

National Review into Model Occupational Health and Safety Laws

National Occupational Health and Safety Review Panel

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Introduction

The Law Council of Australia is pleased to provide the following submission to the National Review into Model Occupational Health and Safety Laws (the Review).

The Law Council supports harmonisation of occupational health and safety (OHS) laws across Australia with the aim of achieving consistency as far as possible. In particular, the Law Council supports the development of a model OHS Act by the Commonwealth, for adoption by all State and Territory Governments.

Unless State parliaments refer legislative power (and presuming that the Commonwealth is otherwise unable to enact general occupational health and safety that would apply to all employers), harmonisation should be achieved by all States and Territories enacting complimentary legislation that mirrors the proposed model OHS Act as closely as possible.

The Law Council does not believe that a Commonwealth takeover is an effective means of creating uniform provisions for OHS laws for all workers. Whilst the Commonwealth could enact legislation that would apply to many employers using its power in respect of corporations (Constitution, s 51(xx)) as it has done in respect of industrial relations, such an approach would lead to the real possibility that different OHS laws would then apply in respect of the same work site, depending on the nature of the employment relationship and the entities concerned. This would create different legal safety regimes with the real prospect that a single incident involving a constitutional corporation and another employer who is not a corporation (for example a non-corporate contractor) could give rise to two separate prosecution proceedings in different courts applying different statutory tests.

This submission refers to existing laws, namely:

- *Occupational Health and Safety (Commonwealth Employment) Act 1991* (“Commonwealth Act”);
- *Occupational Health and Safety Act 2000* (NSW) (“NSW Act”);
- *Workplace Health and Safety Act 1995* (Qld) (“Queensland Act”);
- *Occupational Health, Safety and Welfare Act 1986* (SA) (“SA Act”);
- *Workplace Health and Safety Act 1995* (Tas) (“Tasmanian Act”);
- *Occupational Health and Safety Act 2004* (Vic) (“Victorian Act”);
- *Work Health Act* (NT) (“NT Act”);
- *Occupational Health and Safety Act 1989* (ACT) (“ACT Act”); and
- *Occupational Safety and Health Act 1984* (WA) (“WA Act”).

The following submission responds generally to the questions set out in the Issues Paper, released by the Minister for Education, Employment and Workplace Relations in May 2008 (the Issues Paper). The Law Council would be pleased to elaborate on, or provide further clarification in relation to, anything in this submission.

1 – Legislative Approach

Regulatory Structure

- (1) Which regulatory approach or approaches should be taken in the model OHS Act, and why?
 - (2) How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?
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1.1 The Robens model operates across all Australian jurisdictions and the Law Council considers that the Robens model is the most appropriate basis for the proposed national OHS Act.¹ In particular, the general duties approach seems to be accepted and, given its similarity to common law duties, seems to be well understood in the workplace.

1.2 However, in any move from highly prescriptive legislation existing in some jurisdictions to a broad principles-based regime under the pure Robens model, there should be no reversal of the onus of proof or absolute liability for employers, as presently exists in NSW, Queensland and the United Kingdom (as discussed further in this submission, below).

1.3 In accordance with the Robens model, the proposed model OHS Act should create general duties applicable to all workplaces. A general duty maintains relevance as new and improved methods of work are developed. This encourages employers to continually review and update their approach to safety, rather than be satisfied with a minimum standard obtained at a particular point in time.

1.4 There will continue to be a place for subordinate regulations and codes of practice, to apply alongside the general duties, which more closely prescribe the standards to be met by employers and workers.

Title, Objects and Principles

- (3) What is an appropriate title for the model OHS Act?
 - (4) Should the model OHS Act specify its objectives? If so, how and what should they be?
 - (5) Should the model OHS Act include a set of principles of health and safety protection? If so, what should they be?
 - (6) Are there any other issues that should be considered in the legislative approach of a model OHS Act?
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¹ Arising from the 1972 Report of the British Government Committee of Inquiry into Health and Safety at Work, chaired by Lord Robens.

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- 1.5 An appropriate title would be the *Model Occupational Health and Safety Act*, provided the Act does not extend beyond the parameters of work/occupational related matters.
 - 1.6 The overarching goal of OHS legislation should be to ensure the safety of workers and other persons at the workplace, so far as is practicable.
 - 1.7 Objectives would be consistent with modern drafting principles. The objectives should also be consistent with principles set out in International Labor Organisation Conventions C87, C98 and C187 (when ratified).²
 - 1.8 In addition, the model OHS Act should contain a statement of ‘principles’, which identifies the fundamental principles that are to guide the application of the Act. The model OHS Act should follow the approach taken in the Victorian Act whereby section 4 creates ‘principles’ and section 2 states that regard is to be had to these principles in the administration of the Act. The actual ‘principles’ that are enunciated in the Victorian Act are an accurate reflection of the key principles within a Robens model of OHS and parallel principles should be incorporated into the model OHS Act.
 - 1.9 This notion of “best practice” ought not to be an excuse for inaction on the part of State or Territory governments. If an approach is “best practice” then it ought to be adopted across jurisdictions. At the very least, each jurisdiction’s claim of “best practice” should be subject to robust discussion.

