



**Government
of South Australia**

**SOUTH AUSTRALIAN GOVERNMENT
SUBMISSION**

TO THE

NATIONAL REVIEW INTO MODEL OHS LAWS

ISSUES PAPER

TABLE OF CONTENTS

Introduction-----	3
Chapter 1: Legislative Approach -----	5
Chapter 2: Scope, Application & Definitions -----	9
Chapter 3: Duties of Care – Who Owes Them and to Whom-----	16
Chapter 4: ‘Reasonably Practicable’ & Risk Management -----	28
Chapter 5: Consultation, Participation & Representation -----	30
Chapter 6: Regulator Functions, Powers & Accountability -----	44
Chapter 7: Compliance & Enforcement -----	48
Chapter 8: Prosecutions-----	52
Chapter 9: Other Issues -----	62

INTRODUCTION

South Australia welcomes the opportunity to contribute to the establishment of model OHS laws through this national review. The review represents a unique opportunity to provide a strong foundation for the establishment of genuinely harmonised OHS arrangements within Australia.

SafeWork SA, a business unit of the Department for the Premier and Cabinet, has prepared this submission in consultation with key employer and employee stakeholders in South Australia. SafeWork SA is established under the *Occupational Health, Safety and Welfare Act 1986* (the SA OHSW Act) and is responsible for the administration of this Act and other workplace and public safety and industrial relations laws.

The employer and employee stakeholder input to this submission was provided by members of the SafeWork SA Advisory Committee. This is a tripartite statutory body established under the SA OHSW Act, with responsibility for driving strategic and policy directions for OHS prevention activities in South Australia.

In this submission, where the direction of a response to a question has the support of all stakeholders as represented on the Advisory Committee, this is indicated by the word 'consensus' (Note that this should not be interpreted as necessarily implying agreement with the full detail of the response but rather, as an indication of significant agreement to the approach of the response). Where a response is not marked with the word 'consensus', a divergent view may be held by one or more of the key stakeholder groups.

The submission addresses each of the questions in the order in which they appear in the discussion paper. The length of responses accorded to each question is not necessarily a reflection of the importance attached by South Australia to an individual matter.

South Australia also intends to make additional contributions both to this review and the subsequent processes that will ultimately lead to the adoption of model OHS laws across Australia.

References are made throughout this response to other legislation – both South Australian and from other jurisdictions. In most instances the detail of the referenced legislation is not repeated in the response. However all such referenced documents are publicly available. In the case of South Australian law the recommended website is www.legislation.sa.gov.au.

South Australia has had laws relating to occupational health and safety since the *Factories Act 1884*. In 1920 safety and industrial regulations were amalgamated into a single Industrial Code.

This was added to over time with specific Acts to address matters such as country factories, construction, mines and works inspection, boilers and pressure vessels and lifts and cranes. A major advance occurred with the first consolidated *Industrial Safety, Health and Welfare Act 1972* in Australia – a result of the recommendations of a Parliamentary Select Committee and the report of the Robens Committee of Inquiry (which reported 3 months after the Select Committee). This Act covered all workplaces for the first time, enshrined the broad duty of care (and other obligations) in relation to all employment, provided for the election of workers safety representatives and established tripartite oversight of activities relating to safety, health and welfare at work.

South Australia's current Act has been in effect since 1986. The SA OHSW Act replaced the *Industrial Safety, Health and Welfare Act 1972* and most of the Acts referred to above.

The SA OHSW Act has since been amended on several occasions since 1986. Recent amendments, in 2000 and 2007 provided for adjustments to penalties and related provisions.

The Act was subject to extensive review in 2002 as part of the wider *Review of the Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia*. This led to the *Occupational Health, Safety and Welfare (SafeWork SA) Amendment Act 2005*, which introduced the current administrative arrangements and a series of other major reforms. Most notably it vested responsibility for all OHS functions in SafeWork SA. In the immediate past, the OHS Inspectorate had been separated from much of the advisory and educative functions (which were undertaken by the WorkCover Corporation).

The corresponding *Occupational Health, Safety and Welfare Regulations 1995* have been in operation since 1995. This single set of regulations replaced and consolidated a series of industry and hazard based regulations (some dating from the 1970's) and adopted all national standards completed at that time (except for lead).

These regulations are themselves currently under review by SafeWork SA and the results of that comprehensive review will also feed into the subsequent development of the national model OHS regulations.

The targets relating to reductions in workplace injuries and fatalities contained in the National OHS Strategy have been adopted by South Australia as specific targets in our South Australian Strategic Plan. Since 2001/2002 the incidence of injuries has been trending down. The number of fatalities while showing significant decreases in the last 2 years, is too small to comment on trend over this time period.

South Australia's economy is characterised by a high proportion of businesses that are small business (96%). Small businesses comprise 89% of all businesses with one or more employees. Furthermore, the State has few major corporate head offices.

South Australia has a diversified economy. The State's historical economic reliance on agriculture and traditional manufacturing (automotive/white goods) has decreased and the economy now is more dependent on service industries and emerging sectors such as information technology, wine, aquaculture, tourism and defence along with a significant growth in mining and related sectors.

The vast majority of people live in or within a 100km radius of Adelaide and the next largest centre has fewer than 50,000 inhabitants. There are however very important regional and rural industries including rural producers, manufacturers and a major and growing resources sector.

Due to its geographic placement there are five other States or Territories which border South Australia and both interstate and international trade of commodities, products and services are important elements of our economy.

CHAPTER 1: LEGISLATIVE APPROACH

SECTION 1.1 – REGULATORY STRUCTURE

Question 1

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

SA Response [Consensus]

South Australia supports the adoption of a three-tier model regulating OHS, based on the approach espoused by the Robens Committee in the United Kingdom and presently found in each jurisdiction within Australia. This approach has proven to be both effective and flexible enough to cope with changing workplaces and regulatory practice.

The rationale for this approach is also reflected in our response to the role of subordinate legislation and codes of practice as set out below.

The regulatory regime must be flexible enough to accommodate the fact that there is likely to be a mixture of outcome based, specification-based and process-based regulations, standards and codes of practice.

The approach also must be able to address new and emerging hazards, types of work activity and categories of person undertaking the work.

The *Occupational Health, Safety and Welfare Act 1986 (SA)* (the SA OHSW Act) prescribes duties of various duty holders, provides power for the inspectors, authority for the establishment of SWSA Advisory Committee, appointment of health and safety representatives and committees, and the regulation making power. Further, the SA OHSW Act establishes the legal structure for enforcement including the nature of the offences, the penalties and related provisions. In general terms it provides a good balance between occupational health and safety principles, and broad performance requirements required from duty holders.

There are areas in the SA OHSW Act which might be broadened in model OHS laws such as to include additional definitions, to re-define some of the statutory terms, and to strengthen areas such as risk management.

South Australia contends that the adoption of a model based only upon performance based type legislation would be unrealistic given the nature and extent of business and workplace activities to be covered. Further, such an approach would be difficult for small business to apply and create considerable enforcement and compliance hurdles.

In situations where the risks are both evident and significant, and the mitigating strategies clear, the model must permit the detailed requirements to be prescribed.

Generally, processes should not be prescribed if the compliance outcome is clear. However, if the process itself needs to be regulated to achieve the desired outcomes, eg to ensure the end product is of an acceptable safety level, then the processes to achieve compliance should also be prescribed.

In general terms, we content that regulations should be hazard based with industry level detail to be set out in codes of practice. However, where the circumstances of an industry are clearly unique, industry focused regulations should be considered.

The model should also provide for the licensing of high-risk occupations on a nationally consistent basis involving full mutual recognition. This approach would also align with the Commonwealth's reform program for occupational or trade licensing.

In brief, the whole OHS legislative framework should be based on a balance between principles-based, performance-based, process-based and prescription-based standards.

Question 2

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

SA Response [Consensus]

The model Act should establish the basic legal, administrative and regulatory framework but leave the detailed prescription to the regulations and codes of practice. There are three reasons for this approach, namely:

- This approach has proven to be both effective and adaptable;
- The range of industries, workplaces and hazards to be covered requires this flexibility; and
- A model based on this approach is more capable of achieving the required level of agreement from the jurisdictions and other stakeholders to ensure its adoption.

The range of matters set out in the SA OHSW Act represents an appropriate starting point for the scope of the model OHS Act.

SECTION 1.2 – TITLE, OBJECT AND PRINCIPLES

Question 3

What is an appropriate title for the model OHS Act?

SA Response [Consensus]

Given that the legislation is to be enacted and promulgated in each of the jurisdictions, the title of the model Act should be as inclusive as possible and confirm its status. The matters in the Act should deal with the welfare of those at workplaces and ideally this should be reflected in the title. Accordingly SA suggests:

- The Occupational Health, Safety and Welfare Act;
 - The Workplace Health, Safety and Welfare Act;
- OR (in the event of a short title being preferred);
- The Occupational Health and Safety Act.

Question 4

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

SA Response [Consensus]

There should be objectives in the model Act. Those developed by the ASCC as part of the core elements document are a useful starting point vis.:

- secure and promote the health and safety of people at work (and be applicable to all workplaces);
- protect people against risks to health and safety arising from the conduct of a business or undertaking;
- promote a safe and healthy work environment for people at work that protects them from injury and illness;
- eliminate, at the source, risks to the health and safety of people at work and others; and
- foster cooperation and consultation and encourage registered associations to take a constructive role in formulating and promoting improvements in occupational health, safety and welfare practices and standards.

Question 5

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

SA Response

It is important to have a set of principles that apply to the drafting of the model OHS laws. However, it may not be necessary to have specific principles in the Act itself. The principles could be articulated in a general sense via the objectives. Principles were set to be included in a core elements document created by the ASCC in October 2007 and we contend that the following be adopted to underpin the review, and if considered appropriate, within the model Act:

Principle 1: Positive duties of care are the cornerstone of the legislative framework.

Principle 2: Each person must discharge their responsibilities so far as is reasonably practicable and to the extent they have control over the matter to which the duty relates.

Principle 3: Preventing workplace injury and disease requires positive, proactive and systematic risk management and control.

Principle 4: All persons at work have a right to knowledge and information about the risks they may be exposed to at work.

Principle 5: Participatory frameworks create positive occupational health and safety cultures and practices, and improve health and safety outcomes.

Principle 6: Workers have both rights and responsibilities.

Principle 7: Enforcement should be transparent, proportionate and consistent.

Question 6

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

SA Response

This is dealt with throughout the submission.

CHAPTER 2: SCOPE, APPLICATION & DEFINITIONS

Section 2.1 Industry Sectors

Question 7

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

Question 8

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)?

SA Response [Consensus]

SA contends that ultimately model OHS legislation should cover and be applicable to **all** work related activities and cover **all** workplaces (in accordance with the long established Robens' principles on which current legislation is based). This should include both private and public sectors.

It is not desirable that duties are differentiated for separate "classes" of workers as outlined in the Issues Paper. For example mining workers, offshore oil and gas mining workers, nuclear industry workers, electrical workers, transport workers should, as a matter of equity and for optimal OHS management, all be covered as workers under the same OHS principles and ultimately, legislation. Their status is no different from those who are process workers, nurses, fitters, construction workers, fire fighters etc.

SA considers that Regulations and Codes of practice made under a model OHS Act as discussed earlier can adequately make provision for these sectors by reference to specific areas of high risk or unique work. The existing approach within the SA and other Acts to Amusement, Electrical, Mining, Construction and Opal Mining Regulations are examples of this approach.

Guidance material should also be developed on a national basis to manage a particular set of industry risks as the need arises e.g. as currently being developed for the Stevedoring sector.

