

# ASSOCIATION OF INDEPENDENT SCHOOLS OF VICTORIA INCORPORATED

## NATIONAL REVIEW INTO MODEL OHS LAWS SUBMISSION

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## EXECUTIVE SUMMARY

The Association of Independent Schools of Victoria Incorporated ('the Association') represents 218 independent schools or more than nine per cent of all schools in Victoria.

More than 116,000 students, or approximately 14 per cent of Victoria's student population, attend these independent schools. The Association's membership includes secular and religious schools of various denominations.

The independent school sector is diverse in terms of their educational programmes, their religious and cultural ethos and their size. For example, the smallest school has 10 students while the largest school has more than 2,800 students. There are more than fifteen different religious affiliations. In terms of educational programmes, schools teach a range of senior secondary courses and some schools teach in the Montessori and Steiner traditions. Although schools provide educational programmes for all students, some schools are registered to teach only students with special needs.

The Association provides services and products to enable schools to support their students in the changing educational environment. As a member service organisation, the Association develops and delivers quality products and services to support Member Schools to fund and provide quality educational outcomes.

The Association works closely with state and federal education departments, academic and professional organisations and individuals, contributing to national and state education policy objectives.

The Association is particularly concerned about the potential for aspects of OHS legislation in other jurisdictions to be incorporated into the model OHS Act. These areas are highlighted in this Submission. This Submission also provides recommendations in several areas highlighted for examination in the National Review into Model Occupational Health and Safety Laws Issues Paper ('the Issues Paper'). The Association has elected to focus upon the questions of the Issues Paper which are particularly relevant to independent schools.

Of critical importance and concern to the Association, and to the independent school education sector, is the potential for the following to be included in the model OHS Act:

- employer duties of care to be couched in absolute terms regardless of fault or negligence;
- the right to prosecute to be extended to unions;
- a reverse onus of proof provision;
- officer liability assumed where an organisation commits a breach of its safety obligations where a defence to the breach must then be established; and
- officer liability extending to volunteer officers.

The inclusion of these areas in a model OHS Act has the potential to create a 'blame game' culture where the fear of transgressing overshadows practical action being

taken. It would also undermine a culture of mutual and shared responsibility that should be the prevailing aim of national OHS legislation.

This Submission includes the following recommendations:

- the principles of the 'practical and reasonable control' model should underpin the model OHS Act;
- the concept of 'control' should be included in the factors used to determine 'reasonably practicable' and should therefore be used as a defence for duty holders;
- consultation mechanisms should be expressed as a 'general duty' and should not be prescriptive in order to enable flexibility;
- criminal proceedings initiated under the legislation should be subject to normal criminal justice provisions;
- discrimination and victimisation matters should only be subject to civil proceedings where conciliation is the first step;
- right of entry provisions for authorised representatives of a union should include a range of limitations;
- the right to prosecute should be the exclusive domain of the authority;
- the test to determine officer liability should be subject to the principle of 'reasonably practicable';
- volunteer officers should be excluded from officer liability provisions; and
- the model OHS Act should provide more clarity on incident notification obligations to reduce unnecessary compliance burdens on employers.

Ultimately, it is contended that a 'practical and reasonable control' model, as espoused by the Robens Committee, provides the best route to improving work safety while ensuring that there is an enforcement regime in relation to those duty holders who disregard the Act and contravene the legislation.

## 1.0 PURPOSE OF THIS SUBMISSION

- 1.1 This Submission is made in the context of the National Review into Model Occupational Health and Safety Laws. The purpose of this Submission is to provide comment on the form and content of a model OHS Act.

