

Chapter 1 – Legislative Approach

Regulatory Structure

Question 1

Which regulatory approach or approaches should be taken in the model OHS Act, and why?

The Law Society supports the continuation of the Robens System in Australia. Various State parliaments in the 1970's enacted Robens style legislation. New South Wales established its own enquiry into this matter, culminating in the Williams report in 1981 which led to the enactment of Robens style legislation in New South Wales under the *Occupational Health & Safety Act, 1983* (NSW) (**the 1983 Act**).

In terms of the harmonisation process, a uniform set of Robens style laws supported by regulations and codes of practice would practically be the most effective way of achieving the aims of harmonisation.

If the Federal Government were to consider adopting a system other than a Robens style system, we would submit that a significant inquiry, much like the one undertaken by Lord Robens in the United Kingdom in the 1970's ought be undertaken.

Question 2

How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

The Law Society of New South Wales considers that the model OHS Act ought be of the Robens style imposing general absolute duties to ensure a safe workplace. It is submitted that if greater detail is required to address specific types of dangerous activities or matters pertaining to a particular industry, these are better dealt with by way of regulation and/or code of practice.

Objects and Principles

Question 3

What is an appropriate title for the model OHS Act?

Occupational Health and Safety (Model Legislation) Act

Question 4

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

The Law Society supports the concept of the Act specifying its objectives.

However, we submit that consideration needs to be given as to whether or not these objectives should be specified in a specific section within the Act as is the case with section 3 of the *Occupational Health and Safety Act, 2000* (NSW) (**the 2000 Act**) and as part of an explanatory memorandum. The matter for consideration is this. In New South Wales the Courts have tended to construe the absolute nature of the duty as described in Preamble to the 1983 Act and section 3 of the 2000 Act as creating such

a high standard that potential defences have all but been decided out of existence by this approach. In the Law Society's view care should be taken in terms of drafting such objectives if it is thought beneficial for them to be part of the principal Act. These objectives ought not be settled until a decision is made as to how the principal obligations are to be framed and whether the phrase reasonably practicable should be part of the principal offence.

If it is considered that objectives should appear in the Act, if it is the case that the principal obligations are placed upon employers to ensure safety as far as is reasonably practicable as is the test in the majority of Australian States, then the objectives should be drafted in a manner which is consistent with that obligation. The Courts would then construe the obligations in accordance with the obligations as described in the objectives.

Question 5

Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?

The Law Society does not consider that a set of principles should be part of the Act. Given the regulatory nature of the Act and assuming that a Robens style approach will be maintained such principles if included within the principal Act, would in the Law Society's view detract from the absolute duty. If it is considered that a set of principles should exist as a way of explaining to duty holders how they might discharge their duty, consideration would need to be given as to whether or not that set of principles ought not be included in, for example, a Code of Practice.

Question 6

Are there any other issues that should be considered in the legislative approach of a model OHS Act?

A significant issue requiring attention arises in the following circumstances. It may frequently be the case that an employer has to retain external expertise to carry out a particular task or give particular advice. For example, in New South Wales if asbestos is encountered it can only be removed by a licensed asbestos operator. However, if that licensed asbestos operator itself breaches an occupational health and safety law, under the principal contractor provisions, the principal contractor who could not perform the work in any event is potentially liable in that circumstance. This same situation exists in the construction industry in relation to a number of different disciplines where a principal contractor will for example retain the services of a specialist scaffolding company, a demolition company or geotechnical advisors.

Consideration should be given as to refining the terms of potential defences to include a situation where a principal contractor has discharged its obligations with respect to a particular work activity if it has retained a suitably skilled and qualified entity to perform those tasks. This defence may need to depend upon a requirement for licensing of particular dangerous activities.

Chapter 2 - Scope Application and Definition

Industry Sectors

Question 7

Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation. If so, what provision should be made for establishing the relationship between the model OHS Act and industry specific legislation?

Yes. However, the model OHS legislation should be the predominant safety legislation in all workplaces. However the specific industry legislation, and in the New South Wales case this relates principally to the mining industry ought be maintained. The mining legislation has had a significant history of development, often arising out of inquiries from tragic circumstances within mines and there has been significant legislative development in that particular sector. Whilst we will address this issue later in answer to the question regarding the right to prosecute, the Law Society's view is that the industry specific legislation should be kept, but that there should be a single workplace prosecutor within each State. This would mean that for example in New South Wales the Department of Primary Industries which investigates and prosecutes matters arising from mines would lose its ability to prosecute.

Question 8

Alternatively, should a model OHS Act incorporate all industry specific legislation? If so, how and to what extent (eg could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?

No. See 7 above.

Question 9

Should the model OHS Act contain provisions for improving co-ordination between safety regulators within jurisdictions? If so, what should be provided?

No, this should be a matter of administration and comity between the State based regulators.

Workplaces and Non-Workplaces

Question 10

Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

The nature and conduct of work has moved on significantly from the 19th century *Factories Acts* where it was contemplated that work would usually be taking place at the employer's work premises. Work is conducted in many different premises often with multiple employer's contributing to the end result. The legislation should ensure that the general duties reside on an employer with respect to the work being performed by that employer's workforce, the obligations should extend equally to non-employees but should not be limited to premises under the control of a particular employer.

Control of premises however is an area that does need to be examined. Provisions exist with respect to control of premises, and in this regard we would refer you to section 10 of the 2000 Act, which impose very wide obligations of control and which create obligations even where control of the premises is limited. As a matter of fact a number of employers will have little or no control over the premises where their employees will be working. This is not to say that the same employer does not have control over the systems of work, and general duties in this regard will continue to exist, but the premises issue can be a significant problem.

In summary it is the Law Society's position that the general duties of care placed upon employers should be related to the work and any place of work used by that employer to conduct its business.

Question 11

Should general duties of care under the model OHS Act be extended to members of the public? If so, how?

Yes, this is typically done in the general duty which pertains to non-employees. The Law Society does not support a particular category pertaining to members of the public.

Responding to Change

Question 12

Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

If the Commonwealth enacts model OHS legislation which is of the Robens general duty variety, the requirement for flexibility referred to in this question will be met. Obviously it is an increasing feature of many workplaces that independent contractors are utilised to perform work previously conducted by employees. The current scheme of the various State based occupational health and safety Acts more than adequately cover the differing situations involving non-employees and we would submit that a similar approach ought be adopted in the model OHS legislation.

Question 13

Are there current or emerging hazards and risks that are not effectively addressed under general duties of care? If so, how should they be provided for under a model OHS Act?

As in the answer to question 12 above, we do not consider that special regard need be had for new or emerging hazards within the model legislation itself. Provided the model legislation itself is Robens based, these matters will be covered. We do not consider in terms of the regulatory nature of this Act that introducing notions of reasonable foreseeability, which are usually matters associated with common law of negligence would be helpful or of assistance. We would imagine that contemporary risk assessment approaches will be included within the regulations. If there is an emerging hazard, this becomes a question as to:

- (i) the risk assessment process; and

- (ii) if the principal duty is qualified by the phrase “*reasonably practicable*”, this may be sufficient comfort for an employer with respect to the emergence of new hazards.