SA contends that a further example of an Industry based approach arises from the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* which commenced in NSW on 1 March 2006. The development of this regulation originated from an Inquiry by the NSW Motor Accidents Authority regarding long haul road freight transportation, which was chaired by Professor Michael Quinlan. In its final report the inquiry recommended a range of remedial measures including the development of legal obligations throughout transport supply chains, including obligations to apply to major retail consignors and consignees (located at the top of the supply and production chain).

SA draws your attention to clause 81C of the Regulation, which deals with the duty of consignors and consignees to make inquiries regarding the likely fatigue of drivers. Other provisions deal with retailer obligations to provide full details of contracts to the relevant

unions. This moves away from the traditional legislative requirements applying to direct employers. Rather, these provisions go beyond the direct employer/employee relationship and target the major retail consignors located at the top of the supply and production chain.

The current review is an opportunity to support this important industry specific "Chain of Responsibility" legislation. In our view, having broad OHS legislation applying across the community would facilitate this approach.

SA recognises that this objective might need to be pursued over time and notes that the review panel might develop the model OHS Act with this in mind.

Question 9

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

SA Response [Consensus]

SA takes this opportunity to propose that the recently signed Intergovernmental Agreement on OHS be reflected within the model laws themselves, and in particular to reflect that the law in each jurisdiction requires a commitment to adopt and maintain nationally uniform OHS legislation and national model subordinate legislation.

SA has an existing provision which could serve as a starting point in this regard. Section 13 of the SA OHSW Act (Functions of the Advisory Committee) and in particular Section 13(3)(b) provides some guidance on this matter although the stronger commitment contained within the recent IGA should be reflected.

Beyond such a provision, SA considers that there is no need for the model OHS Act itself to contain detailed machinery provisions designed to co ordinate activities between safety regulators. This is due to the formal structures already in place and operating effectively.

The Heads of Workplace Safety Authorities (HWSA) is a national body established to:

- provide a forum for discussion and resolution of matters of interest to agencies responsible for the administration of OHS in Australia and New Zealand;
- generate and implement joint national activities, either through ASCC or jointly by the jurisdictions;
- consider practical issues associated with the administration of OHS legislation and agree to national approaches;
- cooperate with ASCC and facilitate the achievement of national goals including the National OHS Strategy;
- review the efficacy of national and jurisdictional strategies in improving OHS performance with a view to applying successful strategies as widely as possible and learning from unsuccessful strategies; and
- liaise with the Heads of Workers Compensation Authorities and where appropriate engage in joint projects with HWCA.

HWSA comprises the Executive Directors of all Australian jurisdictions, the Commonwealth and New Zealand, has established a Secretariat, meets formally four

times per annum in addition to undertaking extensive work out of session and has established cross jurisdictional sub committees and reference groups.

HWSA operates under a Memorandum of Understanding which has been agreed and committed to by all regulators and facilitates their active cooperation in policy development, intervention activities and initiatives for enhanced skills and training within the Inspectorates etc.

The replacement body for the ASCC will also be established on a basis that includes all of the participating jurisdictions.

The model OHS legislation will however need to provide for the mutual recognition of licenses and permissioning systems more generally and provide for the exchange of (otherwise confidential) information to that end.

Question 10

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

SA Response [Consensus]

SA contends that the inclusion of a general duty of care requirement in a model OHS Act is essential as a core provision and should be tied to the conduct of work, rather than only workplaces as traditionally considered. This approach would cover the myriad of work activities that are undertaken outside the confines of the ever-diminishing “traditional” workplace. This should contemplate work related activity for example in private residences, vehicles, parks and streets, public infrastructure and at a wide range of temporary workplaces such as at which emergency services personnel attend.

It should be noted that this objective could be achieved by defining workplace in the same way as the SA OHSW Act, namely:

*“**Workplace** means any place (including any aircraft, ship or vehicle) where an employee or self-employed person works and includes any place where such a person goes while at work any place where work is performed.”*

If this approach were adopted, it would however be necessary to ensure that these duties are qualified by the requirement that the duties extend to the extent that the duty holder has or should have had control over the “workplace”.

Question 11

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

SA Response [Consensus]

SA contends that the general duty of care in model OHS legislation should in general terms cover members of the public, in the same manner as is provided for in the SA OHSW Act. The Objects of that Act include the provision at Section 3(c) “to protect the public against risks to health or safety arising out of or in connection with the activities of persons at work.”

SA considers that this strengthens the protection of members of the public who may be exposed to a significant potential for harm associated with the use of high-risk plant and dangerous substances in particular. For example, failure of a large crane which may kill or injure a single employee but also many bystanders or adjacent building residents; failure of a lift in a building which has the potential to severely injure or kill many workers or members of the public; a chemical (e.g. ammonia) leak or explosion of a pressure vessel which may endanger employees plus those living or working nearby or passing in the street.

SA provides the further example of the need in OHS legislation for public safety protection from high-risk plant in relation to amusement devices with the example of the Spin Dragon case, an amusement device that collapsed at the Adelaide Show. While no workers were injured 27 young members of the public on the ride and queuing to use the ride were injured, some severely, when the damaged plant fell onto them.

It is argued that the OHS legislation has appropriate coverage, and the OHS Authorities have the necessary skills, expertise and ability, to administer such high-risk plant, thus reducing the potential for harm and increasing the protection to both workers and the public. The tripartite structure of OHS legislation provided for by Robens style legislation, which allows input from those exposed to the risks i.e. the workers, additionally protects the public who may otherwise have no input into management of the risks to which they are exposed when for example using lifts and amusement rides.

Section 22 of the SA OHSW Act provides an example as to how this can be provided:

This duty could be extended to apply to persons generally such as a third party plant inspector, design verifier, installers, etc where safety of members of public could be affected by the action of the third parties.

SECTION 2.3 – RESPONDING TO CHANGE

Question 12

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

SA Response [Consensus]

SA contends that the model OHS Act should be developed so as to achieve this objective.

This might involve the adoption of broad coverage for the model Act, with broadly stated definitions for the concept of work and the relevant duties. This should be supported by broad objects (and principles) within the Act.

For example, Part 1, 3(g) of the *Occupational Health and Safety Act 2000 (NSW)* ‘Objects of the Act’ states: ‘to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices.’

Further to this, Part 1, 7 of the NSW OHS Act regarding ‘Risks arising from activities at work’ and use of the term ‘undertaking’, provides a broad scope and application for risks arising from work irrespective of whether the work is considered new or evolving.

The *Occupational Health and Safety Act 2004 (Victoria)* includes a provision for ‘principles of health and safety protection’, (Part 1, 4). This provision informs readers of the broad principles related to ensuring health and safety and assists in the interpretation of prescribed duties of care. Whilst this provision does not specifically include information on new or emerging work arrangements, it is consistent with this concept.

The capacity to cover chain of supply obligations as discussed earlier in this response should also be considered in this regard.

Finally, we note that the development of a model OHS Act, with the detailed requirements being left to regulations and codes, would also facilitate this objective.

Question 13

Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how would they be provided for under a model OHS Act?

SA Response [Consensus]

SA contends that in general terms, the existing approach evident within Australian OHS legislation is sufficient to deal with such matters. We have also set out the necessary additional measures in previous responses.

The model Act should be constructed so as to also cover psychosocial hazards in the workplace. At present section 55A of the SA OHSW Act deals with inappropriate behaviour, or “bullying” and the model Act and regulations must be capable of effectively dealing with such issues. It is suggested that a systematic, principles-based approach to dealing with psychosocial hazards in the workplace be adopted. Approved codes and regulations should provide a hierarchy of controls for psychosocial hazard management.

Building on the growing number of studies and theories on work stress, the Health & Safety Executive (HSE) in the UK has explored various aspects of workplace stress to develop standards¹ for the management of job stress. These standards cover work demand, support, control, roles, organisational change and relationships. The application of these standards is used to prevent workplace stress and mitigate or eliminate the sources of work stress. Approved codes and regulations should take into account current trends concerning psychosocial hazards.

There are current and emerging trends, including those associated with disease, particularly those of long latency, that are not adequately addressed within the existing regulatory framework. These are not necessarily overlooked by the general duties but rather in the detailed regulations including some deficiencies in the monitoring of health and related records.

SECTION 2.4 - DEFINITIONS

Question 14

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

¹ The Management Standard. <http://www.hse.gov.uk/stress/standards/>

SA Response

The model OHS Act should provide definitions for critical terms and concepts used within the legislation. These should include concepts such as (but not limited to), 'person in control' and 'owner'. In addition, commonly used terms such as 'hazards', 'risks', 'design' and 'import' should be defined in the Act.

The SA OHSW Act establishes many of these definitions in Part 1 Section 4 and these represent an appropriate starting point for the model. However there are other concepts and terms that could also be defined and we would welcome further discussion on this issue.

The following observations are not intended to outline the proposed definitions (where relevant) but rather raise a number of considerations in the context of the common approach to such concepts within existing Australian OHS legislation.

Supplier – This must be defined carefully to avoid unintended narrowing of the concept.

Workplace – This has been addressed in our response to questions 10 and 11.

Designer – This should cover not only the designer of plant/equipment/structure but also those who conduct modifications, as the modification itself could place a risk on persons.

Consultation – Refer to Chapter 5 of SA response.

Owner – When referencing owner of an item consideration must be given to the related concept of the person who is in control.

Responsible officer – this is an important concept and should be defined in a manner to contemplate large multinational and national employers, small business and public sector administrative units so as to ensure that there is a responsible officer within each jurisdiction.

Supervisor – if adopted, this definition needs to provide a clear separation from mentor. Supervisor needs to address a person who can exercise the power to direct a person and has the capacity to report up.

Multiple duty holder – refer to Chapter 3 of SA response.

Principal Contractor – refer to Chapter 3 of SA response.

Importer – In an ideal situation under nationally adopted OHS Act and Regulations, it does not matter where the plant is brought into the country as the importer will have identical obligations for the safety of plant irrespective of the jurisdictions. Each jurisdiction will only need to deal with imports into that jurisdiction. Importer would then be anyone who brings the plant, goods, materials etc into Australia.

There must also be a distinction made between the importer and the supplier, as the duties could be different.

Finally, due to the complex nature and application of the terms '**reasonably practicable**' and '**control**', these should not be conclusively defined in the model Act but left to case

law for interpretation. Some greater clarity could however be addressed through the provision of national guidance material.

Against this background, it is noteworthy to consider section 20 (2) of the Victorian OHS Act that details the matters for determining reasonably practicable in relation to ensuring health and safety. Section 20 (2) provides reference to a number of factors that would generally represent the understanding that has developed under the South Australian law, namely:

- the likelihood of the hazard or risk concerned eventuating (likelihood);
- the degree of harm that would result if the hazard or risk eventuated (consequence);
- what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk (knowledge and experience);
- the availability and suitability of ways to eliminate or reduce the hazard or risk (risk control); and
- the cost of eliminating or reducing the hazard or risk (resources).

This approach might form the basis of any approach to provide some guidance within the model OHS laws. For further information regarding the factors effecting 'control' and the concept of 'reasonably practicable', please refer to our responses provided for Questions 16, 37 and 38.

Question 15

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

SA Response

Yes. The South Australian OHS & W Act contains a unique and important provision. The Act establishes a duty for a Responsible Officer (Section 61). A Responsible Officer is the person within a corporate entity who has carriage of responsibility for OHS within the organisation/work group. The provision is important because it provides certainty about where responsibility rests. Furthermore it provides a point of reference for the regulator to target assigned personnel for the purpose of providing information on key safety principles/obligations.

SA acknowledges that the construction of duties and obligations relating to responsible officers with the SA OHSW Act can be further improved but contend that this is a powerful concept that should be considered in the national model OHS Act.

Other matters are addressed throughout our response.

