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

Introduction to Australian Nursing Federation submission

The Australian Nursing Federation (ANF) welcomes the opportunity to make a submission on the Exposure Draft of the Model OHS Act.

The ANF is the national union for nurses in Australia with branches in each state and territory. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of nurses and nursing in Australia.

The ANF's 170,000 members are employed in a wide range of enterprises in urban, rural and remote locations in the public, private and aged care sectors, including hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, offshore territories and industries.

The ANF participates in the development of policy in nursing, nursing regulation, health, community services, veterans affairs, education, training, occupational health and safety, industrial relations, immigration and law reform.

The ANF supports the submissions of the Australian Council of Trade Unions (ACTU).

In common with the ACTU and with other unions, the ANF is concerned that the model Act falls short of the highest standard of protections needed to ensure healthy and safe workplaces in Australia, and fails to meet the principles for the process that 'there be no reduction or

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

compromise in standards for legitimate safety concerns'. We are concerned that the drafting of the laws is such that the highest OHS standards and rights for Australian workers will not be implemented and indeed existing entitlements will be watered down.

Some of the main OHS issues of concern to Australian nurses include stress, violence, bullying, shiftwork patterns, manual handling, injuries caused by needles and other sharps; exposure to blood borne pathogens (eg. HIV, hepatitis) and to hazardous substances such as glutaraldehyde, latex and cytotoxic drugs. The ANF has particular concerns about psychosocial OHS hazards that historically have not received adequate protection under existing OHS legislation, and which have increased in recent years. The ANF is concerned that some of the provisions of the model Act will not address these issues adequately.

The ANF makes comment on the provisions of the exposure draft below.

Questions
Part 1 – Preliminary Matters
Q1. What is the best title for the model Act?
The ANF strongly supports the title **'Occupational Health and Safety Act'** as the most appropriate title for the Model Act. The title of the Act must include 'health', the Act is about much more than 'safe work' which the current title suggests, and 'Occupational Health and Safety' as a term is widely used and accepted, and is used throughout the exposure draft, and relates the Act to what it is in terms of relating to health and safety at work.
Q2. Does the definition of '*officer*' clearly capture those individuals who should have '*officer'* duties under the model Act?

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

Q3.	There is some overlap between the definitions of 'plant' and 'structure', as many types of plant have structural attributes, and vice versa. Should 'plant' and 'structure' be defined in a way that removes this overlap?
The ANF supports the (New South Wales Nursing Association (ANF, NSW Branch))(NSWNA) submissions in this regard.	
Q4.	Are there any other types of activities or undertakings that should be specifically included or excluded from application of the model Act? For example, should residential strata title body corporates be excluded?
The ANF supports the NSWNA submissions in this regard.	
Q5.	Is the scope of the suppliers' duty appropriate?
The ANF supports the NSWNA submissions in this regard.	
Q6.	Is the scope of the '*worker*' definition appropriate? Should it cover students gaining work experience?
The ANF supports the NSWNA submissions in this regard. In addition: The ANF is of the view that the definition is broadly appropriate. In addition the definition of 'worker' should cover persons gaining work experience, such as nurses undertaking clinical placements in hospitals, as there is no logical or reasonable explanation why they should be excluded. An example is where a student may be working in a workplace in a paid position two shifts per week and being exposed to a set of hazards/risks, where the employer then has obligations to this worker, and under contract is also a 'student' on work experience for a further number of shifts per week, undertaking the same work, in the same workplace, however the work as a 'student' would potentially not be afforded the same protections and rights as those shifts where the worker is paid. These placements are integral to their professional training, and without them nurses are unable to gain their qualification. Whilst there may be some differences between school students undertaking work experience (sometimes paid, sometimes unpaid), and nurses undertaking clinical placements (unpaid) they should both be afforded these protections to the highest standard, especially considering that the unexperienced and new in the workforce are the most likely to be injured.	

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Registration number:
Received by:

Further, in drafting the legislation, the ANF considers it would be more in keeping with the intent of the Panel's and WRMC's recommendations if the term 'person' was used rather than 'student' as non-students also undertake work experience programs, e.g. cadets, people undergoing post work injury rehabilitation/retraining and people on unemployment programs.

