

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

SPECIFIC COMMENTS

Please complete this template to provide specific comments with supporting reasons against each chapter of the Issues Paper. If you are responding to a specific question in the Issues Paper, please include a reference to the relevant question number.

1. Legislative Approach:

Q1 - Q6.

No response.

2. Scope, Application & Definitions:

Q7. Should the model Act maintain the status quo regarding industry-specific legislation?

Q8. Alternatively should a model Act incorporate all industry-specific requirements?

The model OHS Act should cover all industry sectors across the nation. The principles and duty-holders are generic and common to all industries - i.e. employers, employees, those in control, etc. With the Act enshrining principles and duties, legislation can then be brought in from time to time to relate to specific industries without the need to change the Act. This also allows a framework that would pick up emerging industries.

OHS incident statistics could be one indicator of the need to define industry sectors that require specific legislation; for example agricultural, forestry, fishing (35% of all fatalities), and construction (20% of fatalities).¹ Complexity or level of risk could be another measure (eg. mining).

For example in Victoria, new regulations have included industry-specific requirements for the Construction industry, along with regulations relating to types of work activity (eg. to do with noise) that will apply across many industry sectors.

The Australian Institute of Architects supports the model of one compiled Regulation that ensures duty-holders can go to one place and be assured of finding all their obligations without reference to separate multiple and over-lapping regulations. This would assist in overcoming one of the Cole Commission's criticisms about confusing and differing OHS laws.

Q9. Should the model Act contain provisions for improving coordination between jurisdictions?

Yes. Inter-jurisdictional conflict or overlap presents enormous complexities and generates real business costs for service businesses that operate in more than one state, and particularly in border regions.

¹ NOHSC (2004) The Role of Design Issues in work-related injuries in Australia 1997-2002

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

This is a semantic matter; obviously a workplace is a place where work is conducted, whether traditionally or not. It is also impossible for a person (worker) to be conducting work and not be in a place. However, it may not be possible to be absolute in response to this question. Some duties may be better expressed one way and others the alternative way.

Q11. Should general duties of care under the model Act be extended to members of the public?

It is readily apparent that OHS law is only a sub-set of all laws regarding the health and safety of people generally - both now and in the future.

OHS law - for historical reasons too imbedded to ignore - concerns itself with the duties owed to people as employees, ie. workers. There are many other laws that are targeted at the health and safety of people in various other roles; notably environmental law, road safety and building law. Each of these other areas of law has grown in response to community interests.

Building Acts, Regulations and referenced Australian Standards provide a wealth of stipulations aimed at the safety of building users: eg. structural integrity; light levels, noise levels, falling, slip resistance, air movement and quality, etc. These are all matters that can affect any building occupant whether or not as an employee.

For example in Victoria the OHS Act includes an object (cl 2(c) "to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons". This object duplicates the objects of other legislation and leads to conflicting, ambiguous and differing legal obligations. Compliance with the Building Regulations regarding, for example, handrail height cannot be assumed as 'ensuring absence of risk' under OHS law.

As OHS Acts have incorporated duties for designers of buildings, this extension of OHS law to ensuring the safety of the general public from the work undertaken, brings about a vast area of potential conflict with the mass of building standards and regulations about buildings which have been codified to protect people.

The Australian Institute of Architects recommends that OHS law should avoid overlap or extension to the safety of the general public.

Q12. Should the scope and application of the model Act be sufficiently broad and flexible to accommodate new and emerging types of work arrangements?

It is likely that the courts can well enough decide what the employer/employee roles are, irrespective of new work relationships. (See comment on p.13 of the Issues paper. and footnote 10. Any attempt to codify the future will be likely to cause confusion and conflict.

The Australian Institute of Architects believes the model OHS Act should mainly set out the required principles, rather than attempting to cover unknown future possibilities.

Q13. Are there current or emerging hazards and risks that are not adequately addressed under general duties of care?

