

# Submission to the National Review into Model OHS Laws

Prepared by the Chamber of  
Commerce and Industry of  
Western Australia

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CHAMBER OF COMMERCE  
AND INDUSTRY  
WESTERN AUSTRALIA

## Introduction

The Chamber of Commerce & Industry of Western Australia (CCI) is the peak employer group representing businesses big and small in Western Australia. CCI has over 5600 members across a broad variety of industries and in vastly different regional areas.

As part of its member services, CCI provides direct advice and assistance to member employers in relation to workplace issues such as occupational safety and health, workers' compensation, industrial and employee relations and immigration.

CCI also plays an active role in policy making in various spheres related to OHS, from representation on local and jurisdictional policy forums such as the Commission for Occupational Safety & Health in WA to the (then) Australian Safety & Compensation Council (ASCC) and its predecessor the National Occupational Health & Safety Commission (NOHSC). To better represent employers on a broad level, CCI is closely affiliated with the Australian Chamber of Commerce and Industry (ACCI) and many smaller local chambers in various localities around the state.

To fully comprehend the issues and concerns of employers in relation to OHS CCI has long established employer forums, committees and working groups which consist of relevant industry participants. CCI has forums dedicated to OHS matters in general industry and specifically in the retail sector and employers actively participate in the development of policy positions and identification of OHS issues.

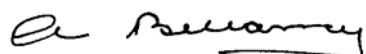
CCI is a regular contributor to jurisdictional and national reviews and consultation regarding OHS matters and is able to put forward the position of Western Australian employers with confidence due to the interactive nature of CCI's policy making teams. Representatives from CCI and the business community prepare detailed submissions to reviewers, decision makers and government on an enormous variety of topics and CCI publishes policy papers related to issues of greatest concern to business on a regular basis.

CCI is therefore well placed to be a consultative partner in the development of new and innovative policy and welcomes the opportunity to contribute to the development of nationally consistent OHS legislation.

OHS is an issue which poses significant challenges for employers. The resources and expertise required to address some of the more complex or comprehensive OHS requirements in current legislation are creating inconsistencies and compliance burdens which cannot be effectively addressed by most employers. The demands imposed by overlapping regulatory requirements, the often vast amounts of related regulation and often limited amount of guidance material are causing many employers to re-evaluate their ability to carry on business in Australia. Viability of businesses and their ability to respond to legislative requirements should be taken into account in the drafting of legislation and specifically in the model OHS legislation. Business owners and managers require a clear framework of OHS provisions and regulations and supporting guidance material to make compliance an achievable outcome for all employers. National harmonisation and consistency is to be commended as a goal and if achieved will be a tremendous boost for employers as a

whole in terms of the increased certainty, clarity and effectiveness in preventing injury and illness.

It is the furtherance of a sustainable economy, open competition and safe workplaces and communities which dictate the priority areas for policy making at CCI and it is with pleasure that we submit this response to the Review Panel for consideration.



**Anne Bellamy**  
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*Chamber of Commerce & Industry WA*

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

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## Executive Summary

Model OHS legislation is an opportunity to harmonise OHS practices, procedures and obligations across all of the Australian jurisdictions and is a concept strongly supported by WA employers.

National consistency and clear guidance material to assist participants in the system in achieving compliance are to be actively pursued into the future to enable Australian businesses to sustain their growth, employ their workforce and achieve the ultimate aim of preventing and reducing injury and disease associated with the workplace.

Model legislation should provide balanced and realistically achievable obligations and goals and should not reflect distorted allocation of absolute responsibility on employers. Specifically, the harsh and unreasonable system adopted by the New South Wales Government in relation to occupational safety and health should not be endorsed in any of the model legislation's provisions.

OHS outcomes should remain the focus of all legislative approaches and the objective of prevention should be the critical underpinning guide. It is therefore not helpful to base provisions on unattainable and unjust absolute liability or strict liability principles and the aim of the legislation should be to facilitate compliance, not punishment.

The model OHS Act requires a robust framework with well drafted succinct provisions which outline responsibilities in such a way as to provide clarity, certainty and pathways for achieving compliance. Subordinate legislation and supporting material must also be comprehensive and able to practically applied in the workplace and must provide specific ways for employers to comply with identified responsibilities and duties.

Other persons at the workplace must also have duties under the model OHS Act and there must be a recognition that there is mutual responsibility to commit to achieving OHS outcomes. Penalties on employees and others in the workplace who breach safety guidelines or instructions must also reflect the seriousness of such a breach.

It must be a primary theme in the model OHS legislation that the critical parties in all OHS matters are the employer and their employees. Other peripheral parties, such as trade unions, must be given no powers to enforce any provisions in the Act and specifically must not be able to commence prosecutions. The regulator must have the sole ability to commence proceedings for breaches of the legislation and CCI strongly opposes any quasi-enforcement role for any party (including employees who may be appointed Health & Safety Representatives and unions) other than the regulator under the model Act.

Consultation and dispute resolution must commence and be achieved in the workplace wherever possible, with the involvement of the regulator only where issues cannot be resolved.

Penalties must reflect the seriousness of the offence and should be allocated by a court or Panel of competent jurisdiction. Penalties should be civil in nature and criminal matters should be prosecuted only by the Office of Public Prosecutions (or similar) in the criminal jurisdiction under general criminal law. There should be no specific criminal industrial offences such as industrial manslaughter and the onus of proof and evidentiary processes must be the same for a defendant in an OHS prosecution as in other areas of the law. Most specifically there should never be a referral of the onus of proof under the provisions of the model Act.

Tripartism must be encouraged and facilitated in the model OHS Act in policy making and regulatory processes. Administration of the Act and all enforcement activities must remain with the regulator. Consultation between the participants in the system, through the creation of tripartite state based bodies and an overarching national tripartite body should also be facilitated under the model Act.

## SPECIFIC COMMENTS

### Chapter 1 The Legislative Approach

#### 1.1 REGULATORY STRUCTURE

##### **Question 1: Which regulatory approach or approaches should be taken in the model OHS Act and why?**

The model OHS Act is an unparalleled opportunity for Australian jurisdictions to create an innovative and practical framework to deliver true and sustainable occupational health and safety outcomes.

The Act should have clear objectives that give clarity and purpose to the legislation. The approach should be that of an overarching Act which contains the objectives of the legislation and the substantive provisions to underpin the framework.

Regulations should outline desired outcomes and guidance material (including adopted codes of practice) should outline best practice or good practice to achieve the outcomes specified in the regulations.

The focus of the legislation should be on facilitating increased awareness of occupational health safety issues and control of hazards and risks in the workplace. The legislation should provide the mechanisms for cooperation and communication by all workplace parties to address health and safety issues in the workplace and should not aim to micromanage workplace issues.

A Regulatory Impact Statement (RIS) should accompany the draft model OHS Act to outline and support the cost implications of the new provisions to be enacted. The value of an RIS cannot be underestimated in enabling stakeholders to ascertain the true impact the new legislation will have.

The model OHS Act should provide a framework for underpinning a workplace relations culture of good communication, mutual respect, cooperation and personal responsibility.

The model OHS Act needs to recognise modern business practices and an increasingly mobile workforce and must emphasise desired outcomes over prescriptive process and must allocate appropriate priority to prevention over enforcement processes.

##### **Question 2: How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?**

The Act itself should be relatively general and non-prescriptive, model regulations should provide adequate prescription to enable clear direction and an outcomes based approach, and detailed guidance material should be provided to achieve the specific outcomes in the regulations.

In limited circumstances, and in industries where employers are already working under prescriptive standards and are prepared to commit to these standards as being suitable for the industry in all circumstances of that particular activity being carried out, a separate regulation to address that industry's standards could be enacted. The feasibility of such an approach and the types of industries and activities which could be tied into such a prescriptive standard will require extensive industry consultation and agreement.

CCI members are committed to the health and safety of their employees and others in the workplace and report that one of the greatest barriers to their ability to manage safety and

health in the workplace is the complexity and proliferation of regulation applicable to all aspects of business.

For most employers, the guidance of a general Act with progressively more detailed requirements set out in regulations, codes of practice and guidance material would be practically helpful in achieving the objective of a safer workplace across the board.

For small businesses it is generally an overwhelming task to sort through the often vague, voluminous, unspecific, ambiguous and complex legislation and information which is available and develop a specific policy, procedure and action plan to be applied in the workplace.

Simplification of the legislative model, a clear ascending hierarchy of prescription and greater clarity around actual required outcomes is desirable. It is also desirable that there be flexibility in how outcomes are achieved and it is especially critical that the actions of employers be assessed on their merits in the circumstances of each particular workplace and incident.

The role of subordinate OHS legislation is to support the substantive statute which imposes the overall duties that employers must satisfy. Regulations, codes of practice and guidance materials must be developed to educate and inform employers about “what they need to do” and “how they can do it” to achieve compliance with the Act.

Overall the model legislation and supporting material should be “user friendly” and readily accessible by all workplaces.

## **1.2 TITLE OBJECTS AND PRINCIPLES**

### **Question 3: What is the appropriate title for the model OHS Act?**

In recognition of the nature of the legislation and its intention to have national application the most appropriate title for the model OHS Act would be the Australian Occupational Safety & Health Act.

Employers are familiar with the acronyms OHS and OSH and will readily identify with either of these concepts. Use of the term “occupational safety and health” gives optimal clarity as to the nature of the topics to be covered. The term itself has internationally accepted nuances associated with the inclusion of issues around physical and psychological safety, health and welfare of persons in a work environment or related to work.

Welfare is largely related to comfort and well being of people at work and with respect to work and is impliedly included in the term occupational safety and health in common usage of that term in workplaces.

The issue of occupational safety and health is an issue with application across all jurisdictions and goes to the heart of the Australian way of life and way of working.

Use of the word “Australian” rather than “National” should be considered as it gives a clear indication that the legislation has been developed to address Australian issues with expected compliance and commitment from all Australian jurisdictions, employers, employees, workers, contractors and other parties associated with workplaces.

State legislatures can adopt the model legislation with the title Australian Occupational Safety and Health Act with recognition that it has been developed with the input of all Australian jurisdictions to further the ambition of reaching optimal Australian standards of workplace safety and health.

**Question 4: Should the model OHS Act specify its objectives? If so, how and what should they be?**

Yes, the Act should specify its objectives. The objectives will assist in identifying the focus of the legislation and the aims for which it has been enacted.

The objectives should be clear, succinct and detail only those overarching objectives which will guide the balance of all other legislation and supporting materials which will follow. They should not be too broad and should clearly reflect the desired outcomes for compliance.

Objectives of the model Act should be as follows:

- 1 To reduce the incidence of death, injury and illness in Australian workplaces;
- 2 To promote and secure the safety and health of people in and around Australian workplaces;
- 3 To create consistency and harmonisation of the occupational health and safety rights and duties of employers, employees, and other persons associated with workplaces across all Australian jurisdictions
- 4 To clearly define the duties of persons who can affect the health and safety of people at work or associated with a workplace;
- 5 To set model occupational safety and health standards for implementation in all Australian workplaces;
- 6 To provide sufficient information, guidance and clarity to employers, workers and other people associated with workplaces to enable them to implement effective occupational safety and health processes, policies and procedures and to develop safe systems of work.

**Question 5: Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?**

No, there is no need to include principles in the Act if the objectives are clear and the intention of the legislation is clearly espoused in its provisions. The Act itself should be the base document which sets out the overarching outcome aims related to occupational safety and health in its entirety.

The Act should refer to the application of a test of reasonable practicability to establish the basis of the duties to be created by the Act. The only principles which could enhance the objectives of the Act are those which define risk management philosophies.

Practically founded risk management principles to underpin the doctrines of the legislation can provide context and greater focus on the preventative and proactive management initiatives which the Act supports.

More technically complex legal principles will create confusion and unnecessary complexity. The use of the "precautionary principle" is particularly unsuitable for inclusion in the model OHS Act.

If the objectives of the Act are adequately clear of the intention and desired outcomes there is no need to specify potentially confusing principles which the average Australian employer and employee may require legal advice to interpret. That would be contrary to the intention of the model legislation to make occupational safety and health legislation clearer and more readily applicable in practice, more simple and ultimately more "user-friendly" for workplaces.

Inclusion of principles would also make interpretation of the Act and issues of compliance more complicated than the current legislation in most jurisdictions.



**Question 6: Are there any other issues that should be considered in the legislative approach of a model OHS Act?**

The structure of the model OHS Act should be in the first instance a simple and transparent model which has worked successfully in a number of Australian jurisdictions.

It is appropriate to adopt a performance based system, with the focus on achievable outcomes, adequate but not excessive prescription around the means of achieving the outcome, and practical guidance material that supports and facilitates compliance.

Specifically there should only be 4 tiers of OHS related legislation and documentation as follows:

1. An overarching Act which sets out the broad framework
2. Regulations (in the form of a general application Regulation and industry specific Regulations, which can include adopted Australian National Standards developed by an independent tripartite body (such as the ASCC)).
3. Codes of Practice (which have evidentiary status only – to set out good or best practice, proof of compliance with the Code should give an excellent case for compliance with the provisions in the Regulations)
4. Guidance Notes and Materials (to provide guidance and examples to assist parties within the system to meet the requirements of the Act, Regulations and Codes of Practice. Pro forma documents for more general application should be developed and made available to employers for adoption to establish a base standard for compliance).

There should be no introduction of new subordinate types of legislation such as orders or directions or similar.

There should be boundaries applied to the making of regulations and only where there is no other avenue for ensuring compliance with an OHS matter should regulations be developed. Specific regard should be had to the principles of regulation making endorsed by the Council of Australian Governments (COAG) and the Commonwealth Office of Regulation Review (ORR):

Regulations should be:-

1. the minimum necessary to achieve an objective;
2. not unduly prescriptive,
3. integrated and consistent with other laws;
4. designed to minimise the compliance burden imposed;
5. accessible, transparent and accountable;
6. communicated effectively; and
7. enforceable.

## **Chapter 2 Scope, Application & Definitions**

### **2.1 INDUSTRY SECTORS**

**Question 7: Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety regulation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation.**

No, the model OHS Act should attempt to cover all areas of work, including mining and dangerous goods. Industry specific regulations should be enacted as subordinate legislation to the overarching OHS Act and the demonstrated industry appetite for national harmonisation of mining and other industry law gives a good basis for its inclusion in a more comprehensive system.

The overarching objectives of the Act should be aimed at all workplaces and industry specific regulations should be based on agreed industry practice and standards.

**Question 8: Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (eg could industry specific issues be dealt with in regulations, codes of practice and guidance material under the model OHS Act?).**

Yes, this alternative is practical and the most suitable approach to the inclusion of all workplaces. Extensive consultation with industries to be covered by specific regulations should occur to ensure adequate consideration of all relevant issues and to foster commitment from industry participants.

Codes of Practice aimed at industry specific issues have the potential to be very helpful. They are a useful tool to provide varying levels of compliance detail to a legislative or regulatory requirement. Some codes are losing the original focus of providing compliance options by articulating only one way of achieving a particular outcome. Currently there are a number of national and state codes of practice which are large, complex and very technically orientated.

Detail limited to principles, particularly in respect to a risk management approach with more supporting guidance, is a sound alternative.

Wherever possible a code of practice aimed at an industry specific issue should provide a risk management tool appropriate for use by all employers in that industry. Many employers also readily identify with, and implement, national standards and the tripartite development of national standards in consultation with industry will enable OHS messages to be delivered in subordinate legislation and supporting documents.

**Question 9: Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdiction? If so, what should be provided?**

Yes. If industry specific regulations are to be implemented as part of the model OHS Act then provision will need to be made for the regulation of that legislation by state agencies. Any areas of regulatory overlap will need to be identified and removed to reduce the burden of red tape on businesses attempting to comply with aspects of legislation with various different agencies.

Government bodies should be required to manage occupational safety and health regulation with reference to the objectives of the Act, improve efficiency, clarity and achieve the desired outcomes. A Memorandum of Agreement outlining the commitment of all relevant arms of government should be initiated to facilitate better coordination.

## **2.2 WORKPLACES AND NON-WORKPLACES**

**Question 10: Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?**

Duties of care imposed on persons associated with work and a workplace should extend only to those issues which are workplace issues and within the control of persons who are in control of the workplace. This means the duties should be attached to the work to be performed, the persons carrying out the work and those who may be directly affected by the work by virtue of their employment or physical proximity to the workplace.

Visitors to a workplace should have a duty to follow safety directions and an employer should have the power under the model OHS Act to ask people who are not compliant with safety

procedures in the workplace to leave the workplace. There is currently provision made for this in the WA legislation as follows:

**57A. Visitors to comply with directions**

(1) *In this section —*

**“authorised person”**, in relation to a workplace, means —

- (a) *an employer of any employee at the workplace, including a person that is an employer by operation of section 23D, 23E or 23F;*
- (b) *any self-employed person carrying out work at the workplace; and*
- (c) *a person at the workplace who has the management and control of —*
  - (i) *the workplace; or*
  - (ii) *the work being carried out at the workplace;*

**“conduct”** includes a failure to do a particular act or thing;

**“employee”** includes a person who is an employee by operation of section 23D, 23E or 23F.

(2) *Subsection (3) applies if —*

- (a) *a person (a “visitor”) is at a workplace otherwise than in the capacity of —*
  - (i) *an employer;*
  - (ii) *an employee;*
  - (iii) *a self-employed person; or*
  - (iv) *a person having control, to any extent, of the workplace;**and*
- (b) *an authorised person believes on reasonable grounds that —*
  - (i) *any conduct of the visitor at the workplace; or*
  - (ii) *the presence of the visitor in the workplace or in a particular part of the workplace,**constitutes a hazard to any person.*

(3) *The authorised person may direct the visitor —*

- (a) *to immediately cease engaging in the conduct concerned; or*
- (b) *to immediately leave the workplace and not to return as a visitor to the workplace until permitted by the authorised person to do so.*

(4) *A person who, without reasonable excuse, fails to comply with a direction given to the person under subsection (3) commits an offence.*

A similar provision should be included in the model OHS Act.

In the first instance it should be the nexus to the workplace and work activities which creates a duty of care, rather than a convoluted allocation of obligations based on wider definitions. Most Australian jurisdictions define duty holders based on their connection to the control over the workplace, plant, equipment, work activity or work systems. This is an appropriate allocation of duties and the model OHS Act should identify duty holders and general duties of care based on the link to the conduct of work and the workplace.