Q7. Is the definition of '*workplace*' appropriate?

The ANF supports the NSWNA submissions in this regard. In addition:

The ANF considers that the definition of *'workplace'* should be broadened to include any place where work is carried out. The duty should apply to any place where people work or are likely to work, including domestic premises where nurses may attend for the purposes of home visits. Any attempts to limit this or the circumstances should be avoided by amending the definition to read: *'A workplace is any place, whether or not in a building or structure, where workers work or are likely to work'.*

Part 2 – Safety Duties

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

The ANF supports the NSWNA submissions in this regard. In addition:

In relation to clause 16 'The principle of risk management', the ANF considers that this does not provide sufficient expression of what is expected. It is vital for the approach to OHS management, which has been argued to be implicit via the definition of 'reasonably practicable', that this be explicitly expressed in the Model Act. Risk management, by its very nature when related to OHS, incorporates hazard identification, risk assessment, risk control and evaluation. All of these components should be explicitly incorporated within the legislation. Without any of these components, the validity of the risk management process is incomplete and unsatisfactory.

There should also be an additional provision in relation to the elimination or control of hazards *'at the source'* considering that this is the most effective means of ensuring health and safety.

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

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

The ANF supports the NSWNA submissions in this regard.

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

The ANF supports the NSWNA submissions in this regard. In addition:

The ANF considers that the definition of 'reasonably practicable' must be exhaustive so that only the matters listed may be considered in determining compliance with the duty, so as to not potentially lead to disputes in workplaces surrounding the definition of what can be included. The five matters listed cover all necessary matters which need to be considered in determining appropriateness. Furthermore, we consider that there should be a clearer requirement to weigh up risk (likelihood and gravity of harm) versus the feasibility and cost of measures in the definition, and only where time, trouble and cost of measures are grossly disproportionate to the extent of the risk is the measure not reasonably practicable. Additionally, the ANF considers that the phrasing 'and appropriate weight given' should be removed from this section to again reduce the potential for disputes surrounding the exact meaning of the section.

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

The ANF supports the NSWNA submissions in this regard. In addition:

The ANF believes the primary duties are more limited than existing provisions, and has become complex and confusing in the attempt to combine several duties into an overall duty i.e. the combining of duties of the employer to employees, as well as to 'others', to self-employed persons etc. More specifically:

- In Section 18(1), the phrase 'while the workers are engaged at work in the business or undertaking' should be removed – this is unnecessarily limiting

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Registration number:
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- Section 18(3) should be removed from here and a stand-alone provision included relating to duty to other persons
- Provisions relating to 'health' have been omitted from Sections 18(4)(b), (c) and (d). It is critical that these provisions relate to both safety and health.
- Section 18(4)(g) should be limited by the inclusion of 'work-related' following 'preventing' i.e. to read '…monitored for the purpose of preventing work-related illness or injury of workers…'

Moreover, we believe it is critical that the duty of care should be extended to circumstances where the primary duty holder provides *accommodation* to a worker, as this is particularly important to nurses working in remote areas, where accommodation is provided and maintained by the duty holder in order to attract and retain staff. We note the serious OHS consequences of failure to provide safe accommodation in relation to the assault of a nurse in far north Queensland in 2008 and can provide many examples in remote high risk communities elsewhere in Australia.

Additionally, we believe particular provisions currently protected in the Victorian OHS Act 2004 have been overlooked, and thus represent a diminution in standards, including s21(c) relating to maintenance of each workplace, s22(c) relating to provision of information to workers concerning health and safety at the workplace and s22(2) where a person conducting a business or undertaking (PCBU) must, so far as is reasonably practicable, keep information and records relating to the health and safety of workers of the PCBU; and employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the PCBU concerning the health and safety of workers.

Q12. The model Act requires the provision of, so far as is reasonably practicable, any information, training and instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work (Clause 18(4)(f)). Should this requirement expressly require that the information etc. be provided in an appropriate language or languages, or provided at a level that can be understood by the workers?

