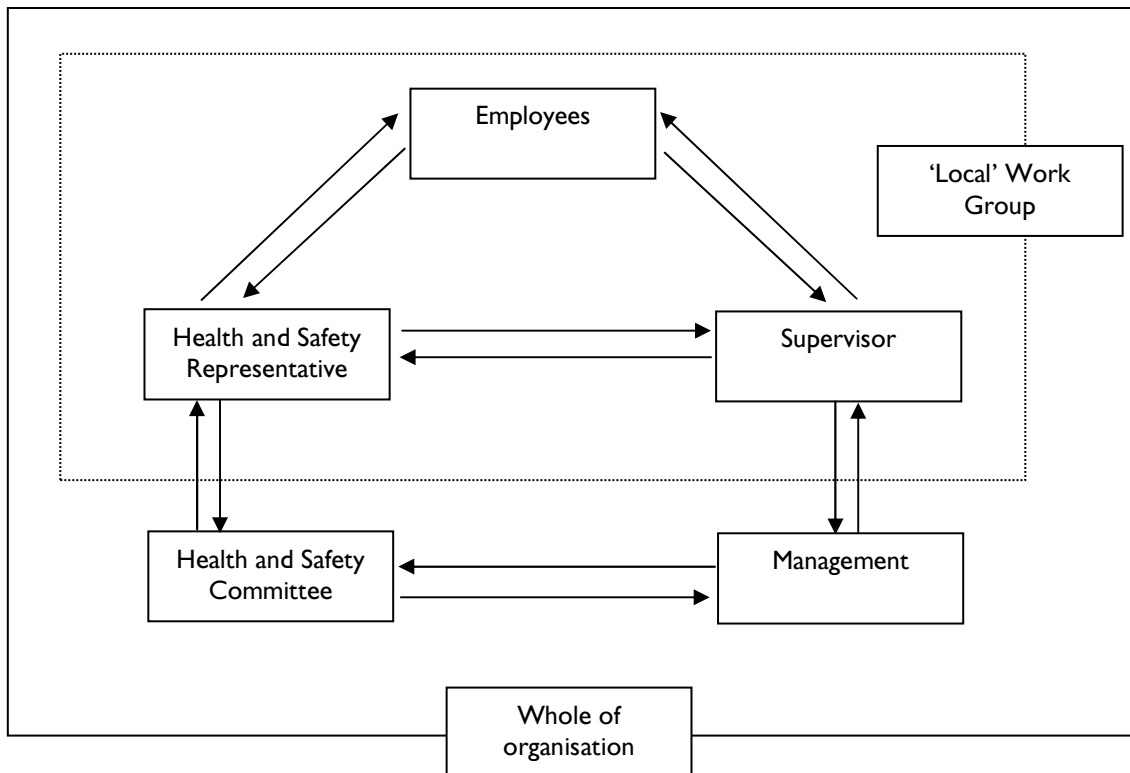
As discussed, South Australia and Australia, is primarily a small business economy, it is essential therefore, that flexible consultative mechanisms be enabled by the legislation and supported and encouraged by the regulatory body. An appropriate flexible provision in the model OHS Act will enable workplaces to address the matters raised in Question 48.

The inclusion of a provision in the model OHS Act requiring employers to establish consultative systems as appropriate for the nature style and context of the activities being undertaken is supported. This provision must recognise the needs of all business for flexibility. It must NOT impose a one size fits all model e.g. that of electing health and safety representatives or establishing OHS Committees.

It is not appropriate that the large organisation model of consultation as presented in legislation (eg. HSR's and Committees) be forced onto smaller organisations that have different needs and systems.

Participation and representation

- 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?



The diagram above illustrates the role of the health and safety representatives (HSR) and OHS Committee, namely the HSR focus on safety issues for the work group (ie local situation) and the OHS Committee for the prevention strategy for the whole of the workplace.

It is clear that HSR's have a work group responsibility and local focus, consulting directly with supervisors and with management through the OHS Committee. This focus does not require HSR's to have access to organisational (eg Board) papers or other such material. It is essential that the role and function of both HSR's and OHS Committee must be clear and unambiguous.

HSR's and OHS committees are appropriate for large and medium organisations. The nature of small business is such that alternative systems are more appropriate. There must be no requirement for small business those with less than 30 employees to have HSRs or OHS committees.

