National Review Into Model OHS Laws – NSCA Submission

Contents

1. Introduction

The National Safety Council of Australia (NSCA) welcomes this opportunity to provide input into the National Review into Model Occupational Health and Safety Laws (National Review).

We believe that the National Review is an important step in developing laws that will make it easier to protect the occupational health and safety (OHS) of all Australians.

We support the harmonisation timetable and look forward to a national model OHS Act being implemented by December 2011.

It's vital that this process results in laws that provide consistent and high-level OHS Australia wide. All stakeholders deserve access to the same healthy and safe working environments.

Under OHS laws, stakeholders need to feel confident that they understand what is being asked of them and what is being asked of them is fair and reasonable and results in healthy and safe workplaces.

This submission covers the topics and responds to the questions that are listed in the Issues Paper released by the National Review in May 2008.

1.1 Submission topics

- Legislative approach
- Scope, application and definitions
- Duties of Care – who owes them and to whom?
- 'Reasonably practicable' and risk management
- Consultation, participation and representation
- Regulator functions, powers and accountability
- Compliance and enforcement
- Prosecutions
- Other issues

1.2 Overview of the response to the National Review's Issues Paper

Overall, the NSCA supports the introduction of one OHS Act with specific additional legislation based on different industries, such as mining, which should also be consistent nationally.

The replacement body for the Australian Safety and Compensation Council (ASCC) would be

the appropriate body to draft and provide advice on the model OHS Act, but the state regulators should enforce it.

In line with new and emerging OHS risks, the model OHS Act should include provisions for risk managing health and wellbeing and/or psychological hazards. If psychological injuries are viewed as compensable injuries by workers' compensation authorities across Australia then they must be referenced in OHS Acts/Regulations.

However, the NSCA does concede that a key and difficult issue will be defining psychological health hazards and catering for individual difference. For example, psychological strain could reflect a person's inability to cope with a reasonable employment request – i.e. the person might not be the right fit for the job.

While clearly defining psychological, and a number of other OHS, hazards is paramount in the development of model OHS laws, achieving a uniform use of terminology throughout the legislation is also vital. Currently in some jurisdictions, for example QLD, the terminology isn't consistent and can lead to confusion.

Clarity and care are also needed in the drafting of the model Act's control provisions. The legislation must ensure that frontline managers are not exposed to OHS accountabilities they have little control over.

Although delegation of control is a natural part of business, assigning responsibility should not result in relinquishing accountability. Allowing this to happen in law will result in legal exposure to frontline managers, who already suffer overwhelming pressures. Alone, this inclusion could devastate industry as it could result in a situation where being promoted to a line manager role would be a risk that could not be compensated for by the relatively small additional financial reward.

The same clarity and care also needs to be given to drafting the duties of care. A definition of reasonably practicable should be included in the model Act. The guidelines provided by both the VIC and WA OHS Acts should be at least the minimum guidance included. Any definition of reasonably practicable must also include a reference to risk management.

The NSCA doesn't believe that the definition of reasonably practicable should be left to the courts to decide as it means that what is reasonably practicable is only considered after an accident or injury, which is counter to a preventative approach to OHS.

Also key to a preventative approach is consultation, participation and representation. The model OHS Act should contain consultation provisions that apply to all work relationships and follow the provisions laid down in the NSW and VIC OHS Acts.

However, the NSW and VIC provisions allowing health and safety representatives (HSRs) to issue provisional improvement notices (PINs) should be removed. Allowing HSRs to issue PIN notices can create industrial issues and be disruptive if the person issuing the PIN does not understand the context. But the option for HSRs to access state regulators should be retained to deal with matters that remain unresolved.

Right of entry should be restricted to the regulator and emergency services. And only the regulator and law enforcement agencies should be able to commence legal proceedings.

However, workers should have the right to refuse to do unsafe work. Such a refusal would be accompanied with an immediate request to the regulatory body to decide on the appropriateness of the refusal.

The NSCA also recognizes that employers need assistance to meet their OHS obligations. As such, the ASCC replacement body should provide advice to employers, while the state regulators carryout enforcement. However, if it isn't possible for this division of roles to occur and the roles of providing advice and enforcement is left to the state regulators, there should be a clear division of roles within the state regulator. As such, one group of inspectors should be dedicated to giving advice and another to carrying out enforcement to prevent situations arising where the inspector handing out the advice is also the one prosecuting the employer.

