



Public Comment Response Form Exposure Draft for Model Act and Stage 1 Model Regulations

You are invited to answer any and all of the questions listed below which have been taken from the Exposure Draft Discussion Paper:

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
Work Health and Safety Act. I agree with the arguments in the Discussion paper for this title.
Q2. Does the definition of ‘ <i>officer</i> ’ clearly capture those individuals who should have ‘ <i>officer</i> ’ duties under the model Act?
<p>The term ‘<i>officer</i>’ appropriately includes all community volunteers who act on Boards of Directors. May it also be construed to include heads of domestic households the engage contractors to do specialist activities around the house (eg electrician, plumber)?</p> <p>Section 26 requires officers to exert due diligence – appropriate to a Board of Directors, including volunteers, but not to heads of domestic householders engaging contractors.</p> <p>Section 33 with section 29 exempts local authorities and volunteers for offences against Primary duty of care, Duties related to specific activities and Duties of officers etc. It is not appropriate to exempt the legal entity of local authorities from these duties – but it is appropriate to exempt the elected Councillors. It is appropriate to exempt volunteers as officers (section 26) but not volunteers as workers (section 27). Volunteers should have the same rights of OHS protection as other workers, and, in turn, have the same responsibilities as other workers in the workplace. There should be an exemption for heads of domestic households.</p> <p>Recommendations: Amend the Model Act to ensure that heads of domestic households are not liable as ‘<i>officers</i>’ or ‘persons with the management and control of workplaces’.</p>



Amend the Model Act so that local authorities, as legal entities, are liable under this Act, but elected Councillors are not.

Amend the Model Act so that volunteers are exempt from legal liability as officers, but are held liable as workers.

Q3. There is some overlap between the definitions of 'plant' and 'structure', as many types of plant have structural attributes, and vice versa. Should 'plant' and 'structure' be defined in a way that removes this overlap?

No. The discretion of the courts to hear cases taking into account all the circumstances will provide clarification in specific instances.

Q4. Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?

Section 23(2) of the *Occupational Health and Safety Act 2004 (Vic)* requires employers, so far as reasonably practicable, to
'(b) employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees of the employer.'

In my employment, as an occupational health and safety consultant, small to medium sized enterprises contact me and ask me to be that person – as they are required to answer who their suitably qualified person is – in tender documents. Both Victorian and Commonwealth companies and agencies now seem to have such a question in their tender documents.

There are many OHS matters where a person conducting a business or undertaking needs access to specialist advice, especially as 'health' now includes psychological health (section 4) in the Model Act. For example, OHS matters related to: Plant, asbestos, ergonomics of workstations, discrimination and harassment, occupational violence, OHS impacts of shift work, fatigue. In some cases, this requires an OHS generalist, in other cases, access to specialists such as tertiary qualified engineers, ergonomists, industrial hygienists, organisational psychologists.

It is not sufficient to have access to 5 day trained Health and Safety Representatives or trained trade union OHS permit holders.

WorkSafe Victoria has taken up this issue by issuing a guideline (under section 12 of their Act) on how they interpret 'suitably qualified'.



<p>Recommendation: Add a requirement for persons conducting a business or undertaking to have access to appropriate professional OHS advice.</p>	
<p>Q5. Is the scope of the suppliers' duty appropriate?</p>	
<p>Yes</p>	
<p>Q6. Is the scope of the 'worker' definition appropriate? Should it cover students gaining work experience?</p>	
<p>Yes. I am especially pleased to see volunteers are now to be treated as workers. I also want volunteers and students gaining work experience to have the duties of workers. In parts of the hospitality, fast food and restraint industries – new workers are persuaded to work for no pay for the first few weeks. The reciprocal duties between persons conducting a business or undertaking and workers are important – persons conducting the business or undertaking must provide adequate induction (to the industry, the site and the tasks) and workers must follow instructions related to OHS.</p>	
<p>Q7. Is the definition of 'workplace' appropriate?</p>	
<p>Yes.</p>	
<p>Part 2 – Safety Duties</p>	
<p>Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?</p>	
<p>Yes.</p>	
<p>Q9. Is the definition of 'reasonably practicable' appropriate in this context?</p>	
<p>Yes.</p>	
<p>Q10. Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining</p>	



compliance with the duty?
No. The courts should always be given discretion to interpret definitions, taking into account the circumstances of the incident.
Q11. Is the proposed scope of the primary duty appropriate?
Yes, especially with the caveat 'so far as is reasonably practicable'. It is also important that the self-employed (section 18(2)) are included.
Q12. The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?
Recommendation: add that this be provided at a level that can be understood by the workers.
Q13. The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (Clause 18(4)(e)). Should this provision be drafted to require 'access to' such facilities (e.g. to take account of requirements for mobile workplaces)?
Yes.
Q14. Is the scope of the duties related to specific activities appropriate?
Yes.
Q15. In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
Yes – it is up to the person conducting a business or undertaking, working with the person with the management and control of the workplace to ensure workers are not ignorant of what constitutes 'reasonable care' in the circumstances of the particular workplaces.
Q16. Is the treatment of volunteers under the model Act appropriate?