The responsibilities presented in South Australia's OHS&W Act provide an example of the appropriate functions for HSR's and OHS Committees.

HSR's must be elected by a workgroup through a secret ballot system (if requested) to represent that workgroup. All members of that work group, including supervisors and where appropriate managers must be entitled to vote.

Concerns have been raised with respect to discrimination and harassment of HSR's. It would appear that there is greatest scope for confrontational situations to occur (thus creating the perception of discrimination and harassment) where HSR's have been elected without consultation and input from the employer.

Third parties (eg registered employee associations) must not be able to enter a workplace, and conduct elections for HSR's, with the employer having no input or consultation regarding the election process. The employer is then 'informed' by the third party (eg registered employee associations) of who the HSR's are. The elected HSR's are frequently 'told' by the registered employee associations which course of training they must attend and that the employer is responsible for the cost, with the employer having little opportunity to have input in determining which training course (or when) is appropriate for the elected HSR.

The system outlined above, can only result in the employer being less supportive of the HSR, and has significant potential to lead to confrontational situations at the workplace which give rise to concerns of harassment and discrimination. As workplaces where the employer is fully involved in the election process and selection of courses, HSR's are fully supported and encouraged to undertake their responsibilities.

There is clear evidence that the greatest improvements in OHS occur where all workplace parties work together proactively to achieve agreed outcomes. Where HSR's are elected without the support and input of employers it is most unlikely that collaborative outcomes and environment will develop.

Sharing of resources

Given the role and nature of HSR's it is not feasible or appropriate to share HSR's between organisations. There is too much potential for conflict and argument with respect to costs, such as salary etc.

The inclusion of provisions in the model OHS Act enabling workplaces to elect health and safety representatives (HSR's) and/or establish OHS&W Committees is supported.

HSR training

South Australia has the most generous entitlement for HSR training in Australia that is five days of training for each year they are an elected HSR. The uptake of HSR training as reported by the Approved Providers of HSR training is that few HSR's are fully utilising this entitlement. While the majority of HSR's attend Level One training, only a half of these participants attend Level Two training. Despite the efforts of the Approved Providers of HSR training to provide an extensive, practical based training program, very few HSR's are participating on 'continuing Representative' training courses. The current legislative entitlement of five days every year of office as mandated in South Australia's OHS&W regulations is clearly excessive.

Training of HSR's should consist of a training course of up to five days, with an option to access Recognition of Prior Learning (RPL) so that they do not attend unnecessary training. The HSR training must be competency based and aligned with VET qualifications.

OHS Committees

OHS Committees where formed should be entitled to attend training of half a day duration which focuses on their strategic role.

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

The requirements and systems for training of HSR's and OHS Committees are best dealt with in regulation and not in the model OHS Act.

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

As discussed previously, it is not appropriate for the model OHS act to impose one form of consultative system on workplaces. Every workplace must have the capacity to develop such systems as are appropriate for their context. This would include classes of workers for whom HSR's and OHS committees are not appropriate.

Right of entry

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

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

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

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

The only party which should have right of entry to the workplace for OHS matters are OHS Inspectors. The employer community has confidence in this system, whereby an independent non-biased party is responsible for the enforcement and prosecution of OHS legislative breaches

Any matters relating to training and qualification are an administrative matter to be dealt with by the jurisdiction's OHS administration.

In South Australia, employees are required to notify management of OHS hazards at the workplace. If management does not respond appropriately, employees (and indeed any person) have the right to lodge a complaint about the OHS&W matter with SafeWork SA, who is required to investigate the complaint. This system ensures that an 'independent professional' (the OHS Inspector) investigates the complaint and can ensure, if required, that appropriate action is taken.

Given the strength of this system, there is no requirement which would enable a third party, eg a Union to be able to investigate complaints regarding OHS&W issues at the workplace.

The Paper *Workplace Health and Safety in the Building and Construction Industry* prepared by Barry Durhan (Peopled Pty Ltd) for the Cole Royal Commission into the Australian Building and Construction Industry, clearly reflects the problems that occur when OHS is used for industrial relations or other purposes.

The employer community is strongly of the opinion that OHS must not be used as an industrial relations tool or able to be used for the agendas of other parties such as Unions.

