

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

SPECIFIC COMMENTS

In 2007, Professor Ron McCallum, Dr Toni Schofield and Dr Suzanne Jamieson of the University of Sydney were awarded an ARC discovery grant to investigate the role played by the legal prosecution of OH & S offences in deterring serious workplace injuries and fatalities. Ms Belinda Reeve is also a key researcher in this project. Specifically, our project aims to: i) determine the deterrent capacity of recently enacted occupational health and safety legislation in New South Wales (2000) and Victoria (2004), and ii) to examine the role and comparative effectiveness of different models of deterrence in relation to the law and other significant institutional processes involved in OH&S regulation and the prevention of serious workplace injuries and deaths.

Critically, the project involves a reconceptualisation of deterrence as a dynamic social process as opposed to a relationship between sanctions and outcomes. Deterrence is constituted in and by the combination of four main arenas of organisational practice associated with serious OH & S prosecutions – law and judicial process, administrative processes, trade union processes and corporate or business process. From this perspective, identifying the effectiveness of deterrence involves an analysis of the barriers and opportunities for reducing and preventing serious workplace injuries and death that are created by the practices involved in these processes. A key focus of investigation is thus the social arrangements and practices within and between the organisations involved in OH&S prosecution, examining what they do and how they interpret and understand their participation.

Given the organisational complexity of OH&S prosecution, the project uses a synthesis of legal and social scientific research methods and analytical techniques applied across four different studies. These methods and techniques include close legal-case analysis, critical discourse analysis, and interviews with judges, magistrates, Victorian and New South Wales WorkCover staff, trade union secretariats and employers. It is anticipated that the results of the project will be used to reduce the heavy costs that current rates of workplace injuries and deaths impose on Australian workers, their families and the national economy.

Our interest in the national review into model OHS laws stems from this project, and our respective backgrounds in employment and industrial law, occupational health and safety, gender and work, and health sociology and policy. We allude to some preliminary observations which have come to light through our research later in this submission when discussing “Regulator Functions, Powers & Accountability.”

We support the development of model OHS legislation to be enacted by all States and Territories and the Commonwealth with respect to its employees. We are of the view that a uniform approach to occupational health and safety throughout Australia will aid employees, employers, contractors, trade unions, employer associations and regulatory bodies in ensuring that Australian places of work adhere to the highest standards of health and safety. We note that at the meeting of the Council of Australian Governments which was held on Thursday 3 July, all of the governments signed an *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*, and we are delighted with this outcome. It now appears clear that a model law will be enacted into law by all State and Territory governments and also by the Commonwealth Government for its employees. This

means that this national OHS inquiry and all participants have a once in a generation opportunity to modernise our grid of occupational health and safety laws on a national basis.

We are academics based at the University of Sydney, and naturally enough we have more detailed knowledge of the *Occupational Health and Safety Act 2000* (NSW) than of similar legislation in the other States and Territories. Indeed, Professor Ron McCallum and Dr Suzanne Jamieson were part of a panel of review which undertook work built upon by those who introduced into the Parliament of New South Wales the 2000 Act (see *Report of the Panel of Review into the Occupational Health and Safety Act 1983* (NSW), WorkCover NSW, June 1997). This knowledge of the New South Wales legislation largely informs the remainder of this submission.

We neither have the time nor the capacity or expertise to answer every question in the Issues Paper. Rather, we have decided to focus our submission on the following topics: duties of care; the concept of “reasonably practicable”; regulator functions, powers and accountability; compliance and enforcement, and prosecution.

Duties of Care – Who owes them and to whom?:

In this section of our submission which deals with the duties of care in a model OHS law, we shall comment upon questions 20 to 25. First and foremost, though the patterns of work have greatly altered since Lord Robens and his colleagues wrote their report some three dozen years ago, it is still the case that most remunerated work is performed by employees under the control of employers. We are of the view that the model law should make it clear that the primary or principal duty of care should be placed on employers to protect the safety and health of their employees.

We are also of the view, having regard to our knowledge of the NSW OH&S Act, that the model law should place a duty on employees to take reasonable care for their own health and safety while at work. We note that this is also the view of the authors of the 2006 *Report on the Review of the Occupational Health and Safety Act 2000* (WorkCover NSW, Gosford, May 2006) (the WorkCover Report).

Finally, from our reading of the case law in New South Wales and in other States, we are of the view that the model law should clarify the responsibilities of both labour hire companies and host bodies to ensure the safety of labour hire workers, especially when they are employees. We are of the view that the Western Australian legislation may be a useful starting point here. It does appear to us that both the labour hire company and the host body should share the responsibility of the safety of these workers.