² Being the C87 - ILO Convention on Freedom of Association and Protection of the Right to Organise (1948); C98 – ILO Convention on the Right to Organise and Collective Bargaining (1949); and C187 – ILO Promotional Framework for Occupational Health and Safety Convention (2006) (note: Australia has not yet ratified C187).

2 – Scope, Application and Definitions

Industry Sectors

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- (7) Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation? If so, what provisions should be made for establishing the relationship between the model OHS Act and industry specific legislation?
 - (8) Alternatively, should a model OHS Act incorporate all industry specific safety legislation? If so, how and to what extent (e.g., could industry specific issues be dealt with in regulations, codes of practice or guidance material under the model OHS Act)?
 - (9) Should the model OHS Act contain provisions for improving coordination between safety regulators within jurisdictions? If so, what should be provided?
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- 2.1 The Law Council notes that currently there are some industry sectors which are subject to stand-alone OHS laws.
- 2.2 As part of a move to a harmonised national OHS legal system, it would be appropriate to create a model OHS Act that establishes general duties that apply across all industries. This will assist in ensuring a common approach and understanding of OHS duties, and reduce the potential for confusion and legal argument as to whether particular workplaces fall into one industry or another.
- 2.3 There will continue to be a place, however, for industry-specific regulation to sit alongside the general duties to address particular OHS issues relevant to that industry. An example of such an approach is the NSW Act which applies to coal mines in NSW, in circumstances where the method by which coal mines are to ensure health and safety is further regulated by the *Coal Mine Health and Safety Act 2002* (NSW).
- 2.4 The next phase of harmonisation should include the development of industry-specific regulation to ensure greater consistency in regulatory frameworks for industry nationally, and ensure changes to the proposed model OHS Act affect all industries equally. In addition, the Commonwealth should consider developing model regulations for specific industries, which could be used as the basis for industry standards in all jurisdictions. Any changes to the regulatory framework designed to reflect changes in any one industry (e.g. due to the effects of modernisation) could then be effected first through the model regulations or relevant model subsidiary legislation and adopted uniformly by all jurisdictions.
- 2.5 A further benefit of this approach would be to reduce the cost of regulation, as each State/Territory regulator would not necessarily need specialists in every field or industry. Instead, relevant industry specialists could potentially operate nationally rather than conducting OHS reviews, assessments or investigations in one jurisdiction alone.

Workplaces and Non-Workplaces

- (10) Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?
- (11) Should general duties of care under the model OHS Act be extended to members of the public? If so, how?
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- 2.6 The general duties on an employer in respect of both employee's and non-employees should arise in respect of any place of work of the employer. This should include any place where the employer's employees work and would include but not be limited to any premises controlled by the employer where the employees work.
- 2.7 A place where employees work would be defined to include every area which may be affected by the work being done, and every area where an employee at work may be required to go.
- 2.8 The Law Council notes that the parameters of proposed model OHS Act should be clearly defined to remove overlap and confusion in relation to the applicability of different legislative or common law civil and criminal liability schemes.
- 2.9 Inevitably there will be overlap between other systems of regulation (e.g. road safety, product liability, public liability). The reach of OHS legislation should cover all workplaces and work relations, regardless of this overlap.
- 2.10 It is noted that the common law imposes a duty on business as occupiers to ensure the safety of members of the public though the law of negligence and there are a range of civil and criminal sanctions regulating product liability. Notwithstanding this, the Law Council believes OHS duties extend to subcontractors and members of the public who enter onto worksites, in respect of which sites the employer has control
- 2.11 In relation to public liability and product liability, OHS legislation in all jurisdictions extends criminal sanctions to manufacturers, designers and suppliers if they produce or supply services or products used in a "workplace" or for work purposes. However, practical problems with respect to the application of the criminal sanctions have been reported in some jurisdictions as the statutory time limit to bring a prosecution (usually from the date of manufacture of an item/plant) can be insufficient to be effective against manufacturers. The Law Council notes that, in order to ensure the effectiveness of provisions conferring liability on manufacturers, suppliers or designers under the proposed model OHS Act, the statutory time limits for bringing prosecutions in relation to such claims should be reviewed and harmonised.
- 2.12 The Law Council supports provision in the model OHS Act for criminal sanctions against manufacturers, designers and suppliers. In any event, the Law Council supports a uniform approach to ensure any law in this regard has national effect, in order to avoid jurisdictional problems associated with prosecuting manufacturers, suppliers or designers based in different jurisdictions.