Right of entry provisions for Union officers are appropriately dealt with in both State and Commonwealth Governments Industrial Relations legislation. This is the appropriate vehicle for this matter. It is NOT appropriate for right of entry provisions for union officers to be included in the model OHS Act.

As recommended by Robens in his report, extensive powers were given to OHS Inspectors. Inspectors were given right of entry, access to and right to remove any documents, material or equipment. They have the right to examine, take statements on affidavit and investigate. Police investigating serious crimes cannot exercise this level of power. Employer associations conceded to these powers in the interests of safety, at a time when the consequences of prosecutions were substantially less.

The jurisdictional tendency to massively increase penalties and the attempts to introduce gaol terms demand that Inspectors powers need to be reviewed. Certainly their accountability requires review.

The model OHS Act must ensure that OHS Inspectors powers are commensurate with, and do not exceed, those of the Police. There must be the same conditions and limitations.

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?

South Australia's OHS&W Act includes significant Sections on resolving OHS issues. The focus of the process is on those at the workplace resolving the issue and includes health and safety representatives and an OHS committee (if they exist) as part of the process.

This process coupled with the right of any individual to seek assistance from the OHS Inspectorate ensures there are robust processes to resolve issue.

The model OHS Act must contain similar provisions emphasising that those at the workplace must work together to resolve the issue. If not resolved there is the right of access to the independent umpire, the OHS inspector.

Right to cease unsafe work

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

Q68. Should a model OHS Act provide for the right of a HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

Q69. Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

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

The model OHS Act must contain provisions that provide the right of workers to refuse or cease to undertake work they consider unhealthy and unsafe. Health and safety representatives must have the right to require activities to cease if they are of the opinion there is an immediate risk of injury or death or workers. Payment of wages must be maintained. There must be however, penalties on HSR's who use their power to cause harm to the employer or to support an industrial dispute.

As mentioned above in the event of a dispute the matter is referred to an OHS Inspector.

Employers must have the right to assign other duties to workers in the above situations.

Protection from discrimination and victimisation

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?

There is little substantive evidence that there is wide spread discrimination against health and safety representatives, or indeed employees generally, with respect to their actions regarding OHS at the workplace.

Employees have substantial access to other bodies such as Industrial Relations Commission if they believe they have been unfairly dismissed or treated due to raising OHS matters.

South Australia's OHS&W Act Section 56, 'Discrimination against workers', provides substantial protection to health and safety representatives and employees. The inclusion of a provision based on this section from SA's OHS&W Act in model OHS Act would be appropriate. However, the 'reverse onus of proof' requirement in this Section is inappropriate, has the potential to be misused and must not be included. The capacity for compensation to be awarded is NOT supported.

The capacity for representatives to bring actions is NOT supported, as it could lead to vexatious and spurious claims in the event that a HSR's actions are not fully supported by the employer.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

Role and functions of regulators

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

The model Act should provide for the establishment, functions, powers and accountability of regulators. The provisions in the Act should be supported with subsidiary regulations.

The OHS Act should have a provision for regulators to be responsible for the following functions bearing in mind the role of the bipartite Ministerial Advisory Committee which would have responsibility for establishing strategic management directions:

- > Development of OHS regulations, codes of practice and guidance material
- > Discussion papers, working parties and consultative bodies
- > Information and promotion services
- > Investigative and inspectorate activities
- > Compliance, enforcement and prosecution
- > Accountability

It is essential that the Act highlights the need for regulators to be continually working with stakeholders

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

The model OHS Act should contain provisions that require the regulators to publish enforcement and prosecution policies.

Improving OHS outcomes over the long term rests on the ability of the regulators to effectively enforce those laws in a consistent manner which ensures a common 'compliance experience' for duty holders.

It should also be a requirement for compliance policies to be published by regulators. The compliance policy must provide an overview of the legislative framework and set

out how the constructive compliance strategy is applied to enforcement and prosecution activities and consists of a mix of positive motivators and deterrents to improve health and safety.

These publications should be required for transparency and consistency purposes.

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

The model OHS Act should include these provisions to support employers in their efforts to comply with their duty of care. Also, these provisions can assist duty holders in understanding how regulators interpret key issues and provisions in the model OHS Act. Section 12 of the Victorian OHS Act 2004 adequately provides for this, with powers to make guidelines.

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

The inspector should only have the power and functions of education, advice and enforcement.

