# A REVIEW OF KEY CHARACTERISTICS THAT DETERMINE THE EFFICACY OF OHS INSTRUMENTS

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Australian Government
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# A Review of Key Characteristics that Determine the Efficacy of OHS Instruments

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## Glossary

| | |
|---|---|
| ASCC | Australian Safety and Compensation Council |
| COPS | Code of Practice |
| NOHSAC | New Zealand Occupational Health and Safety Advisory Committee |
| NOHSC | National Occupational Health and Safety Commission |
| OHS | occupational health and safety |
| SME | small and medium enterprise |

Reference is also made to various OHS statutes by their initials. The full title and date of each statute referred to are listed in Appendix 5.

## Executive Summary

Codes of practice and guidance material fulfil important roles in Australia and New Zealand under their respective regulatory regimes. The former provide greater certainty about what constitutes compliance and the latter provide broader advice. Yet notwithstanding their centrality to the success of OHS regulation, these mechanisms have been subject to very little empirical scrutiny.

The principal aim of this report was to review key characteristics that determine the efficacy of OHS codes of practice and guidance materials and, in so doing, to fill some gaps in the knowledge base about them. The report is underpinned by a review of the literature relating to codes and guidance materials (both regulator and industry developed), in Australia, New Zealand and internationally, in the area of OHS and other areas of regulation. This review is complemented by detailed interviews and questionnaires administered to 54 respondents, drawn from OHS regulators, industry, unions, OHS and other specialists in seven countries (Australia, New Zealand, the United Kingdom, Canada, The Netherlands, Denmark and Finland). The review is also informed by an online survey of 22 users of codes and guidance materials (in Australia and New Zealand).

The factors determining the efficacy of codes of practice and guidance materials are wide ranging. This research adopted an exploratory approach, identifying and examining a diverse range of factors including the type of instrument and legal status, the purpose and characteristics of individual instruments, development processes, promulgation activities, monitoring of implementation, enforcement and other contextual influences operating in the industries and organisations in which it is intended codes and guidance will be implemented. We make no claim to determine the statistical significance of particular factors. It would be difficult and quite likely impossible to do this, precisely because of the diversity of, and interaction between, these and other factors influencing OHS performance in workplaces. Rather, this report examines the ways these factors can influence efficacy of OHS instruments.

With regard to legal status, codes of practice ‘approved’ or otherwise officially ‘made’ under OHS legislation have a quasi-legal status. At a minimum they are ‘evidentiary’ and legislation provides for their use as evidence in court proceedings, without further ‘proving’ in court. However, they are not legally binding. They provide guidance about an acceptable way (or ways) to comply with an OHS statute (or regulations), but there is the option to devise alternative ways of satisfying legal obligations. Voluntary codes and non-statutory guidance materials are also flexible instruments that provide advice but they have a less formal status.

Rather than a dichotomy between codes with quasi-legal status and voluntary codes or guidance, there is a continuum with regard to the legal status of all types of codes and guidance materials. At one end of

the continuum are instruments that are legally binding because they are cited or 'called up' in an Act or regulations. At the other end of the continuum are purely voluntary (industry-developed) codes and guidance. In between there are approved codes of practice with a rebuttable presumption of non-compliance (a 'safe harbour' for regulators), approved codes of practice (compliance codes) that are 'deemed to comply' (a 'safe harbour' for duty holders), and approved codes of practice that are evidentiary but have no 'rebuttable presumption' or 'deemed to comply' status.

In the continuum of quasi-legal and purely advisory instruments, we suggest the principal basis for selecting a quasi-legal instrument over a purely advisory one is the need for unequivocal, authoritative advice. An 'approved' code of practice is a more appropriate choice when it is important to provide clarity and certainty about an acceptable way(s) to comply with the OHS statute or regulations, and it needs to be clear and unambiguous that the instrument has legal status and/or can be used as evidence in proceedings. A statutory guideline is appropriate if there is a need to provide definitive interpretation of a particular provision of an OHS statute or regulation. In other circumstances, where the principal aim is to provide practical advice and solutions, guidance materials (in various forms) are appropriate.

To ensure efficacy, legal status needs to be considered alongside instrument design, content, processes for development, promulgation, enforcement and contextual issues. Irrespective of whether OHS instruments are codes, guidance materials or another type, they need to be suitable for, accessible to and usable by the target audience, and the target audience needs the capacity and motivation to use them.

OHS instruments need to be designed as OHS policy interventions, on the basis of a clear understanding of the rationale for the instrument, how it is intended to work, and who or what is supposed to change. In turn, these questions need to be answered on the basis of a 'contextual analysis' of the characteristics of the intended target audience, the industry sector, culture, supply chain relationships and other relevant contextual issues. Decisions can then be made about: the purpose of the instrument; the appropriate legal status and characteristics of the instrument; how the instrument should be developed, who should be involved and how; how it should be promoted, disseminated and explained; the need for and approaches to monitoring implementation; and a strategic approach to enforcement.

The focus of a code of practice or guidance material, may be a class of hazard/risk (eg plant, hazardous substances), a particular hazard/risk (eg forklifts, isocyanates), hazardous work or tasks (eg demolition, confined spaces), or a particular process (eg OHS risk management, consultation). The choice of subject matter is appropriately made on the basis of analysis of the target audience and industry sector(s). A key consideration is to address the serious hazard exposures or risks for particular working communities.

The type of standard or provisions (or mix of provisions) is also important. Appropriately, general duties, performance outcomes and process-based standards are now the building blocks of OHS statutes and regulations in Australia, New Zealand and a number of the overseas countries we studied. However, these types of standards are not especially helpful in codes and guidance intended to provide clarity or certainty about what compliance may look like. Some of our respondents saw a place for explanation of hazard/risk management principles, training or other process-based provisions with regard to specific hazards/risks. Most of our Australian and New Zealand respondents favoured a more prescriptive approach, providing practical advice and solutions indicating what duty holders can do to achieve compliance. However, even here there may be exceptions.

With regard to format and style there was broad agreement from industry and union 'users' of codes and guidance materials that desirable features are: plain language so they are easy to read; clear and concise information (not discursive); practical 'how to' advice and solutions; clear simple drawings, diagrams, photos or other illustrations to support advice/solutions provided; incorporation of checklists and tools for use in implementation; up to date; reference to other resources and contacts; free print copies; and the avoidance of excessively long, complex or repetitive material.

The development of codes of practice is resource intensive and time consuming. Yet OHS regulators typically made a decision to develop a particular instrument based on essentially ad hoc criteria. With limited human and financial resources available there is a strong case to use these strategically, adopting a systematic approach to determining when a new instrument is developed and pre-determined criteria for doing so. These criteria might include: areas of risk identified on the basis of hazard exposure and injury surveillance information; and areas of greatest need for use of regulator resources (those less able to develop themselves).

Development processes also 'miss the mark'. For codes of practice, 'typical' processes include forums for stakeholder consultation on draft documents produced or provided (from another source) by the regulator, a period of public consultation/public comment, and approval by the relevant Minister or authority. There may also be Parliamentary scrutiny of gazetted codes. Despite all of these processes there are serious concerns about knowledge and expertise contributed to the process, and weaknesses in (or lack of) engagement with those expected to implement the code. These issues were raised with particular reference to regulator-developed codes of practice but may also apply to the development of OHS instruments more generally.

Whether the development of a code or guidance is led by a regulator or by industry, some rethinking of the process is needed. For efficacy, there is a need to ensure relevant knowledge, skills and experience are contributed with regard to: the hazard/risk or other subject matter;

existing OHS legislation; the standards development process; practical understanding of the industry sector(s), workplace(s) and work process(es) for which a code or guidance is intended; and plain language drafting and user friendly presentation. Effective communication skills are also needed to facilitate the involvement of individuals with these different areas of expertise, as well as skills in gathering and assimilating information.

There is a case for identifying specific competencies required for standards development staff and actively developing such expertise (rather than 'learning by doing'). Beyond this, we are not suggesting that all the knowledge, skills and experience can be found in particular individuals. This is part of the problem. Current processes tend to focus too much responsibility on the individual members of committees and working parties. Rather, as part of the 'analysis' process we are suggesting there is a need to clarify what is needed for development of a particular instrument and to actively seek this out.

Except amongst the most motivated people, changes in attitude and behaviour rarely flow from information provision alone. However well an OHS instrument is designed and developed, its efficacy will also depend on how well it is disseminated and made known to those for whom it is intended. A more proactive approach is needed than the present heavy reliance on websites and newsletters. For efficacy, there is a need to tap into the ways the relevant people actually obtain information and who they will 'hear' it from, ideally connecting with their business priorities.

Promulgation can also take a much wider range of forms including: face-to-face distribution and encouragement of action from trusted sources (customers, suppliers, industry peers, networks and associations); active distribution in inspectors' visits to workplaces; more active 'hands on support' such as on-site advice over a period of time; print copies available free so they can be 'put in people's hands'; facilitating access through websites by direct communication with relevant people about what is there and how to access it. Attention to website design can also increase accessibility to 'casual visitors'. Trialling and testing is needed to ensure this.

There is a case for more strategic use of codes and guidance materials by OHS regulators to provide advice, monitoring and enforcement when required. This includes inspectors alerting duty holders to particular codes and guidance, and 'taking them through' the advice and solutions they provide. By referencing provisions in audit tools, performance can be monitored and duty holders alerted to relevant codes and guidance available for areas of non-compliance. They can be used as part of targeted interventions, such as industry sector workshops to educate duty holders and follow up checks on implementation, and in enforcement action.

For codes of practice, in particular, there is a case for ensuring that monitoring and enforcement are integrated into the overall

implementation strategy. Experience with voluntary industry codes suggests some ways the influence of regulators may be widened to other 'actors', for example by harnessing peer pressure through industry associations, networks and supply chains, encouraging independent third party audits that make specific reference to particular provisions of codes, and provision of incentives by workers' compensation providers. The relevant actors and opportunities for monitoring and enforcement can be considered 'case by case' as new instruments are developed.

Through the literature and findings from respondents we have identified a number of opportunities for enhancing the efficacy of OHS codes and guidance materials. This does not mean these instruments are inherently flawed. Rather, their efficacy may be reduced by less than optimal design, development, promulgation, monitoring and enforcement. Our respondents had suggestions for improvement and sometimes had serious concerns, but industry, union and regulator respondents alike saw an ongoing role for these OHS instruments.

Respondents who apply codes or guidance as end users said they are a resource for developing in-house policies, procedures, practices or systems of work. They are used to identify hazards and determine controls or opportunities for improvement. They are used to develop training materials and determine workplace amenities and facilities. They provide a benchmark against which OHS outcomes can be progressively improved, through work and workplace redesign, hazard/risk management, training and safe work practices.

The challenge is to enhance the quality, extend the range of users and foster their implementation across a wider range of workplaces. Important lessons may be drawn from experience with voluntary industry codes where common characteristics of success have been identified. These include: commitment and leaders who visibly champion the code; staff development and training to ensure 'buy in' by those who need to implement it; and clearly articulated aims, roles and responsibilities. Also important are: an open process of development and implementation, including communication with a wide range of stakeholders; and fair and open dispute resolution.

We have also stressed the need to treat the development and introduction of new codes and guidance materials as OHS policy interventions and part of this means incorporating evaluation as an integral part of the intervention. A range of confounding influences makes evaluation difficult. Nonetheless, the basis for evaluation should be determined when clarifying the rationale for an OHS instrument, how it is supposed to work, and who or what is supposed to change.

# Chapter 1: Introduction

## Background

Australia and New Zealand's OHS regulatory regimes, which follow the model recommended by the British Robens' Report of 1972, are 'performance based' or 'goal-setting'. The general duty provisions which form their core are supported by regulations and approved codes of practice and by guidance materials prepared by regulatory authorities. These regimes also leave open the possibility of (or in some cases actively encourage) the development of codes of practice by industry. The emphasis is on encouraging and facilitating compliance and best practice as well as inspecting for and enforcing compliance. For these reasons, providing greater certainty about what constitutes compliance (through codes of practice) and broader advice (through guidance material) is particularly important (Gunningham and Johnstone 1999, pp 29-31).

Yet notwithstanding the centrality of codes and guidance to the success of these regulatory regimes, these mechanisms have been subject to very little empirical scrutiny. It is over 25 years since some of these regulatory regimes were introduced, but in that period very little effort has been made to identify the relative importance of codes and guidance materials to the functioning of the entire regulatory regime, to determine whether codes should be voluntary or quasi-legal, whether codes and guidance material work better in some circumstances than others, what characteristics determine their efficacy or how they can best be designed and implemented to work in the public interest. Indeed, there has been no systematic review of the efficacy of instruments at the 'voluntary' end of the OHS regulatory continuum in general, or of approved codes of practice and guidance materials in particular (see Government of Canada 1998 and Webb 2004 for detailed analysis of consumer protection voluntary codes). The few evaluations in Australia, New Zealand and other countries have focused primarily on particular OHS codes or guidance, in a particular jurisdiction.

This report is a step towards rectifying this deficiency and to answering the above and related questions. It is based on an extensive literature review of material relating to codes (both regulator and industry based) and guidance materials not only in Australia and New Zealand but also internationally. It extends to relevant material not just in the area of OHS but also with regard to other areas of regulation. This review is complemented by interviews and questionnaires administered to over 70 respondents in seven countries. These key informants provided invaluable information and informed views on a variety of complex matters that could not have been gleaned from the partial and limited literature on these instruments. The interviews and responses to questionnaires were particularly valuable with regard to questions concerning the use, relative effectiveness and key design elements of

statutory, quasi-statutory and non-statutory instruments created (by regulators and by industry) to support OHS regimes in a range of countries and states.

## Why Codes of Practice and Guidance Material?

For the last three decades, traditional prescriptive regulation has been subject to mounting criticism (Baldwin, Scott and Hood 1998, p 15; Bluff and Gunningham 2004, p 19). First, it is rigid and incapable of addressing market failings in the most efficient, least-cost manner. Second, the problem of regulatory overload makes the continuing use of highly detailed prescriptive regulation problematic and quite probably counterproductive. Finally, shrinking tax bases, a predisposition towards 'light handed regulation' and the resistance of companies operating in an increasingly global market place, further serve to make prescriptive regulation unattractive to both business and governments (though not it should be emphasised, to many SMEs and trade unions).

For such reasons, policy makers across a variety of nations have experimented with alternative policy instruments, both in OHS and in other areas of social regulation. These alternatives hold out the promise of delivering desired policy outcomes in a more flexible, efficient and effective manner, which is less intrusive and less interventionist than prescriptive regulation. Codes of practice and guidance materials are amongst the policy mechanisms which may prove best capable of providing these benefits. Above all, they are seen as playing essential roles: (i) as a form of 'responsive regulation' (Ayres and Braithwaite 1992, pp 35-44), regulation which responds to the particular circumstances of the industry including how effective it has been in the past in making private regulation work; and (ii) in providing essential guidance to employers and others as to how to fulfil their statutory responsibilities.

In principle, codes of practice and guidance material have many advantages. These include their capacity to provide practical, flexible and cost effective solutions. If they are industry-focused they may: generate industry 'ownership', at least if industry are involved in their development; be tailored to industry needs and address OHS problems on an industry-wide basis; establish a form of industry quality control; and improve the overall image of an industry and provide for public confidence in its capacity to meet its social and regulatory obligations. Beyond this, the virtues of codes and guidance depend upon their particular structure.

Notwithstanding the perceived virtues of codes of practice and guidance materials the use of codes (though far less guidance) is not without controversy. On the one hand, the current quasi-legal status of OHS codes in Australia has been criticised on the ground that the codes have become far too prescriptive in practice and that they now operate as de facto regulations (Brooks 1993, p 236). On the other hand, a report of

the Australian Industry Commission (Industry Commission 1995) was particularly critical of many existing codes that focused on how to manage a particular hazard in all workplaces in all industries with the result that the guidance they provided was too broad and general to be of practical assistance. More recently there has been considerable controversy over the design and structure of 'compliance codes' introduced under the Victorian OHS Act 2004, while New Zealand's declining production of codes of practice, and the aging (without updating) of some codes and guidance has been the subject of some criticism. Clearly there is a diversity of views about how codes should best be designed and indeed even broader debates, dating back to the Robens' Report (1972, p 45) continue as to the appropriate balance between the use of enforceable, mandatory regulations, and more flexible codes of practice that cannot be directly enforced. We will return to these questions later in this report.

## Outline of the Report

Throughout this report we present an integrated discussion of the findings from the review of the literature and the empirical component of the present project. Where applicable we also discuss relevant provisions of OHS legislation.

The methods used for the research are presented in Chapter 2, followed by an outline of the types of OHS instruments and their legal status (if any) in Chapter 3. In Chapter 4, the purpose of different types of OHS instruments are discussed, as well as the subject matter, types of standards incorporated in them, and the design and format of instruments. The drivers for developing codes of practice and guidance material, the processes for and some issues in development are examined in Chapter 5. In Chapter 6 there is discussion of the approaches used to promote, disseminate and explain OHS codes of practice and guidance materials, as well as approaches to and experience of monitoring and enforcement. Chapter 7 explores ways the efficacy of codes and guidance materials may be influenced by contextual issues such as the industry sector, culture, size and characteristics of organisations in which they are used. The use and impact of codes and guidance materials is examined in Chapter 8, on the basis of empirical data from Australian and New Zealand industry and union respondents, and in Chapter 9 the evidence for efficacy is reviewed on the basis of the published literature. Finally, Chapter 10 discusses the implications of the findings of the preceding chapters for the design, development, promulgation, monitoring and enforcement of OHS codes of practice and guidance materials.

# Chapter 2: Methods Adopted for this Project

## The Literature Review

The literature review involved a search for, collation and analysis of literature concerning regulator and industry-developed codes of practice and guidance materials, their intended purposes, evidence of efficacy, and characteristics that determine their efficacy. While the review focused on Australia, New Zealand and the other target countries as identified below, relevant research and reports were also sought from the literature worldwide. The review incorporated literature relating to codes of practice and guidance materials in OHS (but not technical standards), as well as in other relevant fields.

This search identified more than 100 articles, reports or books of relevance to the project. An analysis was undertaken of the content of all references which might provide insights in relation to: the types of standards; what instruments exist in particular jurisdictions; definitions of codes and guidance; purposes of codes and guidance; development processes; content/elements of codes and guidance; implementation processes; reasons for implementing codes; legal status; enforcement of codes/use of codes or guidance in enforcement; methodology for evaluating codes and guidance; effectiveness (determinants of/constraints for); and regulator research priorities/initiatives. There is a wider literature on 'regulation' and 'regulatory law' which was used to supplement the sources identified through the literature search.

A systematic search was made of a range of electronic information networks, databases and websites for references relating to codes of practice and guidance materials in OHS and other relevant fields, both regulator and industry developed, and from the literature worldwide. The search terms 'code', 'code of practice', 'guidance', 'guideline' and 'guide' were used individually and in combination with the terms 'effectiveness', 'evaluation', 'efficacy'. The terms 'self-regulation' and 'selfregulation' were also searched but these proved too generic to identify literature relevant to the present project.

The electronic networks and databases searched were: APAIS, Australian Digital Theses, CCH Online (OH&S Library), CCOHS Online (for OSHLINE, HSELINE, NIOSHTIC-2, CISILO and Canadiana), Cochrane Library, Conference Papers Index, Dissertation Abstracts, EBSCO, IngentaConnect, Lexis.com, ProQuest, Science Direct (Elsevier), SSRN (Legal Scholarship Network) and Web of Science.

The websites searched were:

- Australia: ACT WorkCover; ACTU; ASCC; Australian Law Reform Commission; Department of Industrial Relations Qld; Comcare; Monash University Accident Research Centre (MUARC); Productivity

Commission; SafeWork SA; WorkCover NSW; WorkCover Vic; WorkSafe NT; WorkSafe WA.

- Canada: Institute of Occupational Health; IRSST (Quebec); CSST (Quebec); WorkSafe British Columbia; Alberta Standards and Workplace Safety.
- Europe: EU Agency for Safety and Health at Work; EU Foundation; EU/OSHA; HESA-ETUI (peak union body).
- Finland: Finnish Institute of Occupational Health; Ministry of Social Affairs and Health.
- Germany: Commission for Occupational Health and Safety and Standardisation (KAN); Hauptverband der Gewerblichen Berufsgenossenschaften.
- New Zealand: Department of Labour; Environment and Risk Management.
- The Netherlands: National Institute of Occupational Health.
- Norway: the Norwegian Institute of Occupational Health
- Singapore: Ministry of Manpower, OHS Division
- UK: Centre for Corporate Accountability; Health and Safety Executive (all Health and Safety Laboratory, Contract Research Reports and Research Reports); Institution for Occupational Safety and Health; London School of Economics
- US: AIE Brookings Institute (Harvard), NIOSH, OSHA.

## The Empirical Component of the Research

### Data collection methods

The project required that information be obtained about the efficacy of statutory, quasi- and non-statutory codes of practice and guidance material, including information about: the types of instruments; how they are developed (including who develops, drivers and criteria for development, and the development process); their intended, as well as actual, roles and purposes; promulgation activities; evaluation studies undertaken and characteristics that determine their efficacy; and resource implications. These are complex questions that do not lend themselves to simple answers. Where, as with this project, the aim is to develop a more detailed understanding in an area where there has been little past research, the most appropriate methods are qualitative ones which enable more in-depth exploration of processes and experience (Morse and Richards 2002, 27-28). As such, qualitative methods were used to collect data from key informants, through telephone interviews and survey questionnaires, returned by email. An Interview Schedule and Questionnaire were used since there were particular matters about which information was required (as summarised at the beginning of this

paragraph). (Appendix 1 presents the topics canvassed in interviews or through the questionnaire)

Topics were open-ended, rather than closed-ended, so as to explore the range of responses and yield well-rounded explanations based on richer, more detailed data than the surface patterns and trends that quantitative survey data provide (Mason 1996, 4). In any event, within the timeframe/budget for this project it was not feasible to administer a survey to a statistically representative sample of informants, in multiple countries. Surveys also typically have a low response rate which impairs the validity of findings. In any case, it was not meaningful or feasible to 'control' the very wide range of variables influencing the efficacy of codes of practice and guidance materials in any particular context. These issues are discussed through each chapter of this report. These chapters reveal the diversity of factors potentially influencing efficacy, with regard to issues of legal status, characteristics of instruments, variation in development and promulgation, and variation in end use settings.

However, it was feasible and informative to capture some workplace experience by posting a brief electronic survey to the website of the New Zealand Occupational Health and Safety Advisory Committee (NOHSAC). This contained questions designed to extract illustrative examples of the ways codes and guidance are used, and workplace OHS changes attributable to their use. The NOHSAC survey provided valuable insights supplementing the in-depth interviews and questionnaire, outlined above. (Appendix 2 presents the questions asked in the NOHSAC online survey).

## Analysis and presentation of data

The data gathered through telephone interviews, email questionnaires and the online survey were analysed qualitatively to construct explanations of the characteristics, development, use and efficacy of codes of practice and guidance materials. The data were used to corroborate and clarify findings through comparison, identifying common themes and key points of difference. Boxes are used throughout the report to provide illustrations of broader points being made in the text, to summarise key findings or processes, or to make complex material easier to interpret.

## Countries selected to review the efficacy of codes and guidance

Countries were selected (in addition to Australia/New Zealand) on the basis that they had a legal architecture and cultural characteristics sufficiently similar to Australia and New Zealand so that their experience could be extrapolated with some confidence. Necessarily, they were also countries that had significant experience of such instruments. Representative jurisdictions meeting these criteria were Canada (in particular British Columbia), Denmark, The Netherlands, the UK and Finland.

A decision was taken not to consider developments in the United States. This was essentially because the US approach to OHS law is very much, "a command-and-control regulatory model of worker protection" (Lobel 2006, p 269), with no provision for codes of practice or other non-prescriptive underpinnings. Moreover, rules under the *Occupational Safety and Health Act* 1970, are interpreted by the Occupational Safety and Health Administration (OSHA), an agency which is embedded in an adversarial legal system in which confrontational enforcement and "going by the book" is the norm, and "you see it, you cite it", is the agency mantra (Bardach and Kagan 2002). As such, there is little scope for tools such as codes of practice.

## Selection of key respondents

The key informants were drawn primarily from regulators, industry associations, unions, OHS researchers, OHS consultants and people with industry experience. The number of informants was based on obtaining sufficient information to develop a consistent description of how things are done in a particular country, and illustrative examples of the use and impact of codes and guidance materials. It was not appropriate to seek a statistically representative sample or undertake statistical analysis (as discussed above).

Informants were identified after initial consultation with the Office of the ASCC and NOHSAC. The key criterion was relevant knowledge and experience. This included involvement with development, promulgation and evaluation initiatives, and/or experience of use and impact. All respondents to telephone interviews or email questionnaires had the opportunity to provide responses across this range of topics, but were able to indicate if they did not have knowledge or experience of a particular topic. We drew on existing contacts, as well as liaising with relevant OHS authorities, and peak employer, union and OHS professional associations to identify potential informants. Respondents were identified through snowball sampling, through these sources, as well as articles placed in the email newsletters *Regulation at Work* (NRCOHSR 2007) and *OHS Alert*.

## Characteristics examined in determining efficacy

It was desirable that information be obtained about a range of matters to enable discussion and documentation of codes of practice and guidance materials, and the key and common elements of their efficacy in improving OHS performance. We incorporated these items in the interview schedule and email questionnaire (Appendix 1). In addition, we took account of international experience of voluntary initiatives generally. According to the OECD (OECD 1999, pp 134-135) some other characteristics which it would be important to examine include: clearly defined targets; characterisation of a 'business as usual' scenario; credible regulatory underpinning; credible and reliable monitoring; third

party participation; penalties for non-compliance; and information oriented provisions.

## Number and range of respondents

We gathered detailed information (through telephone interviews or email questionnaires) from more than 70 respondents across the seven countries. In Australia, 17 respondents provided detailed responses reflecting different jurisdictions for OHS legislation in this country, and in New Zealand there were 9 detailed responses. The detailed data from interviews or email questionnaires were supplemented by responses to the NOHSAC online survey. There were 10 responses to this from Australia and 12 from New Zealand. There were a further 28 respondents from the other five countries. We applied the qualitative research principle of 'redundancy', which involves gathering information until one has a comprehensive and consistent story, and no new information is forthcoming (Lincoln and Guba 1985, p 202). Such a small sample was not intended to support multivariate statistical analyses common to larger-sample studies. Rather, the in-depth descriptions and accounts provided by the smaller sample of respondents increased 'internal validity' by providing a rich contextual understanding. This was critical to achieving the aims of this project.

Information about respondents is presented in Appendix 3. Those providing detailed responses were identified by their country (state or province), type of respondent and a distinguishing number. For example, the first Australian OHS specialist providing a detailed response was identified as Aus, OHS spec 1. Regulators were identified as 'Reg' (eg UK, Reg 1), industry respondents were coded as 'Ind' (eg N2, Ind 1) and unions as 'Union' (eg Aus, Union 2). Appendix 3 indicates the organisations with which detailed respondents were associated. Individual names are not provided for reasons of confidentiality. Responses to the NOHSAC outline survey were identified as Aus, NOHSAC - # or NZ, NOHSAC - #. These responses came from people using codes or guidance in workplaces. It should be noted that most detailed and NOHSAC respondents contributed as individuals, rather than representing an official view from their organisations.

# Chapter 3: Types of Instruments: Quasi-legal, Voluntary and Hybrid

## Chapter Overview

Codes of practice and guidance materials vary widely, not only in their scope and ambition but also on a variety of other criteria. Fundamental points of difference are whether they are developed by regulators or other bodies which include (but are not limited to) employer or industry associations, professional organisations, standards organisations, individual companies, unions and other organisations. This chapter identifies the different types of instruments and examines their legal status which may be voluntary, quasi-legal or hybrid. It focuses on instruments used in OHS in the target countries but also discusses the use of some instruments, for example voluntary codes of practice, in other fields.

## Quasi-legal Codes of Practice Developed by Regulators

As indicated above, the legacy of the Robens Report was the enactment of legislation in Australia, New Zealand and the UK that served to shift OHS regulation from a highly prescriptive approach to one of specifying general duties of employers and others in an OHS statute, underpinned by regulations and codes of practice. These codes are intended to fill in much of the detail which was lacking in the general duties, but to do so in a more flexible fashion than had occurred in the past.

In this legislative hierarchy, the OHS statutes and regulations by their nature are mandatory. To bestow similar status on codes of practice would render meaningless any distinction between them and regulations. Rather, codes of practice referred to explicitly in legislation are 'quasi-legal' since, while not mandatory, they nevertheless have a clearly understood legal status. Their precise legal status varies from jurisdiction to jurisdiction as described in Box 1 below.

In all Australian jurisdictions, New Zealand and the UK, codes of practice that are approved or otherwise officially made under OHS legislation have 'evidentiary' status. They may be used as evidence in proceedings. As one regulator explained, "Evidentiary status potentially overcomes the restrictions in the *Evidence Act* 1995 and the rules of evidence adopted by the courts" (NSW, Reg1). Such legislation prevents the use of documents as evidence unless backed by an independent expert witness (and evidence of that expertise must also be provided), and relevance to the case established.

Codes are also flexible, advisory instruments since failure to comply with such a code of practice does not in itself give rise to civil or criminal liability. In this sense they provide guidance about an acceptable way (or

ways) to comply with the OHS statute (or regulations), but preserve duty holders' options to devise their own means of satisfying their obligations. As another senior regulator has noted:

> This flexibility is particularly important when there is more than one satisfactory way to achieve a certain level of health and safety, or when technology changes at a faster rate than the code of practice can be updated. We are showing industry one way of meeting the standard, but freeing them from constraints of making it the only way (quoted in Gunningham and Johnstone 1999, p 227).

