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## 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
<b>Part 1 – Preliminary Matters</b>
<p><b>Q1.</b> What is the best title for the model Act?</p> <p>The Oxford dictionary defines “Safety” as “freedom from danger or risk”. Other dictionaries have similar meanings. Overall this is a negative meaning. In addition, many people involved in OHS equate ‘safety’ to traumatic injury, and not to long term disease, nor psychological injury, such as stress. The inclusion of “Health” in the title obviates this by covering these issues and also implying the positive promotion of good health. A suggested title is “<i>Health &amp; Safety at Work Act</i>”</p>
<p><b>Q2.</b> Does the definition of ‘<i>officer</i>’ clearly capture those individuals who should have ‘<i>officer</i>’ duties under the model Act?</p>
<p><b>Q3.</b> 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?</p>
<p><b>Q4.</b> 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?</p>



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<b>Q5.</b> Is the scope of the suppliers' duty appropriate?
<b>Q6.</b> Is the scope of the ' <i>worker</i> ' definition appropriate? Should it cover students gaining work experience?
<p>There have been situations where students on work experience have been killed while at the workplace. Many tertiary programs require a degree of work experience as part of the study program. At the very minimum, the employer owes a duty of care to the student in the same manner as they owe a duty of care to other workers at the workplace.</p> <p>At the same time, education institutions placing students also have a duty of care to investigate that the safety systems in the organisation that they are placing the students into are adequate to ensure their safety. The situation is similar to that applying to labour hire firms.</p> <p>Yes – students on approved work experience should be covered by the term “worker”.</p>
<b>Q7.</b> Is the definition of ' <i>workplace</i> ' appropriate?
Yes
<b>Part 2 – Safety Duties</b>
<b>Q8.</b> Do the principles that apply to the duties of care give clear guidance on what is expected?
<p>While the general principles are clear, the application by the employer requires an understanding of what things work and what doesn't. There is nothing in the Act that assists the employer to seek and obtain good advice.</p> <p><b>A specific recommendation is made on this issue at the end of this response form, under “Other Comments”</b></p>



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<b>Q9.</b> Is the definition of 'reasonably practicable' appropriate in this context?
<b>Q10.</b> Should the definition of 'reasonably practicable' be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?
<b>Q11.</b> Is the proposed scope of the primary duty appropriate?
<b>Q12.</b> 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?
This is a matter for a code of practice, not the enabling Act.
<b>Q13.</b> 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)?



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<b>Q14.</b> Is the scope of the duties related to specific activities appropriate?
<b>Q15.</b> In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
<b>Q16.</b> Is the treatment of volunteers under the model Act appropriate?
<b>Q17.</b> 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?
<b>Q18.</b> What should the maximum penalty be for a contravention of the model regulations?
<b>Q19.</b> The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care



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offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?

**Part 3 – Other Obligations**

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

**Part 4 – Consultation, participation and representation**

**Q21.** Is the proposed scope of duty to consult workers appropriate?

**Q22.** Should the model Act include a procedure to follow if agreement on a consultation procedure cannot be reached?

**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?



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<p><b>Q24.</b> Negotiations for work groups must be commenced within a '<i>reasonable time</i>'. Should a time limit be prescribed e.g. 14, 21 or 28 days?</p>
<p><b>Q25.</b> Elections for HSRs and possibly deputy HSRs must be conducted '<i>as soon as reasonably practicable</i>' 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?</p>
<p><b>Q26.</b> 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?</p>
<p><b>Q27.</b> 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?</p>
<p><b>Q28.</b> The <i>Fair Work Act 2009</i> (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?</p>



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

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

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

**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?

**Part 6 – Workplace entry by OHS entry permit holders**

**Q33.** Are the notification requirements appropriate?



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<b>Q34.</b> 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?
<b>Q35.</b> 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?
<b>Q36.</b> 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?
<b>Part 7 – The Regulator</b>
<b>Q37.</b> Should guidelines have any other particular legal status under the Act?
<b>Part 10 – Review of Decisions</b>



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**Q38.** Is the list of reviewable decisions appropriate?