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

The functions should be separated to the extent that the primary purpose is the advisory and education function. The enforcement function should be very much secondary.

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?

In relation to inspectors, the model OHS Act should contain provisions for: the capacity of the Governor to appoint suitably qualified inspectors.

A comprehensive list of inspector's powers should be provided for, that are exercisable upon entry to ensure greater accountability and transparency.

The powers, and the purposes for which the powers may be used, should be set out in the model OHS Act. They should be prescriptive and could include:

- > *The general powers of entry and powers exercisable upon entry*
- > *the powers to require the production of documents to take samples*
- > *the powers to issue search warrants*
- > *the powers to issue notices (eg prohibition and improvement) to persons and to require the name and address of a person*
- > *the powers to provide advice to duty holders, as well as to enforce compliance with the law and to promote effective OHS outcomes*
- > *the requirement to announce their entry into a workplace and to give a report concerning the entry to the occupier*
- > *Inspector decisions liable to an internal review to promote transparency in OHS decision making.*

Based on enforcement data, enforcement measures are not proving to be effective in reducing the injury and fatality rate. Promoting advice and assistance is more likely to achieve a better response from businesses. The advisory role of inspectors should be the primary role, with the enforcement role secondary. This can be addressed under 'general powers on entry' and achieved by including the role of advice and assistance in this provision.

The model OHS act must contain provisions which enable the Inspector to modify, amend, or cancel notices or instruments issued by the inspector.

Internal review of inspectors' decisions

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?
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Provisions should be made for two distinct types of reviews – internal reviews and external reviews.

The right of internal review should be provided for in the model OHS Act. The specific process does not need to be in the model OHS Act. The Department responsible for the administration of OHS can establish a transparent internal process so that decisions by an inspector, predominantly on enforcement and inspector determinations, can be reviewed.

The internal review process must be transparent in prescribing procedures and time lines, with public identification of the persons appointed to manage the internal review process. The process should be economical and quick and review both decisions and non-decisions in the interests of safety. In addition, the reviewing body should give reasons for the decisions arrived at in the review; and the inspector should be a full participant in the review process and should be informed of the outcome and the reason for it.

The right of review must be accessible to all affected workplace parties.

There will also be occasions where the option of an internal review is unsatisfactory. Therefore there must be provisions for an external review in the model OHS Act. South Australia's system for Review Panels is a robust system that has provided mechanism for addressing external review requirements.

CHAPTER 7: COMPLIANCE & ENFORCEMENT

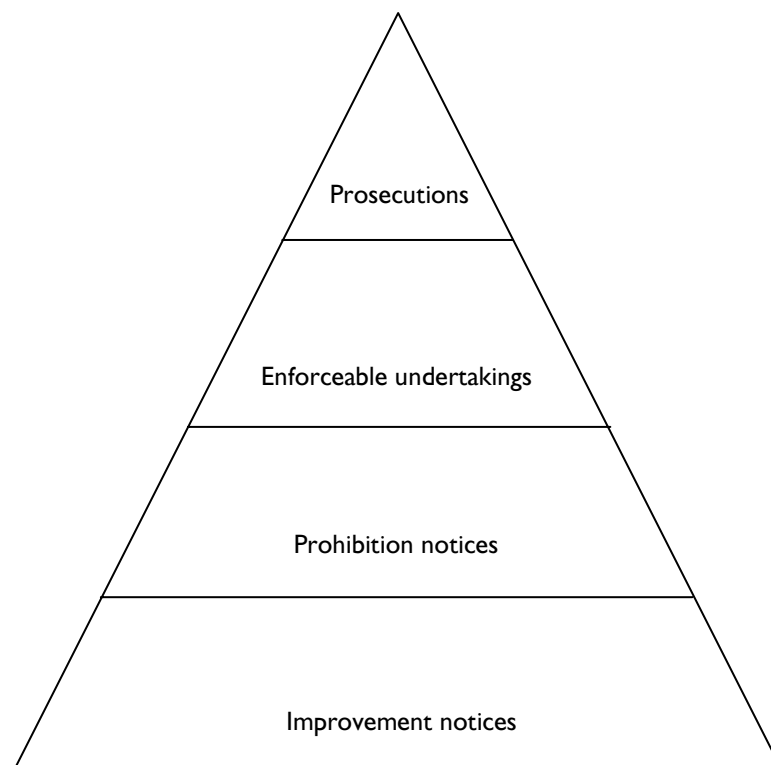
Enforcement measures

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?