When it comes to who is liable for OHS breaches, corporation officers should be held accountable. Such officers should be defined as per the Corporations Act.

2. Response to the National Review's Issues Paper

The following provides detailed responses to the questions listed under each of the topics in the Issues Paper released by the National Review in May 2008.

2.1. Legislative approach

Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

The model Act should be focused on principal-based and, perhaps, performance-based standards. This will allow for regulation that can call up, where necessary, prescriptive process-based and industry codes of practice (COP). Increased prescription in high-level documents (such as Acts) drives minimal compliance rather than best practice, stifles innovation and does not allow for industry-specific variations.

Regulations should also include prescription for extremely high-risk tasks such as asbestos removal and working in confined spaces.

Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

As above, the Act should be at the values/policy level and allow the subordinate documents to cover any required detail.

Q3. What is an appropriate title for the model OHS Act?

Three schools of thought are proposed for the title of the Act:

- *Occupational Safety, Health and Welfare* Act – the terms "Safety", "Health" and "Welfare" signify consideration of broader and emerging risks, such as the ageing Australian workforce, and the key issue of health (as well as safety). Also, the term "Welfare" takes into consideration work–life balance issues and provides an opportunity for employers to demonstrate that they are an employer of choice.

- *National OHS and Wellbeing Act* – the term "National" signifies that the Act is applicable to all jurisdictions. "OHS" and "Wellbeing" signify that safety has a holistic and/or all encompassing focus and is more than just about physical or obvious hazards, such as falls from heights, excessive noise, but also hazards that may be harder to quantify/manage, such as bullying, stress, nutrition or occupational violence.

- *Workplace Safety, Health and Welfare Act* – use of the term "Workplace" instead of "Occupational" is preferred as it better reflects the need for a systems approach to OHS. Such an approach covers people, plant/substance, environment and systems/procedures. The term "Occupational" tends to have people only connotations to the exclusion of the aforementioned factors.

Q4. Should the model OHS Act specify its objectives? If so, how and what should they be?

Yes. Objectives define the intent of the Act and demonstrate in a direct way the overall guiding principles that should be a part of the way an organisation conducts its business/activities. Guidance could be taken from the VIC OHS Act, s3; and NSW OHS Act and the objectives could include:

- Adopting a preventative approach;
- Managing risks before they transfer to loss;
- Community impacts; and
- Lessening the burden on workers compensation and medical services.

2.2. Scope, application and definitions

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

The model Act should cover occupational safety and health for all Australian operations, but allow for the drafting of separate industry-specific legislation where additional detail, exemptions and/or industry-specific requirements/prescription are required. An effective model operates in NSW where the Mine and Rail Safety Act works in conjunction with general OHS.

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

An overarching Act with subordinate industry-specific regulations would not work.

The current approach of an OHS Act and regulations to deal with broad hazard categories (for example, noise, confined space, hazardous substances, etc) rather than industry sectors is more aligned with the Robens Committee principles.

More COPs, however, could be developed at a national level for industry sectors (for example, in QLD there is a Sugar COP, and a Forestry and Saw milling COP). Benefits would include more practical guidance material for employers in high-risk industries. Industry-specific issues

are better dealt with in a COP rather than muddying the waters by incorporating them into industry-specific regulations under the one overarching Act.

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

Currently, a problem exists where the state regulators are both the enforcers and the advisory services. State regulators should only enforce the Act.

Improved coordination between safety regulators within jurisdictions could be achieved through a process whereby the replacement body for the Australian Safety and Compensation Council (ASCC) provides advice about the model Act, and the state regulators enforce the Act.

However, if it isn't possible for this division of roles to occur and the roles of providing advice and enforcement is left to the state regulators, there should be a clear division of roles within the state regulator. As such, one group of inspectors should be dedicated to giving advice and another to carrying out enforcement to prevent situations arising where the inspector handing out the advice is also the one prosecuting the employer.

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

General duties that are tied to the workplace would force employers to consider the safety of workers and others, regardless of where the work is carried out (for example, at home, from a car, etc). The definitions associated with these duties need to be clearly outlined, for example, 'workplace', 'reasonably practicable', and 'risk management'.

In addition, the 'conduct of work' should not be mutually exclusive from what is meant by the 'workplace'. The emphasis should be on the relationship between the worker/person and employer, where the worker/person is operating under the direction of the employer.