**Question 11: Should general duties of care under the model OHS Act be extended to members of the public? If so, how?**

Yes, in limited circumstances there should be a duty of care to people who are not employees who are either at the workplace or would be affected by the carrying out of the work or the condition of the workplace. As a guiding limitation, however, duties should be applied to people who are employees at the workplace and any person carrying out work in that workplace (whether employees or not).

General tort law assists in providing the basis for a general duty of care to all persons who may enter the workplace. Those undertaking work or maintaining the workplace should be required to identify those people using a standard test of foreseeability and make suitable arrangements to protect their health and safety. There is no need to extend the duty beyond a general duty of care and employers and others should be given the opportunity to apply a standard of care and processes which are reasonably practicable and reasonably necessary in their particular circumstances.

Protection of the health and safety of people in the workplace or vicinity of the workplace is appropriate under OHS legislation but there is no need in the general ambit of the model OHS Act to consider including protection of property and the environment. These issues should be covered under either specific regulation covering, for example, dangerous goods, plant and substances, or in altogether alternative legislation aimed at protecting property and the environment.

Consistency and harmony with other types of actions which may arise out of the same OHS incident is critical in ensuring that there is no overlap or complexity with respect to determining the extent of a party's responsibilities.

Mutual responsibility should be the focus of the provisions in the model OHS Act and issues relating to contributory negligence, control and other matters which could affect an employer's ability to protect the safety and health of people should be taken into account in enforcement actions.

### **2.3 RESPONDING TO CHANGE**

**Questions 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?**

Yes, the scope of the principal Act should be so broad as to cover all work situations which may arise in the future and it is in specific regulations that particular work arrangements can be identified as being included or exempt from the provisions of the legislation.

Defining the duty holders and their duties will ensure that any amendment or updating of concepts and arrangements can be accommodated with adequate parliamentary scrutiny and industry consultation.

Better compliance from relatively new players in the OHS sphere can be achieved if adequately detailed industry specific material is provided to employers and employees in those industries and via targeted information dissemination by state and commonwealth regulators on joint OHS initiatives.

Information regarding the inter-relationship between conflicting or complementary demands on businesses from other legislation should be provided to employers by regulators. This information should include references to employment protection, privacy, disability and discrimination legislation which may impact on an employer's OHS compliance activities.

Codes of practice should be the method for setting out the practical guiding principles in identifying and addressing the specific safety concerns and further detailed guidance should be provided to assist small employers or those requiring a more information on how to meet specific requirements. The guidance material is not subject to the same political rigour and can be amended quickly and easily to ensure ongoing relevance.

There are few employers, employees and other parties who would willingly compromise their safety and the safety of others in their workplace if they were aware of all that was required of them and they were given practical information on how to achieve compliance. It is a lack of certainty, resource and knowledge which is often the reason for non-compliance by employers.

**Question 13: Are there current or emerging hazards and risks that are not effectively addressed in general duties of care? If so, how should they be provided for under a model OHS Act?**

All of the jurisdictions currently have regulation to various degrees of prescription which address a broad and varied set of work arrangements and activities.

The model OHS Act should deliver a broad and general framework with supporting industry or activity specific regulations and guidance material. At the stage of development of the subordinate legislation a tripartite state or territory based body should obtain the views of employers, employees and other interested parties as to the topics for inclusion and which areas require greater prescription. The Act should facilitate this process.

Australian industry structures, work performed and markets have changed significantly in recent years with the advancement of technology and changing global expectations. Regulations should respond to these changes appropriately and should not affect or limit the natural and desirable evolution of business practices in Australia.

Consequently, a prescriptive and detailed response to emerging hazards and risks should be reserved only for the management of prohibitive actions or where widely recognized specific standards are to be enforced. An example of an area where prescription to a very high level is acceptable and desirable is in relation to exposure to toxic substances and atmospheric contaminants.

Business innovation and a performance improvement drive will be stifled by over prescription of aspects of workplace operation and workplace responsibility for managing and reducing risks and hazards as they present. Self management of risks and flexibility in achieving safety outcomes should be supported by the model OHS regulatory scheme.

As CCI has submitted to various other occupational safety and health reviews recently, CCI recommends the Panel be cognisant of the recommendations of the Taskforce on Reducing Regulatory Burdens on Business in the review of the existing regulations and developing new regulation.

CCI recommends regulation be based on the following principles to address a particular OHS concern:

- *It should promote the safety and health of persons at work;*
- *It should provide for a practical and flexible approach to safe work*
- *It should focus on outcomes not processes*
- *It should recognise OSH as the mutual responsibility of employers and employees*
- *It should provide for minimum government involvement*

New hazards and risks should be addressed via the usual process for the introduction and review of regulation as the need arises and it may be an initiative of the regulator to ask industry participants to provide periodic feedback as to any new or emerging hazards or risks.

Ultimately, it is the employer and employee who best know the workplace, workforce and work activities carried out and who are best placed to highlight any areas of concern to the regulators and parliaments.

Consultation is critical in a dynamic and evolving area such as OHS and it is the expertise of those who are carrying out the work, controlling the work, designing and manufacturing the plant and equipment and otherwise actively participating in the occupations which give rise to particular hazards and risks who should collaboratively identify and aim to address the areas of concern. The model OHS Act should facilitate this.

## 2.4 DEFINITIONS

**Question 14: Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?**

Critical terms should be defined in the model OHS Act but only to such an extent as is required to achieve the framework to be established under the legislation.

Specific terms which may be subject to change with changing workforce structures such as “employer”, “worker”, and “contractor”, terms such as “workplace”, “reasonably practicable” should also be defined in this way.

Substantive definitions which would be appropriate are:

Employer – a person (including a body corporate) who employs one or more people to carry out work under a contract of service or training,

Worker – a person who is engaged to carry out work under a contract of service or training and can include a service contractor or the employees of service contractors

Independent Contractor – a person who enters a contract for service with an employer to carry out work at a workplace, where the work is not in the usual course of business of the employer

Service Contractor – a person who enters a contract for service with an employer to carry out work at a workplace, where the work is in the usual course of business of the employer

Person – means a natural person or body corporate

Workplace - means any location at which a person is required to carry out work or attend in the course of their employment

Reasonably practicable – should be defined as in s3 of the WA Act:

**“practicable”** means reasonably practicable having regard, where the context permits, to —

- (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;
- (b) the state of knowledge about —
  - (i) the injury or harm to health referred to in paragraph (a);
  - (ii) the risk of that injury or harm to health occurring; and
  - (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health;

*and*

- (c) *the availability, suitability, and cost of the means referred to in paragraph (b)(iii);*

Secondary definitions to address other specific concepts should be developed based on the specific provisions to be included in the model OHS Act and regulations to achieve the objectives of clarity and effectiveness. Industry should be consulted on the scope and meaning of definitions to be included.

It will be counterintuitive to create a new set of definitions under the model OHS Act if the intention is not to adopt these definitions in other legislation which may play a complementary or cumulative role in relation to the OHS obligations.

It is necessary to develop definitions which can be applied across all jurisdictions and across all legislation which may deal with the same class of person and similar duties. More specific delineation of a broad class of, for example, contractors in the construction industry, could be covered in subordinate legislation and guidance material. The Act itself should be so broad as to capture the entire class of persons for which it is designed to provide a framework of occupational safety and health obligations, rights and processes.

#### **Question 15: Are there any other issues relating to the scope, application and definitions of a model OHS Act?**

There must be duties imposed on employees and other people in the workplace under the model OHS Act as is the case in areas of law outside of workplace circumstances. Breaches of these duties by employees should give the employer the discretion to implement performance management or termination processes to reflect the seriousness of failing to meet OHS obligations. Taking such action should not expose the employer to liability for breaches of other legislation, such as industrial or anti-discrimination laws.

Provisions in the model OHS Act should facilitate such a process.

Specifically, OSH issues should not become industrial tools and the legislation should promote a cooperative and non-adversarial identification, control and resolution of workplace OHS hazards, risk and issues.

Please also see comments in Question 25.

### **Chapter 3 Duties of Care – Who owes them and to whom?**

#### **3.2 CONTROL**

##### **Question 16: Should the model OHS Act include a “control” test or definition? If so, why and what should it be?**

Yes, the model OHS Act should include a clear definition of control and should include more specific “control” tests for specific industries (where these are developed by the relevant industry participants) in subordinate legislation where this is appropriate. This should be similar to the definition of “person in control” as provided in s22 of the WA Act:

#### **22. Duties of persons who have control of workplaces**

- (1) *A person that has, to any extent, control of—*
- (a) *a workplace where persons who are not employees of that person work or are likely to be in the course of their work; or*

- (b) *the means of access to and egress from a workplace,*  
*shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards.*
- (2) *Where a person has, by virtue of a contract or lease, an obligation of any extent in relation to the maintenance or repair of a workplace or the means of access to and egress from the workplace, the person shall be treated for the purposes of subsection (1) as being a person that has control of that workplace or that means of access or egress.*
- (3) *A reference in this section to a person having control of any workplace or means of access to or egress from a workplace is a reference to a person having control of that workplace or that means of access or egress in connection with the carrying on by that person of a trade, business or undertaking (whether for profit or not).*
- [(4)-(6) *repealed*]
- (7) *This section does not apply to a person whose duties are set out in section 20.*  
*[Section 22 inserted by No. 30 of 1995 s. 16; amended by No. 51 of 2004 s. 23, 80 and 103.]*

Control for the purposes of the general duty of care should be defined to include the clearest possible interpretation with recognition that a chain of control may be relevant to determining where obligations lie.

The judgement of Heenan J in the decision ***Reilly v Tobiassen [2008] WASC 6*** relates specifically to an interpretation of the issue of “control” in a complicated construction chain of contracting. In this case the employee working director of a subcontractor was fatally injured when cast concrete panels collapsed.

Specifically, Judge Heenan stated:

*“...the policy of the legislation prompts an expansive meaning to be given to that term so that any person whose influence amounts to 'control' has a duty to act, so far as he, she or it can, to ensure safe working practices. Indeed this expansive interpretation is positively signalled by the section itself because s 22(7), already mentioned, expressly excludes an employee from the operation of the section. This signals that, but for that exclusion, an employee who does have a measure of de facto control would otherwise bear the duties which the section imposes. In my view, within the context of s 22(1)(a), 'control' means the ability of any person to whom the section applies (that is, who is constructing the building and who is not an employee) to use the influence associated with that control to install, maintain and enforce appropriate safe working practices and to avoid ascertainable hazards so far as is practicable.*

Control should be defined so as to enable participants in the OHS system to identify the extent of their obligations and to make identification of duty holders easier. The relevance of control to a particular circumstance should be determined based on the particular facts of the situation and should not of itself be a determining factor in liability issues.



**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?**

Control should play a proportionate role in determining who is a duty holder and the type of duty which should apply in a particular circumstance.

The overall situation must be analysed to determine whether a particular person had the requisite control to have influenced the particular risk, hazard or adverse outcome which eventuated. Control held by a party where the ability to exercise that control is limited, or if there are other relevant matters which impact on the guiding principles of culpability in relation to more serious offences, must be taken into account.

Parties must have the opportunity to refute a case against them and control may be a relevant factor for determination by the decision maker.

In relation to plant and equipment, there should be emphasis placed on the mutual responsibility of all parties using and maintaining plant, including employees.

Duties should be placed on designers, manufacturers and suppliers of plant, however, these must be tempered with the test of what is “reasonably practicable” in the circumstances and unpredictable outcomes as a result of the use of plant should not be their responsibility per se.

The test of control in determining obligations should take into account who has actual influence. The costs associated with risk management by parties who have the ability to influence safety outcomes is a factor in most jurisdictions in determining whether the duty of care has been met, and this is appropriate.

In the current business environment, where labour is scarce in many industries and there is a greater reliance on outsourced workers, contractors and external parties to achieve business productivity, greater focus should be on the control of all parties with an influence over risks and hazards. This may mean that the employees of a contractor have control and influence over safety issues which traditionally may have been under the control and supervision of the principal employer’s work site manager.

Control tests should be based on those with actual control over the safety and health risk and circumstance and should not be limited by other principles which may affect the control chain (such as whether an obligation has been entered into or waived under a contract).

CCI strongly opposes modelling the model OHS Act on the NSW OHS legislation as this jurisdiction has a distorted concept of “control” and through recent decisions in the NSW Commission has demonstrated a lack of assessment of the true control elements relevant to the particular facts of the prosecution. Legal ability to exercise control and reasonable practical ability to exercise control should be assessed as relevant matters in determining the true control of the alleged offender.

CCI specifically rejects the application of a reversal of the onus of proof in the model OHS Act.

**Question 18: Should control be able to be delegated or relinquished? If so, in what circumstances and should be the legal effect of doing so?**

Where it is in the ordinary course of doing business or carrying out work that control over aspects of tasks is relinquished or delegated there should be no negative connotation to this action and the relevance of the control to the particular circumstance should be the focus.

If there is no intention on the part of the duty holder who delegates or relinquishes control to evade responsibility but rather it is a consequence of normal and legitimate business dealings then this should not give rise to any expectation that control has been relinquished or delegated for any untoward reason. Defences should be available to parties who are found to have control over a particular risk or hazard which has given rise to an alleged breach of a provision of the legislation.

Where business practices offend the concept of obligation which is intended to apply to legislative provisions, the test of control should be even more relevant in determining where responsibilities lie.

### **3.3 SHARED RESPONSIBILITIES**

#### **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?**

Yes, wherever it is appropriate and possible to identify particular duty holders who may share or have multiple responsibilities, this should be done in the Act and their responsibilities should be clarified. Actual assessment of the facts of a circumstance which may arise before the judiciary will require interpretation as to the application of such provisions.

Clarity around who is a duty holder in particular circumstances is therefore critical for effective identification OHS responsibilities. Defining those duties will depend largely on the tests of control and the assessment of the particular risk and adverse outcomes and the model OHS Act should not attempt to identify and define every possible scenario. This would in fact make application of the legislation difficult and complex beyond what is suitable for achieving the objectives of the Act.

The focus of clarifying duty holders and their responsibilities should be to achieve the objectives of better safety performance and management of risks and hazards in the workplace and the Act should be drafted with this objective in mind.

Where an employer has attempted to manage an identified risk through the sensible employment of a contractor with expertise in the area of risk, this should be seen as a positive attempt to meet safety responsibilities and not a relinquishment of control. How the employer utilises, manages and acts upon the advice from the contractor is again an area for assessment as to how “reasonably practicable” the action to control the risk was.

Employers should not be penalised for having inadequate resource to manage all risks, and where another person carries on a business with professed expertise in addressing certain OHS risks and hazards, engaging such a person without having to personally acquire all of their expertise makes good business sense.

It is counterintuitive to make it pointless for employers to attempt to manage risks through the engagement of external experts if they will be held accountable for that risk regardless of their efforts to contain it. Reasonable practicability must be assessed in every circumstance, including the engagement of experts.

Every case should be assessed on its merits and where an employer has, as part of its overall safety approach, chosen to employ an expert to address a particular area of risk which requires expertise, this should be positively taken into account when determining the employer’s liability and should be considered in the context of the employer’s attempt to comply with the requirements of the legislation. Employers should of course be required to manage all areas of workplace safety in the most appropriate manner, and outsourcing of all risk identification and management is not suitable in any workplace.

It must be determined how reasonably practicable it was in the particular circumstances for the employer to manage the risk without external expertise, having regard to the type of expertise, normal business standards, the resources of the employer in terms of staff and finances, and the nature of the risk and potential degree of harm.

### 3.3 WORK RELATIONSHIPS

#### **Question 20: Is primary reliance on employment relationships a valid basis for framing safety obligations?**

Yes, the employment relationships which affect or influence the particular circumstance which gives rise to hazards or risks to be managed should be the basis for framing safety obligations.

The overall scheme of the legislation should reflect the need to cover all relevant persons and the recent decision of Heenan J in the WA case of *Reilly -v- Tobiassen* at pp31 highlights the scope of the WA legislation which should be adopted by the model OHS Act:

*“The overall scheme of the Act, therefore, is to impose specified duties for the exercise of care to ensure safety and health at work and, so far as is practicable, to ensure the safety or health of other persons, whether employees or not, who might be adversely affected by work undertaken by the person on whom the duty is cast or by any hazard arising from, or increased by, the work or system of work arising from the activities of the person on whom the duty is cast. Therefore, in marked distinction to the issues which arise in determining whether a particular defendant is vicariously liable for the actions of some third person - the liability existing if the person is an employee but, with some exceptions, not existing if a person is an independent contractor - liability for breach of a duty under this Act can arise for both an employer or an employee and, for that matter, for a self-employed person or a person having control of a workplace.*

*... Clearly, the intention of the legislature is to impose duties comprehensively upon all persons at workplaces or construction sites, or persons associated with them, whose actions or activities might affect the health, safety or welfare of others or which might expose others to hazards. Unlike the situation arising in cases of alleged vicarious liability, there is no 'liability-free zone' for different categories of persons associated with a workplace or a construction site whose activities might affect health, safety, welfare or give rise to, or increase the risk of, exposure to hazards, under this legislation.”*

The model OHS Act provisions should facilitate such an interpretation.

#### **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?**

The current practice in Western Australia appears to be providing adequate clarity to all potential parties in the occupational safety and health system and would provide a suitable basis for model OHS duties to people other than employees. WA currently uses the term “employee” rather than “worker” however and in recognition of the desirability to harmonise occupational safety and health legislation with other legislation (such as workers’ compensation and industrial laws), using the word “worker” is appropriate.

The term “Worker” includes employees, apprentices and trainees. And a separate general defining division (modelled on Part III Div 3 of the WA Act) outlining certain workplace situations which are also to be treated as employment for determining obligations of an employer, contractor and other persons should be included.

See also the extract from *Reilly v Tobiassen* in Question 20.

Part III Division 3 of the WA Act sets out clear guidance to the extension of modern employment relationships to include contractors and labour hire employees under OHS duties. The model OHS Act should contain similar clarity.

### **Division 3 — Certain workplace situations to be treated as employment**

*[Heading inserted by No. 51 of 2004 s. 8.]*

#### **23C. Terms used in this Division**

*In this Division —*

**“business”** includes the operations of a public authority;

**“public authority”** means —

- (a) a Minister of the Crown acting in the Minister’s official capacity;
- (b) a State Government department, State trading concern, State instrumentality or State agency; or
- (c) any other body or person, whether corporate or not and including a local government, that under a written law administers or carries on a social service or public utility for the benefit of the State or a part of the State.