‘Reasonably Practicable’ & Risk Management:

In addressing question 37, we submit that the model legislation should include the words “so far as is reasonably practicable” in each general duty provision relating to the duties of employers, employees, self-employed persons and persons in control of premises used by people as a place of work. Further, “reasonably practicable” should be defined in the legislation, similarly to the definition contained in section 20 of the *Occupational Health and Safety Act 2004* (Vic). This recommendation will give greater guidance to employers and to other duty holders as to what is required of them under the general duties. When dealing

immediately below with who bears the onus with respect to reasonably practicable, we shall write in more detail about section 20 of the Victorian Act.

While we are in favour of placing the words “reasonably practicable” in the body of the general duty provisions, we disagree with an approach which places the onus of proof on the prosecution with respect to “so far as is reasonably practicable.” Instead we recommend that the onus must be on employers to show that they did all that was reasonably practicable in eliminating or minimizing risks to health and safety. Our position is that in this field of regulatory offenses, employers are in the best position to determine what was done in each situation, and whether what they did was reasonably practicable. In other words, employers and other duty holders know what steps they have taken with respect to risks and hazards and so forth, and accordingly the onus should be placed on them to prove, on a balance of probabilities, that they did all that was reasonably practicable. In our judgement, this gets the balance right between regulatory authorities on the one hand, and employers and other duty holders on the other.

Placing the reasonably practicable onus on employers and other duty holders has worked well in both the United Kingdom and in the State of Queensland. There has been, however, some disquiet in the State of New South Wales. In our judgement, the reasons for this disquiet are twofold. First, the fact that the current duties in the New South Wales Act are stated in absolute terms gives employers and other duty holders the impression that they will always be on the back foot and that any reasonably practicable defence will be futile. However, as we have argued above, if the requirement of "reasonable practicability" is placed into the duty provisions, this disquiet will be largely eliminated.

The second reason for some disquiet in New South Wales, we suggest, is the closed nature of the system. As we shall show when examining appeal processes below, it is difficult to obtain review of a decision of the Industrial Court of New South Wales by a general superior court. This gives some employers the impression that they are being subject to a jurisprudence which is virtually unreviewable. If a model law allows appeals from specialist courts to general superior courts, much of this angst will disappear.

In order to more fully explain our concerns about placing the onus of proof on the prosecution, we will unpack the manner in which the “reasonably practicable” concept operates in the *Occupational Health and Safety Act 2000* (NSW), and the *Occupational Health and Safety Act 2004* (Vic). Once this task has been completed, it will be timely to note the effect upon the ease of bringing prosecutions that will be brought about if the onus of proof with regard to “so far as is reasonably practicable” is placed on the prosecution.

Unpacking the "So Far As Is Reasonably Practicable" Concept

The centrepiece of the *Occupational Health and Safety Act 2000* is the general duties which seek to protect persons at workplaces from unsafe working conditions. Put briefly, these general duties, which are placed upon employers (section 8), self-employed persons (section 9), controllers of premises (section 10) and also on manufacturers and designers (section 11), require duty holders to ensure, in various ways, the health, safety and welfare of persons at work. A breach of these general duties is an offence which gives rise to a criminal penalty (section 12). However, section 28 of the Act provides two defenses to employers, to self-employed persons and to other duty holders. Under section 28, duty holders are able to defeat prosecutions where they are able to prove, not beyond reasonable doubt but only on a balance

of probabilities, that:

S28...

- (a) it was not reasonably practicable for the person to comply with the provision, or
- (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

These defenses have worked well and have enabled duty holders to defeat prosecutions (see, for example, *Workcover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182; and *WorkCover Authority of New South Wales (Inspector Belley) v Australian Inland Energy Water Infrastructure t/as Inland Energy and Water* [2003] NSWIRComm 408 (note that the report of this decision in the Industrial Reports is only of a motion and does not contain Staunton's full judgment, see (2003) 128 IR 257).

In the WorkCover Report (NSW), it was recommended that section 28 be repealed in toto, and instead to insert the words "so far as is reasonably practicable" into all of the general duties. For example, section 8(1) sets out the general duty which is placed upon employers with respect to their employees. When the words "so far as is reasonably practicable" are inserted into this provision, its opening words will read as follows:

S 8(1) An employer must, *so far as is reasonably practicable*, ensure the health, safety and welfare at work of all the employees of the employer.

In a prosecution for breach of any of the general duties, the prosecution has always been obliged to prove beyond reasonable doubt that the duty holder has failed to ensure the safety of the relevant persons at work. With the insertion of the words "so far as is reasonably practicable" into the duties, a significant hurdle will be placed in the path of the prosecution. As well as proving beyond reasonable doubt that the duty holder has failed to ensure safety at work, the prosecution will now be obliged to prove beyond reasonable doubt that the duty holder had also failed to do all that was reasonably practicable for it to do, to prevent the breach of the general duty.