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

Duties of care should extend to the protection of "any other persons" in so far as those other persons are not contributors to any loss through their own negligence and only when the employer could reasonably be expected to know they are at the workplace. For example, a construction site within a car park at a shopping centre must protect members of the public who are park their cars in and around the site, not those who jump the fence to consume alcohol, cause damage etc.

Duty of care should also take into consideration lawful entry to construction sites and public places, such as hospitals. It should cover visitors to these sites and visitors/contractors or staff failing to follow a reasonable direction.

Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

Yes. The scope should be sufficiently broad and flexible to accommodate new and evolving types of work. Despite increasingly complex and evolving labour arrangements key definitions should be kept simplistic, such as 'contract of services' and 'contract for services'.

Q13. Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

Yes, for example, health and wellbeing and/or psychological hazards. If psychological injuries are viewed as compensable injuries by workers' compensation authorities across Australia then they must be referenced in OHS Acts/Regulations. A key and difficult issue will be defining psychological health hazards and catering for individual difference. For example, psychological strain could reflect a person's inability to cope with a reasonable employment request – i.e. the person might not be the right fit for the job.

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

Critical terms that require uniform definitions:

- Worker
- Volunteer
- Employee
- Workplace
- Employer/person conducting an undertaking
- Reasonably practicable
- Relevant person
- Principal contractor
- Project Manager
- Client
- Consultation
- Competent person
- Contractor
- Incident
- Dangerous event/dangerous occurrence
- Injury types , for example, minor injury, serious injury
- Hazard
- Risk
- Hierarchy of Control – Elimination, Substitution, Isolation, Engineering, Administration and PPE.
- Visitor

However, more important is the uniform use of terminology throughout the legislation. For example, QLD legislation provides definitions for an employer and self-employed person, but often uses other terminology such as "person conducting a business or undertaking" or the "relevant person" and in some instances refers to "a relevant person or a worker of a relevant person who is an employer" (WHS Reg s52(4)). This can be confusing and difficult for a person,

not familiar with the way legislation is written, to understand exactly which person within an organisation is being referred to.

2.3. Duties of care – who owes them and to whom?

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

Such a test or definition should only be included if it does not create a defence for either frontline management (as they are not empowered to make business decisions) or senior managers (who may argue they are too far removed to understand the daily activities).

Q18. Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

Delegation of control is a natural part of business; however, assigning responsibility should not result in relinquishing accountability. If this occurred in law it would result in legal exposure to frontline managers, who already suffer overwhelming pressures from senior managers and employees. Alone, this inclusion could devastate industry as it could create a situation where being promoted to a line manager role would be a risk that would not be compensated for by the relatively small additional financial reward.

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

Yes. The Act should clarify responsibilities where multiple duty holders and multiple duties are involved. The current QLD legislation (WHS Act s24 (3) and s25)) helps to highlight this point as mentioned in the Issues Paper. Further clarification could be achieved by legislating for tighter requirements to be included in the contract documents that are used when engaging contractors. For example, this may include requiring the contractor and the organisation engaging the contractor to include a document similar to the Commonwealth Health and Safety Management Arrangements (HSMA) – to ensure that decisions and duties are outlined and met within a consultative framework and that these decisions and duties are recorded in an appropriate manner.

Clarification of responsibilities is particularly pertinent where designers, manufacturers, suppliers and employers all have responsibility for plant and equipment brought into a workplace. This is covered by NSW regulations but, in real terms, it does not seem to result in 'earlier' duty holders, such as designers, being held accountable (i.e. prosecuted).

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

Yes. This is particularly important in relation to the ongoing outsourcing/casualisation of the labour force.

Q21. How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

Greater definition of employers' duties in relation to non-employees is required; however, the duties need to be kept as broad as possible to cover a wide cross section of non-employee situations.

Q23. How and to what extent should the model OHS Act specify an employer's duty of care?

Both general and specific duties are beneficial. Additionally, the QLD requirement for employees to take reasonable care is also beneficial.

Q24. To whom should these duties be owed?

All persons legally and reasonably expected to be affected by work as per the QLD model.

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

The model Act should require workers to notify relevant persons of uncontrolled or inadequately controlled hazards, arrive at work fit for work, notify relevant persons if they become unfit (for example, fatigued or ill) and behave in a manner that isn't reckless. This may include adding a workers duty of care as per the NSW OHS Act, s21, where workers are not to interfere with anything provided in the interests of health, safety and welfare.