Evidence from international sources, other Australian jurisdictions and other areas of legislation clearly indicates that an enforcement strategy based on a range of activities is required to motivate everyone (employees, employers and others) to achieve healthy and safe workplaces. Punitive measures (no matter how extreme) will not by themselves achieve the required outcomes.

The model OHS Act must contain provisions for hierarchy of enforcement measures. This should consist of the following simple hierarchy.



To implement this hierarchy there will need to be enabling provisions in the model OHS Act accompanied by regulations and guidance material to facilitate implementation.

Measures exercised at the workplace

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

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

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

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

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

The model OHS Act must contain provisions for health and safety representatives to issue PINS or in the case of South Australia, Default Notices. The circumstances in which these notices can be issued and the process for their review must be prescribed in the Act.

As discussed above the OHS Inspectors must have the capacity to issue Improvement and Prohibition notices. The Act must also prescribe the circumstances in which they are issued and the process for contesting/reviewing the notices.

Reference has been made previously to the South Australian system of Review Panels which can be implemented to review notices.

All notices must specify the reason for their issuance and the outcome that is required.

All notices must specify a period of time in which compliance must be achieved.

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?

The South Australian OHS&W Ministerial Advisory Committee accessed research into interstate experience with Infringement Notices for OHS offences. The research clearly indicated that an Infringement Notice regime has not resulted in improved OHS performance in any of those jurisdictions that use them for OHS. There was evidence that in the construction industry in NSW the cost of Infringement Notices was included in the financial planning as another operational cost of the construction project.

There are several concerns that arise in considering the introduction of Infringement Notices in an OHS environment:

- > Will Inspectors be required to issue a specific number of Infringement Notices a year?
- > Will Infringement Notices be seen as a source of revenue for the Government?
- > What offences will Infringement Notices be for, e.g. not enough band-aids in the first aid kit?
- > Will Infringement Notices apply equally to offences by both employers and employees? E.g. employees issued an Infringement Notice for failure to use Personal Protection Equipment.

In summary there is firstly, clear evidence that Infringement Notices will not lead to improved OHS performance and secondly, that Infringement Notices do not fit 'neatly' into the OHS regime. There is an extensive range of issues, which must be resolved before any consideration, could be given to such a system.

Measures exercised beyond the workplace

Q100. Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?

There is no requirement for the model OHS act to contain provisions with respect to injunctions. Other state legislation addresses this matter.

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?

A punitive framework which relies solely on monetary penalty is restrictive and may not encourage improved OHS performance. Other legislation both in South Australia and the Commonwealth allow those agencies responsible for enforcement to negotiate ‘enforceable undertakings’ with organisations. These ‘enforceable undertakings’ may require organisations to undertake a range of actions from issuing recall notices on products, to reimbursing customers, to placing full-page advertisements apologising for their actions, to list just a few.

To ensure that the penalty regime is effective, considerations must be given to allowing ‘enforceable undertakings’ to be negotiated with organisations that are in breach of OHS legislation. This system would avoid costly and protracted court cases as ‘the punishment fitting the crime’. This regime of enforcement framework based on alternative strategies must be considered in preference to an increase in penalties.

The agreement to undertake an enforceable undertaking must not be seen to be an admission of guilt.

CHAPTER 8: PROSECUTIONS

When the Robens based Occupational Health, Safety and Welfare Act was introduced to South Australia in 1986, the maximum fine for a business for a breach of Section 19 of the Act was \$100,000; the new maximum now being \$600,000. If Section 59, ‘Offence to endanger persons at work’ of the OHS&W Act is taken into account the true maximum penalty for an individual or organisation is \$1.2 million and up to a five year jail sentence.

In recent years the jurisdictions are perceived as competing as to who can boast of having the largest health and safety penalties in Australia.

The OHS penalties were meant to apply when risk was allowed to continue or where the employer had failed to do everything reasonable and practicable to ensure a safe work place. One could have assumed that the courts would have been looking at how foreseeable the risk was, the state of knowledge, the probable consequence and the practicality of risk reduction or elimination.

What has occurred since has been a significant move towards using the OHS Act for “after the event” prosecutions with an accompanying increase in the level of the maximum penalties and an increase in actual penalties by the courts.