The second portion of the WorkCover Report's recommendation respecting "so far as is reasonably practicable" was to insert into the Act a detailed definition of "reasonably practicable" which focuses in part on the actual or imputed knowledge of individual duty holders. The reason for such a definition is to aid duty holders in determining with respect to workplace risks and/or hazards, what reasonably practicable steps must be taken to eliminate or to minimise the risks or hazards.

The WorkCover Report recommended that the definition of "reasonably practicable" which is contained in section 20 of the *Occupational Health and Safety Act 2004* (Vic) be inserted into the *Occupational Health and Safety Act 2000* (NSW).

Section 20 of the *Occupational Health and Safety Act 2004* is headed "The concept of ensuring safety." Section 20(1) makes it clear that when a duty which contains the words "so far as is reasonably practicable" is placed upon a person or body, including the general duties, the person or body is required to take steps to eliminate risks etc. It is easiest to set this sub-

section out in full. It provides:

S 20(1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person--

- (a) to eliminate risks to health and safety so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

Section 20(1) of the Victorian Act is a sensible provision which encourages duty holders to lessen and eliminate risks. Indeed, it has counterparts in the *Occupational Health and Safety Regulation 2001* (NSW).

Section 20(2) of the Victorian statute sets forth an extended definition of "reasonably practicable." This sub-section says that "in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety", regard must be had to matters set forth in five paragraphs, and reproduced in full below:

S 20(2) ...

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
- (e) the cost of eliminating or reducing the hazard or risk

We have no difficulty with paragraphs (a), (b), (d) and (e) of section 20(2) which assist duty holders by spelling out the concept of "reasonably practicable." Rather, it is paragraph (c) of this provision which presents difficulties where it is the prosecution which bears the onus of proof with respect to reasonably practicable. This is because paragraph (c) makes it clear that when determining whether a person has failed to eliminate or to lessen hazards or risks, it will be necessary to determine "what the person concerned knows, or ought reasonably to know" about eliminating or lessening the hazards or risks. It is easiest to analyse the limitations in these words through the use of an example.

Suppose an employer is prosecuted for breaching the general duty contained in section 8(1) of the New South Wales Act because it failed to ensure the safety of an employee who was injured in an accident. Suppose further that in accordance with the WorkCover Report recommendation, the words "so far as is reasonably practicable" were inserted into the general duty provisions. The prosecution will be required to prove beyond reasonable doubt that the employer failed to do all that was reasonably practicable to eliminate the hazard or risk which caused the accident. But if section 20 of the Victorian Act was to be inserted into the New South Wales statute in accordance with the WorkCover Report recommendation, then paragraph 20(2)(c) would apply to this example. This paragraph will require the prosecution to prove beyond reasonable doubt that at the time of the accident, the individual employer actually knew about - or should in all of that individual employer's circumstances reasonably have known about - the hazard or risk and any methods of elimination. It is only when the

prosecution has proved, beyond reasonable doubt, that either the employer knew or should reasonably have known about the hazard or risk and how it could be eliminated, that the prosecution will be able to prove that the employer did not do all that was reasonably practicable in the circumstances.

The "So Far As Is Reasonably Practicable" Recommendation - Suggested Reasons

The example in the previous paragraph shows that a similar definition of “reasonably practicable” in the model OHS legislation would make it far more difficult for prosecutions to succeed, even where duty holders have breached the general duties. It appears that in large part the WorkCover recommendation to place the words “so far as is reasonably practicable” into the general duties of the New South Wales statute and inserting the Victorian extended definition of “reasonably practicable” into the New South Wales Act was motivated by a desire to give guidance to employers and to other duty holders with respect to their obligations. Put another way, it is appropriate to clearly enunciate to duty holders that they are obliged to carry out their duties to ensure health and safety at work, only so far as is reasonably practicable. Further, in determining what is reasonably practicable in each instance, regard will be had to the actual or imputed knowledge of duty holders.

It appears to us that a further reason behind this recommendation (which is unstated in the WorkCover Report), is a view that in criminal proceedings of this nature, it is inappropriate on grounds of fairness to require defendant duty holders to prove, albeit on a balance of probabilities, that they had done all that was reasonably practicable in the circumstances. In his 2004 report which preceded the enactment of the *Occupational Health and Safety Act 2004* (Vic), the *Occupational Health and Safety Review* (State of Victoria, Melbourne, March 2004) (the Maxwell Report), Mr Chris Maxwell (as he then was), argued that the current position in Victoria with respect to reasonable practicability should be retained. In Victoria, the onus of proof with respect to reasonable practicability is on the prosecution. Maxwell wrote:

It is a fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of an offence. This principle should only be departed from in the most exceptional circumstances. ... [T]he fact that ... the concept of reasonable practicability imports notions of fault into OHS breaches makes it all the more important that it be for the prosecution to establish that this standard was not met." (Chris Maxwell (he is now Justice Chris Maxwell President of the Court of Appeal of Victoria), *Occupational Health and Safety Act Review* (State of Victoria, Melbourne, March 2004) paras 715-716, and for his full argument see Ch 33).