Q27. Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?

Senior management should be responsible for OHS. However, the inclusion of a requirement for senior managers to provide adequate resources, including the appointment of a safety professional to enable them to meet their requirements would be a healthy mid point.

In QLD, appointed workplace health and safety officers (WHSOs) have become key players in assisting employers' discharge their obligations. To our knowledge, QLD is the only Australian state to have mandated that employer-appointed officers provide assistance to employers and are required to undertake advanced training.

Essentially, the other states' legislation suggests that it is workers who should have formal representation and training, not employers. However, in relation to worker representation – workplace health and safety representatives (WHSR) – most training only addresses basic implementation issues from a worker's representation perspective.

Although there is a more unitarist approach to OHS in Australia, WHSRs are still essentially worker representatives. And it could be suggested that WHSRs, more often than not, exercise their OHS rights on a reactive, rather than proactive, basis – i.e. after a loss and not before.

However, the Australian Standard AS4801 specifies that an organisational appointment shall be made to maintain occupational health and safety management systems OHSMS. The standard describes an OHSMS as comprising Policy → Plan → Implementation → Measure → Review.

But how can an organisation be compelled to engage in policy, planning, implementation, measurement and review processes if the representation isn't comprehensive and the organisation doesn't subscribe to any sort of OHSMS Standard?

Having an appointed officer, like a QLD WHSO, would provide more regulatory rigour to a "preventative approach to OHS". However, many WHSOs report that their role (like WHSRs) is not recognised/used until after loss.

If anything, the role of the WHSO should be fleshed out to include more policy/planning considerations and the employer should be compelled to develop at least a basic OHSMS for the WHSO to 'curate'.

Q28. What should the liabilities of such appointed persons be if the responsibilities are not met?

Holding OHS professionals accountable for events where management has not met its obligations is not only questionable – based on responsibility/accountability – but could cause a shortage of people willing to take on such roles in an already tight market.

Q29. What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

The relationship between the duty holder's OHS responsibilities and such an appointed person should be outlined as per the IAW specified in VIC OHS Act, s 22b.

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

Clear responsibilities are currently outlined in the NSW Act and this would be an appropriate for the model OHS Act.

Q33. Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

Yes. This requirement is currently covered under the NSW Regulations; however, enforcement has not been actively carried out.

The lifecycle of various items, structures or systems and their impact on OHS needs to be taken into account. Consideration needs to be given to extended producer responsibilities for items such as x-ray equipment, mobile phones, fridges, toner cartridges and asbestos brake liners.

Q34. How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example, where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

The current model adopted within the QLD Regulations for the control of hazardous substances where specific obligations are placed on manufacturers, importers and suppliers could be adopted for all situations, whether it is plant, equipment or substances. Should a manufacturer identify the failings of a designer there should be obligations imposed on the manufacturer to take appropriate action in regard to the identified failings.

Q35. How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand, and gratis) or temporarily (loan or hire)?

'Supply' should be defined, for example, as per the Issues Paper, page 17: "supply and re-supply by way of sale (including by auction), exchange, lease, hire or hire-purchase, whether as principal or agent". However, this should be defined only once and should be broad enough to cover both temporary and permanent supply activities.

2.4. Reasonably practicable and risk management

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

The question of what is deemed to be 'reasonably practicable' is one which many people have difficulty answering and they often ask if there is such thing as a 'reasonable person or decision'. The guidelines provided by both the VIC and WA OHS Acts would be the most common definition as they appear in many documents, books and OHS guides. They would also be the most common definition taught to WHSOs, state and Commonwealth health and safety representatives (HSRs) and taught in OHS courses. As such, these guidelines should form at least the minimum provisions of such a "reasonably practicable" test in a model OHS Act.

In QLD, clear guidance isn't given. If the definition of reasonably practicable is left to the courts to decide – and courts don't decide until after loss of life or injury – the legislation is hindering the 'preventative approach'.

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

No. The test or examples for assessing compliance should be included in COPs.

Q42. Should 'hazard' and 'risk' be defined in the model OHS Act?

Hazard and Risk would be part of the uniform definitions as stated in Q14.

Q43. Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Risk management relies on employers/those in control of workplaces to put in place controls that will reduce risks to 'as low as reasonably practicable' wherever elimination is not possible. As such, any definition of 'reasonably practicable' must include a reference to risk management as it is a key part of the risk management process.