## 2.0 INTRODUCTION

- 2.1 The Association supports the development of a national OHS framework to establish consistency in laws across State and Territory jurisdictions. The current legislative structure where separate national, State and Territory statutes co-exist is complex and confers a regulatory burden on employers operating across more than one jurisdiction.
- 2.2 The Association maintains that the independent advisory panel (the Panel) has a challenging task ahead in recommending a national framework that unifies inconsistencies across seven State and Federal OHS Acts. This challenge lies in ensuring the overarching principle of safety without adopting provisions that focus on punitive action rather than prevention.
- 2.3 The key area in OHS legislation is the high level 'duty of care' obligation. The duty of care section is critical as it forms the overall spirit of the legislation. Duty of care provisions diverge widely across State and Territory jurisdictions ranging from an 'absolute' obligation to ensure safety in NSW to the 'practicable and reasonable' model that operates in Victoria.
- 2.4 The Association strongly rejects the NSW model which requires employers to ensure the health and safety of employees at work and adopts a prosecutorial approach to workplace safety. Rather than reduce unsafe behaviours and drive cultural changes in the workplace, this 'blame game' approach serves more to hinder the development of a culture of mutual and shared responsibility for workplace safety throughout all levels of an organisation.
- 2.5 The Association supports the 'practicable and reasonable' model enshrined in the *Occupational Health & Safety Act 2004 (Vic)*. This model adopts a realistic view that absolute safety is impossible to achieve. It focuses on risk management and control rather than risk elimination where this is not achievable. The Association believes that this model is the best direction for the achievement of continuous improvements in workplace safety and should underpin a national system.

## 3.0 LEGISLATIVE APPROACH

### TITLE, OBJECTS AND PRINCIPLES

- Q3** *Should the model OHS Act specify its objectives? If so, how and what should they be?*

- 3.1 The model OHS Act should specify its objectives to clearly articulate the overall purpose of the statute. The objects of the Act provide the context for

the interpretation of its purposes and should be carefully constructed to ensure that overall aims are captured.

- 3.2** The objects are defined in most State and Territory statutes. While the wording does vary across these jurisdictions, some key principles are common to many of them and should be identified as the core objectives of the model OHS Act.
- 3.3** These key principles include the following:
- to secure the health, safety and welfare of employees and other persons at work;
  - to reduce, eliminate and control risks to the health and safety of employees and other persons at work;
  - to promote education and community awareness on matters relating to OHS; and
  - to provide for the involvement of employees, employers, and organisations representing employers and employees, in the formulation and implementation of health and safety standards.
- 3.4** Some statutes feature objects that focus solely on the 'elimination' of risk. For example, s.2 of the *Occupational Health & Safety Act 2004* (Vic) includes the object '*to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work*'. This objective incorporates an impossible task failing to recognise the reality that all risks cannot be eliminated. The second point in paragraph 3.3 is a variation of this theme but allows for the reduction or control of risks where appropriate under a risk management model. This is consistent with the Robens 'practical and reasonable control' model which is currently recognised as the international benchmark for safety systems.
- 3.5** In reviewing the objects detailed in the various jurisdictions, the Association has concerns about a particular object featured in the NSW legislation. The *Occupational Health and Safety Act 2000* (NSW) includes the object '*to promote a safe and health work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs*'. This is a far reaching statement that, at the highest level, bestows the unreal obligation upon the employer to provide an environment that is adapted to the physiological and psychological needs of employees. This is an abstract ideal and it is not practicable for employers to take into account individual psychological and physiological needs in all work arrangements.
- 3.6** As Maxwell asserts, one of the contemporary issues facing most workplaces is the increasing prevalence and recognition of 'psychological' or 'work environment' hazards. The model OHS Act should acknowledge workplace psychological risks in the 'Definitions' section, however the abstract statement, as detailed in the NSW legislation, should not be incorporated into the objects of the model OHS Act in an attempt to recognise the prevalence of psychological hazards.

