

**PARLIAMENT OF NEW SOUTH WALES  
LEGISLATIVE COUNCIL**

**STANDING COMMITTEE ON LAW & JUSTICE**

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**REPORT ON THE INQUIRY INTO**

**- WORKPLACE SAFETY -**

**INTERIM REPORT**

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**ORDERED TO BE PRINTED 22 DECEMBER 1997  
ACCORDING TO RESOLUTION OF THE HOUSE**

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December 1997  
Standing Committee on Law & Justice, Report No. 8

ISBN 0 7313 0036 X

# Terms of Reference

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That the Standing Committee on Law and Justice inquire into and report on workplace safety matters, with particular reference to:

- (a) integrating management systems and risk management approaches aimed at reducing death and injury in the workplace;
- (b) social and economic costs to the community of death and injury in the workplace; and
- (c) the development of an appropriate legislative framework for regulatory reform and/or codes of practice in relation to occupational, health and safety in the workplace.<sup>1</sup>

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<sup>1</sup>Minutes of Proceedings of the Legislative Council, 26 June 1996, p 284.

# Committee Membership

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The Hon Bryan Vaughan,MLC, Australian Labor Party  
Chairman

The Hon Helen Sham-Ho,MLC, Liberal Party  
Deputy Chairperson

The Hon Janice Burnswoods,MLC, Australian Labor Party

Reverend The Hon Fred Nile,MLC, Christian Democratic Party

The Hon Peter Primrose,MLC, Australian Labor Party

The Hon John Ryan, MLC, Liberal Party

The Hon Janelle Saffin,MLC, Australian Labor Party

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*The appendices have not been reproduced here. For a copy, please contact the Secretariat on Telephone: (02) 9230 3311, or Fax: (02) 9230 3371, or Email: law.justice@parliament.nsw.gov.au*

- 1 Statistics on Occupational Health and Safety Prosecutions, Provisional Improvement Notices, and Fines 1992/93 - 1996/97, contained in correspondence from the WorkCover Authority, September 1997.
- 2 Inquiry into Workers' Compensation System in NSW - Final Report 15/9/97, *Grellman Report* pp 74-76.
- 3 Environment Protection Authority Prosecution Guidelines.
- 4 Construction Policy Steering Committee Occupational Health, Safety and Rehabilitation Management Systems Guidelines, Capital Project Procurement Manual, 2nd Edition.
- 5 Participants in seminars, round table meetings, briefings and witnesses at public hearings (including intrastate hearings).
- 6 Submissions received by the Committee.
- 7 Minutes of the Proceedings.

# Chairman's Foreword

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On Monday 15 December 1997, the very day when the Standing Committee on Law and Justice met to finalise this report, three young men died in accidents on construction sites in NSW.

During the last financial year 2,900 people died from workplace accidents and occupational diseases in Australia. During the same period there were 2,030 people killed on the roads.

This toll is unacceptable. It is the view of the Committee that the time has come for the community to be made aware of the full human, social and economic cost of workplace death and injury, and for this critical issue to receive the same attention that road safety has received for the last twenty years.

The Committee does not pretend that this report contains all the answers. However, this report does make a number of recommendations which have the potential to assist the process of reform in order to meet the challenge of reducing the level of workplace death and injury.

This *Interim Report* of the Standing Committee on Law and Justice contains the Committee's response to the *Final Report of the Panel of Review of the Occupational Health and Safety Act 1983* (the *McCallum Report*), which was chaired by Professor Ron McCallum, and which reported to the Attorney General in February of this year. When the *Occupational Health and Safety Act* was enacted in 1983, NSW was clearly at the forefront of the regulation of workplace safety within Australia. Over the years, however, the Act has become somewhat outdated and other States have adopted a number of useful initiatives that have yet to be implemented in NSW. This report of the Standing Committee on Law and Justice seeks to rectify that situation. The Committee draws attention to some of the strong features of the legislative regimes and related programs which operate in other States, and recommends that they be adopted in NSW. At the same time, the Committee recognises the strengths of the NSW Act and affirms that these strengths must be retained.

This report also contains a brief discussion of a number of issues unrelated to the *McCallum Report* but which have emerged during the Committee's inquiry during 1997. In relation to these other issues, this report contains a number of recommendations which the Committee would like to see implemented as a matter of urgency during 1998.

It must be emphasised that this report is limited in its scope. The Committee's terms of reference certainly enable the Committee to undertake a wide ranging inquiry traversing a range of issues in relation to workplace safety. The Committee will be further pursuing its inquiry during 1998. The Committee will be releasing an *Issues Paper* in February 1998 which will outline the particular issues which the Committee will be examining during the second part of the inquiry.



## **Acknowledgements**

On behalf of the Committee I would like to thank all those individuals and organisations who have been of assistance to the Committee with its inquiry during 1997.

Most importantly, I would like to thank all of those organisations and individuals who took the time to make submissions to this inquiry. It should be noted that not all these submissions have been referred to in this report. That is a result of the somewhat limited focus of this report on modernising the *Occupational Health and Safety Act* and a handful of other issues. As noted above, the Committee will embark upon the second stage of its inquiry in 1998 during which a wide range of issues will be examined. The broad range of submissions received by the Committee already will be a great assistance during the course of the second stage of this inquiry.

I would like to thank the staff of the Committee Secretariat for their work in the preparation of this report and for their assistance during the course of this inquiry. The Committee's Senior Project Officer, Ms Louise McSorley, drafted this report. Ms McSorley was also responsible for the conduct of research and analysis during the course of this inquiry and for arranging hearings, site visits and study tours. The Committee Director, Mr David Blunt, edited this report and managed the inquiry process. The Committee Officer, Ms Phillipa Gately, was responsible for the formatting and presentation of this report and for administrative arrangements during the course of the inquiry.

Finally, I would like to thank my fellow members of the Standing Committee on Law and Justice for the considered and constructive manner in which they have approached this inquiry. The Committee has operated in a non-partisan manner throughout this inquiry. It is a testament to the responsibility of all members that the Committee has been able to produce a report, which deals with a number of potentially contentious issues, but which contains 32 recommendations, every one of which has the unanimous support of all members of the Committee.

HON BRYAN VAUGHAN MLC  
CHAIRMAN

# Summary of Recommendations

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## CHAPTER THREE - OBJECTS OF THE ACT

RECOMMENDATION 1: The Committee recommends that the current objects of the *Occupational Health and Safety Act* be reviewed to ensure that they reflect adequately the principles of prevention, equity, participation and acceptance of responsibility provided that, in any review, reference to the psychological needs of workers is retained.

## CHAPTER FOUR - DUTY OF CARE

RECOMMENDATION 2: The Committee recommends that the duty of care provisions contained in sections 15 - 19 and 50 of the *Occupational Health and Safety Act* be simplified and clarified.

RECOMMENDATION 3: The Committee recommends that the substance or meaning of the current duty of care and defence provisions contained in sections 15 - 19, 50 and 53 of the *Occupational Health and Safety Act* be retained unchanged.

RECOMMENDATION 4: The Committee recommends that the duty of care provisions contained in sections 15 - 19 and 50 of the *Occupational Health and Safety Act* be applied in a balanced manner which recognises the responsibilities of all persons in the workplace to promote workplace safety.

RECOMMENDATION 5: The Committee recommends no further amendment to the Act to specifically capture middle ranked managers of a corporation.

RECOMMENDATION 6: The Committee recommends that the WorkCover Authority develop guidance material about management responsibilities under the *Occupational Health and Safety Act*.

## CHAPTER FIVE - ENFORCEMENT AND REGULATION

RECOMMENDATION 7: The Committee recommends that the WorkCover Authority consult with companies which have achieved a significant improvement in their health and safety in order to identify factors which have been important in the process of cultural change, with a view to publishing guidance material for use in both large and small businesses.

RECOMMENDATION 8: The Committee supports the use of risk management systems as a means of enabling employers to go beyond mere compliance and pursue best practice in health and safety. The Committee therefore recommends that the WorkCover Authority examine the most appropriate mechanisms for

encouraging the use of risk management systems. Such an examination should draw upon the Victorian experience with the SafetyMAP program.

RECOMMENDATION 9: The Committee recommends that the Workcover Authority sponsor a hard hitting publicity campaign, along the lines of the campaign that has been run by the Victorian WorkCover Authority, to raise community awareness of workplace safety.

RECOMMENDATION 10: The Committee recommends that the Advisory Committee on Workers Compensation, established to implement the recommendations of the *Grellman Report* examine the most appropriate mechanisms for using workers compensation premiums as an incentive to promote best practice in workplace safety. Such an examination should draw upon the South Australian experience with the Safety Achiever Bonus Scheme.

RECOMMENDATION 11: The Committee recommends that the WorkCover Authority give priority to the development and publication of prosecution guidelines, along the lines of those published by the Environment Protection Authority, so as to provide transparency and certainty to industry and other stakeholders about WorkCover=s enforcement policies.

RECOMMENDATION 12: The Committee recommends that there be no increase in the level of on-the-spot fines under the *Occupational Health and Safety Act* without a full cost-benefit analysis.

RECOMMENDATION 13: The Committee recommends the development of sentencing guidelines for use by the judiciary in matters arising under the *Occupational Health and Safety Act*.

RECOMMENDATION 14: The Committee recommends the development and use of non-monetary penalties in matters arising under the *Occupational Health and Safety Act* including:

- the posting of bonds;
- community service orders;
- publicity orders; and
- the disqualification of corporate offenders from government contracts.

RECOMMENDATION 15: The Committee recommends that section 47A of the *Occupational Health and Safety Act* be amended to enable a court to order an occupational health and safety audit of a corporation.

RECOMMENDATION 16: The Committee recommends the removal from the *Occupational Health and Safety Act* of the differentiation between corporate and non-corporate offenders, and the development of a system of graduated penalties.

RECOMMENDATION 17: The Committee recommends that section 556A of the *Crimes Act* continue to be available in sentencing for breaches of the *Occupational Health and Safety Act*.

RECOMMENDATION 18: The Committee recommends that Victims Impact Statements be admissible in sentencing under the *Occupational Health and Safety Act*.

RECOMMENDATION 19: The Committee recommends that the WorkCover Authority develop strategies to encourage greater publicity of successful prosecutions arising under the *Occupational Health and Safety Act*.

RECOMMENDATION 20: The Committee recommends that the WorkCover Authority include in its enforcement strategy the conduct of targeted blitzes of industries and regions with a poor health and safety record.

## CHAPTER SIX - WORKPLACE CONSULTATION AND TRAINING

RECOMMENDATION 21: The Committee recommends that the *Occupational Health and Safety Act* be amended to contain a general duty to consult.

RECOMMENDATION 22: The Committee recommends that the *Occupational Health and Safety Act* and regulations be amended to require occupational health and safety committees be established in any workplace, regardless of size, where a majority of employees so request.

RECOMMENDATION 23: The Committee recommends that the *Occupational Health and Safety Act* be amended to require the establishment of a position of health and safety representative in any workplace, regardless of size, at the request of the majority of employees. Such health and safety representative would be elected by employees and should have the following powers:

help resolve health and safety issues and report to management on workplace hazards;

request an inspection by a WorkCover inspector;

accompany a WorkCover inspector on a workplace inspection;

be present at accident investigations;

issue Provisional Improvement Notices (to which an employer may object, pending an inspection by a WorkCover inspector); and

stop work where there is an imminent danger, after consultation with the employer and pending an inspection by a WorkCover inspector.

These powers must be subject to appropriate checks and balances, such as those provided for in the Victorian *Occupational Health and Safety Act 1985*, so as to ensure that they are exercised responsibly and sparingly.

RECOMMENDATION 24: The Committee recommends that the *Occupational Health and Safety Act* be amended to require the establishment of a position of health and safety officer in any workplace, regardless of size, at the request of the

employer. Such health and safety officer would be nominated by the employer and should have the following powers:  
help resolve health and safety issues and report to management on workplace hazards;  
liaise with employees about health and safety matters;  
request an inspection by a WorkCover inspector;  
accompany a WorkCover inspector on a workplace inspection; and  
be present at accident investigations.

RECOMMENDATION 25: The Committee recommends that the Occupational Health, Safety and Rehabilitation Council develop guidelines for the training to be provided to health and safety representatives and health and safety officers.

RECOMMENDATION 26: The Committee recommends the establishment of peak industry committees, along the lines of the WorkCover Construction Industry Consultative Committee, to develop strategies to encourage best practice in health and safety in their industry. Priority should be given to the establishment of such committees in industries with a poor health and safety record.

RECOMMENDATION 27: The Committee recommends that the WorkCover Authority consult with the Department of School Education, TAFE and Universities about the development of appropriate health and safety teaching material including:  
the funding of mobile vans to raise awareness of health and safety issues at the primary school level, particularly in areas of the State where children are present in the workplace (eg farms, outworkers);  
the provision of information about workplace hazards to high school students before they undertake work experience; and  
the incorporation of health and safety material into management courses and other appropriate tertiary and vocational courses.

## CHAPTER SEVEN - DIFFICULTIES AND COMPLEXITIES OF THE CURRENT ACT

RECOMMENDATION 28: The Committee recommends that the *Occupational Health and Safety Act* be redrafted in a plain English style and reorganised in a more coherent manner to facilitate comprehension and access.

## CHAPTER EIGHT - OTHER RECOMMENDATIONS ARISING OUT OF THE INQUIRY

RECOMMENDATION 29: The Committee recommends that the *Occupational Health and Safety Act* be amended to provide for an assessment of proposed Codes of Practice. The assessment should include a modified cost-benefit analysis, a period of public consultation and an opportunity for parliamentary scrutiny. Codes of Practice should also be reviewed every 5 years.

RECOMMENDATION 30: The Committee recommends that all contracts entered into by the NSW Government contain specific provisions for the management of occupational health and safety.

RECOMMENDATION 31: The Committee recommends that the *Annual Reports (Statutory Authorities) Act* and the *Annual Reports (Departments) Act* be amended to require that the annual reports of all NSW Government agencies include details of their health and safety records.

RECOMMENDATION 32: The Committee recommends that the *Occupational Health and Safety Act* be amended to provide for the establishment of a Joint Parliamentary Committee on Workplace Safety, to be known as the WorkSafe Committee.

# Chapter One

## Introduction

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### 1.1 Background

1.1.1 On 26 June 1996 the Legislative Council referred the matter of workplace safety to the Standing Committee on Law and Justice. The terms of reference were:

That the Standing Committee on Law and Justice inquire into and report on workplace safety matters, with particular reference to:

- (a) integrating management systems and risk management approaches aimed at reducing death and injury in the workplace;
- (b) social and economic costs to the community of death and injury in the workplace; and
- (c) the development of an appropriate legislative framework for regulatory reform and/or codes of practice in relation to occupational health and safety in the workplace.<sup>2</sup>

1.1.2 On 5 July 1996 the Premier publicly announced the Committee's inquiry, at the launch of Advocates for Workplace Safety. The Premier said that the Committee would undertake a wide ranging inquiry.<sup>3</sup> The Attorney General endorsed the reference to the Committee and placed it within the context of reforms in the area of occupational health and safety introduced by the Government.

The Upper House review will be another step in the evolution towards safer workplaces, with a focus on further improving existing legislation and regulations.<sup>4</sup>

1.1.3 The Attorney General also announced the appointment of Professor Ron McCallum, Blake Dawson Waldron Professor of Industrial Law at the University of Sydney to "conduct an independent review of the *Occupational Health and Safety Act* and report to the Standing Committee".<sup>5</sup>

### 1.2 Conduct of this inquiry

1.2.1 On 30 October 1996 the Attorney General and Professor McCallum attended

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<sup>2</sup> *Legislative Council, Minutes of Proceedings, 26/6/96, p 284.*

<sup>3</sup> "Premier Launches Review into Workplace Deaths", *News Release, 5/7/96.*

<sup>4</sup> "Review Continues Push for Safer Workplaces", *News Release, 5/7/96.*

<sup>5</sup> *Ibid.*

a deliberative meeting of the Committee, to brief the Committee on Professor McCallum's review, and to discuss reporting arrangements for Professor McCallum's review. There was also a discussion about a proposal for the Committee to formally launch its inquiry with a public seminar early in 1997.

- 1.2.2 On 18 February 1997 the Committee held a public seminar at Parliament House to formally launch the inquiry. 19 guest speakers addressed the seminar and there were 160 registered participants. The speakers and seminar participants are listed in Appendix Five. The seminar was designed to enable representatives of Government, business, the union movement, victims of workplace accidents and academics with expertise in occupational health and safety, to clearly state what they saw as the key issues which should be addressed by the Committee during the course of the inquiry. The Committee published the transcript of the seminar proceedings in a report tabled in Parliament on 12 March 1997.<sup>6</sup> It was the Committee's intention that the seminar report would take the role of a discussion paper, provoking discussion and assisting individuals and organisations in the preparation of their submissions to the inquiry.
- 1.2.3 On 2 April 1997 the Attorney General announced the appointment of Mr Richard Grellman, senior partner with KPMG, to inquire into the NSW workers' compensation system. The terms of reference for Mr Grellman's inquiry included the identification of "incentives for employers who actively promote and implement safe work practices to reduce workplace injury". On 16 April 1997 the Attorney General and Mr Grellman attended a deliberative meeting of the Committee to brief the Committee on Mr Grellman's inquiry.
- 1.2.4 At the deliberative meeting on 16 April 1997 the Attorney General presented the Chairman with a copy of the report of Professor McCallum's panel of review.<sup>7</sup> The Committee and the Attorney General also discussed the timetable for the Committee's inquiry. The Attorney General indicated that he would be agreeable to the Committee reporting in two stages, with the first report dealing with the Committee's response to the *McCallum Report*.
- 1.2.5 The Committee advertised for written submissions on 12 April 1997. The closing date for written submissions was originally set as 30 June. The Committee granted a number of extensions to this deadline and by the end of September the Committee had received 40 submissions. The authors of those submissions are listed in Appendix Six.
- 1.2.6 On 23 May 1997 the Committee met with the members of Professor McCallum's Panel of Review of the *Occupational Health and Safety Act*. The

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<sup>6</sup> *Proceedings of the Public Seminar on Workplace Safety*, 18 February 1997, (hereafter *Public Seminar*).

<sup>7</sup> *Review of the Occupational Health and Safety Act 1983: Final Report of the Panel of Review*, February 1997 (hereafter *McCallum Report*).



Committee received a briefing about the issues covered in the *McCallum Report* and there was an opportunity for discussion between Committee members and members of the panel.

- 1.2.7 During July 1997 the Committee undertook visits to a number of regional centres through NSW. The Committee spent two days in Newcastle on 14 and 15 July. The Committee received a detailed briefing about occupational health and safety issues faced by industries operating on the Newcastle waterfront. The Committee received a series of briefings at the BHP steel works and also met with a number of school cleaners on their early morning shift at a local high school. On 16 and 17 July the Committee then spent two days examining health and safety in the coal mining industry. This included discussions with representatives of the Minerals Council, the Department of Mineral Resources and the CFMEU. The Committee visited the Ravensworth mine (open cut) and Newstan colliery (underground). During the week beginning Monday 21 July a number of Committee members travelled to Wee Waa and Tamworth. Two days were spent examining health and safety issues in the cotton industry. Whilst in Wee Waa the Committee met with industry leaders, research scientists and agricultural aviators (involved in aerial spraying). The organisations and individuals from whom the Committee received briefings during these visits are listed in the Appendix Seven.
- 1.2.8 The Committee has visited three States during the course of this inquiry. In July the Committee undertook a brief visit to Melbourne to study some particular features of the Victorian regulatory framework, including health and safety representatives and Safety MAP (Management Achievement Program). The Committee visited a manufacturing firm, Denso, and received a presentation from a small construction company, Super Drives. The Committee also met with WorkCover staff, union representatives and the Minister for Finance and Gaming, the Hon Roger Hallam. In early November the Committee spent two days in Adelaide where the Committee received detailed briefings from senior staff of the South Australian WorkCover Corporation and the Department for Industrial Affairs. The particular issues of interest to the Committee in South Australia were the Safety Achiever Bonus Scheme and health and safety representatives. On 7 November the Committee undertook a one day visit to Brisbane for discussions with senior staff of the Division of Workplace Safety of the Department of Industrial Relations and Training, and the Queensland WorkCover Corporation. The individuals from whom the Committee received briefings are listed in Appendix Seven.
- 1.2.9 In late July the Committee also undertook a number of site visits and received further briefings in Sydney. On 29 July the Committee met with members of the Occupational Health Safety and Rehabilitation Council of NSW. The Council briefed the Committee on its work, with particular reference to the development of regulations and Codes of Practice and tripartite consultation involving Government, employer organisations and

trade unions. The Committee also visited the Sydney Casino, including the new casino which was then under construction. On 31 July the Committee visited the Olympic and Showground construction sites for a full day of briefings about developments in health and safety in the construction industry. The individuals from whom the Committee received briefings are listed in Appendix Seven.

- 1.2.10 The Committee has so far held six days of formal hearings during this inquiry. On 15 July the Committee took evidence in Newcastle. On 23 July a hearing was held in Tamworth. Hearings have been held in Sydney on 5 and 7 August, and 7 and 8 October 1997. The witnesses at these hearings are listed in Appendix Four. In addition to these hearings, on 30 October 1997 the Committee received a briefing from Professor Neil Gunningham from the Australian Centre for Environmental Law at the Australian National University.
- 1.2.11 The Committee held a preliminary discussion about possible recommendations to be included in this report at a deliberative meeting on 22 October 1997. Following that meeting a Chairman's draft report was prepared. The Chairman's draft report was considered by the Committee at its deliberative meeting on 15 December 1997 and following a number of amendments the report was adopted by the Committee at that meeting. The Committee's deliberations are included in the Minutes of Proceedings which are reproduced in Appendix Seven.

### **1.3 Nature of this report**

- 1.3.1 As set out above, it was agreed between the Committee and the Attorney General in April 1997 that the Committee would report on this inquiry in two stages. The Committee's first report would address the issues and recommendations contained in the *McCallum Report*. The Committee's second report would report on the broad range of issues able to be examined under the Committee's terms of reference. It would be expected that the recommendations contained in the Committee's first report, if agreed to by the Government, would be implemented during 1998. The recommendations contained in the Committee's second report, however, would be unlikely to be implemented before the March 1999 NSW general election.
- 1.3.2 In accordance with the agreement between the Committee and the Attorney General, this report focuses upon the issues and recommendations contained in the *McCallum Report*. Chapter Two contains a brief outline of the *McCallum Report*. Chapters Three to Seven reflect the chapters in the *McCallum Report* and contain the Committee's response to the issues raised in the *McCallum Report*. The Committee has deemed it unnecessary to respond to every recommendation contained in the *McCallum Report*. The

Committee has only referred to those issues upon which the Committee has received submissions or evidence, or upon which the Committee has formed its own views. Where the Committee has not commented on specific recommendations contained in the *McCallum Report*, it can be assumed that the Committee has no objection to, or at least no specific views upon, those recommendations.