CHAPTER 3: DUTIES OF CARE

SECTION 3.2 – CONTROL

Question 16

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

SA Response

This is a complex but important issue in terms of the relationships between the various duties and duty holders. We contend that it would be prudent to address these issues within the model OHS Act. Our preliminary view is that the treatment of ‘control’ should adopt a series of principles rather than attempt to define all of the permutations of control.

A more transparent understanding of control in the legislation will provide greater clarity to regulators, industry groups, workers and employers alike, as opposed to simply relying upon case law alone. This is particularly relevant in terms of emerging employment arrangements and chain of responsibility scenarios.

In simple terms, the case law currently places emphasis upon ‘actual control’, rather than ‘theoretical control’ or the ‘right to control’. In a practical sense, this necessitates inquiry into various factual circumstances on a case by case basis, including (but not limited to): who provides directions and supervision on a day to day basis, who does the employee report to when tasks are complete, who gives instructions and direction on complexities about the task, who does one report safety issues to, etc.

We consider that the concept of control should also consider which party had the right to control (in the absence of an agreement between them) in order to avoid artificial strategies that attempt to delegate responsibility. The responsibilities of principal contractors require further consideration and clarification.

There are operational difficulties in clarifying the responsibilities of multiple duty holders on construction sites where there is a complex series of contractor relationships. This is especially so in domestic construction activities where the bulk of contractors tend to be small business entities with limited employee engagement. Accordingly, model legislation will need to address this issue with a particular emphasis on clarifying duties owed by principal contractors.

The end product must allow each category of person to easily identify what they are required to do without attempting to devise a comprehensive definition of the duties as they apply in a particular situation.

In this regard, SA has attempted to assist parties by providing a schedule to the OHSW Regulations. This ‘matrix’ allows easier identification of the sections of the regulations that apply to specific duty holders.

In any event, national guidance material will be essential to the effective application of the concepts, particularly in terms of multiple duty holders.

Against this background, it is relevant to consider the approach adopted in the Victorian OHS Act (Part 1, s 4(2)) regarding control i.e. *Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable*. This expression embodies some of the intent that should underpin the development of the model OHS Act.

The issue of control and its interpretation is complex and SA would seek to provide additional input on this matter as the review unfolds.

We do note in the interim that there is significant South Australian case law that may assist in determining a relevant definition of control (e.g. *Moore vs. Adelaide Brighton Cement Ltd [2004] SAIRC 78*). We would support further investigation and work by the review panel on this issue.

Question 17

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

SA Response

In SA, there are prescribed duty holders eg employer, employee, self-employed, etc. It is also useful to consider the Victorian Act (see earlier discussion) on the application of control within the context of each of the prescribed duty holders i.e. the employer, employee, self-employed, etc, who control or manage matters that give rise to risks to health and safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.

In SA, the application of the duties are qualified by the concept of what is reasonably practicable. Within this context, control is one of a number of factors to be considered.

When determining control over a given scenario, the specialist expertise or knowledge of the work by the relevant party must also be considered. This can be particularly difficult when overlapping duties exist, and there is some ambiguity as to who is responsible for what.

Given the complexities surrounding the use of control to determine duties in legislation, we welcome further consideration and discussion with the review panel on this issue.

Question 18

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

SA Response

As outlined earlier, we do not consider that parties should be able to artificially delegate responsibility. However, it is foreseeable that there may be some situations that arise where **control** may be delegated. In particular, the existence of specialist skills and knowledge could be one such circumstance.

The legal effect should relate back to the test of what is reasonably practicable. There is merit in Victoria's expression of this principle i.e. the expected level of knowledge about

hazards or risks and how to control them is based on what a reasonable person in the duty holder's position should know.

At law, duties upon which people's health and safety are reliant are considered non-delegable duties (*Kondis v State Transport Authority* 1984 HCA 61). Duties pursuant to the OHS Act are also considered non-delegable, and on this basis, any delegation of duty allowed by legislation should be undertaken with extreme care.

Finally, SA supports the notion that the issues regarding control could be better clarified in national guidance material.

Question 19

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

SA Response

SA supports this concept in principle.

Consistent with the response provided for Question 16, there exists a level of complexity and confusion in the understanding by the business community regarding multiple duty holders and multiple duties. This lack of understanding has been known to create an absence of action due to the reliance of the multiple duty holders on each other. Perhaps the most salient test when determining the existence and extent of a person's duties is the test of reasonable practicability.

This concept and the related control issues have been discussed in detail earlier in our response.

As with earlier issues surrounding control, care should be exercised when framing the existence and extent of work related safety duties, as the consequences of limiting definitions could be very problematic for regulators.

SECTION 3.3 – WORK RELATIONSHIPS

Question 20

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

Question 21

How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Question 22

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

SA Response

Due to the overlapping context of these three questions, a single response has been provided.

The context of the employment relationship still provides a useful focus on risks arising from employment/work arrangements. This is often a useful starting point in determining responsibility for those directing and engaging in work to those persons that could be adversely affected by risks arising from the work. Further, the objects of the SA OHSW Act are focussed to a large degree upon work and employment.

There is generally greater clarity regarding the responsibilities owed where there is a direct employment relationship, i.e. employer to employee, due to the articulation of provisions under specified duty holders.

However, the model OHS laws should not be limited to the concept of employment. Where this direct employment relationship does not exist i.e. employer/self employed to visitor, volunteer, contractor, member of public, etc, some uncertainty prevails within the some of the existing laws and duties and responsibilities should be clearly established.

Section 22 (2) of the SA OHSW Act provides for the duty owed to non-employees. This provision states:

An employer or self-employed person must ensure, so far as is reasonably practicable, that any other person (not being an employee employed or engaged by the employer or the self-employed person) is safe from injury and risks to health –

- (a) while the other person is at a workplace that is under the management and control of the employer or self-employed person; or*
- (b) while the other person is in a situation where he or she could be adversely affected through an act or omission occurring in connection with the work of the employer or self-employed person.*

Furthermore, Section 4 (3) of the SA OHSW Act creates a duty of care owed to volunteers by an employer. This section states: *where a person, in connection with a trade or business, carried on by the employer, performs work for an employer gratuitously, the person will be taken to be employed by the employer.*

Finally, Section 25 of the SA OHSW Act provides a duty applicable to all persons. The provision states:

- (1) A person (not being an employer, employee or occupier of a workplace) must not –*
 - (a) misuse or damage anything provided in the interests of health, safety or welfare; or*
 - (b) place at risk the health or safety of any other person while that person is at work.*
- (2) It is a defence to a charge of an offence against subsection (1) for the defendant to prove-*
 - (a) that the act or omission alleged to give rise to the offence was neither intentional nor reckless; or;*
 - (b) that there is a reasonable excuse for that act or omission.*

These provisions provide some clarity regarding the duties and responsibilities owed where a direct employment relationship is non-existent and should be considered by the review panel.

Queensland also has a provision that may be of some value where a direct employment relationship is not present. Section 28 of the *Queensland Workplace Health and Safety Act (WHS) entitled 'Obligations of persons conducting business or undertaking'.*

This section states:

- (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.
- (2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.
- (3) The obligation applies-
 - (a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and
 - (b) whether or not the business or undertaking is conducted for gain or reward; and
 - (c) whether or not a person works on a voluntary basis.

This provision sits above and runs parallel to the more specific obligations of particular duty holders within the Queensland WHS Act.

This section of the Queensland legislation appears to have some merit and goes some way in achieving concurrent and overlapping duties to ensure that all persons are protected from risks arising from work irrespective of their employment relationship. The Queensland provision warrants further investigation into its effectiveness in a practical sense, particularly whether it is effective in capturing the proper duty holders under the OHS legislation.

SECTION 3.4 – DUTIES OF EMPLOYERS

Question 23

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

SA Response [Consensus]

Current South Australian provisions for employer responsibilities, in particular Section 19(1) and 19(3)(b), (d), (e), (f), (g) are seen as the most relevant factors in describing the extent of the employer's duty of care. Section 19 provides as follows:

19—Duties of employers

- (1) An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular—
 - a) must provide and maintain so far as is reasonably practicable—
 - i. a safe working environment;
 - ii. safe systems of work;
 - iii. plant and substances in a safe condition; and
 - b) must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and
 - c) must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.

Maximum penalty:

- a. for a first offence—Division 2 fine;
- b. for a subsequent offence—Division 1 fine.

(2) Without derogating from the operation of subsection (1), an employer must so far as is reasonably practicable—

- a) monitor the health and welfare of the employer's employees in their employment with the employer, insofar as that monitoring is relevant to the prevention of work-related injuries; and
- b) keep information and records relating to work-related injuries suffered by employees in their employment with the employer and retain that information and those records for such period as may be prescribed; and
- c) provide information to the employer's employees (in such languages as are appropriate) in relation to health, safety and welfare in the workplace (including the names of persons to whom the employees may make inquiries and complaints about matters affecting occupational health, safety or welfare); and
- d) ensure that any employee who is to undertake work of a hazardous nature not previously performed by the employee receives proper information, instruction and training before he or she commences that work; and
 - a. keep information and records relating to occupational health, safety or welfare training undertaken by any of the employer's employees during their employment with the employer; and
- e) ensure that any employee who is inexperienced in the performance of any work of a hazardous nature receives such supervision as is reasonably necessary to ensure his or her health and safety; and
- f) ensure that any employee who could be put at risk by a change in the workplace, in any work or work practice, in any activity or process, or in any plant—
 - i. is given proper information, instruction and training before the change occurs; and
 - ii. receives such supervision as is reasonably necessary to ensure his or her health and safety; and
- g) ensure that any manager or supervisor is provided with such information, instruction and training as are necessary to ensure that each employee under his or her management or supervision is, while at work, so far as is reasonably practicable, safe from injury and risks to health; and
- h) monitor working conditions at any workplace that is under the management and control of the employer; and
- i) ensure that any accommodation, or eating, recreational or other facility, provided for the benefit of the employer's employees while they are at work, or in connection with the performance of their work, and under the management or control of the employer (either wholly or substantially), is maintained in a safe and healthy condition.

Section 20 of the SA OHSW Act regarding employers' statements for health and safety at work is useful if an employer is identified as not having appropriate written policies and procedures but it should be noted that it is rarely used in prosecution. Non compliance under this section is almost always dealt with by way of statutory notice.

SA contends that a duty holder section for ‘employers’ based upon these concepts should be included within the model Act.

Question 24

To whom should these duties be owed?

SA Response [Consensus]

It is reasonable to expect an employer’s duties to extend to those persons (including employees of the employer and other persons such as contractors, visitors, volunteers, members of public) exposed to risks arising from the business activities of the employer.

Section 19 and Section 22 of the SA OHSW Act provides an example for this and the deeming provision in section 4(2) is also relevant.

The test of reasonable practicability can also be used to determine the extent of responsibility owed.

It should also be made clear that this duty should extend to those persons exposed to latent risks arising out of work such as asbestos and other health hazard and cover the maintenance of plant/equipment, etc.

SECTION 3.5 – DUTIES OF WORKERS AND OTHERS

Question 25

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

SA Response [Consensus]

SA contends that the notion of ‘reasonable care to be taken by employees in the interests of their own and others’ health and safety’ is the appropriate employee duty. This duty to take reasonable care is arguably a lesser duty than to ensure as far as reasonably practicable, and this reflects a workers reduced capacity to take proactive or positive steps to provide for the safety of others. In essence, the duty to take reasonable care is equivalent to the long standing common law duty.

In principle, workers should have responsibilities attributed to the following:

- properly use and maintain equipment provided for health and safety purposes;
- obey reasonable instructions (both written and verbal) of the employer for health and safety purposes;
- do not endanger the health and safety of themselves and/or others by attending work while affected by alcohol or drugs; and
- co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or associated regulations (same as the Victorian provision for employee duties i.e. Section 25).