## 4.0 DUTIES OF CARE – WHO OWES THEM AND TO WHOM?

### CHAIN OF RESPONSIBILITY

#### **Q16** *Should the model OHS Act include a ‘control’ test or definition? If so, why and what should it be?*

- 4.1 A clear definition of control and a test to determine its applicability should be included in the model OHS Act. The lack of a clear definition of control in some jurisdictions has created confusion and uncertainty for duty holders. The model OHS Act is an opportunity to develop a comprehensible definition of control for consistent application nationwide.
- 4.2 As a general principle, the model OHS Act should not impose obligations on employers in situations that they cannot reasonably exercise control over. Over the last decade or so, the structures of work organisation have changed rapidly and it is common for employers, contractors and labour hire firms to exercise duties of care in the one workplace. This situation of multiple duty holders is widespread within independent schools where a range of contractors can be working on building works and casual relief teachers are sourced from labour hire firms at any one time. This creates a situation where the demarcation between duties of care and responsibilities is blurred. It is necessary for the model OHS Act to clearly define the concept of control and to provide some guidelines on to whom it should be apportioned.
- 4.3 It is for this reason that the relevance of ‘control’ should be made explicit in the model OHS Act and as Maxwell asserts, should be included in the list of ‘reasonably practicable’ factors. This will allow the law to differentiate between each duty holder’s responsibilities according to their capacity to control workplace hazards.
- 4.4 The integration of control with the other factors which determine what is ‘reasonably practicable’ will allow control issues to be used as a defence if a duty holder can show that the contravention occurred by reason of matters beyond its control.
- 4.5 The model OHS Act could also encourage parties to address issues of control at the outset, when the duties are imposed, so that the scope of duties and responsibilities can be established. This will allow duty holders, in some circumstances, to relinquish control where a contractor possesses the skills and expertise required to carry out a relevant activity. Obviously a range of factors that determine when it is reasonable for a duty holder to relinquish control will need to be included, such as the demonstration of relevant expertise and safety systems by the contractor.

### DUTIES OF EMPLOYERS

#### **Q23** *How and to what extent should the model OHS Act specify an employer’s duty of care?*

- 4.6 Currently, there is a lack of consistency in the legal definition of ‘duty of care’ across State and Territory jurisdictions. These definitions range from as far as is ‘reasonably practicable’ to an absolute duty of care without regard to issues

of control or feasibility. The model OHS Act should describe, in general terms, an employer's duty of care to ensure the health and safety of employees at work to the extent that it is 'reasonably practicable'.

- 4.7 This definition adopts a broad and practical approach to OHS duties of care, recognising the fact that some OHS incidents are genuine accidents and beyond human control. When read in conjunction with the principles of 'risk management', this definition frames a preventative approach to safety aimed at identifying, assessing and controlling risks.
- 4.8 Principles of 'duties of care' which require people to *ensure* work safety (i.e., NSW) by imposing absolute obligations which cannot be practically achieved should not be incorporated into the model OHS Act. This distorts the Robens 'practical and reasonable control' model which most OHS legislation is based on and would undermine confidence amongst Australian employers in the way that OHS is regulated.

#### **DUTIES OF WORKERS AND OTHERS**

**Q25** *How, and to what extent, should the model OHS Act specify worker's duties of care?*

- 4.9 The model OHS Act should recognise that employees have a crucial role to play in safety at the workplace. Continuous improvement in workplace safety relies upon inputs from all levels of an organisation. The view that employee responsibilities are peripheral to an employer's primary responsibility of managing safety detracts from a collegial approach to workplace safety. While safe work systems are the responsibility of employers, all people at work should be encouraged to focus on what they can personally do to maximise safety.
- 4.10 The model OHS Act should impose a duty of care on each worker for what they reasonably and practically control. This is a principle espoused under the Robens model and means that everyone involved in work has shared responsibilities for workplace safety. Further, this duty of care should extend to all persons working at the workplace including contractors and visitors. The duties of workers should be specified in similar terms as defined under s.36 of the *Workplace Health and Safety Act 1995* (Qld).
- 4.11 The model OHS Act should aim to cultivate a community approach to workplace safety. This cannot be achieved by narrowly concentrating responsibility at the very top. Applying unequal measures of responsibility so that some parties have heavy responsibilities while the responsibilities of others are lighter will only create a culture lacking in accountability. A collective safety conscience will evolve if all workers can be held accountable for what they reasonably and practically control.