There will always be emerging hazards and risks. However Acts, and this model Act, can cover these by general duties. Whilst this may appear open-ended and an impossible obligation on duty-holders, it is a good approach as long as there is the qualification in the Act

of 'reasonable and practicable' tests which cover what can, or ought to have been known at the time.

Q14. Which terms are critical for achieving national consistency?

Consistent definitions of the following must be adopted nationally:

- Reasonably practicable
- Control
- Employ
- Design
- Construction (work/project).

Refer later sections for discussion and implications of the terms 'reasonably practicable', 'control', and 'employ'.

'Design'

Often the activity of 'design', of a building or structure for example, is taken to include the design, or 'up-stream' planning or scheduling of the construction activity or work process.² Regularly 'construction' is talked about as both the noun and the verb, as if the designer of one is necessarily the same person as the designer or planner of the other. This is almost never the case in the construction industry. The simplistic discussion of 'up-stream duties' has obscured the fact that different things are being designed. These different design activities call for different professional skills, knowledge and training. The architect or engineer designs the building but the builder designs or plans the construction activity and the construction site. This distinction needs to be made in OHS definitions for the duties of 'designers of buildings' to be clearly and usefully legislated.

'Construction'; construction project, construction work

Often 'construction' is taken to include 'design'. For example 'Construction project' in NOHSC:1016(2005) means a project involving construction work and includes design, preparation and planning".³ In Victoria a more precise definition of 'Construction project' is given as involving construction work and includes preparation and planning of the construction work⁴

Q15. Are there any other issues relating to the scope, application etc of a model OHS Act?

No response.

3. Duties of Care – Who owes them and to whom?

Q16-18. Should the model OHS Act include a test or definition of 'control' and should it be able to be delegated.

If a national definition or tests for 'control' were to be adopted, this term would need very careful consideration. A good definition would be useful, but dangerous and confusing if not nationally consistent or not consistent with other areas of law.

² See ASCC website : Glossary of OHS and design related terms. Designed-product includes systems of work or processes.

³ See National Standard for Construction Work (NOHSC 2005)

⁴ Vic OHS Regulations 2007.cl 1.1.5.

In the construction area, building contractors are traditionally given 'possession of the site' under contract for the carrying out of their work. This gives them control of the construction site as a workplace, and in relation to other forms of liability.

Architects, engineers and other building professionals are commonly engaged by their clients to act as their agent under a building contract. Traditionally, building contracts establish the architect, engineer, etc. in the quasi-arbitrator role of superintendent. The superintendent does not contractually have control of the site or works and the whole of building contract law has established this position (unless by his actions or otherwise the superintendent can be shown to have taken control).

In the 'design' activity, an OHS duty on a designer to design a building or structure such that the safety of those who construct it is ensured is never in the control of a designer (that is, in his activity as a designer). Additionally the control able to be exercised by a designer in 'ensuring' the safety of those who may work in a building is limited, primarily by the client. The designer does not control the budget or the project resources and the designer's brief is set by the client under contract.

These building contract positions must be recognised and adopted consistently in any OHS Act definition of 'control'. To have an OHS definition of 'control' at odds with general building law would be completely unacceptable. In the Institute's experience with various OHS jurisdictions and in discussion with OHS academics, this important distinction of 'design' roles is rarely understood or recognised.

Q19. Should the model OHS Act clarify duties where there are multiple duty-holders.

This is matter that the courts can best determine and is probably best left to the development of case law. A pragmatic view would be that definitions of 'control' or of 'reasonable practicability' would determine the degree of responsibility of shared duty-holders.

Q20-22. Is primary reliance on employment relationships a valid basis for framing OHS obligations?

The meaning of 'employee' in OHS law is sometimes stretched for particular duties to include those who are engaged as independent contractors rather than just under contracts of employment.⁵ This should be eliminated as redundant, in that the independent contractors are employers in their own right and required to follow all OHS laws.

As observed previously, OHS law is only a sub-set of all laws regarding the health and safety of people generally - both now and in the future.

To try and expand the basis for defining OHS duties in OHS law to other than the employment relationship could only lead to confusion, ambiguity and overlap with other areas of law. This is contrary to improving OHS outcomes.