SA contends that the model OHS Act should contain a duty holder section for ‘workers’ to incorporate duties consistent with the above.

Question 26

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?

SA Response

SA supports this concept.

Those persons visiting a place where work is performed should have some obligation to the health and safety of themselves and others. This applies to authorised visitors (such as suppliers, contractors, etc) and unauthorised visitors (such as trespassers). It is important that there is a mechanism to prosecute people who unlawfully interfere with a worksite.

Section 25 of the SA OHSW Act entitled 'Duties applicable to all persons' provides a good basis for this. Section 25 states:

- (1) A person (not being an employer, employee or occupier of a workplace) must not –*
- (a) misuse or damage anything provided in the interests of health, safety or welfare; or*
 - (b) place at risk the health or safety of any other person while that person is at work.*

SA recommends that this provision be considered as an appropriate duty for persons not performing work while visiting a workplace. Furthermore, SA recommends that the following additional duty be added to the above:

- (1) A person (not being an employer, employee or occupier of a workplace) must not –*
- (c) disobey any reasonable instruction (both written and/or verbal) of the employer for health and safety purposes.*

This last duty will address matters such as emergency response and evacuation, immediate risk to health and safety, induction, etc.

SECTION 3.6 – APPOINTED PERSONS AND OFFICERS

Question 27

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

SA Response

Yes. Section 61 of the SA OHSW Act provides for the appointment of a 'responsible officer/s' by a body corporate to ensure that the body corporate complies with the requirements of the OHSW Act. The person appointed, would usually be seen as the most senior person of the body corporate, who resides within South Australia. This legislation also provides a fallback position, where if a Responsible Officer is not nominated, then all officers of the body corporate will be deemed as responsible.

Further to this appointment, is the obligation to train the responsible officer to ensure that they understand the duties and responsibilities placed upon them under this legislation.

Another advantage of this provision is that it enables the regulator to work within the state jurisdiction and this is particularly important with international and national companies with head offices outside of the State jurisdiction. The responsible officer provision assists to make the entity accountable locally.

Personal liability for senior company officeholders, provides a significant deterrence to apathy and ignorance of OHS responsibilities by senior company officeholders, and can be a powerful motivating factor when trying to achieve compliance by a given corporate entity.

Furthermore, should a company voluntarily wind up to avoid prosecution and sanctions under OHS legislation, then a charge against the responsible officer can be useful 'insurance' to ensure that company law cannot be used to subvert OHS responsibilities.

The appointment of a responsible officer as described above is seen as a more cost effective and simpler alternative to the Queensland requirement to employ a person at workplaces with more than a specified number of employees.

SA supports the inclusion of a provision consistent with Section 61 of the SA OHSW Act in the new model legislation.

Question 28

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

SA Response

Under the SA legislation, responsible officers are liable to a division 5 penalty, which currently stands at \$10,000. However, if the prosecution can establish that the conduct of the responsible officer has contributed to the commission of the offence by the body corporate, then the same penalty as the company is liable for (\$300,000 for a first offence) can be imposed onto the responsible officer.

Also, the argument for increased responsibility to individuals/officers will reduce disparity with sole traders. Sole traders, as individuals, cannot distance themselves from the penalties attributable to their business, and they already face the full consequences for breaching the OHS legislation.

SA recommends that the liabilities for breaches of this provision should extend to prosecution, fines and when appropriate, non-pecuniary penalties.

Question 29

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

SA Response

Section 61 of the SA OHSW Act provides some measures for this. However, there is an opportunity to provide further clarity in relation to reporting, training, and resourcing of appointed persons.

There needs to be a responsibility placed on duty holders to ensure that appointed persons have sufficient authority within the organisation to effect change. Furthermore, the duty placed upon such persons should extend to: reporting on compliance

performance by the company, participating in training, and following up on identified safety related compliance issues.

Question 30

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

SA Response

SA supports this concept.

The provision of positive duties is regarded as a powerful motivator for senior officers to comply with OHS legislation. The notion of a positive duty such as, 'to ensure' provides a strong legal direction to appointed officers to be proactive in their duty to achieve OHS outcomes. A lesser standard would be seen as diminishing the OHS responsibility of the appointed officer.

It should be further noted that this is a higher duty than is placed upon 'regular' employees. This higher duty reflects the greater capacity to effect change and have influence, which is bestowed upon senior company officeholders, when compared to other employees.

To balance out this higher duty, some reasonable defence provision should be considered to cover circumstances where the officeholder could not have known about or controlled the issues that led to the incident in question.

SECTION 3.7 – DUTIES OF PERSONS IN CONTROL

Question 31

Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If no, how could this be clarified?

SA Response

No. Arguably, South Australian legislation does not provide the level of clarity desired on this issue. SA sees some merit in provisions consistent with the Victorian legislation, particularly Section 26, '*Duties of persons who manage or control workplaces*', and we believe that a similar provision to this should be considered in the model Act.

SA also supports the notion that the scope of this duty should be written in such a way so as not to extend to domestic premises.

Question 32

Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

SA Response [Consensus]

SA supports this concept. The duty should extend to all persons including employees and non-employees exposed to risk arising from work carried out by the person in control of the work area and/or temporary workplace.

See our earlier suggestion regarding the scope of workplace. The definition proposed by SA is also useful as it captures temporary workplaces.

Question 33

Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

SA Response

As a matter of principle, the model OHS Act should cover various parties whose decisions and actions have an influence on the health and safety of others.

This may cover design, manufacture, or inspections. Whether it is over the life span of an item is probably not the issue, what should be considered is who has control and what the person does or has to do in relation to the safety of the plant at any stage or phase in the life of the item, structure or system, that will be used in a workplace.

While it is reasonably easy to trace the life of an item of plant from concept to disposal, and duty holders associated with the life cycle of plant can be defined, it starts to become more difficult to treat a structure as if it goes through the same life cycle as an item of plant. Hence identifying various duty holders can be more difficult for a structure or for a system.

Question 34

How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in *one jurisdiction and manufacture in another*? *Should the manufacturer be responsible for the failings of a designer in this situation?*

SA Response [Consensus]

While broad duties can be prescribed for a designer, the concept of “design” is not easily defined. Also, for plant and for structures (including buildings), design means different things.

We suggest that the review consider what it is that we need to regulate. This should consider that for plant and machinery consisting of a number of components, every component has its designers, manufacturer and supplier. Each component can be locally produced or imported.

The objective of the duty should be that when an item of plant is delivered or supplied to the final user or owner it must be safe and fit for purpose at the time of delivery.

This also places the responsibilities on the importer and supplier, who must, among other things, ensure that the plant supplied complies with the OHS requirement.

It should be noted in that context, that designers may be beyond the jurisdiction of Australian regulators and the importer will need in practice to be responsible for the safety design of the item.

As with other duties, the duties for designers should apply to the extent of reasonable practicability and to the degree of their control.

Question 35

How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

SA Response

Provided the duty is always conditioned by the concepts of reasonable practicability and the degree of control, the duties associated with supply should apply on each occasion.

Question 36

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

SA Response [Consensus]

See our earlier responses on the scope of the model Act and the duties of all those associated with workplaces.

Chapter 4: ‘Reasonably Practicable’ and Risk Management

Question 37

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

SA Response

Yes. The SA OHSW Act includes reference to “reasonably practicable” and SafeWork SA is of the view that this should be retained as the general concept applicable to duties under the model OHS Act. Moreover, SafeWork SA supports any approach that adds clarity and certainty to legislative instruments without restrictive definitions. Accordingly, it would be helpful for the Act to provide some direction on what is meant by reasonably practicable, primarily through guidance material. As outlined earlier in our response to Q 14, the approach evident in the Victorian OHS Act in this regard may serve as a helpful model in forming that material.

Question 38 & 39

If not, what alternative standard should be included? How should it be defined and what level of detail provided?

SA Response [Consensus]

SafeWork SA notes that the concept of reasonable practicability has universal application in an OHS context across jurisdictions, albeit differently constructed in some jurisdictions. As noted above SafeWork SA supports the test of reasonable practicability. Accordingly an alternative standard is not proposed.

Notwithstanding this view it is noted that in relation to the particular duties associated with the provision of information, instruction, training and supervision, the required standard in the SA OHSW Act is “as reasonably necessary”. This has some merit in that particular context given the nature of the obligation. In other words, the obligation to provide training, supervision and instruction should not be predicated by what is practicable for the employer (or person responsible) but on the basis of what is necessary for the worker, to undertake work safely.

Question 40

Should “control” be an element of the standard?

SA response

Yes, but the context and caveats have been dealt with in other responses.

Question 41

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

SA Response [Consensus]

Examples can be helpful in clarifying an obligation. Our preferred position is that examples should in general be left to the subordinate instruments and not within the model Act itself.

By way of example, should the question of “cost” be included as a matter of reasonable practicability it would be helpful to provide duty holders with an explanation of what this might mean in practical sense. Such additional information is best provided as guidance material.

Question 42

Should ‘hazard’ and ‘risk’ be defined in the model OHS Act?

SA Response [Consensus]

Yes. If these terms are key elements in the construction of the Act, and they are referred to on a basis for which there is obligation, then they should be defined within the overall OHS model laws.

Question 43

Should a definition of ‘reasonably practicable’, or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Question 44

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

SA Response [Consensus]

See our earlier discussion of reasonably practicable.

We do see merit in having specific regulatory obligations to manage risks in a systematic way through the application of hazard identification, risk assessment and control. These should be set out in subordinate legislation.

CHAPTER 5: CONSULTATION, PARTICIPATION & REPRESENTATION

SECTION 5.1 – DUTY TO CONSULT

Question 45

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

SA Response

SA would support the inclusion of two primary principles in the model OHS Act:

- A. The duty of employers to consult with employees regarding issues that impact or could impact on the health, safety and welfare of those employees.
- B. The right of employees to determine how they are represented in the consultation process and by whom.

These are principles already embodied in the Acts of most jurisdictions. The “Duty to consult” requirements under Part 4, Section 35 of the Victorian OHS Act provides a particularly clear example of the type of requirement suggested in point ‘A’ above.

Point “B” is the type of over-arching principle that could be reflected in the objectives of the Act as well as guiding the development of specific requirements on this issue.

SA also contends that there is great benefit in having all requirements relating to consultation grouped into one “Division” or “Part” of the model OHS Act, as is the case of the NSW OHS Act (Sections 13 to 19).

A useful introductory provision at the start of a Part on “Consultation” would be an explanation of what consultation is and the outcome sought by it. This would hopefully clear up common misunderstandings e.g. that consultation is not simply the provision of information after a decision has been made - but rather a genuine opportunity for employees to contribute to the decision-making process (but not a right to make the final decision). (See Vic Act 36(1) or SA OHSW Regulation 1.3.1 (3))

Consideration should be given to whether the duty to consult should be extended to cover other duty holders whose actions affect the health, safety and welfare of other persons in the workplace e.g. building owners and multi-employer workplaces. (See Q46 below)

Question 46

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

SA Response

Traditionally OHS legislation only covers the employer’s duties to consult with their employees. However, contemporary OHS legislation should recognise that there are a range of other duty holders whose actions also impact on workplace health and safety (e.g. building owners, occupiers, and installers of plant).

Consideration should be given to whether these “other” duty holders should also have an obligation to consult with persons in a workplace whose health, safety and welfare would

be affected by the duty holder's actions or lack thereof. For example building owners wanting to schedule repairs or renovations or change arrangements for the provision of amenities should consult with the employers whose employees work in the building – and the employers in turn with their employees and/or their representatives.