- 1.3.3 Chapter Three deals with the **Objects** of the *Occupational Health and Safety Act 1983*. This is a brief chapter, as the Committee has received little comment or evidence in relation to this issue. The Committee endorses the rewrite of the current objects of the Act, as recommended in the *McCallum Report*, but highlights the need to retain a reference to the psychological needs of workers.
- 1.3.4 Chapter Four is concerned with the **Duty Of Care** contained in the *Occupational Health and Safety Act 1983*. The Chapter endorses the recommendations contained in the *McCallum Report* for the clarification and simplification of the duty of care provisions and the retention of the substance of the current duty of care and defence provisions. This chapter also includes a discussion of two issues of particular concern to the Committee in relation to the duty of care provisions. The Committee identifies the duty of care owed by the owners or occupiers of domestic premises and middle managers as issues requiring further consideration in the second part of the Committee's inquiry during 1998.
- 1.3.5 Chapter Five deals with the area of **Enforcement and Regulation**. The chapter begins with a discussion of the importance of cultural change within organisations which have been able to achieve best practice in health and safety and a range of mechanisms for encouraging best practice. These include: incentives built into workers compensation premiums; the involvement of employer organisations and unions in the identification of the five or six key means for improving health and safety in each industry; and the potential for an effective publicity campaign to raise public awareness of the importance of health and safety. The chapter then goes on to discuss a number of specific issues about enforcement and regulation raised in the *McCallum Report*.
- 1.3.6 Chapter Six discusses the related issues of **Consultation and Training**. The chapter responds to a number of recommendations contained in the *McCallum Report*, endorsing the critical importance of consultation and recommending the establishment of positions of health and safety representatives for both employees and employers.
- 1.3.7 Chapter Seven deals with **Difficulties and Complexities** of the Current *Occupational Health and Safety Act*. The chapter endorses the *McCallum Report's* recommendation for the rewrite of the current act in plain English.

- 1.3.8 Chapter Eight is not related to the *McCallum Report*. The Committee has chosen to add this chapter to include a brief discussion of a number of other issues which have emerged during the Committee's inquiry and contains recommendations which the Committee would like to see implemented during 1998.
- 1.3.9 It must be emphasised that this report is limited in its scope. The Committee's terms of reference certainly enable the Committee to undertake a wide ranging inquiry traversing a range of issues in relation to workplace safety. The Committee will be further pursuing its inquiry during 1998. The Committee will be releasing an *Issues Paper* in February 1998 which will outline the particular issues which the Committee will be examining during the second part of the inquiry. Some of the particular issues upon which the Committee will be seeking further submissions from interested individuals and organisations include:
- the changing nature of work and the workplace, the impact of working from home, work intensification and emerging workplace health and safety issues of stress and violence, and how occupational health and safety legislation should be adapted to meet these challenges;
  - the social and economic costs to the community of death and injury in the workplace, and the collection, use and dissemination of data on workplace death and injury;
  - the particular occupational health and safety needs of people with disabilities, women, people from non-English speaking backgrounds and Aborigines and Torres Strait Islanders;
  - how to encourage cultural change to improve workplace safety and the role of risk management systems in achieving best practice in workplace safety; and
  - the future of Robens style legislation and alternative legislative models such as the systems approach being adopted in European occupational health and safety legislation.

# Chapter Two

## Overview of the McCallum Panel

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### 2.1 The McCallum Panel of Review

2.1.1 As outlined in Chapter 1, the Panel of Review of the *Occupational Health and Safety Act* was charged by the Attorney-General and Minister for Industrial Relations, the Honourable JW Shaw, QC, MLC, with reviewing the *Occupational Health and Safety Act*. The terms of reference for the Panel were:

“Consider and report to the Minister for Industrial Relations on:

- (a) the validity of criticisms of the *Occupational Health and Safety Act* 1983 in terms of its objectives;
- (b) provisions of the Act which could be improved to better facilitate achievement of the objectives of the Act; and
- (c) elimination of any complexities within the Act”.

2.1.2 The Panel comprised 8 members, representative of the major interest groups. Members of the Panel were:

- **Professor Ron McCallum**, *the Blake Dawson Waldron Professor in Industrial Law of the Faculty of Law of the University of Sydney (Chair)*
- **Ms Sylvia Kidziak**, *Chair of the Occupational Health, Safety and Rehabilitation Council of New South Wales*
- **Ms Mary Yaager**, *Labor Council of New South Wales*
- **Mr Terry Hannan**, *Labor Council of New South Wales*
- **Mr Mark Fogarty**, *Executive Manager, Australian Chamber of Manufacturers (New South Wales Branch)*
- **Mr Garry Brack**, *Executive Director, The Employers Federation of New South Wales*
- **Ms Suzanne Jamieson**, *Senior Lecturer in Industrial Relations, the University of Sydney*
- **Ms Wendy Thompson**, *Manager, Occupational Health and Safety Prosecutions Branch, WorkCover, New South Wales*

- 2.1.3 The Panel conducted its review over a four and a half month period and made 42 recommendations. As Professor McCallum stated at the Public Seminar held on Workplace Safety at Parliament House, on 18 February 1997, the role of Panel was:

*to provide a legal brief on the Occupational Health and Safety Act 1983.*

- 2.1.4 In later discussions with Professor McCallum he indicated that his report provided “a snapshot of the Act as at February 1997”. Some of the recommendations made by the Panel of Review have already been adopted, and included in the *Occupational Health and Safety Amendment Act 1997*. The recommendations included in the Amendment Act are:

#### Chapter 4 - Duty of Care

**Recommendation 4:** The Panel recommends that s15 of the *Occupational Health and Safety Act* should be amended to indicate that it creates only one continuing offence.

**Recommendation 5:** The Panel recommends that s17 which places a generic duty upon controllers of workplaces should be rewritten to state with greater clarity the nature of the duty and to whom the duty is owed.

- 2.1.5 The Report was presented to the Attorney General in February 1997. It was not possible to reach unanimity on all the recommendations made by the Panel, and an addendum entitled “Comments and Qualifications” of both the Employer Representatives is included in the Report.

## 2.2 Summary of the McCallum Report

- 2.2.1 The Panel implicitly supported the proposition that every worker has the “right to a safe and healthy workplace as a non-negotiable legal right which should not be subject of collective bargaining” (William’s Report of 1981, p.20). The Panel found that the Act was unduly complex and that the current objectives of the Act are limited in two aspects:

- (1) They “fail to reflect adequately the principles of prevention, equity, participation and acceptance of responsibility” as they lack reference to a consultative relationship between employers and employees.
- (2) They fail to “provide for and encourage progressively higher standards of occupational health and safety”.

2.2.2 Hence, the 1983 Act was unable to ensure its intended universal coverage for the purposes of protection, obligation and continuing best practice of OHS in all workplaces. The Panel's intent was to clarify the legislation, "encourage sensible management of risk, commitment and ownership and most importantly reinforce the need to change to safe work practices".<sup>8</sup>

The recommendations clarify the statutory obligations of all workers under the Act and promote proactive strategies designed to increase health and safety in all workplaces:

In particular, the Panel argues for enhanced workplace consultation; a stronger focus on training, education and publicity; a broader and more flexible approach to penalties for breaches of the Act and regulations; and a modernisation of the *Occupational Health and Safety Act* to eliminate unnecessary technicalities and to make its provisions more easily understood and accessible by persons at workplaces.<sup>9</sup>

2.2.3 The comments by Mr Brack and Mr Fogarty appear to be based on a fundamental objection to the way in which the duty of care is framed under the *Occupational Health and Safety Act*. All other objections flow from what the employer's see as the principal flaw in the Act. Other issues of concern were:

**Mr Fogarty:**

- employers' will have unlimited liability for employees;
- that the employees' responsibility is under prescribed; and
- that amendments are really aimed at compliance rather than improvement.

**Mr Brack's** reservations:

- questions the validity of OHS statistics (numbers and causation);
- emphasises that education was vastly more effective than enforcement measures such as on-the-spot fines;
- claims that 'consultation' cannot be legislatively prescribed but rather that it is the product of a co-operative culture; and
- is particularly concerned that the amendments should differentiate between the size of the employer's enterprise.

## 2.3 Research undertaken by the Panel

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<sup>8</sup> P.22 *McCallum Report*  
<sup>9</sup> P.ix *McCallum Report*

- 2.3.1 In addition to the 27 submissions made to the Review of the *Occupational Health and Safety Act*, the Panel also considered a body of recent literature on occupational health and safety. Professor McCallum referred the Standing Committee on Law and Justice to the bibliography contained in the Report, and suggested that it provided a useful reference point. Of particular interest to the Committee was a paper commissioned by the New South Wales WorkCover Authority in 1996, entitled *Enforcement Measures for Occupational Health and Safety in New South Wales: Issues and Options*. The authors of the paper are Neil Gunningham, Richard Johnstone and Peter Rosen.
- 2.3.2 The paper reviewed the current system of enforcement measures for occupational health and safety, as well as the enforcement strategies utilised by the WorkCover Authority. It made 44 recommendations aimed at enhancing and making more effective WorkCover's enforcement activities.
- 2.3.3 The Committee found this paper extremely useful, because it considered not only the policy aims of the legislation, but also the implementation, administration and effectiveness of such policy. It also highlighted current issues within WorkCover that needed to be addressed. As the Committee is interested in ensuring that any recommendations for reform will be administratively successful as well effective, the paper provided the necessary detail, which drew together legal principles and implementation. The paper has been referred to in various chapters of this Report.



# Chapter Three

## Objects of the Act

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### 3.1 Current objects of the *Occupational Health and Safety Act*

3.1.1 The current objects of the *Occupational Health and Safety Act* are:

- s.5 (a) to secure the health, safety and welfare of persons at work;
- (b) to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work;
- (c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs; and
- (d) to provide the means whereby the associated occupational health and safety legislation may be progressively replaced by comprehensive provisions made by or under this Act.

3.1.2 The *Occupational Health and Safety Amendment Act 1997* amends the objects of the *Occupational Health and Safety Act* to delete subsection (d) and insert instead:

- (d) to protect persons (whether or not at a place of work) against risks to health or safety arising from the use of plant that affects public safety.

This amendment has not yet commenced.

### 3.2 Recommendations of the McCallum Panel

3.2.1 The objects of the Act be replaced with the following:

- (a) To secure and promote the health safety and welfare of all persons at work.
- (b) To protect all persons at a place of work against risks to health or safety.
- (c) To promote safe and healthy work environments and systems of work which are free from disease, illness and injury.

- (d) To provide for the involvement of employer and employee consultation and cooperative participation in achieving the object of the Act.
- (e) To protect all persons at work by the identification, assessment and elimination or control of risk.
- (f) To provide for the collection and dissemination of data which provides practical assistance to employers and employees in their efforts to eliminate risks of injury and disease at places of work.
- (g) To develop and promote education in the workplace and community awareness on matters relating to occupational health and safety.
- (h) To provide a legislative framework which allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices.
- (i) To provide for the special occupational health and safety needs of women, young workers, persons of non-English speaking backgrounds, disabled persons and persons of Aboriginal or Torres Strait Islander background.

3.2.2 The *McCallum Report* points out the significance of the objects of a statute in alerting readers to the purpose for which the statute has been enacted and as an aid to interpretation. Specific reference is made to section 33 of the *Interpretation Act 1987* which provides that:

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

3.2.3 The majority of the Panel of Review argued that the current objects of the *Occupational Health and Safety Act* do not reflect a modern approach to occupational health and safety in that they “fail to reflect adequately the principles of prevention, equity, participation and acceptance of responsibility.”<sup>10</sup> Ms Sylvia Kidziak, Chairperson of the Occupational Health

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<sup>10</sup>

*McCallum Report*, p 4.

Safety and Rehabilitation Council, elaborated on the concerns of the majority of the Panel when the Committee met with the members of the Panel on 23 May 1997. Ms Kidziak emphasised the changes which have occurred to the workplace and to occupational health and safety since the enactment of the *Occupational Health and Safety Act* in 1983 and the need for the objects of the Act to keep pace with these changes. She also referred the promulgation of a range of regulations under the Act.

It is now some 14 years since enactment of the *Occupational Health and Safety Act*. While we consider changes to the primary Act in New South Wales concerned with occupational health and safety, we have in parallel a number of changes. We have a changing work force in a changing industrial environment. The proportion of workers in industry has been steadily decreasing, with an increase in the numbers of people seeking work, and at the same time job profiles have been changing.

There is also a range of new technologies which in themselves are changing faster than we can learn to use them. For example, approximately one-third of the work force now uses computers. There are also new and different hazards in workplaces. Our learning has taught us that some hazards that were taken for granted - for example, working with asbestos without correct safety procedures - is no longer acceptable or lawful.

Work organisation has also changed, with the development of new management models, the QA approach, and different reporting structures. Businesses have become leaner in order to survive. While these trends affect the industrial structure and work organisation, the work profile also has changed dramatically. Organisations operate with fewer people; young workers expect safer workplaces; the industry history of paying workers salary loading for "danger work" does not sit within the requirements of model workplace legislation; and a new, younger work force will change jobs more rapidly and retire earlier - at the same time as all these other changes are taking place.

The workplace also is changing. More workers are requesting the option to work at home, part time, or in job sharing. There has also been a change in the types of injury now being compensated. For example, since the enactment of the Act, we have also had the RSI wave, or epidemic as it was called. There has been lengthy debate on compensability for stress originating from the workplace. There has been recognition of the high cost of back injuries. And there have been lengthy court cases and debate on the dangers of smoking in the workplace.

Since enactment, there have also been promulgated a series of regulations under the Act which place requirements on workplaces with regard to matters such as: specific requirements for treating of hazards; technical standards; provision of training; risk management; et cetera. These have been supplemented with a plethora of codes of practice and guidance material. I mention these matters to add weight to the need for changes to the objects of the *Occupational Health and Safety Act* to be more clearly reflective of the modern approach which is now being taken to safety and health in workplaces in Australia.

The objects of any Act are of crucial importance. They alert readers to the purpose for which the Act was enacted. The panel has therefore developed a new set of objects which more clearly reflect the modern approach to occupational health and safety; requirements in current and proposed regulations under the Act; an upfront guide as to the necessary basic requirements to promote and work towards safer workplaces in New South Wales; a framework for regulation development; and, finally, an aim to reduce the still unacceptable level of occupational injury and disease in New South Wales.<sup>11</sup>

- 3.2.4 Mr Brack and Mr Fogarty raised concerns about a number of the specific new objects recommended by the majority of the Panel. For instance, Mr Brack suggested that the recommended paragraphs (b) and (c) could impose wider obligations upon employers and that paragraph (d) was more of a strategy than an object. However, while Mr Brack and Mr Fogarty objected to some of the specific new objects recommended by the majority of the Panel, they did not question the need for the current objects to be reviewed and endorsed a number of the other specific new objects recommended, including paragraphs (a), (f) and (g).<sup>12</sup>

### 3.3 Submissions and evidence received

- 3.3.1 Only two of the submissions received by the Committee specifically discussed the objects of the Act. The NSW Nurses' Federation agreed that the current objects should be expanded but said that it was essential that the current section 5(1)(c), which refers to the physiological and psychological needs of workers be retained.

Retention of the existing object 5(1)(c) is essential since work can significantly impact on mental as well as physical well being. It is important that employers realise that both physical and psychological risk must be addressed. Situations impacting on mental health are found in the health and other industries, eg nurses being assaulted by patients or others, and train drivers unable to prevent hitting and killing people who are on the tracks by accident or design.<sup>13</sup>

- 3.3.2 The submission received from the Department of Health also expressed concern about any possible removal of the current section 5(1)(c), in relation to the psychological needs of workers. The submission suggested that, in view of the increasing number of stress related workers compensation claims and changes to the workplace which impose more stress upon workers, it was more important than ever to safeguard the mental health of employees.

While an enlightened view of occupational health, safety and welfare would consider mental and psychological aspects of the working environment in

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<sup>11</sup> *Transcript*, 23/5/97, pp 6-7.

<sup>12</sup> *McCallum Report* pp 137-138 and 145.

<sup>13</sup> *Submissions*, Volume Five, NSW Nurses' Federation, p 24.

relation to the individual, as well as the physiological aspects, in practice this is frequently not the case. Such a lack is reflected in the increasing number of claims, and their associated costs, in the area of occupational stress...

In any event, with the seemingly poor recognition of the impact of increasing shiftwork and extended hours on the occupational health and safety (OHS) of employees, and the increasing rate and pace of workplace change, the need to safeguard the mental health of employees is greater than ever.

It is recommended that either a clear definition of OHS covering the mental/psychological aspects of employee health is included in the Definitions section of the Act, or an appropriate statement is incorporated into the Objectives.<sup>14</sup>

- 3.3.3 The Department of Health's Human Resource Policy Analyst, Ms Frances Waters, also referred to the proposed removal of any reference to the psychological needs of workers in evidence before the Committee on 7 October 1997.

What surprised me most [about the *McCallum Report*] was the suggested removal of any reference to the psychological welfare or needs of persons at work. In the final report there was a whole new draft of the section on the objectives of the Act, and there was no reference whatsoever made to the psychological welfare of persons, which provisions exist in the current objectives.<sup>15</sup>

- 3.3.4 In addition to the specific references to the objects of the Act referred to above, a number of submissions made reference to the need for the Act to accommodate issues such as stress and violence. The submission received from Whistleblowers Australia highlights the psychological and stress-related injuries suffered by whistleblowers.<sup>16</sup>

- 3.3.5 The draft submission received from the Labor Council of NSW quoted statistics from the Data Analysis Research Unit of the NSW WorkCover Authority that show violence or the threat of violence is the most common cause of occupational stress.<sup>17</sup>

- 3.3.6 The submission received from the NSW Teachers Federation provided a summary of a survey conducted by the Federation on work related stress. The survey reported that 18% of respondents had a medically diagnosed stress disorder, with many respondents reporting that workload was a major cause of stress. The submission by the Teachers Federation also contained examples of violent incidents perpetrated by students, upon teachers and which resulted in stress-induced worker's compensation claims.<sup>18</sup> Ms Joan Lemaire, Industrial Officer with the NSW Teachers Federation presented the

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<sup>14</sup> *Submissions, Volume Six*, NSW Health, pp 1-2.

<sup>15</sup> *Transcript, 7/10/97*, p 6.

<sup>16</sup> *Submissions, Volume One*, Whistleblowers Australia.

<sup>17</sup> *Submissions, Volume Five*, Labor Council of NSW, p 58.

<sup>18</sup> *Submissions, Volume Five*, NSW Teachers Federation, pp 9-11.

Committee with a number of case studies of violence faced by teachers when she gave evidence before the Committee on 8 October 1997.<sup>19</sup>

- 3.3.7 The submission received from Mr Jim Bieler pointed out that issues of stress and violence occur in a range of public sector organisations where employees have face to face contact with members of the public who may be frustrated with policies and systems.

In many public service employment positions, many of the employees have to deal with the general public. Some of these clients are recognised as potentially volatile in temperament. In some situations these clients become frustrated with the policies and systems that they must deal with in their association with the public servants. Examples of this situation occur everyday in the Department of Social Security, the Department of Community Services, Police Service, Department of Correctional Services, Department of Juvenile Justice, Health Services and many more.<sup>20</sup>

#### **Recommendation 1**

**The Committee recommends that the current objects of the *Occupational Health and Safety Act* be reviewed to ensure that they reflect adequately the principles of prevention, equity, participation and acceptance of responsibility provided that, in any review, reference to the psychological needs of workers is retained.**

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<sup>19</sup> *Transcript*, 8/10/97, pp 1-19.

<sup>20</sup> *Submissions, Volume Two*, Mr Jim Bieler.

# Chapter Four

## Duty of Care

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### 4.1 Current duty of care obligations

#### 4.1.1 The duty of care provisions have been described as the “centrepiece” of the *Occupational Health and Safety Act*.

The objective of improving workplace safety by the recognition and allocation of responsibility to ensure safety to specified persons is the centrepiece of the Act. The key provisions of the NSW statute which set out the obligations are ss 15, 16, 17, 18, 19 and 50, otherwise known as the “duty of care” or “general duties” provisions. The duty of care is founded on two principles. The first is that there must be responsibility for the creation and control of risk in the workplace. The second is that the action taken to control the risk should be proportional to the risk involved. The Act not only codifies for specified persons the common law duty of care, it also elevates that duty to an absolute obligation, subject to certain defences.<sup>21</sup>

#### 4.1.2 Section 15(1) provides that:

Every employer shall ensure the health, safety and welfare at work of all his [sic] employees.

Section 15(2) lists (but not exhaustively) a range of ways in which an employer may breach the provisions of section 15(1). Section 16 requires that employers ensure the health and safety of persons other than employees at places of work. Section 17 provides that persons in control of workplaces, plants and substances used by non-employees are to ensure the health and safety of non-employees. Section 18 provides that manufacturers and suppliers are to ensure the safety of plant and substances used at work. Section 19 provides that employees at work “shall take reasonable care for the health and safety of other persons at his [sic] place of work” and co-operate with employers.<sup>22</sup> Section 50 provides that where a corporation contravenes the Act, each director and each person concerned in the management of the corporation, shall be deemed to have contravened the relevant section unless certain defences are satisfied.

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<sup>21</sup> *McCallum Report*, p 37.

<sup>22</sup> Note the absence of gender neutral language throughout the Act. (See Chapter Seven)

4.1.3 Section 53 provides that it shall be a defence to any proceedings against a person for an offence against the Act that:

- (a) it was not reasonably practicable for him [sic] to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
- (b) the commission of the offence was due to causes over which he [sic] had no control and against the happening of which it was impracticable for him [sic] to make provision.

The defences available to a director or person concerned in the management of a corporation under section 50 include that the person was not in a position to influence the conduct of the corporation in relation to the contravention, or that the person used all due diligence to prevent the contravention.

4.1.4 The operation of the duty of care and defence provisions was explained in some detail by the Manager of the Prosecutions Branch of the WorkCover Authority, Ms Wendy Thompson, when the Committee met with the members of the McCallum Panel of Review on 23 May 1997.

Section 15 places on an employer a duty to ensure, the health, safety and welfare of all employees while at the employers place of work. The duty reflects the concept that every person in employment has a right to adequate protection against ill health or injury while at a place of work. It is commonly reflected in the saying: everyone has a right to return home in the same state that they attended work that morning.

The terms of the Act are such that the duty of the employer is to secure the safety of an employee - and that means all employees, whether they be diligent, whether they be careless, whether they be young, whether they be newly trained, or whether they be old and experienced hands. The duty on that employer is to ensure the safety of all of those employees.

The nature of the obligation is absolute. In legislative terms, where an obligation is absolute, that means that it is not necessary to have an understanding that you were doing a wrongful act. In the terms of the statute, the Act itself creates the offence. That is to say, there is no defence of an honest and reasonable mistake. The only defences that are provided for are those contained in section 53, and I will come to those shortly and deal with them separately.