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**Q39.** Are the processes and timeframes prescribed for the internal review of decisions appropriate?

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**Q40.** Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?

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**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?

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**Do you have any other comments?**

**Issue:** The draft Act does not comment on the requirement for competent OHS advice to persons conducting a business or undertaking

**Discussion:**  
The draft Act provides as one of its main objectives the following:



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3(1)(d) to promote the provision of advice, information, education and training in relation to occupational health and safety

One of the current realities of OHS technical advice to a person conducting a business or undertaking, and workers, is its variability in terms of quality.

In the review of the *Occupational Health & Safety Act 1985 (Vic)*, Maxwell (2004)<sup>1</sup> noted:

*“Many duty holders engage consultants to assist them to resolve OHS issues. While many consultants provide competent expert services to their clients, a number of duty holders have raised concerns about poor service that they have received. Examples of poor advice include duty holders paying several thousands of dollars for a range of material that appears to have been downloaded from web-sites with minimal tailored information for the business; information that is unusable by the client.*

.....

*This industry may benefit from some form of industry based accreditation scheme, similar to those operating in the accounting field so that consumers can gain a level of confidence about the consultants that they may engage”.*

There is no reason to believe that the situation is different in other jurisdictions. There are no mandated requirements defining the knowledge, skills and attributes that are required of an OHS professional. It is quite amazing in situations that can affect life and limb, that there is no such regulation. The draft Act, as currently exists in all jurisdictions, requires competency requirements for a range of tradespeople in the workplace to ensure that they perform their work competently (eg Part 3 Division 2). Yet there are no requirements on the competency of advice on setting up the overall safety system for the undertaking. An employer can in good faith pay for advice that if proved to be inadequate, could result in the death of one or more workers, and prosecution of the employer.

Competent advice is required to adequately implement the primary duty of care at the workplace, particularly in relation to the risk management principle (s16), and the “reasonably practicable” principle (s17).

<sup>1</sup> Maxwell C, (2004) Occupational Health & Safety Act Review, State of Victoria, March 2004, cl1270



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If, as Maxwell contends, employers are reluctant to obtain OHS advice if they feel that it could be substandard due to unqualified OHS practitioners, then this will limit the effectiveness of OHS legislation in meeting its main objective:

*3(1)(a) to protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of hazards and risks arising from work*

WorkSafe Victoria has initiated a three part process that goes some way to correcting this situation:

(a) Developed and issued a guideline that defines “suitably qualified” in relation to the requirement in the Victorian legislation (s22(2)(b)) to “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”. The guideline covers the following attributes required of a competent OHS consultant:

- Knowledge
- Industry experience
- Professional activity
- Reputation
- Professional association
- Communication skills
- Technical expertise
- OHS legislation understanding, and
- Risk management strategies.

This has been promulgated to employers indicating how they need to assess the quality of advice that they receive. While not explicit, the implication is that utilising professionals that are certified by OHS professional associations is an approach that is most likely to be successful.

(b) Developed a Victorian Code of Ethics and Minimum Service Standards for Professional Members of OHS associations. This has been endorsed by a number of professional OHS organisations that can act to control the behaviour of members in ensuring that they are qualified,



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and provide advice appropriate to their areas of expertise. Where this is found to have been abused, the consultant can be expelled from the association.

(c) Developed training guidelines for their inspectorate to be able to identify whether employers have obtained, or need to obtain appropriate technical advice to improve safety in the workplace.

While it is early days in the implementation of these guides, they have the backing of all the professional organisations. The guides and Code of Ethics have been developed through consultation with union and employer peak bodies and thus have the support of the work community to improve the quality of OHS advice in Victoria. They are being used in OHS tertiary education within this university so graduates understand their responsibilities as OHS practitioners.

The model Act does not discuss the requirements for a person conducting a business or undertaking to obtain appropriate technical advice, and such a requirement should be included.

**Recommendation:**

It is recommended that a clause similar to the Victorian requirement be included in the draft Act within the duties of a person conducting a business or undertaking. Eg

18(4)(h) *“employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the person conducting a business or undertaking concerning the health and safety of the workers in that business or undertaking”.*