In these ‘after the event’ prosecutions, the fact that an injury has occurred is used as evidence that a risk was present. If the employer had identified the risk and introduced controls the employer will likely be prosecuted for having failed in the duty of providing adequate supervision or training. Increasingly evidence of “doing everything reasonable” is required to be documented. Having instructed a worker in safe practice is no longer acceptable as evidence unless the employer can show a formal training program, records of instruction and formal assessment of the workers’ competency. This is extremely difficult for smaller employers.

The injury now assumes a very important part of the prosecutions case against the employer. An amputation will be used to seek a prosecution with a high penalty. If the finger was bruised or fractured it is likely no prosecution will be launched even though the perceived level of failed duty on the employer’s part may be identical.

Reasonable foresight has been replaced with reasonable hindsight.

In the first 15 years of the Robens style legislation, the Inspectors on examination of a workplace would identify hazards, give directions (often based on a prescriptive regulation) and advice, and only commence a prosecution if the employer failed to rectify an identified problem, or if the hazard was serious and obvious.

The problem that has developed is that with higher penalties and a more punitive policy from regulators, employers (particularly the 96% who are small) have no certainty of what is required of them to avoid penalty. Implementing risk assessments and controls will not save them from prosecution if the controls fail to prevent injury.

The number of prosecutions, which occur each year, must be a reflection of the significant workplace issues that occur. Obviously, as the occurrence and detection of major workplace issues varies each year, so should the number of prosecutions. In addition, the time it takes to investigate an incident and determine if a prosecution should occur will also contribute to variations in the number of prosecutions being undertaken each year.

Criminal or civil liability

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?

Due to the rapidly escalating level and now excessive level of fines and the potential in some circumstances for imprisonment, ALL OHS cases must be heard by criminal courts where there is a greater requirement with respect to evidence. ALL parties must now have access to a trial by jury.

Where prosecutions should be 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?

As all cases should be heard by criminal court,s each jurisdictions criminal system will apply.

Who may commence prosecutions and relevant procedures

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?

As all cases should be heard by criminal courts, each jurisdiction's criminal system will apply.

Evidence

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?

As all cases should be heard by criminal courts, each jurisdiction's criminal system will apply.

The burden of proof and defences

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?

The matter of 'reasonably practicable' has been addressed previously in this submission.

As all cases should be heard by criminal courts, each jurisdictions criminal system will apply. Rules and standards of evidence are well established for criminal cases.

Liability of officers

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?

Officers of a corporation are subject to a range of other federal and state legislation in undertaking their role and responsibilities. It is not appropriate to provide additional requirements and penalties through the model OHS Act.

This matter has been addressed previously in this submission.

Sentencing options

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?

When considering the level of monetary penalty consideration must be given to a number of issues.

These include the

- > unique nature of South Australia's employer duty of care
- > impact of the large monetary penalties on prosecution systems
- > need for OHS inspectors powers to be amended.

Unique nature of South Australia's employer duty of care

In determining penalty levels, especially in comparison with other jurisdictions, it must be noted that South Australia's OHS&W legislation relating to the principal 'duty of care' (ie section 19 (1)) is unique.

Section 19 (1) of the OHS&W Act states that "An employer shall, in respect of each employee employed or engaged by the employer..." The interpretation and application of the underlined phrase, is that in any incident/accident, the employer can be prosecuted for each employee that is placed at high risk in the incident/accident. Thus if five employees were placed at risk, there would be five charges laid by SafeWork SA. Thus the penalties under the OHS&W Act are multiplied by the number of employees placed at risk. In all other jurisdictions, offences are based on an incident and have no relation to the number of employees involved.

It is not appropriate therefore to compare penalties in South Australia with other jurisdictions in an attempt to determine what level penalties should be for OHS offences.

Impact of the large monetary penalties on prosecution systems

If there are very large penalties for OHS (eg of the order of over \$1 million) then there is the potential for:

- > Organisations to vigorously defend cases using QC's. This will significantly increase the costs to Government regulators
- > Government regulators staff may not have the skills and experience to cope with potentially confrontational court situations involving QC's
- > Organisations will demand that employers do not respond to questions from OHS Inspectors unless a lawyer is present.

If a large financial penalty is imposed on an organisation, what are the consequences?