Definitions

Question 14

Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

There are a number of terms which would need to be defined within the definitions section of the model OHS Act. These terms would include:

1. Employee
2. Employer
3. Place of Work
4. Plant
5. Premises
6. Work
7. Regulator
8. Self-employed person
9. Inspector
10. Associated occupational health and safety legislation
11. Mine
12. Prohibition, Improvement and Infringement Notices
13. Controller (see answers to question 16 and 17)

A question arises as to whether or not the terms which may appear in the principal duty such as “ensure”, “safety”, “reasonably practicable” ought be the subject of a definition section entry or not. These types of phrases have traditionally received many judicial considerations. We do not consider that these terms necessarily require definition in the model OHS Act.

Question 15

Are there any other issues relating to the scope, application or definitions of a model OHS Act?

Careful consideration needs to be given to the following circumstance. If an employer is working on a Commonwealth site or with Commonwealth employees there is the capacity in that circumstance for both the Commonwealth and State regulatory regimes to apply. Obviously harmonisation will remove this difficulty to a certain extent except it does create a situation where 2 separate regulatory bodies and 2 separate prosecutors could be investigating potential breaches of their respective occupational health and safety acts with potentially different outcomes. In

this type of situation the Law Society would submit that a single inspector with a dual State and Federal appointment be charged with the task of investigating the matter and prosecuting (if necessary) the matters arising from the event.

Chapter 3 - Duties of Care – Who Owes them and to Whom

Control

Question 16

Should the model OHS Act include a “control” test or definition? If so, why and what should it be?

Yes. The test with respect to control should require that there be either actual control or the actual ability to control the work or the workplace. Provisions such as section 10 of the 2000 Act require control only be to a limited extent. Potentially employers or self employed persons at workplaces with very limited ability to control what is going on (other than with respect to their employees) can find themselves being prosecuted under such provisions. The issue with respect to control should place the obligation into the area of actual rather potential control.

Question 17

What should the role of “control” be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

In many respects, this issue of control should be limited to a workplace or to an employer. It is axiomatic that if an employer has its employees undertaking work, that the employer will be in control of that workforce. These types of situations are easily covered in the principal provisions placing general duties upon employers.

Question 18

Should control be able to be delegated or relinquished? If so, in what circumstances and what should the legal effect of doing so be?

If there are provisions regarding control within the model OHS Act, the Law Society submits that there are the following desirable results from a public policy point of view with respect to control:

1. There should be an obvious formal mechanism by which it is clear as to which entity at a worksite is actually in control. Typically this has been achieved with for example principal contractor type provisions in the various State based regulations (although these are not consistent). In those circumstances there is usually a formal appointment of the principal contractor in for example, a construction contract, and that is not an appointment which can be delegated or relinquished. In that very defined circumstance, the principal contractor appreciates and understands at the time of appointment the serious obligations which accompany that appointment. This is a desirable result and is one that is worthy of further consideration.
2. The Law Society would only recommend an ability or capacity to delegate control in very limited circumstances. Usually this would be in a circumstance where for example, an owner of a building site gives possession of the site to the builder. Between the time possession is given to the builder and practical

completion, it could not be said that the land owner is in control of the site in terms of the building activities that are taking place. Secondly, control ought to be able to be relinquished in the defined circumstance where a specialist undertaking is underway. We have previously used the example of an asbestos removal, but this equally applies to other areas requiring a licence such as demolition or the undertaking of specialist activities such as geotechnical surveying or advice. Any such ability to delegate must be limited to the specific identified activity.

3. It is important to ensure that if the delegation or relinquishing of control is to be permitted that it can only be done so in limited circumstances and that the delegation must be in writing. The Law Society would advocate that such a system ought to be monitored for an initial 2 year period to ascertain whether or not this system is working. If not, some form of official sanction by one of the State based WorkCover authorities may be required in terms of an application to delegate or relinquish control.
4. Obviously this delegation or relinquishment of control would not absolve for example, a principal contractor with respect to its own employees.

Question 19

Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so, how should this be achieved?

It has long been the scheme of occupational health and safety Acts to create overlapping and concurrent obligations at the same workplace. We do not consider that clarification is required, particularly if the Act it adopts general or absolute duties.

Question 20

Is primary reliance on employment relationships a valid basis for framing safety obligations?

Yes. However, the Law Society considers that in the framing of the obligation pertaining to a controller of the workplace plant or premises, the definition should be that of "person" rather than an employer. It is possible that a corporation which is a landowner or which has been formed to own plant and equipment may in fact not be an employer and it would be important to avoid such a lacuna in any model legislation.

Question 21

How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?

It is submitted that the same general duties ought to be generally owed to non-employees, as is the case in the various State Acts. Whilst sometimes difficult factual situations regarding volunteers or labour hire personnel arise, there is no reason in principle as to why different classes of persons should be owed different duties or lesser duties.

Question 22

Is there a broader concept that more effectively covers the various work arrangements?

No, the absolute nature of Robens style duties is sufficient to cover all work arrangements. They are expressed to cover employees and non-employees and a definition of controllers of workplaces or owners of premises and plant is as described in our answer to Question 20 above.

Question 23

How and to what extent should the model OHS Act specify an employer's duty of care?

The Law Society is of a view that the employer's duty of care should be specified in the general or absolute manner as is typically been the case under Robens style legislation. However, the Law Society does consider that the employer's duty of care in the principal obligations (rather than in a reverse onus of proof situation) should be to ensure health and safety so far as is reasonably practical.

Question 24

To whom should these duties be owed?

Employees and non-employees.

Question 25

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

Generally, the model OHS Act should specify that a worker has a duty of care to take reasonable care with respect to others at the workplace who may be affected by that person's acts or omissions. We think there should be a requirement that there be a causal relationship between an individual's act and omission and creation of an actual risk to health and safety.

Question 26

Should the model OHS Act include duties of care for persons who are not performing work (e.g. visitors to a workplace, members of the public)? If so, what should the duties be?

No, this would otherwise be covered by the obligations owed to non-employees or the obligations placed upon person in control of workplaces, plant and premises.

Question 27

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

No. The Law Society would be concerned that if a specific person is appointed under the Act with OHS responsibilities, and a failure to comply with those obligations could result in criminal liability being placed upon that person. The Law Society could imagine that such a position would be an exceedingly difficult, if not impossible role to fulfil. The preferred position is that employers, controllers and employees have

overlapping and concurrent duties to ensure safety at work rather than placing great responsibility in a single office holder.

Question 28

What should the liabilities of such appointed persons be if the responsibilities are not met?

The Law Society does not support this proposition, see answer to Question 27.

Question 29

What should the relationship be between the OHS responsibilities of the duty holder and such appointed persons?

The Law Society does not support this proposition.

Question 30

Should the model OHS Act include positive duties for officers of bodies corporate?