The duty to ensure safety elevates the common law of an employer to take reasonable care, and it is absolute. Where an employee is negligent, or careless, in what he does, that may or may not discharge the duty of an employer. The way the Act is framed, there are separate and discrete duties placed on every person who has a role to play in that particular workplace. The duties are concurrent. It will always be a question of fact as to whether one duty is fulfilled by the actions of that particular person.



The statutory offences that are available under the Act are found in section 53. The first defence is that it was not reasonably practicable for an employer to comply - and that is an objective test in law about what an objective reasonable man would do in those circumstances. Of course, it is not taking the concept to elimination of risk at any cost; it is the cost commensurate with the risk that exists. The other defence available is that the offence was beyond the control of that particular employer.

It is interesting to note the difference in terms of the standard of proof required. Although the Act creates an absolute duty, that duty must be proven to the criminal standard; that is, beyond reasonable doubt. Only if an offence is proven to that standard is it necessary for an employer to rely on one or both of the two defences, and the s53 defences need be proved only to the civil standard, that is, on the balance of probabilities. If a defence is proven to the civil standard, then that employer is found not guilty.

So, the way the Act operates is this. It creates a duty on an employer. If it is alleged that employer has committed an offence, then it must be proven to the criminal standard that offence did occur within the terms of the Statute. It is then open to that employer to raise one of the two defences available, and he need only discharge that proof on the balance of probabilities.

It is frequently said that the fact an accident occurred constitutes a breach of the Act. That is simply not correct. The mere fact that an accident occurs is not sufficient to found a breach. There must always be demonstrated to be, to the criminal standard, a causal nexus between the creation of that risk and the act or omission of a particular employer, and it is a very hard test indeed.

The duty of an employer cannot be delegated. If you bring a subcontractor in, you bring another person into your workplace, you cannot say that you have then discharged the whole of your duty. You may go some way down the track to discharging that duty, but you cannot wholly delegate that duty. The concept of reasonable foreseeability is relevant in terms of the defences that are available under section 53. That is, in a nutshell, what are the nature of the obligations of an employer under sections 15 and 16.<sup>23</sup>

## 4.2 Recommendations of the McCallum Panel

### 4.2.1 Specific Recommendations

**Recommendation 2:** The Panel recommends that sub-section 15(2), which specifies particular safety requirements, be removed and placed elsewhere in Part 3 of the Act. This new provision would provide generic guidance to all duty holders.

**Recommendation 3:** The Panel recommends that penalty provisions be moved into sub-section 15(1) and the remaining sub-sections renumbered.

**Recommendation 6:** The Panel recommends that references to non-domestic premises be removed from the duty of care provisions.

**Recommendation 7:** The Panel recommends that as the terms access and egress used in s.17 are outdated precepts, different wording should be used.

**Recommendation 8:** The Panel recommends that s.17 be amended to provide a duty on owners and occupiers of domestic premises to take 'reasonable care' for the safety of persons who are carrying out work at the premises and/or are using plant and substances provided by the owner/occupier.

**Recommendation 9:** The Panel recommends that s.18, which places a duty on manufacturers and suppliers, should be written in simple terms. There should also be clarification of the responsibilities of a manufacturer to advise of any safety risk.

**Recommendation 10:** The Panel recommends that the wording in sub-section 19(b) be rewritten in clear language.

**Recommendation 11:** The Panel recommends that a new section be introduced into the Act which captures the 'middle ranked' managers of a corporation.

**Recommendation 13:** The Panel recommends that the term 'a person concerned in the management of a corporation', which is contained in s.50, be more clearly defined in order to clarify the persons to whom this provision applies.

**Recommendation 14:** Section 53, which specifies the defences of 'not reasonably practicable' and 'beyond the control of the person' should remain unchanged. The Panel believes the exclusion of the reference 'to reasonably practicable' within the duty of care provisions has strengthened the operation of the Act. The separation of defences available does not place a

greater burden on persons charged with obligations under the Act.

4.2.2 The recommendations made by the majority of the McCallum Panel of Review were aimed at achieving a:

tightening of the existing provisions in the Act so that the nature of the obligations imposed and the persons responsible are clearer.<sup>24</sup>

The majority of the Panel reasoned that:

For the Act to be effective, the scope and allocation of responsibility must be realistic and meaningful. It is of fundamental importance that the obligations are placed on clearly identifiable persons who can reasonably be held responsible for safety matters. The obligations should be such that all workplaces are offered equal safety protection.<sup>25</sup>

### 4.3 Clarification and Simplification

4.3.1 Recommendations 2, 3, 7, 8, 10 and 13 of the *McCallum Report* were essentially concerned with clarification and simplification of the duty of care provisions, so as to enhance clarity, accessibility and coherence. Mr Brack and Mr Fogarty expressed agreement with the substance of these recommendations, provided that any amendments did not change the current meaning of the legislation.<sup>26</sup>

4.3.2 A number of submissions received by the Committee expressed support for moves to clarify and simplify the Act. By way of example, the submission received from Advocates for Workplace Safety stated that:

Advocates agrees with the recommendations of the Panel of Review that sections under Chapter 4- Duty of Care, should be re-written in simple terms, so as to give greater clarity to the roles and responsibilities of both employers and employees.<sup>27</sup>

#### **Recommendation 2**

**The Committee recommends that the duty of care provisions contained in sections 15 - 19 and 50 of the *Occupational Health and Safety Act* be simplified and clarified.**

### 4.4 Duty of care and defence provisions

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<sup>24</sup> *McCallum Report*, p 38.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, pp 138-139 and 145.

<sup>27</sup> *Submissions, Volume Two*, Advocates for Workplace Safety, p 13.

- 4.4.1 The majority of the McCallum Panel of Review expressed strong support for the substance of the current duty of care and defence provisions to remain unchanged. Recommendation 14 was included in the *McCallum Report* as a direct response to a criticism received by the Panel that the current duty of care provisions provide an unreasonable burden upon employers. Mr Brack and Mr Fogarty expressed strong disagreement with recommendation 14 of the majority of the McCallum Panel of Review. Both Mr Brack and Mr Fogarty called for section 15 of the Act to be amended to contain reference to “reasonable practicability”.

We are strongly opposed to the proposed findings in this draft recommendation. More than any other provision in the existing legislation this provision highlights the philosophical failure of the existing law. Section 15 should be recast so as to require employers to “do all that is reasonably practicable” to secure the health and safety of persons at work and to protect other persons at a place of work against risks to health or safety arising out of the activities of persons at work. The effective reversal of the onus of proof, created by the combined effect of section 15(1) and section 53, is another denial of natural justice through the imposition of an unreasonable burden in section 15(1) which must then be rebutted by the defendant using the defences in section 53.<sup>28</sup>

- 4.4.2 When the Committee met with members of the McCallum Panel of Review on 23 May 1997, Mr Brack elaborated on his concerns about the operation of the current duty of care and defence provisions. Mr Brack referred to the problems faced by small business in complying with the duty of care imposed by section 15. Mr Brack also contrasted the duty of care provisions under the NSW Act with the obligations imposed upon employers in European health and safety legislation.

It seems to me that places employers in a most invidious position where, if people can artificially say: accident has occurred, employer is guilty under section 15, using the defences available under section 53, they are not adequate because you should have had a safe system of work, and you did not have it because this person did not have the bottle nailed to the ground so that he could not move it, or there was not somebody standing by him and looking over his shoulder by way of supervision and prevented him by raising the finger and saying, "Uh, uh. No, you're not allowed to do that."

In these circumstances, we see that there are practical issues that have to be contemplated by the legislation, not merely a desire for successful prosecutions against employers. Having said that, we are strongly of the view, as I said before, that there are employers who fail to do the right thing; who fail to have successful strategies in place.

Then one needs to look to larger businesses against smaller business, to see what their relative resources and expertise levels are. It is easy, then, to

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*McCallum Report*, p 140.

recognise that larger businesses often have very significant resources. Some companies have occupational health and safety specialists attached to every working unit in what could be a very large business, but the range is down to small businesses where the knowledge and the responsibility reside in one person alone. Now, that one person running a small business may well have to know an enormous body of regulatory material; and, because of the way the legislation is framed in section 15, that employer has to ensure a safe system of work, ensure a workplace that is free of risk to the safety, health and welfare of that employee. That is an enormously onerous provision.

In Europe, they have to take reasonable measures to assure the safety, health and welfare of an employee. They do all things that are reasonable. In Australia, we say, by section 15, that the employer has to ensure. In other words, there is absolute obligation, as was reported earlier in the discussions of the report. There is an absolute obligation. Then, if you get convicted, you can, by reversal of the onus of proof, you can try to get yourself off the hook by demonstrating that it was not practicable.

One of our concerns is the separation of section 15 and section 53. Firstly, you are prosecuted on what is an absolute obligation, notwithstanding the criminal standard of proof. The prosecution does not have to demonstrate that it was not reasonably practicable or that it was reasonably practicable. The prosecution demonstrates that this absolute obligation was breached. You might be a smaller employer, without the resources available to a large employer, and with people working at a remote site, and the Act recognises a lower standard of obligation on employees than it does on employers.

Or, indeed, where an employee makes a breach, the prosecutors say, "The employee's breach can be explained by the employer's failure to have a safe system of work and to educate and train this employee to the hilt, so that the accident could not have taken place if that had happened." In my view, that is artificial. So what we are looking for, then, is something that is practicable, that does move us along the path of greater workplace health and safety.<sup>29</sup>

- 4.4.3 Professor McCallum and Ms Thompson provided a detailed response to the concerns raised by Mr Brack and Mr Fogarty. Professor McCallum said that the duty of care and defence provisions in the NSW Act were based upon the equivalent provisions in the English *Safety and Health at Work Act 1974* which implemented the recommendations of the Robens Report. Ms Thompson stated that the inclusion of "reasonably practicability" in section 15 would have little practical effect. She emphasised that no prosecution is commenced where WorkCover is aware that a defence of "reasonable practicability" exists under section 53.

COMMITTEE: Professor McCallum, is what seems to be the absolute liability of the employer under the present legislation unique to New South Wales?

Professor McCALLUM: The purpose of sections 15 and 53 is to ensure that employers do all that is reasonably practicable to prevent an unsafe

workplace. The way it operates is that it places on an employer a duty to make a workplace safe and without risk or hazard. That is set out in section 15(1). For there to be established a breach of that duty, the prosecution must prove all the elements of that breach beyond reasonable doubt. That is a high onus. It is the same as in a murder doubt. If that cannot be proved on the evidence, then it is not proven.

Even where the elements of the offence are proved beyond reasonable doubt, it is open to the employer to prove, only on the balance of probabilities, that what she, he or it did was reasonably practicable. If the employer proves that, on the balance of probabilities, the case is lost for the prosecution.

We copied the English Act. The Robens report that you heard mention of this morning was handed down in 1972. In 1974, we had the Safety and Health at Work Etc Act in England. It actually had "Etc" in the title. Section 2 is equivalent to section 15, but you must read it with section 40, which is like our section 53. Although "reasonably practicable" appears in the text of section 2, section 4 makes it clear that the prosecution must prove all the elements of the charge, other than reasonable practicability, beyond reasonable doubt, and then it is up to the employer to prove, on the balance of probabilities, that she, he or it did what was reasonably practicable.

That has always been the situation in the United Kingdom. It is currently the situation in Queensland and in New South Wales. It is not the situation in Victoria, South Australia, Western Australia and, as I understand the position, Tasmania, where the prosecution must prove all the elements of the offence, including reasonably practicable, beyond reasonable doubt.

This whole matter was revisited by the Industry Commission's report No. 47 of 1995 or 1996, entitled "Work, Health and Safety: an inquiry into occupational health and safety". In chapter 4, the legislation of all the Australian States was examined, and New South Wales and Queensland - which have the provision that the employer has the defence of proving on the balance of probabilities what the employer should know, in other words, what is reasonably practicable within his, her or its work force - were upheld by the Industry Commission as models.

In the Canadian provinces, as I understand the position, the way the defences operate is mixed. Mr Brack mentioned Europe. I do not want to go into the Nicene interstices of Europe other than to say that there the common law system does not operate. The tribunals and courts operate on an inquisitorial process. Often this process begins with guilt, until proven innocent. Within an inquisitorial system, that makes sense. I do not think it is helpful to go down that track.

The question is whether we remain with what the Industry Commission and the United Kingdom have regarded as a successful law, or whether we amend our law and place "reasonably practicable" in the elements of the prosecutor's proof, which is done in Victoria, South Australia and Western Australia. I lean towards the Industry Commission, the United Kingdom and the 13 years of successful practice in this State. It is really a matter for the Committee as to whether it wishes to recommend a change in this area of the law or not.

Mr BRACK: The summation of all of that, I think, is that an employer has an absolute obligation under section 15 to ensure - "ensure" being an inflexible term - the health, safety and welfare of persons at work. And then, if they successfully prosecute you on that, you have a defence which reverses the onus of proof. If indeed we are talking about doing all that is practicable, why is it not incorporated into section 15 that is the obligation, that is what we are really talking about, instead of this artificial notion that you have to ensure perfection, and we will prosecute you on that term, admittedly to the standard of criminal proof, but it does not help that the test is wrong. If one made the test right and then applied the standard of criminal proof, then fair enough, the employer would be left in the position of being free from the ultimate dangers of all of that.

COMMITTEE: Ms Thompson?

Ms THOMPSON: The Act has been in place since 1983. The terms of reference that we were given asked us to look at how the Act had worked. We picked up on what the Industry Commission recommended. It would be a reversal for us now to suggest that we should delete what has been a very workable section within the Act, when that section has made New South Wales one of the leaders in terms of safety legislation and safety enforcement.

The term "not reasonably practicable" is in some of the States' legislation. It is a very small duty to satisfy the test of reasonably practicable in order to be able to continue with the prosecution. One simply has to demonstrate that a reasonable person would have put in a particular system before the matter then proceeds. Then you go back to the defence situation that you have in our Act but which operates in the other States as well.

The reality is that no prosecution is taken where a defence is known to exist. So it is not a case that you are automatically prosecuted, and then halfway through it is recalled, "Oh, there is a defence." It is more a case of one assessing the matter, and if there is a defence then of course the prosecution does not proceed; it stops. The moment that defence is apparent and real, that is the end of the matter. There is no point proceeding because the defence is going to be established.<sup>30</sup>

- 4.4.4 As highlighted by Professor McCallum in the quotation above, the Industry Commission reviewed the duty of care and defence provisions in each of the Australian States in its review of *Work, Health and Safety* in 1995. The draft report of the industry Commission explicitly endorsed the NSW duty of care as a more efficient approach than that operating in other jurisdictions. The Industry Commission identified the duty of care as one reason for the greater success rate of prosecutions under the NSW Act as compared with other jurisdictions.

In NSW the onus of proving what is "reasonably practicable" is on the employer (not the government). As a result NSW has had greater success

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ibid, pp 47-49.

in the range and number of its prosecutions than the other jurisdictions, although there are other factors which contributed to its success.

The Commission considers that this is more efficient than the approach in other jurisdictions as employers should be better informed of what is and is not possible in their workplace. Reversing the onus of proof places no greater obligation on an employer than that implied by the duty of care itself. It merely emphasises that employers have to actively pursue their duty - and, if necessary, to demonstrate the steps that were taken.

The Commission recommends that all jurisdictions adopt the NSW expression of the duty of care, placing an onus on the employer to show that it was not "reasonably practicable" to do other than what was done.<sup>31</sup>

4.4.5 Although the Industry Commission withdrew the explicit recommendation for other jurisdictions to adopt the NSW duty of care in its Final Report, the Commission continued to express strong support for the duty of care as it exists in NSW. The Commission reiterated that it is more efficient for the holder of the duty of care rather than the prosecution to have to establish what is reasonably practicable. The Commission also concluded that the inclusion of "reasonable practicability" in the defence did not reverse the onus of proof, as the prosecution is first required to prove that a breach of the duty of care has occurred.

The Commission considers it is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.

The prosecutor would still have to first establish that a breach had occurred. Only then would the duty holder have to show that it was not reasonably practicable to have done more. In NSW the adoption of reasonably practicable as a defence has increased the range and number of successful prosecutions (although there are other factors which contributed to this success).

In the Draft Report, the Commission proposed the adoption of the approach used in NSW. Unions agreed overwhelmingly with the proposal but most employer organisation's opposed it. Employer organisations were concerned that this would constitute reversal of the onus of proof - alleging contravention of an important legal principle.

As already noted, this proposal does not alter the onus of proof in the first instance, namely that the duty of care had been breached.<sup>32</sup>

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<sup>31</sup> *Work, Health and Safety: Inquiry into Occupational Health and Safety*, (hereafter *Work, Health and Safety*), Draft Report, Volume One, 12 April 1995, p 67.

<sup>32</sup> *Work, Health and Safety*, Report No. 47, 11 September 1995, Volume One, pp 55-56.



- 4.4.6 *The Committee was referred to the large amount of case law surrounding the operation of the duty of care and the defence provisions. In the absence of evidence demonstrating any injustice in the operation of the present duty of care provisions, the Committee supports the recommendation made by the McCallum Panel of Review, for the retention of the substance or meaning of the current duty of care and defence provisions.*

*The Committee expects that clarification and simplification of the duty of care provisions will address some of the concerns expressed by Mr Brack and Mr Fogarty in their addendum to the McCallum Report.*

*It is the Committee's view that workplace health and safety is the responsibility of all persons at a workplace. Workers who are in a position where they are able to influence health and safety to whatever extent, must bear the legal responsibility for that influence. Additionally, if OHS legislation is to encourage a systems approach to managing workplace safety - involving all levels of management and employees, legal obligations should reflect this. The Committee supports the McCallum Panel recommendation that the Act be applied in a balanced manner.*

*Further the Committee is concerned that the duty of care obligations should reflect the responsibilities of all persons at work. The Committee intends to include the issue of the obligations of all persons who affect health and safety at work, in the second stage of this inquiry.*

### **Recommendation 3**

**The Committee recommends that the substance or meaning of the current duty of care and defence provisions contained in sections 15 - 19, 50 and 53 of the *Occupational Health and Safety Act* be retained unchanged.**

### **Recommendation 4**

**The Committee recommends that the duty of care provisions contained in sections 15 - 19 and 50 of the *Occupational Health and Safety Act* be applied in a balanced manner which recognises the responsibilities of all persons in the workplace to promote workplace safety.**

## **4.5 Domestic premises**

- 4.5.1 The majority of the McCallum Panel of Review recommended the removal of reference to non-domestic premises in the duty of care provisions, thereby introducing the duty of care in situation where the workplace is a domestic

premise. The Panel was concerned that many home workers do not enjoy the same level of safety as those based in an office or factory. The Panel referred to a submission it received from the NSW Nurses' Association:

By exempting domestic premises from both the duty of care of employers and limiting the right of entry of WorkCover Inspector, a significant section of the workforce is not effectively covered by the Act in the course of work. The Act therefore lacks equity and universal application as intended.<sup>33</sup>

4.5.2 Mr Brack expressed concern about this recommendation concerning removal of the term 'non-domestic premises' from the Act. He argued that such an amendment would:

expose home-owners, tenants and perhaps, real estate agents to onerous "duty of care" obligations..... Homeowners and tenants, by and large, do not have the skills necessary to ensure the kind of safety contemplated by the *Occupational Health and Safety Act* and real estate agents do not have the kind of control necessary, nor, indeed, the level of knowledge of particular domestic premises to ensure such safety.<sup>34</sup>

Mr Brack cites some examples such as:

- A furniture removalist contracted to remove furniture but where the layout of the premises or the means of access to rooms via stairways, corridors, etc. is/are inherently unsafe.

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<sup>33</sup> *McCallum Report*, p 60.

<sup>34</sup> *McCallum Report*, pp 138-139.

- A nursing or other occasional care agency contracted to provide care in the home thereby exposing the contractor or his/her employee to anything that might be unsafe in the domestic premises.<sup>35</sup>

4.5.3 The Committee received a number of submissions which dealt with the regulation of workplaces that are domestic premises. The Labor Council of NSW, in its draft submission, argued that employees working in domestic premises are equally entitled to a safe working environment as employees working in a traditional workplace.

It is essential that the Act give due regard to the fact that domestic premises may also under some circumstances be work premises, and that employees working in domestic premises are also entitled to a safe and healthy workplace. We suggest that the definition be reworded to read along the following lines - *means premises or part of premises occupied solely as a private dwelling.*<sup>36</sup>

4.5.4 The Department of Health, in a written submission, expresses concern about the implications of the recommendation.

Homeowners in particular may be largely unaware of any OHS obligations owed by them to casual workers such as gardeners, window cleaners, house cleaning staff, ironing persons etc, especially where informal arrangements exist.<sup>37</sup>

Ms Frances Waters, representing the Department of Health at hearings in Sydney on October 7, 1997, commented that homeowners would have no idea of the nature and extent of such proposed obligations. Ms Waters stated:

...a surprisingly large number of employers do not know what the requirements of the *Occupational Health and Safety Act* are, so it is really not surprising that home owners would never have given this matter any consideration.<sup>38</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> *Submissions, Volume Five*, Labor Council of NSW, p 6.

<sup>37</sup> *Submissions, Volume Six*, NSW Health, p 2.

<sup>38</sup> *Transcript, 7/10/97*, p 8.

- 4.5.5 The Department of Community Services expresses concern of the impact such a recommendation would have on clients of the Department. In oral evidence before the Committee, Ms Helen Bauer, the Director-General of the Department of Community Services stated:

Typically, older people seem to be more cautious than younger people, and if an older person thought that they may become liable or their estate might become liable, then they may deliberately choose not to make use of the service provided by the State because of those sorts of financial fears.<sup>39</sup>

- 4.5.6 The submission received from the Textile Clothing and Footwear Union of Australia, opposed the recommendation, drawing attention to the possible impact.

Any attempt to make owners of domestic premises responsible for OHS is undesirable because it will have the undesired effect of requiring that outworkers provide for their own safety. Under this proposal outworkers would have to maintain their own sewing machines and ensure that they were safe to operate. Most outworkers borrow money to purchase their machines. The proposed change to section 17 would further burden outworkers financially. This is unfair as many employers of outworkers are likely to be grossly underpaying their outworkers in the first place.

....Outworkers do not become outworkers by choice. They do because of their circumstances. They are vulnerable people who are prone to exploitation by unscrupulous operators. The proposal to remove the words "non-domestic premises" has the effect of removing protection from outworkers and making employers less accountable...<sup>40</sup>

- 4.5.7 The submission received from the Department for Women also expressed concern about the possible implications of this recommendation for outworkers.

In practical terms this may mean that the women outworkers (*persons* within the meaning of this section) may have the onerous task of ensuring that sewing machines are repaired, couriers delivering materials are not injured and other family members are provide a safe working environment. Although the intent may be for this section to apply to employers, the fact is that women outworkers have control of the home and may be considered as *persons* as they are not defined under the Act as *employees*.<sup>41</sup>

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<sup>39</sup> Ibid, p 46.

<sup>40</sup> *Submissions, Volume Five*, Textile Clothing and Footwear Union of Australia, p 14.