Q44. Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?

Risk management is a broad framework that can be applied across all parts of an organisation. It is the main process by which a workplace/organisation can determine those hazards (OHS or otherwise) most likely to have an impact and establish a priority for setting objectives and

targets, managing budgets and utilizing appropriate resources to meet all organisational requirements.

By specifically requiring that risk management principles and processes be included in the model OHS act, we would move away from risk management in its current consultative form and could end up relying on a much more prescriptive form of legislation. This may suit larger organisations with dedicated budgets and adequate resources. However, smaller businesses, in particular the self-employed and/or small family operated business may find compliance with all the requirements of the Act much more difficult to achieve.

2.5. Consultation, participation and representation

Q45. What provisions should be made in the model OHS Act for consultation?

The current provision in both the NSW and VIC OHS Acts provides well for consultation and could be an appropriate inclusion in the model OHS Act.

Q46. What are the work relationships to which a consultation provision should apply?

Consultation provisions should apply to all work relationships. It is a vital component of the risk management process to consult with people on the risks that affect their specific work.

Q47. Should there be different levels of consultation required for different work relationships?

Levels of consultation will be dependent on the nature of the hazards and the goals, objectives and scope of the organisation. The legislation should make provisions to ensure that consultation occurs across all levels and types of work relationships, but should not specify the intricacies of that consultation.

Q48. How should consultation be provided for?

There should be no requirement for employers to the detail how their organisation consults with its stakeholders. Employers should be allowed to assess and develop their own approach to consultation. For example, when information is to be communicated, the employer should consider access to the communication medium, the urgency of the information to be communicated, the physical layout of the workplace and the culturally and linguistically diverse backgrounds of the staff etc.

Q49. Should there be a requirement for establishing HSRs and HSCs?

Yes. If the focus of the model OHS Act is to be prevention through consultation and risk management, then the Act must provide for ways that organisations can undertake these processes. As part of these processes, employees must be consulted. Employers must carry out a minimum standard of consultation, for example, through the establishment of health and safety representatives (HSRs) and health and safety committees (HSCs).

Q50. What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

If the consultation provisions as outlined in Q45 and Q46 are provided for in the Act, then effective participation and representation of workers in improving health and safety outcomes will also be provided for.

Q51. How, and in what circumstances should HSRs be appointed or elected, and HSCs established?

Where HSRs are to represent the rights of workers, HSRs should be elected to their positions. Workers should elect the HSRs.

Q52. Where an election is required, who should be entitled to vote?

The workgroup that the HSR will represent should be entitled to vote.

Q53. What should the powers and functions of HSRs be?

The powers and functions of HSRs should be as per the NSW and VIC legislation. However, the provision allowing HSRs to issue provisional improvement notices (PINs) should be removed. Allowing HSRs to issue PIN notices can create industrial issues and be disruptive if the person issuing the PIN does not understand the context. But the option for HSRs to access state regulators should be retained to deal with matters that remain unresolved.

Q54. What should the structure and functions of HSCs be?

The structure and function of HSCs should be the same as the provisions in the current NSW and VIC legislation.

Q55. What training and qualifications should members of HSRs and members of HSCs have?

HSRs and members of HSCs and any other safety delegates (for example, WHSOs and employees appointed under other agreed arrangements) should be familiar with the model OHS legislation and aware of their responsibilities and powers. It is recommended that training is only delivered by registered training organisations (RTO) and training organisations accredited by ASCC's replacement body. All training competencies should be nationally consistent with a refresher course to be undertaken at regular intervals, for example, every two or five years as is appropriate for the particular safety role of the delegate.

Q56. Are there alternative mechanisms that should be considered?

The Act should allow for "other agreed arrangements" which are appropriate for the level of risk in the workplace. Alternative mechanisms to be considered could include an employer advisor (for example, WHSOs) and an employee advisor (not in a formal HSR role).

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

Yes. The model Act should include right of entry provisions. The regulator and emergency services should have access.

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

No. Training/qualifications for these positions should be included within their own relevant workplace legislation and/or procedures.

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

Right of entry should be exercised when an employee or employee representative requests that an authorised representative enter their workplace so valid health and safety issues, unresolved safety matters or a suspected/known breach of the OHS legislation (for example, uncontrolled risks, an incident causing injury, death or damage to property or a near miss/dangerous occurrence) can be investigated.

