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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
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
Occupational Health and Safety Act
Q2. Does the definition of ‘ <i>officer</i> ’ clearly capture those individuals who should have ‘ <i>officer</i> ’ duties under the model Act?
Yes
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
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?
Yes
Q5. Is the scope of the suppliers’ duty appropriate?
Yes



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Q6. Is the scope of the ‘*worker*’ definition appropriate? Should it cover students gaining work experience?

Yes. Yes

Q7. Is the definition of ‘*workplace*’ appropriate?

Yes

Part 2 – Safety Duties

Q8. Do the principles that apply to the duties of care give clear guidance on what is expected?

Yes

Q9. Is the definition of ‘*reasonably practicable*’ appropriate in this context?

Yes

Q10. Should the definition of ‘*reasonably practicable*’ be exhaustive i.e. so only matters listed may be considered in determining compliance with the duty?

No, it should be as it is on page 13. This has proven to be most satisfactory and is acceptable to employers.

Q11. Is the proposed scope of the primary duty appropriate?

Yes



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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?

It should be provided at a level that can be understood by the workers. Migrants should be encouraged to learn English.

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)?

No, this should not be necessary.

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?

No. How This is going a little too far.

Q16. Is the treatment of volunteers under the model Act appropriate?

Yes, otherwise you may not have any!



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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?

No, they are excessive and inappropriate.

Part 2, 2.6. Offences and Penalties.

In submissions made to the Robens Committee 40 years ago there was “a very considerable body of opinion to the effect that the sanctions of the criminal law had only a very limited role to play in improving standards of safety and health at work.”

The draft Act ignores those findings and reverts to an increased regulatory presence and the imposition of extreme penalties, a situation that the Robens Committee recognised as inappropriate to the majority of infringements which arise under OHS legislation.

The typical infringement or combination of infringement arise rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency. In these circumstances the process of prosecution and punishment by the criminal courts is largely an irrelevancy. The real need is for a constructive means of ensuring that practical improvements are made and preventive measures adopted.

The conclusion of Neil Gunningham (Sydney Law Review Vol. 29; pp359-390) “that vengeful prosecution against those who neither intended harm nor were reckless in their behaviour is widely perceived to be unjust, and prosecutions carried out in NSW have caused the law to lose its legitimacy in the eyes of duty holders” should be heeded.

The Robens Committee recognised this 40 years ago.

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

At the level currently applying in Western Australia.



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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?

Of course they should not all be criminal offences. A criminal conviction for non-duty of care offences would be a nonsense.

See comments on question 17.

Part 3 – Other Obligations

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

Yes

Part 4 – Consultation, participation and representation

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

Yes, it is most appropriate. It is likely to be the most important component of the draft legislation.

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

No! It would discourage efforts to reach agreement. The current procedure in Western Australia is effective and appropriate.

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?

Yes, only by agreement. More prescription less consultation.

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?

28 days would be appropriate.



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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?

Yes, it should be, suggest 28 days.

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?

Yes, if it is to be taken seriously. All too often the tyranny of distance is misused as an excuse.

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?

One month should be adequate but two months is acceptable.

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?

No! The ‘reasonable grounds’ has been appropriate in our jurisdiction.

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

Absolutely – it is essential to acceptability of the HSR’s credibility.



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

Absolutely – it is essential to acceptability of the HSR’s credibility.

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

Yes.

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?

Yes

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

The institution of entry permits to workplaces is strongly opposed by this Association.

Part 6, Division 2. Entry to inquire into suspected contraventions

The proposal to allow entry to workplaces by persons not required to demonstrate any level of competency or expertise in occupational health and safety is foolhardy and rejects the key principle on which the Robens-type legislation is based.

The Robens Committee considered that it was crucial to recognise that “the primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them.”

This solution was to operate under legislation which was effectively self-regulatory.

Introducing third parties, particularly those who have no OHS expertise into the equation, is certain to alienate both employers and



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trained safety and health representatives who have demonstrated their capacity to represent employees and deal with the maintenance of safe and healthy workplaces.

Western Australia has existing legislation that is functioning extremely well and is demonstrably effective.

There is no precedent in OHS legislation in other advanced nations for this imposition and no evidence has been provided to warrant this unnecessary disruption to the consultative, participative process existing at this time in Western Australia.

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?

See question 33.

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?

See question 33.

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?

See question 33.

Part 7 – The Regulator

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

No, they are purely advisory in content and are usually intended to assist understanding and compliance with codes, regulations etc.

Part 10 – Review of Decisions

Q38. Is the list of reviewable decisions appropriate?

Yes.



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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.

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?

In a code of practice.

Do you have any other comments?

P3, Division 4, Issue Resolution

The introduction of ‘a representative of a party’ to the issue resolution process (Clause 73) is strongly opposed. This will discourage workplace resolution of OHS issues by the employer-employee process which continues to be demonstrably effective here in Western Australia.

No justification has been provided for this proposal and one can only conclude that there is a hidden motive behind it.

The current situation which utilises inspectors where there is difficulty with resolving issues is both adequate and appropriate.



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P18, Part 8. Enforcement Powers

In the current Western Australian OSH Act Part V, Inspectors, occupies 8 pages.

In the model Act, Part 8, Enforcement Powers, occupies 20 pages.

The Western Australian Act has functioned extremely well over the past 25 years with the role of inspectors as recommended by the Robens Committee having as its prime objective the prevention of accidents and ill health and the promotion of progressively better standards at work through the provision of information and skilled advice to industry and commerce.

Industry needed to accept increasing responsibility for self-inspection and self-regulation. The primary objectives of the inspection services should be first, to support this development, and secondly to concentrate regulatory activity more selectively on serious problems.

These arrangements have been successful in Western Australia for the past 25 years and there is no justification, nor has it been provided, to alter the status quo.

Consultation RIS for a Model OHS Act

Access Economics expects that the model Act will confer an overall marginal to small net benefit for business.

This is an opinion only and is not supported by any hard evidence. For employers not having multi-jurisdictional operations there may well be additional costs rather than marginal benefits.

This position needs to be clearly pointed out to small to medium business.