“Have your say on workplace safety laws.”



Section 26 requires officers to exert due diligence – appropriate to a Board of Directors, including volunteers.

Section 33 with section 29 exempts volunteers for offences against Primary duty of care, Duties related to specific activities and Duties of officers etc. It is appropriate to exempt volunteers as officers (section 26) but not volunteers as workers (section 27). Volunteers should have the same rights of OHS protection as other workers, and, in turn, have the same responsibilities as other workers in the workplace.

Recommendation: Amend the Model Act so that volunteers are exempt from legal liability as officers, but are held liable as workers.

Q17. Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?

The Category 1 offences (section 30) cover what in the ACT is termed industrial manslaughter and in Victoria ‘reckless endangerment’.

It is appropriate that all three categories cover the risk of injury or illness as well as when an injury or illness has occurred.

Q18. What should the maximum penalty be for a contravention of the model regulations?

Per recommendations of the Review Panel, as agreed by the WRMC:

Category

Maximum penalty, corporations

Maximum penalty, individuals

1

\$3 million

\$600,000 and/or 5 year imprisonment for officers

\$300,000 and/or 5 year imprisonment for workers or other persons

2



\$1.5 million
 \$300,000 for officers
 \$150,000 for workers or other persons

3
 \$500,000
 \$100,000 for officers
 \$50,000 for workers or other persons

By the time these penalties come into force (end of 2011) they will represent small increases in the maximum penalties in the Victorian Act. I am assuming each jurisdiction will index the pecuniary penalties – per use of penalty units in the Victorian system.

Additional categories are not necessary. It is an essential part of our legal system that the courts are given discretion in applying penalties, taking into account the total circumstances of the breach of any Act. The penalties in Acts are maximums – as guidance to the courts on public opinion about perceived severity of offences.

Q19. The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?

Criminal offences must be proved beyond reasonable doubt; civil offences on the balance of probabilities. I prefer criminal offences – to emphasise that we are talking about potential or actual death, serious injury or illness.

Part 3 – Other Obligations

Q20. Is the list of notifiable incidents sufficiently clear and objective, so duty holders easily understand their obligations?

Section 35 (vi) 'loss of bodily function' – is not clear. I understand this term to refer to temporary or permanent loss of use of a sensory organ or going unconscious.

Recommendation: Amend 'loss of bodily function' to reflect temporary or permanent loss of use of a sensory organ or going unconscious.



Part 4 – Consultation, participation and representation	
Q21. Is the proposed scope of duty to consult workers appropriate?	
Yes. However, there is no indication in section 46 Nature of consultation – that those consulted are NOT the decision makers.	
Recommendation: Amend section 46 to make clear that the ultimate decision about an OHS matter must be made by the person conducting a business or undertaking, because of their duties under section 18.	
Q22. Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?	
One aim of consultation is to prevent OHS issues coming under dispute internally. One aim of 'issue resolution' procedures is to prevent OHS matters becoming a dispute and requiring external intervention (eg from the Regulator or Union OHS representatives or employer association representatives). In the same way that Issue Resolution provides allow escalation (section 74), so there should be an escalation provision when consultation fails to use the Issue Resolution procedure.	
It is noted that Issue Resolution could simply be used as a delay tactic by those dissatisfied with a consultation process. However, the use of Issue Resolution procedures is both a 'safety valve' and a recognition of 'due process' being used in the workplace.	
Recommendation: Amend Part 4, Division 1 to alert and allow duty holders to use the Issue Resolution procedure in Division 4 if they fail to reach agreement via consultation procedures.	
Q23. Clause 49 allows work groups to be determined for workers engaged in 2 or more businesses or undertakings. Should such arrangements be by agreement only, i.e. with no prescribed procedure if negotiations fail?	
By agreement only. In OHS we seek common agreement around preventing injury and illness. Australia's OHS Acts are based on a consensus model, with safeguards when consensus cannot be attained. There is a potential for anger about OHS if two businesses or undertakings, with different objectives, services, products or activities are forced to co-operate when there is no need for them to do so.	
Q24. Negotiations for work groups must be commenced within a 'reasonable time'. Should a time limit be prescribed e.g. 14, 21 or 28 days?	
No. Different industries, such as residential aged care and house construction operate on different perceptions of reasonable time. The courts have discretion in taking into account all the circumstances.	