The ANF supports the NSWNA submissions in this regard.

Q13. The model Act requires, so far as is reasonably practicable, the provision of adequate facilities for the welfare of workers at work (Clause 18(4)(e)). Should this provision be drafted to require 'access to' such facilities (e.g. to take account of requirements for mobile

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workplaces)?
The ANF supports the NSWNA submissions in this regard.
Q14. Is the scope of the duties related to specific activities appropriate?
The ANF supports the NSWNA submissions in this regard. In addition: The ANF contends that the specific activity duties are inadequate. In particular, we believe there should also be strong, specific duties on those who design work environments and work systems, in addition to those who design plant, substances or structures, given that this is the stage at which most OHS hazards could be easily and effectively resolved. Specifically, • Section 21(1)(b), 22(1)(b), 23(1)(b) and 24(1)(b) should include 'could reasonably be expected to be used as' as per (a) • Section 21(2)(d), 22(2)(d), 23(2)(d) and 24(2)(d) should additionally incorporate refurbishment • Section 21(2)(d)(ii), 22(2)(d)(ii), 23(2)(d)(ii), 24(2)(d)(ii) and 24(5)(b) should incorporate storage of substances
Q15. In determining whether a worker failed to take reasonable care, should regard be had to what the worker knew about the relevant circumstances?
The ANF supports the NSWNA submissions in this regard. In addition: What the worker knew should be taken into account. However, what the worker knows does not necessarily impact on the worker's capacity to protect their own health and safety as they seldom have the authority to remedy risks. We offer an example from a nursing perspective - nurses are often placed in a position of short-staffing leading to a number of risks, e.g. higher risk of assault, no available assistance with manual handling, and fatigue. The conflict arises because nurses have a duty of care to their patients/clients which is fundamental to nursing practice – ceasing or refusing work is seldom an option, and regulators generally refuse to address risk situations arising from staffing and skill-mix. In this situation in order to fulfil their nursing responsibilities, nurses may have no choice but to accept the risk, and be unable to take reasonable care of their own health and safety.

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

Q16. Is the treatment of volunteers under the model Act appropriate?
The ANF supports the NSWNA submissions in this regard. In addition: The ANF is of the view that the treatment of volunteers under the model Act is inconsistent and unclear, being that volunteers are included in the definition of 'worker', 'officer' and PCBU, and as such are given responsibilities under the model Act, and are then absolved of liability for failure to comply with these responsibilities under s.33. We are of the opinion that these volunteers should be subject to the same responsibilities as others, where they are in a position to be able to make decisions that impact on the health and safety of workers or others, and as such should be held accountable for these decisions e.g. where volunteer directors on boards are able to make decisions that put staff at considerable risk by overriding recommendations of Health and Safety Committees and managers in relation to addressing hazards in the workplace. Additionally, volunteers working as employees should also be held accountable for their actions / omissions and should be required to comply with provisions for safety in the same way that other workers are expected to comply.
Q17. Are the range and levels of penalties proposed above appropriate, taking account of the levels set for breaches of duties of care by the WRMC?
No - the range and level of penalties are not appropriate. Fines for employees are excessive, inequitable and disproportionate compared with the maximum fines proposed for officers/non-corporate offenders and corporations.
Q18. What should the maximum penalty be for a contravention of the model regulations?
Q19. The intention is that all contraventions of the model Act be criminal offences. Is this appropriate or should some non-duty of care offences be subject to civil sanctions e.g. failure to display a list of HSRs at the workplace, offences relating to right of entry?

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

The ANF supports the NSWNA submissions in this regard.