<sup>41</sup> *Submissions, Volume Six*, Department for Women, p 2.

4.5.8 The NSW WorkCover Authority identified this recommendation as one that would require further consideration because of the potential impact on policy and operations.<sup>42</sup>

4.5.9 *In view of the concerns raised about the potential impact of this recommendation upon outworkers and others, the Committee does not support, at this stage, the inclusion of domestic premises in the duty of care obligations in the Occupational Health and Safety Act. The Committee does acknowledge that the changing nature of work and work relationships needs to be addressed. In the second part of this inquiry, in 1998, the Committee will consider this issue.*

## 4.6 Middle Managers

4.6.1 The majority of the McCallum Panel of Review, in considering section 19 of the Act, recommended a new section in the Act to specifically detail the obligations of middle managers of a corporation. The majority reasoned that the current structure of the section is:

not adequate to capture modern corporate structures. The current chain of responsibility within a corporation needs to be recognised, as well as the graduated levels of responsibility.<sup>43</sup>

The Panel noted that the current provisions contained in s.19, together with the provisions of s.50, which place obligations on directors of a corporation or those concerned in the management of a corporation, have resulted in successful prosecutions against a site manager. The Panel also stated that s.50 has the potential to apply to plant managers, production maintenance managers and supervisors. The Panel recognised the often invidious position of many of these managers stating:

Junior or less highly ranked officers of a corporation have little discretion over operating procedures and production targets. A refusal to follow a direction may lead to dismissal and reduced career prospects.<sup>44</sup>

The Panel recommended a new section, based on section 19 to specifically target middle management. Such a provision would have a penalty between the maximum available under s50 and s19.

4.6.2 Mr Brack and Mr Fogarty expressly rejected the recommendation. Mr Fogarty cited the existing provisions for directors of corporations and

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<sup>42</sup> Correspondence, 19 November 1997.

<sup>43</sup> McCallum Report, p 87.

<sup>44</sup> Ibid.

persons concerned in the management of a corporation (s.50). Mr Brack criticised the recommendation as pursuing a “prosecution psychology”.

We all agree that improved occupational health and safety will be achieved at all levels of an organisation taking responsibilities seriously. However, using section 50 to create statutory scapegoats is not, in our view, an appropriate means of seeking to produce the essential cultural change that is necessary<sup>45</sup>.

- 4.6.3 The Department of Health’s Human Resources policy Analyst, Ms Frances Waters, expressed concerns about the workability of the Panel’s recommendation, in evidence before the Committee on 7 October 1997.

Given the unenviable, and often, position of most middle managers as being the meat in the sandwich, so to speak, between executives of organisations and the employees, and given the already significant burden most carry in the workplace, it is my view that this matter needs much more consideration if it is to be enshrined in legislation. Middle managers can already be held liable, as can any employee for that matter. In any event, I would imagine it would be difficult to define with any consistency what would constitute a middle manager for the purposes of the legislation. As the department’s (written) submission suggests:

“Section 17 of the current Act indeed attempts to cover this matter. In relation to this section, it may be wiser, as Recommendation 5 of the *McCallum Report* suggests, to rewrite the section to state with greater clarity the nature of the duty and to whom the duty is owed.”<sup>46</sup>

- 4.6.4 The submission received from the Department of Community Services expressed similar concerns about the position in which this recommendation would place middle managers.

The proposed changes would be unduly onerous on Middle Managers due to the level of delegated authority such managers normally hold.<sup>47</sup>

Ms Helen Bauer, the Director-General of the Department of Community Services, expressed further concerns about identifying exactly who is a middle manager and the effects of the recommendation, in evidence before the Committee on 7 October 1997.

... specifically in the Department of Community Services, every member of staff has delegated authority from the department head and /or directly under the *Occupational Health and Safety Act* 1983 to act with a reasonable duty of care. It is not clear to me what will be achieved by more precisely defining for those middle managers what their responsibilities might be additional to those already prescribed,

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<sup>45</sup> Ibid, p 139.

<sup>46</sup> *Transcript*, 7/10/97, p 9.

<sup>47</sup> *Submissions, Volume Six*, Department of Community Services, p 1.

as it were, by statute and expected of them under delegation from the department head.<sup>48</sup>

- 4.6.5 In a consultancy report to WorkCover, Neil Gunningham, Richard Johnstone and Peter Rozen, comment on the difficulty of obtaining evidence of criminal behaviour (i.e OHS breach) by a manager or director. The report states that such behaviour is usually not the discrete act that characterises a breach of the criminal law, but rather the creation of a corporate culture where OHS breaches are not prevented or remedied. Because of this Gunningham et al argue that it is important that:

individuals... are not prosecuted for their actions when the real issue is the failure of the company to have appropriate OHS policies and procedures or when the behaviour of the lower level employee has been induced by an incentive (emanating from the top of the management structure) to behave in a manner which is unsafe to the employee or other employees; and that scapegoats are not forward by the management to take the full force of such individual prosecutions.<sup>49</sup>

- 4.6.6 The Full Bench of the Industrial Court considered the question of reasonable care and the extent of the obligation under s.19 in the matter of *Inspector Gordon v Gregory Ronald Wallis*<sup>50</sup>. The Court held that a relevant factor is the nature of the employees' position. If the employee is in a supervisory position the level of reasonable care is different to that of a front line employee. The Court went on to explain if an employer had implemented a safe system of work and a supervisory employee, employed to police such procedures, endangered a fellow employee, by virtue of "a careless act or omission in relation thereto", the supervisory employee would be liable under s.19(a). However,

if the act or omission complained of was, in truth and substance, a failure to provide and maintain a safe system of work or otherwise 'ensure' the health and safety of employees under s.15.... The act or omissions in such cases would be those of the employer concerned.<sup>51</sup>

The Court quite clearly draws a distinction between the situation where an employee who is a middle ranked manager and in a position to affect workplace health and safety, and a middle manager who is not able to exert influence on occupational health and safety outcomes.

- 4.6.7 Section 50 places a higher level of obligation on those individuals who are in a position to affect the behaviour of the company. The Chief Industrial Magistrate has held that s.50 aims:

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<sup>48</sup> Transcript, 7/10/97, p 44.

<sup>49</sup> *Enforcement Measures for Occupational Health and Safety In New South Wales: Issues and Options*, April 1, 1996, (Gunningham Report).

<sup>50</sup> Unreported, 1011 of 1996, 14 August 1996.

<sup>51</sup> Op cit.

to ensure that those at the appropriate level with personal responsibility for the conduct of corporations be made to face the consequences of their conduct, with a view in part to contributing to future safety.<sup>52</sup>

- 4.6.8 *Because of the judicial opinion on the operation of both s.19 and s.50 quoted earlier, and the concerns expressed about inappropriate targeting of middle managers, the Committee considers that it is inappropriate to make a substantial legislative change at this stage. Legislative amendments may negatively impact on middle managers who are often in no real position to influence workplace behaviour, and may result as Professor Gunningham suggests, in scapegoating of such managers.*

*The Committee acknowledges the area of management responsibility for occupational health and safety breaches is problematic, but does not feel it is warranted at this stage to further extend the legislation. The Committee does recommend that information needs to be disseminated on the nature of employees and managers duty of care.*

*The Committee recommends development of guidance material that explains the nature of the duty of care, and the exercise of due diligence by managers/directors as required by s.50(1)(b) OHS Act.*

#### **Recommendation 5**

**The Committee recommends no further amendment to the Act to specifically capture middle ranked managers of a corporation.**

#### **Recommendation 6**

**The Committee recommends that the WorkCover Authority develop guidance material about management responsibilities under the *Occupational Health and Safety Act*.**

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*Inspector Tucknott v Richard Dykes*, CIM, 16 March 1994, unreported.



# Chapter Five

## Enforcement and Regulation

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### 5.1 Current regime

5.1.1 The enforcement of the *Occupational Health and Safety Act* and regulation of workplace safety in NSW is generally in the hands of the WorkCover Authority. Enforcement and regulation ranges from initial advice from a WorkCover inspector or one of WorkCover's other technical experts or services, to the issue of on-the-spot fines, improvement and prohibition notices by inspectors, as well as prosecutions in the Local or Industrial Court, depending on the severity of the offence. The key sections of the Act providing for enforcement are set out below.

**s31R: Inspector may issue improvement notices**

Under this section an inspector may issue improvement notices to remedy a contravention of the Act.

**s31S: Inspector may issue prohibition notices**

This section allows an inspector to issue a notice requiring a person to cease an activity where the inspector believes such an activity involves an immediate risk to health and safety.

**s51B: Penalty notices for certain offences**

Authorised officers may issue a penalty notice where a person has committed an offence under the Act or the regulations.

**S48: Authority to prosecute**

Proceedings for an offence under the Act may be instituted by a WorkCover inspector, by an industrial organisation, or by a person authorised by the Minister.

5.1.2 The Manager of WorkCover's Prosecution Branch, Ms Wendy Thompson, outlined the current enforcement regime in evidence before the Committee on 7 August 1997. Ms Thompson likened the enforcement regime to a pyramid, with advice and persuasion at the bottom of the pyramid, and constituting the majority of WorkCover's enforcement activities. Following from this, is the issue of notices such as penalty or prohibition notices and finally prosecution in either the Magistrates Court, or for more serious breaches, the Industrial Relations Commission.

(See footnote <sup>53</sup>)

Ms Thompson stated:

It is simply a pyramid in the sense that one steps up the ladder in terms of enforcement activity. At the bottom scale of enforcement activity there is advice and persuasion. The next step up the ladder is the issuing of notices, and that is prohibition or improvement notices. The next step up is penalty notices, infringement notices. Then the final peak of the pyramid refers to prosecution and that may occur in two jurisdictions in New South Wales. The matters that are regarded as less serious are commenced in the magistrates court, and the matters regarded as more serious are before the Industrial Relations Commission. Prosecutions are regarded to have a dual role. They are both punitive and also act as a deterrence to others who may be encouraged to engage in that activity. WorkCover engages in prosecutions in certain circumstances and I have copies of the overheads to provide to the Committee, and I will go through these fairly quickly.

Prosecutions are taken where there is an alleged failure to comply with a notice issued by an inspector, which may be a prohibition or improvement notice. They are taken where there is an alleged breach of an Act or a regulation which has resulted in a fatality or an injury, or where the breach has led to the creation of real and potential risks to safety but, through fortuitous circumstances, no injury has occurred. For example, I refer to plant failure. One can readily envisage dangerous equipment being used, which perhaps has not been properly maintained, and there has been a failure and a near miss. Such an incident would be regarded with seriousness because the consequences could have easily gone the other way. The next matter on

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*Exhibit, Transcript, 7/8/97.*

the list is contested infringement notices. This refers to the penalty notices that an inspector issues. Like a traffic parking fine, the individual who has been issued with this notice has a period of time in which to pay the fine or say "I contest this notice", in which case proceedings have to be commenced and the matter is heard as if it was a prosecution in the first instance.

Prosecutions are also taken where there is a failure by a person to hold prescribed licences or permits set out in the various Acts and regulations; where there is an offence in relation to inspectors—for example, where people have obstructed an inspector in the course of his inquiry, removed plant that failed or evidence relevant to the investigation, or impersonation of an inspector. Prosecutions are taken where there is an allegation of discrimination against an employee who may have reported a matter in relation to safety and has found himself dismissed or otherwise discriminated against by a particular employer; where there is a failure to render assistance to an injured worker; and where there is any matter where, in the inspector's opinion, the issue of an improvement, prohibition or penalty notice is not regarded as appropriate for ensuring compliance.

Three classes of people can initiate prosecution: an inspector; the secretary of an industrial organisation in respect of any members of that organisation who may have been put at risk; and a person authorised by the Minister or a prescribed officer. To date, the majority of prosecutions have been undertaken by WorkCover. WorkCover is a funded, public body that employs a large and highly skilled group of professional people. When an accident occurs, the dominant purpose of any investigation is to look for the cause of that failure, to look at the public interest aspect of the dissemination of any technical or relevant material to the public, so as to prevent the reoccurrence of that type of accident.<sup>54</sup>

5.1.3 In evidence before the Committee the WorkCover Authority advised that in 1996-97, 537 prosecutions were finalised, with 403 of those prosecutions regarded as successful.<sup>55</sup> WorkCover also issued 2,073 prohibition notices and 10,934 improvement notices in 1996-97. Of penalty notices issued in 1996-97, 2,187 were issued for employer breaches and 223 for employee breaches. The annual trends in OHS prosecutions, Prohibition and Improvement Notices and Infringement (Penalty) Notices from 1992/93 to 1996/97 are illustrated in a series of graphs and explanatory notes prepared by WorkCover which are reproduced in Appendix One.

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<sup>54</sup> *Transcript, 7/8/97, p 55.*

<sup>55</sup> *Ibid, p 66.* WorkCover regards successful prosecutions as those prosecutions where the defendant was convicted and a penalty was awarded or the offence was proved and no conviction recorded (s.556A,556B or 558 *Crimes Act*).

## 5.2 Recommendations of the McCallum Panel

**Recommendation 15:** The Panel recommends that the penalty level and range of offences relating to penalty notices be reviewed.

**Recommendation 16:** The Panel recommends that, as there is an existing crime of manslaughter when workplace deaths are caused by grossly negligent and/or reckless conduct, there is no need to place in the *Occupational Health and Safety Act 1983*, a crime of industrial manslaughter.

**Recommendation 17:** The Panel recommends that s 556A of the *Crimes Act 1900* which bestows a discretion upon a judge on finding a charge proven not to record a conviction, continue to be available for individual defendants but should not be available for corporations.

**Recommendation 18:** The Panel recognises that the criminal law creates some practical difficulties with the enforcement of the Act. However, in the view of the Panel the criminal law is more appropriate for the enforcement of safety offences.

**Recommendation 19:** The Panel recommends that consideration should be given to raising the level of penalty notices - on-the-spot fines - above its current \$500 limit to increase the availability of penalty notices for less serious breaches of occupational health and safety legislation. It is the Panel's view that on-the-spot fines have not merely worked well with employee breaches, but that they operate efficiently with less serious breaches by individual employers and small corporations.

**Recommendation 21:** In the provisions of the Act which specify monetary penalties a sharp differentiation is drawn between corporate and non-corporate offenders. The Panel recommends that this differentiation be abolished and replaced by a more graduated system of monetary penalties devised to meet the various situations where employers and those in control of premises commit breaches of the Act.

**Recommendation 22:** The Panel considered whether it was appropriate to continue repose of the criminal jurisdiction under the *Occupational Health and Safety Act* in the Industrial Relations Commission in Court Session. The Panel recommends that the Industrial Relations Commission in Court Session continue to exercise this jurisdiction.

**Recommendation 23:** The Panel recommends that when hearing appeals in occupational health and safety matters from magistrates, other than from the Chief Industrial Magistrate, the Commission in Court Session be constituted by a single judge. The Chief Industrial Magistrate is, after all, a specialist in this field of law.

**Recommendation 24:** Section 74A of the *Occupational Health and Safety Act 1983* gives discretion to a judge when sentencing a defendant to order the person to remedy the cause of the breach. The Panel recommends this provision be clarified to give an express power to investigate the circumstances of any breach of the Act; to view the premises; to take into account any rectifications made by the offender; or to undertake a process of occupational health and safety audit.

**Recommendation 25:** The Panel recommends that the use of non-monetary penalties should be encouraged. These could include the posting of bonds whose redemption could be conditional on making specified improvements to the workplace. Community service orders may also prove to be useful.

**Recommendation 26:** The Panel supports the use of Victim Impact Statements in prosecution proceedings for safety offences.

**Recommendation 27:** The Panel recommends that sentencing guidelines should be developed specifying aggravating and mitigating circumstances in the commission of offences under the *Occupational Health and Safety Act* and Regulations.

**Recommendation 28:** It is the view of the Panel that there is a need for greater links between workers compensation premiums and safety performance.

**Recommendation 29:** The Panel recommends that there should be greater publicity about prosecution outcomes.

5.2.1 The *McCallum Report* stated that “in any graduated system of enforcement, the critical factor is the mix of enforcement strategies available”. The Panel argued that its recommendations were aimed at achieving:

a process of enforcement and regulation which is more flexible and more innovative than is the current regime in New South Wales. The proposals ..... are critical in modernising this State's approach to occupational health and safety.<sup>56</sup>

### 5.3 Cultural change and best practice in health and safety

5.3.1 At the public seminar held by the Committee on 18 February 1997 to launch this inquiry, there were presentations from representatives of three large companies which were able to demonstrate significant improvements in their health and safety records in recent years. ICI was able to demonstrate a reduction in medical treatment injuries from over 20 per million worker hours in 1983 to 3 medical injuries per million worker hours in 1997. The then Executive Director of ICI Australia Limited, the late Warren Haynes, emphasised that ICI was aiming to bring this injury rate lower still, that the goal was “No injuries to Anyone - Ever”. Mr Haynes identified a number of the factors which had contributed to ICI's success in improving its health and safety record. Mr Haynes emphasised that the most important factor had been cultural change, about the absolute importance of safety, both in terms of leadership and employee responsibility. Mr Haynes stated:

Our culture is built on the belief that all injuries are preventable and hence a culture that says ‘nothing is more important than safety’. If you cannot do a job safely then you do not do it at all. This responsibility for safety is shared right through the organisation, and I stress that. It is not just a leadership issue; it is leadership right through the organisation, but it is also an employee responsibility. Let me start by talking about leadership. Leadership must provide the resources and the support and lead by example. There are plenty of things that leadership can do to stress the role of safety in the workplace where there is a corporate value.

For example, it is a prime accountability in the description we have of all job positions. It is written in to all managers as their prime responsibility and, indeed, it is written into their current objectives for each year and their performance is measured at the end of each year, and the remuneration is effected to the extent to which they do or do not perform in terms of safety. It is the first item on any team meeting whether that be our board meetings, meetings of the executive team or meetings in factories and workplaces.

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*McCallum Report* p 89.





In the event of an injury, senior management lead the investigation to understand not only the immediate cause of a medical treatment injury, but also to peel back the onion and find the underlying causes. Was it a cultural problem? Is there a hardware problem? Were the procedures being followed? I involve myself in the safety charter that we have for the company and also involve myself in safety audits that we run around the company on a regular basis throughout the year. Every leader in the company has personal responsibilities for safety and we have established a safety charter. The safety charter sets out the responsibilities of individuals as leaders but also sets out responsibilities for individuals as employees in the company.

Let me stress again that individual employees also have responsibility for safety. That responsibility is for safety of themselves in the way they carry out their work, but also responsibility for their fellow employees, for their safety and the way in which the individual carries out their work. The safety charter that we have is discussed on a one-on-one basis between a supervisor and each individual employee, at the end of which they have the opportunity to sign on to that charter to say that they understand and accept those responsibilities. I think that is one of the key parts of establishing the culture and responsibilities within the organisation.<sup>57</sup>

- 5.3.2 CSR limited was also able to demonstrate a significant improvement in its health and safety record in recent years. The Managing Director of CSR Limited, Mr Geoff Kells, spoke about the strategies which CSR had adopted to achieve those improvements. Mr Kells also emphasised the importance of cultural change and leadership.

If you go to any CSR operation you will see the same sign at every operation, normally near the place where we all enter. The sign says, "No job is so important and no task so urgent that we cannot take time to perform our work safely. The safety of our people must come first." I think they are good words, and the challenge for all of us is to make them real and to convince everybody who is employed by, in this case, CSR, or whoever the employer is, that is a genuine statement of the beliefs of that organisation. That is a very big ask, particularly for large companies and those, like ours, with a lot of operations geographically diverse...

How do we actually build leadership and commitment of everybody into the priority of stopping people from being hurt? I am absolutely convinced that unless we can do that, we will not make the progress that we all want. Listening to the last speaker, there is obviously a real challenge when some companies do not believe that they even have a responsibility. But our task is to get the leaders of the organisation to actually focus on their people and the safety responsibilities that they have for them. That is the task. It must start at the top.

In our case, we set up a board committee. That committee has now visited 100 sites since 1991 when it was created. Safety statistics are reported at every board meeting, and the 10 worst sites and the 10 best sites in CSR make reports to me on a monthly basis. We have programs for concentrating our managers' minds on this, until there is a cultural change, by including their safety performance in reward mechanisms and promotion mechanisms, and we do provide a system which absolutely must be followed. It is not a matter of a manager in our company choosing which system he thinks is the best, but, rather, there is a CSR system which is mandatory and must be in place. One feature—but only one feature—of that system must be some proper analysis of the cause of accidents, the type of accidents being incurred, and having a program to address them. I do think that many safety programs tend to be all things to all people. You only drive reductions like that, and stop people from being hurt, by concentrating firstly on the big issues and not actually frittering away our activities on everything. But once we have addressed the big issues, we move on to the next. That involves a discipline on a system in place, led from the top, reinforced in the middle by both sticks and carrots, until there is actually a cultural change in the organisation. I would simply say to you, if you pick out one ingredient in that and ignore the rest, I really do not think we will stop people from hurting themselves.<sup>58</sup>

5.3.3 BHP Steel was also able to demonstrate a significant improvement in its health and safety record in recent years. The Group General Manager of the Long Products Division of BHP Steel, Mr Robert Kirkby, spoke about the implementation by BHP Steel of the “Dupont” safety management system. The Committee received a further detailed briefing about the Dupont approach when the Committee visited BHP Steel in Newcastle on 15 July 1997. The Committee was told that the “Dupont” safety management system is based on four principles:

- all injuries and occupational illnesses can be prevented;
- management is directly responsible for preventing injuries and occupational illnesses;
- training is a fundamental element of the program - people are the most critical element in ensuring the success of a program; and
- safety is good business.

Mr Kirkby also emphasised the importance of making safety an organisational priority. He said that safety was the first issue discussed at all management meetings and that line managers had clear OHS responsibilities. Furthermore, he said that BHP Steel was working towards the point where there would be no

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Ibid, pp 78-79.

stigma attached to employees taking responsibility for telling other employees how to work safely.<sup>59</sup>

- 5.3.4 The Committee received briefings from two companies recognised by the Victorian WorkCover Authority as achieving best practice in health and safety on a visit to Melbourne in July. Denso, a medium sized manufacturing firm, and SuperDrives, a small paving company, both emphasised the need for cultural change in terms of management commitment and employee recognition of the significance of health and safety in achieving improvement in health and safety. They also demonstrated that safety management systems could be effectively utilised by medium and small companies in improving health and safety. Both Denso and SuperDrives had been recognised by the SafetyMAP (Management Audit Program) with an Advanced Achievement Certificate. SafetyMAP provides for the assessment of an organisation's health and safety management systems by the Victorian WorkCover Authority.
- 5.3.5 The Committee received evidence from the Acting Manager, Regional Operations Division of the WorkCover Authority, Mr Geoff Mansell, on 7 August 1997 in relation to the development of safety management systems in NSW. Mr Mansell referred to the self audit program which has been incorporated into the licensing system for self insurers and to the safety systems which had been developed for the Olympic and Showground construction projects. Mr Mansell acknowledged the success of the SafetyMAP program operated by the Victorian WorkCover Authority and said that WorkCover was considering adopting the SafetyMAP program.