Obligations in respect to managers and officers are discussed with respect to the answers to questions 122 to 127.

Question 31

Do current provisions for persons in control of a workplace (and plant and substances) clearly express who owes a duty, to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

The problem with the current provisions concerning control of workplaces (plant and substances) is the qualification in a number of provisions wherein something less than legal or actual control can still give rise to liability. For example under section 10(4) of the 2000 Act the person who has limited control of premises, plant or substances is still defined as a controller of those situations. This has the potential to lead to an anomalous situation whereby a person may be unaware of the duties that they hold as a controller. For example a labour hire company whose employees are using defective plant owned by the host employer. Whilst the labour hire company may well be guilty of a breach of the principal provision, we would submit that it is very difficult for that body to exercise control over a physical piece of plant which they do not own. There is no doubt that the labour hire company in that circumstance would have control over its own employees, and could exercise that control in terms of directing them not to work on the particular machine, but we do not consider that a situation which alleges control of the particular piece of machinery or premises when in fact none exists is helpful.

We do, however, recognise that there may be situations within a corporate structure where one company may own the machinery and another may employ the staff. All that might arise in this circumstance is that different duties are breached by different bodies. It is for this reason that the Law Society considers that the requirement for a controller of premises, plant or substances being an employer is not appropriate. It may often be the case that in fact the owner of the premises or plant is a company without employees and the definition with respect to a controller of these circumstances should be wide enough to cover that circumstance.

Question 32

Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

No. The general duties referred to earlier in this paper ought be sufficient unless it is a specialist or licensed undertaking that we have earlier referred to.

Question 33

Should the model OHS Act clearly establish health and safety obligations for various activities which affect health and safety for the whole life of an item, structure or system (i.e., conception to disposal)? If so, what should the duties be in relation to these activities?

Yes. The Law Society considers that this is an important aspect of securing health and safety at work. Many employers will purchase plant and equipment or substances in good faith believing that the item has been designed and checked to ensure that it is safe for use. Such purchasers do not normally have an ability to modify such plant without creating a risk that they void any warranty or guarantee with respect to that equipment. It is therefore essential that obligations are placed upon such suppliers and manufacturers, importers and designers to ensure safety. These entities, however, do need to be protected against the following circumstance. It is quite possible that a piece of plant or equipment could be in service for many years. It may be that developments to that particular machine occur over time in terms of the development of later models.

The Law Society considers that there is a case for a limitation period with respect to such suppliers, but it would need to be significant, for example, of the magnitude of 5 years.

Question 34

How should the model OHS Act deal with situations where the relevant upstream activity occurs in another jurisdiction or outside Australia, for example where design occurs in one jurisdiction and manufacture in another? Should the manufacturer be responsible for the failings of a designer in this situation?

No. Typically given that occupational health and safety offences are criminal offences, mainstream criminal law provisions with respect to the extra territorial application of criminal law apply. For example in NSW Section 10C of the *Crimes Act 1900* applies. This provision provides that a geographical nexus exists between the state and the offence if the offence is committed wholly outside the state but the offence has an effect within it. We consider that the existence of such mainstream criminal provisions which are readily applicable to the situation referred to in this question should remain. There is an existing body of authority both at first instance and appellate level with respect to those provisions. We would not recommend that a distinction between a manufacturer and designer be made as proposed in the question, rather the general duty should apply and the prosecutor as a matter of fact must turn his or her mind to the actual involvement of the designer or manufacturer in the creation of the risk. Again, the framing of the principal liability is crucial in this regard because if the phrase "reasonably practicable" is a part of the principal duty, this could be the comfort that for example that the innocent manufacturer with respect to a design failure may need to rely upon.

Question 35

How should the activity of supply be defined? Should it occur only once or every time an item changes hands, whether permanently (wholesale, retail, second hand and gratis) or temporarily (loan or hire)?

Supply should be widely defined to cover a range of situations. In this regard we would commend the definition in section 11(2) of the 2000 Act which in a comprehensive fashion takes into account the various means by which plant or substances may be supplied for use at work. The definition of "supply" should pertain to situations every time an item does change hands simply because there are a number of situations such as with respect to the hire industry that ought be subject to ongoing obligations. It is very common for employers to hire plant, for example elevated work platforms, wood chippers, cranes or other pieces of heavy plant and equipment and it is essential that those suppliers understand and have placed upon them obligations to ensure the plant and equipment that they supply is safe.

Question 36

Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

The Law Society would submit that in respect to obligations placed upon designers, manufacturers and suppliers that the following issues need to be taken into account:

1. We would consider that the obligations should arise when the machine is being properly used and for the purpose for which it has been designed or supplied.
2. We would suggest that the obligation would also not arise in circumstances where the plant and equipment has been modified in a relevant way so as to create a risk. In such a circumstance the supplier for example would have no control over the situation where for example a worker removes a guard. However we do understand that an issue may arise if a machine is easily able to be altered so as to make it unsafe and consideration does need to be given to this situation.

As described above, the Law Society considers that the limitation period with respect to this matter may need to be lengthy but not unlimited. It is obvious that plant and equipment could be in use for many years and it would be unreasonable to have potentially unlimited criminal liability with respect to such a situation.

Question 37

Should a test of "reasonably practicable" be included in the model OHS Act?

Yes. This standard of "reasonable practicability" should appear within the primary duty and not as a defence. The Law Society submits that no definition or test as to what constitutes "reasonably practicable" should be included in the model OHS Act, although it is recognised that in many respects what is reasonably practicable or not is a question of fact in each case. However, some guidance within the model OHS Act, consistent with case law as to what this phrase means may be of assistance if it is thought necessary to define the phrase. Such a definition necessarily ought not be exhaustive.

Question 38

If not, what alternative standard should be included?

Not applicable.

Question 39

How should the standard be defined? What level of detail should be provided?

The standard should be defined by way of a non-exhaustive definition. This was an approach adopted in the Maxwell Review in Victoria. However, there must be sufficient discretion left for a court to decide this issue as a matter of fact.

Question 40

Should control be an element of the standard? (see Chapter 3)

Control should be one of the factors in setting the standard as to what is "reasonably practicable".

Question 41

Should a test or examples for assessing compliance with the standard be set out in the model OHS Act or in subordinate instruments? If so, what would that contain?

No. It is the Law Society's submission that the Robens standard in terms of general duties of care should be the underpinning philosophy of the model OHS Act. To the extent that within the Act tests or exemplars for assessing compliance are set out, this general duty is detracted from and with respect to employers this is not appropriate.

Question 42

Should 'hazard' and 'risk' be defined in the model OHS Act?

Possibly. It may be necessary to define the terms "hazard" and "risk" so as to avoid arguments as to whether or not the term connotes an existing risk or the possibility or potential of a risk eventuating. This apparent dichotomy has been discussed in a number of cases and it is submitted that a fundamental aim of a harmonised system should be the elimination or minimisation of potential arguments with respect to definitions. It is important to understand that if there are legal challenges to such terms, if they are not defined, under a harmonised or model system, this will immediately have an effect Australia wide. The argument against definition is to allow the Courts the discretion to deal with differing factual scenarios as they arise.