Q63. What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

Normal escalation of issues utilising the workplace 'chain of command' and then an option to contact the regulator or an external agency for matters that remain unresolved.

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

Yes. However, any right to refuse or cease to undertake work should be accompanied by an immediate request to the regulatory body for that body to make a decision on the appropriateness of the refusal or cessation. This would provide for an independent body to resolve the issue and help protect both the employee and employer from any reprisals.

However, every effort should be made to consult frequently to prevent problems from escalating in the first instance.

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

The Act should require the payment of wages/associated benefits to those who have exercised their lawful refusal or cessation rights. This would provide a level of protection for people exercising such rights. However, should it be shown later that the refusal or cessation occurred for deceitful or illegitimate purposes, then an organisation should have the right to demand recompense for that period of time when work was not carried out.

Q71. What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?

Provision for protection from discrimination or victimisation should be made in the model OHS Act. For example, the QLD WHS Act, s174; or NSW OHS Act, s23.

Q73. Should a breach of the provisions be the subject of criminal or civil proceedings or both?

A breach of provisions should be subject to both civil and criminal proceedings – which one is applied would depend on the individual facts and results of the breach as per the current VIC OHS Act.

Q75. Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

Yes. The regulator should have some powers to provide protection from ongoing discrimination or victimisation, pending proceedings. Although most current legislation provides for protection from discrimination and/or victimisation, this is usually through industrial relations legislation. To date, however, it appears that breaches of this legislation have not often been proven or provisions of the legislation enforced.

Q78. Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

Yes. The NSW OHS Act, s23; and VIC OHS Act currently have inclusions for this and could be used as a guideline.

2.6. Regulator functions, powers and accountability

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

Yes. Workplace legislation needs to focus on the possible consequences of not complying. In some cases, it is the punishment which is the deciding factor in ensuring that at least minimum compliance is achieved. As a consequence, this can offer the personnel affected by the activities of an organisation a minimum level of protection.

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

Yes, for recognised documents such as regulations and COP.

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

No. The inspector is not a separate individual that sits apart for the OHS regulator. The inspector is a person within the OHS regulator that acts as the 'mechanism' by which the regulator gathers information to enforce compliance with and provide advice on the legislation in force at the time.

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

Yes. Advice and enforcement should be separated along national and state lines – i.e. a national body should provide advice, while the states should enforce the laws.

Q84. How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

The model Act should specify the powers/functions/appointment/accountability as per the VIC OHS Act, S95, Appointment of Inspectors; or QLD WHS Act, Part 9 – Inspectors.

Q85. Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

The ASCC replacement body should provide advice to employers, while the state regulators carryout enforcement. However, if it isn't possible for this division of roles to occur and the roles of providing advice and enforcement is left to the state regulators, there should be a clear division of roles within the state regulator.

This would require separating inspectors' functions, so there are inspectors dedicated to providing advice and assistance and inspectors dedicated to conducting investigations where the outcome would most likely result in an enforceable undertaking, prosecution or the like.

Separating the roles would help ensure independent investigations, as it would prevent inspectors who had previously provided advice and assistance to certain employers from then prosecuting those same employers.

Q86. Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?

No. Inspectors are part of the OHS regulator and as such should not be independent of direction, instruction or review.

Q87. Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

No. This type of provision may be open to abuse. A senior person or separate body should undertake review, modification, amendment or cancellation.

2.7. Compliance and enforcement

Q90. Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

The model Act needs to document the enforcement measures and provide a guide as to the remedies; however, these enforcement measures do not need to be in a hierarchical fashion.

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

A description of what they are, when they are applicable, how they are to be issued, and what impact they will have on the workplace. The definition of a PIN should remain as is.

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

Yes. This would be consistent with the NSW OHS Act. It would be the role of the Inspector to provide clear, concise detail on how to remedy the breach.

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

The existing NSW OHS Act, Part 6, provides guidance on these provisions.

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

No. It should depend upon the circumstances and risk to the business and others. The reasonableness of the inspector's request should also be considered.

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

No. The notice should stand until such time as the appeal is heard and a decision is made.

Q97. Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Yes. In accordance with the guidelines in the current NSW and VIC OHS legislation.

Q98. Should the administration of infringement notices occur under OHS law or individual state legislation?

Administration of infringement notices should occur under OHS law.

Q99. What amounts should be specified as fines for infringements?