Q23-24. Employer's duty and to whom?

To enlarge the employer's duty to those who may be affected by the business undertaking, wherever they may be, (ie. the public at any place remote from the workplace), would be complex and redundant. It would overlap with environmental law (e.g. pollution control) and consumer protection law (eg. a poorly-made toy).

⁵ Vic OHS Act 2004. Cl. 5 Definitions is extended for Cl 21 by the addition of Cl.21(3) to include contractors.

Duties of employers should be limited to their employees in the direct sense (probably akin to taxation law tests) to distinguish between contractors and employees, for clarity and to focus on improving OHS outcomes.

Q25-26. Duties of employees and others?

A worker visiting a worksite controlled by other than his own employer is still owed a duty by his employer. For example an architect employee may be required as part of his work to visit a building site. His employer would have a duty to properly equip, induct and train his employee about this work activity. The controller of the building site clearly has a duty for public safety, including visitors, from his activities on the site. These may be from Council by-laws, EPA requirements, as well as his professional duties of care and contractual obligations.

There is little need for OHS law to expand into these areas. The Institute recommends maintaining the status quo regarding employees.

Q27-30. Appointed persons and officers.

No response.

Q31-32. Persons in control of a workplace.

The relationship between employers, owners/lessors/lessees of a workplace (or plant, etc) and persons-in-control of a workplace needs clear definition. The diffusion of responsibility lies in the interaction between the worker and work process (employer-controlled); the workplace (possibly building owner and/or lessee controlled) and the plant / equipment being used (person-in-control?).

On a construction site, the builder, as the head contractor, is the primary employer and is given possession or control of the site contractually by the owner or client. This remains conceptually the case even where the owner/builder contract refers to the builder's access to the site, rather than possession. The builder typically would have direct employees on the site and also engage independent contractors who may have their own employees on the site. All the workers on the site have an employer who owes them a duty of care, but under overall control of the site by the builder.

Different contractual models for the owner and builder relationship preserve this overall control. A construction manager engaged by a site owner may have no employees at the workplace but has management control of the workplace and/or the work process.

The employer has responsibility for providing a safe workplace (whether as owner, lessee or by entering a contract to provide services at a specific place), and providing safe equipment, training and safe work procedures. The person-in-control of the work has responsibility for the management of the work procedures.

Model OHS law should be directed at the person in control of the work and/or the workplace.

The notion of a Safety-in-Design Coordinator, proposed, we understand, by the ACEA, is not supported by the Australian Institute of Architects. Such a role would only add complexity and potentially further dilute the clarity of duties held by other parties.

Q33. Should the model OHS Act clearly establish OHS duties for various activities that can affect OHS for the whole life of an item, structure or system?

Building or structure designer

Most jurisdictions have now enacted duties for designers of buildings and structures. In some States these 'designer' duties apply to the safety of those who erect, maintain and demolish the buildings as well as those who use the building as a workplace for its intended purpose.

Notably in Victoria the designer duty is limited to the design for the safety of those who use the building as a workplace for the purpose for which it has been designed. This includes those workers who will maintain and repair the workplace from time to time, as this activity could reasonably be inferred as a corollary use of the building, (though it might be argued that it is not its intended purpose).

Safe design for intended use

The Institute accepts and supports OHS legislation for designers of buildings and structures to be used as workplaces to have duties to ensure that they are designed to be safe for persons using it as a workplace for a purpose for which it was designed - within various tests of reasonable practicability.⁶

The design of buildings is an area that is extensively controlled by building regulations and Australian Standards. Community expectations about safety have been prescribed for a long time - such matters as lighting, structure, fire, slipping, falling, noise, air quality, etc. There is a national, inter-governmental model - the Building Code of Australia - and a State-framework of approvals and certification. Emerging hazards can be codified. In fact many identified OHS hazards could be most efficiently avoided by prescribing a control via building regulation. A prescriptive approach may well be more effective than imposing an OHS duty to consider a matter on a case-by-case basis.