Organisations may:

- > Be forced to close down with employees losing their employment
- > To ensure a positive bottom line will retrench staff or will delay changes and improvements affecting viability and possibly OHS standards
- > In paying a large penalty may lead to a poor share market performance and lowered dividends and results. This will affect shareholders, which today, are primarily superannuation funds.

As indicated in the economic background section of this submission Australian businesses are primarily small businesses, with only a relatively small proportion of large organisations. Generally any large fine on a small business has the significant potential to result in business closure.

Need for OHS inspectors powers to be amended

As recommended by Robens in his report, extensive powers were given to OHS Inspectors. Inspectors were given right of entry, access to and right to remove any documents, material or equipment. They have to right to examine, take statements on affidavit and investigate. Police investigating serious crimes cannot exercise this level of power. These powers were conceded to by employer associations in the interests of safety at a time when the consequences of prosecutions were substantially less. The jurisdictional tendency to massively increase penalties and the attempts to introduce goal terms demand that Inspectors powers need to be reviewed. Certainly their accountability requires review.

If penalties are substantially increased Corporations and their employees will legitimately demand the same rights granted to a citizen being investigated for a serious offence be included in OHS legislation. This will mean that powers of Inspectors will need to be substantially changed.

It is our understanding that in delivering a penalty the Magistrate must refer to the ‘Sentencing Act’ which provides guidance as to circumstances that must be taken into account, thus the penalty regime is not ‘totally rigid’.

Monetary penalties

Financial penalties that are imposed on organisations currently are paid into the general revenue of Government. Fines levied for OHS offences and prosecution must be paid into a separate fund, which would be used to support advertising or other targeted campaigns as agreed to by the bi-partite OHS Advisory Committee and recommended to the Minister.

Other sentencing options

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

Alternative penalty options have been discussed elsewhere in this submission.

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

The only specified offence for which imprisonment may be considered is for reckless endangerment. The maximum term should be for five years.

Workplace death and serious injury

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?

Some jurisdictions have proposed that there be provisions in their OHS acts for specific offences such as industrial manslaughter relating to workplace death. The responses to such provisions illustrate the inappropriateness of such a proposal and that such legislation is basically ‘flawed’ and politically motivated.

The proposal for industrial manslaughter is not appropriate in Australia as:

- > In all states e.g. in South Australia the Crimes Act allows for charges of manslaughter where there is gross negligence leading to death. This legislation has been proven to be adequate and therefore new legislation is not required
- > The focus of these provision is retribution rather than prevention and education
- > The potential breadth of application or extension to areas outside of OHS will lead to widespread concern in the community (e.g. Doctors and hospitals)
- > The current financial penalties in the OHS Acts are in themselves wide-ranging and punitive
- > The application of a charge of manslaughter against an individual has traditionally, under Australian law, referred to the direct involvement in the death of another person. Some proposals for industrial manslaughter or similar offences seeks to change that relationship and could, if applied, result in charges against person who is remote in terms of levels of management from the event.
- > The proposal has the potential to significantly raise the stakes for litigation and will encourage employers to fight every prosecution, even taking some cases as far as the High Court
- > There is significant potential for unexpected consequences to arise from the proposal including inclusion of OHS requirements in enterprise agreements and changes to the industrial relations system
- > Corporations and their Senior Officers will now legitimately demand the same rights granted to a citizen being investigated for a serious offence such as manslaughter

given the proposed penalties that currently exist under the OHS system where inspectors have the right of entry, access to and right to remove any documents, material or equipment. The Inspectors also have the right to examine, take statements on affidavit and investigate. Police investigating serious crimes cannot exercise this level of power. The powers of OHS inspectors would need to be brought in line with Police powers if industrial manslaughter is introduced.

The inclusion of provisions for specific offences relating to workplace death or serious injury are NOT supported due to the reasons outlined above. It is recommended that there be provisions in the model OHS act for those who recklessly place at others at risk at the workplace.

The provision in Victoria's OHS Act dealing with 'reckless endangerment is a model that should be examined.

Enforcement of penalties

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?

As all cases should be heard by criminal courts, each jurisdiction's criminal system will apply.

CHAPTER 9: OTHER ISSUES

Regulation making powers

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?