Responding to Change

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- (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?
- (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?
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2.13 The Law Council considers that the scope and application of the model OHS Act should be kept broad to ensure its relevance and applicability for a lengthy period and to ensure it is capable of dealing with evolving work arrangements.

2.14 In an employment/work scenario there are always emerging hazards affecting health rather than safety. These may include, for example, nanotechnology, cyberspace bullying, terrorism (including eco-terrorism), etc. Given the advance of new technology and techniques used in workplaces across all industries, the expression of a duty of care in general terms may be one way to provide for new and emerging risks in the workplace.

Definitions

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- (14) Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?
- (15) Are there any other issues relating to the scope, application and definitions of a model OHS Act?
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2.15 Terms basic to safety regulation include:

- hazard;
- health;
- risk;
- workplace;
- working environment;
- worker; and
- safety.

2.16 Whether or not these terms are defined in the model OHS Act, the Law Council supports a uniform approach to these terms in all jurisdictions. It is also appropriate that these terms, which are in common usage in OHS regulation, are given their ordinary meaning if defined within the legislation, to ensure duty holders are able to properly understand their obligations and duties.

2.17 It is noted that there are different approaches in various jurisdictions as to whether “reasonably practicable” should be defined in the legislation. The Law Council prefers an approach recommended in the 2004 Maxwell Review³ and the 2006 Review of the NSW OHS Act⁴ and as currently exists under the Victorian Act and WA Act, whereby the model OHS legislation would set out a non-exhaustive list of factors for the Court to consider in determining whether it was “reasonably practicable” for an employer to address a certain safety or health risk.

³ Chris Maxwell, *Occupational Health and Safety Act Review*, March 2004, Victorian Government, paragraph 496.

⁴ WorkCover NSW, *Report of the Review of the Occupational Health and Safety Act*, May 2006, NSW Government, p36.

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

Control

(16) Should the model OHS Act include a 'control' test or definition? If so, why and what should it be?

(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?

3.1 The Maxwell Review of the Victorian Act recommended incorporation of a control test into the definition of practicability, although at this stage, implementation of the recommendation has been deferred by the Victorian Government

3.2 As discussed further below, the Law Council regards the concept of control to be to be a relevant consideration in assigning OHS responsibilities. Modern working relationships can take many forms and employers can often exercise little or no control over the environment in which their employees work. As discussed below, contractors, maintenance workers, labour hire personnel and other employees who carry out their responsibilities on the premises of a third party employer, will often be owed OHS responsibilities by two or more employers. Therefore, it is logical to suggest that each party in a position to control a particular work environment, hazard or risk should bear responsibility for it. This is a point that was recognised in the Robens Report, which states that:

“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor other premises or sites within the control of the employer” – Robens Committee⁵

3.3 Accordingly, the Law Council supports the adoption of a control test within the factors to be considered when determining reasonable practicability.

3.4 As noted above, the general duties on an employer in respect of both employees and non-employees should arise in respect of any place of work of the employer.

(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?

3.5 The general duty of care of an employer should not be capable of being delegated or relinquished.

3.6 However, the Law Council notes that defining a test for control may be useful, particularly for employers that require the assistance of expert contractors to carry out a defined technical task on a worksite.

⁵ Robens, A. 1972, page 51 quoted in Chris Maxwell, *Occupational Health and Safety Act Review*, March 2004, Victorian Government.

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- 3.7 This then gives rise to the question of delegation of control. Whilst the Law Council does not support any delegation of duties under the model OHS legislation, there may be circumstances in which a worker (e.g. an expert contractor) is brought on site to perform a particular task. It may be apparent that the contractor is the best person to determine the safety of the environment in which they operate and the tools or processes they are using. This is because the safety requirements of the relevant contractor may be outside the knowledge or expertise of the officer responsible for the workplace under OHS law.
- 3.8 This should not change the fact that an employer owes a responsibility to all workers/employees in their workplace. However, it will affect the matters to which it is reasonably practicable for the employer to have regard in discharging their OHS responsibilities.
- 3.9 Any provisions that seek to address these matters, either through an appropriate test for 'control' or otherwise, should not be framed so as to enable an employer to effectively contract out of its OHS obligations.

