

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

SPECIFIC COMMENTS

Legislative Approach:

The Act needs to define the framework and objectives of what is to be accomplished, with regulations explaining the process and setting out limits and penalties etc. However references to codes of practice should not make it that the only way to be compliant is to follow exactly a code of practice. In a research setting new methods of doing things are always being designed, equipment may used for a purpose it was not originally designed for. The new method may not have been envisaged historically. This must also be the case in industry and other fields. There should always be discretion for a Chief Executive/Inspector to use their experience of knowledge in a determination of what may constitute a breach.

It would be appropriate to add welfare to any new act title, although encompassed in the ideals of the current acts as written it is often an area which is overlooked within a workplace. With more pressures on businesses, and personnel to perform and the higher stress levels that occur because of this, bullying and harassment are becoming more prevalent. Adding welfare to the title will remind those working in the area that it is an important part of health of the workforce.

Workplace gives a broader definition to a work environment than occupational which suggests paid employment where a workplace to me more identifiably includes work environments where people may not be paid.

Suggestive title -Workplace health, safety and welfare Act or Workplace health, safety and well being Act.

I believe it should have objectives so that it is clear to all why the Act exists the QLD model Seems appropriate.

Scope, Application & Definitions:

The principles should define what the processes are such as consultation, risk mitigation, representation, what is meant by a safe work environment, who has obligations and what they are

Duties of Care – Who owes them and to whom?:

The duty of care should extend to protecting the environment in so far as an industry should not be able conduct an activity that has an adverse or polluting affect the environment as this impacts on everyone, the public and the workers within that enterprise. The legislation covering environmental protection should already cover this area.

If the principle objectives to all legislation relating to workplace health and safety is to have a safe work environment for all workers then one set of legislation should be able to cover all industries, non profit workplaces and all work environments. In combining all industries under one piece of legislation it will reduce costs to industries whose work crosses legislative boundaries, for instance extractive industries that might have mines, transport by road and rail and dangerous goods as part of their enterprise.

It also should improve the regulation as no longer will a number of regulators be “in competition”, when an incident occurs only one set of inspectors will examine compliance with one piece of legislation.

This must reduce costs to industry and improve their world wide competitiveness without reducing the safety of the workforce.

Within the legislation codes of practice can be specified for a particular industry.

Where possible legislation for mines, dangerous goods transport and other legislation relative to OHS issues should eventually be within Act or at least should contain the same provisions and not be conflicting. The less pieces of legislation that a person needs to examine and understand in order to conduct a practice or maintain a safe work environment the better.

Q10- In relation to general duties of care being tied to the conduct of work-

I agree with the QLD definition of a workplace. Many people now take their work with them to a persons home, for example mobile cleaners, mechanics, contractors - a workplace should be anywhere where work is performed. This would then also tie in work being done through labour hire companies, or by volunteers.

As per QLD definition-"as any place where work is, or is to be performed by either a worker or a person conducting a business or undertaking.

Q11- Members of the public within a workplace or in a workplace area adjacent to a workplace for a legitimate purpose should be treated the same as employees and volunteers, and an employer should have a duty of care towards them.

Q12-A reform of the OHS to bring all states into line should at the same time be worded in such a way as to encompass as many forms of work and work environments as possible. This is best addressed in how "workplace", "employer" and "worker" are defined in the legislation as is seen in the QLD legislation.

The incorporation of the words welfare or well being into the title of the Act would help to emphasise this part of health that maybe has not had the attention it has deserved in the past.

Employer- needs to encompass those controlling labour hire companies, franchises and people employed to work at home

Control- the word control should be defined as being the person who owns or is in charge of a workplace or workplace area. It could be similar to that in the QLD legislation for a workplace area as per below and expanded to include persons in charge of a company corporation or organisation such as Directors and members of boards of Directors.

- 15B (1) The *person in control*, of a relevant workplace area, is the person who is the owner of the relevant workplace area.
- (2) However, if there is in place a lease, contract or other arrangement that provides, or has the effect of providing, for another person to have effective and sustained control of the relevant workplace area, the other person, and not the owner, is the *person in control* of the relevant workplace area.