Some years ago there was a fair bit of discussion in New South Wales about the concept of safety plans, which essentially was the promotion of safety management systems. Some of the concepts considered at that time were government recognition of successful systems, the possible wavering of some controls for organisations that were successful, and also incentives. That caused considerable concern in some quarters and much time was spent consulting the various parties about the merits of those proposals. At that stage we set up a high-level committee with representatives from both sides of industry and produced a set of criteria that was considered acceptable for a system operating in New South Wales.

We recently carried out a close examination of the Safetymap program in Victoria into which they put a lot of effort and resources. We find that program meets most of the criteria that our safety plans activities focus on. We are looking closely at adopting that as one of a range of management systems available in New South Wales. We certainly would not want to adopt one in

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Ibid, pp 57-59.

preference to others, but we would like to see a variety of well-developed useful systems available for people to use.

COMMITTEE: I can see the culture change within the workplace and within management, which is fantastic. The question is, why not adopt it?

Mr MANSELL: It seems that a lot of the benefits of the Safetymap program are not the formal recognition or certificate because the numbers that have gone through that process are very small; far fewer than we have in our self-insurer program. What has happened is that the documents and materials that are well developed have gone through the community and many people are using them as a guide. It is acting like guidance material to assist people to improve. Although they will perhaps never worry about formal recognition or auditing, they will gain something from the documentation. We think there is a lot of promotional value in having that kind of system available.

COMMITTEE: Perhaps we need more promotion in New South Wales?

Mr MANSELL: Our strategy really has been in the early days of introduction of safety management systems in New South Wales to use the available leverage to encourage critical sectors to adopt systems. We have looked at the top end of the market. There are some 300-plus organisations with more than 1,000 employees that we would like to see operating effective management systems in New South Wales. Self-insurers are a subgroup of those. We have a licensing system of self-insurers that enables us to provide leverage to encourage those organisations to adopt systems, and they have. That is a significant group progressing well in very much a promotional supportive role. We have not prosecuted them or applied notices. We have done it in a cooperative way to assist them to improve. The construction industry has also had significant movement. We are looking at other strategies to pick up those larger organisations because they are probably the first step towards addressing this approach.<sup>60</sup>

#### **Recommendation 7**

**The Committee recommends that the WorkCover Authority consult with companies which have achieved a significant improvement in health and safety in order to identify factors which have been important in the process of cultural change, with a view to publishing guidance material for use in both large and small businesses.**

#### **Recommendation 8**

**The Committee supports the use of risk management systems as a means of enabling employers to go beyond mere compliance and pursue best practice in health and safety. The Committee therefore recommends that the WorkCover Authority examine the most**

**appropriate mechanisms for encouraging the use of risk management systems. Such an examination should draw upon the Victorian experience with the SafetyMAP program.**

- 5.3.6 *The Committee will be further examining safety management systems during the second part of the Committee's inquiry during 1998.*

## 5.4 Community awareness

- 5.4.1 When the Committee visited Melbourne in July it was struck by the high profile of workplace safety. Trams and highway overpasses had large posters with health and safety messages. These messages were part of a wider campaign in the print and electronic media to raise the profile of workplace health and safety. The Committee received a briefing from the Victorian WorkCover Authority on this community awareness campaign and viewed a series of arresting, indeed confronting, television advertisements. This campaign featured workers in a variety of situations, with graphic demonstrations of workplace injuries. The campaign is similar to recent road safety advertisements screened in NSW, with "real life scenarios". The advertisements detail workers in everyday situations and reveal the ease with which injuries can occur.

- 5.4.2 A number of submissions received by the Committee called for the development of a hard hitting community awareness campaign to raise the profile of workplace safety in NSW. The submission received from Advocates for Workplace Safety, called for greater media attention to workplace safety and noted the role of the media in raising the profile of road safety:

Constant media reporting of road statistics and trauma have raised the profile of road crashes, in both the community and political arenas. The similarities between the 1990s situation of workplace trauma and the situation applying to the reporting of road trauma in the late 1960s and early 1970s are particularly interesting. As we have seen over the last two decades, road death and injury became and has remained a significant political issue and a major source of community concern. The media has proven not only responsive to road trauma issues, but to be an active catalyst for change to traffic and criminal law, and to safer policies and practices in road safety. Workplace safety should, and can, become just as significant an issue in media reporting.<sup>61</sup>

- 5.4.3 The draft submission received from the Labor Council of NSW drew attention to a number of community awareness campaigns which had been effective in achieving cultural change, including drink driving, quit smoking

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*Submissions, Volume Two, Advocates for Workplace Safety, p 8.*

and “slip, slop, slap” campaigns. The Labor Council highlighted the WorkSafe Australia campaign which ran for a short time in 1996 and commented on the budget disparity between road safety and occupational health and safety.<sup>62</sup>

5.4.4 Ms Michelle Alber in a written submission recommended “a media campaign to raise the profile of OHS”.

The Industry Commission found that more people are killed and injured at work than die on roads (Work, Health and Safety 1995). That fact alone justifies at least an equal amount of funding to such a campaign. A serious media campaign would likely have a significant impact in developing a community culture that values workplace safety.<sup>63</sup>

5.4.5 The issue of media reporting of health and safety issues was also discussed in the submission received from the NSW Nurses’ Association.

Since most employers would have frequent contact with the media, effective use of the media would increase employer knowledge of the existence of workplace health and safety legislation and the consequences of breaching it. It may also help to reduce the prevalence of the ‘it can’t happen to me’ paradigm.<sup>64</sup>

The Association recommended a mix of media strategies, including:

- promote organisations (of various sizes) which have been successful in dealing with workplace health and safety solutions;
- highlight the results of workplace injury and disease;
- publicise significant prosecutions; and
- run advertising campaigns to highlight workplace risks and their potential consequences (perhaps on ‘it can’t happen to me’ with an appropriate response).<sup>65</sup>

### **Recommendation 9**

**The Committee recommends that the WorkCover Authority sponsor a hard hitting publicity campaign, along the lines of the campaign that has been run by the Victorian WorkCover Authority, to raise community awareness of workplace safety.**

<sup>62</sup> *Submissions, Volume Five*, NSW Labor Council, p 28.

<sup>63</sup> *Submissions, Volume One*, Ms Michelle Alber, p 29.

<sup>64</sup> *Submissions, Volume Five*, NSW Nurses’ Association, p 3.

<sup>65</sup> *Ibid*, p 4.



## 5.5 Links between workers compensation premiums and safety performance

5.5.1 The *McCallum Report* recommended the development of greater links between the workers compensation premium and safety performance. The Panel acknowledged that WorkCover premiums recognise experience rating principles. However, the Panel said there was a need for more explicit recognition of safety performance in workers compensation premiums and argued that workers compensation premiums could be used as a means of encouraging improved health and safety in small business.

Though workers compensation claims performance is recognised in experience rating principles which apply to WorkCover premiums, there is no mechanism in the premium structure for linking occupational health and safety performance to premium levels across industry. It is the view of the Panel that the potential for injury prevention and occupational health and safety management initiatives to result in improved claims performance should be recognised in the WorkCover premium system. Such incentives should also explore mechanisms for encouraging small business promotion of workplace safety and injury prevention and management.<sup>66</sup>

5.5.2 Mr Brack expressed support for this recommendation. However, he acknowledged the cross-subsidy provided to small business and said that consideration needed to be given to means to ensure that, in the event that a more direct system of experience rating is introduced, small companies are not “wiped out” in the event of a major claim.<sup>67</sup>

5.5.3 One of the terms of reference of the Grellman inquiry into the NSW workers compensation scheme was the identification of “incentives for those employers who actively promote and implement safe work practices to reduce workplace injury”. The *Grellman Report* recommended a significant overhaul of the scheme, including a move to private underwriting. In relation to the premium rating system, the *Grellman Report* recommends that all private insurers should apply a uniform experience rating premium system. The initial experience rating system “should represent only minor changes to the current formula”. The system would include an experience premium, based on an employer’s claims history, and an industry classification premium which could be varied by plus or minus 10%, based on a number of factors, including a company’s “OHS practices”.<sup>68</sup> The *Grellman Report’s* recommendations concerning the proposed experience rating premium system are reproduced in full in Appendix Two.

5.5.4 When the Committee visited Melbourne in July, discussions were held with the Minister responsible for the Victorian workers compensation scheme and health and safety legislation, the Hon Roger Hallam, Minister for Finance

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<sup>66</sup> *McCallum Report*, p 117.

<sup>67</sup> *Ibid*, p 141.

<sup>68</sup> *Grellman Report*, pp 74-76.



and Gaming. Mr Hallam was a particularly enthusiastic advocate of the need to link workers compensation and OHS. He argued that the only way in which safety would be significantly improved was through providing direct financial incentives through performance based workers compensation premiums. He extolled the experience rating premium system included in the Victorian workers' compensation scheme.

- 5.5.5 When the Committee visited Adelaide in November there was considerable discussion of attempts to link safety performance to workers compensation premiums in South Australia. The Safety Achiever Bonus Scheme rewards good safety performance by awarding a bonus calculated on a percentage of the employers workers compensation premium. The scheme provides this bonus to employers who adopt occupational health and safety management systems and achieve reduced claims costs. The key elements of the scheme are prevention and injury management. It is a tiered scheme involving several levels of achievement, with the maximum bonus being 20% of the industry levy rate.
- 5.5.6 The Safety Achiever Bonus Scheme is run concurrently with the WorkCover Corporations's bonus/penalty scheme. This scheme involves awarding a bonus or penalty based on claims experience relative to other employers in the same industry. Larger businesses can receive a maximum bonus of 30 per cent and a maximum penalty of 50 per cent. Even the smallest employer can receive a bonus of up to 20 percent or a penalty of 33 per cent of their premium.
- 5.5.7 The Committee was told that reviews had recently found that the Safety Achiever Bonus Scheme may not be cost effective and may not have led to an identifiable improvement in safety performance. The Committee received a briefing about a new incentive scheme which is currently under development.
- 5.5.8 A number of submissions received by the Committee supported the use of workers' compensation premiums as a way of encouraging improved health and safety.<sup>69</sup>
- 5.5.9 *The Committee supports the concept of linking safety performance to workers compensation premiums. However the Committee would caution against the use of workers compensation claims and costs to measure the effectiveness of OHS policies and programs. There is a large body of literature of the many influences upon propensity to claim and claim costs, and there is often no one clear cost driver.*

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<sup>69</sup>See for example *Submissions, Volume Two, Advocates for Workplace Safety, p 13.*

*Additionally workers compensation claims do not reveal the overall extent of occupational accidents and disease. It is too easy for scheme administrators to concentrate on lifting the threshold for claims and reducing benefits, thereby reducing the number of claims, and costs. This does not result in a genuine and equitable scheme. Emphasis must be placed on appropriate level of benefits, but more importantly on the prevention of all workplace injuries and diseases.*

*The Committee is also interested in the concept of offering a reduction in workers compensation premiums for the adoption of 5 or 6 key OHS strategies, which have been identified by WorkCover as effective for that industry. These five or six key measures could be determined or developed in consultation with the relevant employer organisation, employers and unions. Those employers who implemented such strategies would receive an automatic premium reduction. This would appear to be an administratively simple and cost effective measure to enhance safety outcomes.*

#### **Recommendation 10**

**The Committee recommends that the Advisory Committee on Workers Compensation, established to implement the recommendations of the *Grellman Report* examine the most appropriate mechanisms for using workers compensation premiums as an incentive to promote best practice in workplace safety. Such an examination should draw upon the South Australian experience with the Safety Achiever Bonus Scheme.**

## **5.6 Prosecution guidelines**

- 5.6.1 A number of submissions received by the Committee expressed concerns about the enforcement strategies currently pursued by the WorkCover Authority. Both Mr Joe Tripodi, MP, Member for Fairfield, and Ms Fran Kavanagh, of Advocates for Workplace Safety were critical of NSW WorkCover Authority's prosecution activities, commenting that information was very difficult to obtain.<sup>70</sup> Anecdotal evidence given to the Committee, also supported this criticism, and further suggested there was little or no coherency in the application of prosecution options. The draft submission received from the Labor Council of NSW was also critical of the way in WorkCover has deployed its resources.<sup>71</sup>
- 5.6.2 Mr John May, in a personal submission, called for the discretions surrounding prosecution options to be curtailed, together with the

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<sup>70</sup> Transcript, 5/9/97, p 11 and 9/9/97, p 3.

<sup>71</sup> Submissions, Volume Five, Labor Council of NSW, p 63.

requirement for reasons to be provided when deciding not to proceed with a prosecution.<sup>72</sup>

- 5.6.3 During the course of the inquiry the Committee's attention was drawn to the prosecution guidelines which have been developed by the Northern Territory WorkCover Authority and by the NSW Environment Protection Authority. These prosecution guidelines have been developed to provide information to the public about the way in which the prosecutors discretion is exercised. Such guidelines seek to ensure that decisions are made consistently and efficiently, in accordance with principles of natural justice. The prosecution guidelines of the Environment Protection Authority details the policy of the EPA on the exercise of its discretion in relation to a variety of enforcement and penalty options. The EPA's prosecution guidelines are reproduced in Appendix Three.

#### **Recommendation 11**

**The Committee recommends that the WorkCover Authority give priority to the development and publication of prosecution guidelines, along the lines of those published by the Environment Protection Authority, so as to provide transparency and certainty to industry and other stakeholders about WorkCover's enforcement policies.**

## **5.7 Penalty notices**

- 5.7.1 The *McCallum Report* noted that penalty notices are only issued for certain specified offences, as contained in the *Occupational Health and Safety (Penalty Notices) Regulation 1996*. The Panel supported the current regime, stating:

It is the Panel's view that on-the-spot fines have not merely worked well with employee breaches, but they operate efficiently with less serious breaches by individual employers and small corporations.<sup>73</sup>

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<sup>72</sup> *Submissions, Volume Two*, Mr John May & Ms Margo Burl.  
<sup>73</sup> *McCallum Report*, p 29.

5.7.2 The Panel argued for a wider range of offences to be included, together with an increase in the level of fine, so that this enforcement mechanism supports the focus on systematic management of workplace hazards and risks. A graduated system of penalties was also recommended.

5.7.3 Mr Brack and Mr Fogarty expressed concerns that the scope of penalty notices would be widened, with Mr Brack stating:

We are opposed to the “parking policeman” mentality that seems to underpin the approach to penalty notices.<sup>74</sup>

Mr Fogarty indicated he would support a review of the existing provisions in the interests of an “equitable and balanced system of penalties”. Both employers though expressly rejected any increase in the penalty level, with Mr Brack arguing:

... these things, in our view are being used unreasonably by inspectors, we do not see it as appropriate to raise the limit. We see that as an approach to a revenue stream by WorkCover, not an approach which is being evenly used in the workplace to improve actual performance.<sup>75</sup>

5.7.4 The only submission which addressed this issue in any detail was that received from the NSW Nurses’ Association. The Association expressed concerns about alteration of the current level of penalty for on-the-spot fines, stating such a change would:

defeat the purpose of on-the-spot fines by increasing the number which are challenged in the Courts thus tying up the Court’s time with minor matters and increasing the amount of time WorkCover NSW Inspectors spend in Court and on administrative matters.<sup>76</sup>

The Association agreed with the principle of a graduated system of penalties. However the Association suggested that such a system should remain simple and easy to apply, with only three levels of penalty. The Association also recommended:

that the judiciary be provided with detailed guidance on applying penalties<sup>77</sup>.

5.7.5 *Because of the concerns expressed above, as well as the observation by the McCallum Panel that the current system has worked well, the Committee cannot, at this stage, support the recommendations to change the present system.*

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<sup>74</sup> McCallum Report, p 140.

<sup>75</sup> Transcript, 23/5/97, p 37.

<sup>76</sup> Submissions, Volume Five, NSW Nurses’ Federation, p 26.

<sup>77</sup> Ibid.

*The Committee is concerned that any modifications to the current on-the-spot fine system may reduce the efficiency of such penalties. If the level of penalty is increased many employers may consider appealing such notices. Also it may be inappropriate for hefty penalties to be levied administratively by inspectors. However if the WorkCover Authority could demonstrate that changes to the system would be a more efficient way of ensuring compliance with the Occupational Health and Safety Act, the Committee would support an increase to the level and range of penalties.*

#### **Recommendation 12**

**The Committee recommends that there be no increase in the level of on-the-spot fines under the *Occupational Health and Safety Act* without a full cost-benefit analysis.**

## **5.8 Sentencing guidelines**

5.8.1 Responding to concerns raised about lack of consistency in sentencing for OHS breaches the McCallum Panel recommended the development, in consultation with interest groups, of sentencing guidelines. Mr Fogarty agreed that sentencing guidelines may be of some utility in reducing the disparity in OHS sentencing, and that further consultation on the issue is necessary.

5.8.2 Mr Brack could not support or reject the recommendation until he received further information:

We cannot make a valid judgement about this matter until reasonable detail is provided about the nature of the aggravating or mitigating circumstances and the weight to be given to them.<sup>78</sup>

We would be apprehensive about the notion of sentencing guidelines being in place, given what we see as a determination by the government, firstly, through raising the level of penalties, secondly, through the structure of this report to turn employers into scapegoats for all events, and thirdly through the structure of section 15, which says that you are guilty if you have an accident notwithstanding the subsequent case judged on the basis of the criminal test, et cetera.

For all of those reasons, we should not, in our view, simply accept a notion that you can incorporate into law some scale or arrangement for judging of penalties which makes the determination automatic and therefore takes flexibility away from the courts.<sup>79</sup>

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<sup>78</sup> *McCallum Report*, p 141.

<sup>79</sup> *Transcript*, 23/5/97, p 39.

5.8.3 The Committee received few submissions directly addressed to this point. The draft submission by the NSW Labor Council echoed the concerns raised in the *McCallum Report*, stating that:

prosecution judgements are inconsistent and far too lenient.<sup>80</sup>

5.8.4 The submission by the NSW State Coroner, Mr Derrick Hand, is illustrative of the remainder of the submissions. Mr Hand supports the recommendation stating:

I agree that sentencing guidelines should be developed to assist a Court in arriving at a suitable penalty.<sup>81</sup>

5.8.5 Sentencing guidelines were a specific recommendation of the 1995 report by the Industry Commission, *Work Health and Safety: Inquiry into Occupational Health and Safety*.<sup>82</sup> Neil Gunningham, Richard Johnstone and Peter Rozen in their Report, "Enforcement Measures for Occupational Health and Safety in New South Wales: Issues and Options" also recommended sentencing guidelines, as they are one way of achieving a level of consistency in the sentencing process.<sup>83</sup>

5.8.6 Guidelines can also provide sentencing judicial officers with information on the *Occupational Health and Safety Act*. It has been suggested to the Committee that the complex nature of a breach of the general duty of care under the Occupational Health & Safety Act, which requires an examination of the context of the breach and the systems of work operating, rather than the individual action or event, as is the case with the majority of criminal matters, is an unfamiliar concept for many judicial officers, who usually deal with petty crime and traffic matters.

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<sup>80</sup> *Submissions, Volume Five*, Labor Council of NSW, p 63.

<sup>81</sup> *Submissions, Volume One*, NSW State Coroner.

<sup>82</sup> *Work, Health and Safety*, Final Report, p xliii.

<sup>83</sup> *Enforcement Measures*, pp 127-133.

- 5.8.7 *There appears to be a clear concern in the community about the level of understanding of the complexity of occupational health and safety law, as well as the often inappropriate levying of penalties.*

*It is the Committee's view that sentencing guidelines would enhance the move towards a systems based approach to occupational health and safety. Not only would sentencing guidelines assist sentencing judicial officers to identify a system of work or management as the breach, rather than a focus on a single act or omission, it would also provide useful signposts to employers who have not breached the OHS Act. The application of sentencing guidelines, together with the recommendation for greater publicity of OHS prosecutions, will highlight the need for a systematic approach to workplace safety.*

*The Committee considers that consultation with the Judicial Commission, as well as the Law Society and other stakeholders, is essential in the development of sentencing guidelines.*

#### **Recommendation 13**

**The Committee recommends the development of sentencing guidelines for use by the judiciary in matters arising under the *Occupational health and Safety Act*.**

## **5.9 Non-monetary penalties**

- 5.9.1 The *McCallum Report* discussed the use of non-monetary penalties, recommending that judicial discretion be widened to allow judges to impose a range of non-monetary penalties. The Report referred to the large body of literature on sanctions such as community service orders, publicity orders and the posting of bonds conditional on workplace improvements. Both Mr Brack and Mr Fogarty supported the Panel's recommendation for the use of a range of non-monetary penalties.<sup>84</sup>
- 5.9.2 The submission received from Professor Michael Quinlan, Head of the School of Industrial Relations and Organisational Behaviour at the University of NSW, criticised the current penalty regime in NSW.

It is now increasingly recognised that compliance strategies used in the past have not been especially effective..... Greater enforcement activity/use of sanctions is needed if OHS laws are to achieve changes at the workplace, and especially employer behaviour, which will bring about a reduction of injury

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*McCallum Report*, p 113 and 141.

and disease. OHS agencies, including WorkCover, having been overly reliant on persuasion in the past.<sup>85</sup>

- 5.9.3 The Department of Health's Human Resource Policy Analyst, Ms Frances Waters, in evidence before the Committee on 7 October 1997, questioned the efficacy of large fines, querying whether they would improve occupational health and safety outcomes.<sup>86</sup>
- 5.9.4 The Industry Commission in its Final Report in 1995 reported widespread support for a range of sanctions for breaches of OHS legislation, and recommended implementation of a range of non-monetary penalties for corporations.<sup>87</sup>
- 5.9.5 Reliance on non-monetary penalties has been criticised as reducing the options available to sentencing courts, nor providing incentives to employers and other obligation bearers to adopt better OHS practices.<sup>88</sup> Gunningham, Johnstone and Rozen noted that a combination of measures - fines and non-monetary penalties, would be the most effective method of regulation in this sphere, as the behaviour of corporations/employers "is influenced by a range of variables".<sup>89</sup>

*The Committee supports the development of a broader range of penalties, including specifically:*

### **Publicity orders**

Publicity orders take a range of forms, including orders requiring publication of an OHS offence in a company annual report or directors report, publication in a major or regional newspaper of details of the offence. The content of such publication can be specified by the Court or in a regulation. The publication can contain details of the offence, the hazard and the harm or potential harm, prosecution and conviction information, and the remedial action ordered by the court or taken by the offender. The offender may also be liable to pay for remedial notices or warnings as well.

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<sup>85</sup> *Submissions, Volume One*, Professor Michael Quinlan, p. 47

<sup>86</sup> *Transcript, 7/10/97*, p 9.

<sup>87</sup> *Work, Health & Safety*, Final Report, Volume 1, pp 125 - 6.

<sup>88</sup> *Enforcement Measurements*, p 114.