*[Section 23C inserted by No. 51 of 2004 s. 8.]*

#### **23D. Contract work arrangements**

- (1) This section applies where a person (the **“principal”**) in the course of trade or business engages a contractor (the **“contractor”**) to carry out work for the principal.
- (2) Where this section applies, section 19 has effect —
  - (a) as if the principal were the employer of —
    - (i) the contractor; and
    - (ii) any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned,in relation to matters over which the principal has the capacity to exercise control; and
  - (b) as if —
    - (i) the contractor; and
    - (ii) any person referred to in paragraph (a)(ii),were employees of the principal in relation to matters over which the principal has the capacity to exercise control.
- (3) Where this section applies, the further duties referred to in subsection (4) apply —
  - (a) as if the principal were the employer of —
    - (i) the contractor; and
    - (ii) any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned;and
  - (b) as if —
    - (i) the contractor; and
    - (ii) any person referred to in paragraph (a)(ii),

were employees of the principal.

- (4) The further duties mentioned in subsection (3) are —
- (a) the duties of an employee under section 20; and
  - (b) the duties of an employer under sections 23G(2) and 23I(3).
- (5) An agreement or arrangement is void for the purposes of this section if it purports to give control to —
- (a) a contractor; or
  - (b) a person referred to in subsection (2)(a)(ii),
- of any matter that —
- (c) comes within section 19 or 23G(2); and
  - (d) is a matter over which the principal has the capacity to exercise control,
- but this subsection does not prevent the making of a written agreement as mentioned in section 23G(3).
- (6) A purported waiver by a contractor of a right that arises directly or indirectly under this section is void.
- (7) Nothing in this section derogates from —
- (a) the duties of the principal to the contractor; or
  - (b) the duties of the contractor to any person employed or engaged by the contractor.

[Section 23D inserted by No. 51 of 2004 s. 8.]

### **23E. Labour arrangements in general**

- (1) This section applies where —
- (a) a person (the “**worker**”) for remuneration carries out work for another person (the “**person mentioned in subsection (1)(a)**”) in the course of trade or business;
  - (b) that person has the power of direction and control in respect of the work in a similar manner to the power of an employer under a contract of employment;
  - (c) there is no contract of employment between the worker and that person; and
  - (d) neither section 23D nor section 23F applies.
- (2) Where this section applies, section 19 has effect as if —
- (a) the person mentioned in subsection (1)(a) were the employer of the worker; and
  - (b) the worker were the employee of that person,
- in relation to any matter that —
- (c) comes within section 19; and
  - (d) is a matter over which that person has the capacity to exercise control.
- (3) Where this section applies, the further duties referred to in subsection (4) apply as if —
- (a) the person mentioned in subsection (1)(a) were the employer of the worker; and
  - (b) the worker were the employee of that person.

- (4) *The further duties mentioned in subsection (3) are —*
  - (a) *the duties of an employee under section 20; and*
  - (b) *the duties of an employer under section 23I(3).*
- (5) *An agreement or arrangement is void for the purposes of this section to the extent that it purports to give control to the worker of any matter that —*
  - (a) *comes within section 19; and*
  - (b) *is a matter over which the person mentioned in subsection (1)(a) has the capacity to exercise control.*
- (6) *This section applies despite anything to the contrary in, or any inconsistent provision of, an agreement, whether made orally or in writing.*
- (7) *A purported waiver by a worker of a right that arises directly or indirectly under this section is void.*

*[Section 23E inserted by No. 51 of 2004 s. 8.]*

### **23F. Labour hire arrangements**

- (1) *In this section —*  
**“agent”** —
  - (a) *means a person that carries on a business of providing workers to carry out work for clients of the person; and*
  - (b) *includes a group training organisation as defined in section 7(1) of the Industrial Relations Act 1979;***“worker”** *includes an employee or a contractor.*
- (2) *This section applies where, under a labour hire arrangement, work is carried out for remuneration by a worker for a client of an agent (the “client”) in the course of the client’s trade or business.*
- (3) *A labour hire arrangement exists where —*
  - (a) *an agent has for remuneration agreed with the client to provide a worker to carry out work for the client;*
  - (b) *there is no contract of employment between the worker and the client in relation to the work;*
  - (c) *there is an agreement (which may be a contract of employment) between the worker and the agent as to the carrying out of work including in respect of remuneration and other entitlements; and*
  - (d) *that agreement applies to the carrying out of the work by the worker for the client.*
- (4) *Where this section applies, section 19 has effect as if —*
  - (a) *each of the agent and the client were the employer of the worker; and*
  - (b) *the worker were an employee of each of the agent and the client,**in relation to any matter that —*
  - (c) *comes within section 19; and*
  - (d) *as regards —*
    - (i) *the agent, is a matter over which the agent has the capacity to exercise control; or*

- (ii) *the client, is a matter over which the client has the capacity to exercise control.*
- (5) *Where this section applies, the further duties referred to in subsection (6) apply as if —*
  - (a) *each of the agent and the client were the employer of the worker; and*
  - (b) *the worker were an employee of each of the agent and the client.*
- (6) *The further duties mentioned in subsection (5) are —*
  - (a) *the duties of an employee under section 20; and*
  - (b) *the duties of an employer under section 23I(3).*
- (7) *This section applies despite anything to the contrary in, or any inconsistent provision of, an agreement, whether made orally or in writing.*
- (8) *A purported waiver by a worker of a right that arises directly or indirectly under this section is void.*

*[Section 23F inserted by No. 51 of 2004 s. 8.]*

Volunteers and other unpaid workers should be considered “other persons” for the purposes of dealing with obligations for safety and health and should be covered under the general duty of care provisions.

Apprentices and trainees should be considered “workers” or employees and specifically included in the definition as such.

**Question 22: Is there a broader concept that more effectively covers the various work arrangements.**

Please see comments at Q21.

**3.4 DUTIES OF EMPLOYERS**

**Question 23: How and to what extent should the model OHS Act specify an employer’s duty of care?**

The duties of employers should be defined as per section 19 of the WA Act, which sets out specific duties related to workplace conditions, training and supervision of employees, consultation, personal protective equipment, plant and substances. These duties have been developed by the active collaboration of the representative parties to the tripartite Commission for Occupational Safety & Health in WA.

**19. Duties of employers**

- (1) *An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the “employees”) are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall —*
  - (a) *provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards;*
  - (b) *provide such information, instruction, and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards;*

- (c) *consult and cooperate with safety and health representatives, if any, and other employees at the workplace, regarding occupational safety and health at the workplace;*
  - (d) *where it is not practicable to avoid the presence of hazards at the workplace, provide the employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and*
  - (e) *make arrangements for ensuring, so far as is practicable, that —*
    - (i) *the use, cleaning, maintenance, transportation and disposal of plant; and*
    - (ii) *the use, handling, processing, storage, transportation and disposal of substances,**at the workplace is carried out in a manner such that the employees are not exposed to hazards.*
- (2) *In determining the training required to be provided in accordance with subsection (1)(b) regard shall be had to the functions performed by employees and the capacities in which they are employed.*

Duties in the model OHS Act should reflect these recognised, well established and tested, and very appropriate principles applicable to an employer's liability. The scope of the duty in WA was referred to in the recent District Court of WA case of *Liberta v Canute (WA) Ltd* [2006]WADC196 where DCJ Stavrianou stated:

*"The duty of an employer is to take reasonable care to avoid exposing its employees to unnecessary risk of injury (**Bankstown Foundry Pty Ltd v Braistina** [1986] HCA 20; (1986) 160 CLR 301 at 307-8; **Hamilton v Nuroof WA Pty Ltd** [1956] HCA 42; (1956) 96 CLR 18 at 25). The employer is not the insurer of the safety of the employee and the duty is not an absolute one (**Bankstown Foundry Pty Ltd v Braistina** (supra) at 307 and 314).*

*In order to establish liability there are four elements which need to be proved:*

- "1. That there was a risk of injury which was reasonably foreseeable. (The foreseeability issue).*
- 2. That there were reasonably practicable means of obviating the risk. (The preventability issue).*
- 3. That the employee's injury belonged to the class of injuries to which the risk exposed him. (The causation issue).*
- 4. That the defendant's failure to eliminate the risk showed a want of reasonable care for the employee's safety. (The issue of reasonableness)."*

The provisions of the model OHS Act should facilitate such an interpretation.

#### **Question 24: To whom should these duties be owed?**

Employers should have duties to their employees, apprentices, trainees, contractors and any other person who performs work at the workplace and could therefore be adversely affected in the workplace as a result of an employer's failure to meet the requirements set out in section 19 of the WA Act.

Please also see comments in Questions 20-23.



### 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?

The duties of care to be met by a worker should reflect the mutual obligation of everyone in the workplace.

Under the model OHS Act workers should be required to work consistently applying the work processes, training, instructions and experience they have in order to meet their duty of care. Non-compliance with an employer's safety rules, directions, standards, procedures and work systems must be a breach of the employee's duty of care and persuasive evidence should the employer be prosecuted if an injury ensues.

Workers should be required to take reasonable care for their own safety and to avoid adversely affecting the health and the safety and health of any other person through any act or omission similarly to s20 of the WA Act.

#### 20. *Duties of employees*

- (1) *An employee shall take reasonable care —*
  - (a) *to ensure his or her own safety and health at work; and*
  - (b) *to avoid adversely affecting the safety or health of any other person through any act or omission at work.*
- (2) *Without limiting the generality of subsection (1), an employee contravenes that subsection if the employee —*
  - (a) *fails to comply, so far as the employee is reasonably able, with instructions given by the employee's employer for the safety or health of the employee or for the safety or health of other persons;*
  - (b) *fails to use such protective clothing and equipment as is provided, or provided for, by his or her employer as mentioned in section 19(1)(d) in a manner in which he or she has been properly instructed to use it;*
  - (c) *misuses or damages any equipment provided in the interests of safety or health; or*
  - (d) *fails to report forthwith to the employee's employer —*
    - (i) *any situation at the workplace that the employee has reason to believe could constitute a hazard to any person that the employee cannot correct; or*
    - (ii) *any injury or harm to health of which he or she is aware that arises in the course of, or in connection with, his or her work.*
- (3) *An employee shall cooperate with the employee's employer in the carrying out by the employer of the obligations imposed on the employer under this Act.*

Although there are specific employee responsibilities in the above WA provisions, it is ultimately the employer who bears the responsibility for events at the workplace and they should therefore be able to respond to breaches of employee duty with an appropriate disciplinary approach which is independent of requirements in industrial relations legislation.

There must be duties imposed on employees and other people in the workplace under the model OHS Act as is the case in areas of law outside of workplace circumstances. Breaches

of these duties by employees should give the employer the discretion to implement performance management or termination processes to reflect the seriousness of failing to meet OHS obligations. Taking such action should not expose the employer to liability for breaches of other legislation, such as industrial or anti-discrimination laws.

Provisions in the model OHS Act should facilitate such a process.

**Question 26: Should the model OHS Act include duties of care for persons who are not performing work (eg visitors to a workplace, members of the public)? If so, what should the duties be?**

Yes, under the model OHS Act all persons should have a duty to protect the safety and health of every other person in a workplace as far as is reasonably practicable in the circumstances. Such a provision should make it an offence for a person to knowingly or recklessly engage in conduct that places another person at a workplace in danger of serious injury.

A good example which can be mirrored in the model OHS Act is found in s21 of the WA Act.

*21. Duties of employers and self-employed persons*

- (1) *A self-employed person shall take reasonable care to ensure his or her own safety and health at work.*
- (2) *An employer or self-employed person shall, so far as is practicable, ensure that the safety or health of a person, not being (in the case of an employer) an employee of the employer, is not adversely affected wholly or in part as a result of —*
  - (a) *work that has been or is being undertaken by —*
    - (i) *the employer or any employee of the employer; or*
    - (ii) *the self-employed person;*
  - or*
  - (b) *any hazard that arises from or is increased by —*
    - (i) *the work referred to in paragraph (a); or*
    - (ii) *the system of work that has been or is being operated by the employer or the self-employed person.*

See also comments in Q25.

### **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?**

No, it should remain outside the ambit of the OHS legislation to address workplace and business arrangements in terms of staff and performance responsibilities. The employer should be responsible for allocating OHS responsibilities to suitably qualified, skilled and experienced staff and there is no place for introducing a mandated position with OHS responsibilities in modern workplaces.

Mandatory training should not be introduced but training aimed at assisting employers in training staff who are given OHS responsibilities to enable them to meet a minimum level of qualification should be made available. This would be a better approach for achieving the

objectives of the Act in ensuring that safety and health responsibility is recognised to be the responsibility of all persons in a workplace and not just one person who is given the mantle of “OHS officer” by virtue of a statutory requirement.

The issues of control and influence as well as the nature of the workplace and the work structure should dictate who carries OHS responsibilities in the workplace and businesses should not be forced to allocate duties based on a generic title.

Voluntary appointment of an OHS officer in the workplace, and access to various levels of training to assist OHS officers in identifying hazards, managing risks and better compliance will have a better practical effect for most workplaces.

**Question 28: What should the liabilities of such appointed persons be if the responsibilities are not met?**

The mandatory appointment of specific duty holders is not supported.

Responsibilities for OHS should be allocated based on the structure of the particular workplace and its practices. Liabilities should be directly related to true responsibilities which are attached to a person’s ability to control and influence OHS outcomes and not due to an artificial title.

See comments in Q 27.

**Question 29: what should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?**

As stated in answer to Question 28, CCI does not support the mandatory appointment of specific duty holders.

The carrying out of tasks to achieve compliance with the duties of employers may from time to time be delegated to staff members who are capable of undertaking such tasks. The employer remains the duty holder and has not abdicated their position of ultimate control over the workplace or the performance of duties by their staff.

Employers are vicariously liable for most of the actions of their employees and principles of mutual obligation apply to the employment relationship. Any employee charged with performing tasks associated with the employer’s attempts at compliance with OHS requirements does so as part of their employment obligation.

Responsibilities for OHS should take into account this relationship and employers recognise that they do not “hand over” their responsibilities when their employee performs work on their behalf. Employers recruit staff to be allocated OHS responsibilities based on their business requirements and most responsible employers do not see this as a relinquishment or sharing of their responsibilities. The employment context, the employee’s skills, experience, qualifications and role requirements will determine the scope of the employee’s ability to assume a certain level of control over how well the employer complies with their legislative requirements. True control and the compliance duty remains with the employer as a legal entity.

Ultimately there is no expectation by employers that certain employees will personally assume any duties under OHS legislation other than that of an employee to their own health and safety and that of other people in the workplace.

It is therefore again illustrated that there is no place for appointment of staff with specific OHS responsibilities under the model OHS Act.

**Question 30: Should the model OHS Act include positive duties for officers of bodies corporate?**

Yes, officers of bodies corporate who have control over OHS matters by virtue of their position and who benefit from this position should have positive duties.

The model OHS Act must provide for a clear message to office holders that they will be treated with the same assessment of their actions as other duty holders under the Act, namely that they must have acted as far as reasonably practicable to protect the safety and health of people at the workplace over which they had some level of control.

The fact that a person is an office holder or executive should not attract more onerous duties than those imposed on other parties in the OHS system. Failure to apply equal tests to office bearers and officers of corporations will result in inequity and a disincentive to business establishment and growth. This outcome will negatively impact on those with entrepreneurial aspirations, their workforce and the economy as a whole. The model OHS Act should not create this disincentive.

The model OHS Act should facilitate the distribution of guidance material to officers of corporations with respect to their duties and practical strategies for achieving compliance.

### **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 not, how could this be clarified.**

Yes, current provisions in most jurisdictions are broadly attempting to address the issue of control and have various levels of clarity in this regard. True control should be the focus of the definition in the model OHS Act, with the focus on an assessment of the particular facts and contractual arrangements in the relevant workplace and not a generic test which attributes liability based on a "one size fits all" definition.

Section 22 of the WA Act is particularly clear and applicable.

Please see the extract from s22 and further comments in Question 16.

**Question 32: Should the model OHS Act specify that persons in control of a work area or temporary workplace also have a duty? If so, to whom?**

No, there is no need to further specify duties on supervisors and managers in the model OHS Act.

Every person in a workplace must have a duty either as an employer, employee, person in control of a workplace or as an "other" person under the model OHS Act. These defining areas of responsibility are adequate and there is no need to apply more onerous or specific duties to supervisors or area managers.

### 3.8 ACTIVITIES WHICH IMPACT ON HEALTH AND SAFETY

**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 (ie conception to disposal)? If so, what should the duties be in relation to these activities?**

Yes. Provisions in the model OHS Act should outline the responsibilities of designers, manufacturers, importers and suppliers, installers and erectors of plant and substances for use in a workplace. Section 23 of the WA Act effectively sets out duties which should apply to this class of person.

#### **23. Duties of manufacturers, etc.**

- (1) *A person that designs, manufactures, imports or supplies any plant for use at a workplace shall, so far as is practicable —*
  - (a) *ensure that the design and construction of the plant is such that persons who properly install, maintain or use the plant are not in doing so, exposed to hazards;*
  - (b) *test and examine, or arrange for the testing and examination of, the plant so as to ensure that its design and construction are as mentioned in paragraph (a); and*
  - (c) *ensure that adequate information in respect of —*
    - (i) *any dangers associated with the plant;*
    - (ii) *the specifications of the plant and the data obtained on the testing of the plant as mentioned in paragraph (b);*
    - (iii) *the conditions necessary to ensure that persons properly using the plant are not, in so doing, exposed to hazards; and*
    - (iv) *the proper maintenance of the plant,*  
*is provided when the plant is supplied and thereafter whenever requested.*
- (2) *A person that erects or installs any plant for use at a workplace shall, so far as is practicable, ensure that it is so erected or installed that persons who properly use the plant are not subjected to any hazard that arises from, or is increased by, the way in which the plant is erected or installed.*
- (3) *A person that manufactures, imports or supplies any substance for use at a workplace shall, so far as is practicable, ensure that adequate toxicological data in respect of the substance and such other data as is relevant to the safe use, handling, processing, storage, transportation and disposal of the substance is provided —*
  - (a) *when the substance is supplied; and*
  - (b) *thereafter whenever requested.*
- (3a) *A person that designs or constructs any building or structure, including a temporary structure, for use at a workplace shall, so far as is practicable ensure that the design and construction of the building or structure is such that —*
  - (a) *persons who properly construct, maintain, repair or service the building or structure; and*

(b) *persons who properly use the building or structure,*  
*are not, in doing so, exposed to hazards.*

Suppliers and manufacturers should only be responsible so far as is reasonably practicable for ensuring that plant and substances are safe for the purpose which they are supplied and should not be responsible for unexpected adverse outcomes due to the use for which it was intended .