It appears to us that the WorkCover Report also adopted the Maxwell position on reasonable practicability. However, neither the Maxwell Report nor the WorkCover Report examine in any detail the industrial history of the concept of reasonable practicability in safety regulation. Nor do these reports spend much time on the nature of strict liability offences in areas of regulation such as occupational health and safety, food preparation and distribution and environment protection (for comment see Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws - Critical Perspectives*, (Oxford University Press, Melbourne, 2004), pp. 61-63)). It is easiest to examine this industrial history and also to explore the nature of regulatory safety offences by delving into the approaches taken to reasonable practicability in the United Kingdom, and in New South Wales, Victoria and Queensland.

The Use of "Reasonably Practicable" in the British and New South Wales

Occupational Health and Safety Statutes

The genesis of Australia's modern approach to workplace health and safety was the Robens Report, which was handed down by Lord Robens and his English Committee in 1972 (Lord Robens, *Report of the Committee on Safety and Health at Work, 1970-1972*, London, H.M.S.O., 1972). In response to this report the United Kingdom Parliament enacted the *Health and Safety at Work etc Act 1974* (U.K.). This statute enacted a series of general duties which were copied by all Australian jurisdictions. Put briefly, the British general duties required duty holders to ensure safety at work, so far as is reasonably practicable etc. In other words, the phrase "so far as is reasonably practicable" was placed into the actual duties. This would mean that under British Law, the prosecution would be required to prove beyond reasonable doubt all of the elements of the offense, including that the duty holder had failed to do all that was reasonably practicable.

The use of the words "so far as is reasonably practicable" had a lengthy history in British safety legislation which preceded the Robens laws, that is, in the old British Factory Acts which go back to the 19th Century. In *Nimmo v Alexander Cowan and Sons Ltd* [1968] AC 107 the House of Lords had to decide who bore the onus of proof under section 29(1) of the *Factories Act 1961* (UK). Breach of this provision was a criminal offense. Although this provision is lengthy, it is necessary to set it out as follows:

S 29(1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there.

In this case, a worker who had been injured when unloading bales of pulp at the employer's factory, brought civil proceedings seeking damages for breach of statutory duty by the employer. Counsel for the worker averred that the factory premises were unsafe under section 29(1) of the *Factories Act 1961*, and left it to the employer to prove that it had done all that was reasonably practicable. The question for the House of Lords was whether the worker or the employer bore the onus of proof in these civil proceedings with respect to reasonably practicable. Their Lordships examined English and Scottish case law over the previous thirty years dealing with the concept of reasonably practicable in safety statutes and regulations. All of the English case law referred to by the judges placed the onus of proving reasonable practicability on defendant employers. The view was that with respect to these types of remedial statutes, it was both appropriate and indeed fairer to require employers to prove that they had done all that was reasonably practicable in all of the circumstances. After all, each employer was in the best position to explain what it had or had not done at the time of the accident. Put another way, knowledge of what the duty holder had done was locked up in its breast, and it was appropriate to require the duty holder to explain its actions or inactions. (See *Callaghan v Fred Kidd & Son (Engineers) Ltd* [1944] KB 560; *McCarthy v Coldair Ltd* [1951] 2 TLR 1226; *Marshall v Gotham Co Ltd* [1954] AC 360; *Trott v W E Smith (Erectors) Ltd* [1957] 1 WLR 1154; and *Braham v J Lyons & Co Ltd* [1962] 1 WLR 1046).

All of these decisions related to civil proceedings for breach of statutory duty. We have been unable to find decisions discussing the onus of proof relating to criminal proceedings under the factory act statutes, possibly because few if any went on appeal to the superior courts.

In *Nimmo v Alexander Cowan and Sons Ltd* [1968] AC 107, Lords Guest, Upjohn and Pearson held that the employer bore the onus of proof with respect to reasonable

practicability. However, Lords Reid and Wilberforce delivered strong dissenting speeches. The law lords were of the view that criminal proceedings under section 29(1) of the *Factories Act 1961* would not alter the onus of proof being on employers. For example, Lord Reid, who dissented in *Nimmo's Case*, made it clear that there was no difference with respect to who bore the onus of proof in criminal proceedings for breach of the provision or in civil proceedings seeking damages for breach of statutory duty. Lord Reid said:

In my opinion this question should be approached by considering first what a prosecutor would have to allege and prove in order to obtain a conviction. For civil liability only arises if there has been a breach of the statutory duty, and I cannot see how a pursuer could succeed in a civil action without averring and proving all the facts essential to establish the commission of an offence. It is true that the standard of proof is lower in a civil case so that the pursuer only has to show that it is probable that an offence was committed. But that cannot mean that the onus of proof is different with regard to any of the essential elements of the offence." ([1968] AC 107, 115).