<sup>89</sup> *Ibid.*



### **Community service orders**

Community service orders are common in criminal convictions in Local Court matters. In OHS offences, community service orders may play a socially useful role, in not only penalising the offender and deterring others, but by providing an avenue for redress. For example, a corporation which has been convicted of an OHS offence could be ordered to undertake or fund a research project in an OHS area, or provide a “rehabilitation centre for victims of a particular type of workplace hazard”<sup>90</sup>. The type of order should not be limited, and this mechanism should allow for an innovative approach to punishment for OHS offences.

### **Disqualification of corporate offenders from government contracts**

The Committee has also considered the current requirement for tenders for some government construction contracts to contain details of OHS programs. The Committee can see benefits in extending these requirements to other government contracts, such as cleaning and hospitality services. Such recommendation is further detailed in Chapter Eight.

As a complementary regulatory strategy the Committee recommends that those corporations and individuals who fail to meet legislative obligations for safety, be disqualified from tendering for government contracts. Such disqualification period should be related to the seriousness of the breach of legislative standard or contractual agreement.

The Committee is concerned with the practical implementation of such a recommendation, given that many companies have quite discrete entities, involved in a variety of undertakings, and disqualification of an entire organisation may operate inequitably. The Committee recommends that this issue should be addressed when developing such alternative penalties.

### **Bonds**

Bonds or corporate probation involve an element of supervision of OHS practices and performance. Whilst the Committee supports the use of such alternative sanctions, especially where they are linked to a requirement for remedial action to be undertaken by the offender, the Committee is concerned of the cost or burden imposed on courts or regulatory authorities in monitoring such sanctions.

**Recommendation 14**

**The Committee recommends the development and use of non-monetary penalties in matters arising under the *Occupational Health and Safety Act* including:**

- **the posting of bonds;**
- **community service orders;**
- **publicity orders; and**
- **the disqualification of corporate offenders from government contracts.**

## **5.10 Occupational health and safety audit**

### **5.10.1 Section 47A (1) of the *Occupational Health and Safety Act* provides that:**

If a court convicts a person of an offence against this Act or the regulations in respect of a matter which appears to the court to be within the person's power to remedy, the court may, in addition to imposing a penalty provided with respect to the offence, order the person to take such steps as may be specified in the order for remedying that matter within the period specified in the order.

### **5.10.2 The McCallum Panel of Review recommended the amendment of s.47A to clarify the provision and give an express power to the Court to investigate the circumstance of any breach of the Act; to view the premises; to take into account any rectifications made by the offender; or to undertake a process of occupational health and safety audit. Mr Brack and Mr Fogarty supported this recommendation.**

### **5.10.3 The written submission received from the OHS Manager at the University of Sydney, Mr Jon D'Astoli, generally endorsed the recommendations of the McCallum Panel. However, Mr D'Astoli was concerned that this recommendation though be further clarified.**

An OHS Audit of an entire organisation will probably not detail the OHS systems at the "work face" level, whereas an OHS Audit of the particular management unit will.

In addition to this, there are many different OHS Auditing systems available. Consideration should be given to whether a particular standard of auditing is required and what key elements of the OHS system need to be assessed.<sup>91</sup>

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*Submissions, Volume One*, Mr Jon D'Astoli.

- 5.10.4 Professor Neil Gunningham endorses the concept of OHS Audits arguing for "a broader range of mechanisms ... co-regulation....and much more flexible enforcement strategies, as well as conventional command and control."<sup>92</sup>
- 5.10.5 *In much the same way a rectification order under s.47A is enforced, an order to implement a safe system of work or other such procedures, could be administered. Therefore the Committee supports the use of this form of sanction because it would appear to be another tool in the regulatory regime, aimed at facilitating the development of safety management systems.*

#### **Recommendation 15**

**The Committee recommends that section 47A of the *Occupational Health and Safety Act* be amended to enable a court to order an occupational health and safety audit of a corporation.**

### **5.11 Penalty differentiation between corporate and non-corporate offenders**

- 5.11.1 The *McCallum Report* when considering the differentiation in penalties for corporate and individual offenders, commented that such a distinction was rigid and that it "fails to recognise the diversity in corporate structures operating in workplaces."<sup>93</sup> The Panel noted the current practice of many trades persons, who adopt a corporate form for tax purposes - colloquially known as "two dollar companies". Although the corporate form of these entities is the same as some of Australia's largest corporations, in substance these entities are very different. The McCallum Panel supported a graduated penalty system, tailored to the offender. Mr Brack and Mr Fogarty supported this recommendation.
- 5.11.2 The submission received from the NSW Nurses' Association discussed the need to apply any graduated system of penalties in an equitable manner. Determining whether an employer is large or small could be problematic and the Association was concerned whether such a system could be administered in an even-handed manner.<sup>94</sup>

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<sup>92</sup> *Transcript*, 30/10/97, p 2.

<sup>93</sup> *McCallum Report*, p 104.

<sup>94</sup> *Submissions, Volume Five*, NSW Nurses' Association, p 26.

- 5.11.3 Ms Frances Waters, of the NSW Department of Health, in oral evidence before the Committee commented on the efficacy of the current penalty differentiation:

...sending a small business bankrupt, with all the associated trauma and job loss, does not seem to be an effective long-term option for improving occupational health and safety in the workplace.<sup>95</sup>

- 5.11.4 *The current sharp differentiation in penalty levels between corporate and non-corporate offenders is difficult to justify in the current NSW industrial context. To impose a medium range penalty on a large corporation may merely be reflected as an abnormal item in the company's annual report, but for a husband and wife small business, incorporated for ease of legal and accounting administration, such a penalty could send the business into receivership.*

*The Committee agrees with this view and considers the maintenance of the penalty differentiation between corporate and non-corporate offenders to be an ineffective penalty. The Committee supports the McCallum Report recommendation for the removal of the penalty distinction and the development of a graduated penalty scheme. The Committee considers that this, together with the Committee's other recommendations for sentencing guidelines and non-monetary penalties, would be a far more effective sanctioning system.*

#### **Recommendation 16**

**The Committee recommends the removal from the *Occupational Health and Safety Act* of the differentiation between corporate and non-corporate offenders, and the development of a system of graduated penalties.**

## **5.12 Section 556A Crimes Act**

- 5.12.1 Section 556A of the *Crimes Act 1901* provides that:

Where any person is charged before any court with an offence punishable by such court, and the courts thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of offence, or to the extenuating circumstances under which the offence was committed, or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is

<sup>95</sup>

*Transcript, 7/10/97 p 9.*

expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either:

- (a) dismissing the charge; or
- (b) discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

5.12.2 The *McCallum Report* stated that s.556A is “an appropriate discretion available to the courts when sentencing an individual.”<sup>96</sup> However, the Panel majority did not support the use of the discretion when sentencing corporate offenders:

On a number of occasions magistrates have used the provision when sentencing corporate offenders. Such decisions when appealed have been overturned by the Industrial Court.<sup>97</sup>

5.12.3 Mr Brack and Mr Fogarty both objected to the suggestion that the discretion should not be available to corporate offenders, with Mr Brack stating:

we cannot see the reason for differentiating between those two circumstances.<sup>98</sup>

5.12.4 Professor Neil Gunningham, in an interview with the Committee, stated that section 556A should not be available in occupational health and safety prosecutions because many magistrates use the provision to avoid penalising OHS offenders. Additionally he questions the efficacy of retaining such a provision as:

given (the) small proportion of offences WorkCover actually prosecutes, it is highly unlikely that it is going to waste its time prosecuting for something that is trivial.<sup>99</sup>

5.12.5 *The Committee does agree with Professor Gunningham that it may be a waste of resources for WorkCover to prosecute for an OHS breach only to have no conviction or penalty awarded. As WorkCover has indicated in evidence before the Committee, only the more serious offences are brought before the Courts<sup>100</sup>, and it is arguably contrary to public policy to allow such offences to go unpunished.*

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<sup>96</sup> *McCallum Report*, p 103.

<sup>97</sup> *Ibid.*

<sup>98</sup> *McCallum Report*, p 140.

<sup>99</sup> *Transcript*, 30/10/97, p 18.

<sup>100</sup> *Transcript*, 7/8/97, p 55.

*However the Committee is also reluctant to circumscribe the discretion of sentencing judicial officers. The inclusion of the appropriate use of s.556A in sentencing guidelines should address any concerns about inappropriate use of the provision.*

### **Recommendation 17**

**The Committee recommends that section 556A of the *Crimes Act* continue to be available in sentencing for breaches of the *Occupational Health and Safety Act*.**

## **5.13 Victim Impact Statements**

5.13.1 The right to have a victim impact statement placed in evidence during sentencing is an issue that is discussed in the *McCallum Report*. The Panel generally supported the use of such statements in “appropriate prosecutions”.

5.13.2 Mr Brack and Mr Fogarty expressed some reservations about the use of victim impact statements in prosecutions arising under the *Occupational Health and Safety Act*. Mr Brack stated:

There is still significant uncertainty about the appropriate place of Victim Impact Statements in the Australian legal system. In the absence of deliberate criminal intent, the Occupational Health & Safety system is dealing with accidents and accidental outcomes, while the Worker’s Compensation system is dealing with the personal consequences for the injured employee.<sup>101</sup>

Mr Fogarty agreed that there was some uncertainty, expressing the view that:

Victim Impact Statements may be useful, however, clarification is required to define the purposes for their use ....<sup>102</sup>

5.13.3 Both Mr Brack and Mr Fogarty were concerned that Victim Impact Statements would affect the severity of sentence, with Mr Brack commenting:

Anything that is relevant to the severity of sentencing should be dealt with and be cross-examinable within the case at first instance. Even though the occupational health and safety jurisdiction is a criminal code, it is completely different from the ordinary criminal law which does not have a complementary worker’s

<sup>101</sup> *McCallum Report*, p 141.

<sup>102</sup> *McCallum Report*, p 146.

compensation system, not (nor) the complexity of work-related circumstances always relevant in the employer/employee relationship.<sup>103</sup>

Mr Fogarty also argued for cross examination of the victim.<sup>104</sup>

- 5.13.4 The submission received from Mr Stanley Teale contained a copy of the victim impact statements prepared by Mr Teale and his family, for the coronial inquest into the workplace death of his son, Richard. Mr Teale stated:

I feel that I must include our victim impact statements to inform the committee of the importance of workplace safety and how it can affect a family losing a son when it was the fault of the employer not taking responsibility to ensure safety in the workplace.<sup>105</sup>

The statements detail the devastating impact of a workplace death and confirm the submission by Advocates for Workplace Safety that:

It is the families who have to live with the consequences of workplace trauma. The ramifications are far reaching, not only for the families ..... Workplace deaths and injuries are not accidents. They are a life long legacy.<sup>106</sup>

- 5.13.5 Information on the personal impact of workplace injury, placed in the public domain this way, may be a factor in enhancing awareness of workplace safety and the social impact of workplace death and injury. It is important that the human tragedy behind the “accident” is not forgotten or trivialised. As Mr Teale states in his written submission:

...glossy OH&S graphs and statistics might look good in annual reports, but it means very little when I look at my sons’ death certificate.<sup>107</sup>

Public knowledge of workplace injuries and the impact on victims and their families may assist in facilitating the cultural change many submissions call for. For victims and their families, inclusion of victim impact statements also allows participation in the legal response to a major event in their lives. Ms Kavanagh of Advocates for Workplace Safety, called for a Victim Impact Statement to be automatically considered in OHS proceedings, as it ensured that loved ones did “not become irrelevant to, or lost in, the legal process.”<sup>108</sup>

- 5.13.6 The NSW Law Reform Commission in its Discussion Paper on Sentencing<sup>109</sup>, recommended victim impact statements (VIS) be admissible

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<sup>103</sup> *McCallum Report* p 141.

<sup>104</sup> *McCallum Report*, p 146.

<sup>105</sup> *Submissions, Volume Two*, Mr Stanley Teale.

<sup>106</sup> *Submissions, Volume Two*, Advocates for Workplace Safety, p 5.

<sup>107</sup> *Submissions, Volume Two*, Mr Stanley Teale.

<sup>108</sup> *Submissions, Volume Two*, Advocates for Workplace Safety, p 5.

<sup>109</sup> *Sentencing*, Discussion Paper 33, NSW Law Reform Commission, Sydney 1996.

at sentencing hearings, subject to guidelines on their use. Although the Discussion Paper dealt with general criminal matters, and did not specifically refer to occupational health and safety prosecutions, the issues raised by the Commission are relevant in the sphere of occupational health and safety prosecutions. Specifically the Commission recommended the Victim Impact Statement should be used to provide some information as to the significance of the offence. The Law Reform Commission considered that a Victim Impact Statement should not be admissible in homicide matters.<sup>110</sup>

- 5.13.7 After the release of the *McCallum Report*, the NSW Parliament passed the *Victims Rights Act 1997*. This Act provides for Victim Impact Statements in certain proceedings.<sup>111</sup>
- 5.13.8 The operation of the rules of evidence often means that the full impact of breaches of duty of occupational health and safety legislation is not made known to the sentencing magistrate or judge. Accepting such statements in OHS prosecutions ensures that a sentencing magistrate or judge is fully apprised of the effect the breach of duty has had on the victim, and often their family.
- 5.13.9 *The Committee supports the continued use of Victim Impact Statements in occupational health and safety proceedings. The Committee notes the concern expressed by employer representatives over the effect on sentencing. However the implementation of this recommendation, together with the recommendation for sentencing guidelines, which focus the sentencing officer's mind on the issues to be considered when sentencing, will address the concerns expressed by the employer representatives.*

### **Recommendation 18**

**The Committee recommends that Victims Impact Statements be admissible in sentencing under the *Occupational Health and Safety Act*.**

## **5.14 Publicity of occupational health and safety prosecutions**

- 5.14.1 The majority of the McCallum Panel were of the view that there is currently an under reporting of the outcomes of prosecutions under the *Occupational Health and Safety Act*. The majority took the view that publicity was, in

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<sup>110</sup> Ibid, p 436.

<sup>111</sup> *Victims Rights Act 1996*, Schedule 2, which amends the *Criminal Procedure Act 1986*, Part 6A.



effect, another enforcement mechanism, which could be used as a powerful deterrent.<sup>112</sup>

- 5.14.2 Mr Brack and Mr Fogarty expressed concerns about this recommendation on the basis that media reporting is not always accurate and can be sensationalist in its approach to such matters.

Given the ... sensationalist approach that can be adopted by the media, we are opposed to the notion that the Australian legal system should move in the direction of the American legal system in appealing to the media as part of the political strategy of legal and judicial administration.<sup>113</sup>

- 5.14.3 In March 1997 the Attorney-General and Minister for Industrial Relations, the Hon JW Shaw, QC, MLC, announced a successful WorkCover prosecution against Warman International. The fine awarded in the matter against Warman was the largest ever recorded in Australia for an occupational health and safety offence.<sup>114</sup> During the workplace visits and hearings many people made reference to this case as a positive reminder of workplace safety obligations.

- 5.14.4 In a written submission, Professor Michael Quinlan recommended "publication of OHS convictions, including a description of the offence(s) and penalties imposed". Professor Quinlan noted that:

in some cases adverse publicity poses a greater threat to a firm than an actual monetary penalty by undermining its public image.<sup>115</sup>

- 5.14.5 The written submission by the NSW Department of Health expressed concern with the implementation of such a recommendation:

While as it reads this is probably not unreasonable, the real test is in how it is to be finally incorporated in any legislation and to what extent, and in which context this 'publication' would occur. Matters regarding consistency of reporting in OHS are problematic in optimum circumstances. Careful consideration of what constitutes a 'publication' prosecution, and its consistency of application is needed.

It should also be noted that over-saturation in the media of these matters may actually have a 'desensitising' affect on the public in general.<sup>116</sup>

In oral evidence, Ms Frances Waters, representing the Department again recommended caution because of the privacy rights of those affected by the incident.<sup>117</sup>

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<sup>112</sup> *McCallum Report*, pp 119-120.

<sup>113</sup> *Ibid*, p 142.

<sup>114</sup> Press Release, March 27, 1996.

<sup>115</sup> *Submissions, Volume One*, Professor Michael Quinlan, p 52.

<sup>116</sup> *Submissions, Volume Six*, NSW Health.

<sup>117</sup> *Transcript*, 7/10/97, p 9.

- 5.14.6 Ms Valerie Dyson, of the Tamworth Farmsafe Action Group supported targeted publication of safety incidents:

...it would be a really good idea to get the message to farmers by having in *The Land* a regular column on incidents, accidents and near misses.<sup>118</sup>

- 5.14.7 Committee Recommendation

#### **Recommendation 19**

**The Committee recommends that the WorkCover Authority develop strategies to encourage greater publicity of successful prosecutions arising under the *Occupational Health and Safety Act*.**

### **5.15 Targeted Blitzes**

- 5.15.1 Linking the enforcement strategies of on-the-spot fines and publicity, Professor Michael Quinlan has suggested that the WorkCover Authority needs to adopt a more targeted and strategic enforcement strategy. Specifically, he suggested the conduct of targeted blitzes of industries with a poor safety record. Such blitzes could be conducted after an extensive education and information program in particular industries. These programs should be developed in consultation with industry representatives and delivered in conjunction with industry.

We need a targeted and strategic compliance strategy. We need to use both positive and negative forms of inducement. It is not an either-or situation. Some employers will respond to positive help, and with small business we need to provide all the help we can. On the other hand, some business will respond only to the incentive that is provided by prosecution. I am afraid that is the case. Most level-headed employers, if you sit them down in a group, will admit that as well. So you need a variety of packages of inducements. I would also suggest that you need the maximum array of sanctions as well. Do not just think about fines, because fines have limited behavioural change potential.

Some of the things that might be worth thinking about are using targeted publicity campaigns in conjunction with on-the-spot fines, saying you are going to target an industry, providing a lot of advice to those employers that want to get advice then, and only then, going in and doing a targeted blitz of a particular region of New South Wales and issuing on-the-spot fines. So you try to mix the positive and the negative sides. And you publicise all this.

Publicity is very powerful, particularly with big companies. No-one wants to be named adversely.<sup>119</sup>

**Recommendation 20**

**The Committee recommends that the WorkCover Authority include in its enforcement strategy the conduct of targeted blitzes of industries and regions with a poor health and safety record.**

# Chapter Six

## Workplace Consultation and Training

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### 6.1 Current consultation obligations

6.1.1 The current consultation obligations under the *Occupational Health and Safety Act* have been described succinctly by Professor McCallum in the following terms:

In New South Wales, we took a very softly-softly approach to consultation in our 1983 Act. All that we said was that in workplaces of more than 20 persons there should be established a safety and health committee and that the employer number should not outnumber the employee number; in other words, there should be an equality. We did not go down the route of most other States, to require the establishment of a safety and health committee to discuss matters and the election of safety and health representatives to be watch-dogs on behalf of employees of the safety of their undertakings.<sup>120</sup>

6.1.2 Section 23 of the Act provides for the establishment of occupational health and safety committees where there are 20 or more people employed at a place of work and the majority of employees requests the establishment of such a committee. Section 24 provides for the functions of occupational health and safety committees. Those functions include reviewing measures taken to ensure health and safety at the place of work; investigation of matters and attempting to resolve matters. If a matter is not able to be resolved, the committee is to request an inspection by a (WorkCover) inspector. Section 25 provides for the powers of occupational health and safety committees, including the power to carry out inspections of the place of work and obtain information about the place of work. Section 25(2) provides for the provision of training to members of occupational health and safety committees. Much of the detail of these provisions is prescribed in the *Occupational health and Safety (Committees in Workplaces) Regulation 1984*.

6.1.3 In 1996 40.6% of NSW workplaces with 20 or more employees had established occupational health and safety committees. This translated to 36.3% of all NSW workplaces.<sup>121</sup>

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<sup>120</sup> Transcript, 23/5/97, p 20.

<sup>121</sup> Quoted in *McCallum Report*, p 122.

## 6.2 Recommendations of the McCallum Panel

### 6.2.1 Specific Recommendations

**Recommendation 30:** The Panel recommends that there should be a broad duty of consultation placed in the Act that all employers and employees have a duty to consult through mechanisms appropriate for the particular workplace or enterprise.

**Recommendation 31:** The current provisions establishing committees in places of work with 20 or more employees should remain.

**Recommendation 32:** As is the case at present, in places of work where there are less than 20 employees, committees may be established where the employers and the employees are in agreement.

**Recommendation 33:** In places of work with less than 20 employees where there is no agreement or directive by WorkCover New South Wales to form a committee, the employees be given the right to elect a safety and health nominee who would consult with a designated senior manager.

**Recommendation 34:** Above and beyond the minimum requirements set out in 30-33 above, the Panel recommends there needs to be greater flexibility to allow for, where appropriate, mechanisms for consultation within an enterprise, industry or occupational grouping and that the Minister give consideration to further development amongst the appropriate partners of this concept.

**Recommendation 35:** The Panel recommends that the Minister consider a comprehensive review of training to ensure its adequacy and its appropriateness in New South Wales workplaces. It is further recommended that the matter be referred to a working party representative of the workplace parties or the Occupational Health, Safety and Rehabilitation Council of New South Wales for further advice.

6.2.2 The *McCallum Report* made six recommendations relating to consultation and training. The entire Panel stated:

All Panel members recognise that serious and adequate employer/employee consultation is one of the best methods of eliminating workplace accidents and risks.<sup>122</sup>

The Panel agreed that a broad duty to consult should be contained in the *Occupational Health and Safety Act*.

6.2.3 The majority of the Panel argued for a modernisation of consultation arrangements, including the right of employees to elect a health and safety nominee. Mr Brack and Mr Fogarty objected to mandatory prescription of the form of consultation. Mr Brack argued that in those organisations with successful consultation methods, there is already a culture which is serious about employee participation. Mr Brack argues that without a culture which is receptive to consultation, mandatory consultation will not achieve favourable OHS outcomes:

...one of the things that concerns me is the simplistic notion that if you have consultation, then necessarily you get an improvement. It may well be that you have to have culture first in order for consultation to produce those kinds of results.<sup>123</sup>

### 6.3 Committees

6.3.1 The Panel recommended retention of the current provisions for consultation, together with legislative provisions for committees and health and safety nominees in smaller workplaces. It was the opinion of the majority of the Panel that the current legislative obligations for committees worked well. For smaller workplaces, committees may be established where the employer and employees agree.

6.3.2 Mr Brack commented that committees have been established in many workplaces with less than 20 employees. He again emphasised the need for flexibility in consultation arrangements:

Some businesses with more than 20 employees have non-statutory committees. In other words they find the provisions of the legislation too restrictive, and therefore set up other consultative arrangements. Some very large companies do precisely that, and show reasonably good results for their endeavours. So we say: yes, let's have things that suit the circumstances of the business.<sup>124</sup>

6.3.3 A variety of views about occupational health and safety committees were expressed in the submissions received by the Committee. The NSW Nurses' Association commented on the current inequity in the Act, with

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<sup>122</sup> *McCallum Report*, p 123.