#### **APPOINTED PERSONS AND OFFICERS**

**Q27** *Should the model OHS Act provide a mechanism for persons to be appointed to a position that has specific OHS responsibilities?*

- 4.12 The Association is concerned that some OHS laws require the appointment of an individual to hold responsibility for OHS at a workplace in certain circumstances. In Queensland, for example, employers with 30 or more

workers must appoint a Workplace Health and Safety Officer. Tasmanian legislation requires employers to appoint a 'responsible officer' at each workplace where the employer carries on business. Such prescriptive requirements, if incorporated into the model OHS Act, would impose a significant burden on many independent schools.

- 4.13** More than 25 per cent of Victorian independent schools are small community-based schools that operate on limited budgets and do not have ready access to resources and expertise. A requirement to appoint a suitably qualified individual to provide OHS advice would be difficult for these schools to comply with. Many of these schools are also situated in regional areas where qualified and experienced OHS advisors are in short supply.
- 4.14** It is widely acknowledged that there is a paucity of OHS specialists in the market *in general*. Many schools have experienced difficulties in hiring staff with a relevant OHS background. In situations where it is not possible for an employer to comply due to circumstances outside of their control, would the employer be found to be in breach of the Act? Would consideration be given to employers who could not comply with such requirements for these reasons?
- 4.15** In keeping with a performance-based standards structure, the model OHS Act should afford employees the flexibility to develop their own system of compliance in this area. The legislation should require an employer to "nominate a person with, or persons each with, an appropriate level of seniority (not being a HSR) to be the employer's representative or representatives". This would allow employers more scope to assign OHS responsibilities to existing roles rather than having to source OHS specialists. There is also no arbitrary number of employees to effect a legal obligation that is difficult to comply with.
- Q28** *What should the liabilities of such appointed persons be if the responsibilities are not met?*
- 4.16** Where the model OHS Act imposes an obligation on appointed persons it should be equivalent to that imposed on employees. That is, to take reasonable care, within the limits of their ability to exercise control. As is the case under Victorian legislation, an officer should not be expected to do more than is reasonable in the circumstances. The scope of the officer's duty should be limited by what the officer knows (or ought reasonably to know) and his/her ability to influence the safety decisions. An appointed person should not be held liable for a contravention of the Act which he/she could not reasonably have been expected to know about nor had control over. Further, liability should be limited where an appointed person acts in accordance with a regulation or code of practice.
- 4.17** Where liability is too onerous for those charged with the responsibility of managing OHS in the workplace, the fear of prosecution will cause skilled people to abandon working in the area of OHS. It also imposes a regulatory burden on persons who will focus more on paper trails to avoid liability rather than the development of safe practices and practical solutions to risks.

## 5.0 REASONABLY PRACTICABLE AND RISK MANAGEMENT

### CONCEPT OF REASONABLY PRACTICABLE

#### **Q37** *Should a test of “reasonably practicable” be included in the model OHS Act?*

- 5.1** A test of “reasonably practicable” should be included in the model OHS Act. This will clarify the considerations that can be taken into account in determining an employer’s duty of care, or defence. The clarification of what ‘reasonably practicable’ means in a statute will provide greater certainty for parties and reduces the scope for inconsistent interpretation of this concept by the courts and regulators. As Maxwell emphasises, the test should be what is “reasonably practicable” in the circumstances.
- 5.2** The model OHS Act should include the definitions of “reasonably practicable” that are detailed in legislation in both Victoria and Western Australia and which are also established at common law. Further to these five factors, control should also be included as an item considered to establish what is “reasonably practicable”. The reasons for this are stated in paragraphs 4.3 and 4.4 above, which also refer to the reasons provided in the Maxwell Report.