Part 3 – Other Obligations

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

The ANF supports the NSWNA submissions in this regard. In addition:

The list of notifiable incidents fails to capture many aspects currently enshrined in legislation. This represents a reduction in the current standards and is therefore contrary to COAG directives and federal government assurances. The ANF believes that there are omissions from the list of notifiable incidents, in particular:

- Incidents of violence threatening workers
- Exposure to infectious substances such as blood borne viruses or biological contamination
- Exposure to non-substances such as radiation
- Exposure to substances with long-latency health effects e.g. silica, asbestos
- Exposure to carcinogens
- Serious psychological trauma

We also note that the requirements to maintain records of all incidents notified should be contained within the Act (and not the Regulations), and there should additionally be a provision that requires copies of the record of the incident to be available to certain parties, for example as per s38(4) of the Victorian OHS Act 2004.

Part 4 – Consultation, participation and representation

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

The ANF submits that there should be no qualification surrounding consultation relating to ‘so far as is reasonably practicable’. This should be

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Received by:

an unqualified duty. Consultation is a fundamental mechanism available to both employees and employers in relation to occupational health and safety, and providing a safe and health workplace, and cannot be downgraded by qualification of when this duty is required. There should be no circumstance where this is not reasonably practicable.

The ANF consistently finds when investigating OHS matters raised by members that the lack of consultation by employers has often contributed to the existence of the risk in the first instance (e.g. risks arising from the design of a workplace or work environment, or choice of equipment), the persistence of existing risks, and the subsequent failure to eliminate or control them at a local level. It is therefore vitally important that the scope of duty be mandatory, comprehensive and enforceable.

Moreover, 'with or without the direct involvement of the workers' in s46(2) should be removed to avoid confusion as to when HSRs are required to be consulted and when workers are required to be consulted, leaving the provision so that where represented by an HSR, the consultation must involve that HSR.

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

The ANF supports the NSWNA submissions in this regard.

Q23. Clause 49 allows work groups to be determined for workers engaged in 2 or more businesses or undertakings. Should such arrangements be by agreement only, i.e.with no prescribed procedure if negotiations fail?

The ANF supports the NSWNA submissions in this regard.

Q24. Negotiations for work groups must be commenced within a '*reasonable time*'. Should a time limit be prescribed e.g. 14, 21 or 28 days?

The ANF supports the NSWNA submissions in this regard.

Q25. Elections for HSRs and possibly deputy HSRs must be conducted '*as soon as reasonably practicable*' after the relevant work groups

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

	are established, or after a request for an election is received if work groups are already established. Should a time limit be prescribed?
The ANF supports the NSWNA submissions in this regard.	
Q26.	The model Act requires that the HSR training must take place within a reasonable time, to accommodate a range of circumstances. For example, it may take longer for HSRs working in rural or remote regions to attend an approved course that may not be available in their area. Should a time limit be specified within which the training must be provided?
The ANF supports the inclusion in the model Act of provisions in relation to establishing how and when HSR training takes place, including: • A right for HSRs to attend any course approved or conducted by the Authority • The HSR must make a request to attend training at least 14 days prior to commencement of the course • The course is chosen by the HSR, in consultation with their employer • The employer must pay the costs associated with attendance at the course • The Authority can determine disputes • An employer who refuses to allow attendance is guilty of an offence It is considered that such detail (from Regulation 8) should be included in the Act for ease of reference by HSRs.	
Q27.	The model Act requires that a health and safety committee be established within 2 months of the request being made. Six of the current OHS Acts include such a timeframe, which varies across jurisdictions from 3 weeks to 3 months. Is the proposed time limit of 2 months appropriate?
The ANF supports the NSWNA submissions in this regard.	
Q28.	The *Fair Work Act 2009* (Cth) (Fair Work Act) refers to ceasing work on the basis of a 'reasonable concern' of the employee about an imminent risk to his or her health and safety, while the model Act refers to 'reasonable grounds'. Should the terminology in clauses 75 and 76 be aligned with the Fair Work Act?