Of major concern is that as regulations are changed, or new regulations developed and gazetted, there is inadequate consideration being given to their practicality and application in the workplace. It is essential that there is a legislative requirement that all new regulations (or changes) and Codes of Practice are tested across a range of workplaces before being gazetted. This will ensure that the regulations (or changes) are relevant, appropriate, enforceable and will lead to improvements in OHS.

While it may be presumed that the penalties for breaches of OHS regulations are too low, compared to those in OHS Acts, an examination of prosecutions for OHS offences in South Australia indicates that nearly all prosecutions are for breaches of Sections of the Act. Inherently, a breach of a Regulation is a failure to comply with the principal 'duty of care' in Section 19 of the Act. The prosecution would be therefore, for failure to comply with Section 19, rather than the Regulation.

The provision of lower penalties for breaches of some regulations such as those dealing with licensing or similar is appropriate. Not all regulations will require a penalty.

Information provided in Part Three and the response to Questions 1 and 2 in this submission must be considered when developing provisions in the model OHS laws dealing with regulation.

Codes of practice

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

The model OHS law must contain provisions relating to the development and approval of codes of practice.

For example the provisions must contain requirements for

- > Regulatory impact statements
- > Expiration / sunset clauses. It should be noted that South Australia has legislation that provides a ten year sunset requirement on all regulations.
- > Developed in consultation with employer stakeholders
- > tested across a range of workplaces before being gazetted

Information provided in part three and the response to questions 1 and 2 in this submission must be considered when developing the provisions in the model OHS laws dealing with codes of practice.

Notification of incidents and reporting

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

Reporting systems with respect to notification of incidents must be dealt with in subordinate legislation. It is a level of detail that is not required in the model OHS Act.

External appeals and issue resolution

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?

South Australia's OHS&W legislation contains provisions which allow for the establishment of Review Panels. These Panels are established when an employer disputes and Improvement or Prohibition Notice. The Review Panel has the capacity to confirm, amend or cancel Notices. The Panels therefore provide a form of conciliation / arbitration.

The model OHS law must contain such systems to enable the review of Inspectors decisions.

Tripartite mechanisms

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?

The need for strong and effective collaboration and consultation at the state level is essential. South Australia's current Occupational Health and Safety Advisory Committee provides a model which must be adopted.

The OHS Committee would consist of nine (9) members similar to the current Committee. Four (4) members would be employer representatives appointed by employer associations. Four (4) members would be employee representatives appointed by the relevant Union system. Two (2) additional members would include the Director of the government department that is the equivalent of South Australia's SafeWork SA and the equivalent of South Australia's CEO of the WorkCover Corporation (or their nominees). An independent Chairperson would be appointed by the Government. The Independent Chairperson must clearly be 'apolitical', not aligned with any party or political organisation which could lead to a perception of bias and be supported by both employer and employee key stakeholders.

To ensure that the essential principle of consultation and collaboration is addressed, it is essential that only the employer and employee representatives have voting rights on the OHS Committee, with the Independent Chair NOT having a casting vote. As OHS is a workplace issue, the representatives of the workplace, that is the employer and employee representatives must be those who have responsibility for deciding/ voting on issues.

A structure such as that proposed above will also reduce the potential for the 'politicisation' of OHS and reduction in the potential for OHS to be used for other agendas.

The relevant Government department would service the Committee.

Briefly the key functions of the OHS Committee would be provide strategic direction and recommendations on legislative changes. Thus the key functions would be to:

- > Provide advice and recommendations to the Minister and Government
- > Develop OHS legislative changes and forward these to the Minister and Government
- > Formulate and endorse all OHS programs and targeted campaigns and forward these to the Minister for his approval and subsequent implementation.

The above committee structure and key functions ensures that

- > The 'essential principles' outlined above in this submission are addressed

- > Key stakeholders are an integral part of ensuring OHS improvements
- > There is a focussed strategic approach to all OHS activities and targeted campaigns and that key stakeholders are not ‘marginalised’ as is the current situation
- > The broader community would have confidence that OHS issues are being addressed

Mutual recognition

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?

Permits and licensing are matters that can be addressed through subordinate legislation and guidelines. Mutual recognition can be addressed in this legislation. The current national initiatives with respect to licensing of high risk OHS activities must be maintained and provide a model for how mutual recognition can be addressed.

As discussed above the OHS law must be a framework and not try to address all issues.

Interaction of federal and state laws

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?

A far simpler approach would be to transfer responsibility for OHS to the Federal Government.