### RISK MANAGEMENT

#### **Q44** *Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?*

- 5.3** The risk management model is enshrined in most State and Territory regulations which mandate a systematic approach to managing risks and hazards. The three-step risk management model which consists of hazard identification, risk assessment and risk control, is widely accepted as the standard methodology for managing safety in Australia.
- 5.4** Given that the risk management model is accepted as the rudimentary structure for a systematic approach to hazard management, it would perhaps make sense to mandate the process in the Act to provide more clarity and to reduce the ambiguity surrounding safety processes.
- 5.5** However, the introduction of a statutory requirement to adopt a systematic approach to managing safety in the model OHS Act may have an adverse impact in some circumstances.
- 5.6** A high level duty to conduct a risk management process is not practicable or efficient in every situation. The requirement to carry out a risk management process in circumstances where risk controls are firmly established or well known is not practical and directs resources away from other safety tasks. Many independent schools already struggle under the weight of legislative red tape. A statutory requirement to establish management systems would direct time to paper compliance rather than directing time to actively reduce risks and hazards.

- 5.7 No State or Territory jurisdiction has expressly required employers to conduct risk management processes. In general, acts are supported by regulations which mandate a standard risk management approach focusing on specific industries. Thus, the framework for OHS legislation already compels employers to adopt a risk management approach to managing safety. This current structure should be continued under a national system as the regulations are the most effective tier to prescribe risk management processes that target specific industries.

## 6.0 CONSULTATION, PARTICIPATION AND REPRESENTATION

### DUTY TO CONSULT

**Q45 What provisions should be made in the model OHS Act for consultation?**

- 6.1 The Association recognises that an effective safety system is predicated on employee consultation and participation. Where a statutory duty to consult with employees is included in the model OHS Act, the duty should be flexible enough to allow employers and employees to agree on arrangements for consultation and representation that suit the needs of the particular workplace. The way in which employers consult with staff and who they specifically consult with should not be detailed. It is not feasible or practical to specify generic consultation arrangements for a range of different circumstances.

- 6.2 Consultation provisions in the model OHS Act should not include an absolute requirement to involve a Health and Safety Representative (HSR) in consultations where employees are represented by a HSR. While it is logical to involve the relevant HSR in consultations in most circumstances, this may not always be practicable (for example, where the HSR is absent from the workplace and there is no elected deputy). The absolute duty to consult with a HSR where applicable may be difficult to comply with. This duty may also obstruct situations where an immediate safety decision is required and the relevant HSR is not available. In some situations where the HSR is not available, it may be sufficient for the employer to consult with the employees concerned in order to implement a decision or to resolve an issue without having to involve the HSR. Any reference to the involvement of HSRs under consultative provisions should be qualified by the phrase, 'as far as is reasonably practicable'. For example, s.36 (2) of the Victorian Act could be redrafted as follows:

*"If the employees are represented by a health and safety representative, the consultation must involve that representative as far as is reasonably practicable (with or without the involvement of the employees directly)".*

### RIGHT OF ENTRY

**Q59 Should the model OHS Act include right of entry provisions? If so, who should be entitled to exercise the right of entry?**

**Q60 Should the model OHS Act specify training and qualifications for such persons?**

**Q61** *In what circumstances should the right of entry be exercisable?*

**Q62** *What powers should be exercisable upon entry and subject to what conditions or limitations?*

**6.3** It was hotly debated during the review of the Victorian OHS legislation whether or not right of entry provisions for union officials should be included in the new act. Many employers and peak employer bodies stressed the potential for entry under OHS purposes to be abused as an industrial relations weapon.

**6.4** There has been no anecdotal evidence of abuse of the right of entry provisions for OHS purposes in the independent education sector. The Association is not in a position to comment on the practical implications of this provision in other, more industrialised industries. It may be that the absence of abuse of right of entry provisions is due to the limitations on right of entry for authorised representatives imposed by the Act.