The OHS designer duty for intended use - being performance-based leads to confusion and ambiguity in the way that it relates to building regulations. Compliance with building regulations ought to be enough to demonstrate compliance with the OHS design duty. There is no apparent commitment to this principle in current OHS legislation.

Design to ensure safety in constructing a building

The Institute does not support the adoption in law of a building-designer OHS duty towards those who will erect the building or structures.

It is not debated that a designer may be able to assist and contribute to the potential for a building or structure to be safer to erect if designed in one way compared to another - assuming that the same work process was employed in each case – an 'upstream' effect. This is translated into an 'upstream' duty on designers in some OHS legislation.

The flaw in translation to an 'upstream' duty is that the designer of the future workplace is not (or only very rarely) the designer of the construction site. These are two very different workplaces. They occupy the same site but at different times.

Designers of buildings necessarily design the building to take account of its use when it is all in place - that is, after its construction is complete. Their design documents - drawings,

⁶ Refer to s.28 of the Victorian OHS Act.

specifications - show what is to be the result *after* construction. They do not normally instruct the builder in how to construct the building. If they do, they are not 'designers of buildings and structures, but designers of work processes or construction sites as workplaces. The latter is the builder's job and expertise, and in this regard the builder is acting as the designer of the construction site as a workplace for its intended purpose. There may be a number of ways to erect the same building and almost never is the sequence of construction, the level of manpower, the specification of plant and equipment to build it, the extent of scaffolding, etc either the contractual responsibility, or within the expertise of, the designer of a building.

There are, of course, also designers of other things such as temporary scaffolding (a structure which may be a workplace) and designers or planners of the construction site (entries, exits, materials storage, protection works, drop-zones, site sheds, etc), but these should not be confused with the role and responsibility of the architect or building designer.

The analogy with designers of plant

The argument has been made that, just as there are duties for designers of plant, so there should be design duties for designers of buildings as workplaces and for good measure for the safety of those who erect them.⁷ This analogy is false. Designers of plant are commonly required to design the item of plant so that it is safe to use for its purpose. They are not required to design the item of plant (eg. a circular saw) so that its individual components can themselves be manufactured or assembled safely. They do not design the manufacturing process or the manufacturing workplace.

Some jurisdictions recognise this separation and have a separate duty for installers, erectors and commissioners of plant.⁸ This duty-holder is more correctly analogous to the constructor or builder of the building or structure who designs, or has designed for them, the construction process.⁹

A balanced consideration of the statistical basis

Maxwell and others have been convinced that the need for the building designer duty is well supported by empirical evidence.¹⁰

The Institute strongly believes that the empirical evidence does not support the way in which designer duties have been framed in OHS law in Australia.

The studies commissioned by NOHSC¹¹ to investigate the design-relatedness of OHS fatalities and incidents show that 37% (or 77) of the 210 fatalities in the two years 2000-01 and 2001-02, were definitely or probably design-related across all industry sectors. 'Design' by implication related to the design of plant, equipment, tools, and structures. However the design of systems, processes and buildings was beyond the scope of the analysis.

⁷ See Maxwell (2004) cl 816 and this Issues Paper p.16.

⁸ Victorian OHS Act s.31.

⁹ As a matter of interest some Acts also have a specific duty for manufacturers of plant - not to ensure the items of plant are manufactured safely - but to ensure that it is manufactured "to be safe and without risks to health (when) used as intended". Vic OHS Act s.29. This analogy, if applied to buildings would require the constructor of the building to ensure that it is constructed so that it can be safely used. This obviously overlaps with the controls imposed by Building Acts and Building Regulations and is thus redundant.

¹⁰ Maxwell (2004) c. 813.

¹¹ NOHSC (2004) The Role of Design Issues in Work-related Injuries in Australia 1997-2002.

The building or structure design could thus have been related to about 6% of all fatalities, including 1.4% in the construction sector.¹² Plant and equipment remain the largest design-related agencies, despite long-standing plant designer duties.