Given the existing case law at the time of the enactment of the *Health and Safety at Work etc Act 1974* (UK), the onus of proof with respect to reasonable practicability would be placed upon duty holders. We surmise that to put this matter beyond doubt, especially given the dissenting speeches of Lords Reid and Wilberforce in *Nimmo's Case*, the British Parliament expressly provided in section 40 of the *Health and Safety at Work etc Act 1974* that duty holders bore the onus of proof with respect to reasonably practicable. Although section 40 is somewhat convoluted in its mode of expression, as it is important in this submission we shall set it out in full. Section 40 provides:

S 40 In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something as far as it is practicable or so far as is reasonably practicable or to use the best means to do something that shall be for the accused to prove (as the case may be) that was not practicable or not reasonably practicable to do more than in fact was done to satisfy the duty or requirement or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

This onus of proof provision in the British *Health and Safety at Work Act 1974* has worked well for more than thirty years. In recent proceedings before the English Court of Appeal, the requirement of duty holders to prove reasonable practicability was challenged as being contrary to English human rights legislation. In other words, it was argued that this requirement in effect created a type of strict liability offence. However, the Court of Appeal held that the Act did not infringe the human rights legislation because in this type of remedial statute it was appropriate to require the duty holder to prove, on a balance of probabilities, that it had done all that was reasonably practicable (*R v Davies* [2003] ICR 586).

New South Wales was the first Australian jurisdiction to fully adopt these Robens laws. In its *Occupational Health and Safety Act 1983* (NSW), Parliament did not place the words "so far as is reasonably practicable" in the general duties, together with the enactment of a reversal of onus provision, as is the case in the United Kingdom. Rather, it used a more direct method; in section 53 of the 1983 Act it set forth the words "reasonably practicable" and expressly stated that it was up to duty holders to prove on a balance of probabilities, that they had done all that was reasonably practicable. Section 53 then became section 28 of the *Occupational Health and Safety Act 2000* (NSW). The weakness in this approach was that the words "so far as is reasonably practicable" were not contained in the general duties which were absolute in

nature. This gave duty holders less guidance on what was required of them to ensure safety at places of work.

The approach to "Reasonably Practicable" in the State of Victoria

The State of Victoria is interesting. In its *Occupational Health and Safety Act 1985* (Vic), the general duty provisions contained the words "so far as is reasonably practicable." No reverse onus of proof provision, like section 40 of the British 1974 statute, was included in the Victorian Act. Yet at that time, it was unclear whether such a reverse onus of proof provision was absolutely necessary. After all, it was possible to argue in reliance upon *Nimmo v Alexander Cowan and Sons Ltd* [1968] AC 107 and the case law from various pieces of factory legislation and other industrial statutes, that common sense dictated that it was not appropriate for the prosecution to be required to prove, beyond reasonable doubt, the failure of the duty holder to do all that was reasonably practicable. On the contrary, it was sensible and appropriate to require the duty holder to prove reasonable practicability on a balance of probabilities.

In 1987, in *Kingshott v Goodyear Tyre and Rubber (No. 2)* (1987) 8 NSWLR 707, the New South Wales Court of Appeal had to decide in breach of statutory duty proceedings, whether the worker or the employer bore the onus of proving reasonable practicability under section 40(1) of the *Factories, Shops and Industries Act 1962* (NSW). This provision was similar to section 29(1) of the *Factories Act 1961* (UK) which was analysed in *Nimmo v Alexander Cowan and Sons Ltd* [1968] AC 107. In *Kingshott*, the New South Wales Court of Appeal followed *Nimmo's Case* and held that the onus lay on the employer. McHugh JA (as he then was) delivered a strong dissenting judgment. We have been unable to find decisions concerning prosecutions under the old factories legislation where the onus of proof with respect to reasonably practicable has been discussed. Like the situation in the United Kingdom, this may be because few matters were brought on appeal. However, with respect to actions for breach of statutory duty, the onus of proof with respect to reasonably practicable has been analysed in the context of safety and mining statutes and regulations where much turned upon the actual language of various provisions (see *Duff v Lake George Mines Pty Ltd* [1960] SR (NSW) 83; *Bellia v Colonial Sugar Refining Co Ltd* [1961] SR (NSW) 401; and *Wellington v Lake George Mines Pty Ltd* [1962] SR (NSW) 326).