**6.5** Where the model OHS Act includes right of entry provisions for authorised representatives of unions, limitations similar to those proposed in the Maxwell Report should be included to ensure that right of entry is exercised only for the specific purpose of investigating a suspected breach of the Act.

**6.6** In summary, the right of entry conditions that should be incorporated into the model OHS Act are:

- access for authorised representatives is for investigative purposes and is not for enforcement purposes. It should be ultimately up to the Authority to determine whether enforcement action is required;
- access is only permissible for authorised representatives at those workplaces where employees are, or are eligible to become, members of that particular union. Further, at workplaces where different types of work are carried out, the authorised representative is restricted to the particular area where the persons working are, or are eligible to become, members of the relevant union. For example, in the case where building works are carried out on a school's premises, access for an officer of a construction union would be restricted to the area where relevant work is carried out. The officer would not have unfettered access to the entire school grounds;
- the reason for entry is restricted to OHS matters. The officer must present the details of the suspected breach in writing to an employer representative prior to entry;
- officers must be granted a specific permit from an authority/body for the purposes of right of entry under the Act. Permits should only be granted where the officer has completed an appropriate training course and has not had their permit revoked in the past. A permit for right of entry for industrial purposes is not interchangeable with a permit issued under the model OHS Act;
- unless the authorised representative held a reasonable belief that an immediate risk to health and safety existed, a minimum of 24 hours' written notice to the employer should be required; and
- it is essential that the model OHS Act allows for the disqualification of permits where an officer has repeatedly contravened the conditions in the

legislation or is found to have deliberately hindered, obstructed or harassed an employer or a worker at the workplace.

#### **PROTECTION FROM DISCRIMINATION AND VICTIMISATION**

**Q71** *What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and should be protected?*

**Q73** *Should a breach of the provisions be the subject of criminal or civil proceedings or both?*

**6.7** The model OHS Act should provide statutory protection for employees and HSRs from unfavourable treatment by the employer for having raised a health and safety issue. This is necessary to ensure that individuals can raise safety issues without fear of managerial reprisals. In some jurisdictions, unfavourable treatment is broad enough to include discrimination, harassment and victimisation of employees.

**6.8** It has been argued in some OHS reviews that the action taken by the employee or the HSR need only be the 'dominant' reason for the unfavourable treatment rather than the 'sole' reason. There is concern that this criterion, coupled with the employer bearing the onus of proof, has the potential to facilitate trumped-up complaints by employees and HSRs to protect them from reasonable action taken in a reasonable manner by the employer to demote, discipline, redeploy or dismiss them. The legislation, in this regard, is heavily weighted in favour of employees.

**6.9** This concern is heightened if an individual is exposed to criminal proceedings if he/she breaches these provisions. The presumption of guilt in this area does not accord with the principles of natural justice usually applied in normal criminal courts. It is unjust to deny individuals the presumption of innocence for a breach of these provisions where the penalty can be as severe as imprisonment. The combination of criminal penalties and the reverse burden of proof would have the effect of rendering HSRs 'protected species', creating situations where management representatives fear applying managerial prerogative. For these reasons, the Association maintains that the model OHS Act should only expose individuals to civil proceedings for a breach in this area, especially if the burden of proof rests with the defendant.

**Q77** *Should there be mechanisms in the model OHS Act for resolution of discrimination or victimisation disputes, as alternatives to criminal prosecution by the regulator, such as conciliation or arbitration before a tribunal?*

**6.10** The model OHS Act should include alternative dispute resolution mechanisms in relation to matters involving employee discrimination or victimisation. These types of matters really constitute a dispute between the parties rather than an act or omission that has direct safety consequences and should therefore not be subject to criminal proceedings. Such a dispute resolution mechanism should include conciliation as the first step to provide parties with the opportunity to resolve the matter in a less formal environment.