Question 43

Should a definition of 'reasonably practicable', or an alternative standard, include a reference to risk management principles and processes (hazard identification, risk assessment and risk control)? If so, how?

Yes. Within the definition of "reasonably practicable" it is submitted that a number of factors would need to be taken into account including the application of risk management principles of hazard identification and how they apply to the particular circumstance.

Question 44

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

No, we would suggest that risk management principles would better be described within the associated regulations.

Question 45

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

The Law Society submits that consultation with the workforce is an essential and ought be obligatory aspect of any model system. It is recognised that those actually performing work tasks will have valuable information to contribute as to the risks and hazards of their daily work. The Law Society submits that mandatory obligations regarding consultation, and we would submit that the establishment of occupational health and safety committees are perhaps the best way to achieve this purpose, ought be part of the model legislation.

Question 46

What are the work relationships to which a consultation provision should apply?

The primary obligations to consult should exist between employers and employees. However, it is recognised that at many work places contractors or a wide range of non-employees may be utilised to perform the work. The obligation to consult should be a general obligation residing upon employers with respect to employees and non-employees alike performing work at the employer's place of work.

Question 47

Should there be different levels of consultation required for different work relationships?

No, there is no reason in principle as to why different levels of consultation will take place depending upon one's status as an employee or not.

Question 48

Should there be different levels of consultation required for different work relationships?

- *a multi-employer worksite;*
- *an employer with operations across more than one worksite;*
- *small business;*
- *remote workplaces;*
- *precarious employment; and*
- *workers from culturally and linguistically diverse backgrounds.*

The Law Society submits that the types of situations described in question 48 are exactly the types of situations that require consultation. For example, it is submitted that in small business or remote work places it is a much greater challenge and

imperative for consultation to take place. Further, consideration must be given for workers for whom English is a second language and if anything the need to consult is a greater imperative.

The Law Society would submit that the appropriate approach would be to set a broad standard within the model legislation and provide more detail in either a regulation or code of practice to take into account the various different factors referred to in this question.

Question 49

Should there be a requirement for establishing HSR's and HSC's?

Yes.

Question 50

What provision should be made in the model OHS Act to enable the effective participation and representation of workers to improve health and safety outcomes?

The Law Society submits that the starting point for consultation between the employer and the employees will be with the health and safety committee. Consultation with the committee should be mandatory.

Question 51

How, and in what circumstances should HSRs be appointed or elected and HSCs established?

HSRs and HSCs should be established by election. We would submit that thresholds with respect to numbers of employees should exist for the establishment of a committee by election. Generally, the threshold which has been accepted around Australia is 20 employees. We would recommend that smaller work places be required to have a health and safety representative rather than a committee, and this ought be enshrined in the model legislation.

Question 52

Where an election is required, who would be entitled to vote?

The Law Society submits that voting should take place within a particular employer. That is, to vote for either a health and safety committee or representative, one must be an employee of the employer within whom that committee or representative resides. We would submit that with respect to regulations or codes of practice, situations involving multi employer sites where there may be a combined committee can be addressed.

Question 53

What should the powers and functions of HSRs be?

Health and safety representatives should generally have powers which are defined within the legislation to:

1. Raise occupational health and safety issues with the employer.
2. Accompany inspectors during inspections.

3. Be entitled to receive copies of health and safety committee minutes.
4. We would submit that there ought be a discreet offence with respect to the victimisation or harassment of a health and safety representative.

Question 54

What should the structure and functions of HSCs be?

We would suggest that the statutory right for a committee be as described above. Its powers and functions can be described in the regulations but would generally pertain to issues such as consultation and review of risks and the making of recommendations to control or eliminate risks.

Question 55

What training and qualifications should members of HSRs and members of HSCs have?

The Law Society submits that a base level of training ought be provided to both HSRs and HSCs in order to allow them to appropriately and effectively discharge their functions. However we do not see the need that such a prescription be contained within the model legislation, rather there could be a specific code of practice or regulation which provides guidance as to how to inform and skill such persons.

Question 56

Are there alternative mechanisms that should be considered?

No.

Question 57

To what extent should the specific requirements be dictated in the OHS Act, and to what extent in regulations?

The Law Society's view is that the establishment of the health and safety representatives and committees should exist within the Act. There should be protections in the Act to ensure that persons involved in such activities are not victimised or harassed. However, guidance as to how to discharge the functions of these roles should exist in either the regulations or in codes of practice.

Question 58

Are there classes of workers for whom current representation requirements are not effective? How could the model OHS Act address such problems?

This is a question which would require research and one that we would suggest is a project for a WorkCover Authority. We would not consider however that a model OHS Act should address such a matter.

Question 59

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

Historically, trade unions have had a role to play in workplace safety. In principle, the Law Society supports a right of entry of trade union officials with respect to safety. If this power is to be exercised the model OHS Act should clearly define the circumstances in which it can be exercised and the notice requirements. The Law Society would not support right of entry which is at large or unrestricted.

Question 60

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

No, other than if the right of entry is being exercised by a trade union official, there must be a definition of who an authorised employee's representative is and the powers associated with that authority.

Question 61

In what circumstances should the right of entry be exercisable?

The Law Society submits that the right of entry powers should only be exercisable upon notice (for example, 24 hours) in writing and with respect to an alleged specific safety breach.

Question 62

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

The authorised representative should have the power to enter and inspect upon notice. We consider that it is excessive and not appropriate that a person who is not part of an independent regulator should be given the power to take statements or require the production of documents. We would not recommend that such powers be given to an authorised representative.

Question 63

What provisions should be made in the model OHS Act to assist the effective resolution of health and safety issues?

If the system established by the model OHS Act is a Roben style absolute duty system, the responsibility will reside with the employer or the controller of the workplace to ensure health and safety. Whilst employees or committees may have various views on safety matters, ultimately it is the employer who will bear the burden of complying with the occupational health and safety duties upon pain of prosecution.

Question 64

When should issue resolution procedures be activated?

Not applicable.

Question 65

If issue resolution procedures are to be specified, in whole or in part. should they

appear in the model OHS Act or in the regulations?

Not applicable.

Question 66

How best can the model OHS Act ensure resolution procedures are, where possible, agreed at a workplace level?

Not applicable.

Question 67

Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?

Yes. However, this right to refuse or cease work should not be at large and there should be a specific mechanism for resolving such a situation. The difficulty is the real risk that such a right could be used for other purposes. We would suggest that the mechanism would include involvement of the safety committee in the review of the work procedures.

Question 68

Should a model OHS Act provide for the right of the HSR to direct that work cease? If so, what conditions, limitations or restrictions should be placed on the exercise of the right by a worker or representative?

No, we would submit that providing such a power to a health and safety representative is imposing an intolerable burden and potential conflict upon the representative.

Question 69

Should the model OHS Act require payment of wages and/or associated benefits to workers who have exercised the right to cease work in accordance with the Act? If so, what should be provided?