Beyond this, the codes of practice provided for under the OHS statutes have somewhat different legal status. In the UK and some Australian jurisdictions (Cwth, NT, SA, Tas), where a person is alleged to have breached a provision of the Act (or regulation), the fact that they failed to observe a relevant code of practice may be taken as conclusive evidence of a breach of the Act (or regulation) unless the court is satisfied that the person has complied with their obligations in some other way. In these jurisdictions there is a 'rebuttable presumption' that breach of a code constitutes breach of the relevant Act (or regulation). There is said to be 'reverse onus of proof' with these codes. The approach is similar in NSW where a person's failure to observe a code is evidence of the matter to be established in proceedings and the onus of proof in any proceedings lies with the defendant (OHSA (NSW), ss 28, 46 and 110).

In Queensland, duty holders must discharge their OHS obligations by complying with a regulation, a relevant code of practice, or adopting another way that gives the same level of protection against the risk, taking reasonable precautions and exercising proper diligence. In any proceedings, the onus of proof is also on the defendant to prove these matters. (See WHS (Act), ss 26, 27, 37 and 42).

Thus, in the UK and in six of the Australian jurisdictions, codes of practice provide duty holders with an acceptable way (or ways) of meeting their statutory obligations (under the relevant Act or regulations). However, there is a 'sting' that if a breach of statutory obligations is identified, and a person has not complied with any relevant code of practice, the onus will be on them to demonstrate they had taken alternative action to comply with their obligations by other means. There are somewhat different approaches in the other Australian jurisdictions and in New Zealand.

In the state of Victoria a person complying with a 'compliance code' that relates to an obligation imposed by the Act or regulations, is taken to have complied with that obligation. Compliance codes are 'deemed to comply' (OHSA (Vic), s 152). This positive expression makes it clear that compliance codes are intended to provide a 'safe harbour'.

In Victoria, as well as in Western Australia, the Australian Capital Territory and New Zealand, codes of practice are admissible in evidence but there is no rebuttable presumption that breach of an approved code

of practice (compliance code in Victoria) is a breach of the Act or regulations. They may be taken into account in determining whether a person breached statutory obligations but the onus of proving an offence rests with the prosecution (OSH Act (WA), s 57(8); OHS Act (ACT), ss 37(4), 38(2), 39(2) and 44(2)); HSE Act (NZ), s 20(9); HSNO Act (NZ), s 81; and see also Johnstone 2004, pp 222-225 for a discussion of the onus of proof).

It is a moot point whether these differences in the status of regulator-developed codes of practice make any real difference. For example, a New Zealand regulator had successfully prosecuted breaches of the HSE Act using a range of voluntary guidance material as evidence of the state of industry knowledge at the time (NZ, Reg3). In the Australian state of Victoria the legal status of codes of practice changed from 'reverse onus of proof' to 'deemed to comply' but legal advice suggested this was of no real consequence. A Victorian regulator explained:

> In revision of our code approach we gained some other legal advice and that was quite illuminating because what the advice was saying was whether a code has a deemed to comply status or whether it has a reverse onus of proof matters little in terms of our prosecutional activity. Our prosecutors will say that they've had no problem whatsoever in leading non-statutory guidance into a prosecution where it's relevant and to have the courts take account of that. With our new codes and the legal status that they've got our prosecutors have got every confidence that they can lead those codes in much the same way that they've done with non-statutory guidance and not have a problem there either. So they're really saying to us that legal status in the scheme of things from an enforcement point of view is a bit of a furphy. In essence what they're doing is using the code or the non-statutory guidance as a demonstration of a state of knowledge about what a duty holder should have done in that particular circumstance. Our legal people say that if the court believes that it's relevant then they will take account of it no matter what the status is (VicReg1).

This regulator suggests that industry perceptions of legal status matter far more than actual legal status. Where there is a reverse onus of proof, codes may be perceived to be de facto regulations, whereas 'deemed to comply' compliance codes are perceived as being of assistance, "not something that the regulator will use to beat them over the head" (VicReg1).

(We note, however, that evidentiary status may be more important in some jurisdictions, as suggested by the comments above from the NSW regulator regarding evidence).

**Box 1**

**Legal Status of Codes of Practice in the UK, Australia and New Zealand**

**United Kingdom** - Failure of any person to observe a provision of an *approved code of practice* does not in itself render that person liable to criminal or civil proceedings. Nevertheless where a person is alleged to have breached a general duty, a regulation, or any other relevant statutory provision, the fact that the accused failed to observe a relevant code of practice may be taken as conclusive evidence of the person's failure to do all that is reasonably practicable unless the court is satisfied that the person has complied with their obligations in some other way. In effect, this provision creates a rebuttable presumption that breach of a code constitutes a breach of the Act or regulations. (HSWA (UK), s 17).

**Commonwealth, South Australia, Tasmania and Northern Territory** - relevant provisions of Acts are similar to the UK approach. Failure to observe a provision of an *approved code of practice* does not in itself render that person liable to criminal or civil proceedings. However, there is a rebuttable presumption that breach of an approved code of practice is a breach of the Act (Cwth, SA, Tas, NT) or a regulation (Cwth). (OHS Act (Cwth), s 71; OHSW Act (SA), s 63A; WHS Act (Tas), s 54; WH Act (NT), s 187B).

**New South Wales** –relevant provisions of NSW OHS Act are expressed differently but the overall approach is similar to the UK and Australian jurisdictions above. Failure to observe a provision of an *industry code of practice* (approved by the Minister) does not in itself render that person liable to criminal or civil proceedings. However, in proceedings, a person's failure to observe a relevant code is evidence of an offence against the Act and regulation. To escape liability a person would need to provide evidence to show they had taken alternative action which complied with the Act or regulation, or that it was not reasonably practicable to comply with the Act or regulation, or the breach was due to causes over which the person had no control and against which it was impracticable to make provision. (OHS Act (NSW), ss 28 and 46).

**Queensland** – A person must follow a relevant *code of practice* (made by the Minister), which states ways to manage exposure to risk. Alternatively, they may adopt another way that gives the same level of protection against the risk, taking reasonable precautions and exercising proper diligence. (WHS (Act), ss 26, 27 and 42).

**Victoria** – Failure to comply with a *compliance code* does not give rise to any civil or criminal liability. If a compliance code makes provision for or with respect to an obligation imposed by the Act or regulations, a person complying with the code is taken to have complied with the Act or regulations in relation to that obligation. Compliance codes are 'deemed to comply'. (OHS Act (Vic), ss 150 and 152).

**Western Australia** – an *approved code of practice* is admissible in evidence in proceedings. It is a defence to demonstrate compliance with the Act or regulations by observing the code or by other means. There is

no rebuttable presumption that breach of an approved code of practice is a breach of the Act or regulations. (OSH Act (WA), s 57(8).

**Australian Capital Territory** – In working out whether an employer, person in control of a workplace, or person erecting or installing plant has taken all reasonable steps to protect health and safety, regard may be had to whether relevant codes have been complied with. There is no rebuttable presumption that breach of an *approved code of practice* is a breach of the Act or regulations. (OHS Act (ACT), ss 37(4), 38(2), 39(2) and 44(2)).

**New Zealand** – Under HSE Act (NZ), s 20(9), in determining whether a person breached any provision of the Act, a court may take into account any *approved code of practice* relevant to the matter. There is also provision for approval of codes of practice under the hazardous substances legislation. These codes are evidentiary and may be produced in proceedings (HSNO Act (NZ), ss 78-81).

***OHS statutes in each country and Australian jurisdiction are listed in Appendix 5***.

## National Model Standards and Codes of Practice in Australia

In Australia, the role of *national model* OHS standards and accompanying codes of practice is also important. The ASCC[1] 'declares' OHS Standards for hazards common to many industries and workplaces across Australia, and for priority, high risk industries. Once declared, standards and codes are endorsed by the Workplace Relations Ministers' Council (WRMC) which comprises representatives from all states, territories and the Commonwealth. However, national model standards and codes do not become law unless and until they are adopted as regulations or codes of practice under the principal OHS statutes, in Commonwealth, state or territory jurisdictions. Each of the Australian jurisdictions is committed to the principle of achieving national consistency through this approach. However, interpretations of how national standards and codes should be included in legislation vary considerably from jurisdiction to jurisdiction.

In 2007, the Council of Australian Governments (COAG) renewed the commitment to improve the development and uptake of national standards and codes of practice. COAG announced that a national OHS standards framework would be developed, with a somewhat different emphasis on national standards based on performance outcomes and codes of practice providing practical guidance on how to achieve these outcomes. This is an extension of an existing process geared to encourage the development of greater consistency across the various

[1] Formerly the National Occupational Health and Safety Commission (NOHSC).

jurisdictions, and also to reduce transactions costs and 'red tape'. The new approach may signal some changes in the content of national standards and codes in the future. The national OHS standards framework is presented in Box 2 below.

**Box 2**

**Elements of the National OHS Standards Framework in Australia**

> *National standards* focussed on safety requirements (specified as outcomes where possible) as the basis for jurisdictional regulations.

> A *Core Document* containing the key principles found in OHS Acts to be used as the common framework for developing and reviewing national standards.

> N*ational codes of practice* that provide more focussed practical guidance on how to meet an outcome.

> *Guidance material. Regulatory interpretive documents*.

> A *Handbook* that documents the principles and processes of the national standards framework.

Source: *Australian Safety and Compensation Council Media Release*, 16 May 2007 (ASCC 2007).

## Regulators' Codes in the Context of the Compliance Framework

The nature and form of codes of practice[2] must be understood within the context of the other elements of the Compliance Framework. Conceptually, codes sit in a hierarchy of instruments that is diagrammatically represented at Box 3 below.

**Box 3**


This hierarchy is both a hierarchy of the status of the policy that is set out in each of the instruments (eg the Act is the paramount source of policy on OHS) and a hierarchy of the relative strength of the instruments relied upon in compliance and enforcement.

Codes are placed in the third level of the hierarchy. They do not establish policy but provide guidance on how policy in regulations and the Act may be implemented. Codes are not mandatory and do not create offences so legally they are less influential than regulations and the Act. However, they have a significant standing in the state of knowledge, above non-statutory guidance.

Model adapted from WorkSafe Victoria (2007, pp 4-5).

[2] Compliance codes in the Victorian scheme.

## Guidance Material

While codes of practice promulgated by government have a quasi-legal status, guidance material, at least in Australia, New Zealand and the UK, does not. Yet it can still have considerable value and indeed, as Box 3 illustrates, the volume of guidance material and its impact may exceed that of other policy instruments in the instrument hierarchy. Guidance material takes various forms including guidelines, guides, safety or hazard alerts, and fact sheets. Some problems, especially those which are complex, where it is difficult to define requirements or a particular solution, or where the aim is to present best practice, may lend themselves more to guidance material than to codes or regulations. For example, in Victoria, the *Guidance Note on Bullying - Prevention of Bullying and Violence at Work*, is a crucial vehicle for spreading ideas, publishing good practice and suggesting practical means whereby employers may meet their legal obligations. The *Guidance Note on Bullying* provides substantial practical information as regards what constitutes bullying, how the work environment may contribute to the risk of bullying, and how prevention measures can be taken and incidents of bullying can best be dealt with. The guidance note also recognizes the critical role of employee participation in an effective OHS management system, in promoting a positive workplace culture and in bullying prevention more generally. It addresses occupational violence in similar terms. In particular, it recommends a range of complementary prevention measures to combat bullying that should best be used in conjunction with each other. These include mechanisms that create awareness, development of a policy, the duty to inform, instruct and train, the identification of risk factors, the control of risk, and encouraging reporting. It also includes the development of a 'no bullying' policy.

Guidance materials may be stand-alone documents providing practical guidance, or they may be prepared to support an Act, regulation or code of practice. Notwithstanding its apparently voluntary status, guidance material can be taken into account by courts or tribunals in seeking to determine whether there has been a breach of some broader general duty (or provision of a regulation). This is certainly the case in Australian jurisdictions and New Zealand but guidelines also have a formal role in jurisdictions such as Denmark, British Columbia and some other provinces of Canada.

In Denmark, guidance is based on Acts and Executive Orders and explains how the regulations are to be interpreted. As one Danish OHS specialist described it:

> The guidance issued by the inspectorate is not mandatory. An employer can always protest to a Committee. But the guidance plays an important role and [guidance documents] are considered as standard operating procedures. If the employer hasn't done anything and they have not listened to the guidance then there will be a breach. But if they have done something else to deal with the problem that might be different but

> might still be acceptable and might be a defence … So the guidance has no formal legal status but is used in court as a kind of reference (Dk, OHS spec1).

The Danish Working Environment Authority website explains that "WEA guidelines are not binding on enterprises *but the Danish Working Environment Authority will take no further action if an enterprise has complied with the WEA Guidelines"* (WEA 2007, emphasis added). In effect guidelines are 'deemed to comply' instruments.

In Alberta in Canada, guides and guidelines are voluntary instruments developed to explain and provide guidance about complying with the performance-based Act and regulations. Thus, they may focus on the legislation or particular hazards and provide duty holders with access to OHS information. There is also an *Occupational Health and Safety Code* 2006, however this is a detailed set of binding rules (some 540 pages). A person who contravenes this code is guilty of an offence under the Alberta OHS Act, s 41(1). (As codes of this type are more akin to regulations rather than quasi-legal or voluntary instruments we do not discuss them further in this report).

In British Columbia, OHS guidelines are interpretive documents to assist in the application and interpretation of the *Workers Compensation Act* and the *OHS Regulation*. They relate to specific sections of the Act or regulation, and are published in order to provide workplace parties with reasonable expectations of the approach a prevention officer may take at a workplace. For example, they may: explain terms or phrases used in the Act or Regulation; explain the intent of a legal requirement; provide background or educational information in order to enhance understanding of a legal requirement; provide one or more options for compliance with performance-based regulations or statutes; prescribe procedures, measures, standards or training courses acceptable to the board; and communicate the existence of a Vice-President Directive suspending the application of a regulatory requirement.

Whether guidelines are 'binding' in a legal sense depends on the legal requirement the OHS guideline relates to. For the most part they simply provide information on complying with legal requirements although, "prevention officers should give strong weight to the information provided in the OHS guidelines when they determine whether the requirement in the Act or regulation has been met" (WorkSafe BC, 2007a and see also WorkSafe BC 2007b). Many guidelines relate to sections of the *OHS Regulation* that give WorkSafe BC the ability to set out mandatory means of compliance (such as "acceptable to the Board" or "approved by the Board"). Guidelines communicate WorkSafe's decisions in such areas (WorkSafe BC, 2007a). In practice, as a British Columbian regulator pointed out:

> Guidelines are really quasi-law. We have a system of administrative penalties and officers can issue an order citing a violation, and the text explains the violation. They will commonly rely on guidelines in writing the citation. If this is challenged the review officer will also consider the

> guidelines and if they have not been complied with [unless they have done something else] it's a slam dunk (BC, Reg1).

Similarly, in Quebec we were told that:

> Guidelines that are developed by the inspectorate have particular significance. They have science behind them, there has been consultation with stakeholders and they have credibility…Even though guidelines are not referenced in legislation they provide support to inspectors and employers and can be taken into account by a court. But guidelines are only one way to protect workers. If an employer has found some other way that is as efficient then that would be OK (Q, Reg1).

Guidelines or guidance notes have a similar function under some of the Australian OHS statutes. For example, under OHSA (Vic), ss 12-15, the Victorian WorkCover Authority may make guidelines on the way a provision of the Act or a regulation would apply or how the Authority's discretion would be exercised.

In addition to guidelines issued by government, there is nothing to preclude industry associations, unions or others from issuing guidance material, although it has been less common for them to do so. Certainly it would appear from the literature that guidance material is largely developed and disseminated by government, although occasionally others also take on this role. The most notable examples are the UK, and to a lesser degree, New Zealand.

In the former, the Health and Safety Executive has in recent years, increasingly encouraged industry associations to develop such guidance which (provided the HSE is satisfied as to their quality) it will endorse and 'co-badge'. According to one respondent:

> We [the regulator] produce only a limited amount of guidance – only where there are specific needs and there is a good reason why industry cannot produce it itself … as a general policy we work with industry. If they express a need for guidance we work with them and we will endorse it if we support it. So we get what industry itself says is good practice – our inspectors in court can cite the industry standards as that which we think is reasonable under a 'reasonably practicable' test. So it isn't just the HSE developed stuff, to which the response might be 'they would say that'… So when industry produces new guidance, and it will do it via a working group, the committee approves it and the HSE logo and the industry association logo go on it, so its joint badging. (UK, Reg 2).

In New Zealand, the Agricultural Health and Safety Council prepares guidelines "to capture best industry practice and to encourage those who are not carrying out best industry practice to do so" (NZ, Ind 1). Our respondent explained that as guidance developed by an independent organisation they don't have any formal legal status but, as with regulator-developed guidance, they have been recognised by the courts in some instances. We were told:

> They don't have any legal status but over time they develop legal status because if you end up in a court of law, and I've been called as an expert

> witness once on a guideline we had for the use of all terrain vehicles, or quads … and the ATV guideline that we have here was used as the benchmark to measure whether the person had done all they could and whether they reached industry practice or not. In the end they were held accountable to that so over time they've become - they actually have legal status, and in the absence of anything else they set the benchmark (NZ, Ind 1).

From the above, it appears that if guidance is established, by statutory provision or court acceptance, as authoritative and relevant for the purpose of enforcement activities or court proceedings, it may acquire a form of legal recognition. Documents that appear at first instance to approximate guidance, may acquire a quasi-legal status as a result of their interpretation by inspectors, courts and tribunals. The result is that the gap between evidentiary codes and guidance is blurred, as is their legal status.

Of course individual organisations, particularly large corporations, also develop a range of systems, protocols and management tools which they disseminate to and expect their individual facilities and operations to adhere to. Though this cannot be regarded as formalised 'guidance material', for practical purposes it provides guidance and direction within an organisation's operations.

## Voluntary Codes

The earlier discussion focused on codes of practice that are closely connected to, and indeed usually explicitly referred to in OHS legislation as having specified legal consequences. It is for these reasons that the terminology 'quasi-legal' is adopted. There are other codes of practice that are not produced by regulatory agencies and that do not have direct legal consequences. These are usually called 'voluntary codes'. Such codes are produced most commonly by industry associations and applied by their members (although less commonly in relation to OHS). Some may be intended as advisory only (in much the same way as guidance material provided by regulatory agencies), but others are required to be complied with as a condition of membership of the association (or of a particular scheme). To date, voluntary commitments have taken two main forms.

The first form of commitment is for individual enterprises to sign up to a code of conduct (or charter) which seeks to encourage higher standards of corporate performance (for example in safety, health or environment) across industry as a whole. A case in point is Canadian Standards Association's (a not-for profit membership body) CSA Z1000-06 - *Occupational Health and Safety Management*, Canada's first consensus-based OHS management standard, introduced in 2006. Any business enterprise can choose to adopt the code, and (should they wish) have compliance under it certified by a qualified third party. Such codes are designed to influence behaviour within enterprises and to influence

outside perceptions of this behaviour. Potentially, they can provide a moral compass and a systematic means of improving compliance and achieving broader safety, health or environmental aspirations, act as a communications tool and promote a culture of social integrity (OECD 2000a). (There is a similar process in Australia and New Zealand for organisations to seek certification of OHS management systems against AS/NZS 4801 by a JAS-ANZ accredited conformity assessment body).

A second form of voluntary code is one that is developed by an industry association and applied to its members (or all members who choose to join). By far the most significant example of this approach is the chemical industry's Responsible Care initiative which operates in over 40 countries. While different countries have implemented Responsible Care in different ways, at its core, it includes commitments to improved safety, health and environmental performance (though usually without specifying measurable outcomes), to improved relations with customers and communities, and to greater transparency. These aspirations are to be achieved through a series of codes of practice, many of which relate to good management practices and systems (PACIA 2007).

From a public policy perspective, there may also be considerable benefits in encouraging the development of voluntary codes. These benefits include: encouraging or discouraging particular behaviours or activities; stimulating more efficient, effective operations that minimize negative safety, health or environmental impacts; diffusing new technologies and best management practices within an industry; complementing existing laws thereby improving relations with government agencies and regulatory bodies; assisting in establishing the appropriate legal standard of care for an activity; going beyond minimum standards set by law, and adjusting standards more quickly and less expensively than do laws and regulations (Government of Canada 1998, p 4).

Having said this, it is important to emphasise that the above types of voluntary commitments are not public policy instruments per se because they are undertaken exclusively by private sector organisations. Accordingly, while governments may encourage such initiatives, for example by supporting and publicising them, they do not use them as a public means to achieve safety, health or other public policy goals. Nevertheless, unilateral instruments do have public policy implications, and governments can encourage such activities, albeit indirectly (OECD 2000b). They also, as indicated above, do have legal implications insofar as they may be taken into account by a court of law (although they are not binding on it), in determining whether the defendant has discharged their general duty requirements or satisfied any due diligence defence. As such, their legal status is not substantially different from that of approved codes of practice under the WA, ACT and New Zealand OHS statutes, as discussed above.

From the variation in legal status of regulator-developed codes and voluntary codes developed by other bodies, it is apparent that the distinction between quasi-legal and voluntary codes is better thought of

in terms of a continuum than as a dichotomy. On this continuum, the status of codes in New Zealand, the ACT and WA lies more towards the middle than that of the other Australian states, which are located close to the 'quasi-legal' end of the continuum.

A further blurring occurs between the status of voluntary and 'quasi-legal' codes in circumstances where voluntary codes operate as an adjunct to core regulatory approaches. An example in Europe is the certification requirements for safety professionals. These set out minimum standards of competence for safety professionals employed in pursuance of particular articles of law on working conditions. They were developed under the auspices of a third party certification body (SKO). In the Netherlands safety professionals are accredited by the National Accreditation Board (RvA), which is contracted by the Ministry of Social Affairs to oversee the certification process. As a respondent told us, under Dutch law, without certification "an individual is not allowed to fulfil the statutory safety advisory function and a company is not allowed to claim compliance with that article [of law] by employing or contracting that person" (NL, OHS Spec 1).

Another 'grey area' involves whether, in what circumstances and to what extent, voluntary codes developed by industry should be formally adopted by a government under the regulatory framework and, as a result, acquire quasi-legal status. As discussed further in Chapter 5, regulators may incorporate or approve documents from other sources as, or as part of, approved codes of practice. Approval of industry association documents appears to be rare (although in the UK, informal endorsement through 'co-badging' is increasingly common), but there may be policy arguments for encouraging this approach.

## Hybrid Instruments

One exceptional approach is that embodied in covenants in the area of OHS (and environment) in The Netherlands. These covenants represent (in European terms) an unusual hybrid, since they address both collective and sector wide OHS issues, and once signed by the participants and incorporated into a collective labour agreement are legally binding on individual enterprises. There is no compulsion to sign but enterprises that decline to do so may be subjected to a more intensive inspection schedule by government regulators.

Such covenants are agreements between the social partners (labour, management and government at the collective level) to improve working conditions (and to reduce sick leave and occupational disability) in specific sectors. They contain quantitative targets (such as reducing physical strain at work by a given percentage) and are geared to bringing down occupational disability rates (Van Luijk 2002). Once a covenant has been signed, government OHS inspectors may enforce its terms.

Well over 50% of workers in the Netherlands have been covered by such covenants, which are supported financially by the relevant government agency (see generally Ministry of Social Affairs and Employment (nd a and b)). According to the limited literature available in English on the covenants, one of their main advantages is to make it possible to implement tailor-made (sector-specific) measures to tackle hazardous or unhealthy situations at work. For the most part, the terms of these covenants are then translated into provisions contained in collective labour agreements entered into between the social partners at the sector or 'branch' level. Such collective agreements in turn are intended to motivate the social partners to be continually vigilant about working conditions in their own sectors, even after all the covenants lapse (the entire covenants experiment was intended to end after five years, in 2007).

## Chapter Summary – Types of Instruments and Legal Status

In this chapter we have seen that codes of practice 'approved' or otherwise officially 'made' under OHS legislation have a quasi-legal status. They are evidentiary but not legally binding, and they provide guidance about an acceptable way (or ways) to comply with an OHS statute (or regulations). Voluntary codes and non-statutory guidance materials are also flexible instruments that provide advice. Rather than a dichotomy between codes with quasi-legal status and voluntary codes or guidance, there is a continuum with regard to the legal status of all types of codes and guidance materials. In Chapter 10 we revisit the inter-related issues of type of instrument and legal status, considering their relevance to the efficacy of OHS instruments.

# Chapter 4: Purpose and Characteristics of Instruments

## Chapter Overview

Those developing and/or issuing codes of practice and guidance materials have choices to make, not only about the type of instrument, but also concerning the content or subject matter addressed, the type of provisions, and the format and style. These characteristics potentially influence the efficacy of codes of practice and guidance material. Ideally, the starting point would be to define the intended purpose of any instrument and then to make decisions about content, type of provisions and form so as to optimise efficacy. Such an approach is consistent with contemporary methods for the design and evaluation of OHS policy interventions which emphasise the importance of understanding the implied or explicit rationale of a given initiative, how it is supposed to work, and who or what is supposed to change. This involves gathering background information and conducting a needs assessment on the problem and the range of possible intervention strategies (LaMontagne 2004, p 108; LaMontagne and Shaw 2004, pp 5-12).

In this chapter we begin by discussing the intended purposes of codes and guidance, and how this may influence choice of instrument. We then examine some of the choices with regard to particular characteristics of OHS instruments.

## Purpose and Choice of OHS Instrument

### Quasi-legal codes and guidance material – regulator developed

For the most part, the various OHS Acts provide only relatively succinct statements concerning the intended purpose of codes of practice. In the OHS statute in the UK and most of the Australian jurisdictions the purpose of codes of practice is expressed very generally as being for the purpose of providing 'practical guidance' (Cwth, ACT, NSW, NT, Tas, Vic, WA). The SA OHSW Act expresses their purpose in even more general terms as being "for the purposes of this Act" (OHSWA(SA), s 63(1).

There is a somewhat more precise statement in the Queensland Act where a code of practice "states ways to manage exposure to risks common to industry or a part of industry" (WHSA(Qld), s 41(1)). Under the NZ HSE Act, a code of practice is a "statement of preferred work practices or arrangements", or the equivalent for design of plant and PPE, and manufactured plant and substances (HSEA (NZ), s 20(1)), and under HSNO Act (NZ), s 78 an approved code of practice is "for the purpose of implementing any requirement included in controls or in regulations in force under this Act".

With such general statements of purpose, it is not immediately clear when a regulator may choose to develop and/or recommend a document as a code of practice under the OHS statute, rather than the production of some other form of guidance material, or indeed the taking of no action at all. An example of the sorts of principles that may guide the development of codes of practice, statutory guidelines and other guidance information is provided by the recently revised Victorian approach to these issues, summarised in Box 4. This suggests compliance codes are the appropriate choice when the purpose is to provide clarity and certainty about what may be done to comply with OHS obligations, provided there are known and effective means of achieving compliance. If certainty and transparency is needed about WorkSafe's interpretation or administration of OHS law, the appropriate choice is guidelines. For promotion of OHS awareness and to build OHS knowledge OHS Alerts may be used to identify immediate remedial action needed to address hazardous practices or things. More generally, guidance may be produced about the Act, regulations, particular hazards or risks, best practices, reference sources or performance data.

**Box 4**

**Principles for Selecting OHS Instruments in Victoria**

**Principles Relating to Compliance Guidelines**

WorkSafe will make recommendations to the Minister about making Compliance Codes to provide duty holders with clarity and certainty about what a duty holder may do to comply with key duties under the Act or the regulations.

WorkSafe will use Compliance Codes as the primary vehicle for communicating compliance information where there are known and effective means of achieving compliance. In other cases, WorkSafe will use OHS Practice Notes (see below). Given that the regulations will no longer duplicate provisions of the Act, Compliance Codes will play an important role of integrating the provisions of the Act and regulations to provide comprehensive practical guidance on compliance. Compliance Code proposals may include background, contextual information and general advice as well as specific guidance on how to comply with specific duties.

The guidance in a Compliance Code is not mandatory. A duty holder may adopt other appropriate and effective means of achieving compliance. Where appropriate, Compliance Code proposals may incorporate or adopt, by reference, documents produced by reputable standards setting bodies.

**Principles Relating to Guidelines**

WorkSafe will issue Guidelines where it is necessary to provide certainty and transparency about WorkSafe's interpretation or administration of OHS law and the way it makes decisions

**Principles Relating to Other Information**

WorkSafe will continue to publish general and targeted information to promote OHS and build knowledge and awareness on OHS. WorkSafe will issue two types of information for this purpose – alerts and OHS Practice Notes.

***Alerts***

Alerts provide brief descriptions of a work practice or thing that has been shown to be particularly hazardous and which needs immediate remedial action by duty holders. Alerts will be short (no more than 2 A4 pages and a single page is preferred). More specific and detailed guidance on the issue may be produced subsequently in a Compliance Code.

***OHS Practice Notes***

WorkSafe will also issue OHS Practice Notes on matters such as:

> The Act and the regulations;

> The nature and characteristics of particular hazards and risks;

> Techniques for understanding and dealing with risks to OHS;

> Encouraging the implementation of optimum strategies for improving OHS performance (for example information about good management practice or describing 'state of the art' technical solutions) while recognising that not all duty holders will be able to or be expected to achieve such standards or outcomes;

> Useful reference guides to accessing the range of information available on a particular hazard or risk; and

> OHS performance data.

*Source: Victorian WorkCover Authority 2006, pp 5-6.*

The other largest Australian OHS regulator, NSW WorkCover, uses approved industry codes of practice to provide practical guidance about how to achieve the standard required by the OHS Act and regulations, and a range of advisory guidance material. The latter includes: 'guidelines' to clarify the interpretation of OHS legislation; 'guides' to provide practical information and guidance; 'industry standards' to specify practical solutions to different problems in industry; 'safety alerts' and 'hazard alerts' to address immediate hazards and risks; and 'fact sheets' to provide practical information and guidance in summary form (NSW, Reg1).