In 1990, this matter of interpretation came before the High Court of Australia in large part because the competing interpretations of the onus of proof with respect to reasonably practicable in criminal proceedings were finely balanced. In *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, after carefully examining the prior case law, the High Court held that as the words "reasonably practicable" appeared as part of each of the general duties without more, "reasonable practicability" was an element of each offence and accordingly, it was up to the prosecution to prove beyond reasonable doubt that the duty holder had failed to do what was reasonably practicable. From our reading of the judgments, their Honours were swayed by the criminal nature of the general duties in the Victorian statute. When the Parliament of Victoria enacted its recent *Occupational Health and Safety Act 2004* (Vic), it continued its practice of making reasonable practicability an element of its general duties. The other Australian States, except for the State of Queensland, have followed the Victorian approach.

The Different Approach taken in the State of Queensland

The Queensland *Workplace Health and Safety Act 1995* takes a different approach to that operating in the United Kingdom, in Victoria and in New South Wales. Part 3 of the

Workplace Health and Safety Act 1995 (Qld) specifies obligations with respect to safety which are placed on employers, employees, self-employed persons, etc (see Part 3 Divisions 2 and 3 of the Act). Section 37 sets forth the defences available to persons and bodies on whom obligations are placed. Although it is lengthy, it is necessary to set it out in full. Section 37 states:

S 37(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove

- (a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk that the person followed the way prescribed in the regulation or notice to prevent the contravention; or
- (b) if a code of practice has been made stating a way or ways to manage exposure to a risk
 - (i) that the person adopted and followed a stated way to prevent the contravention; or
 - (ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or
- (c) if no regulation, ministerial notice, or code of practice has been made about exposure to a risk that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control.

(3) In this section, a reference to a regulation, ministerial notice, or code of practice is a reference to the regulation, notice, or code of practice in force at the time of the contravention.

Section 37(1) enables persons on whom obligations are reposed to raise a series of defences which they will be required to prove only on a balance of probabilities. First, that the person adhered to a regulation, ministerial notice or code of practice which specified a manner for reducing the risk, etc. Secondly, where there is no relevant regulation, ministerial notice or code of practice, that the person may adduce evidence that it "chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention." This "reasonable precautions" defence is similar to, and resonates with the "reasonably practicable" defence in New South Wales.

Section 37(2) also enables persons to defend themselves by asserting on a balance of probabilities that "the commission of the offence was due to causes over which the person had no control." This provision is on all fours with the "beyond control" defence contained in section 28 of the *Occupational Health and Safety Act 2000 (NSW)* which is set out above in this submission.

Although the approach taken in Queensland differs from that taken in a majority of the other States, it is clear that with respect to the defences, it largely mirrors the approaches taken in the United Kingdom and in New South Wales. While it does not use the words "reasonably practicable", it does use the words "reasonable precautions" which are similar in scope.

Queensland also adopts the "beyond control" defence which has always been a part of New South Wales Law. The important point here is that the defendant to a prosecution in all three jurisdictions has the onus of proving the defences - whether reasonable practicability or reasonable precautions - on a balance of probabilities.

In summary, we submit that the words "so far as is reasonably practicable" be placed into the general duties of the model OHS legislation. We also agree with the placing of a definition of "reasonably practicable" into the legislation, similar to the definition contained in section 20 of the *Occupational Health and Safety Act 2004* (Vic). This recommendation will give greater guidance to employers and to other duty holders as to what is required of them under the general duties.

However, we disagree with an approach which would mean that the prosecution would bear the onus of proof with respect to "so far as is reasonably practicable." The standard of proof for the prosecution with respect to "so far as is reasonably practicable" would be beyond reasonable doubt because "reasonably practicable" will be an element of the crime. When this onus of proof requirement is coupled with a requirement that the prosecution prove "what the person concerned knows, or ought reasonably to know", about the hazard or risk and ways to eliminate or reduce the hazard or risk (as found in section 20(2)(c) of the Victorian Act), this adds greatly to the task of the prosecution due to their focus on the actual or imputed knowledge of duty holders. As we have shown through the examples set out in this submission, these changes will place significant hurdles on prosecutors which are in our view unwarranted.

Regulator Functions, Powers & Accountability:

Our submission on this issue relates to question 79. We submit that the model OHS legislation should establish regulatory bodies and specify their powers and functions. In addition to outlining the regulators' enforcement and administration duties with regard to the OHS legislation, it is important that the model legislation explicitly address the advisory, assistance and educational functions of the OHS regulators in respect of duty holders.