As observed by Toole (2002) in an analysis of the roles of all construction parties "sub-contractors heavily influence the root causes of accidents, general contractors retained a moderate ability to influence ... architects/engineers exercised little influence over the root cause of accidents". Behm (2005) concluded that 'safe design is beneficial to risk minimisation but it is not a panacea'.

Much of the literature cited about the designer's role is primarily referring to the need for upstream planning of the construction process rather than design of the building.

The Australian Institute of Architects supports the inclusion of a duty for building designers in line with the Victorian OHS Act but does not support the extension of the building designer duty to the construction of the building.

The Institute strongly recommends that the design of the building and the design, or planning, of the construction process and construction site be recognised as separate designer duties, in the same way that designers and installers of plant are identified separately in some OHS Acts.

Q34 - 36

No response.

¹² If the mining, forestry, agricultural, and fishing industry sectors are excluded - ie. 31 of the design-related fatalities - there were 20 that occurred in the construction industry and 26 in all other industry sectors, presumably within or on buildings or structures.

In the second report (Driscoll, 2005) the analysis of the cases in each industry sector shows that in the construction sector possibly 3 of the 20 design-related deaths could be related to the design of the building or structure; ie. 1.4% of all fatalities. The major cause was design of plant and equipment. Driscoll observes that 'well-known solutions exist for virtually all the design problems underlying the fatal events'.

In agriculture/ fishing 1 of the 28 deaths was building-design related (a windmill railing); in manufacturing possibly 4 of the 7 could have been related to structure or facility-design; the rest being plant, mainly guarding problems. 1 or 2 of the 8 transport industry deaths were related to building design. 2 of the 7 deaths in trade/retail were due to lack of RCDs (something that is covered by Building Regulations). One (1) death occurred in the health sector due to entrapment by fire. So 10 deaths could be related to building or structure design in all other industries.

4. 'Reasonably Practicable' & Risk Management:

Q37 - 41. Should tests of reasonably practicable be included in the model OHS Act?

As the Robens style of OHS legislation is directed at general principles and to 'ensuring' absence of hazards or risks, or of safety, it is imperative that definitions of 'reasonable and practicable' be included in a model OHS Act and that this includes all the tests currently included in the Victorian Act. These tests have been agreed by the industry-stakeholders (clients, contractors and designers) in the only industry-wide guide to safer construction in the construction industry.¹³ Maxwell recommended against the inclusion of these tests in Victoria but his position was not accepted by the Institute or the government in the 2003 Act.

Q42 - 44. Should risk management processes be specifically included and required in the model OHS Act?

Risk management processes can be given sufficient weight by inclusion as Codes or guidelines. The risk management process allows judgement to be made commensurate with the scale and nature of the project's hazards and risks. This is the approach endorsed in relation to construction by the major industry stakeholders in the *CRC Guide to Best Practice for Safer Construction (2007)*.

This document also emphasises that the greatest OHS improvements stem from improved awareness and a culture of safety, rather than a formulaic ticking of the boxes to cover legislative responsibility.

The Institute strongly believes a model OHS Act should set out the objectives and the principles and that Codes and guides should set out the specific ways of complying.

5. Consultation, Participation and Representation:

No response.

6. Regulator Functions, Powers & Accountability:

No response.

7. Compliance & Enforcement:

No response.

8. Prosecutions:

The Institute believes the onus of proving that a defendant breached a duty under OHS laws should fall on the prosecution, as in the current Victorian legislation, and not as presently provided in the NSW and Qld legislation, where the defendant must prove it fulfilled the relevant duty. The Institute agrees with Maxwell¹⁴ that the legislation should be consistent with the general principles of criminal law.

¹³ CRC Guide to Best Practice for Safer Construction, 2007.

¹⁴ Maxwell (2004) cl 760

9. Other Issues:

No response.

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GENERAL COMMENTS

Please list any general comments you would like to make on any other matters not already highlighted in the Issues Paper. Ensure your general comments fall within the Terms of Reference of the National Review into Model OHS Laws (refer to Appendix A of the Issues Paper).

General Comments:

Various relevant comments are contained in the responses to questions above.