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

- 3.10 As a matter of principle, there is no reason why it is not appropriate for more than one person to have a duty in respect of the same person. It would be appropriate for the model OHS law to acknowledge that multiple duty holders and multiple duties can arise in respect of the same work-place. For example, in respect of a faulty plant or structure, it may not be just the employer, who is liable for maintaining an unsafe system of work, but also the builder/manufacture that built the plant, structure or machinery, which is found to be sub-standard.
- 3.11 There is no reason for the model OHS Act to take an approach of alleviating certain persons of some or all of their duties because others also have duties.

Labour hire companies

- 3.12 The Law Council acknowledges that labour hire companies, as a class, have practical difficulties in ensuring safety of employees who are placed at work sites of their clients. In many respects the same difficulties confront other employers, such as subcontractors or maintenance employers whose employees regularly work at sites not owned or controlled by the employer.
- 3.13 However, labour hire companies are indicative of employment relationships in which OHS obligations overlap. Whilst the labour hire company may be obliged to ensure its workers are appropriately trained, qualified and equipped to manage their own safety, that the placement was appropriate and the host employer had proper work/OHS systems in place, it may have limited control over the environment in which its workers will be working. In such circumstances, obligations are rightly owed by both the labour hire company and the supervising entity with control over the worksite.
- 3.14 It is noted that these matters are appropriately dealt with in assessing whether it was reasonably practicable for the labour hire company to protect its employees against certain risks. As outlined above in response to questions 14 and 15, and in response to questions in Chapter 4 (below), this should include consideration of the extent to which the labour hire company was in a position to exercise

control or address the relevant safety risk. This will ensure labour hire companies and other forms of contractual employers are given appropriate guidance about how they are required to discharge their OHS obligations.

- 3.15 The Law Council is strongly of the view that a standard approach to the general duty is a critical part of any model OHS legislation. On balance, the approach in the Commonwealth Act is supported and it is noted that there are few differences between the approaches in most jurisdictions, with the exception of NSW and Queensland.

Treatment of workers

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- (20) Is primary reliance on employment relationships a valid basis for framing safety obligations?
- (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?
- (22) Is there a broader concept that more effectively covers the various work arrangements?
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- 3.16 The Law Council generally agrees that reliance on the employment relationship is the appropriate basis for framing safety obligations.

- 3.17 The model OHS Act should contain a general duty for employers to protect the health and safety of non-employee's who are at the employer's place of work, as currently exists in every jurisdiction. The scope and nature of that duty should reflect the same policy approach as is taken in respect of the general duty toward employees (discussed below).

- 3.18 The Law Council notes that the fiduciary nature of the employment relationship is the foundation at common law for the implied duty to provide a safe place of work, safe systems of work, etc. However, the definition as to when a working relationship is an employment relationship needs to be examined so as to capture more modern working relationships. The Law Council notes that deeming provisions may be useful in this regard.

- 3.19 In addition, the term "worker" should be used rather than employee or contractor, etc.

Duties of Employers

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- (23) How and to what extent should the model OHS Act specify an employer's duty of care?
- (24) To whom should these duties be owed?
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- 3.20 Consistent with current legislation, there should exist civil and/or criminal penalties for employers that fail to meet a general duty in respect of OHS.

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- 3.21 As noted above, it is preferred that the model OHS Act create general duties rather than technical specific standards. A general duty will maintain relevance as new and improved methods of work are developed, and will encourage employers to continually review and update their approach to safety, rather than be satisfied with a minimum standard obtained at a particular point in time.
- 3.22 Current legislation approaches the content of the general duty in three ways:
- By obliging employers to “*take all reasonably practicable steps to protect the health and safety at work of the employer’s employees*”: Commonwealth Act, s 16(1); SA Act, s 19; Tasmanian Act, s 9; Victorian Act, s 20; and ACT Act, s 37.
 - By obliging employers to “*provide and maintain so far as practicable for employees a working environment that is safe and without risks to health*”: WA Act, s 19(1) to same effect. See also NT Act, s.29.
 - By imposing strict liability on employers who fail to ensure the health and safety of their employees, subject to a defence of reasonable practicability, which is the position in New South Wales and Queensland. For example, s 8(1) of the NSW Act: “*An employer must ensure the health, safety and welfare at work of all the employees of the employer*” which is read with s 28 which provides a defence to a person who can prove that: “*it was not reasonably practicable for the person to comply*”.
- 3.23 The New South Wales provision has been described by Brooks *Occupational Health and Safety Law in Australia*, 4th edition, CCH, Sydney 1993, p 498 as in practice amounting to “*a duty to take reasonable care with a reverse onus of proof*”.
- 3.24 It is noted that there are different views among governments, regulators and legal professionals about which approach is to be preferred. There is a legitimate policy view that the approach in NSW, Queensland and the United Kingdom is appropriate – i.e. the prosecution must prove that there was a risk to health and safety and it is then a matter for the defendant to prove to the civil standard a defence that they had done all that was reasonably practicable to remove that risk.
- 3.25 The underlying rationale for this approach is that responsible officers, including company directors, will take a keener interest in ensuring workplace safety if they are subject to strict personal liability for any breaches by the company and face a high probability of conviction in the event of a breach. This will particularly be the case where conduct is assessed according to an objective standard, by which all responsible officers will have a general duty of care to address all foreseeable risks, rather than a subjective requirement that the person knew, was reckless or was wilfully blind as to the existence of certain risks. It is also argued that it is more efficient for the duty holder, rather than the prosecution, to establish what was reasonably practicable, “*as the duty holder knows more about the costs and benefits of the various alternatives open to him or her at any given time.*”⁶
- 3.26 An alternative and also legitimate view is that the approach in NSW and Queensland imposes an undue burden on employers that is unnecessary if a