**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 the designer in this situation?**

The aim of the upstream responsibility chain is to determine the root cause of adverse OHS events and to prevent similar events. The manufacturer's obligation under the model OHS Act should include a requirement to test plant and substances to reduce or eliminate the risk of harm to a person who may use it in a workplace.

The introduction of plant and equipment from overseas suppliers who may design and manufacture the items outside of Australian standards must be regulated under the model OHS Act. It must be a duty on the Australian based receiver of components to manufacture plant or equipment or an importer who intends to supply the items to Australian customers to ensure that they meet Australian design and manufacturing standards. Further pursuit based on a faulty design may not in all circumstances achieve any furthering of the objectives of the Act and serves only to "place blame at the right door".

Australian manufacturers and suppliers of items which are designed or manufactured overseas should have the responsibility of ensuring that they meet Australian requirements and will not pose risks to people using them at an Australian workplace. Cross border application of this provision should apply also.

**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)?**

Supply should be given its natural meaning in the workplace context and should cover permanent and temporary provision of plant or substances. There should be a recognition that re-sale of items is also "supply" and supply responsibilities should reflect the nature of the transaction.

The definition of supply in s3 of the WA Act is useful in setting out what should constitute supply for the purpose of the model OHS Act.

**3... "supply", in relation to any plant or substance, includes supply and re-supply by way of —**

- (a) *sale (including by auction), exchange, lease, hire, or hire-purchase, whether as principal or agent;*
- (b) *the disposal in a manner referred to in paragraph (a) of assets of a business that include any plant or substance; and*
- (c) *the disposal of all of the shares in a company that owns any plant or substance;*

The model OHS Act should have a similarly clear definition of supply.

**Question 36: Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?**

It is imperative that all duty holders and their duties be clearly defined to make the model OHS Act as “user friendly” as possible for those charged with compliance.

Specific duties of care should be developed in consultation with industry as there are practical issues associated with all legislative reform which cannot be resolved satisfactorily except by tripartite collaboration and commitment.

The distorted and unrealistic duties imposed by provisions with absolute liability, such as those founding the NSW Act, are untenable and must not be included in the model OHS Act.

The model OHS Act must recognise that there is a limit to the liability of duty holders based on their efforts to control hazards and risks. A test of whether a duty holder did everything reasonably practicable to control the specific risk and circumstances must apply to all duty holders equally, including suppliers, designers, manufacturers and end users of plant and equipment, and buildings and structures.

Specific regulations and guidance material designed to facilitate compliance with the duties of designers, manufacturers, suppliers, installers and users of plant, equipment and structures must also be developed to support the duties to be stipulated in the model OHS Act.

## **Chapter 4 ‘Reasonably Practicable’ & Risk Management**

### **4.1 CONCEPT OF “REASONABLY PRACTICABLE”**

**Question 37: Should a test of “reasonably practicable” be included in the model OHS Act?**

Yes, s3 of the WA Act and the Victorian model which set out the areas to which regard must be had when determining whether something is reasonably practicable in the particular circumstances, provide effective and clear guidance to employers and others who have duties under the legislation. A similar provision should be included in the model OHS Act.

**3...“practicable” means reasonably practicable having regard, where the context permits, to —**

- (a) *the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;*
  - (b) *the state of knowledge about —*
    - (i) *the injury or harm to health referred to in paragraph (a);*
    - (ii) *the risk of that injury or harm to health occurring; and*
    - (iii) *means of removing or mitigating the risk or mitigating the potential injury or harm to health;*
- and*
- (c) *the availability, suitability, and cost of the means referred to in paragraph (b)(iii);*

Reasonable practicability takes into account the abilities of the duty holder to comply with their duty which is critical in eliminating unfair strict liability provisions. It is a term which most employers readily associate with their duties and will assess their actions against.

A guide similar to WorkSafe Victoria's guideline "*How Worksafe applies the law in relation to Reasonably Practicable*" should be developed under the model OHS Act supporting documentation to assist duty holders in meeting their obligations.

This concept should be applied to all duties with no strict liability applicable. Specifically the NSW model of strict and absolute liability and responsibilities should not be adopted by the model OHS Act.

It is not appropriate for a framework to mandate that employers must guarantee safety as this is not a realistic or achievable outcome. The standard should be the requirement to take all reasonable steps to prevent foreseeable risk of injury, as discussed in Question 23.

**Questions 38, 39, and 40: If not, what alternative standard should be included, how detailed should it be and where should it be included?**

See comments in Question 37.

**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?**

Tests and examples for compliance can be included in guidance material to assist employers to take practical steps towards ensuring compliance. Tests and examples can be detailed and industry specific where appropriate and should be developed in consultation with industry.

#### **4.2 RISK MANAGEMENT**

**Question 42; Should hazard and risk be defined in the model OHS Act?**

Yes, hazard and risk should be simply defined in the model OHS Act using a definition similar to that in s3 of the WA Act.

**3... "hazard", in relation to a person, means anything that may result in —**

- (a) injury to the person; or
- (b) harm to the health of the person;

**"risk", in relation to any injury or harm, means the probability of that injury or harm occurring;**

Failure to define these critical terms will undermine the mechanisms and obligations created by the model OHS legislation which are based on the control of these concepts.

**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?**

Yes, the underpinning principles for achieving occupational safety and health rely on a commitment and self management of the factors which can cause adverse OHS events by employers and those in the workplace.

Clearly defined principles of risk management will provide duty holders with a valuable tool for assessing their compliance and for monitoring the success of their initiatives. The definition of "reasonably practicable" should include a means for measuring the reasonableness and practicability of measures that can be undertaken to mitigate and eliminate risks. The provision of risk management principles and processes in guidance material that supports the provisions of the model OHS Act is a very suitable and desirable inclusions.



The model OHS Act should reflect the desirability of all workplaces implementing an effective safety management system relevant to the industry and the size of the operation. The Act should facilitate this through the provision of information dissemination mechanisms and guidance material which can be easily accessed and understood by workplace participants.

See also comments in Q37.

**Question 44: Should risk management principles and processes be specifically required by the model OHS Act in relation to general duties or otherwise?**

No, the model OHS Act should not be so prescriptive as to require that employers follow certain defined pathways to achieve the desired outcomes, except in necessarily narrow areas such as exposure to toxins.

Risk management principles should be included in the Act in the provisions relating to determining what is reasonably practicable in particular circumstances and can be explained in greater detail in subordinate legislation and guidance material.

Risk management principles should be clearly defined in a guidance document which includes pro forma documents with hazard identification checklists, risk assessment, and risk management process flows. This type of document will provide assistance to inexperienced and smaller employers to meet minimum requirements and improve their performance through self management of OHS responsibilities. All such documentation should be developed in consultation with business to make it applicable to the workplace.

## **5. Consultation, Participation and Representation**

**Question 45: What provisions should be made in the model OHS Act for consultation?**

The model OHS Act should make provisions for consultation, with the primary focus on informal issue resolution at the workplace.

Consultation between the regulator and employers relating to the enforcement of the Act, changes to provisions, duties and other matters which require higher level information exchanges should also be provided for in the model OHS Act.

The Robens' approach to occupational health and safety remain a valid philosophy in that it recognises that OHS is about employers and employees working together to avoid injury by creating a safe work environment.

Robens recognised that the best parties to identify and resolve workplace safety issues are those that create and work with the hazards. OHS issues generally require a quick response and actions to resolve an issue as the safety of people could be at imminent risk.

Although the underlying Robens philosophies provide a solid foundation for future legislation, It must be recognised that a more modern and innovative approach is required to respond to the many complexities which are inherent in modern work arrangements. Critical players should remain the employer and employees at the workplace with issue resolution focussed on a cooperative approach as outlined in the Robens model but there must be a clear path to outcomes defined in the model OHS Act which goes beyond the Roben's approach.

CCI is supportive of a collaborative process by, in the first instance, employers and employees at the workplace. Regulators should intervene only when informal processes fail.

Communication and consultation about OHS matters should be integrated into mainstream business practices to make them meaningful in contemporary workplace arrangements.

Tripartite bodies with OHS responsibilities such as the WA Commission for Occupational Safety & Health and the successor of the Australian Safety and Compensation Council, are best placed to determine the interests of all parties in the OHS system. Ideally, the Act should make provision for the establishment of tripartite jurisdiction based bodies and a tripartite national body with representatives from industry and each jurisdiction.

Those bodies should consult with industry on regulations and proposed codes of practice and on implementation of OHS provisions. The use of regulatory impact statements (RIS) will also enhance the consultation process in OHS matters as they can be used as a tool by policy decision makers.

The focus of consultation at all levels (between employers and employees, employers and contractors, regulators and other parties in the system) should be focussed on the dissemination of information and informed policy making. Decisions affecting OHS prescription and compliance should be made following open and informed consultation and debate.

**Question 46: What are the work relationships to which a consultation provision should apply?**

With the aim of a collaborative and cooperative approach to safety in the workplace, the only parties critical to consultation are the employer and their employees. If an issue is of such a nature that other parties are necessarily involved as duty holders, regulators or as potential persons who may be injured in the workplace (eg contractors), then specific consultation can be appropriate between those groups. The regulator should also be required to consult with other parties in the OHS system about all issues which may affect the system and its processes.

Commitment to the issues to be resolved is critical for successful consultation and the over prescription of consultation will not achieve this outcome. Overly rigid guidelines for how consultation is to be undertaken will create a mechanical process without the true desirable outcome of a genuine commitment to addressing the issues in question.

Employers and employees should be provided with guidance material which outlines strategies for achieving safer workplaces and effective consultative mechanisms. This material should promote the benefits of communication, risk assessment, awareness, strategic planning, constructive problem solving and front line issue identification which can result from an effective workplace consultation system.

**Question 47: Should there be different levels of consultation required for different work relationships?**

Yes, relationships which are based on a narrow area of the employer's business should deal with OHS issues related to that area only. In that case, the employer and for example a specific group of contractors should be required to consult only where there are issues regarding safety which apply to that area of work.

A general employment relationship should allow the employees at a workplace to comment on and be actively involved in the finding of solutions for identified OHS issues in that workplace. Consultation in this setting is ideally undertaken regularly but informally and should not be inhibited by formal processes.

Other relationships should consult based on whatever is an appropriate level of consultation in the circumstances to address all OHS issues which may apply to that relationship and the involvement of external parties should be limited to the provision of advice to those parties.

The model OHS Act should provide a framework for consultative mechanisms with minimal prescription as to the process to be followed and should facilitate the dissemination of guidance material about consultation methods.

**Question 48: How should consultation be provided for - a multi-employer site; an employer with operations across more than one worksite; small business; remote workplaces; precarious employment; and workers from culturally and linguistically diverse backgrounds?**

Minimal prescription around the process for consultation should be included in the model OHS Act. Employers should be given more detailed information about how they can successfully and effectively consult with any relevant party in guidance material.

Employers should be able to determine the level and frequency of consultation required to achieve the objectives of the Act and meet their obligations using the guidance materials.

There are too many workplace variations to make provision for all circumstances and a general duty to consult regularly should be the extent of prescription.

Issues such as language barriers and other problems which are the consequence of modern recruitment and labour arrangements should be addressed via the tripartite OHS bodies discussed in Question 45, with a view to the development of strategies to assist employers in meeting their duties under the legislation.

## **5.2 PARTICIPATION AND REPRESENTATION**

**Question 49: Should there be a requirement for establishing HSRs (health and safety representatives) and HSCs (health and safety committees)?**

Where an employer considers it is appropriate or employees request it, it may be determined by the workplace that the election of HSRs and the establishment of HSCs is desirable. This is an acceptable concept in current OHS systems in most jurisdictions. The model OHS Act should facilitate this consultative mechanism in circumstances where the employer and employees agree it is the appropriate method of consultation for them. In many instances this method of OHS consultation facilitates better communication between workplace parties and a more cooperative approach to issue resolution and clear guidance material to assist in the establishment of such a process should also be developed..

Many workplaces can undertake successful OHS consultation via informal mechanisms without having any HSRs or a HSC or may have another mechanism for communicating about and resolving OHS issues.

There should be limited prescription regarding the structure of workplace consultative mechanisms in the Act. The supporting guidance material should provide practical and varied strategies which workplaces may wish to implement depending on their circumstances

Specifically, CCI does not support mandating HSR election or the establishment of HSCs.

**Question 50: What provision should be made in the model OHS Act to enable effective participation and representation of workers to improve health and safety outcomes?**

The model OHS Act should make provision for the establishment of a flexible consultative arrangement at the workplace and guidelines and information materials outlining how this can

be achieved should be developed and disseminated to employers. This material should set out the types of strategies which can be used. The regulator should also provide proforma documentation for employers and employees to consider when determining the most effective consultative mechanism for their workplace.

### **Question 51 - 58: Election/powers/functions/training of HSRs and establishment/ structure/ functions of HSCs**

#### **Election and establishment**

The model OHS Act should place responsibilities regarding whether HSRs and HSCs are established and how they are elected and structured on workplace parties.

Employers and employees are best placed to determine whether HSRs and HSCs will achieve the OHS strategies and aims set for the workplace and can also best determine the structure of HSCs to meet their intended purpose.

Election of HSRs and establishment of the HSCs should be the responsibility of the parties in the workplace and this will have the benefit of fostering commitment to the aims of the workplace with respect to OHS matters.

It may be difficult to appoint a HSR in circumstances where the relationship between the employer and a particular employee has eroded and the guidance material should aim to provide methods for addressing OHS issues in an objective and solution based way rather than reinforcing an adversarial position.

Third parties, including regulators and unions, should not try to impose specific forms of consultative mechanisms of workplaces.

Many workplaces can undertake successful OHS consultation via a HSC without having any HSRs or may have another mechanism for communicating about and resolving OHS issues.

There should be limited prescription regarding the structure of workplace consultative mechanisms in the Act. The supporting guidance material should provide practical and varied strategies which workplaces may wish to implement depending on their circumstances.

#### **Powers and functions**

HSRs should have functions and not powers and should be a conduit between the employer and employees. They should be appointed to provide a mechanism of consultation and their appointment should confer functions related to this.

CCI strongly opposes HSRs being able to issue PINs or have other enforcement powers.

HSRs have a consultative role, designed to support the resolution of issues at the workplace and must not become quasi- enforcers. The primary function of the HSR must be to facilitate effective communication and problem solving of workplace issues in a cooperative manner with the employer and other employees and the ability to issue PINs undermines this function and creates an adversarial atmosphere.

#### **Training and qualifications**

Training for HSRs and members of a HSC should be provided if necessary and considered appropriate for achieving the workplace goals related to OHS. Structured consistent training offered as part of the overall system is a successful initiative in most jurisdictions and should be encouraged.

## **5.2 Participation and Representation**

### **Question 59: Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?**

No, there is no basis for a right of entry to be conferred on any party other than the regulator (namely WorkSafe or similar and its authorised inspectors or officers). Right of entry provisions which favour third parties, such as unions, will only confuse OHS and industrial matters to the detriment of workplace resolution of issues.

The model OHS Act should provide for appropriate dispute resolution mechanisms which will ideally resolve matters at the workplace level or escalate the dispute to the regulator (as further discussed in Question 63). If effective dispute resolution processes are included in the Act there is no need to facilitate right of entry for any party beside inspectors. The Act should focus on attempting to achieve optimal dispute resolution processes.

CCI strongly opposes the inclusion of a right of entry provision in the model OHS Act.

### **Question 60: Should the model OHS Act specify training and qualifications for such persons?**

Right of entry powers should only be conferred on authorised regulator (eg WorkSafe) inspectors and those inspectors should have appropriate training and qualifications to be appointed to such a role.

### **Question 61: In what circumstances should a right of entry be exercisable? Question 62: what powers should be exercisable upon entry, and subject to what conditions or limitations?**

See comments in Q. 59 and 60.

WorkSafe inspectors should have the ability to exercise the right of entry only in circumstances such as those defined in Part V of the WA Act to further the objectives of the model OHS Act and to ensure or assist compliance.

This is discussed further in Q84.

### **Question 63: What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?**

The model OHS Act should include provisions for structured (HSCs and HSRs) or informal workplace consultative mechanisms for issue resolution. If matters cannot be resolved using this mechanism there should be a process for referring matters to the independent regulator for an objective opinion.

Workplace cooperation should always be the focus of OHS issue resolution and statutory provisions to address this aim should limit the involvement of parties only to the employer and employees.

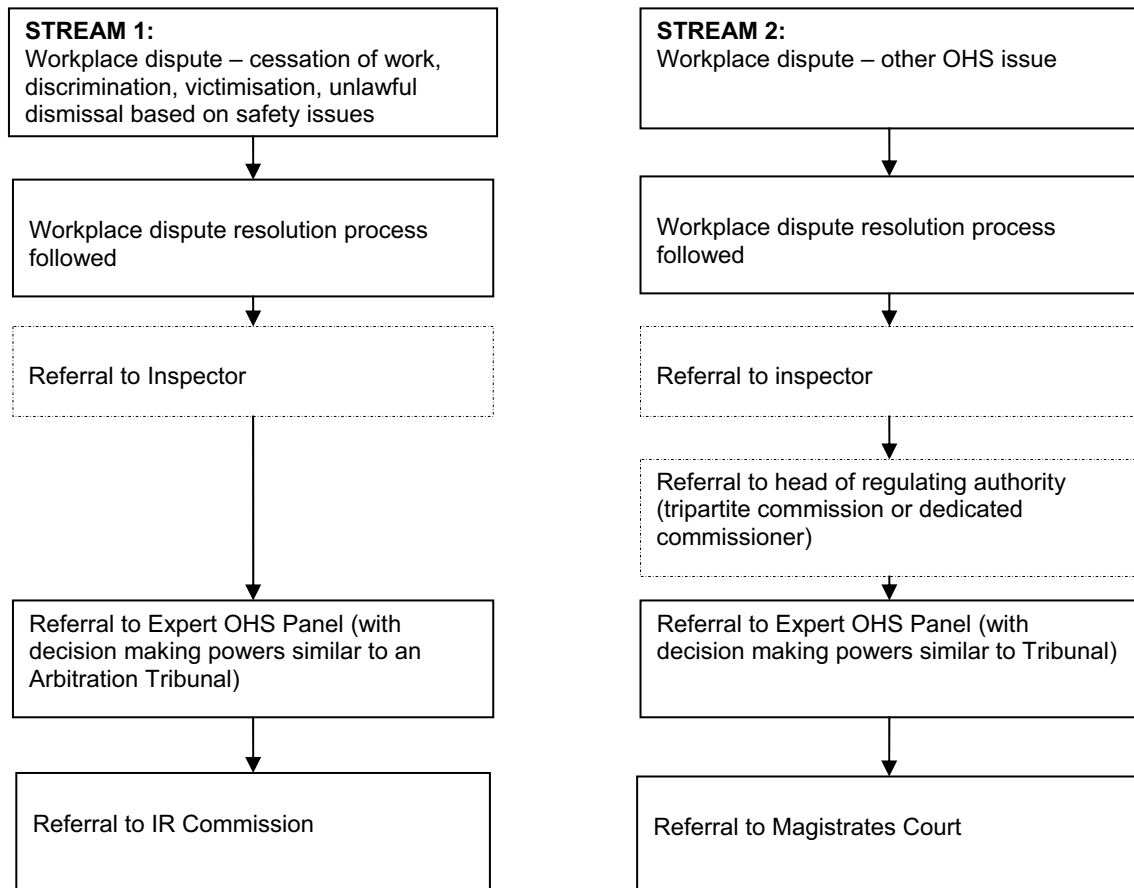
The power of HSRs to issue provisional improvement notices (PINs) that is conferred in several jurisdictions does not appear to serve any practical purpose, and in fact will often deteriorate an already sensitive workplace relationship. CCI has long held the view that PINs are not an appropriate response to an unresolved workplace safety issue.