<sup>123</sup> *Transcript*, 23/5/97, p 27.

<sup>124</sup> *Ibid*, pp 39-40.

provisions for consultation only for larger workplaces. The Association proposes an amendment to the Act to make consultation with employees compulsory, regardless of the size and structure of the workplace.

It is employees who have the most intimate knowledge of their jobs and are therefore often best qualified to contribute to hazard identification and risk assessment and control. It is also well recognised that ownership of programs and work practices is the best motivator for compliance.<sup>125</sup>

6.3.4 Professor Adrian Brooks, of the University of NSW Law School, also commented on the inequity in the current consultation arrangements in evidence before the Committee on 7 August 1997:

6.3.5 One of the problems at the moment is that because New South Wales provides only for health and safety committees and because they are not appropriate for very small workplaces with maybe only 20 people or less, the committee structure is made a requirement for larger workplaces. Therefore, there is no requirement at all for participation in smaller workplaces, which numerically make up the bulk of workplaces in the State.<sup>126</sup>

6.3.6 The Police Service also supported an expansion of the consultation provisions of the legislation:

to encourage greater employee participation and awareness.<sup>127</sup>

6.3.7 The submission received from the Director-General of the Premier's Department, Mr Col Gellatly, suggested that there was already considerable flexibility in the current provisions of the Act relating to consultation. He advised of a rationalisation of such committees being undertaken in the government offices in the Governor Macquarie Tower in Sydney. A cross-departmental committee has been established which would:

avoid duplication, minimise administrative processes, streamline areas of training and other programs, allow information sharing and provide a forum for common issues to be dealt with more effectively.<sup>128</sup>

6.3.8 The submission received from the Department for Women, supported the existing provisions for occupational health and safety. The Department however recommends that such a committee should be representative of the workforce.<sup>129</sup>

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<sup>125</sup> *Submissions, Volume Five*, NSW Nurses' Association, p 19.

<sup>126</sup> *Transcript, 7/8/97*, p 38.

<sup>127</sup> *Submissions, Volume Six*, NSW Police Service.

<sup>128</sup> *Submissions, Volume Six*, Premier's Department.

<sup>129</sup> *Submissions, Volume Six*, Department for Women.

6.3.9 The Industry Commission found that employee participation is “critical to successful management of the risks to health and safety at work”. The industry Commission came to that view for the following reasons:

- employees have a right to be involved in decisions affecting them, especially when their health and safety is at risk;
- employees are often best placed to know what needs to be done to address health and safety risks; and
- employee participation has other benefits, including industrial relations, higher morale and increased productivity.<sup>130</sup>

6.3.10 A recent survey by the NSW WorkCover Authority reviewed the operation of occupational health and safety committees in NSW workplaces. The results of the survey suggest that the current legislative arrangements for consultation are not appropriate for many workplaces, and not particularly adaptable for small workplaces.<sup>131</sup> The study notes that committees are characterised by a high degree of industry sector stratification, with public administration and health sectors having the highest representation of committees and the wholesale/retail industry sector the lowest.<sup>132</sup> Workplaces where there are alternative patterns of labour market participation - casual, part time or temporary (usually women or younger workers), often usually do not have committees. In these industries where there are committees they may not be in compliance with the legislative provisions.

6.3.11 *The Committee believes productive occupational health and safety committees can play an important role in enhancing OHS outcomes for workplaces. However the particular structure for committees detailed in the current regulation may not be appropriate for all workplaces. Legislation needs to be framed in such a way as to encourage consultation within a framework that is appropriate for the individual workplace.*

*The Committee therefore supports the McCallum Panel of Review recommendations for increased flexibility in workplace consultation.*

### **Recommendation 21**

<sup>130</sup> *Work, Health and Safety*, Final report, Volume One, p 63.

<sup>131</sup> *Workplace Occupational Health & Safety Committees in New South Wales: A Summary of the findings of a WorkCover survey of OHS Committees*, published by the Data Analysis and Research Unit of the WorkCover Authority of NSW, December 1996 (hereafter *Workplace Committees*).

<sup>132</sup> *Ibid*, p 11.



**The Committee recommends that the *Occupational Health and Safety Act* be amended to contain a general duty to consult.**

#### **Recommendation 22**

**The Committee recommends that the *Occupational Health and Safety Act* and regulations be amended to require occupational health and safety committees be established in any workplace, regardless of size, where a majority of employees so request.**

### **6.4 Health and safety representatives/nominees**

6.4.1 The majority of the McCallum Panel recommended the establishment of the position of health and safety nominee. The term health and safety representative, the term used in most other Australian states, was considered, however due to employer concerns the Panel majority chose the term nominee. The Panel noted that:

in a majority of other Australian jurisdictions, elected safety and health representatives have been in place for approximately a decade, and their presence in workplaces has not generated much controversy.<sup>133</sup>

6.4.2 Mr Brack and Mr Fogarty opposed this recommendation. Mr Brack argued that the proposal removed the flexibility provided in Recommendation 30 and would be ineffective. Mr Brack argued:

we believe consultation is desirable, but only likely to be beneficial if it operates within a co-operative workplace culture<sup>134</sup>.

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<sup>133</sup> *McCallum Report*, p 125.

<sup>134</sup> *McCallum Report*, p 142.

- 6.4.3 The role of health and safety representatives was discussed in the Industry Commission of 1995. Quoting the submission of the ACTU, the industry Commission contrasted the role of health and safety representatives with that of committees.

The OHS Committee has clearly defined responsibilities in the workplace which involve the broader issues, including integration of OHS into management systems, data gathering and statistic gathering and review, developing and overseeing workplace programs and so on. The health and safety representative is much more closely involved with the day-to-day issues which arise in their "designated work group", and in dealing with those issues on behalf of the workers who elected him/her.<sup>135</sup>

- 6.4.4 The Industry Commission expressed its support for the establishment of the position of health and safety representative in all States.

The Commission recommends that the principal OHS legislation in each jurisdiction provide employees with a right to elect their health and safety representatives and any employee members of the health and safety committee at their workplace.<sup>136</sup>

- 6.4.5 Professor Michael Quinlan, in a written submission, referred to research which showed that in states where health and safety representatives have powers, including the right to information and the right to halt the work process, such representatives are active and their knowledge of OHS is higher. The research concludes that health and safety representatives are effective mechanisms for changing attitudes and practices<sup>137</sup>.

- 6.4.6 The draft submission received from the NSW Labor Council of NSW also supported the introduction of the position of Health and Safety representative.<sup>138</sup>

- 6.4.7 Some submissions have raised concerns about changes to consultation arrangements. The Department of Community Services, in its submission, raised concerns that:

the proposed change could produce an unwieldy number of Safety Nominees in a large decentralised organisation such as the Department of Community Services, which has a substantial number of small workplaces.<sup>139</sup>

- 6.4.8 Workplace consultation, in the form of employee health and safety representatives, is a feature of the occupational health and safety legislation in other Australian States. Safety representatives are often additional to workplace safety committees. Many submissions referred to the arrangements in Queensland and Victoria, and it was partly in order to

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<sup>135</sup> *Work, Health and Safety*, Final Report, Volume One, p 64.

<sup>136</sup> *Ibid*, p 67.

<sup>137</sup> *Submissions, Volume One*, Professor Michael Quinlan, p 29.

<sup>138</sup> *Submissions, Volume Five*, Labor Council of NSW, p 46.

<sup>139</sup> *Submissions, Volume Six*, Department of Community Services.

investigate these arrangements that the Committee visited Brisbane and Melbourne.

- 6.4.9 In Victoria, the *Occupational Health and Safety Act 1985*, makes provision for health and safety representatives, as well as committees. Health and safety representatives in Victoria have the widest range of powers of any of the safety representatives in other jurisdictions. Not only are health and safety representatives able to participate in inspections by WorkCover staff, they are able, after consultation with the employer, to issue Provisional Improvement Notices and direct a cessation of work where there is an immediate threat to health and safety<sup>140</sup>. Where the employees do stop work, the employer may direct them to alternative duties. If alternative duties cannot be found and an inspector finds that there was reasonable cause for the work stoppage, the employees are entitled to be paid for the lost time.

The Committee was provided with information from the Victorian WorkCover Authority about the use of such powers by health and safety representatives. This information shows that the checks and balances in the legislation ensure that such wide ranging powers are used sparingly.

#### **HEALTH AND SAFETY REPRESENTATIVES - VICTORIA**

- Approximately 18,000 health and safety representatives in Victoria since 1988

#### **WORK CESSATIONS**

- Inspectors have attended 580 work cessations
- 293 have been disputed - inspectors found 179 to have reasonable cause

**D I S P U T E D**  
**P**

**ROVISIONAL IMPROVEMENT NOTICES**

- 1988 - 111  
1989 - 283  
1990 - 341  
1991 - 269  
1992 - 201  
1993 - 117  
1994 - 134  
1995 - 113  
1996 - 102  
1997 (to date) - 38
- 52% have been affirmed by an inspector

Source: Victorian WorkCover Authority

6.4.10 Professor Quinlan has commented about the controversy which accompanied the establishment the position of health and safety representative in Victoria.

The creation of the H&S representative under revised OHS laws was initially one of the most controversial aspects of the legislation in Australia, being sometimes bitterly contested in Parliament. However, this controversy rapidly waned and even the change of government in states like Victoria has seen little amendment to these powers.<sup>141</sup>

6.4.11 The *Queensland Workplace Health and Safety Act* provides for three consultative mechanisms.

- **workplace health and safety officers (WHSO):** appointed by management at a workplace where 30 or more people work (and it is an industry nominated by the Minister as requiring WHSO's) .<sup>142</sup> The role of a workplace health and safety officer is to advise on health and safety, conduct inspections, report hazards and workplace injuries, and investigate or assist with investigations of injuries.

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<sup>141</sup>

*Submissions, Volume One*, Professor Michael Quinlan, pp 27-28.

<sup>142</sup>

S.58(1) *Workplace Health and Safety Act* (Qld).

- **workplace health and safety representatives:** are elected by co-workers. They have powers to inspect the workplace, be present at accident investigation interviews, undertake reviews of dangerous events and advise the employer on this, help resolve workplace health and safety issues and report to an employer or inspector on workplace hazards.
- **health and safety committees:** with similar responsibilities to those of NSW committees.

6.4.12 Professor Michael Quinlan, of the University of New South Wales, stated that Workplace Health and Safety Officers have had a number of benefits including a greater focus on appointing persons with an understanding of occupational health and safety, and a greater emphasis on prevention and education. Professor Quinlan also states that the position of workplace health and safety officer:

appears to have encouraged a more co-ordinated approach to OHS generally.<sup>143</sup>

6.4.13 The powers of health and safety representatives were considered by the Industry Commission in its Final Report on *Work, Health and Safety* in 1995. The Commission expressed support for a list of proposed powers and functions submitted by the ACTU. Those powers and functions were:

- to inspect the workplace;
- to have access to all health and safety information relating to the workplace;
- to call in a government inspector and to accompany an inspector during an inspection;
- to initiate prosecutions through the union, in respect of breaches of regulations, where the inspectorate fails to act;
- to stop work and order workers and others at risk out of areas where an immediate threat to health and safety is suspected (with no loss of wages) pending the arbitration of an inspector;
- to initiate improvement notices on any plant or process;

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*Submissions, Volume One*, Professor Michael Quinlan, p 23.

- to be informed of any accident or hazardous event immediately and to carry out an emergency inspection of the site, and to be given copies of accident reports;
- to represent workers in health and safety disputes or internal inquiries after accidents;
- to be consulted by the employer on all changes to the workplace which may have implications for the health and safety of the workers they represent;
- to perform all their activities on paid time, and to have adequate facilities;
- to call in consultants and advisers to the workplace at any time, after notifying the employer, and at the employer's expense;
- to be able to carry out their duties without incurring additional legal responsibility; and
- to be able to perform these duties during working hours without loss of pay or other entitlements.<sup>144</sup>

The Commission expressed its support for all but three of these proposed powers. The three powers not supported by the Industry Commission were: the power to order workers to stop work; to initiate improvement notices; and to call in consultants or advisers at the employer's expense.<sup>145</sup>

6.4.14 *The Committee acknowledges that employee participation within the committee structure is not the only method of workplace consultation, nor is it necessarily the most effective. Alternative mechanisms for consultation, which allow individual workplaces or industries to determine the appropriate method and level of consultation, must be introduced if employee participation in workplace safety matters is to be encouraged.*

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<sup>144</sup>

*Work, Health and Safety*, Final Report, Volume Two, pp 354-355.

<sup>145</sup>

*Ibid*, Volume One, p 65.

**Recommendation 23:**

The Committee recommends that the *Occupational Health and Safety Act* be amended to require the establishment of a position of health and safety representative in any workplace, regardless of size, at the request of the majority of employees. Such health and safety representative would be elected by employees and should have the following powers:

- help resolve health and safety issues and report to management on workplace hazards;
- request an inspection by a WorkCover inspector;
- accompany a WorkCover inspector on a workplace inspection;
- be present at accident investigations;
- issue Provisional Improvement Notices (to which an employer may object, pending an inspection by a WorkCover inspector); and
- stop work where there is an imminent danger, after consultation with the employer and pending an inspection by a WorkCover inspector.

These powers must be subject to appropriate checks and balances, such as those provided for in the Victorian *Occupational Health and Safety Act 1985*, so as to ensure that they are exercised responsibly and sparingly.

**Recommendation 24:**

The Committee recommends that the *Occupational Health and Safety Act* be amended to require the establishment of a position of health and safety officer in any workplace, regardless of size, at the request of the employer. Such health and safety officer would be nominated by the employer and should have the following powers:

- help resolve health and safety issues and report to management on workplace hazards;
- liaise with employees about health and safety matters;
- request an inspection by a WorkCover inspector;
- accompany a WorkCover inspector on a workplace inspection; and

- **be present at accident investigations.**

**Recommendation 25:**

**The Committee recommends that the Occupational Health, Safety and Rehabilitation Council develop guidelines for the training to be provided to health and safety representatives and health and safety officers.**

## 6.5 Peak Industry Committees

6.5.1 The McCallum Panel recommended the Minister give consideration to the development of the concept of enterprise, industry or occupational grouping consultative committees.

6.5.2 The Committee heard support for peak industry committees from both employer and union representatives. Ms Deborah Hall, of the Australian Business Chamber, in oral evidence argued that consultation with peak industry representatives is “a crucial step in the development of legislation in New South Wales, as each party .... is a stakeholder in the outcome.”<sup>146</sup>

6.5.3 Mr Peter Sams, Secretary of the Labor Council of NSW in oral evidence, expressed strong support for the establishment of:

peak industry committees with sufficient power and influence. We believe that such committees should be recognised by legislation, and some have been extremely successful. These are committees involving both the unions and the employers.<sup>147</sup>

6.5.4 The submission received from Professor Michael Quinlan expressed strong support for the establishment of tripartite industry committees in NSW. Professor Quinlan drew attention to the industry committees established under the Queensland *Workplace Health and Safety Act* and outlined the practical achievements of some of those committees, including devising codes of practice for the relevant industry and the production of useful and readable guidance material for use by small business. Professor Quinlan argues that industry committees “bring the regulators closer to their client groups” and that the “industry committee structure represents a more systematic approach to establishing standards”.<sup>148</sup>

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<sup>146</sup> *Transcript*, 5/8/97, p 36.

<sup>147</sup> *Ibid*, p 24.

<sup>148</sup> *Submissions, Volume One*, Professor Michael Quinlan, pp 24-25.



6.5.5 During a visit to the Homebush Olympic and Showground construction sites the Committee was briefed on the operation of the WorkCover Construction Industry Consultative Committee. This Committee, chaired by WorkCover, and comprising representatives of building employers and unions, advises on occupational health and safety issues in the building industry. The Construction Committee, particularly, has been involved in the production of much guidance material for industry. The Committee was also informed of the existence of the WorkCover Health and Allied Industries Committee.

6.5.6 The Grellman Report recommends the establishment of Industry Reference Groups to “provide education and practical advice to workers and employers within their respective sector”.<sup>149</sup> The groups will advise on workers’ compensation, occupational health and safety and injury management. One of the responsibilities of such groups is the:

- development and education of best practice industry-specific prevention and OH&S strategies.<sup>150</sup>

6.5.7 *The Committee recommends the establishment of Peak Industry Committees. Priority should be given to the establishment of committees covering industries with a poor health and safety record. One of the first tasks for these committees should be the identification of the five or six key strategies that can be adopted within the relevant industry for the improvement of health and safety and the development of publication of guidance material for employers (including small business) about those strategies.*

*The activity of such Committees should be included in the WorkCover Authority’s strategic planning, and the resource needs of such committees be included in WorkCover’s annual budgeting.*

*Further, legislative provisions to allow for the establishment of such Committees, where the Minister so approves, should be enacted. Such committees could be established for a particular period of time to develop material in response to specific occupational health and safety issues.*

*The consultative committees should be required to report on their activities annually, or at the conclusion of their statutory time period. Such report should be included in the WorkCover Annual Report.*

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<sup>149</sup> Grellman Report, p 76.

<sup>150</sup> Grellman Report, p 77.

**Recommendation 26:**

**The Committee recommends the establishment of peak industry committees, along the lines of the WorkCover Construction Industry Consultative Committee, to develop strategies to encourage best practice in health and safety in their industry. Priority should be given to the establishment of such committees in industries with a poor health and safety record.**

**6.6 Training**

6.6.1 The *McCallum Report* considered the current provisions for training and the majority stated:

Current training requirements are...inflexible, do not allow for a mobile work force, and provide no guarantee that the course undertaken has a tangible long-term effect in the workplace.<sup>151</sup>

The Panel stated that employees and employers consider the current first aid training courses as:

outdated and lacking the content needed to adequately equip both managers and employees with the necessary skills to recognise hazards and recommend improvements in workplaces.<sup>152</sup>

6.6.2 The Panel noted the need for appropriate training to meet a variety of needs covering induction for new employees, as well as hazard specific and general training. The *McCallum Report* recommended a general review of training. Mr Brack's only comment in relation to this recommendation was to the effect that employer representatives would wish to participate if such a review of training was undertaken.<sup>153</sup>

6.6.3 When the Committee visited Homebush Olympic and Showground construction sites, the Committee was briefed on the need for training in the NSW construction industry to ensure a viable and vital industry. The Committee also visited the COMET training rooms and was favourably impressed by this joint initiative of the Master Builders Association and the Construction Forestry Mining and Energy Union (CFMEU). The Committee discussed this initiative with the then Acting General Manager of the WorkCover Authority, Mr John Horder.

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<sup>151</sup> *Transcript, 23/5/97, p 22.*

<sup>152</sup> *McCallum Report, p 128.*

<sup>153</sup> *Transcript, 23/5/97, p 40.*

COMMITTEE: What does WorkCover think of the Comet arrangement where that extraordinary organisation is partnered by the CFMEU and the Master Builders Association and targeted on the showground site? The organisation comprises a trade union and a master builder that are always traditionally at loggerheads but are in business together training occupational health and safety personnel?

Mr HORDER: Where oil can be poured upon troubled waters, I am all in favour of it. I think it is great to see the parties get together to have a common goal and outcome. It is good business for the master builder for overall costs and for the unions for safety of their members. It is a win-win situation. I believe that it is not necessary for WorkCover to personally deliver all services. To facilitate the delivery of services we do not have to have an army of people at WorkCover running around doing these things. If we can bring the parties together and broker solutions, that will be cost effective and have a win-win outcome for all concerned.<sup>154</sup>

6.6.4 At a public hearing in Tamworth, the Committee received evidence from the Tamworth Farmsafe Action Group about the need for innovative training. The Farmsafe Group mentioned courses funded under a Federal Drought Assistance scheme that were conducted in local halls and on farms, rather than at a TAFE. Additionally farmers were given funding towards employing a relief worker in their absence.<sup>155</sup> The Farmsafe Action group also recommended the use of mobile vans, to deliver safety education in schools, similar to those currently used for the "Life Education" program. The group recommended that this method of delivery was particularly appropriate for farming communities.<sup>156</sup>

6.6.5 The submission by the Deputy Premier, Minister for Health and Minister for Aboriginal Affairs, summarised the theme of many submissions when he recommended:

basic principles in health and safety and the concept of risk management be introduced at secondary school, and form part of most professional, technical and related training. This brings an understanding of OHS and risk management into the workplace with its employees.<sup>157</sup>

6.6.6 Mr Jon D'Astoli, the Occupational Health and Safety Manager at The University of Sydney, also called for occupational health and safety to be included in education.

The inclusion of OHS as a core element in Management courses run by various tertiary colleges should improve proper management of OHS into the future.<sup>158</sup>

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<sup>154</sup> *Transcript, 7/8/97, p 75.*

<sup>155</sup> *Transcript, 23/7/97, p 8.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Submissions, Volume Six, Deputy Premier.*

<sup>158</sup> *Submissions, Volume One, Mr John D'Astoli.*

- 6.6.7 Ms Trish Butrej, representing the NSW Nurses' Association also commented on the need for OHS training for management, stating:

There is too much reliance on training the employees, instead of skilling management up to actually undertake the risk assessment and risk management processes in their own areas of control.<sup>159</sup>

- 6.6.8 The training needs of young people were highlighted, with many submissions calling for the re-institution of the Federal youth safety strategy "Don't let their first day be their worst day".<sup>160</sup>

- 6.6.9 Professor Michael Quinlan gave graphic evidence of the injuries many young people, who are often studying full-time and working part-time, suffer:

I am aware of a case involving a young worker employed by a very large fast food chain. The worker was put on a job where he had to use a cream dispensing machine, one of those cones. He had to disassemble it to clean it, and he was not given any training. He misassembled it and a piece shot out of the machinery and took out one of his eyes. The company involved was prosecuted by WorkCover, and the worker who lost an eye was provided with a job in the company. The next job he was given was cleaning the back of the ovens with caustic soda.

Again the worker was given no training and no account was taken of the fact that he had only one eye. While he was cleaning the back of the ovens a splash of caustic soda hit him in the eye. It was fortunate that it happened to be the glass eye, because that worker could have lost his second eye. We are not talking about a small operator here; we are talking about a large American-owned fast-food company.<sup>161</sup>

- 6.6.10 In relation to the development of information kits for school, TAFE and university students, the draft submission received from the Labor Council of NSW drew attention to the role of its YouthSafe Committee.

Labor Council has established "YouthSafe", a youth OHS committee that comprises a diverse group of young men and women who have an insight into the issues facing their fellow young workers. YouthSafe aims to:

- make proposals to the government regarding ways and means of producing campaigns and strategies;
- produce flyers that will cater especially for young and inexperienced workers regarding their rights in relation to OHS;

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<sup>159</sup> *Transcript*, 8/10/97 p 37.

<sup>160</sup> See for example, *Submissions, Volume Two*, Advocates for Workplace Safety, Appendix 3, p 3 ; *Volume Five*, Labor Council of NSW, p 59.