No. The significant problem in the area of occupational health and safety law is the overlap with traditional industrial law issues of disputation and conflict. We would submit that it is inappropriate to create a system whereby industrial type conflict could arise. We do however, consider that an alternate dispute resolution procedure should be defined so as to enable a genuine safety concern to be dealt with. We would suggest that matters such as notice being given to the employer and an opportunity to consider and/or rectify the alleged risk ought be a mandatory requirement on the part of all employees/workers. There should be a right that the particular work process under review not be carried out during that period and that the employee can be lawfully reassigned to other duties. This would obviate the need for there to be payment with respect to a failure to work.

Question 70

In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?

See question 69 above.

Question 71

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

The Law Society submits that it should be an offence to discriminate or victimise a person who has raised a bona fide safety issue in accordance with the Act or the Regulations.

Question 72

Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?

The Law Society submits that the regulator should be the body who could bring an action with respect to a criminal offence of discrimination or victimisation of a person raising the health and safety issue or who is victimised for so doing. The person who has been subject to that victimisation or discrimination, if they have suffered a loss, for example if they have lost their job, should be able to bring a civil action in their own right.

Question 73

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

See answer to question 72 above.

Question 74

Who should have the burden of proving relevant elements of offences (e.g. conduct and intention) and should the standard of proof be the civil standard (on the balance of probabilities) or criminal standard (beyond a reasonable doubt) for these elements?

With respect to the criminal offence, the prosecutor should bear the burden on the criminal standard. With respect to the civil proceedings, the applicant or plaintiff should bear the burden of proof on the civil standard.

Question 75

Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?

Yes.

Question 76

What remedies should be available to the victims?

Victims should be entitled to bring actions for damages and loss of wages and/or reinstatement.

Question 77

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?

The Law Society considers that there is much to commend an approach of conciliation and arbitration of such matters. We consider that it is essential, as far as possible to remove conflict or the potential for conflict with respect to workplace health and safety. We can imagine many circumstances where persons of goodwill could differ with respect to a workplace health and safety issue and the criminal law is a very blunt and perhaps inappropriate instrument to be the means by which such a matter is resolved. As in some aspects of the mainstream criminal system, there are diversionary systems by way of conferencing which exist as an alternative to prosecution. Prosecution however remains in the armoury of the regulator should a party not apply themselves appropriately to the non-court process. A process of conciliation may be appropriate.

Question 78

Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?

No.

Question 79

Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?

Yes. The Law Society submits, as exists in the various State Occupational Health and Safety Acts, that a specific regulator be established, has defined powers and functions and that the regulator be granted significant independence. This latter point is of particular significance given that the regulator has the power to prosecute criminally. The Law Society is of the view that the model OSH Act should provide that the power and decisions to prosecute under occupational health and safety law resides exclusively with a single Regulator established by the Act.

Question 80

Should the model OHS Act require regulators to publish enforcement and prosecution policies?

Yes.

Question 81

Should the model OHS Act include provisions that allow the making of interpretative documents?

No.

Question 82

Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?

The Law Society is of the view that the function and powers exercised by the inspectorate should be separate to that exercised by the prosecutor. The analogy is the investigation of crime by the police which is then prosecuted by the Office of the DPP. The decision to prosecute should reside with independent legally qualified prosecutors who are subject to either the Bar Rules or Solicitors Rules of Practices governing the behaviour of prosecutors. Such decisions are therefore subject to review both within the prosecutor's office and by professional bodies, which would not be the case if it is the inspector him or herself exercising the decision whether to prosecute or not.

Question 83

Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?

Yes. See question 82 above. Further, it is desirable to avoid the situation whereby it is alleged that an inspector exercising an advisory function has in effect approved a system of work or the use of a machine which is then later subject to a prosecution. The decision to prosecute or not should rise or fall on the facts of the matter and whether or not the principal standards have been breached and not be permitted to be side tracked by arguments about potential abuses of process by the regulator because of the opinion of the single inspector. These functions should be separated and it should be made clear that the exercise of an advisory function under the model OHS Act does not constitute a defence to any proceedings taken by the regulator.

Question 84

How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?

The model OHS Act should specifically provide for the appointment of inspectors, their specific powers should be delineated as well as their functions. Inspectors will be granted rights of significant powers to enter workplaces and to require the production of documents and the requirement for persons to submit to interviews. These should be specific statutory powers and there should be a right for a person subject to the exercise of an inspector's powers to require written notification of the exercise of those powers and the ability to exercise a privilege against self-incrimination. This privilege would not otherwise excuse the person from answering the questions, rather it is a transactional privilege which means that the statement or information provided in response to the exercise of power cannot be used in proceedings against the person. We do not consider that issues such as an inspector's qualifications or accountability is a matter for inclusion in the model OHS Act, rather these are internal matters of administration for respective WorkCover authorities.

Question 85

Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?

Yes. Inspectors should have a capacity to provide advice and assistance to employers and employees without the risk that by so doing such advice and

assistance is potentially creating a defence in the event that criminal proceedings may be taken with respect to a later breach. It has unfortunately been the case that often employers who are later prosecuted by the workplace regulator allege that there was a form of consent or approval to a particular work activity by virtue of a visit of an inspector. These types of applications made by defence lawyers have led to the case where inspectors have refused to provide advice and assistance at workplaces. The advisory or educational role has been lost and replaced by a purely prosecutorial stance. This situation needs to be balanced as patently inspectors have significant skills and experience in workplace health and safety and if this could be utilised, the model OHS Act should support this.

Question 86

Are there any circumstances in which an inspector be independent from direction, instruction or review by a regulator?

No. The regulator and the inspectors employed within the office of the regulator are public servants. They exist within a hierarchical structure requiring proper systems of probity and governance. The Law Society would consider that circumstances whereby an individual inspector can effectively act independently and without instruction or review by the regulator is a situation to be avoided. The potential for errant or corrupt behaviour by creating such a situation is very real.

Question 87

Should an inspector be able to modify, amend or cancel any notice or instrument issued by the inspector? If so, why and in what circumstances?

Yes, upon written appeal by the person who has been subject to the notice or instrument issued by the inspector. We would recommend however that the process of modifying, amending or cancelling any notice not reside solely with the inspector but be a power exercised in consultation with the regulator. There are probity issues that require consideration in respect to this question.

Question 88

What provisions should be made for the transparent internal review of decisions in the model OHS Act? What matters should be reviewable? What further appeal should be allowed?

The model OHS Act should enable applications for review with respect to the issuing of improvement, prohibition or infringement notices. Applications for review of such notices should be made in writing and it should be a requirement that such applications for review be answered, with reasons in writing. If the application for review is unsuccessful, there should be an appeal to a magistrate with respect to that matter. The Law Society does not advocate any capacity for the decision to prosecute to be reviewed internally. As far as possible, the Law Society considers that the whole prosecution process should be as similar as possible to the operation of prosecutions by the police services and officers of the DPP.