More generally, Australian and New Zealand regulators explicitly or implicitly make the distinction that the quasi-legal codes of practice are used to clarify expectations about compliance with performance-based legislation, in a more comprehensive and detailed way (see for example ERMAN2 2007). In contrast guidance materials tend to be used to address particular issues or when guidance without legal status is preferred for a variety of reasons. As a Queensland regulator explained:

> Codes of practice were developed in order to support the regulations and the general obligations in the head Act … we tried to go to a performance-based approach but industry still needed some sort of practical guidance. So we developed codes of practice in order to provide that guidance … guidance material was meant to provide process information to do with certain aspects of things but also we produce guidance material where we don't actually want to have a statutory instrument but industry wants some guidance (Qld, Reg1).

For example:

> If you've got a performance based regulation which says noise levels shouldn't be any higher than 85dBA … I think in that situation a code of practice is really useful and it provides guidance on how you can achieve that. The code of practice that we've got on risk management is necessary because in our head Act we talk about the way to provide a safe and healthy workplace is to make sure that you reduce the risks. You do this through risk management (Qld, Reg1).

In the UK some HSE officials viewed approved codes of practice in a rather different light. According to one senior regulator: "I see them as useful in terms of repositories of technical requirements… Codes are useful for exposure limits. Or take asbestos, you shouldn't set out the law in a code but you can use codes to set out what methods to use to measure exposure or to identify substances hazardous to health so as to avoid pages and pages of regulations" (UK, Reg1). Another told us that: "Sometimes we put more detail in an [approved code of practice] but this is not necessarily helpful to achieving the policy objective. The best law is the simplest law. But in a technical or scientific area, then codes have a role" (UK, Reg2). In published advice on its decision making process, the UK Health and Safety Executive suggests codes clarify particular aspects of general duties and regulations, and are to be used where there is clear evidence of a widespread problem, to amplify performance-based legislation, there is a strong presumption in favour of particular methods, and the alternative is prescriptive regulations (Health and Safety Executive 2001, p 58).

In the other countries studied, statements concerning the purposes of codes and guidance provided little further illumination. In British Columbia, guidelines are used to help interpret and apply statutory and regulated matters, as well as to set some administrative functions (WorkSafe BC 2007). They are intended to provide ways of complying, not exclusive interpretations. A regulator explained, "guidelines replaced formal legal, policies - they are easier to approve and give us administrative flexibility" (BC, Reg1). Similarly, in Alberta Canada and in Denmark guidelines assist compliance. The Danish Working Environment Authority (WEA) guidelines describe "how enterprises, etc can plan and carry out their work, so as to ensure that the health and safety requirements are met" (WEA 2007). In the Netherlands there is no direct equivalent to codes or guidance under their recently introduced *Working Conditions Act* which came into effect in January 2007 (although the new

development of OHS 'catalogues' comes close to such a development). Nor do these mechanisms figure in OHS regulation in Finland.

Perceptions of the purposes of quasi-legal codes and guidance materials, from respondents, other than OHS regulators, were largely consistent with the policy interpretations and explanations of OHS regulators', as stated above. Box 5 presents examples of the perceptions of industry, union and OHS specialist respondents.

**Box 5**

**Respondents Perceptions of Intended Purposes**

*To assist implementation of the Act. To develop increased awareness of particular topics and provide logical decision pathways (NZ, Ind2)*

A COPs provide a preferred method of work and if followed provide a means of defence against prosecution against the Act … Guidelines are a guide to the regulations and to good practice in particular situations. (NZ, Ind3)

*To explain provisions of Acts or regulations, to provide information about risk control and to establish a minimum standard (Aus, Ind2)*

Explain provisions of Acts and regulations, provide guidance on common situations and how to reduce risks, provide a framework to reduce risk (Aus, Ind4)

*Most ASCC Standards require a code(s) to underpin them to provide detail on how to fulfil obligations and achieve desired safety outcomes (Aus, Union1).*

To establish a minimum set of standards for performance – including benchmarks – while allowing the employer to exceed the standard and perform to a higher level; provide enough advice to assist employer without mandating specific risk control strategies, so as to not stifle innovation and progress; provide guidance on risk management – processes, tools and solutions; provide advice on compliance with legislation; provide a comparison point for employers to enable them to demonstrate compliance by other means (Aus, Union2).

*Because most of the areas where I use these things are major hazard regulations, which are goals set in regulations the guidance notes are usually an attempt to explain to people who will be working under the regulations what is really 'required'… So if somebody is required, for example, to demonstrate that the risk is as low as reasonably practicable then there will be a guidance note that explains what that actually means (Aus, OHSspec1).*

Guidelines explain to people what is intended when a rule is given out and how the demands of the rule can be achieved in a reasonable way (Dk, OHS spec1).

In summary, the purpose and criteria for choosing to develop a particular type of instrument (or adopt one from another source) are more or less well defined in the countries and jurisdictions studied. Yet, these are

important issues since efficacy is contingent upon having a clear rationale for a particular initiative. We return to these issues in Chapter 10. A related issue is what drives a regulator to develop (or adopt) a particular type of instrument. The drivers are discussed in Chapter 5.

### Voluntary codes of practice

The intended purposes of voluntary codes vary substantially. In broad terms, their intent is to influence, shape, control or set benchmarks for performance. Beyond this, they may have a multiplicity of different purposes. They may be used to demonstrate or refute due diligence in prosecutions or to establish reasonable care in civil litigation. They may encourage or discourage specific behaviours or activities, or promote more informed and less costly interactions between code signatories and the public or workers. They may stimulate more efficient, effective operations that minimise negative social, OHS or economic impacts, or help to maintain or improve public image. They may help diffuse new technologies and best management practices within an industry; and complement existing laws, thereby improving relations with government agencies and regulatory bodies (Government of Canada 1998, p 4).

## Subject Matter Addressed

The subject matter addressed by codes of practice and guidance material is wide ranging. Just as regulations cover a diversity of issues where clearer guidance is needed than is contained in the broad-based general duties contained in OHS legislation, so too, it is necessary to provide clarification on a wide range of issues through codes of practice and guidance material. This may include the management of OHS in the workplace more generally, or guidance about particular hazards or risks and their control. For example, Queensland has the *Risk Management Code of Practice* and NSW has a code of practice for *Risk Assessment.* Common topics for codes or guidance in a range of countries and jurisdictions are: basic facilities such as first aid and amenities; manual handling/manual tasks and occupational overuse; high risk plant such as cranes, boilers and forklifts; hazardous substances/chemicals and specific substances such as asbestos; noise; hazardous work such as confined spaces, demolition, excavation and diving; and hazards in high risk industries such as agriculture, construction and forestry. Some codes of practice or guidance material address ‘emerging hazards’ or groups at risk newly recognised in a particular jurisdiction. Examples are codes of practice for call centres (Qld, WA), fatigue management (WA), working hours (WA), cash in transit (NSW, Qld), violence and bullying (WA), children and young workers (Qld, WA).

The range of codes of practice and guidance materials is quite extensive, and varies according to priorities in each country or jurisdiction. In Australia, some of the subjects addressed in Commonwealth, state and territory OHS instruments reflect national priorities established by the

National OHS Commission (NOHSC) and subsequently the ASCC (Emmett 1997, pp 325-333; NOHSC 2002; and see also Chapter 3 for a discussion of national model standards and codes of practice in Australia). Appendix 4 provides a list of website URLs for codes of practice and guidance materials in New Zealand, each Australian jurisdiction and the other target countries in this research.

Apart from the subject matter of codes and guidance materials, an issue raised by some respondents was the need for these instruments to be evidence-informed, reflecting current approaches to the management of hazards/risks, and to learn from experience implementing codes or guidance on the particular subject in other countries or jurisdictions. A further concern for some Australian respondents was inconsistency between codes of practice dealing with the same subject. This arises both through national model codes being adopted differently in different jurisdictions, as well as development by the states of instruments on the same topic but with different content. An engineer who operates in several states considered:

> New documents about similar topics ideally should be identical to 'good' existing documents in other jurisdictions (states/international), with the only difference being the front cover saying the jurisdiction. Several states have documents which cover similar topics – for example steel construction from QLD and SA. However these documents are very different, and have different terminology.

(See also Chapter 5, "Issues in the development of quasi-legal codes" where we discuss how the nature of stakeholder consultation gives rise to inconsistencies).

In the selected international jurisdictions we surveyed there is inevitably significant variation, but in general terms, some of the same subject matter is covered as in Australia and New Zealand. The Danish case, summarised at Box 6 below, is illustrative. In British Columbia, the guidelines are somewhat narrower and more concrete in their scope. For example, recent guidelines issued relate to drywall sanding requirements, seat belts, vehicle design, responsibilities of the person/parties at a workplace, noise measurement, vibration, hydrostatic pressure or hazardous ground movement, farm labour contractors and growers (responsibilities and OHS programs), sampling of thoracic fraction of sulphuric acid mist, protective structures on mobile equipment in agriculture, and young or new worker orientation and training.

In the UK, as indicated earlier, codes are currently used primarily to clarify technical issues, and even here, only in a very limited number of cases. However, in earlier decades, they were applied much more broadly, in a manner not dissimilar to that of the Australian jurisdictions. The current UK approach to guidelines (and indeed to regulations), is to emphasise safe systems, management, training and competence and "a move away from providing great detail to giving them a management framework" (UK, Reg3).

**Box 6**

**Guidelines in Denmark**

**Technical equipment**
B.2.1.1 - Certificates of crane drivers

**Substances and materials**
C.0.1 - Limit values for substances and materials
C.0.13 - Notification of substances and materials

**Performance of work**
D.1.1 - Workplace assessment

**Other areas**
F.1.2 - Responsibilities and obligations of the client
F.1.3 - Period notices
F.1.4 - Problem notices
F.2.4 - OHS activities of enterprises
F.2.5 - Safety Group and safety representatives
F.2.6 - The Safety Committee
F.2.8 - Agreements on the OHS activities of enterprises
F.5.1 - OHS certificate

*Source Arbejdstilsynet : Regulations http://www.at.dk/sw12175.asp*

## Type of Standard

In broad terms codes, like regulations and statutes, can involve one or more of four types of standards: general duties, performance (ie target or outcomes based) standards, prescriptive (also known as specification) standards, and what are variously termed process, systems-based or management-based standards (see generally Bluff and Gunningham 2004, pp 17-27).

General duties were introduced into the OHS statutes in Australia, New Zealand and the UK as a direct consequence of the UK Robens Report (1972). These provisions impose duties of care on particular parties (employers, designers, manufacturers etc) in relation to other specified parties (employees, other workers etc). Broad duties are also a feature of OHS legislation in Canada and Denmark although OHS legislation in these countries has different origins and influences. In the Netherlands under the new *Working Conditions Act*, the Government lays down target requirements and limit values in broad terms. These define the framework which employers and employees must use to formulate agreements and compile their own OHS 'catalogue'.

General duties have the advantages of encompassing a wide range of risks, not becoming out of date quickly and allowing the duty holder the flexibility to determine preventive action suited to their operations. However, the very breadth and flexibility of general duties entail

considerable uncertainty for duty holders as well as for OHS inspectors. The lack of guidance provided to duty holders about the outcomes required of them, or the means of ensuring OHS, mean that it is uncertain whether the duty of care has been complied with until and unless a matter is actually tested in court. A principal purpose of codes of practice and guidance materials is to flesh out the duties of care and provide practical guidance about compliance. (See Bluff and Gunningham 2004, pp 20-22 for discussion of general duties.)

A second type of standard, performance standards, specify the outcomes to be achieved but, like general duties, do not define the means to achieve them (for example a standard setting out the maximum permissible concentration of a hazardous substance in the workplace). For this reason, they can accommodate to changes in technology. They also allow firms flexibility to select the least costly or least burdensome means of achieving compliance. These attributes make them particularly attractive to large, proactive enterprises and jurisdictions such as the UK, Australia and Canada have demonstrated an increasing sympathy with this approach, especially in regulations. On the other hand, because they are sometimes imprecise, performance standards offer little concrete guidance to enterprises as to what is required of them. Performance standards also have limited scope in that many hazards do not lend themselves to such an 'outcomes-based' approach because no credible performance measures are available. (See Bluff and Gunningham 2004, pp 22-23 for a discussion of performance standards.)

Process-based standards identify a particular series of steps (or processes), to be followed in the pursuit of regulatory goals. One example is the approach to managing hazards by incorporating the steps of hazard identification, risk assessment and risk control. Other examples include the requirements for employers to provide information, instruction, training and supervision; or to keep specified information and records. In their more advanced forms, these standards involve a holistic and *systematic* approach to managing OHS across the organisation as a whole. The focus of a systematic approach is on managing the organisational structure, responsibilities, practices, procedures, processes and resources for implementing and maintaining particular aspects of management specified by the regulation. For example, a systematic approach to managing OHS might involve setting objectives and targets, establishing a management program, procedures for achieving the targets, and measurement techniques to ensure that they are reached. Continuous measurement, benchmarking and the capacity for system self-correction are essential ingredients. Thus, in its developed form this approach goes beyond process to a focus on systems and management and these standards are commonly referred to as either 'systems-based' or 'management-based' standards. (See Bluff and Gunningham 2004, pp 23-27 for a discussion of process and systems-based standards.)

A combination of general duties, process-based standards and some performance standards are now the principal elements of OHS Acts and

regulations, in Australia, New Zealand and the United Kingdom, with more variation in the other countries studied. While Acts and regulations are mandatory instruments and must be complied with, duty holders have considerable flexibility to select preventive action that suits their workplace operations. The 'down side', especially for smaller firms and/or organisations without OHS professional support is considerable uncertainty about what constitutes compliance.

In the past, a highly detailed, prescriptive approach was the norm in Acts and regulations in many jurisdictions, particularly before the 1972 Robens Report and, in some jurisdictions, for a substantial time thereafter. Prescriptive standards specify in very precise terms what duty holders should do and how they should do it, and set out the specific types of methods (especially technologies) that must be used to achieve compliance in given situations. The failings of this approach have been documented elsewhere (Bluff and Gunningham 2004, p 19). When incorporated in mandatory Acts or regulations this approach tends to result in a mass of detailed law that is difficult to comprehend and keep up to date. Inevitably, because prescription cannot cover everything, many problems 'fall between the cracks' of the specific regulations and are not addressed (Baldwin, Scott and Hood 1998, p 15). However, more prescriptive provisions in a code of practice may provide duty holders with guidance about an acceptable way(s) to achieve compliance but provide flexibility to take alternative action. It has been argued that a prescriptive approach inculcates a reactive and passive approach on the part of management, who may come to feel that, so long as they satisfy these requirements and 'go by the book', nothing more is needed (Bardach and Kagan 2002). There is a counter argument that for smaller firms, without OHS advisers, such guidance is necessary (Industry Commission 1995, p 48; Gunningham and Johnstone 1999, p 31).

The crucial question then is what mix of general duties, performance, process and prescriptive standards is appropriate in quasi-legal codes of practice. Over the years, and in different jurisdictions, there have been shifts in the style of codes of practice. For example, the early national model codes of practice in Australia were more prescriptive but from the 1990s a common feature of these codes was a risk-based approach, built around an obligation to identify the hazards, and to assess and control the risk (Emmett 1997, p 330). More recently it has been proposed national codes should provide more focussed practical guidance on how to meet OHS outcomes which would be defined in national standards (model regulations).

New Zealand's codes of practice vary in the balance of different types of provisions but may elaborate general duties and explain approaches to identifying/assessing particular hazards and their control. In this way they may combine process-based provisions such as hazard management, information provision and training, as well as more prescriptive advice about particular hazards and their control.

A shift in style of codes of practice was described by a Victorian regulator, reflecting both national trends and local stakeholder priorities. This respondent explained:

> When you look at our codes as a whole you can see the generational differences between what was done in the '85 to '92 period, what was done from say 1992 through to probably around 2002/2003 and what you'll see for codes from 2003 onwards. The codes that were developed by the old Commission were quite prescriptive sort of documents. They actually said what you can do to comply … The codes that were developed from say '92 through to 2002/2003 … were very much process codes. They spoke about the risk management model of hazard id, risk assessment and risk control without generally offering solutions to compliance problems. The two falls codes that were done I think in 2003 or 2004 … are a combination of both. They do speak of the risk management process but they also provide details of the various forms of control and what they should look like for the prevention of falls from height. So they will paint out specifications for things like elevating work platforms and that sort of thing (Vic, Reg1).

Our UK respondents also identified a shift over time, albeit of a different nature and for rather different reasons. One regulator said, "Codes are used much less now in terms of rule-making than in the last thirty years. It could be because there is less legislation on OHS going through [but also] HSC has become wary of codes. One of the business commissioners views it as a short cut to legislation, as back door regulation" (UK, Reg3). However, as indicated above, in terms of regulations and supporting guidelines, there is now a shift away from detailed regulation to providing broad indicators of how best to manage safety (ie a process-based approach).

In general, our Australian and New Zealand respondents believed there is a place for process-based standards, especially risk management principles (hazard management in New Zealand), in quasi-legal codes of practice, as well as more prescriptive guidance about hazards/risks and control/solutions. Some concern was expressed about the incorporation of general duties in codes of practice for the reason that they do not provide practical guidance and may either cause codes to date (as legislation is amended) or be inapplicable to a particular jurisdiction (in the case of national model codes in Australia). A further concern was that in providing detailed guidance, codes should not contain textbook style technical explanation within the body of the code. It appears there is a balance to be struck between guidance that is too general (which is perceived to be unhelpful) and explanation that is very detailed and may be too technical – neither meets the criteria for practical guidance. The preference for OHS risk management (hazard management) principles supported by prescriptive guidance, but avoiding general statements of duties and textbook style explanation, is reflected in respondents' comments presented in Box 7. These comments came from OHS regulators, OHS specialists, industry respondents and unions.

The UK regulators we interviewed took a rather different view, regarding approved codes of practice (in sharp distinction to guidance material). They saw them as directed to experts with the implication that they should be written with that in mind. We were told:

> If you introduce new regulations you could have a code interpreting each of these regulations. It's a detailed exposition of one of these sets of regulations. It's for experts. You can't expect a hairdresser who is covered by five different sets of regulations to read the codes (UK, Reg 1).

Another said:

> With guidance you are as simple as possible in the language you use. It's all about simplicity and clarity…. But with an ACOP not everybody will read them. They are for professionals and inspectors. You can't dumb them down too far because the key figures are inspectors and safety managers (UK, Reg 2).

This view of the target audience is consistent with the position that the HSE takes towards the development of approved codes of practice, described earlier, namely that they are essentially technical documents.

**Box 7**

**Respondents Comments on Type of Provisions in Codes**

*A lot of national codes have duty statements in them. They should leave them out and just say what should be done. My preference is to state what should be done and avoid duty statements. (SA, Reg1)*

The links to legislation should be explained but this should not dominate. The simplistic approach of NOHSC/ASCC codes to add slightly more explanation to a provision of a national standard is not appropriate since it is not helpful. Some information simply needs to be explanatory *[not part of the code]*, eg see Appendix 4 to the NSW *Code of Practice for the Control of Workplace Hazardous Substances* where the nature of the forms hazardous substances can take is explained" (NSW, Reg2).

*What's in a code should stand and fall on the merits of the strength of the argument or the strength of the issue. Not "look, you need to do this because we told you you have to and this is the way to do it". It shouldn't be about that. It just should be about saying, this is the issue, this is the hazard and these are the recommended ways to deal with it, and without trying to provide the obligation (Vic, Reg2).*

Basic risk management is important, however so is information relating to technological risks and controls (NSW, Reg3).

*Anything that the enforcement agency or industry feel would be of value regarding: high risk activities; risk management – identification, assessment and control; manual handling; consultation; workplace related violence and security; staffing levels and skill mix; design of workplaces; design of plant and equipment; design of systems of work; training; hazardous chemicals' industry specific guidance, eg health and community services industry (Aus, Union2).*

Workplace hazards; methods to reduce hazards; methods to design out hazards; risk management; hazard identification (Aus, Ind4).

*Having altered the [particular regulator] stuff, the approach that we took there was very much around explaining to people the process that they're required to go through and … the type of analysis they needed to do. For example, telling them that if they were doing this work well they would be relating particular controls to particular hazards and that they would be prioritising their risk controls and things like that … Rather than, at some points in the Victorian guidelines you get the impression that this is just somebody writing down everything they know about human factors sort of thing. It becomes almost like a text book and I think that's quite inappropriate. So I would think sticking with the process that people need to follow rather than being some kind of pseudo text book on how to do risk assessment (Aus, OHSspec1).*

…with the safety department in Queensland … they keep putting the obligations out of the Act in the codes and all they do is create a sort of rod for their own backs because as you know law amends all the time … It would

be better off not actually putting those obligations in there … because they're contained in the Act. That information is already known and covered in the legislation itself. Instead of saying "do a risk assessment" in the code, which we all know you've got to do for various things, well give them the tools to do the risk assessment, be it a matrix or a calculator or some other damn thing (Aus, OHSspec2).

*Hazards and risk control (eg welding, violence to care givers, leptospirosis) (NZ, Reg1).*

They can be useful if written clearly and with examples. More technical issues lend themselves to COPs. General topics end up as talk feast (NZ, Ind2).

*They [employers] have to use the systematic approach and everybody has done that … because that's where they get their big discounts … but what they do is they're fudging on the detail. So all we need is detail, not big picture stuff … There is a difference here in New Zealand between how we do risk assessment. We manage the hazard … A lot of employers just like to manage behaviour rather than the hazard, instead of putting physical things in place or making significant changes … So I don't know whether you could capture that in a code of practice … saying "look behaviour is important but hazard management is what you have to do". A code in hazard management would be helpful (NZ, Union1).*

Too much repetition in each document of the basics of legislation and if legislation changes all documents should be revised but are not so create confusion (NZ, NOHSAC10).

While the above discussion has been couched in terms of quasi-legal codes, a largely parallel account could be given in terms of voluntary codes within individual enterprises, or of industry association initiatives. For example, it is not unusual for individual corporations to impose what are in effect highly detailed prescriptive standards (codes) on their own operations together with a variety of performance standards or process-based procedures (perhaps adopted from a standards setting body). However, much will depend on the philosophy and focus of the individual enterprise. Those with traditions of decentralised management are more inclined to specify management practices then specification standards. For example, the manager of every Chevron facility must "provide a current, written facility - specific emergency response plan that addresses, among other things, communication to employees, contractors and the public" and rules specify the risks managers must address and the processes and procedures for doing so (Reinhardt 2000, pp 157-158). Equally at industry association level, scrutiny of probably the most advanced industry self-regulatory initiative, the Institute of Nuclear Power Operations (INPO), would reveal that although there is some encouragement for individual operations to establish prescriptive standards in certain circumstances, the Three Mile Island near-nuclear meltdown demonstrated the serious limitations of this approach and INPO's emphasis is now on process/systems-based standards coupled, where practicable, with performance standards (Rees 1994, chapter 4). This example also suggests the tension between process/systems-based

approaches which may be appropriate for large corporations with expert professional support, and what is suitable for SMEs, without such advisers.

## Design of Instruments - Format and Style

There was broad agreement amongst our industry and union respondents who use codes and guidance materials (including respondents to the NOHSAC3 online survey) that desirable features are: plain (English) language so they are easy to read; clear and concise information (not discursive); practical 'how to' advice/solutions; clear simple drawings, diagrams, photos or other illustrations to support advice/solutions provided; and incorporation of checklists and tools for use in implementation.

Other features canvassed by some respondents were: the need for currency (that is, up to date information); reference to other resources and contacts where additional technical support may be needed (for example, in Appendices); and the use of consistent terminology. Some respondents emphasised the value of codes and guidance being available free of charge in 'hard copy' (for workplaces where workers are not computer literate or there is not easy computer access), as well as being downloadable from the internet. Some respondents considered best practice examples are valuable in guidance materials, to provide a standard to strive for. However, this was not considered appropriate in codes of practice, since these should reflect acceptable ways of complying (not the optimum). Unsurprisingly, poor features identified were excessive length; complexity or too much detail; and repetition of the same information ('overload'). These poor features were believed to reduce readability.

These preferences resonate with one of the few studies to focus on format and style, undertaken by Lancaster et al (2001). This study concluded that professional and national bodies found particular value in risk assessment checklists, an emphasis on task, flowcharts which provided a good overview, an easy to follow format, and presentation through an electronic format that allowed specific information to be accessed and cross-referenced, the introduction of sub-headings, and clear guidance on the involvement of employees. More broadly, the European Agency for Safety and Health at Work (2002) has suggested that good practice in this regard involves: case study examples, demonstrating a real intervention at the workplace; and checklists, product information and standards (where appropriate).

Implicit in some respondents' comments was also the notion that codes and guidance should be readily used by a range of people in the

[3] For NOHSAC respondents the data were based on what they considered to be good or useful features in the codes or guidance materials they use, and what they considered to be bad or unhelpful. In this sense, their perceptions were based on experience as users of codes and guidance materials.

workplace, not just people with OHS training or those comfortable with working through a detailed document. For example, a Queensland based OHS specialist highlighted the needs of non-specialist workplace health and safety officers (WHSOs):

> They are generally people who work in a workplace and it's just another hat they put on. So it's not working all day everyday doing health and safety. So when the time comes that they need to control noise or something like that they pull out the code and a lot of the codes aren't user friendly. They're more like a technical manual and you've got to have a background to understand them, whereas some of the codes are a lot more user friendly. Our code of practice up here for manual handling has got a chapter in the back where it breaks down from work organisation, to postures, to repetitive actions etc and it gives you a checklist to assess that item - a 'yes' and 'no' type checklist - and then it gives you quite a few suggested controls for that issue. That's a lot more user friendly for the individual - as a tool (Aus, OHSspec2).

The Australian and New Zealand OHS regulators contributing to this research shared industry and union concerns about the need for codes and guidance to be user friendly. As a Queensland regulator explained:

> We haven't got guidelines [for style] written as such but we've developed a bit of a template where we talk about what the code is for and then it goes into why it's been done and then it talks about what it's meant to achieve. They're meant to be in plain English, they're meant to be easily understood … newspapers are written for the reading age of around about 8 or 9 and that's what we should be thinking about in terms of codes of practice … But I really believe that we should be keeping them as simple as possible because again if you think about your audience, your audience tends to be the people, those who cannot afford to buy in external assistance … that's what we really need to be thinking about and we need to present them in language that is easily understood and is tailored towards your audience. So if you're writing a code of practice on formwork then you're talking about subcontractors and labourers and people who are fairly basic in their literacy skills and you should be thinking about that but if you're developing a tunnelling code of practice … that is going to be read by some pretty high level engineers, they're the ones who are going to read that one so you've got to think about the audience (Qld, Reg1).

Similarly, New South Wales is currently looking at aspects of style and format with a view to writing material in a particular way, focusing on plain English and user friendly format and presentation (NSW, Reg1). Workplace Standards Tasmania has published *A Guide to Developing Codes of Practice* which also emphasises the need for codes to be written clearly and unambiguously in plain English, and that they should be designed to provide practical guidance on achieving a safe work environment, visual and practical, relevant and up to date and, in most cases, specific to an industry or sector (Workplace Standards Tasmania, 2001, p 3). The New Zealand OHS regulator has an in-house style partly informed by government internet presentation rules. The New Zealand hazardous substances regulator has no particular format but an industry

respondent suggested the regulator should apply its own performance test as set out in the hazardous substances regulations which calls for industry information to be: comprehensible, no abbreviations or acronyms unless they are in common usage, and readily understandable (text and pictorial) to a sample of at least 50 randomly chosen members or the public, with a reading age of at least 12, with no particular education and training in the subject (IndNZ3, referring to *Hazardous Substances (Identification) Regulations* 2001, r 34).

The approach of the British Columbian regulator is more basic. A respondent told us, "we produce a standard [guideline] document with a basic format. We begin by stating the purpose, then the background, a discussion section. We use plain language and it's grounded in a section of the Regulation" (BC, Reg1). In Alberta the emphasis was simply on plain language.

The Victorian OHS regulator is refining its approach to writing codes and has set a number of requirements for its new style 'compliance codes' (WorkCover Victoria 2007, pp 2-3). These codes are to provide practical, industry or hazard specific guidance which is technically accurate and can be understood and applied users. As the level of knowledge and understanding about OHS differs, the type of guidance provided also needs to be different. For some users it may be advice about processes they can follow to make decisions about what to do to comply. For other users, specific information about compliance solutions will be appropriate. Compliance codes need to address both aspects. They must also be capable of being referenced by inspectors and worker OHS representatives in notices, and must be capable of being led in evidence in OHS prosecutions. For these purposes codes must be technically accurate and provide appropriate standards of OHS performance.

The Victorian regulator is also experimenting with different forms of guidance materials, with an emphasis on: concise, simply written information; sequencing information so it make sense to people; using diagrams; assisting duty holders to understand a problem, providing a solution or information about what compliance looks like; readable font size; and unambiguous "to the extent that you can pick any two people with reasonable knowledge of the sector or issue they'd interpret it in approximately the same way" (Vic, Reg2). A recent development is guidance presented as OHS Solutions and, "guidance that purports to actually show you a solution … or a way of doing something should not cop out by regurgitating reasonably practicable - it should actually state what we mean by reasonably practicable" (Vic, Reg2). At a later stage these OHS Solutions may become part of a compliance code, as a consolidated set of guidance relevant to an industry as well as being available as 'stand alone' solutions.

The regulator is also considering different formats for guidance material, including pocket sized 'flip flop' guidance (also used by WorkSafe British Columbia), A5 sized handbooks, audio visual versions downloadable onto IT systems, as well use of eye catching, fluorescent colours. In

considering different formats (which are not mutually exclusive), the regulator is recognising that end users may want information that fits in their pocket, in the glove box of their car or other situations where it can be readily accessed.