<sup>161</sup> *Transcript*, 5/8/97, p 15.

- conduct evaluations of these strategies and advise government accordingly of outcomes; and
- develop information kits for high school, TAFE and university students and young people in the workplace.

Labor Council recommends that this committee should be given support and statutory status. Furthermore the government should provide it with adequate funding to achieve its aims and objectives.<sup>162</sup>

- 6.6.11 *Training of workers is an integral element of achieving a safe working environment. It is the Committee's view that positive safety outcomes cannot be achieved unless every person in the workplace is able to comprehend the need to be conscious of safety, and to understand how to take steps to achieve a safe workplace. There is no point in developing Codes of Practice for dangerous chemicals or hazardous plant, if the worker is not aware that such chemicals or plant are hazardous.*

**Recommendation 27:**

**The Committee recommends that the WorkCover Authority consult with the Department of School Education, TAFE and Universities about the development of appropriate health and safety teaching material including:**

- **the funding of mobile vans to raise awareness of health and safety issues at the primary school level, particularly in areas of the State where children are present in the workplace (eg farms, outworkers);**
- **the provision of information about workplace hazards to high school students before they undertake work experience; and**
- **the incorporation of health and safety material into management courses and other appropriate tertiary and vocational courses.**

# Chapter Seven

## Difficulties and Complexities of the Current Act

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### 7.1 The *Occupational Health and Safety Act*

The Occupational Health and Safety Act 1983 was the first of the new style “Robens” legislation in Australia. The Act has been amended on many occasions since that time, and its current form reflects this. It is a patchwork, with provisions added or removed over time. The Act is not internally consistent and in parts it is quite dense and the language used is old-fashioned.

### 7.2 Recommendations of the McCallum Panel

#### 7.2.1 Specific Recommendations

**Recommendation 36:** The Panel recommends that the *Occupational Health and Safety Act* should be redrafted in a plain English style such as that used in the drafting of the Industrial Relations Act 1996 (NSW). The technique of placing guidance notes in legislation should be used in the act to aid readers in comprehending its materials.

**Recommendation 37:** The Panel recommends that gender neutral language should be used throughout the Act and the regulations, in order to drive home the point that occupational health and safety is the concern of women and of men.

**Recommendation 38:** The Panel recommends that all the general definitions -- and where possible any specific definitions --- should be placed in a dictionary at the end of the Act. Again, this will facilitate comprehension and access.

**Recommendation 39:** The Panel recommends that key matters should be placed in the statute and not hidden in the regulations in order to enable employers, employees and the self-employed to know their significant rights and liabilities.

**Recommendation 40:** The Panel recommends that the sections of the Act be grouped together in a more coherent manner. For example, s.50 which details with the duties of directors and managerial personnel of corporations, should be placed with the general duties provisions which appear in ss 15 to 19.

**Recommendation 41:** The Panel recommends that the general duties section be placed at the front of the statute immediately after its objects provision.

**Recommendation 42:** The Panel recommends that the Act be re-numbered using consecutive numbering which will facilitate easy access.

7.2.2 The McCallum Panel criticised the current format of the OHS Act because:

it is not set out in a clear and readable form, and because many of its provisions are written in an outdated and legalistic manner.<sup>163</sup>

The Panel also commented on subsequent amendments which make numbering of the Act confusing. Mr Brack agreed with the recommendations to update the language of the Act, providing the current meaning was not changed.<sup>164</sup>

### 7.3 Submissions and evidence received

7.3.1 In Chapter 4.3 of this Report, the Committee commented on the many submissions received calling for clarification and simplification of the Duty of Care provisions in the Act and also commented on the inaccessibility of the entire OHS Act and supporting regulations.

7.3.2 Mr Peter Maxwell, the Human Resources Co-ordinator (Environment, Health & Safety) at the Charles Sturt University, in a written submission, also comments on the complexity of the current legislation and refers the Committee to the South Australian legislation, suggesting:

Workplaces would find the consolidation of the regulations and other matters into one set of regulations of great assistance ...<sup>165</sup>

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<sup>163</sup> *McCallum Report*, p 131.

<sup>164</sup> *Ibid*, p 143.

<sup>165</sup> *Submissions, Volume one*, Mr Peter Maxwell.

- 7.3.3 The NSW Nurses' Association also comments on the accessibility of the Act stating the legislation is "somewhat disjointed in parts."<sup>166</sup>
- 7.3.4 Newcastle Trades Hall Council, in a written submission, called for "worker friendly law", stating:
- ... OHS drafting is unduly complicated, designed for lawyers and not the workers they are aimed at protecting.<sup>167</sup>
- 7.3.5 Ms Deborah Hall, of the Australian Business Chamber, in oral evidence before the Committee, recommended:
- that the legislation be written in plain English to simplify it and to reduce the cost and difficulty of implementing the requirements.<sup>168</sup>
- 7.3.6 *The Occupational Health and Safety Act is a primary piece of industrial welfare legislation. The rights and duties it creates have a significant impact on all residents of New South Wales, whether they are employers, workers or visitors at a workplace. It is important that such legislation be, as much as possible, easily understood by all.*

#### **Recommendation 28**

**The Committee recommends that the *Occupational Health and Safety Act* be redrafted in a plain English style and reorganised in a more coherent manner to facilitate comprehension and access.**

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<sup>166</sup>

*Submissions, Volume Five, NSW Nurses' Association.*

<sup>167</sup>

*Submissions, Volume Five, Newcastle Trades Hall Council.*

<sup>168</sup>

*Transcript, 5/8/97, p 36.*



# Chapter Eight

## Other Recommendations arising out of the inquiry

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The Recommendations contained in this chapter are not related to specific recommendations contained in the *McCallum Report*. Rather the recommendations in this Chapter arise from the Committee's inquiry to date. Because of the nature of these recommendations, and the urgent need for their implementation, the Committee has chosen to publish the recommendations now, to allow their implementation during 1998.

### 8.1 Codes of practice

- 8.1.1 During the conduct of this inquiry, the Committee was referred to numerous Codes of Practice. Codes of Practice are documents containing advice on meeting the obligations imposed by the *Occupational Health and Safety Act*. Codes can be approved by the Minister for Industrial Relations, under s.44A of the *Occupational Health and Safety Act*. When a Code is approved, failure to observe such a code can be used as evidence of failure to comply with the provisions of the *Occupational Health and Safety Act*.
- 8.1.2 The Committee is conscious of the impact that such Codes have, particularly on small business. While the Committee applauds the principle of providing plain English, accessible information on workplace safety obligations, a code is in effect a "quasi-regulation". If an employer decides not to follow a code they must show that they have taken measures equal to or better than those prescribed in the Code. Most employers do not have the resources to do this.
- 8.1.3 Unlike regulations and bills there is no parliamentary scrutiny of these rules, nor any requirement to prepare a cost-benefit analysis. Additionally there is no requirement in the legislation for the review of such codes, or for the input of various interest groups. Under the provisions of the *Subordinate Legislation Act* new regulations are subject to a process of public consultation which includes the circulation of a regulation impact statement. The issue was discussed with the then Acting Manager of the Policy Division of the WorkCover Authority, Ms Denise Adams, when she gave evidence before the Committee on 7 August 1997:

COMMITTEE: There are a series of concerns I have about the process of developing codes of practice which have evidentiary status in court, in that for many companies, particularly small businesses, these will have the same impacts on them as regulations would have had, had they been made in the normal

way. However, the codes of practice will not have been subject to the sort of scrutiny that is required under the Subordinate Legislation Act. There is no mandatory requirement for there to be public advertisement and a period of consultation, even though you have given that as your working operation. There is no requirement for that.

There is no controlling mechanism which says they need to be reviewed every five years. There is no cost benefit analysis conducted; no issue of a regulation impact statement or anything similar. Whilst I appreciate they are intended to be flexible, one concern I have is that they provide what the Henry VIII clauses used to provide in legislation: they provide a significant loophole which will remove from business some of the advantages that have been given under the Subordinate Legislation Act, which required people, indeed governments, to be very tight with the imposition of regulation on industry. How will you overcome that, or would it not be appropriate to include in the regulations some requirements that mirror those provisions of the Act?

Ms ADAMS: I began my presentation by talking about the Subordinate Legislation Act and saying how I believed it was an extremely good mechanism. As manager of the Regulation Development Branch, I put in place similar processes for the development of codes of practice as exist for regulations. We have gone beyond what is required in those terms. We consult very heavily on codes of practice. We put them out for public comment. The public comment is considered and the code is produced. Admittedly, we have not got the checks and balances in the system in terms of an external agency monitoring that, as we have with regulations, but we attempt to operate as much within the spirit of those mechanics as is reasonably practical. We have in fact, on a number of occasions, produced cost benefit analyses for those documents, albeit not to the same extent that we would for regulations again.

COMMITTEE: You would agree with me that the parliamentary scrutiny of this material, at the very least, is negligible. They will not be disallowable by a motion of the House.

Ms ADAMS: No, they are not disallowable, but what I am saying to you is that as far as possible I have attempted to replicate the process.

The Committee expressed concern that such processes are a voluntary exercise, and there are no legislative requirements for assessment of the need for and costs of implementing these quasi-regulations, nor for public consultation of the proposed Codes of Practice.

COMMITTEE: Will there be a requirement in the new regulations which will mirror some of the public consultation provisions of the Subordinate Legislation Act to make it mandatory—whilst I accept it might be your operation, you might not be in charge of this program some time in the future. In fact, the program could be subject to political influence. For example, there could be a single accident, with people crying, "Shock, horror! We need a code of

practice", and before we know it a modification is made to a code of practice, which for some people has the same impact of law. It all happens without the benefits of the Subordinate Legislation Act.

Ms ADAMS: I would be sad to see the flexibility lost with codes. To me the flexibility that we have at the moment is an advantage. Yes, what you are saying is a possibility. But there is also a great strength in the flexibility and the ability for us to change the codes, update them, according to need. To me that is an incredible strength.

COMMITTEE: In what way would a mandatory requirement for public consultation remove that flexibility?

Ms ADAMS: It would not remove the flexibility.

COMMITTEE: Would it not be reasonable to at least put that provision in the regulation?

Ms ADAMS: Are you talking about the Subordinate Legislation Act?

COMMITTEE: I am talking about the regulation which allows you to vary the codes of practice. Why not include in that regulation a requirement that says the codes of practice will be subject to public consultation?

Ms ADAMS: I have no problem with having that sort of proposal.<sup>169</sup>

### **Recommendation 29**

**The Committee recommends that the *Occupational Health and Safety Act* be amended to provide for an assessment of proposed Codes of Practice. The assessment should include a modified cost-benefit analysis, a period of public consultation and an opportunity for parliamentary scrutiny. Codes of Practice should also be reviewed every 5 years.**

## **8.2 Introduction of OHS requirements into all government contracts**

8.2.1 Currently in NSW, many major government construction projects require that contractors have appropriate Occupational Health, Safety & Rehabilitation (OHSR) systems in place to manage occupational health, safety and rehabilitation. Contractors and sub-contractors are also required to prepare site specific OHS&R management plans. Such plans and systems do not relieve the contractors of their obligations under the OHS Act, but are a way of achieving a high level of OHS Management.

- 8.2.2 The rationale for these requirements is to develop an approach to health, safety and rehabilitation which is integrated into the organisational management culture of the construction industry. By requiring construction companies to develop, implement and audit OHS&R management systems they develop core OHS expertise which impacts on the entire industry. A particular challenge for the construction industry is the high level of sub-contracting, and the constantly changing nature of the construction site.
- 8.2.3 These requirements, developed by the Construction Policy Steering Committee<sup>170</sup> (and referred to as the CPSC guidelines) require not merely a site specific safety program, but a comprehensive management system involving all levels of management. The CPSC Guidelines are reproduced in Appendix Four.
- 8.2.4 The guidelines are not only an effective tool to manage the interaction of various workers and their activities at the construction site, but are a total organisational response to the challenges of workplace safety risks and hazards.
- 8.2.5 The Committee received a detailed briefing about the application of the CPSC guidelines to the principal contractors at the Olympic and Showground construction sites in July. The Committee discussed this matter with the Acting Director of Regional Operations, Mr Geoff Mansell.

COMMITTEE: We had the pleasure of being out at the Sydney Organising Committee for the Olympic Games site with you. We are ingenues but it does seem that occupational health and safety is well and truly in hand there, do you not think?

Mr MANSELL: The challenge for the construction industry—it is one we have concentrated on, and it is one of the specific applications which I have touched on—is that it is a high-risk situation. Government has used the leverage of its tendering process to persuade or perhaps force industry to go down this path. There are something like 140 organisations accredited under the government scheme. So it is a powerful scheme. It probably has greater coverage than any other in Australia that I am aware of. But because of the complex contractual arrangements the challenge in construction is to build that in and make it effective at the work face.

There are complex structures in which there are a number of levels of management and organisations. Implementation in the construction environment is very difficult. While we believe that we have a good structure in place at the top end, there is a lot of work to be done to make that truly effective at the bottom. I am sure that most of the organisations we deal with at the Olympic site and elsewhere would agree that while they are making good progress there is a long way to go in really having the culture accepted by the myriad of small contractors. We continually find problems with the implementation of our systems at the grass roots. It is like a chain: if some point in the chain is not following the systems and procedures the whole thing

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*OHS&R Management Systems, Guidelines*, Capital Projects Procurement Manual, 2nd edition, Public Works Department, Sydney.

falls down. There is a lot of work to be done but it is very encouraging in that a cultural change is occurring in the industry.<sup>171</sup>

- 8.2.6 A number of submissions received by the Committee suggested that the CPSC guidelines provided a model which should be applied in all government contracts. Professor Michael Quinlan stated the use of such guidelines was a powerful way of addressing the vexed issue of the health and safety of subcontractors.

Government should ... introduce OHS performance criteria into all tendering activities. Tendering requirements in relation to OHS must explicitly recognise and address the subcontracting issue so that a level playing field is established.<sup>172</sup>

- 8.2.7 Professor Neil Gunningham made the same point in an interview with the Committee on 30 October 1997.

For example, you could say, "if you want to get a government contract, if you want to tender for a large construction contract in NSW, then you must meet the following health and safety requirements, one of which is that you must commit yourself to be responsible for not just your behaviour but for the behaviour of all your subcontractors."<sup>173</sup>

- 8.2.8 The draft submission received from the Labor Council of NSW also called for government contracts to include strict OHS requirements.

When contracting out major construction work such as road construction, the olympic site and the building of hospitals and schools, the Government should ensure that there are strict and measurable occupational health and safety criteria incorporated into the tendering process. This process should ensure that when the contracts are awarded to organisations, auditing will guarantee compliance with occupational health and safety legislative requirements. Measurable performance criteria will enable bench marking in OHS.

Contracts should not be awarded to organisations who blatantly disregard the OHS legislative requirements or who have a previous history of poor occupational health and safety performance. Further, organisations with good occupational health and safety performance, should not be disadvantaged in the market place.<sup>174</sup>

- 8.2.9 On 2 December 1997 the Committee Chairman asked the Attorney General and Minister for Industrial Relations a question without notice, during question time in the Legislative Council, about the development of health and safety requirements for inclusion in all government contracts. The Minister said that WorkCover viewed the OHS requirements in the CPSC guidelines as transferable and that the Government would consider introducing such requirements into a range of other government contracts.

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<sup>171</sup> *Transcript, 7/8/97, p 73.*

<sup>172</sup> *Submissions, Volume One, Professor Michael Quinlan, p 33.*

<sup>173</sup> *Transcript, 30/10/97, p 4.*

<sup>174</sup> *Submissions, Volume Five, Labor Council of NSW, p 21.*

The Hon. B. H. VAUGHAN: I direct my question without notice to the Attorney General, and Minister for Industrial Relations. Bearing in mind that government building contracts, especially for Olympics construction, have requirements for the management of occupational health and safety, will the Minister advise if similar requirements are contained in other government contracts relating to industries such as cleaning, printing and hospitality?

The Hon. J. W. SHAW: I understand that some significant initiatives are under way to introduce occupational health and safety requirements into government contracts. The Government is consulting with key stakeholders and has introduced important initiatives in the construction industry, which has had an unimpressive safety record over the years. It is an industry that is fraught with risk to life and limb of workers, and it is an important industry in which to attempt to qualitatively improve safety standards. I have been advised by the WorkCover Authority that it views the guidelines applicable to government building contracts as a prototype. If they prove to be effective, the Carr Government would certainly consider implementing similar requirements specific to other industries, including the cleaning, printing and hospitality industries.<sup>175</sup>

- 8.2.10 During a study tour to Newcastle, the Committee met with school cleaners from a local high school. The Committee was given a demonstration of equipment currently in use, as well as a tour of the workplace. School cleaning has, like many other industries, undergone rationalisation. The cleaners related the recent history of their work at the school, which included cuts to staff numbers and cleaning hours. They relayed stories of increased body stressing injuries. Such anecdotal evidence is supported by research commissioned by the former Bureau of Immigration, Multicultural and Population Research.<sup>176</sup>
- 8.2.11 In evidence to the Committee at a public hearing in Newcastle, Ms Barbara Gaudry, Information and Training Officer of the Newcastle Workers Health Centre, gave a presentation of the occupational health and safety hazards faced by school cleaners. Equipment designed to reduce the OHS risks of cleaners was also demonstrated. Ms Gaudry claimed that employers in the cleaning industry are unaware of their obligations under the OHS Act and regulations, particularly the Manual Handling Regulation, which requires risk management as the system for managing manual handling risks.<sup>177</sup> She argued that such a regulation had failed to protect the health of cleaning staff.
- 8.2.12 Ms Gaudry also argued that the employers refuse to spend money on new, ergonomically designed equipment because of the initial high cost. However as Ms Gaudry pointed out, such equipment can prevent a costly workers

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<sup>175</sup> NSWPD (*Hansard*), LC, 2/12/97, p 44.

<sup>176</sup> Fraser, L, *Impact of contracting out on female NESB workers: case of study of the NSW Government Cleaning Service*, Ethnic Communities Council of NSW: 1997.

<sup>177</sup> *Transcript*, 15/7/97, p 41.

compensation claim in the future. Ms Gaudry gave evidence that she had approached the major companies who hold contracts for cleaning government premises - Tempo, Berkeley Challenge and Menzies - to provide long handled toilet brushes in an effort to relieve strain injuries suffered by cleaners who have to bend and twist awkwardly to clean many toilets. There was no such equipment at the school visited by the Committee.

8.2.13 The Committee was given a “hands on” demonstration of vacuuming classrooms with a “back pack vac”. The cleaners at this school are required to clean the carpeted floors of all the classrooms. Yet all the classrooms have at least 30 desks with chairs. Moving the furniture in one classroom to vacuum the floor may not seem an onerous task, but for a cleaner required to clean 10 such classrooms within a tight time frame, it appeared to the Committee that there was the potential for a body stress injury. The Committee was advised that many cleaners had indeed suffered such injuries when performing this task.

8.2.14 The Committee was also struck by the fact that this school was a workplace for two discrete groups - the cleaners during the early morning and late evening and a workplace for teachers and students during the day. Yet there was little recognition of the impact of the activities of the teachers and students on the safety of the cleaners. The safety of teachers and students appeared to be recognised in the provision of appropriate equipment in classrooms and staff areas, the OHS needs of the cleaners appeared to be ignored. The Committee was shown photographs of classrooms with upended furniture and materials piled haphazardly. Under the OHS Act the school principal or site manager has an obligation to prevent or control such hazards<sup>178</sup>. With a little forethought by all workers at the school, such hazards could be avoided.

8.2.15 *Clearly there needs to be some form of holistic management of such a workplace. The guidelines established for the construction industry, requiring a systematic approach to managing risks in a multi-worker site, could have application in this situation.*

*The Committee can also see potential for the CPSC guidelines to be adapted for the provision of health and catering services. As the practice of contracting out for government services becomes widespread it is imperative that government agencies provide leadership in this field. The Committee will consider this issue further, in 1998.*

### **Recommendation 30**

**The Committee recommends that all contracts entered into by the NSW Government contain specific provisions for the management of occupational health and safety.**

### 8.3 Annual Reports

#### 8.3.1 Several submissions called for reporting of workplace health and safety performance and initiatives in annual reports.

Mr Peter Maxwell, the Human Resources Co-ordinator (Environment, Health and Safety), Charles Sturt University called for mandatory reporting of health and safety performance and programs. Mr Maxwell argued that this is:

the most effective way for achieving the introduction of managements systems...<sup>179</sup>

Mr Maxwell states that many organisations have good EEO programs because they are legally required to include in their annual report details of these programs.

#### 8.3.2 Ms Fran Kavanagh, CEO of Advocates for Workplace Safety, also recommended the inclusion of OHS statistics in annual reports:

At a minimum, the reporting of occupational health and safety should encompass a company's basic philosophy as well as the number and type of traumatic injuries, and the number and categories of workers' compensation claims.<sup>180</sup>

#### 8.3.3 The NSW

#### 8.3.4 Nurses' Association recommended that Government set an example in this area, stating:

A good beginning would be for the NSW Government to create a policy requiring all government organisations to include occupational health and safety reporting in annual reports.<sup>181</sup>

#### 8.3.5 *The Committee regards public accountability as an important factor in facilitating cultural change. Mandatory reporting of occupational health and safety performance is one method of achieving some measure of accountability. The Committee also intends to consider the reporting of private sector performance in the second part of the inquiry.*

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<sup>179</sup> Submissions, Volume One, Mr Peter Maxwell.

<sup>180</sup> Submissions, Volume Two, Advocates for Workplace Safety, Appendix A, p 1.

<sup>181</sup> Submissions, Volume Five, NSW Nurses' Association, p 4.



### **Recommendation 31**

**The Committee recommends that the *Annual Reports (Statutory Authorities) Act* and the *Annual Reports (Departments) Act* be amended to require that the annual reports of all NSW Government agencies include details of their health and safety records.**

#### **8.4 Joint Parliamentary Committee on Workplace Safety - WorkSafe Committee**

8.4.1 The submission received from Advocates for Workplace Safety called for the establishment of a permanent Parliamentary Committee on Workplace Safety. Advocates reasoned that such a Committee would raise the profile of workplace safety in the same way Road Safety Committees have:

Advocates suggests that a principal reason why road safety has such a high profile in both the media and the community is because of the continued existence of Parliamentary committees in Victoria since the late 1960s, in New South Wales since the 1980s, and Queensland and Western Australia in the 1990s which review and report on road safety matters.<sup>182</sup>

8.4.2 The Committee acknowledges the high profile of many Parliamentary road safety Committees, and the substantial achievements of the NSW StaySafe Committee. The establishment of a WorkSafe Committee would send a signal to the community that members of parliament are vitally concerned with the issue of workplace safety. Such a committee could play a valuable role in raising the profile of workplace safety and in examining options for reform in this area.

### **Recommendation 32**

**The Committee recommends that the *Occupational Health and Safety Act* be amended to provide for the establishment of a Joint Parliamentary Committee on Workplace Safety, to be known as the WorkSafe Committee.**