Worker- A 'worker', could be defined as a person who performs work (paid or otherwise) for or at the discretion of an employer, or who is in training within the company/organisation/ workplace under the control of the employer. Such a definition would then include persons who works under a contract for service would be covered by the above as the would be performing work for the employer but not being paid by them as too would self employed persons be covered. This does not negate the duty of care by a labour hire company or an employer of a contractor or the self employed person who all would also have a duty of care.

I think within a research setting students and others in training are often viewed as non employees as they not "working" so much as learning although their task may be the same as a person employed by the employer. This is especially so where students are enrolled in one organisation but do their training elsewhere.

Duty of Care of an employer is well defined in section 28 of the QLD Act and so is the definition of to whom the duties are owed- As per QLD Act to any person who is affected by the conduct of the business or undertaking, which would include workers(as defined above), contractors, labour hire personnel and trainees/students.

28 Obligations of persons conducting business or undertaking

- (1) A person (the *relevant person*) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant

person's business or undertaking.
Obligations of workers should be defined, as this encourages all to take responsibility for OHS in the workplace, it should include not wilfully taking risks, following safety guidelines and wearing PPE if provided for a task.

A single set of definitions should be sought that if possible is in agreement with international standards.

Q32. Yes - this could be done as part of a defining "person in control" to include a category in charge of a work area, temporary workplace.

Q34- Whether or not a person/organisation/company can easily be prosecuted should not affect whether they have an obligation or responsibility under WPHS legislation.

Q35- Supply must be limited to a business dealing whether or not for profit. It should not extend to members of the public.

'Reasonably Practicable' & Risk Management:

Reasonably practicable should be defined and the Victorian legislation definition seems reasonable. and risk management is well covered in the QLD legislation

Consultation, Participation and Representation:

For a harmonious workplace, it is best that all parties or their representatives are consulted. If a business occurs over multiple worksites or is a small business of only a few employees there must be a way in which general information regarding work issues is disseminated. This could be emails/news letters, site or staff meetings, letters to employees. These procedures should be duplicated as much as possible in a consultation process as this should be the least burdensome to an organisation as all procedures for it to occur should be there.

Once an organisation reaches a certain size (maybe the same size as that requiring a WHSO) then HSR should be required rather than at present only if requested to be appointed by the workers. I believe this helps workers realise they too have responsibilities under the legislation and should be to be involved in WPHS matters. In a workplace where workers are not interested in being involved it is hard for employers to put risk mitigation measures into practice.

HSRs could also provide information and advice from within their area of work to employers regarding hazards, possible incidents or accidents and be used to assist in the dissemination of information from the employer to the workers in their area concerning risk mitigation in their workplace and any policies or procedures to limit risk and keep the workplace a safe environment.

From this would flow the need to have a safety committee and this should not have more employer representatives than employee ones.

Safety committees- Involvement of a union on HSC may be appropriate for some industries. In some work areas for instance outworkers, contract hire companies employees or industries where there are persons on visas or temporary employment, employees may need added protection and someone to ensure issues can be raised on their behalf.

Also casual workers and trainees may not be represented on HSCs.

I think that a right of entry should be within the Act and should allow union officials the right to enter a premise unannounced if they believe or can show they have been contacted by a worker with a genuine concern. I think this acts as a warning to employers that they must comply with OHS requirements, and will deter some from negating their responsibility. It also acts as a reassurance to workers that they can call for assistance from a union without having to request information from the regulator. On entry if a hazard or circumstance contravenes the legislation the union representative should contact a Dept Inspector to take charge of the situation from this point.

A basic tenet in safety is that everyone has a responsibility and an obligation to follow safe practices. It follows from this that everyone should have the right to take themselves out of harms way and this should include the right to stop work if the worker believes it to be unsafe.

Any person who believes a certain practice or workplace to be unsafe, should in the raise their concern with an employer or their representative, either directly or if they prefer through a union representative who should take it to management. If this fails then the Regulator should be contacted immediately so an inspector can make a decision.