Question 89

Are there any other issues in relation to the powers, functions and accountability of regulators and their inspectors that should be addressed in the model OHS Act?

No.

Question 90

Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?

As in the mainstream criminal law, the regulator should have at its disposal a suite of options as described in the model contained in Chapter 7.1 of the Issues Paper. We do not consider that the use of such options should be by way of escalation. Rather the Law Society accepts that there is a discretion to be exercised in individual cases as to which is the appropriate option to be pursued and we do not consider that the fettering of that discretion is either necessary or appropriate.

Question 91

Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, they be contained in the model OHS Act, regulations or other policy or guidance documents?

The appropriate standard with respect to enforcement measures should be that as contained in the published prosecutorial guidelines.

Question 92

What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?

As described above, the Law Society considers that the regulator should be armed with a wide suite of enforcement measures and the discretion to exercise judgment as to which enforcement measure is appropriate for the circumstances.

Question 93

Should PINs, improvement and prohibition notices contain recommendations about how to achieve compliance?

Yes.

Question 94

What provisions should be made to allow for the review of PINs, improvement and prohibition notices?

Persons who have been issued with either a PIN, an improvement or prohibition notice should have a statutory right to seek a review of that notice within 7 to 14 days of being served with the notice. If that application for review is unsuccessful, there should be a right of appeal to a Magistrates Court. The regulator should be required to give reasons in writing as to the rejection of an application for review of a notice.

Question 95

Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?

Generally yes, although in relation to prohibition notices, the Law Society understands that it is the practice that a prohibition notice is generally issued in

response to a particular existing risk and it would be inappropriate to allow for a period in which the risk would continue to exist before the prohibition notice can be complied with.

Question 96

Should the lodging of an application for an internal review or an appeal application affect the continued operation of notices? If so, what should the effect be?

Yes, the notice should be stayed immediately upon the application for review being lodged.

Question 97

Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?

Yes. The model OHS Act should not describe the circumstances when an infringement notice ought be issued. This is a matter for inclusion within the regulator's prosecution guidelines and is a discretionary issue.

Question 98

Should the administration of infringement notices occur under OHS Law or individual state legislation?

The administration of infringement notices should be consistent across the jurisdictions.

Question 99

What amounts should be specified as fines for infringements?

Infringement notice fines should be uniform across jurisdictions.

Question 100

Should the model OHS Act provide for injunctions to ensure compliance with the model OHS Act? If so, in what circumstances and what evidence should be required to apply for an injunction?

The Law Society considers that the power for the regulator to apply for an injunction is not required. The whole process of the issuing of prohibition and/or improvement notices and the capacity to review those notices firstly by the regulator and then secondly by a court of competent jurisdiction does in our submission provide a framework within which risks to health and safety that would otherwise be sought to be covered by an application for an injunction are already adequately provided for. An inspector, by issuing a prohibition notice, can immediately achieve the cessation of activity. If that activity is either continued or challenged by the employer, there is a legal process in order to deal with both circumstances. It is suggested that even if a power to seek injunctive relief was included in the model OHS Act, it would be a provision which would in all probability not experience much use.

Question 101

Should the model OHS Act provide for the use of enforceable undertakings as an alternative to prosecution for an offence against the Act? If so, for what offences?

Yes. The Law Society would submit that the power to obtain enforceable undertaking ought be defined in the model OHS Act. However, we would submit that the types of offences or circumstances wherein an enforceable undertaking might be considered would be a matter either for a code or more accurately the prosecution guidelines. Given that enforceable undertakings could be utilised in a wide range of circumstances, we would submit that sufficient flexibility needs to be provided to the regulator as to when to offer or pursue such a matter.

Question 102

Should the giving of an enforceable undertaking result in an admission of fault or liability?

No. If the making of an enforceable undertakings constitutes an admission on the part of the employer, the encouragement to enter such an undertaking is all but removed. By an enforceable undertaking constituting an admission, in circumstances where there has probably been no contest of evidence or findings, it would be inappropriate for this to constitute a legal admission.

Question 103

Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?

Consideration needs to be given to provide safeguards against the use of “phoenix” companies. Unfortunately it has been the case that some companies have avoided prosecution, or have attempted to do so by going into liquidation. The application of corporate laws has been unsatisfactory in dealing with this type of avoidance and it is suggested that, perhaps, the only circumstance where a deeming type of liability would arise is in circumstances where a company has breached an occupational health and safety law and has subsequently gone into liquidation. We would suggest that there be a burden of proof placed on the directors of that corporation to prove that the liquidation was for a reason other than the avoidance of an occupational health and safety liability. For example, if the company has simply gone into liquidation because of an inability to meet its debts, that should be a matter for the directors to prove. This is the only exception where the Law Society would submit that a deeming liability and a reverse onus of proof is acceptable. To prevent defeating such a liability by the liquidation occurring outside the normal limitation period, there should be a special limitation period for the commencement of proceedings against the directors of 6 months after the liquidation.

Question 104

Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

The Law Society considers that the scheme should generally be one of prosecution of criminal offences.

Question 105

Which duties or obligations should be the subject of criminal offences and penalties and which may appropriately be heard as civil matters?

See answer to Question 104 above.

Question 106

Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

The Law Society submits that a properly constituted court, that is, pursuant to Chapter 3 of the Commonwealth Constitution, should have the jurisdiction to hear prosecutions under model OHS legislation.

Question 107

Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

As is well known, New South Wales is the jurisdiction where serious prosecutions are heard before the Industrial Court. In other jurisdictions, less serious Magistrates Court matters are often heard before an Industrial Magistrate. The argument in favour of specialist courts or divisions in courts is that there is significant expertise with respect to work processes and activities. Further, these specialist courts have been able to give occupational health and safety jurisprudence significant attention which may not otherwise be the case in the mainstream criminal courts where matters involving the commission of serious criminal offences, frequently involving the imposition of significant jail terms, would doubtless receive priority. The argument, however, against specialist courts is the limited rights of appeal from those courts both on the question of conviction and penalty. The Law Society would only support the use of a specialist court or specialist division provided that full rights of appeal to the State Supreme Courts exist.

Question 108

To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

See answer to question 107 above, the right to appeal to the State Supreme Courts should be on the same basis as is exercised in mainstream criminal law.

Question 109

Should defendants be entitled to trial by jury in prosecutions for any offence and, if so which?

Generally no. If the model OHS Act does provide for significant periods of imprisonment, a defendant should be entitled to a trial by jury as in mainstream criminal law.

Question 110

Who should be entitled to commence criminal proceedings?

The single Regulator specified within the model OHS Act should have the sole authority to commence and maintain criminal proceedings. The Law Society does not support a situation where there could be multiple prosecutors, be it a department of mines or a trade union. There should be a single independent and accountable prosecutor entitled to commence proceedings.

Question 111

If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?

The Law Society is of the view that there should be a single workplace regulator with responsibility to prosecute for breaches, whether civil or criminal.

Question 112

What should appropriate time limits be for the commencement of a prosecution and why?