In interviews conducted as part of our research and with representatives from a diverse range of businesses, most participants have told us that they have had little contact with New South Wales WorkCover except in instances where they have breached the NSW Act. These participants have indicated that they would welcome further advice and education from WorkCover, especially in the event of a major breach of the legislation and subsequent prosecution. Such an approach by WorkCover would assist in creating a more collaborative relationship between employers and the Authority.

Explicitly outlining the regulatory bodies' educational and advisory functions in the model OHS legislation would reinforce their role in promoting public, and specifically business, awareness of occupational health and safety, as referred to by our study's participants. In prescribing these functions the model legislation could adopt a form similar to that of section 7 of the *Victorian Occupational Health and Safety Act 2004*, which gives WorkCover Victoria its educative and advisory functions and includes a positive duty to "foster a co-operative, consultative relationship between employers and their employees in relation to the health, safety and welfare of those employees" (section 7(1)(h)) and to "engage in, promote and co-ordinate the sharing of information to achieve the objects of this Act" (section 7(1)(i)).

Other participants in our project have told us that although WorkCover NSW provides a good range of information on the relevant legislation and employer duties under it, inspectors (when visiting worksites) are reluctant to give advice to employers on how to remedy a specific risk at their worksite. One possible reason for this is that inspectors do not want employers to attempt to use advice from WorkCover as a defence in prosecutions. We submit that the model legislation should include a provision which states that regulators may give advice to duty holders regarding compliance with a duty or obligation, similar to section 18 of the Victorian Act. Section 18 of that Act also expressly excludes such advice from being used as the basis of a claim against the Authority (section 18(2)(a)) or as a defence in prosecution (section 18(2)(c)). Framing the advice provisions in the model legislation in this way would forestall any concerns that advice given by regulators could be later used against them in prosecutions.

Compliance & Enforcement:

This part of the submission addresses question 101. We submit that the model OHS Act should provide for the use of enforceable undertakings as an alternative to prosecutions for breaches of the Act, with the exception of a breach which involves reckless conduct causing death (section 32A of the *Occupational Health and Safety Act 2000* (NSW)).

We agree with the WorkCover Report, which states that enforceable undertakings:

...provide a timely “restorative justice” approach that engages organisations to achieve systematic solutions that correct or prevent breaches and their underlying causes. In this way they are a departure from the traditional punitive approach of a prosecution for one-off or unlikely-to-be-repeated events providing a responsive and timely sanction that can be part of an effective enforcement strategy (*Report on the Review of the Occupational Health and Safety Act*, WorkCover New South Wales, Gosford, May 2006, p.52).

As noted in the Maxwell Report (para 1681), enforceable undertakings provide a mechanism for both the regulator and the offender to avoid the costs and delays associated with prosecution. The Maxwell Report (para 1694) also notes that enforceable undertakings have the capacity to deal in detail with the duty holder’s future risk prevention, in a way that prosecutions cannot. In addition, by allowing for undertakings to include the implementation of publicity or education to help deter other duty holders, enforceable undertakings can assist in promulgating information about compliance, and can contribute to the creation of a safe work culture.

Prosecutions:

In this section of our submission, we address questions 107 to 110 which relate to which courts should hear OH&S offenses, to rights of appeal and to the role of juries. These issues, we suggest, are intertwined in the operations of the criminal procedure and practice relating to the operation of the criminal laws of the various State and Territory jurisdictions. It may be helpful for the inquiry if we expound upon the position in New South Wales and comment upon its weaknesses and strengths.

In June 2004, together with Mr P Hall (Now Justice P Hall of the Supreme Court of NSW), Mr A Hatcher and Mr A Searle, Professor Ron McCallum co-authored the *Advice in Relation to Workplace Death, Occupational Health and Safety Legislation & other Matters – Report to*

Workcover Authority of NSW, (June 2004) (the McCallum Report). Paragraphs 82 to 99 of this advice detail the history of the manner in which offenses under the New South Wales occupational health and safety legislation were dealt with. It will suffice for present purposes to summarise this material which is available to the inquiry.

In 1979, alterations were made to the general criminal law of New South Wales which enabled some white collar criminal offenses to be heard by the Supreme Court of NSW in its summary jurisdiction. In other words, a single judge in the Supreme Court could hear such offenses without a prior committal process and without a jury. When the *Occupational Health and Safety Act 1983* (NSW) was enacted, this new criminal procedure was adopted and section 47 of this statute enabled the Supreme Court to hear OH&S offenses in its summary jurisdiction. Juries have never been used in New South Wales to hear these types of offenses.

This should be contrasted with the State of Victoria where, as we understand the position, serious OH&S offenses are indictable offenses which are heard in the County Court by a judge and jury after committal hearings.