Office use only
Registration number:
Received by:

The ANF supports the NSWNA submissions in this regard.
Q29. Should a health and safety representative be required to complete approved training before being able to direct that work cease under these provisions?
The ANF opposes this provision. HSRs should be afforded their full entitlement of rights and powers upon election (as per any other elected official), and should be able to exercise these regardless of training.
Q30. Should a health and safety representative be required to complete approved training before being able to issue a PIN under these provisions?
The ANF opposes this provision. Preventing HSRs from issuing PINs until such time as they have attended approved training will almost certainly lead to some employers seeking to delay attendance, and hazards identified by HSRs therefore not being addressed in a timely matter. Further, in some circumstances, HSRs may be required to issue PINs to enable them to attend training, as the PCBU may be unreasonably delaying or otherwise preventing them from attending the training.
Q31. A PIN cannot require compliance before 7 days from the date the PIN was issued. Is this time frame appropriate?
The ANF supports the NSWNA submissions in this regard.
Part 5 – Protection from Discrimination
Q32. Should the model Act expressly protect persons from being coerced or induced to exercise their powers in a particular way?

Office use only
Registration number:
Received by:

The ANF supports the NSWNA submissions in this regard. In addition:

Yes. They should also be protected from being coerced into not exercising their rights, e.g. the right to ask for training. HSRs and deputies, who take on this role voluntarily, and without duties as HSRs and deputies, must be afforded the highest level of protection, not only when they do exercise their powers, but also if for any reason they choose not to do so in a particular way. Additionally, other employees, including HSRs, should be afforded the highest level protection from discrimination in the case of raising any OHS issue – they should not have to fear this process.

Part 6 – Workplace entry by OHS entry permit holders

Q33. Are the notification requirements appropriate?

The ANF supports the NSWNA submissions in this regard.

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

The ANF supports the NSWNA submissions in this regard.

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

The ANF supports the NSWNA submissions in this regard.

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

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Registration number:
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The ANF supports the NSWNA submissions in this regard.
Part 7 – The Regulator
Q37. Should guidelines have any other particular legal status under the Act?
The ANF supports the NSWNA submissions in this regard.
Part 10 – Review of Decisions
Q38. Is the list of reviewable decisions appropriate?
The ANF supports the NSWNA submissions in this regard.
Q39. Are the processes and timeframes prescribed for the internal review of decisions appropriate?
The ANF supports the NSWNA submissions in this regard.
Q40. Are stay arrangements appropriate in relation to the issue of a prohibition or nondisturbance notices, having regard to the purposes of those notices?
The ANF supports the NSWNA submissions in this regard.
Exposure Draft of Key Administrative Regulations
Q41. Should the list of matters to be considered in negotiations for work groups be provided for in a Code of Practice rather than prescribed in regulation?

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

The ANF supports the NSWNA submissions in this regard. In addition:

The ANF contends that the list of matters to be considered in negotiations for work groups should be provided for in the Act, not regulation nor Code of Practice.

Do you have any other comments?

- **Part 1, Division 2 – Objects**
  The ANF believes it is critical that the initial object of the Act s3(1)(a) should refer to the preventative process of providing a safe and healthy workplace for workers, rather than the reverse language as it stands, where it refers to the outcome of not providing such a workplace i.e. protecting workers and other persons from harm. Additionally, wording in s3(2) weakens the objects, and the words 'should' and as is reasonably practicable' should be deleted to strengthen this object.

- **PART 2 - SAFETY DUTIES** Initially, the very title of this part of the Act is limiting, and excludes 'health'. The ANF considers that this should be retitled *'Duties of Care'*, and that this terminology be reflected throughout the section. Further, where the term 'safety' is used in the duties, it should be replaced with *'health and safety'*.

- **Part 4, Division 2, Subdivision 1 – Election of health and safety representatives**
  This Subdivision actually refers to the Establishment of Work Groups and the Election of health and safety representatives, and should be retitled to reflect this. Additionally, s.48 is incorrectly titled and represented, as it, by necessity, should refer to the establishment of Work Groups prior to going into election of HSRs. This process is confused and unclearly stated in the model Act as it stands. The Work Groups must be established prior to any election of HSRs, as this is effectively establishing the 'constituency' who are eligible to vote in such an election. Effectively, ss48-52 should be renamed 'Establishment of Work Groups', whilst ss53-57 should be renamed 'Election of HSRs'.