Generally in mainstream criminal matters, there are no limitation periods. However given that defendants in occupational health and safety prosecutions will usually be corporations, significant delays in commencing prosecutions will cause hardship particularly with respect to the obtaining of witnesses having regard to the mobility of the workforce. The Law Society contends that the system currently operating in New South Wales, namely a general limitation of 2 years which can be extended if there is a Coronial Inquest is an appropriate period. The Law Society also maintains that with respect to offences by designers, manufacturers and the suppliers that the provision as currently exists in New South Wales which permits a prosecution within either 2 years of the breach or within 6 months of the regulator first becoming aware of the breach occurring is a sound approach. However, with respect to suppliers, designers and manufacturers, there should be a general limitation period of for example, 5 years from the initial supply after the expiry of which period, the 6 month extension provision does not operate.

Question 113

Should the model OHS Act include specific provisions for the conduct of prosecutions and what should they be? Alternatively, should that be left to the rules of criminal law and rules of the relevant court or tribunal?

The model OHS Act should not provide for such provisions. As far as possible the system for dealing with occupational health and safety prosecutions should be as close to that of the mainstream criminal law.

Question 114

Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so. why and what procedures?

No, the rules of evidence in occupational health and safety prosecutions should be the same as within the mainstream criminal law. If it is considered that there should be a specific evidentiary procedure, that should relate solely with respect to Codes of Practice. In this regard, it is submitted that a prosecutor should be able to lead

evidence of non-compliance with a Code of Practice as part of its case to make out a breach of the principal duty. The Law Society would not support a deeming provision with respect to an alleged breach of a Code of Practice.

The Law Society does not support the creation of a new defence which would be based upon compliance with a Code of Practice. Generally Codes are written as advisory documents and within Codes scope is given to industry to adopt various measures. The Law Society supports the establishment of a Robens type of system in the model OHS Act and does not consider that giving special evidentiary status to a Code of Practice or a regulation, other than as referred to above is consistent with a Robens system.

Question 115

Should the proof of any elements of an offence be affected by specific provisions in the model OHS Act? If so, which elements and how?

See answer to question 114 above.

Question 116

What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?

See answer to question 114 above.

Question 117

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

Yes.

Question 118

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

The prosecutor should have the burden to prove whether the 'reasonably practicable' standard was met.

Question 119

Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?

No.

Question 120

What, if any, defences should the model OHS Act provide?

The Law Society submits that consideration should be given to the provision of defences for both corporations and individuals. These defences may be different. With respect to corporations, it is submitted that a defence that the commission of the offence was due to causes over which the defendant had no control is appropriate.

Question 121

Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

Defences should be available to be made out on the civil standard.

Question 122

Should 'officers' of a corporation be liable to an offence because the corporation has committed an offence?

No. The Law Society does not consider that it is appropriate that there be a deeming provision which creates criminal liability in the hands of an individual.

Question 123

How should officer be defined?

The term 'officer' should have the same definition as exists in the corporations law.

Question 124

Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

The Law Society considers that with respect to the prosecution of any individual whether an officer of the company or a worker, should be dependent upon the proving by the prosecution that the act or omission of the particular person concerned actually caused or contributed to the corporation's offence. We consider that this is precisely the type of circumstance that ought constitute a variation to the Robens style absolute liability duty. The Law Society does not support deeming an officer guilty of an offence.

Question 125

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

We consider that the test referred to in our answer to question 124, namely that the officer's act or omission must have caused or contributed to the offence of the corporation is a sufficient test.

Question 126

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

Yes. An officer should be able to conduct a defence which is to the effect that the officer in fact was not in a position or did not have the power to effect the corporation's act or omission which gave rise to the offence.

Question 127

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

The approach should be the same as with officers of corporations. To provide for a different test for officers of unincorporated associations or volunteers would in effect create a 2 tier system. The fact that for example a charity conducts work ought not mean that employees of that charity or those who come into contact with its operations ought be afforded a lesser level of protection by the law.

Question 128

For which offences should monetary penalties (fines) be imposed?

Generally it is appropriate that monetary penalties be available with respect to offences under the model OHS Act. However, we do consider that a failing with a number of the existing occupational health and safety acts is the confined nature of penalties. We consider that this Review ought carefully look at a range of potential penalties including:

1. Enforceable undertakings
2. Publication orders
3. Rectification orders
4. Orders directing that the defendant undertake specific approved occupational health and safety projects
5. That the defendants enter a bond to be of good behaviour for a period
6. In cases involving gross carelessness or negligence, it would be acceptable for there to be the prospect of gaol terms for individuals. We would limit this category of penalty to cases involving death or actual grievous bodily harm (which would need to be defined)

Question 129

Should maximum fines be provided in the model OHS Act, or is there an alternative approach?

The Law Society has no problem in principle with maximum fines being specified in the model OHS Act. Indeed the harmonisation of the fine regime in occupational health and safety law generally ought be one of the desired outcomes of this process. However allied to this question will be the assessment as to which courts are to hear and determine occupational health and safety prosecutions. We would support a system of magistrate's courts hearing the less serious matters, and higher courts dealing with cases of fatalities, serious injuries or serious risks to health and safety. Obviously the lower court will have a jurisdictional limit in terms of the level of fine it is able to impose. We would not recommend that any matter commenced in the magistrates court under model OHS laws should be a matter which is capable of resulting in a gaol term for an individual.

Question 130

Should the level of fines be different for the various offences? If so, for what offences and at what levels?

Yes, we would recommend that consideration be given to including in the model OHS Act defined circumstances of aggravation which would lead to the imposition of a penalty which is considered against a higher maximum penalty. This is in accordance with mainstream criminal practices with respect to the assessment of penalty.

Question 131

Should there be a statutory minimum fine for some offences? If so, what?

The Law Society would not recommend that there be a statutory minimum fine for some offences. As these matters are to be heard and determined by the courts, the courts should retain discretion within sentencing to sentence the particular defendant in relation to their conduct.

Question 132

Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?

Typically in existing occupational health and safety there is jurisprudence that the fact of death or serious injury will reveal the level of seriousness of the breach. Whilst we consider that as far as possible the sentencing judges discretion should be maintained, we are of the view that there should be defined within the model OHS Act the circumstances which constitute aggravation and those are circumstances which may include matters such as high degrees of recklessness. Circumstances involving such aggravation could be dealt with, with respect to a higher maximum penalty.

Question 133

Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?

The Law Society would support the establishment of a database with respect to penalties. Such a database however would have to include sufficient factual elements regarding the particular matter and fine if it is to be of utility.

Question 134

What penalty options should be available in addition to or instead of fines?

See answer to question 128 above.

Question 135

Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?

Yes. Gaol terms ought be considered for individuals in limited circumstances. Those circumstances would relate to the following types of cases:

1. Where the individual has been guilty of gross negligence or culpable conduct which has directly caused the death or serious injury of another. This should not be a general duty, rather fault or a high degree of carelessness ought be required.
2. As a corollary to paragraph 1 above, such circumstances of recklessness or culpability would include categories such as:
 - where the defendant is under the influence of drugs or alcohol at the time of the offence being committed
 - the defendant has breached an existing safety rule or direction which that defendant has been trained and instructed in

Question 136

Should there be specific offences relating to workplace death or serious injury? If so, what?