The use of different formats for different target groups is also the practice of New Zealand's Agricultural Health and Safety Council which has produced guidance in different formats for different 'actors' in the agricultural industry. Our respondent explained:

> For instance the ATV guideline is a poster … so we could have one in every farm office and on the wall of every rural school in New Zealand and on the wall of every motorbike shop. The one for the safe use of agricultural airstrips is a booklet. We had another one for the safe building of rotary milking platforms because we had some farmers killed in trapping points and that's a manual because it's used by engineers (NZ, Ind1).

Another Victorian regulator speaks of "inviting people to come on a journey" (RegVic3). He sees the journey starting with simple information in language designed to engage a broader audience, large font, well spaced, different colours to differentiate sections, messages about the degree of risk highlighted for risk communication. The next level is OHS Solutions, which are also in the form of simple information which states the problem and a solution, in less than two pages. This regulator emphasises that, "all of it must be able to be accessed by the audience, read, understood, applied and maintained" (Vic, Reg3).

In terms of guidance material UK regulators concurred with the above approach.

> In the past, because HSE was staffed by graduates, we thought we were writing for graduates! But we were missing our audience –now we target the reading age of the intended audience-- |If I have a message and I can't say it on two pages of A4 paper then is it important? If we provide a wad of material it won't be read – you must get it on a few sheets of paper ……You want to get out basic messages. For the hairdresser, wash your hands and wear gloves….we concentrate on simplifying messages in the context of campaigns and providing a list of dos and don'ts (UK, Reg1).

Another asserted that:

> Some of our guidance drives me up the wall. It reproduces Acts and regulations – guidance is to help duty holders and you don't do that by parroting the words of the statute …you need clarity and simplicity or it blurs the issues (UK, Reg2).

A theme emerging in comments from a number of our respondents is the importance of identifying the target audience for a code or guidance, and designing, producing and disseminating it in ways that capture the attention and meet the needs of the intended user group. This approach is consistent with contemporary methods for the design and evaluation of OHS policy interventions which, as we discussed at the beginning of this

chapter, emphasise the need to understand the rationale of a given initiative, how it is supposed to work, and who or what is supposed to change (LaMontagne 2004, p 108; LaMontagne and Shaw 2004, pp 5-12). Understanding these issues is likely to be more important than developing a standardised format or style.

Intuitively (and as suggested by Australian and New Zealand industry and union respondents), certain characteristics are desirable. Guidance is likely to be enhanced by: the use of plain language; clear and concise information; practical advice and solutions; illustrations that help users apply the guidance; checklists and other tools for use in implementation; and resources and other contacts for more support. Taking these features into account, the over-riding concern should be to understand the rationale for a particular code or guidance, how is it supposed to work, who or what is supposed to change, and how does it need to be designed, produced, disseminated and reinforced to achieve this.

We need now to conclude this section with a note of caution. As important as issues of content, format and style are, there is very little evidence in the wider OHS literature that attitude and behaviour change can be achieved through information measures alone, except perhaps with highly motivated audiences. Behaviour is influenced by a range of factors including beliefs about how others view the behaviour, beliefs about consequences of the behaviour, perceived risk of outcomes, and the degree of control an individual believes s/he has over behaviour. All of this suggests that whether or not a code or guidance has a positive impact on OHS will depend on how it is taken up within workplaces, and the role played by influential people such as managers in workplaces and others outside, including suppliers, customers and OHS inspectors. We return to these issues in Chapter 6 where we discuss monitoring and enforcement in relation to codes and guidance materials. For a review of literature relating to attitude and behaviour change see Glendon, Clarke and McKenna (2006, especially chapter 6), and for a review of literature relating to responsive enforcement see Johnstone (2004, pp 150-160).

## Chapter Summary – Purpose and Characteristics of Instruments

In this chapter we discussed the purpose of different types of OHS instruments, and the subject matter and types of standards incorporated in them. We also examined issues of design and format of instruments. These issues all potentially impact on the efficacy of codes of practice and guidance materials. We revisit them in Chapter 10 where we further explore the implications for efficacy of these instruments.

# Chapter 5: Processes for Development

## Chapter Overview

This chapter examines the processes for developing codes of practice and guidance material. We begin by discussing the drivers for their development, that is, what influences the decision to develop a new instrument. We then consider the processes for development including who participates and the role(s) they play, the nature and extent of consultation in development, approval or endorsement of a new (or revised) instrument, and resources for their development.

## Drivers for Developing Codes and Guidance Material

The drivers for the development of codes of practice differ markedly between regulator-initiated, quasi-legal codes and guidance materials, and voluntary codes or guidance developed by industry or other parties.

In the case of the former, there is very little indication of why particular codes were developed, contained in the official material made available by OHS regulators. However, some indication of the drivers was provided by our Australian and New Zealand regulator respondents. They advised a primary trigger for developing a new instrument was 'political' by which they meant a problem was raised by industry associations or unions. These stakeholders may raise an issue through the relevant Minister, with the regulator or through an industry consultative committee. Inspectors may also identify issues of concern.

The issues or problems identified for attention may be a perceived significant risk or trend in fatalities or injuries, but not necessarily based on analysis of injury, disease or exposure data. Equally, attention may focus on a neglected area (ie widespread inaction by industry, or lack of guidance available for a particular industry sector or group in the workforce). Ambiguity about interpretation of legal requirements may also be a driver of action. Since laws in themselves do not easily translate into accessible language and there is a need for more practical guidance, all parties see value in a mechanism that enables everyone to know what might be required of them or to receive practical guidance as to how to comply. A further driver is a Coroner's findings recommending development of particular material as a result of an inquest.

Perhaps surprisingly, the decision to develop an instrument is typically not made systematically against criteria for determining what is needed. On the contrary, as one respondent said, "direct lobbying is the key influence rather than objective analysis – regrettably, analysis of statistics, culture or causes of accidents are not used" (NSW, Reg2). The approach is apparently similar in British Columbia where a regulator reported, "often we have industry asking us to plug a particular problem"

(BC, Reg1). Again, in the UK stakeholder pressure appeared to have a considerable influence. A regulator told us, “take the CDM regulations - we weren’t going to produce a code but industry wanted one” (UK, Reg 2).

Another important driver for Australian regulators is the commitment to adopt consistent regulations and codes of practice, giving effect to national model standards and codes of practice declared and issued by NOHSC, and more recently by the ASCC as part of their commitments under cooperative federalism. (See COAG 2004). In contrast to the generally ad hoc nature of code development in the Australian states and territories, the national process involved a relatively coherent process.

The ‘first order’ national priority areas were established in the early 1990s and were hazard-based, determined on the basis of: the estimated number of cases and costs of injury or disease attributable to a particular type of hazard; industry, union and community concerns; matters involving products and occupations since there was also a focus on dismantling barriers to trade between the states and territories; and hazards that were commonly addressed in state/territory regulations at the time, and hence priorities for harmonising regulations (and codes) nationally (Emmett 1997, p 330). More recently, alignment with international regulation has been a priority, for example, with proposals to adopt the globally harmonised system, as well as standards and codes for the construction industry, a priority industry under the *National OHS Strategy* (NOHSC 2002). The ASCC is currently developing criteria for determining priorities for national standards development, and Victoria is also developing criteria for state-based instruments.

Part of the decision to develop a new instrument involves determining the type of instrument. In Chapter 4 we discussed the distinction between using codes of practice to clarify expectations about compliance with performance-based legislation, in a more comprehensive and detailed way, and using guidance materials to address particular issues.

Pragmatic reasons may also be drivers to choose one type of instrument over the other. Sometimes there may be an inclination to choose a code over regulations because the former process is much quicker, but some regulators indicated the development process for codes is now similar to regulations and can, as a result, be as lengthy. If the goal is to provide practical guidance, guidance material may do the job as well as a quasi-legal code of practice and can avoid the more formal processes involved with the introduction of a code. On the other hand, stakeholder interests may influence the decision to opt for a code (or not) since its legal status is perceived to give it more standing.

Conversely, in the UK we were told by independent sources that there was now a reluctance to introduce new codes since this would be seen as another mechanism to increase the overall burden of regulation. Some HSE officials also hinted that this was the case although one suggested that:

> ACOPs are seen as not quite legislation, not quite guidance. They are a bit misunderstood. Some think they do not have the force of law but they do. There is a feeling that industry that might not swallow a new regulation might swallow a code of practice (UK, Reg4).

In the case of voluntary codes, participants comprise mainly large corporations for whom the need to protect their reputation and 'social license to operate' is an important driver. Related to this, voluntary codes are often a response to the threat (actual or implied) of direct government intervention, to broader concerns to maintain legitimacy (and through this, commercial advantage), and the need to provide a credible response to crisis. The chemical industry's development of Responsible Care after the Bhopal disaster killed an estimated 2000 people (Gunningham and Grabosky 1998, ch 4), and the creation of the Institute of Nuclear Power Operations after Three Mile Island near nuclear meltdown (Rees 1994), are perhaps the best examples.

Evidence from the environmental area suggests that voluntary codes initiated by industry are variously a response: to negative media attention (Lennox and Nash 2003); to perceived low public opinion; and to non-government organisation (NGO or trade union) campaigns. Beyond this, the effectiveness of external pressures brought to bear, will necessarily "vary depending on the type of product, the type of market (eg the number of players, their size, import/domestic considerations, stability), the extent of public concern or 'outrage', and whether there is some natural affinity between consumer and industry interests". The likelihood of voluntary codes functioning successfully will necessarily vary with the strength of these pressures. Sometimes, the development of such codes is more a mechanism for warding off criticism than to achieve positive behavioural change (Brereton 2003).

An example of industry-developed guidance material designed to address an OHS problem about which there was considerable public concern is the guidance developed by New Zealand's Agricultural OHS Council. Our respondent explained:

> We probably pick the lowest hanging fruit so we look for areas where there is significant opportunity to get an improvement and occupational risk, so to avoid accident and death obviously. So we're keen to pick the biggies first and the ATV one was the first one we did because they were killing too many people on farms. So that's the number one criteria I guess (NZ, Ind1).

## The Development Process – Participation, Consultation and Endorsement

### Quasi-legal codes of practice

Unsurprisingly, the processes for developing and endorsing codes (and guidance material) depend largely upon whether an instrument is a quasi-legal code, a voluntary code or guidance.

In the case of quasi-legal OHS codes (in Australia, New Zealand and the UK), code development is usually coordinated by government. The development process typically involves a tripartite committee, working group or reference group which includes the key stakeholders (employer/industry associations and unions), with regard to the subject matter of the code. The OHS regulator may involve several of its own staff with different skills and expertise. Other regulators may also be involved if there is overlap of responsibility. As a Queensland regulator explained:

> We develop them in consultation with stakeholders, so that will be industry and union. The majority of codes that are produced are produced by working party. We chair the working party in most cases, sometimes somebody else is asked to chair it … and we get representatives from industry and unions … Staff provide both technical as well as standard setting expertise and then we want the practical implications of all of this to come from industry … On the working party we have a policy officer, a technical expert and usually an inspector, so staff from three areas (Qld, Reg1).

The committee or working group's role is normally to comment on draft documents provided by the regulator. As the Queensland regulator went on to explain:

> We actually write the code. We prepare an initial scoping paper, which is approved by the Minister, then we form the group. Then we take that [paper] to the group and we start drafting up a code of practice and just keeping the drafts back to them and they comment on it. That is a more efficient way than trying to get the actual group to write the code itself. So that tends to be how we do it … we're actually going to be writing one where we do the thing totally in-house and then we will take it out … that's a less common process. The more common process is to work with people along the way. (Qld, Reg1).

The source document for an OHS code of practice may not be developed by staff of the OHS regulator. The OHS statutes in most of the Australian jurisdictions, New Zealand and the UK provide for codes to comprise or incorporate material prepared by other parties. (See OHSA(Cwth), s 70(1); OHSA(ACT), s 206(3); OHSA(NSW 41(2); WHA(NT), s 187(2); OHSWA(SA), s 63(2); WHSA(Tas), s 22(2); OHSA (Vic), s 149(2); OSHA(WA), s 57(2); HSEA(NZ), s 20(12); HSNOA(NZ), s78(4); HSWA(UK), s 16(1)(a)).

Source documents regularly used by regulators are Australian, New Zealand, British and European standards, as well as OHS instruments developed by other regulators. In Australia, national model codes of practice developed by NOHSC or the ASCC are key source documents as they are adopted, or reworked for adoption (see also Chapter 3). These are developed in a similar way to the state/territory OHS regulator-developed codes.

In some jurisdictions, particular emphasis is placed on encouraging industry to develop codes of practice which may be considered for formal approval. This approach is explicit in Western Australia where the WorkSafe WA Commission:

> [W]elcomes the development of industry codes of practice that contain information which is technically and legally correct thereby enhancing standards of occupational safety and health within their industry…The Commission recognises that formal approval of the technical information in a code of practice reduces the legal uncertainties where this information is used as part of a safe system of work. In an effort to expand the range of approved codes of practice, the Commission encourages the development of codes of practice, initiated and developed by industry, to provide practical occupational safety and health guidance for high risk situations or sectors of an industry. These 'industry codes of practice' may be recommended to the Minister by the Commission for approval under section 57 of the Act, thereby achieving the same status as an approved code of practice (WorkSafe Western Australia Commission 1998, p ii).

In 2007, a review of OHS legislation in Tasmania (Brown and Hyam 2007, p 285) similarly stated that "provided they meet the basic requirements, if an industry sector or representatives of industry generally decide they wish to gain Ministerial approval of a code of practice, there should be no impediment".

In New Zealand, the involvement of industry in code development is encouraged and for codes approved under the HSE Act it is common "for industry groups to write codes of practise in a co-operative manner with government agencies …[incorporating] proven 'practical steps' to control risks in the workplace (Walls 2001, p 388). A regulator described a similar process for a new guideline which involved: an open invitation to interested people in the industry sector affected to be involved (the 'industry consultation group'); industry input to identify issues to be addressed; development of a draft by the regulator; and consideration of and comment on the draft by more than 30 members of the industry consultation group, as well as those they circulated the draft to (NZ, Reg3).

A somewhat unusual provision is contained in the Northern Territory's *Work Health* Act 1996 (s 187A(4)). This provides that in addition to standard provisions concerning the making of codes of practice, a code of practice may be made in relation to a particular workplace. The provision provides that, "the Authority may, in writing, approve a code of practice

in relation to a particular workplace presented to it by employers under whose care and management the workplaces is and, on its so doing, that code of practice shall be the approved code of practice applicable to and in relation to that workplace".

Regulators routinely issue draft codes of practice for public review and comment, in accordance with statutory requirements,[4] with the aim of seeking wider stakeholder input. This may be a more global public process where the regulator advertises that the draft code is available, posts it to their website and anyone can send in a submission or comment on the draft. Alternatively there may be more targeted public comment which involves consulting specific stakeholders, including industry committees, rather than more general advertising. In New Zealand, the Secretary of the Department must publish a notice in the *Gazette* indicating that the Minister has been asked to approve a code of practice (HSEA(NZ), s 20(1)-(3). Before approving the code the Minister must allow at least a month to pass, consult all persons affected, give them reasonable time for comment and consider all written comments. One regulator advised there may be a form of piloting of a draft code, with end users, and focus groups to obtain input (NSW, Reg1).

Accordingly employer/industry groups and unions (and to a lesser extent other interest groups), may well play active roles in shaping a code's development, and thereby gain a degree of ownership. However, achieving ownership may require more extensive engagement, as we discuss below in the section 'Issues in the development of quasi-legal codes'.

In New Zealand and the Australian jurisdictions, the quasi-legal codes of practice are approved (or 'made' in Queensland), by the Minister with portfolio responsibility for the relevant statute. In some of these jurisdictions a peak, tripartite OHS consultative forum[5] has a specific statutory function to advise on or recommend these codes to the Minister.[6] In the UK, the peak stakeholder consultative forum, the Health and Safety Commission (HSC), rather than the Minister, has the authority to approve and issue codes of practice (HSWA (UK), s16(1)). Similarly, under hazardous substances legislation in New Zealand, responsibility for approval of codes rests with the quasi-judicial Environmental Risk Management Authority (ERMA) (HSNOA (NZ), s 78(1)).

Once approved or officially endorsed, a notice is published in the relevant government *Gazette* for each jurisdiction or country. Some of the Australian OHS statutes require an additional step of tabling an approved

[4] See for example OHSA 2004, s 7(2)), WHSA(Qld), s 45(2)), HSEA (NZ), s 20(1)-(3)) and HSNOA(NZ), s 79(2).

[5] These are variously known as commissions, councils, boards or advisory committees.

[6] See for example OHSA (Cwth), s 12(1)(e); WHSA (Qld), 45(2)(e); OHSWA (SA), s 13(1); OSHA (WA), s 14(1)(b); OHSA (ACT), s 12(2)(b).

code of practice in the jurisdiction's Parliament where it is required to sit for a specified period of time and is subject to disallowance.[7]

As regards national standards and codes in Australia, these are the main vehicles for standard development through cooperative federalism, and tripartite structures are built into the decision-making processes. There are similar tripartite working committees for consultation in the development phase and national periods of public comment on draft codes. The final instrument is considered and declared by the ASCC which includes representatives of the peak employer and employee associations, as well as representatives from Commonwealth, state and territory governments. After ASCC declaration, national standards and codes are considered and accepted by the Workplace Relations Ministers Council, and eventually considered and adopted under the jurisdictions' legislation.

The processes described above are far less characteristic of some of the international jurisdictions we studied. In Denmark it is the 'social partners' – the employer and employee associations - who take the initiative. As one respondent told us:

> Normally the Labour Inspectorate is not involved at all before the final [stage]… each sector council gets money to get involved so there is a driving force to agree in developing guidelines… when they have agreed the guidance material they inform the Labour Inspectorate which has to ensure that the guidance is on the same level or above that required by the law. If it's okay it could be used by a court. The law says employers need to follow the law and also recognised standards for the sector so when it's been agreed it has a status like a recognised standard. And the Inspectorate can treat it as an obligation and can use it as a recognised standard (DK, OHSspec1).

In the Netherlands, it is the employer and employees at branch level who must formulate agreements and compile their own OHS 'catalogue' which will be used by inspectors as the basis for workplace inspections:

> The new *Working Conditions Act* (Arbowet) came into force on 1 January 2007. The Act includes a lot of changes in relation to the previous *Working Conditions Act*, which dates back to 1998. Instead of general regulations imposed from above, the new Act makes provisions for tailor-made rules. Employers and employees can now consult with each other before laying down agreements to ensure a safer, healthier and more pleasant workplace. The Labour Inspectorate will trust in these agreements, but will take firmer action if the rules are abused (Arbonieuwetijl 2007, p1).

We were told:

[7] (OHSA (Cwth), s 70(5); OHSA (ACT), s 206(4) ; OHSWA (SA), s 63(8); OHSA (Vic), s 151(1)). (Under OSHA (WA), s 57(2) codes must be laid before both Houses of Parliament but the Act does not provide for disallowance).

> Detailed regulations are being replaced by OHS catalogues. These must be agreed at branch level. The Labour Inspectorate then use it as a reference point for its inspection and enforcement. When the employer abides by [what is in the] catalogue it's deemed to comply with the law. Within five years catalogues will cover eighty per cent of all enterprises… but the Labour Inspectorate must ensure the outcome [in the catalogue] does not conflict with Dutch law. So the onus is now on the workplace parties but they must at least meet the standard of the existing law. The employee organisations have to be involved. It won't be okay for the employers themselves to write the catalogue. It has to be both workplace parties. If there is no catalogue then the inspectorate will enforce more frequently at that workplace (NL, OHSspec2).

British Columbia in contrast prefers to develop draft guidelines 'in house', with external stakeholders only being consulted "when the product is ready to go" (BC, Reg1).

## Resources for developing quasi-legal codes

Our Australian and New Zealand respondents advised that the resources for developing a quasi-legal code can be considerable, especially if it is a 'green field' code and therefore not substantially based on an existing document from another source. The human resources are variable and often underestimated. Those committed by a regulator would be likely to include the involvement of a project officer, inspectors and technical or scientific experts (such as engineers, occupational hygienists, ergonomists). They may also include the work of plain language drafters during the development process, editors prior to publication, and communications staff may be involved with regard to 'corporate' style and strategy. As a quasi-legal document, legal staff may be involved in assessing a draft code. For regulators these human resources and the associated financial cost will need to be provided from within the agency's operating budget.

The process is less resource intensive if an existing document is used as the basis of a code, but again this varies depending on the complexity of the issue and the amount of change made to the source document. Even this may be too costly for some regulators. Respondents from the South Australian regulator commented that considerable use has been made of Australian Standards as approved codes of practice, as well as instruments developed by other OHS regulators. They suggested that ideally there would be sufficient resources to identify the relevant parts of an Australian Standard to incorporate in an approved code (or regulations), but with little funding for development, staff do what is possible within the resources available. There is limited reworking of instruments from other OHS regulators and relevant Australian Standards receive tripartite consideration, and if deemed suitable are adopted 'as is'.

Human resources are also contributed by industry and union stakeholders participating in the development process. Stakeholder representatives

typically contribute their time 'in kind', participating in their own or their employer's time, and without expenses being paid by the regulator. This involves not only participating in meetings but also reading and contributing to drafts, and communication (if any) with those whose interests they are representing. As a New Zealand employer representative observed, "All participants are self-funding in most cases - time and travel are the biggest costs" (NZ, Ind2). An Australian union respondent explained it is a limitation of the process that, "participating organisations must have sufficient resources to cover the costs of participation and this can limit the ability of stakeholders to be part of the development process" (Aus, Union2). It is not surprising that wider 'ownership' of codes of practice may be limited or lacking, as we discuss below.

In the UK lack of resources is an increasingly important constraint on HSE activities, including the development of codes and guidance material. This was particularly the case where there was some dispute about what these instruments should contain, where the issue was complex and where diverse interest groups were involved. As one UK regulator pointed out, "we can't be everywhere, so we try and prioritise two or three key publications" (UK, Reg2). Indeed, as indicated above, for the most part, the HSE would prefer industry associations to take responsibility for the development of such material, with the HSE endorsing it if it thought appropriate.

The resource demands on the regulator are less significant in Denmark and the Netherlands, given that the regulator does not take primary responsibility for code development, and only engages in the process at a later and less resource intensive stage. In British Columbia we were told that the extent of resource pressure on the regulator varies substantially with the type of guidance material being developed. If an issue is technically complex and there is a substantial degree of opposition to its introduction, particularly from industry, then the resource demands are likely to be very substantial, causing the regulator to think carefully about the overall risk and relative priorities before proceeding.

## Issues in the development of quasi-legal codes

There are some contentious issues relating to the development of codes of practice. First, in some jurisdictions at least, codes are only developed relatively rarely, notwithstanding the perceived need for such instruments. In New Zealand, of the 29 approved codes of practice listed at the Department of Labour's website, only four were issued in the last five years and 17 were more than ten years old. This was a matter of concern to a union respondent who told us, "There's no interest in the Department to develop them and they actually don't see their role anymore in doing it, that I can gather" (NZ, Union1). The Department has issued a wide range of guidance although, as with a number of the approved codes, there is a need for updating.

In Australia, regulators have found codes of practice to be 'resource hungry' instruments to develop. Some regulators do not produce 'green fields' codes but process national codes for adoption, and use Australian Standards or codes from other jurisdictions as source documents. Whether or not a regulator uses existing instruments, or develops a code of practice completely, the process for consideration and approval of a code is more difficult and time consuming than for guidance materials and this can be a deterrent to code development. A Victorian regulator explained:

> A code of practice is a much more difficult thing to get through from a legal point of view, and therefore in my view not to be entered into too lightly. So my usual preference is to try and get guidance out into the industry in another format wherever feasible or possible, and that includes industry standards, which we have developed quite a few of here, co-owned by us and stakeholders and they have had the same sort of status in practice, de facto status if you like, as the code of practice would anyway but without some of the legal difficulties we've experienced in the past in how codes are expected to be written. We also find usually that guidance often is required sooner rather than later (Vic, Reg2).

In the UK, regulators also told us that far fewer codes are introduced today than in the past. Although the reasons for this are multiple and complex, they certainly include resource constraints. Much the same is true for guidance material in British Columbia, at least where issues are technologically complex and contentious. As indicated above, regulators in Denmark and the Netherlands are less pressed in this respect because they do not have primary carriage of code development.

In essence, the cost, time and trouble involved in developing quasi-legal codes of practice acts as a deterrent to producing them. Yet, as we discussed in Chapters 3 and 4, codes of practice under the OHS statutes are intended to provide an acceptable way(s) of complying with the OHS statute and/or regulations, and to provide clarity and certainty about a course(s) of action that will comply. A crucial question is whether and, if so, how governments should ensure sufficient resources to support this rather resource intensive and onerous process. Alternatively, is it acceptable to replace codes of practice with guidance materials (which are quicker and cheaper to produce)? Or is there a third way: altering development processes to make them more efficient? We return to this below.

Unfortunately, the problems do not stop there. An issue raised by Australian respondents was that for those codes that are developed by an OHS regulator there are concerns about the knowledge, experience and expertise of those involved, whether they are staff of the OHS authority or stakeholder participants. Our respondents had criticisms from different standpoints about whether those drafting or otherwise participating brought appropriate 'know how' to the process. Box 8 presents examples of comments in this area. (This issue was not raised by New Zealand respondents. This may be because experience with code development

has been limited in recent years. It is potentially relevant to any regulator-developed codes).

**Box 8**

**Australian Respondents' Comments About Drafting**

*It generally requires experienced people who work in the industry (Aus, Ind4). … A code is good if just reading the material gives an engineer such as myself confidence because it is evident that professionals in the industry have been consulted and the material worked over to be practical (Aus, Ind4).*

They've just released a few new codes but they didn't consult anyone in the particular industry. They're just government people who really didn't have the expertise or background to be generating these codes … I've asked inspectors a number of times over the years, do you consult and they say they do but what's the word consult mean? I mean do they ring someone up with a few questions and say, well I've consulted industry, instead of having people on the committee to research. People with a lot of expertise and knowledge in that particular area, that's what they really need to develop these codes instead of being developed by technical people (Aus, OHS spec2 (works with small and large firms in a range of Queensland industry sectors).

*Usually participants would be expected to have some experience and expertise in the area in which guidance is being developed. Representatives on national committees often represent a point of view or an ideology rather than bringing expertise on a particular topic. To our knowledge, no specific criteria or qualifications are required for membership of committees or for the purposes of providing comments (Aus, Union 2).*

Stakeholder representatives may have general but not in-depth experience of the hazard/risk or industry, and may lack or have limited understanding of OHS legislation. Union representatives can be difficult to get compared to employer/industry representatives. Project officers may have no direct expertise or ability in OHS. Inspectors often have a poor understanding of what is required (NSW, Reg2).

*I think the things do need to be written by somebody who is pretty expert in the field but they need to be guided and controlled enough so that they don't write down everything … if you have a regulator that's got some kind of strategy in mind that they're trying to enact then it would make it much more efficient and much easier to get through the process. Whereas I suspect in quite a few cases either it's done by a committee, so there are all kinds of agendas or there isn't really a clearly stated agenda and so somebody writes something and then it either just gets published in that form or there's more of a sort of, "oh no that's not what we want, you've written something over here and we want it to go over this other way (Aus, OHSspec1).*

Australian Standards are written by committee members - industry experts and regulators. Standards Australia facilitate as project managers and members debate a source document which may be an overseas' standard. Members are selected for their technical expertise in the standard and may write sections of standards. With ASCC, staff write the standards and codes. They are not equipped with the technical expertise and documents are lower in quality. Committee members discuss the draft but staff decide what goes in. (SA, Reg1).

*One of the problems with the national codes is they don't seem to actually retain a technical expert to drive the process through and they're relying by default on the volunteer technical experts of the state authorities and that just doesn't work. Our experience is that you need a person who has a combination of reasonable drafting skill and technical expertise to actually basically be part of the development process (Vic, Reg2).*

The key issue here is that code development may require, on the one hand, technical expertise (expert knowledge) with regard to the hazard/risk or other subject matter, and of existing OHS legislation. A code needs to be technically sound as well as consistent with the requirements of the parent OHS Act and OHS regulations. On the other hand there is a need for practical understanding of the industry sectors, workplaces and work processes for which a code is intended. There is also a need for skills in plain language drafting and user friendly presentation of text and visual material, as we discussed above and in Chapter 4. An important issue then for the efficacy of codes of practice is how to ensure the necessary mix of knowledge, skills, experience and expertise in the development of a code of practice. An important first step is to recognize that all these ingredients are needed. Since finding this mix of knowledge, skills, experience and expertise in particular individuals is unlikely, new ways are needed to ensure teams of people can effectively contribute these. There is also a case for identifying specific competencies required for standards developments and developing expertise in this. Past (and current) practice is to acquire this, to a greater or lesser extent, through participation in the process.

A further issue is the extent to which the regulator, industry and union stakeholders engage with the industry sector(s) (including workers) which will be affected by the code. Respondents suggested a number of inter-related problems in this area. Even if stakeholder representatives are involved in tripartite committees, if they are not seen to be communicating with people in industry there is a perception of a failure to consult. Working through employer/industry associations and unions, and even industry consultative committees, does not necessarily translate into communication with people who would implement the code. If there is communication 'down the line', obtaining comment can be time consuming as stakeholder organisations consult with members. Targeted comment may also be a problem, especially if it replaces rather than supplements more general public comment, because it does not provide maximum access and opportunity to contribute. From a regulator's perspective response to more generalised public comment can be limited and indicate a lack of understanding of legislation. From an individual's perspective in industry, comments provided may appear to not be taken seriously.

Several state regulators commented that these problems may be exacerbated when codes are developed nationally, especially if the national period for public comment is relatively short and it is intended that there only be a single process of public comment at the national level (not duplicated when the state/territory adopts the national

instrument). Those affected in industry need to be aware of and engaged with the process if they are to have a say about the national instrument. As one respondent explained:

> We get people from the employer associations and the unions saying they're not properly represented on these national committees, that it's too peak level … somebody from the ACTU or the ACCI sitting on a technical committee, swamped by six or seven state representatives is not their idea of proper representation. They also feel that these people who supposedly represent their interests on these committees never communicate with them. They try and get over that by making us their conduit … they are very frustrated at what appears in some of these national documents and they believe that they weren't properly listened to or consulted … and that creates a problem for us too because it means … that they want to force WorkSafe to make a Victorian only deviated stand alone type … and that is a concern because we don't want that to be the case. I don't think any of us want to continue on with these sort of variations on a theme (Vic, Reg2).