- **Variation of Designated Work Groups**
  The ANF contends that, although the model Regulations propose at Reg 6(1) that parties can negotiate a variation of the agreement, this provision should be included in the Act to ensure it is appropriately covered.

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

- **Negotiations of Work Groups**
  The ANF supports the inclusion of a provision, similar to the Victorian Act (s44(5) and s48(5)), which allows for a worker or group of workers to be represented in negotiations of work groups by any person authorised by the worker or group. We also support the inclusion of the detail of Negotiation of agreement for work groups (Regulation 4), and Matters to be taken into account in negotiations (Regulation 5) in the model Act, rather than in the model Regulations.

- **s55 Procedure for election of health and safety representatives**
  The ANF consider that provisions (1) and (2) of this section are in direct contradiction of each other, and that it should be strictly the determination of the work group as to how an election is to be conducted, rather than by procedures prescribed in regulations. Additionally, we consider that Regulation 7 should be deleted, as this is also in contradiction of the provision that allows a work group to determine how an election is to be conducted.

- **s59 Disqualification of health and safety representatives**
  The ANF is of the opinion that the use of the word 'function' in (1)(a) and (2)(a)(i) implies that there are roles and responsibilities on HSRs, which is in direct contradiction to 62(3), which indicates that HSRs have no duties (as per additional comments below). However by including this as a ground for disqualification, this confuses the situation. The only test for such disqualification (other than by their work group) should be intent to cause harm. Additionally, (2)(b) of this provision allows the regulator to apply for disqualification of an HSR. This is inappropriate, and unnecessary, and should be limited to an application by a PCBU.

- **Subdivision 2 – Functions and powers of health and safety representatives**
  Throughout this subdivision, references are made to 'functions' of health and safety representatives, however this is contradictory to the statement made in S62(3), which indicates that HSRs have no duties. HSRs are provided rights and powers, not 'functions' under the Act, and they have no obligation, nor duty, to undertake any particular 'function' nor 'duty'. HSRs take on this role on the clear understanding that they have no extra duties of care, and are not paid (nor should they be) for the role, and consequently cannot have 'functions'. It is the contention of the ANF that all references to functions in relation to HSRs be removed, and replaced with 'rights and powers'. Further, there is an oversight in that HSRs have not been afforded the right to be a party to issue resolution, as per the Victorian Act (S58(2)(d)), which must be addressed.

Australian Nursing Federation (ANF)

Office use only
Registration number:
Received by:

- **s62(2)(f) and 64(4) HSR right to seek assistance**
  The ANF considers that, whilst the intention appears to be right, the wording 'request' in this section should be replaced by the word 'seek' as per the provision in the Victorian Act (s58(1)(f)). 'Request' implies the seeking of permission, rather than the seeking of assistance, particularly when read in combination with the qualification contained in s64(4) relating to not requiring to allow a person access. Additionally, this provision (64(4)) demonstrates a misunderstanding of the HSRs right to seek the assistance of any person, and not just someone with an OHS entry permit. It may be another HSR from another Work Group, an OHS professional of another description or someone with an OHS entry permit, but should not be limited to such.

- **s153(2) - HSRs and Inspectors**
  This section should refer to 'immediate' notification of the following persons of the entry, rather than referring to 'as soon as practicable after entry' – there is already appropriate qualification of this within the phrase 'all reasonable steps'. Additionally, there is a significant diminution in the requirements of the Model Act with the omission relating to the provision of an 'Entry Report' by the inspector to both the HSR and the occupier of the workplace (as contained within s103 of Victorian OHS Act 2004). The ANF believes that it is critical that such documentation must be provided by an inspector for the benefit of both HSRs and PCBUs to clarify why an inspector made (or failed to make) a decision, and is subsequently critical in relation to rights to have an inspector's decision reviewed.

- **Training – Regulation 8**
  The ANF also considers that Regulation 8 as it currently stands represents a diminution in the rights of HSRs to attend further courses of training as per current rights, for example in the Victorian Act (s69(1)(d)(ii)) which allows an HSR to attend training (other than that currently outlined in Regulation 8) that is approved or conducted by the Authority.