Where issues remain unresolved the regulator should become involved rather than creating an adversarial workplace situation with the employer and HSR on opposite sides of a dispute. Workplace OHS issues should be resolved cooperatively and via the consultation

mechanisms which have established the HSRs in the workplace. A regulator (eg WorkSafe) inspector should be the only party who can issue improvement notices.

CCI strongly opposes provisions conferring the power to issue PINs or similar notices on HSRs or other third parties (other than the regulator) being included in the model OHS Act.

A process flow for referral of unresolved issues as follows should be included in the model OHS Act to facilitate speedy and effective resolution of issues:



**Question 64: When should issue resolution procedures be activated?**

As soon as a workplace OHS issue is raised resolution procedures should be activated. Guidance material outlining internal dispute resolution processes and referral flow to the regulator should be disseminated to employers for adoption by the workplace.

**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?**

Issue resolution procedures in the model OHS Act, in the form of a requirement to consult with employees about OHS matters will adequately provide the level of prescription required.

Dispute resolution procedures should form part of the guidance material to be disseminated to employers to assist them to comply with the requirements in the model OHS Act.

See also comments in Q.64.



**Question 66: How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?**

Industry should be involved in the drafting of any resolution procedures to be included in the model OHS Act and guidance material to ensure that they would be practically applicable in workplaces. If procedures are “user friendly” for those expected to follow them they will be more readily accepted and agreed at the workplace. Overly prescriptive procedures will not be readily adopted by employers.

It would be appropriate for the model OHS Act to facilitate the establishment of a tripartite OHS Panel which has the function of assessing all disputes related to OHS matters. The Panel should be the direct referral point by inspectors for issues of victimisation, discrimination, unfair dismissal, cessation of work and associated entitlements.

The OHS Panel should sit within the regulator and not within the Industrial Relations Commission.

A referral flowchart is included in Question 71 which outlines the process.

**Question 67: Should the model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?**

The model OHS Act should recognise and enforce the importance of issue resolution at the workplace and by the workplace parties. In the first instance, there should be a duty on an employee who considers the work they are doing is unhealthy or unsafe to report their concerns to their employer. The Act should then make provision for the employer to investigate the employee’s concern and follow the internal issue resolution procedure in effect at the workplace. If the matter cannot be resolved it should be referred to the regulator for independent opinion.

Employees should not have the right to cease or refuse to undertake alternate work altogether unless they have a genuine and reasonable belief that there is an imminent risk of serious injury or harm to their health. After giving notice of their intention to cease work because they feel under imminent and serious threat, an employee should be required to participate in alternate work until the matter has been resolved. The model OHS Act should include provisions to this effect.

Where issues arise in relation to a cessation of work that cannot be resolved between the workplace parties these should be referred to an inspector in the first instance. If the matter cannot be resolved should be referred to the head of the regulating authority and as a last resort to an expert OHS panel. The model OHS Act should facilitate this referral process.

Please also see comment in Question 49.

**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 restrictions should be placed on the exercise of the right by a worker or representative?**

No, CCI holds the view that HSRs should have functions and not powers as mentioned previously and they should not have the power to direct that work ceases.

Please see further comments in Question 49.

HSRs should provide assistance to the employer in managing the investigation into a reported issue and can act as a conduit between management and staff at the workplace with

great effect. This should be the extent of the role of HSR in relation to whether work ceases at the workplace or not.

The model OHS Act should provide for issue resolution to be undertaken between the workplace parties as soon as possible and using agreed processes. Provisions which require that issues which cannot be resolved within a reasonable time frame in the circumstances be referred to an inspector appointed by the regulator should also be included.

**Question 69: 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?**

No, the model OHS Act should not address issues of wages and/or other entitlements other than to support the notion that normal conditions and entitlements of employment continue to apply to a worker who commences alternate duties under instruction from their employer.

An employee should only cease work when instructed by the employer either as part of the employer's response to the issue which has been raised or as a result of an inspector's directive.

The OHS Act should recognise that in certain circumstances where an employee holds the reasonable (objectively assessed) belief that they are in imminent serious danger to their safety or health if they remain in the workplace they should be able to exercise a right to advise their employer of their concern and intention to cease work on this basis. Failure to notify the employer and obtain approval to cease work altogether should be an offence under the Act. Entitlements associated with such a cessation should be determined via the dispute resolution process as outlined in the response to Question 63.

It is critical that OHS matters do not become industrialised and matters related to employee entitlement should be distinct from OHS matters. Entitlements should be based on the employment contract and relevant applicable industrial relations laws. It is these laws which should address the entitlement of workers in various circumstances associated with their employment and failure to perform work.

This is a complex interdisciplinary issue which will require careful drafting and extensive consultation to achieve a workable model provision. CCI considers it is an issue which may also be directly affected by inconsistencies in federal and state industrial legislation and advocates caution in including provisions associated with industrial issues in the model OHS Act.

Please also see the referral process which should be created under the model OHS act described in Question 67.

**Question 70: In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?**

Yes, the model OHS Act should focus on the resolution of issues in the workplace and the provision of information to enable employers to set up effective systems of consultation and issue resolution will achieve this end. It may be appropriate to prescribe in the regulations that a dispute resolution process to be implemented in the workplace must make provision for the process to be followed in the event a worker considers it is unsafe to commence or continue work. Recommended processes to be followed can then be included in guidance material to assist the workplace in determining how best to manage such a situation.

Employers should be given the opportunity to investigate the voracity of complaints and concerns and take reasonable steps to rectify the matter before it is referred to the regulator.



The model OHS Act should make provision for this to occur and for referral to an inspector if the issue cannot be resolved using the workplace system.

Sections 24,25, 26 and 27 of the WA Act provide a default mechanism for dispute resolution which could be included in the model OHS Act. The balance of the provisions in that Division of the WA Act refer to payment of wages/benefits and, although they are related issues, it is CCI's view that those issues rightly belong in the industrial relations legislation and not the model OHS Act.

The only other appropriate mechanism for dispute resolution associated with cessation of work is via referral to an expert OHS Panel as discussed in Question 66 and 69.

Cessation of work should only occur if the workplace parties consider it appropriate and necessary in the circumstances. CCI recognises that it is in the interest of preserving their own safety and health and that of others in the workplace that an employee would in the normal course of events wish to cease work. It is a question of the reasonableness and necessity of this action which will need to be determined by the regulator if the employer and employee cannot agree. Given that in many instances the matter will be considered urgent by the employee, the regulator should provide for a fast track referral mechanism for these types of issues.

A specific OHS Panel focussed on OHS matters should determine matters which arise under the model OHS legislation. A clear dichotomy is required. The referral process mentioned in Question 67 further outlines the system which the model OHS Act should dictate.

### **5.3 PROTECTION FROM DISCRIMINATION AND VICTIMISATION**

#### **Question 71: What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?**

In some circumstances the discrimination or victimisation of a person in the workplace is an OHS issue.

Discrimination, bullying, harassment and similar issues which could affect the physical or psychological health of employees has been dealt with very effectively in the WA Code of Practice *Violence, Aggression and Bullying in the Workplace* and this document provides practical advice and guidance to workplaces to enable them to reduce the incidence and severity of this type of activity. It also highlights the potential seriousness of the impact on affected employees.

It would be helpful if guidance material supporting the model OHS legislation explained to workplace parties that various behaviours on the part of workplace parties such as employers can create a hazard to the health of employees and should be addressed with appropriate controls. The guidance material should also cross reference the relevant provisions of the applicable industrial legislation under which an employer could face liability if found to have victimised or discriminated against an employee in the workplace (for reasons associated with OHS issues or otherwise).

The model OHS Act should be focussed on the objectives of reducing the incidence and severity of injury and harm in the workplace and to this end CCI recognises that a secure framework for reporting and consulting about OHS matters in the workplace is crucial.

The OHS Act can better address this issue through provisions related to the establishment of effective consultative mechanisms and guidance material which highlights the critical importance of open and unfettered information exchange between workplace parties.

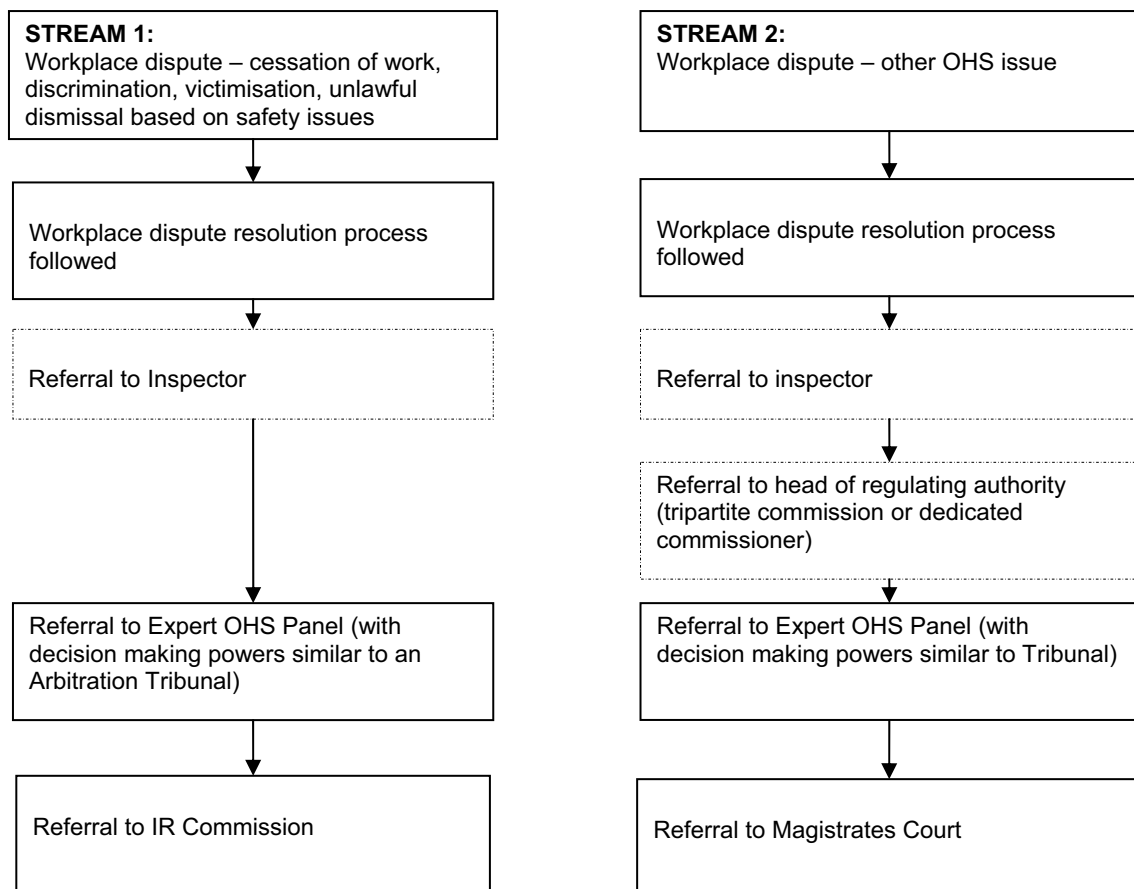
The dichotomy between OHS matters and IR matters must be maintained to ensure that OHS matters do not end up as the basis for industrial action. The intention of the model OHS Act should be clear in the objectives with respect to the collaborative and supportive approach to OHS issue management and resolution. In this respect, the creation of an OHS Panel (as discussed in Question 66 and 69) with specific functions to hear referred matters associated with OHS issues is appropriate and should be facilitated by the model OHS Act.

Where an employer or employee has breached a provision of the model OHS Act, related to their duties as a person who can influence the safety and health of others, these allegations should be investigated by the regulator and heard by the appropriate specific OHS expert panel.

Matters related to industrial relations, such as unlawful termination of the employment contract or harassment in the workplace should be dealt with by the regulator in the first instance and then be referred to the specialist OHS panel specifically established for hearing these types of matters. If there are further industrial matters which cannot be resolved by the tripartite panel, the matter should be heard in the industrial sphere. There need not be any overlap between the scope of the two forums and CCI questions the suitability of industrial experts to determine OHS matters.

CCI considers that industrial issues should be managed and prosecuted by an industrial regulator and panel and that OHS matters should be dealt with by an OHS specific regulator and panel.

The ideal referral process can be visually presented as follows:



**Question 72: Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?**

The regulator should be the initiator of actions for unlawful discrimination. Employees (or their representatives) should have the ability to raise issues with an inspector on behalf of an employee or a group of employees and this action should prompt an investigation by the regulator. If the matter cannot be resolved by the inspector it should be referred to the specialist OHS panel as discussed in Questions 66 and 69. HSRs could have the role of assisting in the steps of the referral process but should not themselves have the power or ability to commence a referral or proceedings.

**Question 73: Should a breach of the provisions be the subject of criminal or civil proceedings or both?**

Where particular workplace behaviour or circumstances give rise to a breach of provisions relating to the safety and health of persons at the workplace, the question of whether the matter should be tried in a criminal or civil proceeding must depend on the seriousness of the offence.

Most jurisdictions currently have provisions which specify criminal penalties for serious breaches with some ability for less serious matters to be heard summarily.

Matters associated with issues of discrimination, termination, victimisation and similar should be heard by a tripartite panel established within the regulator. The panel will have the opportunity to refer any unresolved disputes to the Industrial Relations Commission.

See also comments in Question 71 and 72.

**Question 74: Who should have the burden of proving relevant elements of offences (eg conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or the criminal standard (beyond a reasonable doubt) for these proceedings?**

Matters associated with issues of discrimination, termination, victimisation and similar should be heard by a tripartite panel established within the regulator. The Panel will have the opportunity to refer any unresolved disputes to the Industrial Relations Commission.

Matters should be heard in the civil jurisdiction with the focus on a remedial outcome and not punishment per se.

The burden of proving the offence must be on the person bringing the allegation and a presumption of innocence must be retained until disproved.

See also comments in Q 73.

**Question 75: Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?**

Where the regulator believes that the health and safety of persons at a workplace is potentially in danger as a result of discrimination or victimisation then inspectors should have powers to provide protection to those affected employees.

Determining the type of harm and seriousness of harm which could result from this type of behaviour will require issue resolution processes to be implemented and this is the desirable course. Inspectors should become involved in the workplace in circumstances where a disputed issue cannot be resolved and should be able to make directions with respect to

behaviours within the workplace. Monitoring and enforcement of these directions will be very difficult and largely reliant on subjective evidence from the employee(s) involved.

This is another area where clear guiding principles of issue resolution provided in guidance material supporting the model OHS Act could have a very positive impact on how well workplaces manage these issues.

**Question 76: What remedies should be available to the victims?**

The model OHS Act should facilitate the making of orders by the specialist OHS panel as mentioned in Question 69 to provide remedies to the victims of discrimination, victimisation or unlawful termination based on OHS issues. The panel should have adequate liberty to determine appropriate remedies.

**Question 77: Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?**

Yes, resolution of issues related to OHS should be addressed via mechanisms in the model OHS Act. These mechanisms should be the same as those for other OHS issue resolution as discussed in Q.63 – 70.

Industrial matters should be heard by an IR Tribunal and should be raised under IR legislative provisions, not based on any provisions in the model OHS Act as these should not cover IR matters.

**Question 78: Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?**

CCI is of the view that OHS matters should be heard separately from industrial matters to ensure that OHS decisions are not unduly influenced by an industrial agenda.

The emphasis of dispute resolution mechanisms under the model OHS Act for all issues in dispute should be on speedy and agreed resolution through the most informal process possible.

Where an employer has breached IR legislation in the manner in which they have dealt with their employees who have raised OHS matters, have acted as a HSR, who have limited English skills or are otherwise disadvantaged in the workplace this should be dealt with as a “special” matter to be referred to the expert OHS panel as referred to in Questions 66 and 69.

## **Chapter 6 Regulator Functions, Powers & Accountability**

### **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?**

Yes, the model Act should specify the establishment of a regulator with appropriate functions designed to administer the Act and accountability for actions taken.

The primary functions of the regulator should be to assist employers and other duty holders to effectively manage and control risks, with the focus on prevention and improved performance. Adequate provision should also be made for functions associated with education, advice and training services.

**Question 80: Should the model OHS Act require regulators to publish enforcement and prosecution policies?**

Yes, enforcement and prosecution policies should be published to provide clarity and allow enforcement officers to determine the most appropriate management of incidents following structured guidelines.

A prosecution policy such as the WA policy is helpful in outlining the actions the regulator will take upon notification of a breach and the likely path a prosecution will take if pursued. It also sets out alternatives to prosecution at certain levels, which allows the relevant parties to commence down the appropriate path as soon as possible.

**Question 81: Should the model Act include provisions that allow the making of interpretative documents?**

Yes, interpretative documents, such as the Victorian publication *"How Worksafe applies the law in relation to Reasonably Practicable"* should be developed under provisions of the model Act to provide guidance to duty holders and to prosecutors and the judiciary.

A tripartite policy group can define critical requirements using an interpretative document to the furtherance of the objective to provide clear and specific guidance to duty holders.

**Question 82: Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?**

The OHS regulator should be able to issue advisory notices, interpretative documents and other guidance material which an inspector should not be able to do. These overarching information releases should be developed by the tripartite regulator and not by individual inspectors.