A caveat of “consultation so far as is reasonably practicable” would need to be placed on such provisions and care would need to be taken to ensure that the duty was restricted to consulting with persons in the workplace (e.g. consulting with staff and residents in a nursing home during a hazards audit, as opposed consultation with the community over environmental and public health issues).

The “work relationships” would be dependant on the definitions of each duty holder but examples may include:

- employer to consult with employees, including all relevant groups;
- building owner with occupier/s, employer/s and they in turn with their employees; and
- occupier with other employers on site and they in turn with their employees.

Alternatively, this type of consultation may be better dealt with under a provision that requires duty holders, that share responsibility for making a workplace safe, being required to discharge their duties in a co-ordinated manner (as required in NSW by their relevant OHS Regulations).

Question 47

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

SA Response

No, but this may be a source of confusion for some. The Model Act should make it clear who must be consulted.

The Model OHS Act should also refer to all persons in the workplace whose health, safety and welfare is or may be at risk. For example, in the SA OHSW Act, the following people are considered employees:

- a person who is employed under a contract of service;
- a person who works under a contract of service;
- volunteers as defined under SA OHSW Act Section 4 (3); and
- contractors as defined under SA OHSW Act Section 4 (2).

Question 48

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?

SA Response

The following response is intended to generally address this question.

There are two key issues to consider in relation to this question:

- what is the best way for employees to be heard; and
- how do you ensure effective consultation where you have complicating factors such as multi-employer worksites, where two or more employers share responsibility for the safety of persons on site and control different aspects of the systems of work and work environment at that workplace.

The first question relates to the principle mentioned under Q.49 below i.e. it is the employees who should determine how they wish to be consulted (e.g. through a health and safety representative (HSR), via an OHS committee or by each person having the opportunity to express their view directly to their employer).

As such the model legislation should provide for:

- The election of HSRs; and/or
- The establishment of an OHS committee/s.

In workplaces where HSR and OHS committees do not exist, the employer must ensure other arrangements for consultation are established as agreed with the employees and their unions (where union involvement is requested by the employee/s).

SA would caution against being too prescriptive in describing within the Act the type of consultative arrangements and procedures that should be adopted to cater for the varying types of workplaces and work arrangements. This would be more appropriately dealt with via codes and guidance material. Such material should give practical examples of how consultation may occur in a range of workplaces given the characteristics that could make consultation difficult.

For example, consider a construction site with a principal contractor and sub-contractors. Under SA's current provisions, the sub-contractor's employees may elect one or more HSR's to represent them in discussions with their direct employer (e.g. in discussions about provision of PPE, first aid kits and plant and equipment to be used on the job). The principal contractor would then consult with the sub-contractor and the HSR for the sub-contractor's employees on any site-specific safety issues that are under the control of the principal contractor (not the sub-contractor). See Q51 for our views on alternative arrangements for 'multiple employer worksites'.

It may also be appropriate to include a provision that requires employers, employees and their associations to take into account a range of factors when determining consultative arrangements and procedures. For example:

- The organisation of work (e.g. shift work);
- Size of the organisation (i.e. number of employees);
- Other persons e.g. visitors, volunteers, contractors, etc; and
- The special needs of any employee/s that has a right to be consulted (e.g. culturally and linguistically diverse backgrounds and disabilities).

SECTION 5.2 – PARTICIPATION AND REPRESENTATION

Question 49

Should there be a requirement for establishing HSRs and HSCs?

SA Response [Consensus]

Yes. SA recommends that the current provisions within the SA OHSW Act be adopted for establishing HSRs and HSCs.

Question 50

What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

SA Response [Consensus]

It is believed that the provisions for HSRs and HSCs would cover the issue of representation.

As discussed previously in the response to Q.45, clarifying the nature and purpose of consultation would assist with this issue. For example, providing employees with a genuine opportunity to make an informed contribution to the decision making process before a final decision is made by:

- the provision of all relevant information about an issue; and
- allowing a reasonable time for employees to consider and respond to the issue and options.

Question 51

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

SA Response [Consensus]

In single employer workplaces, HSRs should be elected if requested by an employee/s and agreement of the composition of the work group should occur between employer and interested employees (and their union if requested).

In multiple employer workplaces the designated workgroup should be able to include employees from more than one employer with the HSR having the right to raise issues with the particular employer who has primary control over a specific matter (please refer to Sections 27-30 of the SA OHSW Act).

Reference is made to the Victorian legislation which has provisions for the establishment of multiple employer workgroups. However, further discussion is needed to ascertain the success or otherwise of implementation of the Victorian provisions.

OHS committees in single employer worksites that comprise 20 or more employees should be established where at least five employees of the employer request a committee. As per current provisions of the SA OHSW Act, union involvement in the establishment of HSCs should be permitted if it is requested by their members.

Question 52

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

SA Response [Consensus]

Entitlement to vote should rest with those agreed members of a work group. This provision is addressed in Section 26A of the SA OHSW Act and has been particularly beneficial in avoiding conflict and disputation in workplaces over this issue.

Question 53

What should the powers and functions of HSRs be?

SA Response [Consensus]

It may be useful to include a statement in the Act explaining the purpose of HSRs (e.g. to be a mechanism for consultation, raise and resolve local OHSW issues and represent the workgroup in discussion of issues that affect one or more members). Care would need to be taken to not unintentionally limit the role.

SA supports HSRs having the types of powers and function described in the SA OHSW Act, Divisions 3 & 4 (e.g. power to issue default notices and to stop unsafe work (Refer also the Victoria's PIN)).

Question 54

What should the structure and functions of HSCs be?

SA Response [Consensus]

As with HSRs it may be useful to put a statement in the Act explaining the purpose of a HSC. The requirement for HSRs to automatically be the employee reps on HSCs is seen as positive (refer Victorian OHS Act Section 72(2)).

SA supports HSC having the types of powers and functions described in the SA OHSW Act, Divisions 3 and 4. These include:

- to facilitate co-operation between an employer and the employees of the employer in initiating, developing, carrying out and monitoring measures designed to ensure the health, safety and welfare at work of the employees;
- to assist in the resolution of issues relating to occupational health, safety or welfare that arise at any relevant workplace;
- to assist in the formulation, review and dissemination (in such languages as are appropriate) to employees of the occupational health, safety and welfare practices, procedures and policies that are to be followed at any relevant workplace;
- to consult with the employer on any proposed changes to occupational health, safety or welfare practices, procedures or policies;
- to keep under review developments in the field of return-to-work of employees who suffer work-related injuries; and the employment of employees who suffer from any form of disability;
- to assist in the return to work of employees who have suffered work-related injuries; and in the employment of employees who suffer from any form of disability; and

-
- such other functions as are prescribed or agreed upon by the employer and the health and safety committee.

Question 55

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

SA Response

Training is important; however HSRs and Committee members should not be required, as a **prerequisite**, to have a qualification or to undertake competency-based training. The reasons for this include:

- it would discourage some workers from becoming HSRs or HSC members (especially those with literacy problems); and
- it would in practice limit the number of HSRs and HSCs and create unnecessary hurdles to their establishment.

Training should however be made available to HSRs as a matter of right. SA's experience is that five days is an ideal period of time for HSR training. Our current provisions provide for training each year of a HSRs term of office (3 year terms). We support the continuation of 5 days per year for at least the first two years, with further options for continuing training thereafter.

Training plays a significant role in ensuring that HSRs have the knowledge to exercise their powers under the Act in a responsible and effective manner and disputes requiring inspector involvement are kept to a minimum. Consideration should be given to ensuring newly elected HSRs attend their first training course within a specified timeframe following their election to the role.

Employers should pay for the cost of the training and the HSR should not suffer a loss of income, i.e. ensuring the HSR would receive the same wage as if they had been at work for the same period as the training.

HSC members should also attend recognised training to ensure they have a fundamental knowledge of OHS and the role of the Committee. This will help ensure that the operation of the committee functions in a responsible and effective manner. Employers should also meet the cost of such training for HSC members.

Question 56

Are there alternative mechanisms that should be considered?

SA Response [Consensus]

There should be a requirement in the model OHS Act that other arrangements (as agreed to with employees and their unions) must be put in place to ensure effective consultation with employees in the absence of HSRs and committees.

Question 57

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

SA Response [Consensus]

As it already common practice, the 'duties to consult' and the 'right of employees to be consulted' should be included in the Act. The details of how consultative mechanisms are established should be included in the regulations and codes of practice.

Question 58

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

SA Response [Consensus]

It is acknowledged that certain groups of workers such as outworkers, shift workers and workers with precarious employment may be difficult to address through traditional consultation mechanisms. This is not to downgrade or diminish the value of HSRs and HSCs; but rather to strengthen the point made earlier in Question 48 that consultation arrangements must take into account a range of factors including:

- non-typical work arrangements;
- distribution of workers; and
- nature of work performed.

Section 49 of Victorian OHS Act and Section 27 (6) of the SA OHSW Act provides a useful example of this.

Question 59

Should the model OHS Act include right of entry provisions?

SA Response

This issue is the subject of distinctly divergent positions between employer and employees representatives.

Notwithstanding these views, SA contends that appropriate right of entry for union officials should be part of the model OHS Act. However, the right of entry must be conditional based on reasonable requirements stipulated under the legislation (refer questions 60-62).

Including a specific right of entry provision will assist workers, elected Health and Safety Representatives and OHS Committee members to raise OHS matters without fear of negative repercussions on their employment.

Should a specific right of entry provision be included in the model OHS Act, it would alleviate the need for a worker to reveal if they are a member of a union. Such confidentiality is consistent with freedom of association protections within the Australian Constitution, Australian industrial relations laws and International Labour Organisation conventions. This confidentiality will support continued worker participation in OHS matters - a vital element of contemporary OHS management in the workplace.

South Australia is presently considering specific right of entry provisions in the SA OHSW Act.

If so, who should be entitled to exercise the right of entry?

See Question 61 response.

Question 60

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

SA Response

Yes. Appropriate training should be one of the conditions allowing right of entry. The official should also be required to hold a permit administered by an appropriate 'industrial' authority.

The ACT model requires authorised representatives to undergo the same training as HSRs. This is considered an appropriate model as it would mean existing approved HSR training (with minor adjustments) could be utilised. Existing HSR training delivers an understanding of rights and responsibilities under the OHS&W Act, hazard management, effective consultation and resolution of OHS matters in the workplace.

Approved training course curricula could be modified to include modules that ensure authorised representatives are aware of the scope and effective operation of right of entry provisions under the model act. This will ensure officers are aware of the scope of their role, how to perform it proficiently and any sanctions that apply for misconduct.

It is anticipated that a substantial proportion of authorised representatives have undertaken OHS training. Incorporating a process that recognises prior participation in training would allow such persons to simply undertake the new right of entry modules.

Question 61

In what circumstances should the right of entry be exercised?

SA Response

Circumstances could include:

- Where attendance by the union official has been requested by a union member (or eligible member) from the site; and/or
- If the union official is of the reasonable belief that the health, safety or welfare of their members at the site is at risk.

Question 62

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

SA Response

The primary purpose of the right of entry should be for the purposes of consultation with the employer and the employees. The powers should be consistent with that role.

The model Act should also contain protections for the representative and penalties for abuse of powers, including the potential revocation of the right of entry permit.

Question 63

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

SA Response [Consensus]

Sections 35, 36 and 37A of the SA OHSW Act provide a good basis for this.