In our view and from our reading of very many of the New South Wales decisions, we consider that the summary jurisdiction process, where the offenses are tried by a judge alone, works well. We are of the view that at least in the State of New South Wales, the introduction of juries into such offenses would be a retrograde step. Given that criminal procedure and practice differs amongst the Australian jurisdictions, we would not wish to comment upon appropriate procedures and processes in other jurisdictions. It may be that in Victoria the practice of jury trials of indictable offenses has worked well and ought not to be upset.

Unlike most comparable jurisdictions in the common law world where Robens-style OH&S legislation operates, in New South Wales, serious offenses are heard by a specialist court which is now called the Industrial Court of New South Wales. As is shown in the McCallum Report, this was not always the case. Under the 1983 Act, jurisdiction for the hearing of serious offenses was reposed in the Supreme Court. At paragraphs 92-99 of the McCallum Report, a detailed description of the 1987 changes to the Act is given. In that year, the jurisdiction to summarily hear serious offenses was transferred from the Supreme Court to what is now the Industrial Court of New South Wales. Little can be gleaned from the 1987 parliamentary debates. It is our surmisation that the decision by the New South Wales Court of Criminal Appeal in *Collins v State Rail Authority of NSW* (1986) 5 NSW LR 209 where the State Rail Authority of NSW was acquitted, may have played a part in the Government's decision to transfer this jurisdiction to a specialist court.

In our considered opinion, the Industrial Court of New South Wales and its predecessor specialist courts have, over the last twenty-one years, built up the most comprehensive OH&S jurisprudence in the common law world. We are also of the view, having regard to the many decisions which we have read and digested, that it has dealt competently and fairly with the OH&S matters which have come before it.

Again, not every State and Territory has or could be expected to have a specialist court which would be equipped to hear these types of offenses. However, we remain of the view that at least with respect to New South Wales; the Industrial Court of New South Wales should continue to hear serious breaches of the occupational health and safety legislation.

When occupational health and safety offenses are heard by the general courts, such as in Victoria, the normal criminal appeal rules apply. In theory, if a convicted person or body was

able in leave proceedings to convince the High Court of Australia to hear an appeal, the highest court in our land could deal with such an offense. Where specialist courts hear serious OH&S offenses as is the case in New South Wales, the question arises as to whether, and to what extent, appeals should lie from such specialist courts to general superior courts. In paragraphs 100 to 125 of the McCallum Report, the history of appeals in the New South Wales system is analysed and unpacked. At that time, no appeals lay whatsoever from full benches of what was then the Industrial Relations Commission in Court Session to superior general courts such as the NSW Court of Criminal Appeal or the NSW Court of Appeal. Since this advice was written, 2005 amendments to the *Occupational Health and Safety Act 2000* (NSW) have allowed some appeals to the general courts in relation to acquittals and to the offense in section 32A of causing death or serious injury.

In December 2005, the *Industrial Relations (Amendment) Act 2005* (NSW) came into force. This amending statute lessened the scope of the privative clause which is contained in section 179 of the *Industrial Relations Act 1996* (NSW) by enabling the New South Wales Court of Appeal to judicially review decisions of the Industrial Court of New South Wales for jurisdictional error, provided that the complainant has appealed to a full bench of the Industrial Relations Court.

In our view, where specialist courts hear OH&S offenses which are serious criminal offenses, appeals should lie to the superior courts. In the McCallum Report at paragraphs 136 to 143, Professor Ron McCallum and Mr P Hall QC (as he then was), argued that appeals from decisions of full benches of what is now the Industrial Court of NSW should lie to the NSW Court of Criminal Appeal. We agree with their view. We also agree that such appeals should be on leave and on the grounds that a manifest miscarriage of justice has occurred. By allowing appeals by leave on the ground of a manifest miscarriage of justice, the general courts would not have their time taken up by litigation seeking to circumvent the current closed nature of the system. Here, the recent Kirk litigation is instructive. In this litigation, which was extensive, it was sought to challenge the jurisprudence on occupational health and safety law which the Industrial Court and its predecessor, the Industrial Relations Commission in Court Session, had built up over the last two decades. The arguments adduced were in part due to the perception that the New South Wales system is closed and immune from the jurisprudence of the general courts. (See the two decisions in this series of decisions from the New South Wales Court of Appeal, *Kirk Group Holdings Pty Ltd v Workcover Authority of New South Wales* (2006) 66 NSW LR 151 and *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156).

We would add here for the sake of completeness that the appeal procedure should be clearly written in the model law. We make this observation because the appellate procedures in New South Wales are difficult to unpack because one has to read the relevant provisions of the *Occupational Health and Safety Act 2000* (NSW), the *Industrial Relations Act 1996* (NSW), and the *Criminal Appeal Act 1912* (NSW).