The regulator, and not inspectors, should have the power and function to formally review enforcement notices issued by inspectors.

The regulator should also be provided the power to provide advice on compliance via its inspectors and other officers under the model OHS Act.

**Question 83: Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?**

The regulator's functions of advice and enforcement need not be formally separated provided that there is an approach of facilitating employers to improve their safety performance and not a culture of prosecution of all known failings (the information being gleaned from a call for advice).

In practical terms the functions should be separated to allow confidentiality of situations where an employer seeks advice to remedy an identified safety concern so as not to expose the employer to prosecution simply because their information has now come into the hands of the regulator. The focus of the regulator's functions should at all times be to provide the participants in the system with the information and processes they need to enable compliance with the legislation. Trapping of employers accessing the information service should never be contemplated by the regulator.

Employers should be encouraged to seek advice and information and enforcement action should be taken only where an employer has not taken advice or information to attempt to

improve their safety performance. An information dissemination or call centre to provide advice to employers, employees and others should not require the identification of the caller and prosecutions should not follow from a call for advice via referral.

It must also be made clear in the provisions of the model OHS Act that compliance with the regulator's advice and guidance material will be persuasive evidence of compliance should an adverse event occur. Suitable protections for the regulator should be included in the legislation to facilitate the very desirable activity of broad advice dissemination.

The regulator's advisory service should be bolstered through shared programs with business and other interest groups to deliver information, education and training to target system participants.

## **6.2 INSPECTORS**

### **Question 84: How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?**

Yes, without being overly prescriptive as to the qualifications and the appointment arrangements of an inspector, the Act should allow for the allocation of powers and duties to inspectors. The qualifications and experience of inspectors should be assessed on a case by case basis, determined by the regulator based on the requirements of the system in terms of the critical enforcement areas and the type of issues the inspector is likely to manage.

Powers, functions and accountabilities of inspectors should be provided in the Act and the model used in WA is suitable for adoption by the model OHS Act. The ability to act impartially and objectively should be primary skills inspectors must possess and the legislation should specify these requirements.

### **Question 85: Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?**

The model OHS Act should provide generic powers and functions for inspectors with subordinate legislation outlining specific advice and assistance roles and capacity. Inspectors should act to further compliance with the legislation and all roles and capacity statements in subordinate legislation should facilitate this objective.

### **Question 86: Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?**

No. inspectors should at all times be recognised to be representatives of the regulator in the role of an employee with special functions and delegated powers. There should not be any circumstances in which an inspector should be independent from direction, instruction or review by a regulator.

### **Question 87: 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?**

Yes, if an inspector becomes aware of additional information relevant to their decision to issue a notice or instrument they should have the ability to modify, amend or cancel that notice or instrument. A mechanism for self - review of a decision by an inspector upon becoming aware of relevant further information should be provided in the model OHS Act and further specific circumstances can be included in guidance material and subordinate legislation.

### **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?**

There should be an avenue for the transparent internal review of all decisions in model Act. Inspector's decisions which could result in significant adverse consequences (for example prosecution) to an employer should be open to review and reasons for an inspector's decision should be made available to the reviewer.

Inspectors should be appointed based on their abilities as well as their integrity and transparency of decisions to enable review should be carefully balanced against the need to allow inspectors carry out their duties with initiative and autonomy.

Undue fettering of decision making will not serve the objectives of the Act and instead sound decision making in the first instance, through the provision of appropriate training to inspectors, as well as a transparent and easily accessible decision review mechanism should be included in the model Act.

**Question 89: Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors which should be addressed in the model OHS Act?**

Inspectors play a critical role in the enforcement of the provisions of OHS legislation in all jurisdictions. The role of inspectors and the clear and defined scope of their functions gives a balance to the self management aspects of the risk management philosophy of the OHS legislation in all jurisdictions. Inspectors should be the front line on site advisors and enforcement officers of the regulator with suitable powers to provide the level of certainty required to ensure that the objectives of reducing death and injury in the workplace are met.

Inspectors should have clear operating guidelines and goals, as well as be accountable for the actions that they take. Inspectors should be trained to mediate between workplace parties, determine matters and issue appropriate notices. It is imperative that inspectors are given the tools to carry out their functions to optimum effect. A recruitment policy should be drafted by the tripartite regulator to ensure that inspectors will have the necessary skills to carry out their tasks.

## **Chapter 7 Compliance and Enforcement**

### **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?**

Yes, the model Act should include a hierarchy of enforcement measures in order of escalation. Measures should consist of lower level monetary penalties up to quasi-criminal penalties for serious offences, such as is currently the case in Western Australia.

In all instances the objectives of education and advice should remain the focus in determining enforcement action in the first instance, and escalated enforcement penalties should follow based on the seriousness of the breach and the employer's efforts to remedy the breach.

Any model of enforcement hierarchy must recognise the need to provide advice in the first instance with adequate intermediate levels between the first and most severe penalties. Circumstances for invoking a top level penalty will need to be clearly spelt out in an

enforcement and prosecution policy to be devised by a tripartite body to ensure it meets the needs of all parties in the system.

Compliance and enforcement activities should focus on prevention strategies rather than punishment and the hierarchy of enforcement in the model OHS Act and the regulator's enforcement policy should be heavily biased towards prevention.

**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?**

These principles for enforcement should be included in broad terms in the model OHS Act, with a clear split in the tiers of offence based on the seriousness of the outcome. A prosecution policy should be devised by a tripartite body.

Regulations should specify particular offences and guidance documentation setting out specific offences and methods for compliance in the workplace should also be created.

## **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?**

As mentioned previously in this submission, CCI is of the view that HSRs should not have the power to issue PINs. Inspectors should be the only parties able to issue notices.

The model OHS Act should make provisions for the issue of notices by inspectors, outlining the circumstances in which they can be issued, reviewed, amended, modified, revoked or cancelled.

**Question 93: Should PINs, improvement notices and prohibition notices contain recommendations about how to achieve compliance?**

Yes, improvement and prohibition notices should contain recommendations about how to achieve compliance as this will provide the alleged offender with a specific course of action to follow. Compliance with recommendations should limit further actions related to the alleged breach for which the notice was issued.

CCI does not believe that there is a place for PINs in the model Act.

**Question 94: What provisions should be made to allow for the review of PINs, improvement notices and prohibition notices?**

Mechanisms to facilitate the speedy and transparent review of improvement and prohibition notices should be included in the model OHS Act. The regulator should be responsible for the review of notices and a clear review process should be contained in the guidance material supporting the model Act.

There should be no provisions made for the issue of PINs under the model OHS Act.

**Question 95: Should there be a specific minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?**

Yes, it would be appropriate to allow a specific timeframe for compliance with improvement and prohibition notices, and the period would need to be based on a clear enforcement policy



and based on the nature of the remedial action required to rectify the situation which has generated the issue of the notice.

Adequate time to gather evidence and implement recommended actions should be allowed for in every situation based on its specific facts. Inspectors should be trained to make decisions about timeframes for compliance to incorporate this into the recommendations they include in the improvement and prohibition notices.

There should be no provisions made for the issue of PINs under the model OHS Act.

**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?**

Yes, the lodging of an application for internal review or an appeal should suspend the effect of a notice and should generate regulator review of the notice and appropriate further action within 7 days. Inspectors should be adequately trained to make sound decisions and a speedy and transparent process for review of notices should be provided in the model OHS Act and supporting regulations and guidance material.

There should also be a process for urgent review of prohibition notices where there is a serious impost or consequence for an employer if a notice is permitted to continue to have effect and the employer disputes the issue of the notice or the extent of any prohibition.

**Question 97: Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?**

No, there should be no system for issue of infringement notices under the model OHS Act. In the first instance an offender should be provide advice and information on how to comply with the legislation and following this, if there is no compliance, an inspector should issue an improvement or prohibition notice.

**Question 98: Should the administration of infringement notices occur under OHS law or individual state legislation?**

Not applicable see Q97.

**Question 99: What amounts should be specified as fines for infringements?**

Not applicable see Q97.

**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?**

No, the model OHS Act should not provide for a mechanism for the regulator or any other party to apply for an injunction.

The Act should make provision for effective prohibition notices and the focus of all enforcement actions by the regulator should be the prevention or control of imminent foreseeable serious harm to people at a workplace if compliance with an improvement or prohibition notice is not achieved.

Injunctions will add an unnecessary overlap in the process and will duplicate the function and effect of prohibition notices.

**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?**

Yes, all breaches which can be remedied by the employer via specific practical action should be able to be the subject of an enforceable undertaking instead of prosecution. A prosecution policy should be agreed by a tripartite body and should outline circumstances in which enforceable undertakings should be used.

Where the enforceable undertaking is a legally binding commitment to take specific actions or remedy unsatisfactory conduct or systems they can be an effective tool in achieving the objective of prevention. The model OHS Act should facilitate this type of undertaking.

**Question 102: Should the giving of an undertaking result in an admission of fault or liability?**

No, the giving of an undertaking should be seen as a cooperative response to further the objectives of improving safety systems and preventing and mitigating the risks of harm to people at the workplace. The employer concerned has not been found guilty of the alleged offence and an agreement to undertake certain actions should not attract an automatic deemed admission of fault or liability.

An agreement to enter into an enforceable undertaking must be optional on the part of the employer and the decision should be made prior to any prosecution action. If the employer does not wish to agree to being bound by an enforceable undertaking then the next level of enforcement should be pursued. Agreement to an enforceable undertaking should bar prosecution of the employer whilst the undertaking is in effect and being carried out.

The model OHS Act should make it clear that enforceable undertakings agreed to under its provisions must be focussed on real outcomes and the use of enforceable undertakings as an alternative to prosecution provides a valuable long term solution to businesses. Increased awareness of obligations and improved safety systems will be of benefit to all at the workplace involved and the system as a whole.

**Question 103: Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?**

Yes, the regulator should have clear enforcement processes which can be transparently reviewed and readily accessed by interested parties. The application of a national set of enforcement principles will give greater clarity and consistency to OHS than any other measure and it is critical that jurisdictions agree fully to all model provisions relating to enforcement if the national approach is to have optimal effect. Unequal enforcement systems in different jurisdictions will undermine the efforts of nationally consistent policies and guidelines associated with preventative and mitigation strategies.

The option to use enforcement measures such as enforceable undertakings should be embraced by the regulator as a means of furthering the objectives of prevention, awareness, and better implementation of safety initiatives. The model OHS Act should facilitate the easy referral of matters for consideration of whether an enforceable undertaking is a suitable approach in a particular circumstance.

## Chapter 8 Prosecutions

### 8.1 CRIMINAL OR CIVIL LIABILITY

**Question 104: Should the model OHS Act provide for breaches of duties or obligations to be criminal offence, or be the subject of civil proceedings and penalties, or a mixture of both?**

Breaches of the model OHS Act should be the subject of civil proceedings and penalties in the first instance. A clear enforcement and prosecution policy should be devised by a tripartite body.

There should be no specific industrial manslaughter or similar criminal offences created and, as is currently the case in WA, any criminal proceedings should be commenced by the police where the circumstances are such that a criminal offence under the general criminal law has been committed.

The quasi-criminal high level offences under the WA OSH Act provide escalating penalties which include monetary fines and imprisonment to a maximum of 2 years. In WA those offences for serious breaches are heard in the Magistrates Court where the Magistrates have to date carried out the functions of decision making with great expediency and competence, evidenced by the satisfactory outcomes of decided cases. Any issues which require appeal or further consideration can be pursued in the District Court, again a satisfactory jurisdiction for the hearing of OHS matters.

In his recent review of the WA OSH legislation Mr Richard Hooker stated on consideration of whether those serious breaches should be heard as indictable offences by superior courts:

*“...any change in legislative policy concerning jurisdiction of trial could only be fairly based on an assessment of what would be appropriate for better decision making within the criminal justice system. It should not be driven out of any desire, whether in whole or in part, to obtain more convictions.. the Inquiry is not satisfied that a sufficient case has been made out to ...recommend legislative amendment in this regard”.<sup>1</sup>*

Based on the WA model, the model OHS Act should also provide for prosecutions regarding all breaches to be heard in the Magistrates Court, with a mixture of monetary fines for most offences and only the very highest tier of offences with monetary penalties and imprisonment for a maximum of 2 years.

Section 3A of the WA Act sets out the penalty levels, with level 4 the highest tier of offence and reserved for instances where a breach is due to gross negligence and causes the death of or serious harm to an employee or person:

#### **3A. Penalty levels defined**

- (1) *Where a person is liable to a level one penalty for an offence against this Act the person is liable —*
  - (a) *if the offence was committed by the person as an employee —*
    - (i) *for a first offence, to a fine of \$5 000; and*
    - (ii) *for a subsequent offence, to a fine of \$6 250;*

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<sup>1</sup> Mr Hooker suggested that ongoing consideration in future reviews was warranted as the subject had generated some recommendations in past reviews which had not been implemented by the government of WA.

- (b) *if paragraph (a) does not apply —*
  - (i) *in the case of an individual —*
    - (I) *for a first offence, to a fine of \$25 000; and*
    - (II) *for a subsequent offence, to a fine of \$31 250;*
  - or*
  - (ii) *in the case of a body corporate —*
    - (I) *for a first offence, to a fine of \$50 000; and*
    - (II) *for a subsequent offence, to a fine of \$62 500.*
- (2) *Where a person is liable to a level 2 penalty for an offence against this Act the person is liable —*
  - (a) *in the case of an individual —*
    - (i) *for a first offence, to a fine of \$100 000; and*
    - (ii) *for a subsequent offence, to a fine of \$125 000;*
  - or*
  - (b) *in the case of a body corporate —*
    - (i) *for a first offence, to a fine of \$200 000; and*
    - (ii) *for a subsequent offence, to a fine of \$250 000.*
- (3) *Where a person is liable to a level 3 penalty for an offence against this Act the person is liable —*
  - (a) *in the case of an individual —*
    - (i) *for a first offence, to a fine of \$200 000; and*
    - (ii) *for a subsequent offence, to a fine of \$250 000;*
  - or*
  - (b) *in the case of a body corporate —*
    - (i) *for a first offence, to a fine of \$400 000; and*
    - (ii) *for a subsequent offence, to a fine of \$500 000.*
- (4) *Where a person is liable to a level 4 penalty for an offence against this Act the person is liable —*
  - (a) *in the case of an individual —*
    - (i) *for a first offence, to a fine of \$250 000 and imprisonment for 2 years;*  
*and*
    - (ii) *for a subsequent offence, to a fine of \$312 500 and imprisonment for 2 years;*
  - or*
  - (b) *in the case of a body corporate —*
    - (i) *for a first offence, to a fine of \$500 000; and*
    - (ii) *for a subsequent offence, to a fine of \$625 000.*

*[Section 3A inserted by No. 51 of 2004 s. 15.]*

Part III Div 2 sets out the general duties of care of employers, employees, self employed persons, persons in control of a workplace, manufacturers and other persons and sets out the penalties applicable. This model is suitable for inclusion in the model OHS Act as the offence hierarchy and penalties have been developed by a tripartite body (the Commission for Occupational Safety & Health WA) and to date appear to be providing sufficient guidance and equitable outcomes.

## **19. Duties of employers**

- (1) *An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the “employees”) are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall —*
  - (a) *provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards;*
  - (b) *provide such information, instruction, and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards;*
  - (c) *consult and cooperate with safety and health representatives, if any, and other employees at the workplace, regarding occupational safety and health at the workplace;*
  - (d) *where it is not practicable to avoid the presence of hazards at the workplace, provide the employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and*
  - (e) *make arrangements for ensuring, so far as is practicable, that —*
    - (i) *the use, cleaning, maintenance, transportation and disposal of plant; and*
    - (ii) *the use, handling, processing, storage, transportation and disposal of substances,**at the workplace is carried out in a manner such that the employees are not exposed to hazards.*
- (2) *In determining the training required to be provided in accordance with subsection (1)(b) regard shall be had to the functions performed by employees and the capacities in which they are employed.*

*[Section 19 inserted by No. 43 of 1987 s. 13; amended by No. 30 of 1995 s. 13 and 47; No. 51 of 2004 s. 5, 17 and 78.]*

### **19A. Breaches of section 19(1)**

- (1) *If an employer contravenes section 19(1) in circumstances of gross negligence, the employer commits an offence and is liable to a level 4 penalty.*
- (2) *If —*
  - (a) *an employer —*
    - (i) *contravenes section 19(1); and*
    - (ii) *by the contravention causes the death of, or serious harm to, an employee;*

*and*

- (b) *subsection (1) does not apply,*  
*the employer commits an offence and is liable to a level 3 penalty.*
- (3) *If —*
- (a) *an employer contravenes section 19(1); and*
  - (b) *neither subsection (1) nor subsection (2) applies,*  
*the employer commits an offence and is liable to a level 2 penalty.*
- (4) *An employer charged with an offence under —*
- (a) *subsection (1) may, instead of being convicted of that offence, be convicted of an offence under subsection (2) or (3); or*
  - (b) *subsection (2) may, instead of being convicted of that offence, be convicted of an offence under subsection (3).*

*[Section 19A inserted by No. 51 of 2004 s. 18.]*

## **20. Duties of employees**

- (1) *An employee shall take reasonable care —*
- (a) *to ensure his or her own safety and health at work; and*
  - (b) *to avoid adversely affecting the safety or health of any other person through any act or omission at work.*
- (2) *Without limiting the generality of subsection (1), an employee contravenes that subsection if the employee —*
- (a) *fails to comply, so far as the employee is reasonably able, with instructions given by the employee's employer for the safety or health of the employee or for the safety or health of other persons;*
  - (b) *fails to use such protective clothing and equipment as is provided, or provided for, by his or her employer as mentioned in section 19(1)(d) in a manner in which he or she has been properly instructed to use it;*
  - (c) *misuses or damages any equipment provided in the interests of safety or health; or*
  - (d) *fails to report forthwith to the employee's employer —*
    - (i) *any situation at the workplace that the employee has reason to believe could constitute a hazard to any person that the employee cannot correct; or*
    - (ii) *any injury or harm to health of which he or she is aware that arises in the course of, or in connection with, his or her work.*
- (3) *An employee shall cooperate with the employee's employer in the carrying out by the employer of the obligations imposed on the employer under this Act.*

*[Section 20 inserted by No. 43 of 1987 s. 13; amended by No. 30 of 1995 s. 14 and 47; No. 51 of 2004 s. 19, 79, 102(1) and (2).]*

### **20A. Breaches of section 20(1) or (3)**

- (1) *If an employee contravenes section 20(1) or (3) in circumstances of gross negligence, the employee commits an offence and is liable —*
- (a) *for a first offence, to a fine of \$25 000; and*
  - (b) *for a subsequent offence, to a fine of \$31 250.*

- (2) *If —*
- (a) *an employee —*
    - (i) *contravenes section 20(1) or (3); and*
    - (ii) *by the contravention causes the death of, or serious harm to, a person;*
- and*
- (b) *subsection (1) does not apply,*
- the employee commits an offence and is liable —*
- (c) *for a first offence, to a fine of \$20 000; and*
  - (d) *for a subsequent offence, to a fine of \$25 000.*
- (3) *If —*
- (a) *an employee contravenes section 20(1) or (3); and*
  - (b) *neither subsection (1) nor subsection (2) applies,*
- the employee commits an offence and is liable —*
- (c) *for a first offence, to a fine of \$10 000; and*
  - (d) *for a subsequent offence, to a fine of \$12 500.*
- (4) *An employee charged with an offence under —*
- (a) *subsection (1) may, instead of being convicted of that offence, be convicted of an offence under subsection (2) or (3); or*
  - (b) *subsection (2) may, instead of being convicted of that offence, be convicted of an offence under subsection (3).*
- [Section 20A inserted by No. 51 of 2004 s. 20.]*

**Question 105: which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?**

Please see Q 104.