Section 35, *default notices*, provides that:

- (1) *Where a health and safety representative is of the opinion that a person—*
 - (a) *is contravening a provision of this Act; or*
 - (b) *has contravened a provision of this Act in circumstances that make it likely that the contravention will be repeated, the health and safety representative must consult with the employer in relation to the matter.*
- (2) *If the health and safety representative and the employer are unable within a reasonable time to resolve a particular matter pursuant to subsection (1), the matter must, if there is a health and safety committee that has responsibility in relation to the matter, be referred to that committee or, if there is no such committee, the matter may be referred to an inspector.*
- (3) *Despite subsections (1) and (2), if after taking reasonable steps to stop by consultation a contravention of this Act or prevent a repeated contravention of this Act the health and safety representative is of the opinion that the matter has not been satisfactorily resolved, the health and safety representative may issue a default notice requiring the person to whom the notice is addressed to remedy the contravention.*
- (4) *A health and safety representative must not issue a default notice in relation to any matter that is the subject of an improvement notice or a prohibition notice.*
Maximum penalty: Division 7 fine.
- (5) *Where a health and safety representative issues a default notice, the notice must—*
 - (a) *state that the health and safety representative is of the opinion that a person—*
 - (i) *is contravening a provision of this Act; or*
 - (ii) *has contravened a provision of this Act in circumstances that make it likely that the contravention will be repeated; and*
 - (b) *state the grounds of the health and safety representative's opinion.*
- (6) *A health and safety representative may specify in a default notice a day by which the matters referred to in the notice must be remedied.*
- (7) *Where a default notice is issued to an employee, the employee must, as soon as is reasonably practicable after receiving it, give the notice, or a copy of the notice, to his or her employer.*
Maximum penalty: Division 6 fine.
- (8) *Subject to subsection (11), a person to whom a default notice is addressed or, where that person is an employee, that person's employer, must take all reasonable steps to remedy—*
 - (a) *if a day has been specified under subsection (6)—by that day;*
 - (b) *if a day has not been specified under subsection (6)—within a reasonable time, the matters referred to in the notice.*
Maximum penalty: Division 3 fine.
- (9) *If—*
 - (a) *a person to whom a default notice is addressed or, where that person is an employee, that person's employer, considers that a default notice need not have been issued or is, for some other reason, inappropriate; or*

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- (b) a health and safety representative—
- (i) considers that there has been unreasonable delay in taking action under subsection (8); or
 - (ii) is dissatisfied with the action taken under that subsection in response to the notice, an inspector may be requested to attend at the workplace.
- (10) A request under subsection (9)(a) must be made by a person within 14 days of the receipt of the default notice (or a copy of the notice) by the person.
- (11) Where an inspector has been requested to attend at a workplace under subsection (9)(a), the operation of the default notice is, pending the attendance of the inspector, suspended.
- (12) Where a default notice is issued, the person to whom notice is addressed must, on receipt of the notice (or a copy of the notice)—
- (a) bring the notice to the attention of any person whose work is affected by the notice; and
 - (b) display the notice or a copy of the notice in a prominent place at or near any workplace that is affected by the notice; and
 - (c) keep a copy of the notice for such period as may be prescribed.
- Maximum penalty: Division 6 fine.
- (13) A person must not remove a notice or a copy of a notice displayed pursuant to subsection (12) while the notice is in force.
- Maximum penalty: Division 6 fine.
- (14) A default notice may be cancelled—
- (a) at any time, by the health and safety representative who issued the notice; or
 - (b) if the health and safety representative is absent from the workplace and cannot reasonably be contacted, by a health and safety committee that has responsibilities in relation to the matter.

Section 36, *Action where the health and safety of a worker is threatened*, provides that:

- (1) Where a health and safety representative is of the opinion that there is an immediate threat to the health or safety of an employee who is a member of the work group that the health and safety representative represents, the health and safety representative must consult with the employer in relation to the matter.
- (2) If the health and safety representative and the employer are unable within a reasonable time to resolve a particular matter pursuant to subsection (1), the matter must, if there is a health and safety committee that has responsibility in relation to the matter, be referred to that committee or, if there is no such committee, the matter must be referred to an inspector.
- (3) Despite subsections (1) and (2), if the health and safety representative is of the opinion that given the nature of the threat and degree of risk work should immediately cease, the health and safety representative may direct that work cease until adequate measures are taken to protect the health and safety of an employee.
- (4) Where a health and safety representative gives a direction that work cease—
 - (a) if the direction is given without consultation with the employer or before the matter has been considered by a health and safety committee (if any) that has responsibility in relation to the matter, the health and safety representative must, as soon as practicable after giving the direction, consult with the employer and, if it is necessary or appropriate, with the committee; and
 - (b) the employer or the health and safety representative may request an inspector to attend at the workplace.

Section 37A, *Division not to derogate from other referrals to an inspector*, provides that:

Nothing in this Division limits or derogates from the ability of a health and safety representative, employee or other person to refer at any time any matter concerning occupational health, safety or welfare to an inspector or other person involved in the

administration or enforcement of this Act.

A provision should include that HSRs must allow a reasonable timeframe for an issue to be resolved.

Additionally, the recourse to a default notice and/or an Inspector is available if a HSR does not have access to a HSC and if the employer is deficient in resolving the issue.

At present the South Australian Act permits the involvement of registered associations in the resolution of health and safety issues upon request of an affected employee who is a registered member of the association. The provisions of the SA OHSW Act, s20(1)(iv), s27(7), 28(8), 30(4), 31(3) should be considered when developing the model OHS Act.

Question 64

When should an issue resolution procedure be activated?

SA Response

When all attempts to resolve an issue through appropriate consultation processes have failed and the HSR or HSC members believe that the health and safety of an employee/s is at risk, then formal procedures under the Act should be used in an attempt to resolve the issue. Provisional improvement Notices (VIC) / Default notices (SA) / Cessation of work notices should only occur where all other avenues have been exhausted.

Question 65

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

SA Response

These provisions should be in Act as is currently the case in both SA and Victoria.

Question 66

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

SA Response [Consensus]

This issue can best be met through the inclusion of an outcome-based requirement in the model Act i.e. employers must put in place arrangements for the reporting and resolution of OHS issues as agreed to with employees (and their unions as requested).

The Act should avoid being too prescriptive on what must occur, to allow for flexibility depending on the nature of the workplace / issue, etc.

Question 67

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

SA Response [Consensus]

Yes. SA supports this notion and recommends that the expression of this provision be consistent with ILO Convention No. 155 and current requirements under Section 21(1b) of the SA OHSW Act, duties of employees.

Question 68

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

SA Response [Consensus]

Yes. A cessation of work notice should ideally be served following reasonable consultation with the employer but should not be limited to this if the matter is of a high risk nature. Section 36 of the SA OHSW Act addresses this issue in an appropriate manner (please refer to previous response for Question 63).

Question 69

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

SA Response [Consensus]

Yes. This should be supported on reasonable grounds given the circumstances and where the HSR believed in good faith that there was an immediate risk to health and safety. SA's position would be that employees must be paid wages and can be allocated alternative work.

Question 70

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

SA Response [Consensus]

Yes, through attendance by an inspector if the matter is not able to be resolved within the organisation.

Further, a provision for access to independent, external review such as an OHS review panel or court should be included. Part 7 of the SA OHSW Act regarding the *Review Committee*, represents an appropriate model.

Another area for consideration in the new model Act is a provision for arrangements for employees whilst work is suspended (arising from notices). Section 57 of the SA OHSW Act provides for the assignment of workers during a cessation of work, i.e.

Where work is suspended in consequence of a direction of a health and safety representative that work cease or on account of the issue of a default notice, an improvement notice or a prohibition notice, the employer may, while the work remains suspended, assign an employee to suitable alternative work.

SECTION 5.3 – PROTECTION FROM DISCRIMINATION AND VICTIMISATION

Note: The responses to Questions 71 to 78 reflect the fact that while alleged breaches of victimisation or discrimination are criminal matters, claims for compensations arising out of the matters could be dealt with in a civil tribunal.

Question 71

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

SA Response [Consensus]

A provision consistent with Section 56 of the SA OHSW Act and Sections 76-78 of the Victorian OHSW Act is supported. However, further consideration regarding enforcement of this provision is required due to difficulties experienced in its application.

Question 72

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

SA Response

The State OHS authority; or a registered association (union) who represents the person; or the person who feels aggrieved should be able to instigate action under this particular provision.

Question 73

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

SA Response

Both.

Question 74

Who should have the burden of proving relevant elements of offences and should the standard of proof be the civil standard or criminal standard for these elements?

SA Response

Given the nature of these particular offences, a reversal of the normal onus should be considered. The nature of the onus should be concomitant to the nature of the offence (i.e. civil or criminal).

Question 75

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

SA Response

There is merit in this idea and SA supports further discussion of how this would work in practice.

Question 76

What remedies should be available to the victims?

SA Response

SA recommends that Section 56(4) of the SA OHSW Act and Section 78 be considered in addressing this issue.

Question 77

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

SA Response

There is merit in this idea and SA supports further discussion of how this would work in practice.

Question 78

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

SA Response

No further comment at this time.

CHAPTER 6: REGULATOR FUNCTIONS, POWERS & ACCOUNTABILITY

SECTION 6.1 – ROLE AND FUNCTIONS OF REGULATORS

Question 79

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

SA Response

Yes, current SA provisions are appropriate. SWSA officers are already accountable through existing government statutes, and codes of conduct. Accountability of public officials is important and SWSA has no objection to including such a provision within model legislation.

The provision would need to refer to the contents of ILO Convention 81. Inspectors are able to operate as independent persons albeit with procedures aimed at consistency in process and in the factors influencing their decision-making.

SA will offer further comment on this issue should it proceed.

Question 80

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

SA Response [Consensus]

Yes. The policies should be nationally consistent and published.

Question 81

Should the model Act include provisions that allow the making of interpretation documents?

SA Response

No. It is believed there are sufficient information sources available to the National framework so the system can be kept consistent. Adding to the existing array of information sources will not serve the system well and will result in further prescription and administrative/specialist burden.

Question 82

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

SA Response [Consensus]

Yes. There are a range of functions undertaken by regulatory authorities which are rightfully not exercised by inspectors. This may include, approvals such as those for third party providers e.g. training organisations, assessors. Licensing requirements, exemptions, provision of grants are other matters which have a policy dimension and may be undertaken by officials other than inspectors.

Within the SA OHSW Act and regulations there are also other functions exercised by the Regulator and Minister that should stay in place. Under Section 67 – Exemption from Act, it covers the process by where an employer or any other person may apply to the Minister for exemption for any or the entire Act. Other exemption functions lie within the Regulations and we consider that these should remain the same.

Question 83

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

SA Response [Consensus]

No. Allowing the regulator to give advice provides a holistic approach to making a difference in OHS. The regulator should not be seen as simply the enforcement agency, but an agency where people can come for advice on implementing best practices in OHS. SWSA with its recent restructure has proven how well this works and the positive effect on reduction of work related injuries and illness.

SECTION 6.2 – INSPECTORS

Question 84

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

SA Response [Consensus]

The appointment process for an inspector should be provided in the legislation such as the example under the SA OHSW Act Part 1, section 4. An inspector must be appropriately trained but the legislation should not determine the training requirements. The regulator is responsible for ensuring that standards are met and for providing appropriate training to the inspector. HWSA is currently working on a number of projects to improve the national harmonisation of inspector training and development.

A related issue in appointing inspectors under the model OHS Act is the need to facilitate the protection of persons who are engaged in training and/or providing information in good faith.

Section 38, 39 and 40 of the SA OHSW Act provides a suitable foundation for legislative requirements for powers, functions, protections and accountability of the inspector and these powers and functions should not be reduced in the model Act.

Question 85

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

SA Response [Consensus]

SA legislation gives the inspectorate the powers of entry and inspection, provision of advice and instruction (in good faith), investigation and resolving health and safety issues. The legislation in Section 51 ensures that inspectors have protection under act where liability lies against the Crown. SA would contend that this is sufficient for the model OHS Act.