All of this suggests that in a variety of ways the traditional processes of consultation through tripartite committees and public comment do not tap into (at least not effectively) industry and worker experience. They are rather removed and too indirect for effective engagement and alternative approaches are needed. They are not achieving 'ownership'. There is a need not only to take the issues under consideration out to relevant people (or a representative sample of them), but also to clarify the legal framework on which they are laid. There are no easy answers to this dilemma. Research methodology generally offers alternative ways to gather ideas, insights and experience from people. (See, for example, Ticehurst and Veal 2000). Some suggestions for alternative approaches to engage with end users are summarised in Box 9. These are based on respondents' suggestions.

A more radical departure from existing practice would be to follow either the Danish approach (leave development to sector based 'social partners') or the Netherlands approach (leave 'catalogue' development to the workplace parties). However, it is important to emphasise that both countries have a long tradition of cooperative relations between the social partners that may not readily translate into an Anglo-Saxon industrial relations context. In addition, reliance on industry to develop codes (or guidance) transfers the resources for development burden to industry. Nevertheless, it is worth reiterating that the UK Health and Safety Executive has also increasingly 'outsourced' the development of guidance to industry groups, subsequently engaging with the draft that industry produces and endorsing it if it believes it to be of an adequate standard (broadly that it meets good practice).

**Box 9**

**Alternative Approaches to Input on Codes**

Having clear terms of reference, stating how the process will be conducted, and clarifying expectations.

The regulator consulting a representative sample of potential users in industry, either directly or through workshops.

*Surveying a representative sample of those that may be affected.*

Trialling draft codes of practice (and guidance materials) with a representative group of people for whom it is intended.

Where an employer participates, the employer and the people who will use it getting together and talking about it so that those who manage the job and those who it have input.

A reversal of the process whereby industry develops codes as practical, industry-based solutions and the regulator ensures consistency with legal requirements.

*Regulator funding to organisations to develop material with the regulator reviewing the material to ensure consistency with legal requirements.*

Building codes from practical advice and solutions well-established through use in industry as acceptable and effective means of compliance.

## Codes and guidelines developed by regulators – experience internationally

Internationally, there is some variation in how codes (or more usually) guidelines, are developed. In British Columbia, government is at the centre of the process and consultation takes place at a relatively late stage. According to government respondents:

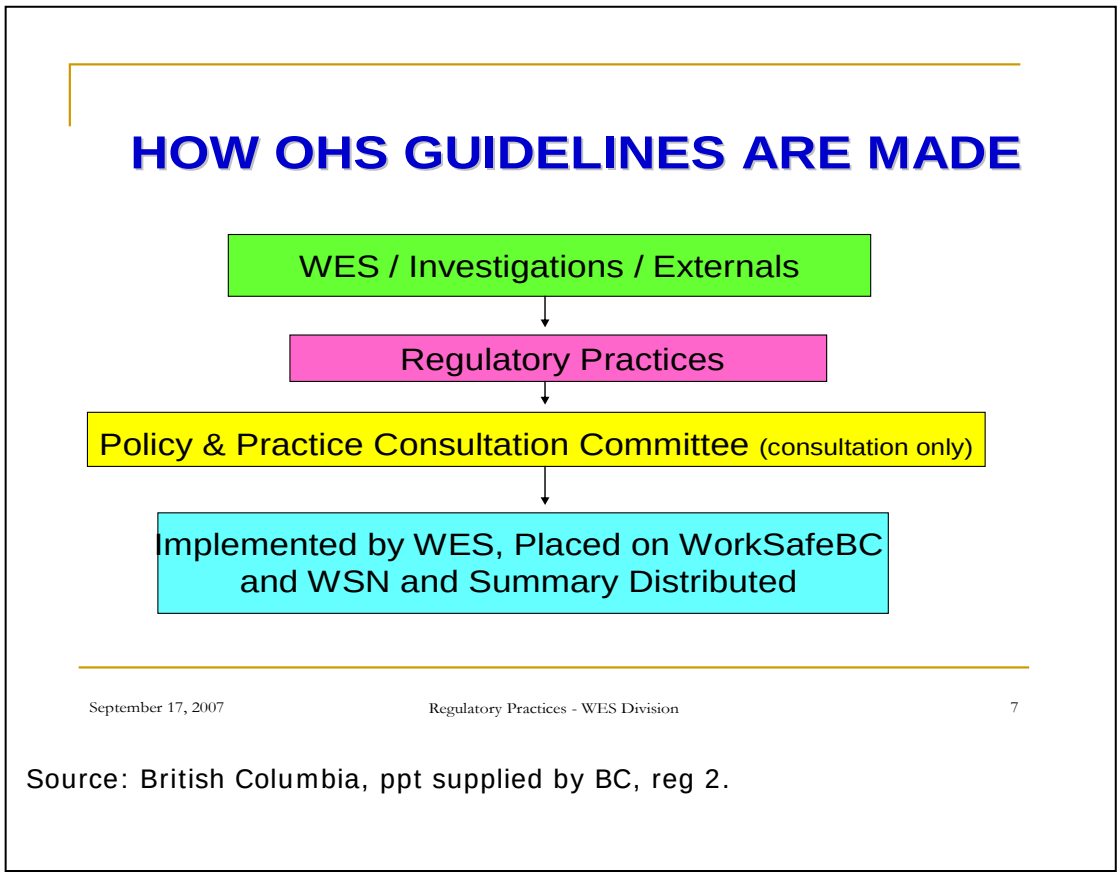
> Guidelines evolve 'in house'. At first they were developed as interpretation documents for safety officers. Gradually stakeholders took an interest and we now use them instead of formal policies. Consultation only takes place when the product [draft guideline] is 'ready to go'. We are wary of industry involvement earlier. We want to remain independent and we struggle to find a balance and to protect the worker interest. Employers are much more organized than workers and we don't want to involve them earlier and be seen as in the 'pockets of industry' (BC, Reg1)

And for another:

> It's true that there is a Policy and Practice Consultation Committee and that is notionally consultation but that comes in at the last gasp. We start with a Standing Committee internally and the Policy Committee gets it pretty much as it's being issued [60 days preliminary issue]. In the [Policy] Committee it's politics – organised labour and employers – but we are open to change (BC, Reg2).

The process in British Columbia is illustrated in Box 10 below.

**Box 10**




Source: British Columbia, ppt supplied by BC, reg 2.

In Denmark, consistent with the general culture of that country, there is a considerably greater degree of consultation. As one OHS specialist described it:

> [A]lthough the guidance is developed by sector councils it is usually discussed at tripartite committees and under the local Work Environment Council, which is a tripartite policy committee. There may be some conflict but usually not. Usually what is agreed to is good manufacturing practices –not the best but it gives a signal to the bad performers and aims to raise the bar by referring to what the good companies are doing (DK, OHS spec2).

The consensual approach was confirmed by another OHS specialist who told us that, "officially the Director of the Labour Inspectorate doesn't have to listen to what [he or she] is told by a tripartite committee but in practice they almost always do listen and often it's a consensus" (Dk, OHS spec1).

In the UK, the nature of consultation and the stage it takes place at will depend upon the particular path by which the code is developed. Where industry itself develops the code then it will consult its members but may

or may not choose to hold discussions with relevant employee organisations. However, if the Health and Safety Executive is contemplating endorsing the code, then it would take soundings from all relevant stakeholders before doing so. Where an approved code of practice is developed by the Health and Safety Executive itself then it will consult extensively with the relevant industry stakeholders. As one regulator reported:

> Where the HSE initiates the process then it engages with the stakeholders at an early stage. It gets to see their ideas which is useful… with the CDM regulations and ACOP we had discussions with industry right from the start and contact with key players as to what should be revised and we talked to lost of groups taking on board the good ideas (UK, Reg5).

UK regulators were generally very positive about industry based guidance material although they recognised that it was not without potential problems.

> Sometimes regulations and guidance is written largely by industry. It's a difficult process because industry expectations as regards drafting are different from HSE's. HSE is concerned with legal implications. And we have expertise in drafting…There is also a danger that different stakeholders have different interests. So HSE has to act as a filter, to provide checks and balances. Its working quite well, and they have more ownership, people agree with you and we get buy in. But if we [HSE] produce guidance and people don't agree, then we don't move forward much. If they suggest it then they publicise it and sell it to their members. But we have a drafting committee and we keep it legal and honest (UK, Reg2).

In these circumstances, material produced by industry would be endorsed by HSE who would for example, write the foreword to the document and co-badge it. In the case of codes, the Health and Safety Commission (the body which must formally approve and issue codes by virtue of the HSWA 1974, s 16) itself includes representatives of peak employer and union stakeholder organisations.

Significantly, UK regulator respondents reported not only that such material was taken seriously by a court as evidence of good practice but that it was taken even more seriously than HSE produced material because it had industry support: "we prosecute and in evidence we point out, your industry group said this is how to do it – so it must be correct" (UK, Reg3).

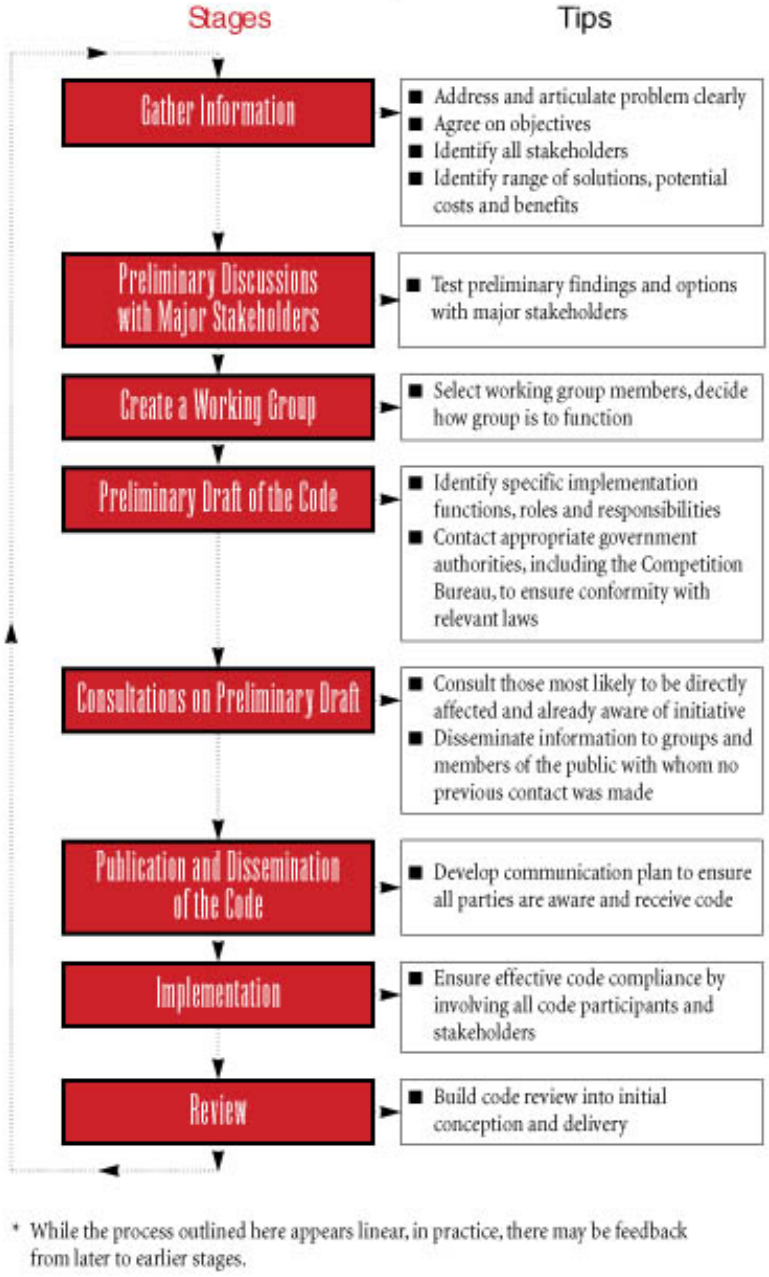
### Voluntary codes of practice

In the case of voluntary codes, development will be initiated by the relevant umbrella organisation, standards organisation, professional body or industry association. In the case of the latter, development will often take place without input from either government or representative organisations of employees (trade unions). However, there are exceptions (see Responsible Care, described below). Where a code is

developed by an industry association then self-evidently it will obtain the views of its members and attempt to represent those views, before developing advanced drafts and finalising a code.

The Office of Consumer Affairs in the Canadian Government has developed an eight step model for developing voluntary codes (Government of Canada 1998, p 15). This is presented in Box 11 below.

**Box 11**




**Source: Office of Consumer Affairs, Canada 1998b, p. 15.**

Sometimes voluntary standards combine more than one of the above approaches. For example, it is common for national industry groups and individual corporations to develop standards or guidelines and the standards adopted may be those of a standards organization such as Standards Australia, Standards New Zealand, or the British Standards Institution. It is also becoming increasingly common for voluntary codes to refer to International Standards such as those of the International Organisation for Standardisation or European standards. Individual industry associations (who may only represent a portion of those working in a particular industry, or only operate at state level) may also choose to adopt standards (i.e. codes or guidelines) that have been developed elsewhere.

An example where wider consultation takes place in the development of a voluntary code is the chemical industry's Responsible Care initiative. For example in Australia, the Plastics and Chemicals Industry Association states that:

> The national Community Advisory Panel (CAP) played a substantial role in development of Responsible Care® codes of practice. It provides ongoing advice to industry on the issues of importance to the community and is a sounding board for industry plans. CAP is a formal independent group of people with community, environmental, emergency service and scientific backgrounds who challenge chemical industry executives partly because they have different vested interests. CAP ensures that public concerns are reflected in the industry's programs (PACIA 2007)

More broadly, Canada's Office of Consumer Affairs encourages wide consultation when developing voluntary codes, although their suggestions do not necessarily reflect current industry practice:

> 'Preliminary Discussions with Major Stakeholders' The objective of this stage is to test the tentative conclusions reached in the information-gathering phase and identify the partners willing to help develop the code. It can be useful to reach beyond like-minded colleagues, employees and other firms and organizations to include more broadly affected interests such as consumer, labour and environmental organizations, community groups and governments. This can help to confirm initial perceptions of their interests and concerns, and could lead additional people and organizations to participate in code development. Focus groups, representing like-minded peers or a broad cross-section of interests, can also be useful for testing new ideas (Office of Consumer Affairs, Canada 1998a, pp 12-13).

## Chapter Summary – Processes for Development

In this chapter we began by discussing the drivers for developing codes of practice and guidance material. Perhaps surprisingly, given the resource-intensive nature of instrument development, regulators do not typically have a systematic approach for determining when a new instrument is developed, against pre-determined criteria. We also examined the processes for developing codes and guidance materials,

identifying a number of issues that have implications not only for the production (and ongoing updating) of these instruments but also for the relevance to and ownership by those intended to use them. In turn this has implications for the efficacy of these OHS instruments and we return to these issues in our final discussion of implications for efficacy in Chapter 10.

# Chapter 6: Processes for Promulgation, Monitoring and Enforcement

## Chapter Overview

This chapter explores the strategies used by regulators and others to promulgate OHS instruments; that is, the action taken to promote and make new instruments known, and to disseminate them. Potentially, promulgation may include awareness raising initiatives (such as media campaigns), educational strategies, and ways of making codes and guidance available through websites, dissemination at events, collection from particular outlets, postal or email distribution, and so on. We discuss the extent to which these and other approaches are used by regulators, industry and union stakeholders, and other parties.

The chapter also discusses the action taken to monitor uptake and implementation of codes of practice and guidance materials, by regulators, stakeholders and others. In this regard, a crucial issue is transparency since this is one of the principal mechanisms by which accountability can be fostered. A critical step towards achieving transparency is the collection of information on progress towards implementation (Gunningham and Sinclair 2002, p 146).

The chapter then turns to enforcement. We discuss the use of codes of practice and guidance materials in enforcement by OHS regulators, including strategies of advice and persuasion, sanctions and penalties in the event of prosecution. The enforcement of voluntary codes of practice is also considered.

## Accessibility

Accessibility is essential to successful implementation of both codes and guidance material. This was a finding that emerged both from respondents and from the research literature. At one level, accessibility relates to the nature and quality of the instrument and factors such as plain language, format, use of illustrations and other tools to enhance usability and uptake of information contained in the instrument. These characteristics were discussed in Chapter 4. Accessibility can also be measured in much cruder terms. For example, how easy it is to find out that a code or guidance material exists on a particular topic and how easy it is to obtain a copy.

The importance of accessibility is illustrated by a UK evaluation of the *Health and Safety (First-Aid) Regulations* 1981, and the approved code of practice and guidance. This found that:

> *[T]he first issue in consideration of all guidance is its accessibility*. Definitive guidance is provided by the [Approved Code of Practice (ACoP) but] this is not widely read or considered…small and medium companies

> who did not necessarily employ health and safety professionals did not appreciate the existence or significance of the ACoP. Also for this group, access to the information was limited by cost and the effort needed to obtain the ACoP …While the survey indications were that guidance was adequate, the chances were that if and when people did read the ACoP it was quite likely that they would find it difficult to follow, non-specific and using language which was not as clear as it could be, particularly to non health and safety trained professionals (Hodge 2006, p 40, emphasis added).

Similarly, an assessment of the effectiveness of the UK manual handling assessment chart (MAC) and supporting website (Melrose et al 2006, p iii) found that only a minority of businesses had ever heard of MAC (21% of the survey participants equating to 7.7% of all businesses). Of these, around two thirds had at least examined the MAC and considered using it and a majority of these had actually made some use of it. However, sustained use of the MAC was quite limited, and most had only used it for a limited time.

Given the importance of accessibility, promulgation activities (and also effective communication, addressed below) are crucial. Yet not all education and informational initiatives have been successful, and much depends upon how the information is presented and packaged, and upon who presents it.

Drawing on what limited empirical literature is available (summarised in Gunningham and Sinclair 2002, ch 2), it would appear that a number of issues are crucial to successful policy implementation. These are:

- capitalising on win-win solutions – the starting point for effective communication, information dissemination and education should be to focus on those circumstances where OHS practice can also be good business practice and to emphasise that what is good in OHS terms may also be good for the economic bottom line;
- the right people disseminating the information – which must not only be transmitted, it must also be received. This is most likely to be achieved where there is face-to-face distribution from trusted sources (customers, suppliers, industry peers, networks and associations) that emphasises practical solutions. Information should also be sector specific, and delivered in a coordinated fashion. The various forms of information delivery must be effectively coordinated, to minimise duplication and ensure accuracy of the message, preferably by government;
- exploiting third party leverage – most SMEs have frequent interaction with larger companies along the supply chain (both their customers and their suppliers), and rely on them as credible sources of information. This provides opportunities for using such people both to disseminate information and to exert pressure on SMEs to pursue opportunities for using OHS improvements to achieve greater business success. On the basis of enlightened self-interest (backed-up by government persuasion), such people may, for example,

encourage the use of the advice, solutions, tools or checklists contained in codes of practice and guidance materials ;

- using more active 'hands on support' – including providing continuing on-site advice over months or years (rather than just 'self-help' information, basic awareness raising, or brief reviews or inspections).

Some of the obstacles to effective access are explored further in Chapter 9.

## Promulgation Activities

Effective promulgation is unlikely in the absence of adequate human and financial resources. Yet the provision of such resources can by no means be taken for granted, particular in smaller jurisdictions where the provision of resources is a continuing challenge.

Our New Zealand respondents indicated that promulgation of quasi-legal codes and guidance materials is far from ambitious in that country. Discussing the role of the Department of Labour, an industry respondent said, "They are involved but are very passive in doing this; they rely on business and employees accessing their website" (NZ, Ind2). However, the regulator does provide free print copies of some guidance materials to industry associations and unions to distribute to their members. Industry associations may also provide information about new instruments in their newsletters and disseminate materials in training courses. As a union respondent explained:

> [W]e said we wanted a thousand copies and they sent us a thousand copies …We got them for the organisers and I use them in seminars … I talk them through it (NZ, Union1).

Industry-developed material is readily distributed through industry networks and the regulator may provide financial support to produce this. As an industry respondent explained:

> [T]he industry that's written it is always pretty damn keen to actually get it out. So they get it out through their own networks. There's been no real government money spent on that at all yet. Some cases we've done second runs of them so the ATV guideline, which I said was a poster, we had a very high profile court case where a farmer got taken to court and denied that he knew anything about the ATV guideline and had never seen it … And so as a response to that we sent it out to every farmer in New Zealand again and we got some sponsorship for the printing of it. So there's a mix of things that happens but generally it's the industry that distributes it and the Department of Labour pay for the printing of it (NZ, Ind1).

In the Australian jurisdictions the approach to promulgation by OHS regulators varies, both between jurisdictions and for different codes. Basic elements are posting new instruments to the agency's website, distributing information (eg flyers) through industry associations and

networks, advice in the regulator's newsletter and being available to present to groups. It is rare that the mass media will be used, although there are examples of such publicity for regulations and codes made together. Some regulators make print copies of codes and guidance available to providers of OHS representative training, and at their public offices. Availability of print copies, free of charge, was highlighted by respondents as very valuable (see also Chapter 4).

For particular instruments there may be a more proactive approach, organising workshops or training in different metropolitan and regional locations, as well as advertisements or articles in industry and professional magazines. For example, with the WorkSafe Victoria *Bullying Guidance Note* promulgation initiatives included 15 workshops around the state. For Queensland's recreational diving code there was a four week education program in the north and south-east of the state. Particular programs developed by regulators may reinforce promulgation, for example grants schemes which provide funding for information and training initiatives based on codes of practice (and other aspects of legislation). There may also be follow up enforcement activity, as we discuss later in this chapter.

The NSW OHS regulator produces a communications implementation strategy for each code of practice. The strategy is to explain the steps to be taken to inform industry about the commencement of the code, key groups to be communicated with and assistance for implementation. Depending on the instrument and the target audience, promulgation activities may include website access and print copies, a media release and other media awareness raising, direct advice by inspectors, workshops, workplace visits, training and implementation packages developed by the authorities' industry teams, business mentoring and funding for outside groups to develop implementation resources (NSW, Reg1). Stakeholders are consulted on the development of the strategy which identifies the key groups to be communicated with and the methods for doing so.

In various ways, as discussed, industry and union stakeholders are part of regulator-initiated promulgation activities but beyond this, some industry associations also undertake their own initiatives. For example, a Queensland regulator explained:

> It depends on the association and what the issue is. For example, the QMBA are actually very proactive. If we produce a new code of practice in relation to construction they actually take that out to their members. They get us involved with them but they actually do it, they organise it … And in fact they keep us honest about what we don't do in those cases. They provide guidance to their members as to how. They have discussions with their members and if the members are sort of confused or don't really understand how something should be done they provide advice (Qld, Reg1).

The NSW OHS regulator also involves industry associations and unions and, for some instruments, involves ethnic and other community groups,

vocational education and workers' compensation providers, and other government agencies.

The comments of other respondents suggest that regulator reliance on industry associations and unions as primary conduits for promulgation may be misplaced as they had not received information through them.

The examples outlined above indicate there are individual cases where promulgation of a particular code or guidance material is proactive and designed to reach a range of people affected by the instrument. However, in general there is heavy reliance on websites, and people in workplaces checking these, rather than 'a big fanfare' to actively raise awareness of new initiatives. Websites are the principal way of making information available to a wider audience, but they will only be an effective communication mechanism if people have the knowledge, capacity and motivation to access them. There is no question that codes and guidance materials should be freely downloadable from websites, but there is cause for concern if this is the primary way that people become aware of them and the primary means for their dissemination. This concern was highlighted by respondents on both sides of the Tasman:

> Far too often Government or agencies think that small businesses will trawl internet websites at the end of their day looking for changes which is simply not the case. Internet sites are not the highlight they are made out to be. In my view people like worked out examples and people to talk to so they can relate to the information (NZ, Ind3).

> [Y]ou've got to think about all your middle and small businesses. They're not in the safety field as such, they're trying to run a business and they're totally unaware that these codes are out there … the government expects, because it's publicised and put out there it's public knowledge, 'well you're the employer, it's your duty to find out what's available'. And the government people just don't seem to understand that most smaller companies don't even think along those lines … We cover the websites in training. We tell them which website to go to and look for legislation and the codes and all the rest of it. Even workplace health and safety officers … in Queensland … You say, what are the websites? And a few people might know them but generally the majority of your audience have forgotten or just doesn't know, and that tells me they're not actually doing it in the workplace … Somehow they need to get it out to industry in general that there's a code that's pertinent to their industry they need to be aware of and have a read of and where necessary use (Aus, OHS spec2).

Heavy reliance on websites was also evident on the part of overseas OHS regulators. As a British Columbian regulator said, "we just use the website - occasionally we do it via industry safety associations and our individual safety officers get an email of updates of guidelines" (BC, Reg1). Similarly, in Alberta codes and guidelines are promulgated via the agency's website and newsletter. And as a Danish respondent explained:

> The web is the major information media and in Denmark almost everybody uses the web. But we also talk to the branch organisations -

> the OHS councils. They are sub-divided into specific sectors and they often play a role in translating or orienting safety representatives and safety managers as regards new guidances (Dk, OHSspec1).

There is further cause for concern if the relevant information cannot be readily identified and downloaded from a regulator's website, because it is not easy to find, at least not by those unfamiliar with the site, or because particular instruments are not available for downloading. The ability to locate sources relates in part to the way material is presented from the 'home page' but also the nature of search engines that use key words rather than intuitive searches.

However, there are examples where the website is not only a generalised gateway to information but where the regulator has established a portal for an industry sector and actively promotes this portal to the sector. Thus, there is less reliance on users finding their own way to the site. This approach is used by the NSW and Victorian regulators. As a Victorian regulator explained:

> It's a bit more than a website with us. We also run a weekly free email newsletter called the *Safety Soapbox*, which has currently got about 14,000 subscribers and it's expanding. So that's become a key way of letting the industry know that new material is available. That's become a bit critical for us … or very effective for us in terms of getting knowledge out there very quickly. You know, 'here's a new publication, click this button and download it' and all of that sort of thing. Then we do that for the other states too through that newsletter. So I suppose that's pushing the internet availability out to people. Also our inspectors have these things automatically downloaded onto their laptops and that means that they can also print them out as needed and some do that more than others (Vic, Reg2).

In summary, for regulator-developed codes and guidance, the internet is an important resource that is potentially accessible to a very wide range of people, within and outside a country or jurisdiction. However, it cannot be assumed that people will necessarily access it and, especially for SMEs there is a need to reinforce the internet with more direct forms of communication.

In the case of voluntary codes and guidance material developed by industry and others, promulgation activities, especially awareness raising and education, are less challenging since the associations who develop codes and guidance are already in communication with their members (as the New Zealand ATV example above indicates). When those members are large companies they are also more likely to be motivated to and have the personnel to actively find out about new instruments. To the extent that voluntary codes of practice are promulgated for SMEs then the literature suggests that considerable dissemination will be needed and that this will best be conducted by trusted sources (on which see above).

## Transparency and Monitoring

Transparency is more important with regards to voluntary codes of practice (promulgated by private organisations) than it is with quasi-legal codes promulgated by government. In the case of the latter, the relevant legislation prescribes stakeholder participation in tripartite forums with a statutory function to advise broadly on OHS matters and, in some jurisdictions, this specifically includes codes of practice. Legislation also prescribes who approves a code of practice, what its legal impact will be and, in some jurisdictions, provides for consideration by Parliament. While, as discussed in Chapter 5, there are limits to the extent of engagement with people in industry for whom codes are intended, there is no doubt that the development process is subject to scrutiny by industry and union stakeholders. Thus, legislative requirements in themselves, as well as regulators' procedures, ensure a degree of transparency. (See Chapter 5 for details of development procedures).

However, *monitoring* of implementation of quasi-legal codes, is far less convincing, notwithstanding that it is crucial to their long term success. There are often substantial implementation challenges, and without monitoring, some codes at least, may fail badly at the implementation stage. In practice there is very little monitoring of a particular code of practice, in isolation. Regulators monitor compliance with OHS legislation more holistically, assessing compliance with general duties and regulations. The uptake of a particular code (or guidance material) may be considered as part of this but monitoring the implementation of a code is rare in practice. As a Victorian regulator explained:

> [O]ne of the questions I had was how can you actually do this in the absence of looking at the standards as well or the regulation? The reason I ask that question … is that we have tended to take a full view of all the instruments that are available to us and form a view about how each of them is going to be used and also form a view about how each of the instruments relates to the other. So how guidance relates to compliance codes, how compliance codes relate to regulation etc (Vic, Reg1).

Nonetheless, without effective monitoring, broader evaluation of codes of practice is in itself problematic. In any event very little attempt has been made to engage in such monitoring. In Chapter 9 we discuss evaluation studies published in the wider literature. In the next section of this chapter we examine the use of codes in enforcement.

Turning to privately initiated voluntary codes, the challenges are very different. In particular, transparency is a major issue and cannot be taken for granted. Here, the first step towards transparency is the public announcement of the principles and practices that an industry presumptively accepts as a guide to appropriate conduct and also as a basis for evaluating and criticising their performance. When first promulgated these principles are often stated in very general terms, such as the 'guiding principles' of Responsible Care (Gunningham and Sinclair 2002, p 146). Over time, an industry's public commitment to such

principles can generate new expectations of accountability, both inside and outside the industry, including demands for more concrete and specific norms. So now, in addition to the guiding principles, Responsible Care has developed (and continues to elaborate) very detailed codes of management practice. (For a discussion of developments with Responsible Care see Gunningham and Sinclair 2002, pp 140-145).