Q25. Elections for HSRs and possibly deputy HSRs must be conducted 'as soon as reasonably practicable' after the relevant work groups are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?

Time limits are best left to a guidance note – not a mandatory Act or Regulation. See my answer to question 24.

Q26. The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?

No. But several provisions in the Model Act require training before a HSR power can be exercised. There is a practical management issue here – which each Regulator will have to take up.

Q27. The model Act requires that a health and safety committee be established within 2 months of the request being made. Six of the current OHS Acts include such a timeframe, which varies across jurisdictions from 3 weeks to 3 months. Is the proposed time limit of 2 months appropriate?

Yes, given the diversity of industries that the provision will be applied to. The law creates a minimum, level playing field. Well managed businesses, with good OHS culture, will establish committees quickly and not be bothered by these legal requirements.

Q28. The *Fair Work Act 2009* (Cth) (Fair Work Act) refers to ceasing work on the basis of a 'reasonable concern' of the employee about an imminent risk to his or her health and safety, while the model Act refers to 'reasonable grounds'. Should the terminology in clauses 75 and 76 be aligned with the Fair Work Act?

I am not a lawyer – I have no opinion on this terminology.

Q29. Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?



Yes. Individuals are already protected under common law – they can cease work when they believe there is a serious and immediate threat to their own health and safety (also embodied in section 75). Again, there is a logistic issue of ensuring training is readily available – which Regulators will have to address. There may be need for public subsidies for transport and accommodation for those HSRs elected in remote and rural areas of Australia – to access appropriate training in a timely manner.

Q30. Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?

Yes, as the issue of a PIN is a legal matter.

Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?

I have no opinion or experience on this matter.

Part 5 – Protection from Discrimination

Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?

Pre 2007 - a Victorian Trades Hall Council survey found that about 60% of the employee Health and Safety Representatives surveyed were frightened to use their powers for fear of retaliation from their employer. Laws will make very little difference to this - to take legal action requires both money and emotional strength. Laws are useful in this context to point out to managers that there are legal protections (even if they are unlikely to be used).

Part 5, Division 1 sections seem appropriate.

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

Yes.



Q34. Should the model Act contain a specific authorisation process for an OHS entry permit or can it rely on authorisation obtained under other Acts such as the Fair Work Act?

No – joint Commonwealth and Victorian provisions currently seem to work well.

Q35. Should contraventions of this Part attract criminal or civil sanctions? If civil sanctions are considered appropriate, should penalty levels reflect those that apply under the Fair Work Act?

The checks and balances in Part 6 appear to be adequate and more extensive than those in the current Victorian OHS Act. Criminal offences emphasise the importance of the need to deal fairly in workplaces where the balance of power is the focus of OHS disputes. Once the OHS permit holder leaves the workplace - it is the workers who have to deal, in the long term, with any bitterness left behind.

Q36. The right of entry provisions have been drafted to be generally consistent with the Fair Work Act. Do these provisions appropriately apply to the role of a union representative when entering the workplace in relation to OHS, rather than in relation to workplace relations?

My impression is that the Part 6 provisions are confined to OHS issues EXCEPT the access given to employee records in section 109. The only OHS matter I can think of that would be in personal files are absences from work. Access to personal files is a privacy issue and very sensitive in the Aged Care and Community sector industries. I see little justification for accessing employee records.

Recommendation: Delete section 109 (1) (a) 'employee records; or'. Amend Part 6, Division 2 to exclude access to employee records, and refer explicitly to privacy legislation of the Commonwealth, States, Territories.

Part 7 – The Regulator

Q37. Should guidelines have any other particular legal status under the Act?

No. Courts should always be able to exercise discretion beyond guidelines of a regulator.