Question 86

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

SA Response

The model Act should provide for the appointment of Inspectors by Executive Council. We are not convinced that the issues of direction or instruction should be expressly dealt with in the legislation. The present circumstances provide for the discretion of the Inspector subject to overall policy guidelines. Where the inspector is of the opinion there is a risk, then the inspector should be able to act accordingly.

If the model is to deal with the issue, there are three elements to this question, each of which should be considered. OHS legislation throughout Australia incorporates elements, which underscore the independence of the inspector in relation to forming an opinion about potential breaches of legislation. This is the case in SA legislation and it is reasonable that a model Act should retain such a provision, albeit greater clarity in the construction of such a provision would be viewed favourably.

The question of “instruction” to an inspector as raised in the issue paper is ambiguous. There are situations where it may be appropriate for the “regulator” (read management) to instruct an inspector to undertake a certain task. By way of example it may be reasonable to issue an instruction to an inspector to take a particular course of action, such as issuing a Prohibition Notice where for whatever reason the inspector chose an alternative course which was not consistent with agency or Government policy. SA acknowledges that this is a challenging area but argues that there needs to be a balance between inspector independence and regulatory discretion.

An inspector should be empowered to question a direction given by the regulator.

In relation to the review of inspectors by the regulator, SA supports a view that decisions by inspectors should be subject to review. SA acknowledges the value of independence in any review process and notes that there is merit in the Victorian legislation. Consideration needs to be given as to whether this issue needs to be placed into the legislation. Where it is up to the opinion of the inspector as per SA statutory notices, having the regulator direct in these matters would be problematic. Where the inspector is of the opinion there is a risk, then the inspector should be able to act accordingly.

The opportunity to review an inspector’s directions (notices) should remain.

Question 87

Should an inspector be able to modify, amend, or cancel any notice or instruction issued by the inspector? If so, why and in what circumstances?

SA Response

Yes. This is appropriate where a notice or instruction needs to be superseded, amended for clarity or improvement, provide for flexibility of timelines, changes of address or other circumstances, or errors made in the notice or instruction. The ability to alter the notice according to fair and transparent but non-bureaucratic procedures, is a benefit for both the regulator and recipients. Any alteration needs to be done in a manner which is clear to all parties affected by the notice and all parties involved should retain the right to object to the alteration (and request higher level review of the decision where appropriate).

SECTION 6.3 – INTERNAL REVIEW OF INSPECTORS’ DECISIONS

Question 88

What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?

SA Response [Consensus]

There should be a provision to review decisions made by the Inspector or Regulator. In SA, statutory notices that are disputed can be reviewed by a review panel through the Industrial Relations Court and the model OHS Act should provide for such an option.

SA also provides the opportunity for persons to appeal a decision made by the agency, such as refusal to grant a certificate of competency or register an assessor. Although this is currently addressed at regulatory level, we are open to the idea that it should be placed into the model OHS Act.

As noted above, SA sees merit in the Victorian model for reviewing inspector decisions. The only note of caution here is the potential impact on resources for smaller jurisdictions.

Question 89

Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

SA Response

Existing powers should be supplemented with authority to ensure that a person can be required to attend for an interview with an inspector to give evidence in circumstances where deliberate evasion from the investigation process is apparent – as is the case in NSW. In these circumstances, the normal caution would still apply for a natural person.

CHAPTER 7: COMPLIANCE & ENFORCEMENT

SECTION 7.1 – ENFORCEMENT MEASURES

Question 90

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

SA Response [Consensus]

Yes, a hierarchy of measures should be adopted including all those commonly in existence in Australian jurisdictions.

Question 91

Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?

SA Response [Consensus]

This type of information should be set out in a national compliance strategy document. The Strategy should cover procedures in so far as inspectorate activity is concerned. It should not contradict any policy/procedure in the criminal law systems in jurisdictions. The elements of the system in each state which impact on OHS enforcement should be consistent and their details openly available to the community.

SECTION 7.2 – MEASURES EXERCISED AT THE WORKPLACE

Question 92

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

SA Response [Consensus]

All three types should remain irrespective of what they are called however the PIN in SA is termed a default notice (SA would concur with majority view as to a title).

Question 93

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

SA Response [Consensus]

No. However, the nature of the default must be clear. If issued by an inspector the recipient must be provided with advice about where to source information and assistance to help remedy the matter. An Inspector should not be regarded as a *de facto* safety consultant. Notices are written to force compliance at a minimum. The recipient is expected to seek and use resources to achieve this and preferably a standard exceeding the minimum.

Question 94

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

SA Response

All notices should be subject to review. The level of review could differ according to type of notice. For instance in the case of a PIN (provisional improvement notice), the review would be initially carried out by an Inspector.

SA would support a review mechanism (assuming internal review by regulator upholds issue of Notice) that allows for an appeal to an external body (such as a review committee) and to a higher jurisdiction (such as an Industrial/superior Court).

Question 95

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

SA Response [Consensus]

Minimum 14 days or whatever the appeal period is. This should not be applicable to prohibition notices. The maximum period should be 90 days.

Question 96

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

SA Response

Not for prohibition notices, but yes for improvement notices and PINs. Refer to the SA OHS&W Act for an appropriate model.

Prohibition notice always stands but an improvement notice would be suspended while an internal review occurred.

Question 97

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

SA Response

SA has a fine of \$315 for one offence only. SA considers that a number of administrative offences in a model act could attract an infringement notice.

Every OHS regulation of an administrative nature should be expiable.

Under no circumstances should a breach of the Act where an injury or a recognised dangerous occurrence results, be capable of expiation.

Question 98

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

SA Response [Consensus]

This should be left to be dealt with in each jurisdiction.

Question 99

What amounts should be specified as fines for infringements?

SA Response

Set fines should be consistent nationally and the level of these fines should be sufficient to act as a deterrent. Every OHS regulation to be expiable except in situations where an injury or a recognised dangerous occurrence results.

SECTION 7.3 – MEASURES EXERCISED BEYOND THE WORKPLACE

Question 100

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

SA Response [Consensus]

Injunctions, but only in the form of prohibition notices issued by inspectors, are an appropriate tool for regulators.

Question 101

Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

SA Response

Yes, albeit that SA currently does not provide for enforceable undertakings in that form. It is SA's view that enforceable undertakings would provide the regulator with an additional enforcement tool. However, appropriate arrangements must be applied to ensure that decisions about this option and the outcomes are consistently applied and publicly accountable.

Enforceable undertakings should be considered after a decision by the regulator against prosecution has been taken.

Question 102

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

SA Response

Yes, but there should not be a conviction or any other sanction applied purely as the result of an enforceable undertaking. SA agrees with the views expressed in the discussion paper as to the process surrounding enforceable undertakings.

Question 103

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

SA Response

No further comment at this time.

CHAPTER 8: PROSECUTIONS

Question 104

Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

SA Response [Consensus]

Within the model Act, breaches of duties or obligations should be dealt with solely as criminal offences. Whilst the concepts of civil and criminal penalties are not mutually exclusive, the duties under the Act are fundamental and the application of the criminal law, including the criminal onus, is appropriate in order to confirm the credibility and deterrent effect of the Act.

The issue of civil penalties is complicated by various local statute and common law considerations. In our view, the concept should not be addressed within the model OHS laws.

Question 105

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

SA Response [Consensus]

Refer to our response for Q.104 above.

Question 106

Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

SA Response [Consensus]

The model OHS legislation should leave the detail of these arrangements to each relevant jurisdiction.

To the extent that the model may assist to establish basic principles for the purposes of national consistency, the Court or Tribunal should be comprised of Magistrates or Judges with a workplace/ employment focus. Normal appeal right and defences should exist.

Question 107

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

SA Response

Yes, this is a special area of law and should be dealt with accordingly.

Question 108

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

SA Response

Appeal should lie to a Judge of a higher court for breaches of duties or obligations should be dealt with as criminal law offences. See *Fair Work Act 1994* as an example.

Question 109

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

SA Response

OHS offences are generally summary offences and should be heard before a Judge or Magistrate. However, there is justification for any offence potentially attracting a jail term to be considered to be a minor indictable offence where the defendant should be offered the opportunity to be dealt with by a Judge and jury.

Question 110

Who should be entitled to commence criminal proceedings?

SA Response

The State via the Minister, the head of the regulatory agency, the Director of Public Prosecutions, an inspector (or equivalent officer) should have the right to commence criminal proceedings.

South Australia does not support the concept of private prosecutions. If pursued, we would consider an arrangement based upon the current SA Act, namely that if after a certain period the State declines to commence proceedings, the victim should have a residual right to commence proceedings subject to Ministerial discretion- refer to OHSW Act s58(7)(c).

Question 111

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

SA Response

SA does not support civil proceedings under the model OHS Act.

Question 112

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

SA Response

The model Act should prescribe an appropriate period eg a maximum of 24 months from the time that the offence was evident. This period should be sufficient to conduct all but the most complex investigations.

Further, the model Act should ensure that the wording is appropriate to allow prosecution in situations where the offence has not become apparent until outside this period, eg for design defects and diseases of long latency. The SA OHSW Act allows for an appropriate authority to grant an extension of time in this type of circumstance.

Question 113

Should the model OHS Act include specific provisions for the conduct of prosecutions, and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?

SA Response [Consensus]

This should not be part of the model OHS Act. Ideally all procedure should be left to the criminal law and the rules of the relevant court or tribunal.

Question 114

Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions?

SA Response

This is worth considering. SA assesses that the recent amendments to the SA OHSW Act in relation to the imputation of conduct and knowledge (corporate liability and liability of directors) is relevant here.

The SA OHSW Act provides specific imputation provisions in Sections 59A - 59C.

These provisions apply to:

- corporations, the directors of corporations and senior officers of a corporation;
- administrative units of the public service (government departments) and senior officers employed by an administrative unit; and
- natural persons (i.e. non-corporate entities) and their employees or agents (only in relation to section 59A).

The provisions particularly relate to the liability of employers and provide that the employer may under certain circumstances be liable as a result of the conduct and state of mind of an officer, employee and/or agent who is acting within the scope of his or her actual, usual or ostensible authority. The liability will not arise where the employer can demonstrate that the alleged contravention did not result from any failure to take all reasonable and practicable measures to prevent the breach of the SA OHSW Act.

Section 59C(1) - (5) relates to the personal liability of a senior officer of a corporation or an administrative unit of the public sector in circumstances where the employing entity has contravened the SA OHSW Act but that contravention can be attributed to the officer or employee. Personal liability for a senior officer within this provision can still exist under the SA OHSW Act even when there has not been a finding by a court that the relevant employer has contravened the SA OHSW Act.

Section 59C(3) of the Act requires that when determining personal liability for an officer of a corporation, or an employee of an administrative unit, the following elements must be taken into account:

- what the officer knew about the matter concerned;

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- the ability of the officer to make, or participate in decisions that affect the organisation in relation to the matter concerned;
 - whether the contravention by the corporation or administrative unit is attributable to the act or omission of another person; and
 - any other relevant matter.

When imputing liability to a corporation, an administrative unit, or a natural person through the conduct of an officer, agent, or employee the SA OHSW Act requires the following factors to be taken into account:

- the conduct and state of mind of the officer, agent and/or employee;
- whether that officer, agent and/or employee was acting within the scope of their actual, usual or ostensible authority when the contravention occurred; and
- whether the employer took all reasonable and practicable measures to prevent the contravention or contraventions of a similar nature.

Question 115

Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?

SA Response

There should be special provisions allowing for the validity of Acts, regulations and codes to be accepted as is common in most State legislation.

The authority and standing of the regulator should also be subject to a rebuttable presumption.