The next critical step towards achieving transparency is the development of an information system for collecting data on the progress of member companies in implementing the industry codes (Gunningham and Sinclair 2002, p 146). The process usually divides into two parts: (1) reporting and data collection (member companies communicate their progress in implementing the industry codes); and (2) the industry collects and analyses the data. The effectiveness of industry codes depends vitally on its data gathering capabilities, particularly the quality of member response to the reporting requirements and the industry's capacity to collect and analyse that data.

The third and final step in achieving transparency - monitoring performance - also seems to be the most demanding and controversial. Monitoring has not been a high spot of many existing voluntary codes. For example, Lancaster, Jacobson-Maher and Alder (2001) identify issues of doubtful third party audit and other flaws in monitoring, while Kolk and Van Tulder (2005, p 9) found effective monitoring to be a particular challenge where codes were not specific in their objectives. So how should monitoring be structured? How will it be financed? Who will do the monitoring? There are no easy answers to these questions and most actual voluntary codes have fallen short in this regard. One option being explored in the most advanced codes is for an industry to invite a panel of independent experts to review the self-reported data and meet with company officials to discuss (and occasionally observe) their operations. Again, Responsible Care is an example of how such an approach can develop over time (Gunningham and Sinclair 2002, pp 140-145)

## Processes for Enforcement

### Quasi-legal codes and guidance developed by regulators

Codes of practice and guidance materials must be seen as components of a broader, integrated enforcement strategy. This involves a hierarchy of enforcement measures, beginning with the facilitation of voluntary action through the dissemination of information and provision of advice to persuade duty holders to comply. It then escalates through the application of inspectors' notices (prohibition and improvement notices) and/or on-the-spot fines (infringement notices), and culminates in the prosecution of breaches of OHS statutes (especially the general duties) and regulations. (For a discussion of responsive regulation and the escalating enforcement response see Johnstone 2004, pp 155-158).

Codes of practice and guidance materials may be used by regulators as part of a co-operative approach to advise and persuade duty holders to comply. This is consistent with their statutory purpose to provide 'practical guidance', as described in Chapter 4. As such, enforcement is not their primary focus. Moreover, failure to implement an approved[8] code of practice is not in itself an offence, as discussed in Chapter 3. Nevertheless, they are evidentiary and failure to comply with an approved code of practice may be used as evidence of failure to discharge a general duty or comply with a regulation. (See Box 1, Chapter 3 for a description of their legal status in New Zealand, the UK and each Australian jurisdiction). They do therefore have enforcement implications.

Regulator respondents in Australia and New Zealand, and to a lesser extent in the UK, advised that their inspectors use relevant codes and guidance when they go into workplaces, as sources of advice about ways to address OHS problems in the workplace. "They use them to walk through what can be done" (SA, Reg2), and "They are used in an educative role – inspectors take copies in the car so they are able to go through them with employers" (NZ, Reg3). In this way they are used to foster compliance. They are also used when assessing or auditing compliance. (See Dirkzwager, Eng and Hodgkinson 1999, for a report of such an audit).

They may be used in conjunction with an inspector's notice. Such a notice would need to cite mandatory requirements of the relevant OHS Act or regulations, since codes and guidance are not mandatory instruments. "A notice can't be used to make a non-mandatory instrument mandatory" (Vic, Reg1), and "There cannot be 'enforcement' as such" (NSW, Reg1). However, a notice may refer to a code of practice or guidance material to draw attention to relevant provisions and to provide information about one way of complying. For example, "if noise monitoring hasn't been done a notice could require it's done and refer to the noise code of practice because if you're doing an improvement notice it gives credibility to refer to the Act and a code" (NZ, Reg3).

Legal writers Creighton and Rozen (2007, p 67) suggest it has been common for inspectors to cite approved codes of practice in 'directives' accompanying improvement and prohibition notices under the former Victorian OHS Act and that:

> [E]arly experience under OHSA 2004 indicates that this approach will continue with respect to compliance codes under notices issued [under] the new Act. However, we note that the practice of issuing improvement and prohibition notices itself varies between jurisdictions.[9]

[8] Industry code of practice in NSW; compliance code in Victoria.
[9] The Workplace Relations Ministers Council (2006, p 17) *Comparative Performance Monitoring Report* indicates the numbers of notices issued over a five year period in Australia and New Zealand.

Some of our industry and union respondents in Australia were aware of instances of inspectors taking action at their workplace using codes or guidance, more commonly to provide advice but in several cases codes were referred to in inspectors' notices. (About half were aware of inspector advice and/or a notice referring to a code or guidance).[10] For example, "inspectors have referred to COPs not guidance notes" (Aus, Ind1); "WorkSafe inspectors in all states use them all the time when guiding site personnel towards a path to compliance" (Aus, Ind3); "most notices issued by WorkCover NSW include reference to WorkCover NSW codes of practice" (Aus, NOHSAC-3); "COPs are often used by the regulator and inspectors to provide guidance and support the identification of non-compliance" (Aus, NOHSAC-7).

In contrast, while a New Zealand regulator advised that codes and guidance may be used by inspectors in similar ways in that country, industry and union respondents were not aware of instances of such action at the workplace, although one respondent from an employer organisation thought this occurred "only on very topic specific issues and very rarely" (NZ, Ind2).

The highest form of sanction, a prosecution under the general duty provisions that is effectively based on a quasi-legal code of practice is, in practice very rare. Regulator respondents suggested there are very few prosecutions based on approved codes of practice. (Although use is made of technical standards developed by standards bodies which may have legal status in some jurisdictions). Nonetheless, the quasi-legal codes under the Australian, New Zealand and UK OHS statutes may be used in evidence in a prosecution, in determining whether or not there has been a breach of an OHS statute or regulation. (See Box 1, Chapter 3 for a description of the legal status in each jurisdiction). Any penalty is one that applies with regard to breach of the relevant general duty under the OHS Act (or a regulation), rather than with regard to breach of the code per se. (See Box 12 below for further illustration). The level of penalties for breach of general duties is set out in the relevant legislation of each jurisdiction. Maximum penalties in the Australian jurisdictions at the time of writing range from Aus$1million for a corporation and $200,000 for an individual (for the most serious offences), in the Australian Capital Territory, to $150,000 for a corporation and $50,000 for an individual, in Tasmania. In New Zealand, the maximum penalty is NZ$250,000 ($500,000 for knowingly causing serious harm).

[10] This is an indication only. We note the sample was designed for qualitative research, to explore the range of experience, and was not intended to be statistically representative of the numbers experiencing enforcement, or industry sectors and other workplace characteristics.

**Box 12**

**Relationship Between Codes, General Duties and Regulations (NSW)**

An approved industry code of practice is designed to be used in conjunction with the OHS Act or OHS Regulation but does not have the same legal force. A person or company cannot be prosecuted for failing to comply with an approved industry code of practice.

However, in proceedings under the OHS Act or OHS Regulation, failure to observe a relevant approved industry code of practice can be used as evidence that a person or company has contravened or failed to comply with the provisions of the OHS Act or OHS Regulation.

A WorkCover NSW Inspector may cite an approved industry code of practice in an Improvement Notice or Prohibition Notice, indicating the measures that should be taken to remedy an alleged contravention or non-compliance. Failure to comply with a requirement in an Improvement Notice or Prohibition Notice is an offence.

*Source: WorkCover NSW 2007 http://www.workcover.nsw.gov.au/*

Although prosecutions based on approved codes of practice are rare, in the eyes of some of our respondents, an important distinction must be made between the legal position and duty holders' perceptions. Approved codes may be perceived to have more 'weight' or 'standing' because of their quasi-legal status, and to be more persuasive than guidance material. It is a sociological truism that something that is perceived to be real is real in its consequences. In Chapter 8 we provide some examples of how those seeking to achieve action on OHS in the workplace may use the legal status of codes to negotiate change.

## The special case of SMEs

Particular enforcement issues are raised by the circumstances of SMEs who, according to Fairman and Yapp (2005a), require regular contact with the regulator if compliance is to be achieved. They found that education and advisory visits appear to assist the SME in making sense of the requirement to self regulate, but that "no amount of education can make systems management any more palatable for an SME" (Fairman and Yapp 2005a, p 513). Crucially, until they are detected, their conception of compliance allows them to feel compliant:

> [I]n the minds of SMEs compliance is an outcome, the terms of which are negotiated in an enforcement inspection. Compliance is not fixed in time. It is achieved when remedial works required under the negotiation are carried out (Fairman and Yapp 2005a, p 515).

There is a lack of awareness about relating legislative requirements to individual business operations and it would be easy to equate lack of 'awareness' with the solution of more information. However, Fairman and Yapp (2005b, p 3) explain that more information in these cases may only produce information overload. Face to face interventions that personalise compliance issues are the most effective way for SMEs to recognise the

gap between their own and required performance. This includes educative approaches of advice giving and training which allow SMEs to internalize rules and make better sense of requirements. The challenge is to devise personal forms of intervention that are feasible considering the resources available to regulators. Given current resources it is likely such approaches may be reserved for exceptional cases.

Box 13 provides an account of how codes and guidance materials may be used more strategically by regulators, as part of a preventive intervention against an intractable risk. The example illustrates the value of guidance material that clarifies the problem and the solution(s), but is actively 'taken out' to the target audience, by the regulator, as part of an educative strategy.

**Box 13**

**Pre-cast and Tilt-up Intervention**

On their own the fact that they exist in an inert sort of sense has minimal impact … And perhaps the best example I can give you is in relation to pre-cast and tilt up panel erection here in Victoria. Back in about 2001 we put out an industry standard in consultation with the unions, industry associations, experts etc on that matter. That actually replaced an old code of practice that we'd originally put out back in about 1987. It was the very first code of practice in Victoria. We replaced it with a much more modern and up to date standard in about 2001 that actually sort of formed part of the basis of the draft of the national code.

However we kept finding that panels kept falling over and we were doing incident reports and you'll see on our website there's a swag of incident reports relating to panel incidents in a period of 3 or 4 years. And we kept sort of trying to promote these incident reports out there. We put out additional guidance notes on particular technical matters. We were reinforcing the existence of the standard etc but they kept happening.

Then there was a death that I suppose brought the matter to a head and we decided to take a new tack and we put on free information sessions for the industry. We called it travelling trainer and we got an internal expert, with some external experts, to put those sessions together and we actually took them around the state and we basically direct mailed and used all sorts of other means to get hold of the actual contractors involved, to get them and their leadings hands into the room and give it to them in a spoon fed fashion. We assessed them before the session and assessed them after it. Assessing them before the session, their level of knowledge of what we thought they ought to have known like the back of their hand was pretty damn low. We think that that's been highly successful, that travelling trainer concept. It's been very, very well received. The feedback's been good and 'touch wood' the incidents seem to be, we finally seem to have got somewhere.

I guess what I'm saying is you need the guidance without a doubt but to leave it at a guidance doesn't do much. What's needed is that guidance has got to be good enough, sound enough, well written enough that you can then do other things with it. It's the doing other things with it that makes the difference. Direct communication, white's of their eyes, one to

one, can't beat it. No point saying, "oh it's all on the internet and there's remote learning for you there" and all that. Human to human contact makes the difference … If you go out and give the content there and you can't answer their questions because you haven't worked out the answers we're not actually helping matters. But simply go out there and tell people there's a problem is not good enough. You've got to actually tell them, this is a problem and these are at least some solutions).

*Source: Vic, Reg 2.*

## Voluntary codes of practice

In the case of voluntary codes which can, at best, only be enforced via self-regulation,[11] the enforcement challenges are different. There are likely to be serious problems of free riding, making effective monitoring and 'enforcement' particularly crucial. This might be achieved through a potentially quite broad range of options. At the lower levels it could include education, incentives (eg under Responsible Care, the sharing of information), independent third party audits, and peer pressure (eg Responsible Care leadership committees). At the higher levels, sanctions might include removal of benefits (eg the right to use the industry logo), a requirement of public disclosure of breaches (making the perpetrator vulnerable to adverse publicity), the taking of remedial measures, or fines imposed by the industry association responsible for administering the code.

Breach of terms of a self-regulatory program might also be construed as breach of contract, making a defecting enterprise liable in damages to the relevant self-regulatory body. The ultimate sanction is often expulsion from the association, compliance being made a condition of membership. The impact of this will vary from case to case. Where an enterprise cannot effectively trade without industry membership it may be potent indeed, though in these circumstances serious concerns may be raised about restrictive trade practices and contravention of any relevant anti-trust laws. Where expulsion will have little direct impact, associations will be reluctant to invoke it for fear of revealing their ultimate lack of regulatory clout (Gunningham and Rees 1997).

It is at this point that many self-regulatory programs are vulnerable to failure. Lacking ultimate capacity to invoke sanctions at the tip of an 'enforcement pyramid' (Ayres & Braithwaite 1992, p 35) the credibility of sanctions at lower levels is also weakened. This is a major reason why 'pure' voluntary codes often have limited success. As Canadian research has shown, in practice individual targets are often set to a lowest common denominator level and are not measurable, enforcement is often (but not invariably[i]) weak, and such initiatives commonly lack many of the virtues of conventional state regulation, "in terms of visibility, credibility, accountability, compulsory application to all, greater likelihood

[11] Unless a voluntary code of practice is accepted by a court as evidence of due diligence in civil or criminal proceedings.

of rigorous standards being developed, cost spreading, and availability of a range of sanctions" (Webb and Morrison 1999, p 8).

## Chapter Summary – Promulgation, Monitoring and Enforcement

In this chapter we examined the approaches used to promote, disseminate and explain OHS codes of practice and guidance materials to those intended to use them. We observed there is a rather heavy reliance on websites and newsletters which may reach 'the converted', rather than a wider range of people who need to know about them. This has implications for efficacy since if promulgation is less than effective clearly uptake and implementation will be impaired. We also discussed approaches to monitoring and enforcement needed to ensure implementation is occurring and is effective. We take up these issues again in Chapter 10 where we discuss the implications for efficacy of OHS codes of practice and guidance material.

# Chapter 7: Contextual Factors Influencing the Use and Impact of Instruments

## Chapter Overview

Quite apart from the content of OHS instruments, how they are developed, promulgated and enforced, contextual factors can have an important influence on OHS performance generally. For example, firms may respond differently depending on their industry sector, size, relationship to competitors, suppliers and customers, and organisational culture. (See, for example, Genn 1993, Haines 1997 and Hutter 2001 for studies examining contextual issues influencing response to OHS regulation).

In this chapter we examine the potential significance of contextual issues in influencing the use and impact of codes of practice and guidance materials. We focus particularly on industry sector, culture, size and corporate characteristics.

## The Significance of Industry Sector

Our respondents had little to say about this issue, possibly because their own experience was often sector-specific, so that they were not well placed to make comparisons.

However, there is a significant literature internationally on this issue and a number of studies have found substantial variation between sectors. For example, in the UK, Currie and Wilson (2001, p 23) found that the manual handling regulations were difficult to apply to specific areas of industrial activity. The need to regulate OHS practice across all industrial activity inevitably leads to difficulties in translating general regulations to make them practical to specific environments. This lack of specificity can be overcome by large companies who employ a OHS specialist but it seems that smaller companies require additional guidance. (The role of OHS specialists was indicated by respondents, as discussed in Chapter 8 below).

Similarly, another evaluation of the UK manual handling regulation and guidance material (Lancaster et al 2001, p iv) also found considerable variation across sectors in the extent of action taken. The authors identified this as being a product of the nature of the business (some manual handling activities in some industries are inherently more difficult to control); the attitude and culture in the sector (in some industries manual handling is seen as a necessary and accepted part of the job); the nature of human resources (eg turnover, temporary staff, young workers etc); organisations that are heavily regulated (eg airports, and fire brigade); and pressure from customers.

In the Australian context, Gunningham (2003) found the challenge of ensuring OHS in agriculture (whether by regulation or codes) is substantially different from that of addressing OHS in manufacturing, construction or many other 'traditional' areas of concern. Agricultural workers commonly work in isolation, without assistance or physical help if things go wrong. They work in varying terrain, in open conditions, and in often unpredictable circumstances. The problems are exacerbated when it comes to the hazards of farm machinery. Farmers and their employees work with a wide variety of machinery types. In contrast to factory work, the product is not uniform and consistent, with the result that machinery may readily become blocked and require frequent clearing. This must usually be done on the spot, manually, and alone. Because the farm is also a home, there are particular risks to children, who may view machinery as a convenient plaything, unconscious of its risks. Unsurprisingly, in the light of these factors, the incidence of agriculture related injury is far greater than the general industry average.

Again in Victoria, a relatively recent examination of the effectiveness of the guidance note regarding workplace bullying in Victoria found that this material had a much higher take up in metropolitan areas and among public sector agencies (The Social Research Centre 2004, pp i-ii).

A number of potential policy questions are raised by these industry specific variations. Perhaps the most important of these concerns is whether codes of practice (and arguably guidance material) should be developed on a sector specific basis or across industry sectors (as is the case with most codes, including national model codes). A related question is the extent to which some sectors which face particular and quite distinctive OHS challenges require the application of very different regulatory strategies than others, as Gunningham (2003) has argued is the case in agriculture. A third and related question is whether or in what ways the particular attitude and culture of a sector should be taken into account in designing approaches not only to the nature of codes but also to enforcement, and whether this should also influence agency resource use. These questions will be revisited later in this Report in Chapter 10.

## Culture, Size and Corporate Characteristics

There is growing evidence that workplace culture can have a powerful influence on OHS outcomes. The writings of Hudson and his collaborators (Parker, Lawrie and Hudson 2006, pp 551-562), Reason's seminal work in describing a reporting culture, a just culture, a flexible culture and a learning culture (Reason 1997, pp 195-197), the work of Weick and others on high reliability organisations (Weick 1987, pp 112-127), and within the Australian context, the work of Pitzer (1999, pp 41-50) all suggest that cultural influences and how they are addressed at the workplace will be crucial determinants of OHS outcomes.

Recently Gunningham (2007, ch 10) has emphasised the particular importance of trust between workers and management in facilitating or

inhibiting effective implementation of both regulation and employer initiated OHS improvements such as OHS management systems, audits, monitoring mechanisms and incident reporting. The findings are that cultural factors far outweigh systems and other processed based initiatives and without a positive OHS culture, other initiatives are difficult to introduce successfully.

That is, the impact of particular instruments, including codes of practice and guidance materials, is likely to vary substantially depending upon the particular workplace culture. However, the implications of this finding for the design and application of codes and guidance material has not been the subject of research to date.

The literature suggests that by far the largest challenge in terms of effective implementation of codes of practice and guidance materials is that of effectively communicating with and influencing small and medium sized enterprises (SMEs). For example, a British study of the impact of the *Manual Handling Operations Regulations* in 1992 on employers and employees of SMEs (Currie and Wilson 2001) revealed "a considerable lack of awareness of these regulations and confusion around the subject of risk assessment procedures" (Currie and Wilson 2001, iii). It was also apparent that because the UK regulator, the Health and Safety Executive (HSE) was regarded as an enforcer rather than as an advisor, its latter role needs to be actively promoted.

Strikingly, only 34% of respondents in this study obtained their information from the HSE. Rather, trade journals were the most popular way of obtaining information. The study concluded:

> Although the Health and Safety Executive (HSE) consider they made adequate provision for small and medium sized businesses (SME) it is apparent from the questionnaire and interview data that many respondents feel that the guidelines and regulations are not specific enough for their business. In particular the Manual Handlings Operations Regulations are considered to be impractical and inflexible, with many 'grey' areas (Currie and Wilson 2001, p 21).
>
> Even to the extent that there is effective communication, SME feel they lack the time, resources, finance and expertise to implement codes of practice (Currie and Wilson 2001, pp 21 and 22).

More broadly there is evidence that organisations interpret their responsibilities differently and that this in itself has important implications for implementation. Thus, Fairman and Yapp (2005a and 2005b) showed how SMEs assume they are in compliance until told otherwise by regulators. Gervais (2006, pp iv-x) reinforces this view, finding that it will be necessary to understand the culture and needs of SMEs when designing or implementing communication techniques. The implications of the above findings and of the challenge of effectively engaging with SMEs are further explored at Chapter 9 below.

Another factor that can impinge on the effectiveness of instruments such as codes is corporate characteristics. While it is beyond the scope of this study to develop a typology of different motivational postures or to map out how different firms respond to similar regulatory initiatives in different ways, it should at least be noted that firms with different 'management styles' respond very differently to similar external drivers, including those provided by government regulators (Gunningham, Kagan, Thornton 2003), and individual factors such as motivation and competency are important to the effectiveness of regulatory instruments, including codes and guidance materials. As Finch et al (1996), point out, codes of practice and assessment processes such as check lists:

> [S]hould be viewed as part of an overall risk assessment and control strategy and not in isolation. *They will not survive unless there is a clear support mechanism within the company* (Finch et al 1996, p xviii, emphasis added).

One study in particular (Lancaster et al 2001, p 36), is noteworthy in its identification of specific corporate characteristics as predictors of successful code (and other instrument) implementation. These are:

- positive organisational culture, management style and commitment (including senior management commitment and management ethos);
- realistic perception and experience of the costs of accidents and ill-health (greater awareness of the cost and benefits among organisations generally may result in a more proactive approach being taken);
- workforce involvement in risk management and effective communication of risks (organisations which involved their employees in the risk assessment process and had effective communications systems were more effective in promoting and impelling risk management practices);
- available resources; and
- effective OHS management systems and competence.

## Chapter Summary – Contextual Issues

In this chapter we raised serious concerns that, over and above the quality of OHS codes of practice and guidance materials, their development and implementation, their efficacy may also be significantly influenced by the characteristics of the industry sector, culture, size and organisations in which it is intended they should be used. Contextual issues are fundamental to efficacy and they are the corner stone of the approach we propose, in Chapter 10, for improving efficacy in the future.

# Chapter 8: Use and Impact of Codes and Guidance – Insights From Industry and Unions

## Chapter Overview

Whether codes and guidance materials are used in workplaces and whether they impact (positively or adversely) on OHS are important indicators of efficacy. Although not conclusive evidence of efficacy, a particular code or guidance instrument must at least be used if it is to have any effect at all. In this chapter we draw on the experience of our industry and union respondents to explore ways that codes or guidance are used, who uses them, and some impacts attributed to their use.

Through the NOHSAC online survey we asked respondents some basic questions about the use and implementation of codes and guidance materials in their workplace(s). For a particular code or guidance material, we asked respondents to provide examples of how it was used or implemented, who used the instrument and to give an example(s) of any changes made or impacts on OHS as a result of using it. There were 22 responses to the NOHSAC survey (10 Australian and 12 from New Zealand). We also asked industry and union respondents, contributing through the detailed interviews or email questionnaire, about use and impact of codes and guidance, and who uses them. Those working in industry answered in relation to their own workplace(s) (4 respondents), while staff of employer/industry associations (1), unions (3) and OHS consultants (2) answered in relation to workplaces they have experience of. Overall, there were 32 responses in relation to use and impact of codes and guidance. We emphasise that these responses are illustrative since the sample was designed to gain insights into experience with codes and guidance, rather than being statistically representative.

## Use of Codes of Practice and Guidance Materials

Respondents to the NOHSAC survey indicated use of a range of codes and guidance materials relevant to risks in their workplaces. Amongst the Australian respondents, the instruments principally used were codes developed/issued by an Australian OHS regulator, except one (radiation safety). Only two respondents referred to regulator-developed guidelines while nine used regulator-developed codes. New Zealand respondents similarly referred predominantly to codes developed/issued by the regulator (the Department of Labour) but some also used regulator-developed guidance or guidance produced by the Accident Compensation Commission (ACC).

Both Australian and New Zealand respondents commonly used codes (and guidance materials) to develop in-house policies, procedures, practices or systems of work. They also commonly used them in risk

management, for identification of hazards, and determining controls or opportunities for improvement. They were used to develop training materials and those relating to first aid and amenities were used to determine the facilities and training needed. Some had referred to codes in design specifications, or applied them in purchasing decisions. In general, codes and guidance are references that are applied when establishing in-house arrangements and for decision-making. They are also used directly as sources of information. For example, they may be referred to 'in the field' or, more rarely, disseminated to employees or accessible to staff on request. Codes of practice are persuasive; they help to determine compliance and settle disputed matters. Some users do not restrict themselves to instruments issued in the jurisdiction(s) in which their firm/organisation operates and seek sources more widely, especially from other regulators. In Box 14 we present some examples of the ways codes and guidance materials were used by respondents.

**Box 14**

**Examples of Use of Codes and Guidance Materials**

*Aus, Ind1: Creates procedures in consultation with designated work groups. Operators are provided with a hard copy of guidance materials to support these in-house procedures (they are of a generation that don't read publications on a computer screen). Through training, staff are encouraged to refer to guidance materials.*

Aus, Ind2: Relies extensively on codes and Australian Standards to develop site practices and systems, as a reference tool or 'argument settler'. "Once the document is used in demonstrating the ideal/proven model for compliance, all argument about why do we have to do it ceases".

*Aus, Ind3: Uses relevant codes/guidance from any jurisdiction to develop in-house procedures. They remove some of the difficulty of interpreting regulations written in 'legal speak'. WorkSafe Victoria's guideline on forklift movement was used to create a self-assessment workbook used by forklift operators in WA.*

Aus, Ind4: Refers to codes in installation design specifications and risk management, and for identification of hazards, review of work method statements and constructability reviews.

*Aus, Union2: The national manual handling code was translated into a series of guidelines and policies in the health industry which were implemented by industry. More recently a training package was developed.*

NOHSAC-Aus2: Used the guidelines for fall prevention to access specific information on stairs, ladders, walkways and elevated work platforms, and to reinforce compliance where there were 'roadblocks' by personnel in supervisory positions.

*NOHSAC-Aus6: Relies on the plant code to provide guidance on ways of complying with the Act and regulations. It is used as a teaching tool, a reference 'manual', a source to other relevant information, an 'argument stopper' and a reinforcement tool for the on-site OHS coordinator. "The*

*fact that the COP is well-thumbed shows me that it is being used frequently".*

NOHSAC-Aus7: Codes provide practical guidance for the development of safe systems of work, particularly for sub-contractors who are more likely to be less resourced and educated about safety solutions. Codes can be used 'in the field' as a quick reference to identify what compliance may look like and as a point of reference during OHS committee meetings.

*NZ, Ind3: Codes provide examples for implementation and are a means to a defence. They can provide better means to compliance than simply reading regulations.*

NOHSAC-NZ1: NZS 8409 is an approved code under HSNO Act and is the basis of training for approved handlers of agricultural chemicals in New Zealand. This is undertaken by people in agriculture, horticulture, forestry, councils and producers of export food products.

*NOHSAC-NZ2: Used manual handling code to reinforce need for change and as tool to assess activities and the work process. Used noise code to reinforce need to monitor exposure, engineer noise out and as guide to PPE. Used VDU code to assess workplace layout. Used crane code to establish monitoring system for engineers and as reference for operator training.*

NOHSAC-NZ4: Used isocyanate code for hazard and first aid information for training and in spray area.

*NOHSAC-NZ6: Used manual handling code and ACC patient handling guideline to: review existing processes and develop action plan for improvement; establish training in recommended handling techniques; identify unsafe techniques; and for design of facility prior to building new hospital.*

NOHSAC-NZ9: Used forest operations code to set slope limits for ground based forestry machinery and provide guidance to harvest planners when deciding what machinery to use in felling operations.

*NOHSAC-NZ10: Used guidelines for prevention of falls as a general reference for area supervisors and foreman on construction sites.*

NOHSAC – NZ12: Used approved codes as tools to audit workplace practices.

## Who Uses Codes and Guidance Materials

The examples of use suggest codes and guidance materials are a vital resource, at least for those who use them. According to our respondents, in both Australia and New Zealand, the people most commonly using codes or guidance in the workplace were OHS[12] personnel and people in

[12] OHS personnel include OHS managers, OHS coordinators, OHS advisers, OHS officers, occupational health nurses etc.

management positions[13]. Other people who may use them, but were not identified as the primary users, were supervisors, worker OHS representatives, OHS committee members, trainers, engineers and other technical/specialist[14] staff, and first aiders (in relation to first aid codes and guidance). Union respondents also advised that they use these instruments.

Here it is important to emphasise again that these findings do not translate across the population of workplaces in either country. As discussed in Chapter 2, information about this research was circulated to a range of employer/industry associations, unions and professional groups in Australia and New Zealand. Those responding to either the NOHSAC survey, in an interview or by detailed questionnaire, self-selected. Those in workplaces (as distinct from industry associations, unions or OHS consultants) worked in larger organisations, typically with more than 100 employees, with three from workplaces with 51-100 employees. It is well established that while some form of OHS support is a feature of many larger organisations, in developed countries, it is rare in small and medium sized organisations (SMEs) (Bluff 2006, p 228). It is not surprising to find respondents indicating that the key users of OHS codes and guidance materials are OHS personnel and some managers in larger organisations. This does not diminish the importance of these instruments in such workplaces but it does raise serious questions about their use elsewhere.

When asked about examples of use of codes or guidance, a Queensland respondent who works as an OHS consultant training workplace health and safety officers (WHSOs[15]) in a cross-section of workplaces in Queensland told us:

> A few people have said that, you know, like the manual tasks code of practice. They had a bit of problem and they remember we covered it in training and they've gone back and had a look at it … It may not have given them the exact answers for their scenario but at least it steered them on the right path and they either contact departments or something and move it on from there. So I've had that a few times but I've got to say more times than not it's a more negative response, people don't know. 'Oh I didn't know there was a code of practice for that. Oh is that right? How long has it been out? Five years?' … we try and give them as much information as we can on how to do this sort of stuff in training but they don't take it on board. I suggest at least once a week they check the website to see what's changed … Unfortunately most of them don't do it … There wouldn't be a very large percentage of evidence to say that people are using them and managing safety and I really can't give you an example of that to be honest (Aus, OHS spec2).