**8.2 WHERE PROSECUTIONS SHOULD BE HEARD**

**Question 106: Which courts or tribunal should have the jurisdiction to hear prosecutions for OHS offences?**

Matters associated with issues of discrimination, termination, victimisation and similar should be heard by a tripartite panel established within the regulator. The panel will have the opportunity to refer any unresolved disputes to the Industrial Relations Commission.

Prosecutions should be heard in the Magistrate's Court, in a specific OHS division or by a Magistrates Court of general jurisdiction.

See also Question 104.

**Question 107: Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?**

See Questions 104, 105 and 106.

Specifically, except as outlined in Question 106, OHS matters should not be heard in the Industrial jurisdiction and there must be a clear distinction between the prosecution and hearing of OHS and industrial matters.

**Question 108: To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?**

Appeals should be governed by the usual court rules applicable for the level of court hearing the matter.

**Question 109: Should defendants be entitled to trial by jury for any offence and, if so, which?**

OHS matters should be heard summarily in the Magistrate's Court.

When considering this issue in his review of the WA OSH Act in 2006 Mr Richard Hooker referred to persuasive correspondence from the Chief Magistrate of WA who had "...asserted that a jury would have greater difficulty understanding the complexity of the legislation and the parties would not have the benefit of reasons for decisions" and Mr Hooker concluded that "that latter point, in particular, is in the Inquiry's view a very weighty one".<sup>2</sup>

### **8.3 WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES**

**Question 110: Who should be entitled to commence criminal proceedings?**

Only the police regulator should be able to refer matters for prosecution to the Director of Public Prosecutions for criminal proceedings as is currently the case in WA.

CCI strongly objects to third party prosecutions as a matter of principle and submits that there is no merit in granting the power to prosecute to unions or any body other than an appropriately qualified and experienced governmental body. The WA system of referral for prosecution by the regulator only is evidence of the appropriateness of this approach because:

- There is no demonstrated deficiency in the WA system.
- Any extension of prosecutorial discretion violates the commonly accepted common law principle that such discretion should only be exercised by bodies which not merely promise to be impartial but are, as a matter of demonstrable fact, impartial by virtue of having no interest whatsoever in the prosecution itself .
- That any other bodies proposed to take this function are not merely disqualified by a lack of impartiality but that it is also the case that these bodies are unqualified in terms of the legal skill and professional experience needed to make the factual and evidentiary determinations inherent in the exercise of prosecutorial discretion.

It is appropriate to acknowledge the generally accepted fact that the exercise of prosecutorial discretion, namely the decision whether or not to commence a prosecution or to discontinue a prosecution once commenced, is one of the most important and difficult exercises of decision making discretion that exists in common law countries.

Prosecutorial discretion is critically important because of the significant impact that such decisions will invariably have on a range of parties including: the alleged offender, the asserted victim, witnesses and members of the public. An incorrect exercise of the discretion to prosecute (or to discontinue a prosecution) not only impacts on individuals directly but also tends to undermine public confidence in the justice and criminal justice system as a whole.

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<sup>2</sup> Hooker Report Review of the Occupational Safety and Health Act 1984, 6 December 2006, pp114 para 7.20



The exercise of prosecutorial discretion is especially difficult because it involves devising and applying tests that must be at once both principled and practically workable. There is an inherent difficulty in establishing consistency and certainty in decision making where discretion resides ultimately in one or a small group of individuals, simply because different people may often come to see the same question of fact in quite different ways. It is often said that what may seem like a weak case to one person may not be seen as a weak case by another. There is also great potential for decision makers to substitute an objective and impartial assessment of the public interest with personal views about the most desirable outcome, which views might be informed variously by particular political or philosophical ideas or particular personal or organisational allegiances and experiences.

The difficulties inherent in the exercise of prosecutorial discretion have been visible in the development of independent Offices of Public Prosecution in the Australian States and the Commonwealth. It is notable that the present arrangement applying to prosecutions under the *Occupational Safety and Health Act 1984 (WA)* ("OSH Act") mirror the practice of these independent DPP Offices by requiring, pursuant to s.52(1) of that Act, that the exercise of prosecutorial discretion be taken only by a person authorised to do so by the WorkSafe Commissioner. In practice that person is independent of the parties potentially to be involved in the prosecution and it is usually the case that the decision is based upon advice received from legal practitioners in the State Solicitor's Office.

Indeed, it is the case that the WA '*WorkSafe – Policies and Procedure – Prosecution Policy*', which sets out the rules to be observed in exercising prosecutorial discretion in WA is modelled on the *Statement of Prosecution Policy and Guidelines* issued by the Western Australian Director of Public Prosecutions published in the WA Gazette 20 September 1999 (it is noted here these guidelines have been updated and republished in 2005).

The important point about the process for the exercise of prosecutorial discretion in OSH is that, as is the case with the DPP, the discretion is exercised by an independent body.

The nature of this independence is critical and what is meant by labelling the position independent is that the decision maker in each instance has no vested interest whatsoever in the decision they are about to take. Notably:

- The decision maker does not represent the complainant, but represents a body separate to and independent from both the complainant and the alleged offender.
- The decision maker does not receive dues or fees or any payment directly or indirectly from the complainant for their services and they do not have any overarching representative, financial or membership relationship with the complainant.
- In no way does the body exercising prosecutorial discretion have any interests which coalesce with either the complainant or alleged offender and nor does the decision maker have any vested interest either philosophical, organisational or financial in the outcome of the prosecution.

The only means by which true impartiality can be guaranteed into the future in the exercise of prosecutorial discretion is to ensure that the decision maker has no interests whatsoever in the conduct and outcome of the prosecution. Any other system opens the potential for the exerciser of prosecutorial discretion to allow irrelevant personal, political, philosophical or financial considerations to affect the decision. Or further, for the decision to become irretrievably tainted by use of the discretion as an industrial relations tool or for any of a range of other motives which would constitute an abuse of process.

The exercise of judicial discretion has always involved some decision about evidential sufficiency. Whereas a prima facie case type test was the more common practice prior to the 1980s it is now commonly accepted that by itself such a test is an inadequate basis for determining whether to proceed with a prosecution. Rather, the test of evidential

sufficiency, whether expressed as a 'reasonable prospect of conviction' or a 'more likely than not test', must have regard to the prospects of securing a conviction. The WA WorkSafe Guidelines Prosecution Policy follows this well accepted path of considering each of, in turn; the prima facie case, whether there are reasonable prospects of conviction and whether it remains in the public interest to prosecute. It is quite appropriate that a failure to meet any one of these three criteria (bearing in mind a reasonable prospect of conviction presupposes a prima facie case), might mean that a prosecution should not proceed.

Specifically in relation to employee representatives, CCI is of the view that unions are no longer representative of workers. Less than 4% of private sector employees are union members. Naturally unions would pursue member interests resulting in selective prosecutions. It would create an unfair disadvantage for workers choosing not to be union members. The model Act must not advantage any organisation in respect to commercial activities.

Providing such a specific power to the unions will result in greater blurring of industrial relations and occupational safety and health. In particular, the threat of prosecution is tradeable in respect to negotiated settlements on industrial and/or OSH matters.

Prosecutions under OHS legislation must not be able to be commenced by any party other than the regulator.

**Question 111: If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?**

Only the regulator should be able to refer matters for prosecution and only civil penalties should be provided under the model OHS Act as in the WA model.

Please also see comments in Question 104 -110.

**Question 112: What should appropriate time limits be for the commencement of a prosecution and why?**

A clear prosecution policy outlining time limits for specific prosecutions should be developed with an emphasis on the speedy resolution of matters and a clear escalating scale of enforcement action.

The regulator should give a clear and true indication of any intention to prosecute an employer within 12 months of the alleged offence and proceedings should be commenced within 2 years of the alleged offence.

**Prosecution 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?**

No the model OHS Act should not contain specific provisions relating to the conduct of prosecutions but a prosecutions policy should be developed with a tripartite agreement as to the scope of the policy and the conduct of the matter in the lead up to prosecution. Once the prosecution has been initiated the rules of the relevant court should apply.

## **8.4 EVIDENCE**

**Question 114: Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?**

No, the OHS should not contain provisions related to evidentiary procedures. The rules of the court to hear the matter should be applied.

**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?**

No, proof of elements of an offence should not be affected by specific provisions in the model OHS Act. The burden of proof to be applied should be that which is decreed by the court which will hear the matter and the normal rules of evidence and natural justice should apply.

There should be no deeming of satisfaction of particular elements of an offence under the provisions of the model Act and no reversal of the onus of proof.

**Question 116: What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?**

Subordinate instruments should have the effect of providing clarity in relation to the scope of the burden on the offender and the possible avenues for compliance which were available to various degrees.

Compliance with regulations should be seen as compliance with the requirements of the substantive Act where the regulations purport to provide specific duties, actions and requirements which will constitute compliance with a statutory duty.

Codes of practice and guidance material should provide evidence of ways in which compliance could have been achieved in an appropriate manner. Compliance with a code of practice about a particular hazard or set of risks should be prima facie evidence of compliance with a statutory duty related to that particular hazard or risk. Following guidance material further indicates an attempt to meet requirements.

The circumstances of each case should be assessed on individual merits and compliance should be tested against those circumstances.

It is critical that all regulations, codes of practice, standards and guidance material is written in plain English with practical steps to follow. The recommended actions must be workplace based, cost effective and attainable.

## **8.5 THE BURDEN OF PROOF AND DEFENCES**

**Question 117: Is “reasonably practicable” an appropriate standard for the model OHS Act?**

Yes, it is appropriate to require duty holders to do all that is reasonably practicable to ensure the safety and health of persons at the workplace and this should be the test for compliance with duties to be outlined in the model OHS Act.

A more onerous standard is unrealistic and unachievable and will undermine compliance and prevention in favour of prosecutions for the sake of prosecuting. In order to achieve the most satisfactory outcome all duty holders must adhere to the same standard applied with a common goal of reduced incidence and severity of workplace injuries.

To apply distorted tests of absolute liability or similar unbalanced approaches (such as in the NSW legislation) is counterintuitive to best performance and outcomes. The model OHS Act should have no strict or absolute liability provisions.

**Question 118: Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?**

The prosecutor should be required to prove that a defendant did not do all that was reasonably practicable to comply with the provisions of the Act and the duty holder should have the opportunity to tender evidence to refute the prosecutor's claim. The defendant should be presumed innocent and compliant unless the prosecution can prove otherwise.

**Question 119: Should the burden of proving elements of an offence differ between different types of offences (eg duties of care and procedural obligations)? If so, why?**

No, the prosecutor should be required to prove their case against the defendant in all cases and the standard of proof to be applied should be determined by whether the matter is being heard in a civil or criminal court or tribunal. There should be no presumption of guilt in any OHS prosecutions and there should be no application of strict liability provisions with a reverse onus of proof.

**Question 120: What, if any, defences should the model OHS Act provide?**

This is a complex legal issue which has implications in relation to other aspects of the model OHS Act such as prosecutions, court processes and evidentiary burdens. The onus of proof should never be reversed and the employer should be considered innocent unless proven otherwise.

The model Act should promote compliance through clear guidance material and supporting subordinate legislation which should provide practical advice and assistance to employers. The supporting material should identify ways that employers can comply with the requirements of the legislation in particular ways and using specific mechanisms.

The guidance material should advise employers that it may become necessary for them to respond to an allegation of breach of OHS legislation and that their actions will be assessed to determine whether:

- They have done all that was reasonably practicable (or taking reasonable precautions or exercising due diligence – this should include circumstances where a person engaged external expertise to address the identified hazard or risk and relied on that expertise in managing the risk in the workplace);
- The offence was due to causes over which the person had control or could make provision;
- An officer was able to influence the relevant conduct of the corporation;
- The defendant having a reasonable excuse for failing to do something required under the Act;
- They followed the requirements in a regulation or recommendations in a Code of Practice, ministerial notice, inspector's direction or other guidance material published by the regulator.
- Any defence normally available to the person under criminal law or civilly in the court in which the matter is heard was applicable.

Until the duties and offences to be created under the model OHS Act are developed it is impossible and inappropriate to consider defences.

**Question 121: Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?**

No, the burden of proof and defences (if any – see comments in Question 120) should be the same for all defendants, regardless of whether they are an individual or corporation.

## 8.6 LIABILITY OF OFFICERS

### Question 122: Should “officers” of a corporation be liable to an offence because the corporation has committed an offence?

No, not automatically. The provisions of s 55 of the WA OSH Act outline circumstances in which officers of a body corporate should be liable to an offence because the corporation has committed an offence. This limitation is appropriate and should be included in the model Act.

#### 55. Offences by bodies corporate

- (1) *Where a body corporate is guilty of an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity he or she, as well as the body corporate, is guilty of that offence.*
- (1a) *Despite subsection (1), if a body corporate is guilty of an offence under section 19A(1), 21A(1), 21C(1), 22A(1), 23AA(1), 23B(1) or 23H(1) the following provisions apply —*
- (a) *a person referred to in subsection (1) is guilty of that offence if it is proved that —*
- (i) *the offence was attributable to any neglect on the part of the person; or*
- (ii) *the person consented to or connived in the acts or omissions to which section 18A(2)(a)(ii) applied that were proved against the body corporate,*
- in circumstances where the person —*
- (iii) *knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty was owed; but*
- (iv) *acted or failed to act as mentioned in subparagraph (i) or (ii) in disregard of that likelihood;*
- (b) *if paragraph (a) does not apply, a person referred to in subsection (1) is guilty of an offence under section 19A(2), 21A(2), 21C(2), 22A(2), 23AA(2), 23B(2) or 23H(2), as the case may require, if it is proved that the offence of the body corporate —*
- (i) *occurred with the consent or connivance of the person; or*
- (ii) *was attributable to any neglect on the part of the person.*
- (1b) *A person convicted of an offence by virtue of subsection (1) or (1a) is liable to the penalty to which an individual who is convicted of that offence is liable.*
- (2) *Where the affairs of a body corporate are managed by its members, subsections (1) and (1a) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.*

### Question 123: How should officer be defined?

Please see answer to Question 122 which outlines the provisions in s55 of the WA Act which has an defining provision in subsection (1).

**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?**

See answer to Q 122.

It is not appropriate to deem a person responsible for the actions of the body corporate if there is no specific guilt on their part and it is not appropriate to include a provision in the model Act which deems an officer automatically guilty.

The prosecution should be required to prove that it was in the circumstances outlined in s55 of the WA Act that the offence occurred by the body corporate and on that basis it is appropriate for an officer to be found guilty of the offence of the body corporate.

**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?**

See answers to Q 122, 123 and 124.

**Question 126: Should the model OHS Act provide for specific defences to be available to an officer? If so, what?**

As above in Q 122,123,124 and 125.

**Question 127: What should the approach to officers of unincorporated associations or volunteer officers be?**

A similar test of personal culpability as that to be applied to officers of a body corporate should be applied to unincorporated associations and volunteer officers.

See comments in Q122 – 126.

## **8.7 SENTENCING OPTIONS**

**Question 128: For which offences should monetary penalties (fines) be imposed?**

Monetary fines should be imposed for all offences. Criminal liability should be determined in the criminal law system with penalties based on the sentencing procedures of the relevant court hearing the matter.

See question 104-110 for further comments regarding penalties.

**Question 129: Should maximum fines be provided in the model OHS Act, or is there an alternative approach?**

Yes, the model OHS Act should set out maximum fines but further guidelines around the application of penalties should not form part of the model OHS Act. Magistrates and judges hearing OHS prosecutions should have the discretion to assess the matter based on the particular evidence and circumstances before them.

More prescription and penalty allocation guidelines would fetter the ability of judges to make equitable sentencing decisions based on the specifics of the particular matter at hand.

Legislative prescription in relation to fines and criminal sentencing in relation to OHS issues would undermine the significance of the many intricacies and technical issues which require consideration in relation to safety and health prosecutions, where the duty of care is often difficult to define and even more difficult to balance against issues of practicability.

**Question 130: Should the level of fines be different for the various offences? If so, for what offences and at what levels?**

The seriousness of the offence should dictate the level of penalty applicable and maximum penalties for certain types of offences should be specified. The level of penalty should not be based on the seriousness of the outcome of the action or omission but rather the seriousness of the offence and the actual culpability of the offender.

A model based on the WA system of penalties as discussed in response to Question 104 would be appropriate

Once the provisions which will dictate the duties under the model OHS Act have been developed and the offences potentially to be created have been identified it is via consultation with business and other interested system participants that specific penalties and offences should be created. CCI looks forward to being a part of such consultation.

**Question 131: Should there be statutory minimum fines for some offences? If so, what?**

No, there should not be minimum fines prescribed in the model OHS Act. Maximum penalties will provide the requisite guidance to decision makers with the discretion to apply a penalty suitable to the particular circumstances of the case.

Penalties imposed by the regulator, specialist OHS panel and the courts should reflect the size of the business, a balanced approach when assessing fault based on duties, and should recognise that the deterrent effect of penalties is limited for any parties outside the matter.

See also comments at Q 129.

**Question 132: Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?**

The level of penalty should be based on culpability of the offender and not the outcome. The penalty should reflect the seriousness of the offence, with the recognition that the seriousness of the offence will in most instances be directly reflected in the seriousness of the outcome. There is equity in this approach and there should be the ability of the judiciary to apply penalties based on the circumstances before them and not a fettering of this discretion with a prescribed penalty based on outcome and not the offence itself.