Part 10 – Review of Decisions



Q38. Is the list of reviewable decisions appropriate?
Seems all right.
Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?
Yes.
Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?
Yes, but add a formal consideration to take into account the seriousness of the matter before a stay decision is made. Recommendation: Amend section 224(2) to require the reviewer to take into account the seriousness of the matter before a stay decision is made.
Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?
Do you have any other comments?
HSR training should be competency based Section 65 Obligation to train health and safety representatives. At the moment, health and safety representatives in Victoria are eligible to attend a 5 day introductory course and an annual 1 day update course. Neither course has any competency testing associated with it and, in my opinion, the Regulator has over-prescribed the content of these courses. Competency testing should not result in the extension of the initial course beyond 5 days or the update course beyond one day. Competency training is now accepted Australia wide as a means of ensuring recognition of learning of workers in many skill areas. Many Certificate IIIs and Certificate IVs in most industries have an OHS module. The National Occupational Health and Safety Commission (predecessor to Safe Work Australia) defined OHS competencies appropriate to various



levels of OHS activity.

Recommendations: Section 65 be amended to refer to 'competency based training'. Amend this section to refer to both an initial course of competency based training and update training. The Division of the Act be amended to recognise prior competency training in HSR from anywhere in Australia.

Each Regulator allow for a practical 'hands on' risk assessment as part of the initial training and for competency to be tested orally by an RTO, to ensure those with low literacy skills can have full powers as a HSR.

Remove reverse onus of proof for discriminatory conduct

Section 99 of the Model Act is very hard to read and understand. I believe it creates a reverse onus of proof for discrimination (as exists in section 77 of the OHS Act 2004 (Vic)). That is, a person charged with discriminatory behaviour must prove they did not discriminate. People must be protected against discrimination. However, reverse onus of proof is not part of our general legal tradition, that requires the prosecution to prove (beyond reasonable doubt in criminal cases and on the balance of probability in civil actions) the charges.

Recommendation: Delete section 99.

Uphold right not to self-incriminate

Section 178 'Abrogation of privilege against self-incrimination' seems an unnecessary provision and an affront to our legal traditions. I do not see the need to compel witnesses to reveal evidence that cannot be used in court.

Section 154 of the Victorian OHS Act 2004 reads:

Protection against self-incrimination

- (1) A NATURAL PERSON MAY REFUSE OR FAIL TO GIVE INFORMATION OR DO ANY OTHER THING THAT THE PERSON IS REQUIRED TO DO BY OR UNDER THIS ACT OR THE REGULATIONS IF GIVING THE INFORMATION OR DOING THE OTHER THING WOULD TEND TO INCRIMINATE THE PERSON.
- (2) HOWEVER, SUB-SECTION (1) DOES NOT APPLY TO—
 - (A) THE PRODUCTION OF A DOCUMENT OR PART OF A



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say on
workplace
safety
laws.”



DOCUMENT THAT THE PERSON IS REQUIRED BY THIS ACT OR THE REGULATIONS TO PRODUCE; OR (B) THE GIVING OF A PERSON'S NAME OR ADDRESS IN ACCORDANCE WITH SECTION 119.

IT SEEMS TO ME THAT THE VICTORIAN PROVISION IS SUFFICIENT FOR AN INSPECTOR TO CARRY OUT THEIR DUTIES WHILE PROTECTING THE INDIVIDUAL CITIZEN,

Recommendation: REPLACE SECTION 178 OF THE MODEL ACT WITH A PROVISION SIMILAR TO THAT IN SECTION 154 OF THE *Occupational Health and Safety Act 2004* (VIC).

Those with the management or control of the workplace need to understand their OHS duties

THERE IS NO PROVISION IN THE MODEL ACT FOR THOSE WHO MANAGE OR CONTROL THE WORKPLACE TO RECEIVE TRAINING IN OHS, IN PARTICULAR THEIR DUTIES AND THE DUTIES OF THOSE THEY MANAGE – UNDER THE ACT. AS AN OHS CONSULTANT, I CONDUCT TWO HALF-DAY TRAINING SESSIONS FOR MANAGERS AND SUPERVISORS – WITH HOMEWORK IN BETWEEN. THIS IS ABOUT THE MAXIMUM TIME BUSY MANAGERS AND SUPERVISORS CAN TAKE OFF TO INCORPORATE SAFETY INTO THEIR DAY TO DAY PRACTICE.

MANAGERS AND SUPERVISORS ARE SOMETIMES EMBARRASSED, BECAUSE THEY HAVE TO BE TOLD WHAT TO DO BY THE 5 DAY TRAINED HEALTH AND SAFETY REPRESENTATIVES.

Recommendation: SECTION 19 BE AMENDED TO REQUIRE THAT THOSE WITH THE MANAGEMENT OR CONTROL OF THE WORKPLACE MUST BE TRAINED IN THEIR OHS DUTIES – AT THE EXPENSE OF THOSE WHO CONDUCT THE BUSINESS OR UNDERTAKING.

JK 18 OCT 09