[13] Managers include site managers, workshop managers, project managers, production managers etc.
[14] Technical/specialist staff included laboratory personnel, medical staff.
[15] WHSOs are required in certain workplaces under WHSA (Qld). They receive basic training but are generally not qualified OHS professionals, and undertake their OHS role along with their other work duties.

## Impacts and Changes Attributed to Use of Codes or Guidance

Our respondents provided a range of practical examples of hazard/risk management improvements they attributed to implementing a particular instrument or instruments. There were several examples of redesign of facilities and systems of work using a manual handling code to prevent these injuries. There were also examples of action taken to protect staff from occupational violence, fall prevention, and upgraded machinery guarding, isolation and lockout systems. Other examples were ground control for trenching, and changes to workplace layout and lighting for computer work. Some respondents believed the incidence of death or injury had declined in an industry as a result of industry-wide strategies implementing a code of practice. Examples were reduced manual handling injuries in health and aged care in NSW, reduced machine rollover deaths and injuries in New Zealand forestry, and fewer spray drift, residue and poisoning cases associated with agricultural chemicals in New Zealand.

It must be acknowledged that it is difficult, and quite likely impossible to precisely identify the role of a particular instrument. Many factors influence improved OHS performance including changes in available technology, enforcement, workers' compensation penalties or incentives, supply chain or union pressure, and so on. Change is also hard to tie down since workplaces and the people in them are constantly changing. Nonetheless, a code of practice or guidance material may underpin change by providing a benchmark against which OHS outcomes can be progressively improved, through work and workplace redesign, hazard/risk management, training and safe work practices. As one industry respondent said:

> It is hard to relate improvements in safety performance to the COPs or standards – H&S improvement has come from better systems, management and awareness. They are however the benchmark by which our system is created (Aus, Ind2).

## Industry-Developed Guidance Material

For the most part, as indicated, the codes and guidance discussed by respondents were regulator-developed/issued instruments. One industry respondent was involved in the development of industry-focused guidance material for the agricultural sector in New Zealand. This material was used for similar purposes to the regulator-developed material, as a resource for training and hazard management. A key point of difference was that the guidance was produced for particular target groups and then used directly by them, rather than as a resource for further development of workplace procedures. As such, it may be used by farmers and farm workers. A respondent explained:

> [T]he ATV guideline has been used as a training manual really for entrance to the industry so the young farm workers are taken to the thing and it's pointed out what you do and what you don't do when you're riding an ATV … For the rotary platforms, that guideline is almost being used now as a manual for how to build a rotary cow shed. So it's full of technical stuff obviously and talks about trapping points and things so it's used for the people that design, for design engineers … it's what they draw their specifications to. The airstrip guideline is used by farmers when they're building new airstrips, by fertiliser companies when they're delivering fertiliser and by the agricultural top dressing pilots when they turn up on site. So they would dig it out and remind themselves of the table in there about how you check whether the fertiliser is suitable to be spread by an aeroplane and when you're on that limit of whether it's too wet or dry enough (NZ, Ind1).

This respondent believed the guidance on ATVs may have contributed to a reduction in deaths and injuries on New Zealand farms caused by ATVs, and that rotary platforms for milking were being redesigned or retrofitted to remove trapping points.

## Chapter Summary – Use and Impact

In this chapter we discussed the use and impact of codes and guidance materials, on the basis of empirical data from Australian and New Zealand industry and union respondents. We found they are an important resource for workplace OHS initiatives but they are more likely to be used by OHS professionals and managers. In Chapter 10 we discuss further potential ways to increase the use and impact of these OHS instruments.

# Chapter 9: Evidence for the Efficacy of Particular Instruments and Key Characteristics Determining Efficacy

## Chapter Overview

This chapter critically examines the evidence regarding the efficacy of codes of practice and guidance material, and key characteristics determining efficacy. The chapter is principally based on the literature, since the empirical component of our research yielded little information about evaluation of codes of practice and guidance materials.

At the outset it should be made clear that there is only limited evidence available internationally concerning efficacy and its determinants. For example, Hillage et al (2001, p vii and ix), researching the efficacy of the Health and Safety Executive and Commission in the UK, point to a "serious deficiency in the evidence base of the HSC/E". In particular they found very little documentary evidence on outcomes – just two studies out of over 1000, linked improvements in incidents of harm with HSE intervention. Such paucity of evidence concerning the efficacy of probably the world's most sophisticated and highly regarded OHS regulator, is indicative of a broader failure internationally to put resources into research geared to evaluate legal and quasi-legal OHS policy and regulatory instruments. (See also Ewin (2007) for a proposal to improve evaluation). Nevertheless, a synthesis of the available evidence can at least provide some important insights with regard to issues of efficacy generally, and there is a more sophisticated literature available as regards the efficacy of voluntary codes.

## The Efficacy of Quasi-Legal Codes

In assessing efficacy, the distinction between quasi-legal codes on the one hand, and voluntary codes (and guidance materials) on the other, remains important, since the incentives for implementation and compliance depend largely upon the legal and enforcement status of a code. The available evidence suggests that there is no reason in principle why quasi-legal codes cannot be relatively effective, though much will depend on actual design, the nature of the code itself, accessibility and internal support by the recipient duty holder.

For example, Finch et al (1996) found that codes of practice that used risk assessment check sheets do, in the main, "lead to the identification of suitable control strategies" (Finch et al 1996, p xvii). This is apparently because "the formal procedures of the codes of practice act to provide a catalyst and structure for looking at how jobs can be improved" (Finch et al 1996, p xviii). A similarly positive conclusion was reached in an assessment of the Victorian manual handling code of practice, and particularly of its risk assessment worksheet (RAW) approach. The RAW

was found to help employers and employees to assess manual handling risks, to be of high overall usability and capable of being used by both experts and non-experts (Quirk, Best and Darzins 2004, p 359).

An evaluation of the South Australian manual handling regulation and approved code of practice was also positive, at least as regards larger workplaces (O'Keeffe and Furness 2001, p 405). This study found that awareness of the regulation and code was very high for medium and large workplaces but only moderate for small workplaces. In medium-large workplaces: "44% had used the code of practice to the point of taking preventative action in the workplace compared with only 4% in small workplaces." And further, "Respondents identified a number of positives regarding the code of practice, with no evidence that the code itself was a significant impediment to improving manual handling practices" (O'Keeffe and Furness 2001, p405). The code had particular value in awareness-raising, reducing injuries, in providing a frame of reference or starting point for action and also in providing a step-by-step method (O'Keeffe and Furness 2001, p 409).

More broadly the Maxwell Report (2004, para 1103) refers to a consultancy report by KPMG which concluded that codes of practice were amongst the OHS requirements that were most significant in motivating CEOs/supervisors to improve their OHS performance.

These findings are consistent with the insights provided by our industry and union respondents. As discussed in Chapter 8, these respondents in Australia and New Zealand suggested codes are used as a resource for developing in-house policies, procedures and training, and for OHS hazard/risk management, at least in larger organisations with OHS personnel. However, there were indications that awareness and use of codes was far from universal.

A New Zealand OHS study - an audit of the industry-based approved code of practice for New Zealand funeral homes (Walls 2001) – also found that implementation of this code was disappointing. While approximately 50% of funeral homes met the required standards the others did not, with some 8% requiring improvement notices to bring them up to standard (Walls 2001). The study concluded that "self-regulation by itself will not achieve high compliance levels in this rather typically sized NZ industry" (Walls 2001, p 387), and "If self-regulation is to be successful, then either government agencies or industry organisations must apply such standards to all members of the industry in a manner which will remove the financial incentive currently present for not complying with health and safety standards" (Walls 2001, p 390).

Our respondents, by and large, could provide only anecdotal and impressionistic evidence as to the effectiveness of codes or guidance material. Australian and New Zealand OHS regulators advised they were not aware of the impact or efficacy of these instruments. Similarly, overseas' respondents indicated evaluation is a weak area. Indeed, in none of the international jurisdictions on which we focused (except the

UK on which see below) were regulators able to point to any credible evaluation studies of guidance materials or codes. There are several reasons proffered for this, as the comments in Box 15 below suggest. Evaluation is believed to be difficult because of the number of confounding influences (other instruments in the legal framework, the effect of enforcement and other influences) and, in any case, there is an underlying assumption that guidance is intrinsically valuable (the more information the better), and necessary to interpret legal requirements. Several respondents suggested there was an intention to evaluate in the future or that something was 'under way', but there were none where results were currently available.

**Box 15**

**Rationales for Not Evaluating Codes and Guidance**

*Impact is generally not measured and possibly not measurable. Also it is difficult to distinguish from overall impact of legislation. There generally seems to be an overall improvement [in OHS] but it is difficult to evaluate over time due to changes in technology (Aus, Reg(mining)1).*

Evaluation is so hard in this context, its not well developed. We talk about it and we assume that the more information we provide through guidelines to strengthen the legal framework, the better. But I'm not even sure what a formal evaluation would look like. We just assume that if we provide more information and strengthen the legal framework then we will have fewer injuries. The key is changing behaviour but that's very hard to measure (BC, Reg1).

*There is informal user feedback (Alberta, Reg1).*

One KPI [key performance indicator] is the number of guidances developed – but that only tells you so much. A study of the effects in small and medium sized enterprises is taking place now but the general answer is no - there is no specific evaluation … The key thing is that if you have an OHS person in the company – a safety manager - who can function as a gatekeeper between the Labour Inspectorate and the [employer and employee groups] then they are able to translate and influence OHS on the ground but without such a person, then the production manager and others don't have the time and the guidance doesn't make a difference (Dk, OHS spec1).

*They are not justified on their high success rate, they are justified as an interpretation of legal requirements in practice (Dk, OHSspec1).*

The only country in our study which has evaluated a series of codes (and guidance materials), but often in conjunction with regulations, is the UK. Published research reports commissioned by the UK regulator, the HSE, were reviewed earlier in this chapter. One UK regulator provided the following nuanced, albeit impressionist analysis of the value of codes.

> I'd say ACOP are effective. In construction there are three parts- the bottom sector –don't know, don't care, won't want to know, usually small, informal sector, hard to reach - you can produce as much guidance as you want but they are still hard to penetrate. Then there is the top

> sector- big. With consultants, lawyers, safety officers, and they love to read ACOP and guidelines and embellish them. Then there is the middle - they just see it, interpret it, use it for what they want to do … We consult but there is a danger of unintended consequences - especially where lawyers are involved – they give them an unintended, complex interpretation. They lose pragmatism, they give advice to their client who then tends to obey the letter of the law – so we are trying to achieve safety on site and to reduce risk but the top third lose the plot – with any procedures to achieve compliance they forget its about protecting the guys on site – so the ACOP can be too legal and too rigid - for example we had a long debate recently - was this particular site a quarry or a construction site - but we at HSE don't really care – the point is are you doing it safely - so we now try and keep it simple. The bottom third have a low reading age - we are sensitive to this especially when producing guidance material. The basic thing is we want safety on site (UK, Reg1).

The HSE has also considered the *criteria* that could most appropriately be adopted in evaluation, and how these might be used as baseline data for future evaluation of the costs and effectiveness of codes or regulations (see generally BOMEL 2007; Wright et al 2004). See also Baines, Crerar and Johnson 2003; Cole 2007 and Fallentin et al 2001 for frameworks for the evaluation of, respectively the joint Australia New Zealand Food Standards Code, a tourism code and Nordic physical workload standards and guidelines ).

A crucial issue in determining criteria for evaluation is whether codes and guidance should be evaluated for their impact on OHS performance (for example, improvements in risk control, reduction in hazard exposures, reduction in injuries), for their demonstrated value in providing practical guidance (for example as measured through improvements in awareness or level of use), or according to cost/benefit criteria. As we suggested earlier, contemporary approaches to design and evaluation of OHS policy interventions emphasise the need to clarify the rationale of a given initiative, how it is supposed to work, and who or what is supposed to change (LaMontagne 2004, p 108; LaMontagne and Shaw 2004, pp 5-12). Applying this approach, any of the criteria mentioned above may be appropriate. The key is to start from an understanding of the rationale, methodology and target audience for the code or guidance.

Turning to 'hybrid' codes, and specifically to the Dutch OHS Covenants, only limited empirical study has so far been reported. A formal evaluation of the (approximately sixty) Dutch covenants is expected to be completed by the Netherlands government by the end of 2007. At the time of writing, only anecdotal evidence as to their success is available. Based on a small sample, it would appear that all stakeholders feel that positive results were achieved, most commonly by raising awareness of OHS challenges and potential means of addressing them. As one trade union representative put it: "the positive effects are not necessarily the achievement of formal goals but rather how they have brought about many changes – raising consciousness, lots of information becoming available, and that's what gives you a good basis for the future … it's the social partners agreeing to changes to be realised" (NL, Ind1). Another

respondent however, cautioned that so far success has been measured in terms of reduced absenteeism but this is only one indicator and is not necessarily related to a reduction in long term incapacitation (NL, OHS spec).

The previously implemented Dutch environmental covenants (which bear considerable similarity to the OHS covenants), have been subject to evaluation which suggests that they have been relatively successful. For example, work by the European Environment Agency found that the Dutch covenant with the chemical industry did achieve substantially better outcomes than a projected 'business as usual' trend, and that it was environmentally effective with regard to at least 33 of the 61 chemicals studied (European Environment Agency 1997). A more recent study also confirmed that the covenants had had a generally positive impact, albeit subject to some constraints (Bressers and Bruijn 2005).

However, it should be cautioned that the Netherlands is a relatively homogenous country with a strongly consensual policy style and a long history of the 'social partners' working cooperatively in an approach often referred to as neo-corporatist. It cannot be assumed that an approach that works in this context can be successfully applied to societies such as Australia and New Zealand where relations between trade unions, employers' organisations and government are often far less co-operative than in the Netherlands.

## The Efficacy of Voluntary Codes of Practice

Far greater challenges to efficacy confront voluntary codes. As with other instruments, voluntary initiatives work better in some circumstances than in others, and not all industries lend themselves to such initiatives. A review of the literature relating to voluntary initiatives and industry self-regulation suggests that there is commonly a substantial gap between the self interest of an industry or an individual enterprise, and that of the public, as for example where it is cheaper for the enterprise to pass on (externalise) some of the costs of production (such as the costs or work related injury and disease) onto a subgroup of the public such as workers, or the public at large (which might for example bear their medical costs). For an overview of the literature see Gunningham and Rees (1997).

Where a large gap does indeed exist then the empirical evidence suggests it would be unwise to rely upon an individual enterprise or industry association taking steps voluntarily in the public interest unless there is considerable external pressure on it to do so (Ogus 1995). As Martin (1995, 6) puts it, "this approach [self-regulation by voluntary codes] can be effective where compliance efforts will largely coincide with best business practices, or where there are strong and effective non-government pressures to comply", but in the absence of such factors, it is unlikely that "an industry regulating itself can deliver any credible outcomes either to its members or its users". Put differently, necessary

(but not sufficient) conditions for the success of voluntary codes are either: (1) a strong natural coincidence between the public and private interest in establishing self-regulation or; (2) the existence of one or more external pressures sufficient to create such a coincidence of interest (Gunningham and Rees 1997).

This conclusion is consistent with a wide ranging assessment of voluntary codes in the area of environmental protection conducted by the OECD (2003), which focused on two key potential shortcomings of voluntary approaches: regulatory capture and free riding. It concluded that the purported positive impacts on the environment of voluntary codes and agreements are questionable, and that many claimed positive effects cannot be attributed unequivocally to them. In general, it was not optimistic about the positive contribution of many such codes.

More specific studies on particular aspects of voluntary codes have also been conducted. Kolk and Van Tulder (2005, p 11) assessed 'compliance likelihood' and found the probability that companies will conform in practice to codes either proclaimed by themselves or developed by other actors vary significantly. Of most significance for present purposes was their finding that:

> Codes issued by business associations proved weakest on all scores. This reflects their lowest common denominator principle … One might see business associations codes as awareness-raising tools. However, once this function has been fulfilled they seem to become public relations exercises and alibis for avoiding more drastic steps rather than active means to increase corporate social responsibility.

On average "company codes scored better than business associations codes, especially concerning the organisations targeted, their reference to standards, monitoring systems and position of the monitoring actor" (Kolk and Van Tulder, 2005, p 11). Trade unions interviewed in their study regarded law enforcement and collective agreements as generally much more effective than voluntary codes.

Other evidence as to the efficacy of voluntary codes is to be found in the business strategy literature and in particular in studies of the impact of corporate codes of conduct as a mechanism to promote Corporate Social Responsibility. For example, another study by Kolk and Van Tulder (2002, pp 260-271) examined the effectiveness of child labour codes in six pioneering international garment companies. The research found that while these codes were considered to be an important vehicle for achieving CSR objectives, they have a number of negatives. In particular their effectiveness was likely to be substantially compromised unless they were specific and strictly implemented and monitored.

A number of other studies in the area of environmental regulation also suggest that "strategies that merely encourage firms to improve their environmental management will make much less of an impact than mandatory requirements" (Coglianese and Nash 2007, p 252) and that voluntary codes "may work best where there is a credible regulatory

threat operating in the background" (Coglianese and Nash 2007, p 258). Similarly Webb (2004, p 381) concludes his edited book on voluntary codes by stating: "it should be clear from the case studies that voluntary initiatives are rarely a substitute for regulatory action, and are much more likely to be a supplement to a regulatory regime that builds on the legal system for its proper implementation, or are transitional instruments that precede regulatory action". Subsequent studies (Sullivan 2005; Morgenstern and Pizer 2007) suggest that while voluntary approaches may be a comparatively inexpensive way to test out new approaches in a non-adversarial environment, the paucity of success stories and their inherent weaknesses should make governments reluctant to use them as a primary policy response.

## The Efficacy of Guidance Material

While there is considerably less evidence specifically as to the impact of guidance material, it can reasonably be assumed that since this is entirely voluntary, and lacks a regulatory underpinning, its 'take up' will depend substantially upon whether its target audience sees it as having value and contributing towards their business or social goals. Where it does (and only when it does) assist these goals then it can be anticipated to be effective in much the same way as the codes of practice, or at least those codes which are disseminated to their intended audience, capable of being used as a resource by that audience and of being widely implemented as described above.

One of very few evaluations to address guidance material directly (Neathey et al 2006), examined the efficacy of the UK HSE's widely disseminated and promoted 'Five Steps to Risk Assessment' leaflet. The authors found that around two-fifths of organisations that had carried out risk assessments claimed to use the Five Steps approach; but only around half of these followed all five of the steps. This seemed to be primarily because they had developed their own procedures. Use of the Five Steps approach was more common in some sectors, such as the public sector and manufacturing, than in others. It was least used in parts of the service sector, particularly retail, hotels and catering. Although penetration to smaller organisations was lower than for larger and medium-sized firms, users from smaller firms were more likely to say that the leaflet had been helpful in improving their knowledge of risk assessment (Neathey et al 2006, p xi). The overall conclusion of this research was that although penetration of the Five Steps leaflet was by no means universal, awareness of the Five Steps approach was relatively high. It was also clear that while some organisations fell short of completing the five individual steps, most employers were carrying out some form of risk assessment.

Another rare high quality evaluation is that of WorkSafe Victoria as regards the Prevention of Bullying and Violence at Work Guidance Note (BVGN). In terms of dissemination and awareness, one evaluation (The

Social Research Centre 2004) found that 58% of those surveyed were aware of the BVGN, with large organisations significantly more likely to know about the guidance note than small or medium sized organisations. Of those who were aware of the BVGN, 88% regarded WorkSafe's approach in terms of that Guidance Note as being effective in preventing bullying (56% somewhat effective, 33% very effective). This was variously because WorkSafe was a good or helpful source of information, raised awareness or was 'helpful'. Only 7 of the 250 employers surveyed regarded the BVGN as being "not at all effective" in helping workplaces to prevent bullying. A subsequent evaluation concluded, "it is clear from case studies that WorkSafe intervention is effective in getting organisations to lift their game, especially in terms of the systems in place and raising the level of awareness of bullying as an issue" (WorkSafe Victoria undated, 3). It also seems that both inspectors and organizations find the BVGN enables inspectors to identify an issue and say what systems and training developments are needed. Over 80% of WorkSafe inspectors surveyed felt the guidance note: was the appropriate mechanism for informing workplace parties; has increased awareness of bullying within workplaces; provided the necessary information for workplace parties to deal with bullying; and has assisted employers in implementing preventive measures.

In the absence of a substantial number of evaluations it is difficult to be confident of the value of guidance material although the findings of the above studies resonate with insights gleaned from respondents. Notwithstanding the lack of direct evidence, a reasonable conclusion might be, as suggested by Wright et al (2004, p vii) in the UK that, "the high level of usage of advice and information … provides support for the continuation, or expansion of HSE advisory activities in all sizes and sectors of organisation" (Wright et al 2004, p vii). However, a crucial point to keep in mind is that although they are voluntary, regulator-developed guidance materials sit within a regulatory framework in which statutory general duties, the possibility of their enforcement and significant penalties (as discussed in Chapter 6), establish a legal imperative for action. While such guidance materials are voluntary in character, there is an over-riding obligation to ensure OHS.

## Key Characteristics of Efficacy

Determining by what criteria codes and guidelines are successful is even more challenging. Certainly it is desirable to distinguish 'satisfaction' measures, basic awareness, use, actual change resulting from use, improved (or reduced) OHS outcomes, costs and benefits, and how these are measured, in order to distil key characteristics determining efficacy, and to relate each of these to demonstrated positive performance change in organisations. Unfortunately the absence of an adequate evidence base referred to earlier, seriously constrains this enterprise.

## Identifying the 'right' standard type

The general literature as to the relative efficacy of different types of standard, (general duties, prescription, performance or process, as described in Chapter 4) that might be incorporated within codes of practice has been reviewed elsewhere (Bluff and Gunningham 2004, pp 17-27). That literature suggests that performance standards, while valuable, can only be applied in a limited range of circumstances. Process and systems-based strategies would appear to have promise in encouraging enterprises to take greater responsibility for developing their own systemic approaches to regulatory requirements, to develop their own best means of identifying and managing risks, to build in reflexivity and to facilitate a shift in industry culture, from reactive compliance to voluntary pro-active improvement of regulatory performance. Whether or to what extent they do so in practice is however a matter for considerable and ongoing debate (Coglianese and Nash 2006). The indications are that they are more suited to larger organisations with OHS professionals who can facilitate the development and implementation of systematic OHS management. With regard to prescriptive standards, the literature documents failings and limitations of this approach when it is used in inflexible, mandatory instruments (Acts and regulations). Arguably, however, for quasi-legal codes that are intended to provide practical guidance and establish an acceptable way or ways of complying, but are not mandatory, there is a place for prescriptive provisions that precisely state what preventive measures may be taken.

In broad terms, following Coglianese and Lazar (2002, pp 205-208), the optimal choice of standard will depend upon a number of circumstances. When objectives can be clearly defined and are easily measured (or assessed), they suggest that performance-based regulations are desirable, on the basis that duty holders can be assumed to have superior knowledge to regulators about how best to achieve a given result. Such an outcome based approach will accordingly, be the most cost-effective. An example is publication of exposure standards for hazardous substances. However, where it is difficult for government to measure performance and the target group is made up of heterogeneous firms facing heterogeneous conditions, then they argue that systems based, (what they call management based), regulation will probably be preferable to its alternatives. This was the approach adopted, for example, with the codes of practice for manual handling and for hazardous substances, in the UK, Australia and New Zealand, which incorporate processes for managing these hazards/risks, including consultation, assessment and information provision. In contrast, when objectives are not easily defined and measured, but the target group is relatively homogenous (ie most enterprises have similar operations and technology tends to be stable over time), then a prescriptive approach may be both effective and efficient. This approach may be particularly suitable for industry-focused codes of practice in some sectors, especially

for SME. Arguably, such industry specific material is needed to support more generic systems or process-based instruments.

## Key design features

The design features of quasi-legal codes have a strong influence on their success and a number of studies identify individual design inadequacies as having the potential to cause policy failure (rather than any inherent problems with quasi-legal codes per se).

For example Ashby, Tappin and Bentley (2004) evaluated the draft New Zealand Code of Practice for Manual Handling and found that the code was in general useful, applicable and informative. Nevertheless they raised a series of design issues, suggesting changes to the risk assessment tools to improve usability and validity and concluding that: "both the Code and the tools within it would benefit from simplification, improved typography and layout, and industry-specific information on manual handling hazards" (Ashby, Tappin and Bentley 2004, 293). The authors found that there was scope to simplify the text of the code, to provide examples/case studies and illustrations, (eg pictures of the records in the relevant parts of the text and colour coding) and that comprehension would benefit from improved layout and clear instructions in how to use the risk assessment tool. Another New Zealand study which tested the NZ manual handling code's risk assessment tool found that the 'Hazard Control Record' risk score analysis process lacks specificity and objectivity (Coyle 2005, p 111), although in other respects this assessment tool had many positive features.

The design of checklists appears to be particularly important. For example, one Australian study involving a checklist in the South Australian manual handling code (the same as the national code[16]) found no correlation with median checklist scores, suggesting that the checklist itself was unsatisfactory for identifying which tasks most urgently require preventive action (Boucaut, Gun and Ryan 1994, pp 205-211). Consistent with this, another Australian study on manual handling in risk assessment (Finch et al 1996, p xix), suggested the need for simplification of codes and check sheets, in order to increase the use and awareness of codes of practice. (See also Kenningham 1998 for a study of the design of manual handling checklists).

Many of the same design problems that beset quasi-legal codes also apply to guidance material. Beyond the sorts of problems identified immediately above, a particular challenge is accessibility, which was explored at Chapter 6. Closely related to this, is the challenge of effectively targeting the appropriate audience. Thus Lancaster et al (2001, pp 10-11), in a study focusing on the appropriateness of guidance material, found that a checklist and flowchart approach was helpful but that the document was pitched at OHS professionals. To this end it was a

[16] The SA manual handling code adopted the national model code as declared in the 1990s.

useful point of reference but the document was thought to assume a level of knowledge that non-specialists do not have, and this, coupled with the presentation of an amount of information that it was thought non-professionals would be unlikely to read, made the document generally inaccessible to both non-professionals and small and medium sized enterprises.

A further study evaluated manual handling guidance in the form of the Manual Handling Assessment Chart (MAC), initially produced for HSE and Local Authority inspectors, but made more widely available to industry. When used by non-inspectors MAC was found to improve users confidence when assessing manual handling tasks (Lee and Ferreira (2003, pp vi-vii). Users particularly liked the simplicity and ease of use, speed to use, intuitive colour scheme, 'traffic light' pattern, step-wise approach, pictorial explanations and ability to determine which specific risk factors to focus on for preventive efforts.

These findings resonate with observations made by our respondents who were especially concerned about the need for careful attention to the design of codes (and guidance materials) to optimise usability, and to tailor instruments to the target audience. These issues were discussed in detail in Chapter 5.

## The challenge of successfully communicating with small firms

This is a particular theme in evaluations of guidance materials although it is also relevant to codes of practice. A common theme of studies with this focus is that successful communication with small (or small and medium sized) enterprises is crucial to the efficacy of guidelines and codes.

For example, a survey of firms purchasing 'COSHH Essentials', a UK guidance document intended to improve chemical control (Wiseman and Gilbert 2002) found that very small firms make up a smaller proportion of purchasers than the overall population of firms, and that the guidance may not be hitting the smallest firms in its target market. Nevertheless, of those respondents that accessed the guidance, most found it useful although several commented that they perceived the guidance to be irrelevant to their own industrial sectors, and the way they use substances that are hazardous to health. Mostly the document is used for reference, mainly to check existing measures, and only two-fifths of respondents progressed through the assessment system.

Again in the case of the Victorian bullying and violence guidance note, one evaluation found that only 26% of small employers, in contrast to 77% of large employers had policies and procedures to manage workplace bullying (Evaluation No 3 of GN, 6), while another (Evaluation No 5) found that some managers felt that WorkSafe had focused on big business and had not been particularly supportive to the needs of smaller businesses. A third noted that while "a high percentage of the survey respondents felt that the Guidance Note as a mechanism to inform

workplace parties was appropriate … several respondents also felt the Guidance Note was too theoretical for small employers" (The Social Research Centre 2004, p 17).

Wright et al (2004, p vii) found another problem was that "there remain a significant proportion of organisations, especially small and medium sized enterprises (SMEs) which do not 'go to' the [Health and Safety Executive] for advice and are not aware of HSE's promotional activity." It is clear that the HSE needs to reach out to these organisations and develop new ways of doing this (Wright et al 2004, p i). In doing so, it must be mindful that small firms appreciate "specific advice and information which they do not need to interpret in order to apply to their activities and which identifies the control measures they need to take" (Wright et al 2004, p vii).

Finally, and resonating with many of the themes discussed above, a UK review of studies of factors important for successful communication with SMEs found key issues are opportunities for face to face communication, identifying and working through 'gatekeepers', leveraging communication through intermediaries and networking, sector specific information, and attention to language and literacy in design of materials (Gervais 2006, pp iv-x).

## Characteristics of good industry codes and their implementation

Considerable work has gone into identifying the common characteristics of good industry codes (both quasi-legal and voluntary). As regards the latter, while voluntary codes can be highly diverse in terms of form, content, and purpose, most of the successful ones share certain characteristics. These are summarised at Box 16 below.

Important characteristics are: commitment and for leaders to visibly champion the code; staff development and training to ensure 'buy in' by those who need to implement it; and clearly articulated aims, roles and responsibilities. Also important are: an open process of development and implementation, including communication with a wide range of stakeholders; and fair and open dispute resolution. There should be clear advantages to participation such as access to information, technology or marketing; and disadvantages to failure to join or comply such as the potential to lose business or be penalised.

**Box 16**

**Common Characteristics of Good Voluntary Codes**

**Explicit commitment of the leaders** - If the leaders of an organisation or sector promote the use of voluntary codes, others are more likely to follow. These leaders should be identified early in the process so that they can champion the initiative and be visible during its development and implementation.