Circumstances surrounding repeat offences should be assessed by the decision maker based on the evidence before them and penalties should to some extent reflect the seriousness of a repeat offence, taking into account the particular facts of the matter.

Criminal matters should be prosecuted by the police if it is considered that a criminal offence has been committed and it is more appropriate for the matter to be heard in that jurisdiction as is currently the case in WA.

See further comments in Question 104-110.

**Question 133: Are there options that could facilitate more consistent outcomes across the jurisdictions such as a national register of decided cases?**

In a specific area such as OHS there is benefit in having precedent to refer to in determining the likely amount of a fine for a particular offence, with a maximum penalty prescribed. Any cases determined in similar circumstances should provide guidance only and not be binding on future decisions with similar facts.

Employers, workplaces, workforces and work methods are unique across the Australian economy and this must be recognised in the way that OHS prosecutions are approached and determined. Judges should have the discretion to allocate penalties appropriate to the

circumstances and there should be no fettering of this discretion. Both parties should have the opportunity to present evidence to the court as to what they consider to be a reasonable penalty in the circumstances with the final decision that of the judge in their sole discretion. It may be appropriate to consider avenues for appeal for more serious offences.

A national database would be beneficial in assisting the education of participants in the system to understand the seriousness of offences and the potential financial impact of a breach of certain provisions. Decision making should be based on sound principles of evidence assessment and should not be dictated, albeit indirectly, by previous decisions.

**Question 134: What penalty options should be available in addition to or instead of fines?**

Penalty options such as enforceable undertakings instead of prosecution should be available in appropriate circumstances and the regulator should make the determination as to what circumstances are appropriate in consultation with the employer.

Adverse publicity order and OHS improvement projects as currently used in some jurisdictions may also be appropriate.

**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?**

Imprisonment provisions such as those in the WA model with a maximum imprisonment of 2 years prescribed in circumstances where a person suffers serious injury or death as a result of the gross negligence of the offender may be appropriate. (see further comments in Q104-110).

It is necessary and appropriate to define “gross negligence” as per s18A of the WA model to ensure that there is a boundary and interpretive guidance in relation to the more serious offences.

**18A. Meaning of gross negligence in relation to certain breaches of this Part**

- (1) *This section applies to a contravention of section 19(1), 20(1) or (3), 21(1) or (2), 21B(2), 22(1), 23(1), (2), (3) or (3a), 23A or 23G(2).*
- (2) *A contravention of a provision mentioned in subsection (1) is committed in circumstances of gross negligence if —*
  - (a) *the offender —*
    - (i) *knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed under that provision; but*
    - (ii) *acted or failed to act in disregard of that likelihood;*
  - and*
  - (b) *the contravention did in fact cause the death of, or serious harm to, such a person.*

There should be no specific criminal offences, such as industrial manslaughter, introduced for OHS matters.



The appropriate place for maximum penalty prescription for criminal matters would be in the criminal code of each jurisdiction under the general criminal law. A commitment by the jurisdictions to ensure consistency in the criminal penalty regime would be critical to achieving the national consistency in OHS laws which is the aim of the model OHS Act.

## **8.8 WORKPLACE DEATH AND SERIOUS INJURY**

### **Question 136: Should there be specific offences relating to workplace death or serious injury? If so, what?**

No, the offence itself should be based on a breach of a safety requirement, not the fact that someone has died or suffered serious injury per se. The level of penalties should be based on the seriousness of the breach, and the outcome (ie death or serious injury) is relevant to this.

The offence penalty regime in the WA model is an appropriate basis for the model OHS Act.

See also comments in Q 104-110, and 128-133.

### **Question 137: Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?**

If breaches result in serious injury or death it should be determined by the regulator and police whether it is more appropriate to commence proceedings under the OHS legislation or in the criminal system under the Crimes Act or other criminal legislation. The outcome should not dictate the requirement for a matter to be treated as a criminal offence, but the culpability of the offender should determine the appropriate jurisdiction to prosecute matters. No specific pathways to facilitate prosecution in the criminal courts should be created in the model OHS Act.

It is against the public interest to create an opportunity for the sensationalism of workplace events through specific criminal offences for OHS matters. Ordinary rights of an accused person in the criminal system should not be affected by the fact that they are an employer, manager, supervisor, executive or other particular defined person in the workplace context.

The person's true culpability should be the focus of any criminal action and the Crimes Act is the appropriate place for these offences to be defined (as they are currently). New offences such as industrial manslaughter are not supported.

### **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?**

It is the seriousness of the offence in all its circumstances which should determine the penalties to be imposed. All relevant circumstances, including the culpability of the offender and the outcome of the breach, should be taken into account in the determination of the penalty. It would be inequitable to base penalty decisions on anything less than all the circumstances of the particular case.

## **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?**

The processes and avenues for penalty collection available under normal court processes should be adequate without any need for provisions to be contained in the model OHS Act.

**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?**

No. The enforcement of penalties against bodies corporate should be managed as per the normal processes of the court. The corporations law and other legislation in effect with respect to the recovery of debts owed by bodies corporate should also provide adequate avenues for penalty collection.

**Question 141: Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?**

The model OHS Act should make provision for alleged offenders to invoke a right to silence to prevent self incrimination, similar to the provisions in the Victorian Act.

Provision should also be made in the model OHS Act for the protection against double jeopardy for the same incident, similar to section 55A of the WA Act.

**55A. No double jeopardy**

*A person is not liable to be punished twice under this Act in respect of any act or omission.*

## **Chapter 9 Other Issues**

### **9.1 REGULATION MAKING POWERS**

**Question 142: Should the power to make regulations be limited and if so, in what way?**

Regulation making powers should be limited to specific issues yet should reflect the dynamic nature of the OHS system. The regulations should give flexibility and consist of only the necessary prescription to achieve the objectives 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.**

Regulations pertaining to administrative and lower tier offences should be able to heard summarily and be dealt with quickly. There should, however, be no strict liability offences in the regulations or the model OHS Act.

The regulations should provide the necessary further particulars to enable employers to comply with requirements of the model OHS Act. Adequate guidance material to facilitate compliance without the need for detailed prescription should be the aim of the model OHS legislation.

Each case must be assessed by a Magistrate on its own merits and an enforcement and prosecutions policy developed by a tripartite body should outline the manner in which various breaches will be dealt with. Specific prescription in the Act is not required or appropriate.

## 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?

A provision similar to that in effect in s57 of the WA OSH Act should be included in relation to codes of practice as this provision supports the objective of providing information to assist in compliance and provides clarity as to the status of codes of practices.

Codes of practice should be developed by tripartite agreement and in consultation with industry. They should be clear and provide easy to follow instructions for compliance.

Wherever possible process flows, checklists and pro forma documents should be included to provide employers with all the tools needed to facilitate compliance.

National consistency of codes of practice and guidance material will have the benefit of reducing the volume of materials to be produced by individual jurisdictions and will enable a focussing of resources on preventative strategies nationally.

#### 57. Codes of practice

- (1) *For the purpose of providing practical guidance to employers, self-employed persons, employees, and other persons that are subject to a duty under Part III of this Act, the Minister may, upon the recommendation of the Commission, approve any code of practice.*
- (2) *A code of practice may consist of any code, standard, rule, specification or provision relating to occupational safety or health that is prepared by the Commission or any other body and may incorporate by reference any other such document either as it is in force at the time the code of practice is approved or as it may from time to time thereafter be amended.*
- (3) *The Minister may, upon the recommendation of the Commission, approve any revision of the whole or any part of a code of practice or revoke the approval of a code of practice.*
- (4) *The Minister shall cause to be published in the Government Gazette notice of every approval or revocation under this section and the approval or revocation comes into force on the day of such publication.*
- (5) *The Minister shall cause a copy of every code of practice, and any document incorporated in it by reference, and any revision or revocation of a code of practice to be laid before each House of Parliament within 14 sitting days of such House.*
- (6) *The Minister shall cause a copy of every code of practice, including any revision thereof and any document incorporated in it by reference, to be made available, without charge, for public inspection.*
- (7) *A person is not liable to any civil or criminal proceedings by reason only that the person has not complied with a provision of a code of practice.*
- (8) *Where it is alleged in a proceeding under this Act that a person has contravened a provision of this Act or the regulations in relation to which a code of practice was in effect at the time of the alleged contravention —*
  - (a) *the code of practice is admissible in evidence in that proceeding; and*
  - (b) *demonstration that the person complied with the provision of the Act or regulations whether or not by observing that provision of the code of practice is a satisfactory defence.*

### 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?

A system for notifying and reporting on “incidents” must be very clear as to the circumstances in which a report or notification must be made. Notification and reporting should be limited only to circumstances which actually result in a specific type of injury (to be prescribed in the Act and regulations). Any additional reporting would be an undue compliance burden.

Reporting of specific injuries is appropriate and a system which provides clear instruction to employers as to the process to be followed is critical. The model OHS Act should specify the types of injuries to be reported and the regulations should set out the requirements to be followed. The regulator should release and disseminate a simple process flow for employers to follow to report injuries.

Injuries to be notified and reported should be those which have a significant impact on the injured person’s ability to work and section 23I of the WA OSH Act, along with regulations 2.4 and 2.5 of the WA OSH Regulations set out clearly what is expected of an employer. The model OHS Act and Regulations should include similarly clear provisions.

#### **23I. Notification of deaths, injuries and diseases**

(1) *In this section —*

**“business of an employer”** means —

- (a) *the conduct of the undertaking or operations of an employer; and*
- (b) *work undertaken by an employer or any employee of an employer;*

**“business of a self-employed person”** means —

- (a) *the conduct of the undertaking or operations of a self-employed person; and*
- (b) *work undertaken by that person.*

(2) *This section applies where —*

(a) *at a workplace, or at residential premises to which section 23G(2) applies, an employee incurs an injury, or is affected by a disease, that —*

- (i) *results in the death of the employee; or*
- (ii) *is of a kind that is prescribed;*

*or*

(b) *at a workplace, a person who is not an employee incurs an injury in prescribed circumstances that —*

- (i) *results in the death of the person; or*
- (ii) *is of a kind that is prescribed,*

*in connection with —*

- (iii) *the business of an employer; or*
- (iv) *the business of a self-employed person.*

(3) *The relevant person must —*

- (a) *forthwith; or*

(b) *as otherwise provided by the regulations,*

*notify the Commissioner in the prescribed form of the injury or disease giving such particulars as may be prescribed.*

- (4) *The relevant person is the employer concerned where —*
- (a) *subsection (2)(a) applies; or*
  - (b) *the person incurs the injury in connection with the business of an employer.*
- (5) *The relevant person is the self-employed person concerned where the person incurs the injury in connection with the business of a self-employed person.*

#### **2.4. Notification under section 23I of certain injuries**

- (1) *For the purposes of section 23I(2)(a) of the Act, the kinds of injury incurred by an employee to be notified by an employer to the Commissioner are —*
- (a) *a fracture of the skull, spine or pelvis;*
  - (b) *a fracture of any bone —*
    - (i) *in the arm, other than in the wrists or hand;*
    - (ii) *in the leg, other than a bone in the ankle or foot;*
  - (c) *an amputation of an arm, a hand, finger, finger joint, leg, foot, toe or toe joint;*
  - (d) *the loss of sight of an eye;*
  - (e) *any injury other than an injury of a kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.*
- (2) *For the purposes of section 23I(3) of the Act, notification of an injury to which section 23I(2)(a) of the Act applies is to be made —*
- (a) *in the form of Form 1 in Schedule 2; or*
  - (b) *by telephone.*
- (3) *The prescribed particulars for the purposes of the notification of an injury to which section 23I(2)(a) of the Act applies are —*
- (a) *name and business address of the employer;*
  - (b) *name, sex and occupation of the employee;*
  - (c) *address of the place at which the injury was incurred;*
  - (d) *date and time the injury was incurred;*
  - (e) *brief description of how the injury was incurred and the type of machine or equipment, if any, involved;*
  - (f) *nature of the injury or, where applicable, report of death; and*
  - (g) *the place to which the employee has been taken.*

*[Regulation 2.4 amended in Gazette 14 Dec 2004 p. 6011.]*

#### **2.5. Notification under section 23I of certain diseases**

- (1) *For the purposes of section 23I(2)(a) of the Act, the kinds of disease affecting an employee to be notified by an employer to the Commissioner are the diseases set out in column 1 of the Table to this regulation that have been contracted in the course of the kind of work set out opposite that disease in column 2 of the Table.*

<b>Disease</b>	<b>Table Work</b>
<b>1. Infectious diseases:</b> <i>tuberculosis</i> <i>viral hepatitis</i> <i>legionnaires' disease</i> <i>HIV</i>	<i>Work involving exposure to human blood products, body secretions, excretions or other material which may be a source of infection</i>
<b>2. Occupational zoonoses:</b> <i>Q fever</i> <i>Anthrax</i> <i>Leptospiroses</i> <i>Brucellosis</i>	<i>Work involving the handling of or contact with animals, animal hides, skins, wool, hair, carcasses or animal waste products</i>

- (2) For the purposes of section 231(3) of the Act, notification of a disease to which section 231(2)(a) of the Act applies is to be made —
- (a) in the form of Form 2 in Schedule 2; or
  - (b) by telephone.
- (3) The prescribed particulars for the purposes of the notification of a disease to which section 231(2)(a) of the Act applies are —
- (a) name and business address of the employer;
  - (b) name, sex and occupation of the employee;
  - (c) name and address of the workplace where the employee works;
  - (d) name of the disease; and
  - (e) date of diagnosis of the disease.

**Question 146: What provisions should be made in the model OHS Act for the external review of regulatory decisions?**

External review of regulatory decisions should be available through a specific OHS Panel or the Magistrate's Court and should be distinct from any industrial or other areas of specialty.

OHS should not be industrialised through decision review in the IR Commission and matters pertaining to OHS decisions should be heard in a specific panel or court or appropriate jurisdiction.

See also Question 71.

**Question 147: Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?**

No. Mechanisms to resolve workplace disputes regarding OHS issues should be aimed at resolution at the workplace without the inclusion of external parties. If matters cannot be resolved using that mechanism there should be an avenue for the regulator to step in to determine the issue. There is no need for a further tier of issue resolution to be introduced.

See also Question 71.

**Question 148: Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?**

**Administration**

We assume that the reference to administration is a reference to the functions of the inspectorate, enforcement, advice and similar functions to administer the provisions of the Act. In that sense, all administration should be undertaken by the regulator without interference from any other parties.

General Administration of OHS regulation in each jurisdiction should be done under consistency provisions of the model OHS Act which facilitate harmonisation.

**Policy making**

In relation to the making of regulations and policy the Act should facilitate a tripartite approach to all aspects of regulation and administration. The Act should provide for the establishment of a tripartite body which can undertake consultation, agree nationally consistent and applicable approaches, and are representative of the primary stakeholders in the OHS system.

There should be provision made to allow for consultation at all levels of OHS policy development with a national tripartite consultative body (such as the former NOSHC and ASCC) to advise on a national regulatory framework.

All stakeholders in all of the participating jurisdictions should contribute to and cooperate with the tripartite body and this body should have the primary function of providing leadership in the coordination of efforts and resources to further the common OHS objectives. The body should also be charged with developing national standards, raising awareness of OHS issues and providing guidance material to support the framework.

The current WA Commission for Occupational Safety Health provides a successful working model for tripartism. It is a body of 13 members with representatives from all participants in the OHS system and has achieved significant outcomes in a cooperative and steadfast manner. The Commission is established under the WA OSH Act and performs prescribed functions with the vision to provide strong leadership in the promotion of occupational safety and health as a key element in business planning. The Commission is guided by a strategic plan which details its objectives and specific actions to be taken to achieve this.

To further its effectiveness in specific high risk areas and industry specific initiatives the Commission obtains advice from a Legislation Advisory Committee, Emerging Issues and Risk Management Advisory Committee, Construction Industry Safety Advisory Committee, and Mining Industry Advisory Committee and has been operating as a tripartite body since 1985. It has completed some significant work including the development of codes of practice on working hours, safe design, implementing national standards or construction work and licensing of persons performing high risk work.

It must be highlighted that although the Commission is an independent body it consults and interacts frequently with the regulator (Worksafe WA) and consultation at all levels is highly effective and encouraged by the Commission. An advisory body such as the Commission will assist in the development and implementation of policies and initiatives to achieve the objective of national consistency and the prevention of injuries in the workplace.

The model OHS Act should facilitate the establishment of a body similar to the WA Commission for Occupational Safety & Health in each jurisdiction and nationally.

**Question 149: Should there be some provision for tripartite committees that deal with OHS matters in particular industries?**

Yes, where it is identified that there are priority industries and priority issues which can and should be addressed at industry level it is appropriate to have tripartite committees established to deal with these matters. This approach will encourage commitment and contribution from all participants in that industry and will enable the experts within that industry to address the core issues for best outcomes.

The model OHS Act should facilitate the establishment of tripartite industry specific committees and there should also be mechanisms within the terms of reference of industry specific committees for their abolishment once the work has been completed.

## **9.6 MUTUAL RECOGNITION**

**Question 150: What areas should be subject to formal mutual recognition in the model OHS Act.**

All areas where a potential inconsistency or overlap may occur should be addressed in the model OHS Act to reduce duplication and confusion. Areas such as licensing, training, qualification, manufacturing standards and similar issues should be included.

**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 outcomes**
- **lower regulatory compliance**
- **improved harmonisation of the requirements for such permits and licensing for industry across Australia**

Once model provisions outlining the processes and requirements for issuing permits and licensing have been agreed it will be necessary for all of the jurisdictions to collectively map all areas of overlap and current inconsistency. The model OHS Act should provide for a system of issuing and assessing permits and licenses based on industry practice and relevance. A consultative mechanism for developing the process should be included in the model OHS Act and the process developed should be part of the regulations.

## **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?**

The model OHS Act should be framed so as to promote the adoption of one system of OHS regulation with central processes which can be applied by the jurisdictions. There should be an obligation on participating jurisdictions to identify any overlap with existing legislation within their jurisdiction and cross-jurisdictionally and provision should be made for resolution of overlaps and inconsistencies to enable adoption of the model OHS Act.

The Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety to be signed by all of the jurisdictions will address many of the issues and further reduction of overlap and inconsistencies should be vigorously pursued on an ongoing basis.



## Other comments

It would be appropriate to include a provision in the model OHS Act for periodic statutory review of the scheme and the Act to ensure that it remains viable, current and optimal for the purpose it has been created.