**6.11** Conciliation as a first step to resolving complaints can be highly effective in settling disputes without the parties having to resort to costly legal

proceedings which protract matters and impose significant cost and time burdens on all parties involved. Such a framework is similar to those used in equal opportunity and unfair/unlawful termination jurisdictions and is effective in reducing litigation.

## 7.0 PROSECUTIONS

### WHO MAY COMMENCE PROSECUTIONS AND RELEVANT PROCEDURES

#### **Q110 *Who should be entitled to commence criminal proceedings?***

- 7.1 In NSW, prosecution can be brought by an authorised person, who may be the secretary of a union. The right to bring proceedings by persons other than the regulator or inspectors (i.e., unions) should not be replicated in the model OHS Act.
- 7.2 A breach of OHS legislation is generally treated as a criminal offence across the various jurisdictions. As Maxwell asserts, criminal prosecutions are very serious matters that should remain the exclusive function of a prosecuting agency. Extending this function or the 'right' to prosecute to third parties, such as unions, has the potential to grossly distort justice. Prosecutions should not be opened to unions or other third parties where it is possible that ulterior motives or ideological agendas drive proceedings. It has been argued that third party initiated prosecutions can improve OHS practices via an increase in prosecutions. However, the Association believes that this would not result in any benefits to OHS outcomes. This would serve more to create a culture of prosecutorial fear amongst employers who will focus more on liability avoidance and less on practical safety improvements. This also has the potential to create conflict with the Authority which may have chosen to pursue a different enforcement tool (i.e., an enforceable undertaking) in a particular situation. The influence of unions in this area should be restricted to contacting the statutory safety authority where they believe a contravention of the legislation has occurred. The question of whether the employer has breached the Act and should be prosecuted is then a matter to be handled by the authority. This approach will maintain a consistency in enforcement and employer confidence in that they will not be exposed to multiple proceedings.

### THE BURDEN OF PROOF AND DEFENCES

#### **Q117 *Is 'reasonably practicable' an appropriate standard for the model OHS Act?***

- 7.3 The concept of 'reasonably practicable' is an appropriate standard for the model OHS Act in order to assess whether or not a duty holder has breached legislation. As is currently the case in many jurisdictions, the test of 'reasonably practicable' should be considered as an element of determining the duty and compliance with it. It is then left for the prosecutor to show that the employer had not taken reasonable steps to provide a safe environment. The model OHS Act should include a clear definition of what factors are considered to determine 'reasonably practicable' and as already highlighted in this Submission, the concept of 'control' should also be added to this list of factors to which the prosecution must have regard.

**Q118** *Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?*

**LIABILITY OF OFFICERS**

**Q124** - *Should the officer be automatically guilty?*

7.4 In NSW, Queensland and Tasmania, the duty holder is presumed guilty and bears the burden of proving their innocence. In contrast, Victorian legislation requires the prosecutor to prove 'beyond reasonable doubt' that there was a lack of reasonable care by the duty holder.

7.5 The Association is strongly opposed to the burden of proof resting on the employer for breaches of OHS legislation. As previously stated in this Submission, the possibility of a criminal conviction is a serious matter and the normal principles of criminal justice should therefore apply which includes the fundamental principle of a 'presumption of innocence' for the defendant. Similarly, officers should not be deemed automatically guilty for a breach of the Act. A system based on assumed guilt perpetuates the employer 'blame game' and undermines the development of a culture of mutual and shared responsibility which should be the ultimate objective of the model OHS Act.

**Q122** *Should 'officers' be liable to an offence because the corporation has committed an offence?*

**Q125** *Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?*

**Q126** *Should the model OHS Act provide for specific defences to be available to an officer? If so, what?*

7.6 It is reasonable for the model OHS Act to recognise that officers do have duties in their separate capacity as an officer of an organisation and therefore are accountable, to a certain extent, for how the employer goes about complying with its responsibilities. Officer liability should be subject to a similar test applied to employers as proposed in paragraph 7.3. This means that an officer would not be found guilty unless the prosecutor was able to prove that the individual failed to take steps that were reasonably practicable in the circumstances.