**Rank-and-file buy-in** - Often, it is the front-line workers (cashiers, factory workers, engineers and supervisors, for example) who translate the code's provisions into reality. To be able to give their full commitment and support, they must understand the code and its objectives, how it will work and their role in implementing it. This requires good internal communications, training and, in some cases, fundamental changes in corporate culture.

**Clear statement of objectives, expectations, obligations and ground rules** - While the need for a code and its initial development may evolve from a brainstorming session or similar free-flowing circumstances, the aims, roles and responsibilities must be clearly articulated early on. This helps to preclude problems such as participant withdrawal. On the other hand, the initial statement of purpose and ground rules should be flexible enough to allow the code to be changed to meet new circumstances and challenges.

**Open, transparent development and implementation** - Codes are more likely to reflect broader socio-economic concerns and be better received if they are developed and implemented openly and with the participation of the larger community (that is, workers, suppliers, competitors, consumers, public-interest groups, governments and neighbours). This enhances the credibility and effectiveness of the code and its proponents and participants.

**Regular flow of information** - Everyone concerned must get feedback on how the code is working and how others are responding to it. This can be achieved through self-reporting, internal and third-party monitoring, compliance verification, public reporting and similar techniques.

**An effective, transparent dispute-resolution system** - A dispute-resolution system that is inexpensive, fair, open, accessible and consistent is often essential to a well-functioning code.

**Meaningful inducements to participate** - If a code makes good business sense and offers meaningful inducements, firms will want to participate. One such inducement might be access to information, technology or marketing tools not available to others. For example, real estate brokers who comply with their code have access to the Multiple Listing Service, which lists properties for sale and people looking for properties.

**Negative repercussions for failure to join or comply** - Firms will be more enthusiastic about joining and complying to a code if they discover that they could lose business if they do not. For example, they might lose public credibility or customer loyalty. Associations that publicise non-compliance and levy fines are an example of negative sanctions that work with voluntary codes.

*Source: Government of Canada 1998b, pp 7-8.*

## Characteristics influencing efficacy of voluntary codes

As regards the particular characteristics that influence the efficacy of *voluntary* codes and guidelines and their capacity to function in the public interest, the evidence is somewhat clearer. Based on evaluative studies a number of general conclusions can be drawn about the value of codes of practice (though none of the major studies involves OHS specifically, but rather the related area of environmental policy). These have been summarised as follows (Gunningham and Sinclair 2002, Ch 6).

- Unilateral commitments at industry level (ie industry based codes of practice) are likely to work best when the following conditions are present: there are relatively few industry players; the exit costs are high (for example, quitting the scheme will draw adverse reaction from markets, competitors or regulators), there is a history of cooperation between member companies; expertise and resources for regulation are available in the industry; non-compliant behaviour can be punished; fair dispute settlement mechanisms are in place; and, some role is available for public participation or oversight.
- A major concern for such collective initiatives is to curb the incidence of free-riding, whereby rogue firms seek to claim the public relations and other benefits of membership of a self-regulatory code-based initiative while avoiding the obligations it entails. Unfortunately, free-riding is often an almost insurmountable problem, because the criteria identified above, or any approximation to them, are only likely to be met in a small number of circumstances.
- Voluntary codes may nevertheless provide a number of 'soft effects'. For example, unilateral commitments by individual enterprises in terms of adopting generic codes may result in the accumulation of managerial expertise in ethical and legal compliance (OECD 2000a, p 3). In relation to industry level voluntary commitments, these soft effects may include (in the very best programs) the capacity to build an industry morality: a set of industrial principles and practices that defines 'right conduct', and the capacity to institutionalise responsibility through the development of industry-wide policies and procedures (Rees 1997).
- An examination of voluntary initiatives in the mining sector (Gunningham and Sinclair 2002, Ch 7) suggests that effective monitoring, sanctions for non-compliance and transparency are crucial to the efficacy of these voluntary codes.
- The paucity of success stories in the empirical literature (see generally OECD (1999), especially Chapter 3 and references therein) should make governments extremely reticent about relying on voluntary programs as a basis for providing any form of regulatory relief or other concessions, notwithstanding industry suggestions that it should do so.

From the above, it may be concluded that 'pure' voluntary commitments at industry group level, cannot be relied upon to deliver public policy outcomes, even in the most favourable of circumstances.

The limited studies of such codes in the area of OHS have found that the greatest motivation to comply with self-regulatory approaches is in circumstances where an industry has a public image to protect, where improved safety can contribute significantly to profits (or, as in the chemical industry, where poor safety can lead to catastrophic explosions) and where, in short, companies have a self interest in improved OHS performance. Where this is not the case, then the track record of self regulation is a poor one (Genn 2003; Gunningham 1995). Since only in a minority of circumstances will the self interest of the target group and the public interest coincide, voluntary self regulation, and voluntary codes of practice in OHS, as in other areas, are only capable of operating successfully under very narrow conditions.

There is much less available evidence concerning the degree to which, or the circumstances in which individual commitments in codes of practice, by individual enterprises are effective. But it seems reasonable to extrapolate from the experience of industry level commitments to draw a similar (albeit provisional) conclusion about individual voluntary commitments, at least in the absence of evidence to the contrary. (See also Parker (2002) for a broader exploration of corporate self-regulation.)

From the above it would seem that key questions influencing the efficacy of codes are: is there an industry body which covers most of the industry; do the problems to be addressed involve important issues of OHS; and is the problem sufficiently serious that it is important to attach the stigma of government prohibition to it to emphasise that it is unacceptable? As the former Australian Trades Practices Commission put it: "if there isn't an industry body with wide coverage and the answer to the other … questions is yes, then legislation will normally be the more appropriate regulatory tool" (Rickard undated).

## Chapter Summary - Evidence From the Literature

In summary, the large majority of the studies that have evaluated codes of practice (particularly quasi-legal codes) and guidance material have not suggested that most codes or guidance materials are inherently flawed and incapable of improving OHS performance, but rather that the *particular codes or guidance material examined* had design flaws sufficiently serious as to substantially reduce the chances of that outcome being achieved, or that there were problems of accessibility, a lack of transparency or contextual influences impacting upon efficacy.

In the next and final chapter we bring together the evidence from the literature and insights from the empirical component of this research, as presented in earlier chapters, and discuss the implications for OHS codes of practice and guidance materials into the future.

# Chapter 10: Implications for OHS Codes of Practice and Guidance Materials

## The Quasi-Legal – Voluntary Continuum

The principal aim of this report is to review key characteristics that determine the efficacy of OHS codes of practice and guidance materials.

We observed in Chapter 3 that codes of practice 'approved' or otherwise officially 'made' under OHS legislation have a quasi-legal status. At a minimum they are 'evidentiary' and legislation provides for their use as evidence in court proceedings, without further 'proving' in court. However, they are not legally binding. They provide guidance about an acceptable way (or ways) to comply with an OHS statute (or regulations), but there is the option to devise alternative ways of satisfying legal obligations.

Voluntary codes and non-statutory guidance materials are also flexible instruments that provide advice. Guidance material is particularly suitable for problems where it is difficult to define an acceptable standard or a particular solution, or where the aim is to present best (not just acceptable) practice. Some regulator respondents were confident that such material could be led, in proceedings, as evidence of what a duty holder could be reasonably expected to know or about preventive action that was reasonably practicable (NZ, Reg3 and Vic, Reg1). However, for the New South Wales regulator evidentiary status of approved codes of practice was important as it "potentially overcomes the restrictions in the *Evidence Act* 1995 and the rules of evidence adopted by the courts" (NSW, Reg1).

In some workplace contexts perceptions of legal status may also make a difference to achieving change. For some of our respondents the quasi-legal status of codes of practice helped to establish them as authoritative, persuasive sources when OHS matters were disputed in the workplace.

Clearly then, as we observed in Chapter 3, rather than a dichotomy between codes with quasi-legal status and voluntary codes or guidance, there is a continuum with regard to the legal status of all types of codes and guidance materials. At one end of the continuum are instruments that are legally binding because they are cited or 'called up' in an Act or regulations. At the other end of the continuum are purely voluntary (industry-developed) codes and guidance. In between there are approved codes of practice with a rebuttable presumption of non-compliance (a 'safe harbour' for regulators), approved codes of practice (compliance codes) that are 'deemed to comply' (a 'safe harbour' for duty holders), and approved codes of practice that are evidentiary but have no 'rebuttable presumption' or 'deemed to comply' status. Also somewhere in the middle but more towards the 'voluntary' end of the continuum are regulator-developed guidance materials that originate from an

authoritative source and support enforceable statutory duties but, in the event of court proceedings, would need to be accepted as evidence.

In the continuum of quasi-legal and purely advisory instruments, we suggest the principal basis for selecting a quasi-legal instrument over a purely advisory one is the need for unequivocal, authoritative advice. An 'approved' code of practice is a more appropriate choice when it is important to provide clarity and certainty about an acceptable way(s) to comply with the OHS statute or regulations, and it needs to be clear and unambiguous that the instrument has legal status and/or can be used as evidence in proceedings. A statutory guideline is appropriate if there is a need to provide definitive interpretation of a particular provision of an OHS statute or regulation. In other circumstances, where the principal aim is to provide practical advice and solutions, guidance materials (in various forms) are appropriate.

However, in terms of efficacy, there is much more to the choice of instrument than legal status. On the basis of the literature and the empirical findings of this research we suggest that to ensure efficacy, legal status needs to be considered alongside instrument design, content, processes for development, promulgation, enforcement and contextual issues. Two quite different examples help to illustrate this. There is evidence to suggest that a lengthy, 'dense' technical code of practice would not be accessed from a website and actively used by most SMEs, regardless of its legal status. On the other hand, an engineer required by contract to address safety in the design of production plant is more likely to seek out specific, technical information s/he can use in the design. These examples illustrate the 'nub' of the issue. Whether OHS instruments are codes, guidance materials or another type, they need to be suitable for, accessible to and usable by the target audience, and the target audience needs the capacity and motivation to use them.

## Designing OHS Instruments that are 'Fit for Purpose'

Our fundamental conclusion is that OHS instruments need to be designed as OHS policy interventions, on the basis of a clear understanding of the rationale for the instrument, how it is intended to work, and who or what is supposed to change (LaMontagne 2004; LaMontagne and Shaw 2004, pp 5-12). In turn, these questions need to be answered on the basis of a 'contextual analysis' of the characteristics of the intended target audience, the industry sector, culture, supply chain relationships and other relevant contextual issues. For example, what is the level of competency (education, training and experience) of those who will be responsible for implementation? How does the industry sector respond to regulation generally? Is there any kind of OHS culture to provide commitment to implementation? What are the key hazards and risks? What are the usual sources of information?

Decisions can then be made about: the purpose of the instrument; the appropriate legal status and characteristics of the instrument; how the

instrument should be developed, who should be involved and how; how it should be promoted, disseminated and explained; the need for and approaches to monitoring implementation; and a strategic approach to enforcement.

With these considerations in mind, the literature and empirical findings from this research suggest efficacy is likely to be enhanced by attention to certain aspects of the design, development, promulgation and enforcement of instruments. We now examine each of these in turn.

## The design and characteristics of OHS instruments

The focus of a code of practice or guidance material, as we discussed in Chapter 4, may be a class of hazard/risk (eg plant, hazardous substances), a particular hazard/risk (eg forklifts, isocyanates), hazardous work or tasks (eg demolition, confined spaces), or a particular process (eg OHS risk management, consultation). The choice of subject matter is appropriately made on the basis of analysis of the target audience and industry sector(s). A key consideration is to address the serious hazard exposures or risks for particular working communities.

The type of standard or provisions (or mix of provisions) is also important. Appropriately, general duties, performance outcomes and process-based standards are now the building blocks of OHS statutes and regulations in Australia, New Zealand and a number of the overseas countries we studied. However, these types of standards are not especially helpful in codes and guidance intended to provide clarity or certainty about what compliance may look like. Some of our respondents saw a place for explanation of hazard/risk management principles, training or other process-based provisions with regard to specific hazards/risks. Most of our Australian and New Zealand respondents favoured a more prescriptive approach, providing practical advice and solutions indicating what duty holders can do to achieve compliance. However, we note that even here there may be exceptions. Notably, large, high-risk establishments are likely to need OHS management systems and performance outcome standards to underpin systematic efforts to address the hazards/risks arising in their operations. (See discussion of the nuclear power industry in the section ‘Type of Standard’, in Chapter 4). The key, as we emphasised above, is determining what is appropriate for the particular target audience and industry sector.

With regard to format and style there was broad agreement from industry and union ‘users’ of codes and guidance materials that desirable features are: plain language so they are easy to read; clear and concise information (not discursive); practical ‘how to’ advice and solutions; clear simple drawings, diagrams, photos or other illustrations to support advice/solutions provided; incorporation of checklists and tools for use in implementation; up to date; reference to other resources and contacts;

free print copies; and the avoidance of excessively long, complex or repetitive material.

Readability and usability don't necessarily translate into use, implementation and effective preventive action. However, they are an essential precursor. Such change is unlikely to flow from a document that is uninviting and hard to follow, except by those motivated to interpret and apply it. There is a case for these 'desirable' features to be set down as criteria to be met in preparing all codes and guidance materials. This does not mean the format has to be standardised. It is still important to take account of who an instrument is intended for, how it is supposed to work, and what is supposed to change. The question then is what is the best format and style to achieve these.

## The development process

The development of codes of practice is resource intensive and time consuming. Yet OHS regulators typically made a decision to develop a particular instrument based on essentially ad hoc criteria. With limited human and financial resources available there is a strong case to use these strategically, adopting a systematic approach to determining when a new instrument is developed and pre-determined criteria for doing so. These criteria might include: areas of risk identified on the basis of hazard exposure and injury surveillance information; and areas of greatest need for use of regulator resources (those less able to develop themselves).

Development processes also 'miss the mark'. For codes of practice, 'typical' processes include forums for stakeholder consultation on draft documents produced or provided (from another source) by the regulator, a period of public consultation/public comment, and approval by the relevant Minister or authority. There may also be Parliamentary scrutiny of gazetted codes. Despite all of these processes there are serious concerns about knowledge and expertise contributed to the process, and weaknesses in (or lack of) engagement with those expected to implement the code. These issues were raised with particular reference to regulator-developed codes of practice but may also apply to the development of OHS instruments more generally.

Whether the development of a code or guidance is led by a regulator or by industry, some rethinking of the process is needed. For efficacy, there is a need to ensure relevant knowledge, skills and experience are contributed with regard to: the hazard/risk or other subject matter; existing OHS legislation; the standards development process; practical understanding of the industry sector(s), workplace(s) and work process(es) for which a code or guidance is intended; and plain language drafting and user friendly presentation. Effective communication skills are also needed to facilitate the involvement of individuals with these different areas of expertise, as well as skills in gathering and assimilating information.

There is a case for identifying specific competencies required for standards development staff and actively developing such expertise (rather than 'learning by doing'). Beyond this, we are not suggesting that all the knowledge, skills and experience can be found in particular individuals. This is part of the problem. Current processes tend to focus too much responsibility on the individual members of committees and working parties. Rather, as part of the 'analysis' process we are suggesting there is a need to clarify what is needed for development of a particular instrument and actively seeking this out. Often this may be more effectively achieved through direct consultation and ongoing communication with the industry sector(s) affected, visits to workplaces for practical input and consulting those with particular hazard/risk expertise. In this way relevant people are aware that the development of a code (or guidance) is underway, are invited to contribute ideas about what should be covered and what technology and practices are observed in industry, and technical experts contribute to development of acceptable methods and solutions (for OHS protection). Wider input doesn't wait for public comment and the development process is more responsive to input from a wider range of interested people.

Interestingly, the Canadian model for development of voluntary codes by industry reinforces the value of clarifying the objectives of the project, identifying the full range of relevant industry stakeholders, clarifying a range of possible solutions and testing these out with interested parties (Office of Consumer Affairs, Canada 1998, p 15). This model also emphasises reaching out beyond like-minded people to including more broadly affected interests, and leading additional people and organisations to participate in code development. Focus groups can also be useful for testing new ideas.

## Promulgation

Except amongst the most motivated people, changes in attitude and behaviour rarely flow from information provision alone (Glendon, Clarke and McKenna (2006, ch 6). However well an OHS instrument is designed and developed, its efficacy will also depend on how well it is disseminated and made known to those for whom it is intended.

For the reasons we discussed in Chapter 6, a more proactive approach is needed than the present heavy reliance on websites and newsletters. For efficacy, there is a need to tap into the ways the relevant people actually obtain information and who they will 'hear' it from, ideally connecting with their business priorities (Gunningham and Sinclair, 2002, ch 2). For regulator-developed instruments this needs to be coordinated by government (to ensure it happens and the accuracy of the message), but it can harness a range of other 'actors'.

Promulgation can also take a much wider range of forms including: face-to-face distribution and encouragement of action from trusted sources (customers, suppliers, industry peers, networks and associations); active

distribution in inspectors' visits to workplaces; more active 'hands on support' such as on-site advice over a period of time; print copies available free so they can be 'put in people's hands'; facilitating access through websites by direct communication with relevant people about what is there and how to access it. Attention to website design can also increase accessibility to 'casual visitors'. Trialling and testing is needed to ensure this.

### Monitoring and enforcement

Codes of practice and guidance materials have a particular role to play in facilitating voluntary action through the dissemination of information and provision of advice, and monitoring is essential to check on implementation and ensure long-term success.

There is a case for more strategic use of codes and guidance materials by OHS regulators to provide advice, monitoring and enforcement when required. This includes routine use of such material by inspectors visiting worksites to alert duty holders to particular codes and guidance, and to 'take them through' the advice and solutions they provide. By referencing provisions in audit tools, performance can be monitored and duty holders alerted to relevant codes and guidance available for areas of non-compliance. They can be used as part of targeted interventions, such as industry sector workshops to educate duty holders and follow up checks on implementation. They are currently used to support inspectors' prohibition and improvement notices, although this practice was more apparent to OHS regulators than it was to our industry and union respondents. They may also be used in evidence in prosecutions for breaches of OHS statutes or regulations.

For codes of practice, in particular, there is a case for ensuring that monitoring and enforcement are integrated into the overall implementation strategy. Experience with voluntary industry codes suggests some ways the influence of regulators may be widened to other 'actors', for example by harnessing peer pressure through industry associations, networks and supply chains, encouraging independent third party audits that make specific reference to particular provisions of codes, and provision of incentives by workers' compensation providers (Gunningham and Rees 1997). The relevant actors and opportunities for monitoring and enforcement can be considered 'case by case' as new instruments are developed.

## Recognising the Value of OHS Codes of Practice and Guidance Materials

Through the literature and findings from respondents we have identified a number of opportunities for enhancing the efficacy of OHS codes and guidance materials. This does not mean these instruments are inherently flawed. Rather, their efficacy may be reduced by less than optimal

design, development, promulgation, monitoring and enforcement. Our respondents had suggestions for improvement and sometimes had serious concerns, but industry, union and regulator respondents alike saw an ongoing role for these OHS instruments. As one regulator said:

> Don't take them away. They are educative for industry and inspectors. But they need more effort into development and updating to ensure they are meeting current practice.

Respondents who apply codes or guidance as end users said they are a resource for developing in-house policies, procedures, practices or systems of work. They are used to identify hazards and determine controls or opportunities for improvement. They are used to develop training materials and determine workplace amenities and facilities. They provide a benchmark against which OHS outcomes can be progressively improved, through work and workplace redesign, hazard/risk management, training and safe work practices.

The challenge is to enhance the quality, extend the range of users and foster their implementation across a wider range of workplaces. Important lessons may be drawn from experience with voluntary industry codes where common characteristics of success have been identified. These include: commitment and leaders who visibly champion the code; staff development and training to ensure 'buy in' by those who need to implement it; and clearly articulated aims, roles and responsibilities. Also important are: an open process of development and implementation, including communication with a wide range of stakeholders; and fair and open dispute resolution. There should be clear advantages to uptake and implementation such as access to information, technology or marketing; and disadvantages to failure to take up and comply, such as the potential to lose business or be penalised. How these may be achieved are matters appropriately addressed early in the design and development of OHS instruments.

We have also stressed the need to treat the development and introduction of new codes and guidance materials as OHS policy interventions and part of this means incorporating evaluation as an integral part of the intervention. A range of confounding influences make evaluation difficult, including the influence of other instruments in the legal framework, the effect of enforcement, the impact of workers' compensation incentives and penalties, as well as the kinds of contextual issues we have discussed elsewhere in this report (see Chapter 7).

Nonetheless, the basis for evaluation should be determined when clarifying the rationale for an OHS instrument, how it is supposed to work, and who or what is supposed to change. Decisions on these matters will influence decisions about what 'success' will look like. It may be improvements in reduction in hazard/risk exposures, implementation and maintenance of hazard/risk control measures, improvement in awareness and knowledge of target groups, and so on. Such measures

are preferred since they reflect the impact on OHS performance, rather than simply ‘satisfaction’ with an instrument.

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# Appendix 1: Topics for Interviews and Email Questionnaires

*Respondents were asked to contribute a response on any topic about which they had knowledge or experience.*

### Type and Legal Status of Instrument

Type(s) of instrument(s) respondent has experience of.

Intended purposes of this/these instrument(s).

Whether they have legal status and, if so, what this is.

If they have legal status, the penalties for non-compliance.

A website or other source where they can be accessed.

### The development process

What influences the decision to develop this/these type (s) of instrument(s).

When it is appropriate to use them rather than another OHS instrument.

What are appropriate subjects for them.

The form they take.

Who develops them?

Processes for obtaining input from other interested parties?

Whether there is engagement with those who are/will be involved in implementing the instrument.

The process of approval before the instrument is issued.

Resources required for their development.

### Promulgation

Whether the regulator is involved in promulgating them and, if so, how.

Whether an industry/employer association(s), union(s) or other organisations are involved in promulgating them and, if so, how.

Resources for their promulgation.

### Enforcement

Whether and, if so, how they are used in enforcement by a regulator. (Asked of regulators).

Awareness of action by an inspector using a code or guidance material. (Asked of industry and union respondents).

### Use and impact

Example(s) of how they have been used or implemented in the workplace. (Asked of industry and union respondents).

Example(s) of changes made to OHS as a result of using them. (Asked of industry and union respondents).

Whether health and safety has improved as a result of using them and, if so, how. (Asked of industry and union respondents).

Who uses them? (Asked of industry and union respondents).

What is good/useful about them? (Asked of industry and union respondents).

What is bad/not useful about them? (Asked of industry and union respondents).

Whether there is evidence of their efficacy and, if so, what.

What characteristics determine efficacy?

Reasons to continue to produce such instruments.

Whether they support (or conflict with) other OHS instruments and, if so, which instruments and how.

### Codes and guidance overall

Any difference in the impact of different types of instruments and, if so, why.

Anything else the respondent would like to contribute.

**Demographic Information**

Industry (with reference to AZSIC industries).

Size of workplace(s) respondent is involved with.

# Appendix 2: Questions Asked in the NOHSAC Online Survey

What is the name of the code or guidance material?

Can you give an example(s) of how it has been used or implemented at your workplace?

Can you give an example(s) of changes made to OHS as a result of using it?

Has health and safety improved as a result of using it and, if so, how has it improved?

Who uses it?

What is good/useful about it?

What is bad/not useful about it?

Has an inspector taken any action at your workplace using a code of practice or guidance material?

In what industry is your workplace? (please tick the relevant box)

- ❑ Accommodation
- ❑ Agriculture
- ❑ Cafes and restaurants
- ❑ Communication services
- ❑ Community services
- ❑ Construction
- ❑ Cultural and recreational services
- ❑ Defence
- ❑ Education
- ❑ Electricity supply
- ❑ Finance and insurance
- ❑ Fishing
- ❑ Forestry
- ❑ Gas supply
- ❑ Government administration
- ❑ Health
- ❑ Manufacturing
- ❑ Mining
- ❑ Personal and other services
- ❑ Property and business services
- ❑ Retail trade
- ❑ Transport and storage
- ❑ Water supply
- ❑ Wholesale trade

How big is your workplace? (please tick the relevant box)

- ❑ Less than 20 employees
- ❑ 21 to 50 employees
- ❑ 51 to 100 employees
- ❑ more than 100 employees

# Appendix 3: Respondents

## Detailed responses

Respondents to the detailed question set (interview or email questionnaire) came from the following organisations. Except where identified they contributed their individual knowledge and experience, rather than an official view of the organisation they worked for.

For further details of the project methods and selection of respondents see Chapter 2.

### Australia

SafeWork South Australia (SA, Reg1; SA, Reg2)
WorkCover New South Wales (NSW, Reg1) – organisation submission
Workplace Health and Safety Queensland (Qld, Reg1)
WorkSafe Victoria (Vic, Reg1; Vic, Reg2; Vic, Reg3)
Department of Primary Industries New South Wales (NSW, Reg2; NSW, Reg3)
Utilities provider, Victoria (Aus, Ind1)
Concrete products manufacturer, several states (Aus, Ind2)
Building and construction products manufacturer, several states (Aus, Ind3)
Structural engineer (Aus, Ind4)
OHS consultant, Victoria (Aus, OHS spec1)
OHS consultant, Queensland (Aus, OHS spec2)
Australian Council of Trade Unions (Aus, Union1)
Nurses' Association, state branch (Aus, Union2)

### New Zealand

Department of Labour (NZ, Reg1)
Environmental Risk Management Authority (NZ, Reg2)
Civil Aviation Authority (NZ, Reg3; NZ, Reg4)
Federated Farmers of New Zealand (NZ, Ind1)
Employers and Manufacturers' Association (NZ, Ind2)
Emergency services authority (NZ, Ind 3)
Engineers Printing and Manufacturing Union (NZ, Union1)
Council of Trade Unions (NZ, Union2)

### Canada

WorkSafe, British Columbia (BC, Reg 1)
Alberta Standards and Workplace Safety (Alb, Reg1)
Workers' Compensation Board, Quebec (Q, Reg1; Q, Reg2; Q, Reg3)
Office of Consumer Affairs, Industry Canada (Can, Reg1)
University of Toronto (Can, Uni1; Can, Uni2)

### The Netherlands

Arbonieuwestijl (NL, Reg1)

Stichting van de Arbeid (The Labour Foundation) (NL, Ind1)
Technical University of Delft (NL, OHS spec1)
University of Amsterdam (NL, OHS spec2)
KPMG

### Denmark

Technical University of Denmark (Dk, OHS spec 1)
Danish Institute of Occupational Health (Dk, OHS spec 2)
Roskilde University (Dk, Uni1; Dk, Uni2)

### United Kingdom

Health and Safety Executive (UK, Reg1; UK, Reg2; UK,Reg3; UKReg4; UK, Reg5; UK, Reg6)
University of Cardiff (UK, OHSspec1)
University of Warwick (UK, Uni1)
London School of Economics (UK, Uni2)

### Finland

Finnish Institute for Occupational Health (Fin, OHSspec1)
Ministry of Social Affairs and Health (Fin, Reg1)

### NOHSAC Online Responses

There were an additional 10 Australian and 12 New Zealand respondents to the NOHSAC online survey. Their organisations were not identified but they were all industry end users of codes or guidance materials.

In this report NOHSAC responses are identified as Aus, NOHSAC # (and numbered 1-10) for the Australian responses, and NZ, NOHSAC # (and numbered 1-12) for the New Zealand responses.

# Appendix 4 – Websites (and URLs) for Regulator Codes of Practice and Guidance Materials

## New Zealand

http://www.osh.govt.nz/order/catalogue/index.shtml

http://www.ermanz.govt.nz/resources/index.html

## Australia

*Australian Capital Territory* (*ACT*)

http://www.workcover.act.gov.au/docs/ohs.htm

*New South Wales*

http://www.workcover.nsw.gov.au/Publications/default.htm

*Northern Territory*

http://www.worksafe.nt.gov.au/corporate/codes_of_practice.shtml

*Queensland*

http://www.deir.qld.gov.au/publications/index.htm

*South Australia*

http://www.safework.sa.gov.au/show_page.jsp?id=5892

*Tasmania*

http://www.workcover.tas.gov.au/node/legislation-1.htm

*Victoria*

http://www.workcover.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Safety+and+Prevention/

*Western Australia*

http://www.worksafe.wa.gov.au/newsite/worksafe/content/resources/websgenl0013.html

## Canada

*Alberta*

http://employment.alberta.ca/cps/rde/xchg/hre/hs.xsl/5065.html

*British Columbia*

http://www.worksafebc.com/publications/default.asp

*Quebec*

http://www.csst.qc.ca/portail/en/prevention/prevention.htm

## United Kingdom

http://www.hse.gov.uk/pubns/index.htm

## Denmark

http://www.at.dk/sw12161.asp

## The Netherlands

http://www.arbonieuwestijl.nl/7/26/English.html

## Finland

http://www.stm.fi/Resource.phx/eng/subjt/safet/index.htx

# Appendix 5: List of OHS Statutes Referred to in the Report

## New Zealand

Health and Safety in Employment Act 1992 (HSEA (NZ))

Hazardous Substances and New Organisms Act 1996 (HSNO (NZ))

## Australian States and Territories

Australian Capital Territory

*Occupational Health and Safety Act* 1989 (OHSA (ACT))

New South Wales

*Occupational Health and Safety Act* 2000 (OHSA (NSW))

Northern Territory

*Work Health Act* 1986 (WHA (NT))

Queensland : *Workplace Health and Safety Act* 1995 (WHSA (Qld))

South Australia

*Occupational Health, Safety and Welfare Act* 1986 (OHSWA (SA))

Tasmania : *Workplace Health and Safety Act* 1995 (WHSA (Tas))

Victoria

*Occupational Health and Safety Act* 2004 (OHSA (Vic))

Western Australia

*Occupational Safety and Health Act* 1984 (OSHA (WA))

## United Kingdom

Health and Safety at Work Act 1974 (HSWA (UK))