See answer to question 135 above.

Question 137

Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

The Law Society submits that breaches of OHS duties should be dealt with in the occupational health and safety legislation.

Question 138

Should the consequences of the breach, rather than only the degree of culpability, determine the penalties to be imposed for some offences? If so, which offences and how should this be dealt with in the model OHS Act?

The Law Society does not consider that it is appropriate to place restraints upon a sentencing judges discretion. The Judge should be able to consider all of the facts of the matter, including subjective features relevant to the particular defendant before arriving at a penalty. We would support a system which would specify circumstances of aggravation which, if proven would lead to the imposition of a penalty which is assessed against a higher maximum penalty.

Question 139

What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?

The same provisions with respect to the enforcement of penalties as exist generally under the criminal law, usually actioned by a State Debt Recovery Officer of the Sheriff's Office should continue to exist under the new system.

Question 140

Should the model OHS Act provide for the enforcement of penalties against officers or other persons? If so, how and subject to what conditions, limitations, defences or requirements?

If this question is aimed at enforcing penalties against an officer of the company in relation to a default by the corporation, this is not a matter that the Law Society would support except in very confined circumstances (see answer to Question 103 above). It would be important to avoid a circumstance where an officer has not had the power or ability to enforce the corporations compliance with a penalty. We would consider that the greater sanction would be the de-registration of the corporation and perhaps consideration could be given to a period of suspension from being an officer of a company for an individual who has caused or procured the corporations' default with respect to the payment of the penalty or fine.

Question 141

Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?

The Law Society considers that one matter requiring urgent attention is the differing systems with respect to appointment of principal contractors around the country. Principal contractor provisions are different for each State and frequently do not cover the situation where the head contractor on a major infrastructure project may in fact constitute multiple entities within the joint venture or alliance arrangement. The whole issue of the creation of principal contractor obligations ought be specified firstly, within the model OHS Act and they be described with greater detail in a Regulation. It should be clear that the appointment of a principle contractor is not delegable except in confined circumstances that we have described above pertaining to particularly dangerous activity which must be carried out, for example, by a licensed operator. These circumstances have been described earlier as covering the situation of demolition or asbestos removal. These categories are not exhaustive, but this is a matter requiring pressing consideration.

Question 142

Should the power to make regulations be limited and if so, in what way?

The regulations should be limited so that it can not be used to expand upon the principal duties set forth in the model OHS Act.

Question 143

Should regulations provide for summary offences with lower penalties, or should some breaches under regulations also be taken to be a breach of the model OHS Act?

The Law Society would support a system of summary offences with lower penalties for breach of the regulations. With respect to breaches of the regulations, typically such a breach would ordinarily constitute a breach of principal duty under a Robens style obligation and it is a matter for the exercise of prosecutorial discretion as to whether or not the offender is charged with a breach of the regulation or a breach of the principal duty. We would not recommend that there be any modification to this process. If the prosecutor in the exercise of its discretion decides to pursue a prosecution for a breach of one of the principal duties under the model OHS Act, the prosecutor ought to be obliged to prove that offence beyond reasonable doubt. In

this process however, the prosecutor should be able to lead evidence regarding the regulation and its breach in order to establish the breach of the principal duty.

Question 144

What provisions should be made in the model OHS Act relating to the development and approval of codes of practice?

The Law Society would recommend that identical or similar provisions as currently exist in the State occupational health and safety Acts with respect to the development and approval of codes of practice should exist under the model OHS legislation.

Question 145

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

The Law Society does not consider that an effective reporting system would be a matter for inclusion in the model OHS Act, rather this is a matter of administration and comity between the State prosecutors/WorkCover authorities.

Question 146

What provisions should be made in the model OHS Act for the external review of regulatory decisions?

We consider that one of the most important aspects of this Review is the establishment of a single independent prosecutor conduct prosecutions under model OHS Law. If this has occurred the conduct of the prosecutor would be subject to the same system of review as exists generally in relation to the conduct of criminal prosecutions. That is the conduct of the prosecutor is measured as against compliance with prosecution guidelines and the various solicitors and barristers rules for the conduct of prosecutions. We do not consider that another or separate system of external regulation with respect to prosecutions is proper or appropriate.

Question 147

Should the model OHS Act include provisions for the resolution of OHS issues by conciliation or arbitration?

Yes, we would refer to our answer in question 77 above. The Law Society would recommend that this type of situation would not typically apply to breaches of a principal duty but is a far more effective model in terms of the resolution of disputes regarding complaints about safety matters by the workforce.

Question 148

Should the model OHS Act facilitate tripartism in the administration of OHS regulation, and if so, how?

The Robens model contemplates the involvement of the regulator employers and Unions a collective body to achieve the aims of workplace health and safety and we consider that this model ought be promoted.

Question 149

Should there be some provision for tripartite committees that deal with OHS matters in particular industries?

Yes. In particular, the Law Society considers the situation where there may be Commonwealth employers working with non-Commonwealth employers needs to be addressed and if it is necessary to prosecute matters arising out of that particular circumstance, that all such prosecutions should be able to be pursued in the same court at the same time. This may be achieved by the dual appointment of inspectors.

Question 150

What areas should be subject to formal mutual recognition provisions in the model OHS Act?

We should submit that Inspectors ought have dual State and Federal appointments. We consider that the ability to investigate OHS breaches across State borders also requires consideration. This is particularly relevant in supply cases.

Question 151

What is the most appropriate way for a model OHS Act to provide for permits and licensing for workers engaged in high risk work that results in:

- *better OHS outcomes;*
- *greater efficiency and effectiveness;*
- *lower regulatory compliance and enforcement burdens; and*
- *improved harmonisation of the requirements for such permits and licensing for industry across Australia?*

The Law Society supports a scheme of accreditation and licensing for workers engaged in high risk work. Examples already exist with respect to asbestos removal, demolition and other dangerous activities and the Law Society considers that an effective National system of registration should be a high priority in any scheme.

Question 152

How should the model OHS Act be framed to reduce or remove the extent of overlap between federal and State or Territory OHS laws, or minimise the difficulties of such overlap?

The Law Society considers that for the process of harmonising occupational health and safety laws to be most effective, the whole issue of overlap between State and Federal offences needs to be addressed. As we have described above, we would consider that the dual appointment of Inspectors is a very important part of this process. We also consider that there should be a capacity where there is an overlap between State and Federal issues for the prosecutor to be empowered with the discretion to decide as to how to proceed in such circumstance. Typically, we would consider that such a circumstance would be best dealt with in the Federal Court system. This, however, would only be an option if the duties under both State and Federal occupational health and safety legislation are the same and the penalties are the same. It is important to avoid a situation where industry could suspect or consider that a particular choice of jurisdiction has been made simply because of the potential of higher penalties in one jurisdiction as opposed to another.