7.7 Further to the 'reasonably practicable' standard, liability should be limited to his/her ability to influence the relevant safety decisions. An officer should not be held liable for a contravention of the Act which he/she could not reasonably have been expected to know about nor had control over. The inclusion of a 'control' test would mean that an officer could be found not to be liable even though the employer has committed an offence. Thus, a demonstrated lack of 'control' in relation to a particular situation could be used as a defence by an officer.

**Q127** *What should the approach to officer of unincorporated associations or volunteer officers be?*

7.8 A person who would ordinarily be defined as an officer but who acts without any fee or reward (i.e., volunteer officers) should be exempt from liability. The

imposition of criminal liability on volunteer officers would have a significantly negative impact on the involvement of volunteer officers in the independent school sector. Most independent schools are governed by a board or a council comprised of volunteer members charged with significant decision-making responsibilities that guide the strategy and direction of the school. The independent school sector is predicated on the goodwill and commitment of these esteemed members of the community who contribute substantially to education. The prospect of criminal liability would undoubtedly discourage such persons from assuming these important positions to the detriment of independent school education.

### 8.0 OTHER ISSUES

#### NOTIFICATION AND INCIDENT REPORTING

##### ***Q145 How should an effective reporting system be provided for in the model OHS Act without an unnecessary compliance burden?***

- 8.1** The Victorian legislation requires employers to notify the Authority of serious incidents (death or serious injury) that occur at a workplace. By way of example, the definition of serious injury includes incidents that result in a person requiring immediate medical treatment for serious eye or spinal injuries or immediate treatment as an in-patient in a hospital. There has been much confusion in the Victorian jurisdiction as to whether a school is legally obligated to report a serious incident involving a student. The Authority has been unable to provide clarity or guidance on a school's obligation as it relates to students in this area.
- 8.2** Independent schools have responsibilities under the OHS legislation to all persons who could be affected by their activities which include not only employees, but contractors, visitors, students and volunteers. There is a broad view that all serious incidents at schools, including those that involve students, are notifiable under the OHS legislation, as a school is a 'workplace' and members of the public (i.e., students) are intended to be covered.
- 8.3** The opposing view is that where legislation involves a criminal liability, it is generally not given an expansive interpretation. This means that the definition of a workplace may not be broadly interpreted to include an incident that involves a student injuring himself/herself playing sport at or for a school, for example.
- 8.4** This issue is important as it is an offence under Victorian legislation to fail to comply with the incident notification requirements. However, the ambiguity surrounding this provision makes it difficult for schools to understand precisely when an incident needs to be reported to the Authority. Is it fair for schools to notify the Authority after every serious student-related incident, especially where students are more likely to be engaged in activities that are high-risk? For example, if a student sustains a significant injury playing football as part of an inter-school competition, is the school obligated to notify the Authority of the incident? Although the injury took place at the workplace, it is clearly not related to the ordinary activities of workers. High-risk student sporting activities generally do not form the ordinary duties of an employee engaged at the school and are areas over which the school has limited

control. A requirement to notify the Authority of such incidents imposes a significant compliance burden on schools.

- 8.5** In the context of this issue, the model OHS Act should include more clarity on an employer's obligations in this area. Notification of incidents and reporting requirements should be limited to injuries that arise out of employee-related duties or where the incident has a nexus to the 'workplace'. For example, clearly a school would have an obligation to notify the authority where an incident involved students in a science or a technology class. It is arguable as to how relevant information involving student injuries that do not have a nexus to the workplace are to the Authority, in its efforts to target compliance and collect statistics relating to workplace health and safety. The inclusion of such non-work related injuries has the potential to greatly distort injury statistics in the independent school sector as they would form a greater proportion of notifiable incidences.
- 8.6** If it is not practicable for the model OHS Act to include clarification about the injuries that would require notification to the Authority, industry specific guidance should be provided in a code of practice or in guidance material.