Question 116

What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

SA Response [Consensus]

There is a need to retain all standards, codes as having evidentiary status. However, to attain this status the relevant document must have been approved by the Executive arm of Government (i.e. either by the Minister directly or by decision of Cabinet or by the Parliament).

The detail of these arrangements should be left to the actual jurisdictions enacting the model Act.

Question 117

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

SA Response

Yes – see our earlier response for Sections 2.4 and 3.3.

Question 118

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

SA Response

The prosecutor should carry the onus of proof. These are criminal charges and the prosecutor must present evidence that shows beyond reasonable doubt. The defendant must be able to answer the allegations by proving elements required for a viable defence.

Question 119

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?

SA Response

Consideration might be given to a civil onus in relation to purely administrative obligations.

Question 120

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

SA Response

The condition within each duty applying the reasonably practicable approach would provide an adequate defence arrangement.

The '**deemed to comply**' concept could also be explored as a means of defence although experience indicates that great care must be taken to frame such an approach as some previous attempts to apply this concept have been fraught with difficulty.

'Deemed to comply' can be a useful concept within the performance-based legislative framework. Compliance with a 'deemed to comply' document (such as an industry code, or a standard), can provide a person with some certainty that a particular obligation or legislative requirement has been met.

On the one hand a 'deemed to comply' document is similar to prescriptive regulations although likely to be longer and more detailed. On the other hand, such a document can be difficult to interpret and can be seen as adding another layer of requirements to the system.

A further problem is that compliance with a 'deemed to comply' document would not eliminate all foreseeable risks and in that sense, can add confusion to a person's understanding of their duty of care. No single document (including prescriptive regulations) can provide detailed control measures for all hazards or risks. The wider the scope of the document, the more likely that some hazards or risks may not be addressed adequately.

Strict criteria is essential for a document to be accepted for deemed to comply purposes. For example the document would need to ensure that:

- provisions in the legislation where they 'deem to comply' are identified;
- it is representative of industry practice;

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- it addresses all significant hazards and provides ways for the risks associated with these hazards to be minimised; and
 - there is transparency in the preparation of the code which must be based on wide consultation with stakeholders.

Legislative provisions must be provided for the regulator to approve and withdraw the status of a deemed to comply document, and for appropriate enforcement measures.

We note that the European Union uses a similar concept in relation to compliance with its Directives. Conformity with a harmonised standard which has been published, confers a 'presumption of conformity' with the essential requirements of the applicable directive that is covered by such a standard. An example is machine guarding where if a level of guarding meets the harmonised standard accepted under the Machinery Directive 98/37/EC, it is presumed to meet the provisions in that Directive in relation to machine guarding. The EU 'presumption of conformity' concept is narrower than the deemed to comply concept contained in an industry code of practice.

Question 121

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

SA Response [Consensus]

No because the concept of culpability is the same irrespective of whether the defendant is a corporation or an individual.

Question 122

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

SA Response

Yes they should be potentially liable depending upon the circumstances. Sections s59A-s59C of the SA OHSW Act provide an appropriate model.

SA notes that this outcome was a result of recent amendments to the SA OHSW Act (which took effect in January 2008). In the development of the amendments, agreement could not be reached between the employers and employee representatives on the manner in which liability should be imputed. It is important to note that officers are not automatically presumed to be liable. Refer to the response to question 114 for more detail.

Question 123

How should officer be defined?

SA Response

SA contends that the concept of a Responsible Officer - Section 61 of the SA OHSW Act should form part of the model OHS laws. In terms of broader officer responsibility, sections 59A to 59C provide an appropriate concept.

Consideration should also be given to establishing 'officer' provisions for non-corporate entities.

Question 124

Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

SA Response

The liability of an officer should be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation. The officer should not be automatically guilty of an offence.

Question 125

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

SA Response

See our earlier responses to Q. 122 and 123.

Question 126

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

SA Response

The Act should not provide for specific defences. The elements used in the 'reasonably practicable' test are adequate for both the purposes of prosecution and defence.

Question 127

What should the approach to officers of unincorporated associations or volunteer Officers?

SA Response

A consistent approach is considered the most appropriate. That is, the same approach as is used for other officers and other entities. In this regard any definition of employer or employee must be considered carefully.

Question 128

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

SA Response

Potentially all breaches of the Act and the regulations should be subject to potential monetary penalty.

Question 129

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

SA Response

Maximum monetary penalties (fines) should be available for all types of offences. However the scale of fines needs to be established as part of the model Act. There should also be options available for non-pecuniary penalties as an additional or alternative penalty.

Question 130

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

SA Response [Consensus]

There should be differences. This could be done via divisional segmentation. There should be a gradient of fines and provision should be made for first and subsequent offences by the same individual or organisation.

Question 131

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

SA Response

There should not be statutory minima however actual amounts should be set for expiable matters.

Question 132

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

SA Response

Penalties should reflect the nature/extent of exposure to the risk as well as the consequence. Higher penalties should apply to repeat offenders.

Question 133

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

SA Response [Consensus]

This would provide a potentially useful source of information. However this would not fall within the province of the model OHS Act. It should be pursued at a Ministerial level through the Workplace Relations Minister's Council (WRMC).

Question 134

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

SA Response [Consensus]

There should be provision for non-pecuniary penalties, such as prominent publicity requirements (naming & shaming), enforceable undertakings, register of offenders, Breaches of duties or obligations should be dealt with as criminal law offences.

Question 135

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

SA Response [Consensus]

Terms of imprisonment should be able to be imposed for serious offences such as in instances where it has been proven that actions (or non actions) demonstrated reckless indifference as to the outcome or the health safety and welfare of others. Section 59 of the SA OHSW Act represents an appropriate model.

SECTION 8.8: WORKPLACE DEATH AND SERIOUS INJURY

Question 136

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

SA Response

SA does not advocate an offence specific to a fatality. The provisions relating to offences should be able to encompass all types of events – irrespective of outcome. Serious injury (no fatality) should not be treated separately to an incident resulting in a death.

Question 137

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

SA Response [Consensus]

If the circumstances surrounding the death are sufficient to warrant a charge of manslaughter, the matter should be dealt with under the Crimes Act or other relevant laws. The fact that the death arose in a work situation will be self-evident.

Question 138

Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

SA Response [Consensus]

No, see the response to Q136.

SECTION 8.9: ENFORCEMENT OF PENALTIES.

Question 139

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

SA Response

This should be left to the relevant jurisdictional laws.

Question 140

Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?

SA Response

See answer to question 140.

Question 141

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

SA Response

No further comment at this time.

CHAPTER 9 – OTHER ISSUES

SECTION 9.1 – REGULATION MAKING POWERS

Question 142

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

SA Response

The power should be broad enough to encompass all matters relevant or arising from the provisions of the Act.

Question 143

Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

SA Response [Consensus]

Regulations should provide for summary offences. However the scale of penalties should be flexible enough to deal with breaches of regulations which might give rise to serious/significant consequences.

SECTION 9.2 – CODES OF PRACTICE

Question 144

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

SA Response [Consensus]

The status and the application of an approved code of practice (ACOP) is not always clear to those who are affected by the regulations, particularly small businesses.

In SA, an approved code of practice is the third tier in the OHS legislative framework, and is a document approved under the Act and given evidentiary status. In providing a preferred way of achieving a satisfactory outcome but allowing flexibility to achieve the outcome through an equal or better method, this type of document is essential to the legislative structure.

The *Queensland Workplace Health and Safety Act* defines their advisory standard or code of practice as follows:

26. (1) If a regulation or ministerial notice prescribes a way of preventing or minimising exposure to a risk, a person may discharge the person's workplace health and safety obligation for exposure to the risk only by following the prescribed way.

(2) If a regulation or ministerial notice prohibits exposure to a risk, a person may discharge the person's workplace health and safety obligation for exposure to the risk only by ensuring the prohibition is not contravened.

(3) *If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by--*

- (a) adopting and following a stated way that manages exposure to the risk; or*
- (b) adopting and following another way that gives the same level of protection against the risk.*

This example provides good clarity and a useful definition that could be considered for the model OHS Act.

The model OHS Act should provide for national codes of practice, both to accompany national standards and to address risks in situations where there are no national standards.

There are issues with the wide use of Australian Standards as codes of practice. This has been recognised by the Productivity Commission.

SECTION 9.3 – NOTIFICATION OF INCIDENTS AND REPORTING

Question 145

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

SA Response [Consensus]

Referring to the statement in the paper, the compliance burden is added to where the requirements vary from jurisdiction to jurisdiction.

Logically, this burden would not exist if there were a common incident notification requirement under the model Act.

The SA incident notification system drives reactive inspection work but not proactive work. The latter is largely driven by compensation statistics. This division is not ideal. There should be a single incident information system.

The Model OHS Act would need to deal with the concept of compensated injury within scope of incident notification, along with fatality, injury, and dangerous occurrence.

The Model OHS Act would need to specify the requirement/system in relation to the following:

1. The functions of an incident notification and reporting system in the context of compliance and enforcement;
2. The functions of an incident notification and reporting system beyond compliance and enforcement e.g. statistical reporting;
3. A national data standard;
4. National data dictionary, with definitions (e.g. clear definition of what constitutes an incident - fatality, injury, dangerous occurrence, compensation...);
5. Operational rules; and
6. Clear report specifications.

The ASCC Comparative Performance Monitoring (CPM) reporting system, which is based mainly on compensated injuries, is probably a useful platform to build on but would need to be extended to cover incident notification for injury and dangerous occurrences.

SECTION 9.4 – EXTERNAL APPEALS AND ISSUE RESOLUTION

Question 146

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

SA Response [Consensus]

Most states have internal review processes with a review panel. This is where an employer or member of public may appeal an inspector based on any grounds – decisions made, or failed to make. After this, if the person is not satisfied the matter can be appealed through to the external review process within the courts.

This may become cumbersome, and the view is the provision in Section 42 and 47 within SA legislation is the benchmark that should be met. Within this legislation where a person seeks review of a statutory notice, the review process goes directly to the Courts. There is also the opportunity where if a party is dissatisfied with how the inspector has arbitrated a default notice or cessation order, this too can be reviewed to the Industrial Court.

Having a process with no internal review, could be perceived by the public as not being transparent or fair. SA would consider the possibility of extending the review time under Section 42, which currently stands at 14 days. This could be extended to a possible 21 or 28 days review period, allowing people a better opportunity to provide a case for the matter.

Questions 147

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

SA Response [Consensus]

Yes – using the SA process for review of notices would allow opportunities to resolve issues.

SECTION 9.5 – TRIPARTITE MECHANISMS

Question 148

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

SA Response [Consensus]

The concept of tripartite mechanisms to provide policy and other advice is considered as fundamental. The detail of the arrangements should however be left to each relevant jurisdiction.

Question 149

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

SA Response [Consensus]

The detail of the arrangements should be left to each relevant jurisdiction.

SECTION 9.6 – MUTUAL RECOGNITION

Question 150

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

SA Response [Consensus]

We note that existing mutual recognition legislation generally excludes OHS related permissioning arrangements.

All types of OHS related licences or permits should be subject to national recognition and dealt with under the model OHS Act.

At present the amount of inter-jurisdictional recognition is limited. However there are some examples of emerging schemes which will progress this situation eg induction training in construction and load shifting equipment.

Question 151

What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high-risk work that results in:

- 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?

SA Response [Consensus]

If there are to be provisions regarding licensing and permits, the national model standard for licensing of high risk work should provide a basis for those types of provisions.

SECTION 9.7 – CROSS-JURISDICTIONAL COOPERATION

Question 152

How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

SA Response [Consensus]

This has been dealt with throughout the submission, and in particular in Chapter 1.