Persons who notify of unsafe practice have to be protected by the law. If this means that an Inspector can withhold information as to their source then this should be allowed. The rights of visa holders and temporary workers need to be protected and this may need to be by the provision in the Act of heavy penalties against those employers who discriminate or dismiss workers for reporting unsafe practice. Provision should also be made in the legislation to protect an employer from vexatious claims.

Regulator Functions, Powers & Accountability:

I believe the Regulator should be left to appoint Inspectors who they believe are qualified for the position. This may not always require formal qualification, with experience and expertise in a particular work environment being equally required. I believe this to be well described in the QLD Act.

s(99) Appointment

The chief executive may appoint a person as an inspector if—

- (a) the chief executive considers the person has the necessary expertise or experience to be an inspector; or
- (b) the person has satisfactorily finished training approved by the chief executive for this section.

Inspectors should be able to be directed by the Chief Executive/Regulator, their decisions should be audited and reviewed by them and in some circumstances even overturned by them. Some decisions are a matter of interpretation of the legislation and it may be felt the ruling is incorrect. The ruling may have been appealed against and overturned by a tribunal

Compliance & Enforcement:

A hierarchy of enforcement measures is essential and should begin at the lowest level with a caution and the opportunity for rectification of a breach where it is a minor matter. This should then scale up as the possibility of the breach causes injury or death increases following a risk assessment type model of low to high probability.

There should be some discretion for the Chief Executive to make a ruling rather than have mandated penalties as some circumstances may warrant this and may not have been easily foreseen. Any enforcement measure should contain information both about how the incident/workplace is a breach of the Act and information as to how to rectify the matter and achieve compliance. Moreover as OHS legislation should be about teaching as well as enforcing, prosecution and fines should not be automatic and the Chief Executive should have discretion.

If a person fails to comply with notices or enforcement measures or repeats unsafe actions then there should be the ability to apply for an injunction to the courts. It seems reasonable that where death or serious injury are a risk that the Act should allow for interim injunctions to also be given to cease the practice until the court make sit decision.

The purpose of OHS legislation is to bring about a safe work environment, if this is assisted by not prosecuting but ensuring an improvement in an area that is considered unsafe occurs, then this should be allowed. If the unsafe practice continues or there is no improvement then penalties should be enforced.

It is appropriate that before a code of practice can be legislated that there is consultation with relevant industries, relevant authorities and any other advisory body as well as the public and this should be written within the Act. It should also be clearly stated that a person can also comply with the Act by following an equivalent method or standard ie the code of practice should not become the only way to comply with the legislation. Codes of Practice should be reviewed on a regular basis to ensure their continued relevance. In some circumstances where an industry is going through a rapid change of technology this may need to be less than 5 years.

It should be possible for industry bodies, relevant authorities or advisory bodies to request a change in a code within the review period should circumstances change.

Reporting should not be used as a tool for automatic prosecution as this leads to a reluctance to report incidents. Employers who are prepared to make reports are likely those who are attempting to be compliant with the legislation and therefore should not be penalised for reporting. Maybe it would be better for the legislation to allow a report to the insurer side of OHS such as WorkCover, or another independent authority to be forwarded to the Regulator automatically without identification unless there is serious injury or death. This may provide more useful statistics if it is statistics and not prosecutions that are required.

Prosecutions:

Other Issues:

Issues of permits or licences for high risk industries

A Chief Executive or Regulator should have discretion to issue permits/ licences for high risk industries to persons under their area of control. Under the Act they issue a licence to a person who they believe has the correct training and experience to hold such a licence. A person already holding a permit or licence in another state would be able to show their ability to hold a licence/permit under these circumstances without any undue burden.

Under COAG states and territories are required to give mutual recognition across state boundaries. It should also follow that after a revocation of a licence in one State, a person should not be able to apply for or hold a licence in another state without penalty. Similarly infringement, improvement notices etc against person/corporation in one state should stand in all states and territories. This should be easier under National OHS Act and regulations.