The amount should be appropriate to the degree of the breach. It is recommended that a penalty unit structure similar to that in current legislation should be adopted.

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

Injunctions to ensure compliance with the Act should be provided for within the legislation. Circumstances and evidence required would be dependent on the individual situation for which an injunction is sought.

Q101. Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

Yes. An enforceable undertaking could be used as an alternative to a prosecution where there is a reduced risk, a level of cooperation, and the company or individual is not a repeat offender.

Q102. Should the giving of an enforceable undertaking result in an admission of fault or liability?

No. The organisation should not have to admit liability; they should be given the opportunity to fix the breach. However, this breach could be admissible in court should a second breach occur.

2.8. Prosecutions

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

The model OSH Act should allow for a combination of both criminal offences and civil proceedings and penalties.

Q110. Who should be entitled to commence criminal proceedings?

The regulator and local law enforcement agencies should be entitled to commence criminal proceedings.

Q111. If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

The regulator and local law enforcement agencies should be entitled to commence civil proceedings.

Q112. What should appropriate time limits be for the commencement of a prosecution and why?

Two years is a reasonable period for all parties to prepare and defend a case.

Q116. What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

The evidentiary status of COPs, regulations and other subordinate instruments should be as per the current NSW OHS and/or VIC Acts.

Q120. What, if any, defences should the model OHS Act provide?

In the current NSW OHS Act, s28 provides guidance on defences and this could be appropriate for the model OHS Act.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

The burden of proof should be the same for a corporation and an individual.

Q122. Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

Yes. Officers of a corporation should be held liable because the corporation has committed an offence.

Q123. How should officer be defined?

The definition of an 'officer' should be as per the Corporations Act.

Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

In a criminal situation, the burden of proof should sit with the prosecutor and the offence needs to be proven beyond a reasonable doubt. But in a civil situation the officer should be guilty unless they can prove a defence.

Q133. Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

Under a model Act, the penalties, convictions and outcomes should be consistent Australia-wide based on precedent.

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

Other penalty options could include imprisonment, adverse publicity, enforceable undertakings, and/or community projects assistance.

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

Yes. Industrial Manslaughter.

Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

Breaches resulting in death or serious injury should be dealt with under the Crimes Act. This will reinforce that the purpose of the OHS Act is to ensure the implementation of preventive risk management processes.

Q138. Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

Both the consequence and the culpability need to be considered. This should be applicable to all offences and determined on a case-by-case basis, taking into consideration any precedents which may have been set.

2.9. Other issues

Q143. Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

The provision for lower penalties under the regulations would need to be based on the level of severity of the breach. Where the severity is significant and/or the result of blatant disregard for legislation, then a breach of both the Act and Regulations would need to be considered as necessary.

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

The provisions for the development and approval of COPs should be similar to that in place with current legislation. For example, the NSW OHS Act, Part 4; and the VIC Act, Part 12.

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

Following the guidelines offered in current legislation could provide for an effective reporting system. For example, the NSW OHS Act, s86-s87; and the VIC OHS Act, Part 5.

Q146. What provisions should be made in the model OHS Act for the external review of regulatory decisions?

Following the guidelines offered in current legislation could provide for an effective review system of regulatory decisions. For example, the VIC OHS Act, Part 10.

Q148. Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?

The tripartite administration of OHS regulation could remain as is with the state bodies reporting to ASCC's replacement body with respect to overarching OHS issues.

Q149. Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

The development and implementation of working parties with participation from all stakeholders would be a sound national strategy for dealing with issues affecting particular industries.

Q150. What areas should be subject to formal mutual recognition provisions in the model OHS Act?

Nationally recognised competencies at all levels, including those for OHS professionals. For example, training, education and competence requirements.

Q151. What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high-risk work?

The most appropriate way for a model OHS Act to provide for permits and licensing would be through the development of national competencies (for example, forklift licensing) including formal workplace assessments after a set period (for example, one month from completion) and refresher courses at defined periods to update skills in selected areas (for example, working at heights, asbestos, electrical).

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?

There needs to be one OHS Act with specific additional legislation based on different industries, such as mining, which should also be consistent nationally.

3. Conclusion

It's evident that much needs to be considered before a model OHS Act can be drafted. However, the NSCA is confident that the current harmonisation process will lead to a set of robust national OHS laws.

However, compliance is only one part of the OHS equation. All stakeholders should be striving to take OHS beyond the letter of the law.

<END>