⁶ Prof. Andrew Hopkins, *An Evaluation of Certain Criticisms of the NSW OHS Act*, November 2005, National Research Centre for OHS Regulation, Working Paper 40, Australian National University, p 8, referring to the Industry Commission Inquiry into OHS, Report No. 47, September 1995, p 55.

concept of reasonable practicability is applied. In a review of the Victorian Act, Chris Maxwell reached the view that:

“It is a fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of an offence. This principle should only be departed from in the most exceptional circumstances.

I have heard nothing to suggest that any such circumstances exist in relation to the [OHS Act]. To the contrary, the fact that – as explained in the previous chapter – the concept of reasonable practicability imports notions of fault into OHS breaches makes it all the more important that it be for the prosecution to establish that this standard was not met.

Nor has there been any suggestion from the Authority that it is difficult to prove offences under the general duties because of the burden of having to prove the practicability element. The Authority is successful in the vast majority of prosecutions it conducts. This is no doubt, at least in part, because in many prosecutions the practical evidentiary burden falls on the duty holder.”⁷

- 3.27 The Law Council is not aware of any evidence that strict criminal liability for company officers, as exists in NSW and Queensland, has resulted in better safety outcomes for workers in those jurisdictions compared to all other Australian jurisdictions. Available data shows that in NSW the incidence of claims for serious injury and disease fell steadily from 22.4 in 1000 to 20 in 1000 from 2001-02 to 2004-05, and then fell sharply to 16.9/1000 in 2005/06.⁸ However, these figures do not demonstrate the effectiveness or otherwise of the reverse onus of proof, which was not inserted into the NSW Act until passage of the *Occupational Health and Safety Amendment Act 2005*. It is also worth noting that the ASCC’s 9th Comparative Performance Monitoring Report demonstrates that the overall trend in NSW, in terms of improving OHS performance follows that of the general trend across Australia. In NSW, compensated workplace fatalities fell from 2000 to 2003 but then rose again between 2003 and 2006, which is consistent with the general trend.
- 3.28 In Queensland a reverse onus of proof has applied since 1995. Between 2000 and 2006, there has been no discernable improvement in Queensland’s OHS performance. Queensland sits above the Australian average on most indicators, including serious workplace injuries, compensated fatalities, enforcement action, prosecution and conviction. All other things being equal, this does not support a conclusion that the reverse onus of proof is an effective means of improving OHS performance.
- 3.29 It should be noted that, on the basis of available data, prosecutions in NSW and Queensland have been as effective, or more effective, than in other Australian jurisdictions. However, it is not reasonable to draw any conclusions with respect to the application of the reverse onus of proof, as NSW prosecutions have been largely successful without placing the evidentiary burden on the defendant. The Law Council notes however that there are anecdotal reports that the approach in NSW has caused employers to be particularly conscious of health and safety issues in the workplace.

⁷ Maxwell, *Ibid*, p 357.

⁸ ASCC, *Comparative Performance Monitoring Report – comparison of occupational health and safety and workers compensation schemes in Australia and New Zealand*, 9th Edition, February 2008, Workplace Relations Ministers’ Council, Commonwealth of Australia, chapter 3.

Law Council position

- 3.30 The Law Council generally considers that in respect of criminal sanctions a reverse onus of proof will rarely be appropriate. As noted above, the Law Council is not aware of any evidence that the reverse onus of proof has produced better safety outcomes in New South Wales and Queensland, as opposed to jurisdictions which apply the ordinary standard required in criminal proceedings.⁹ It may be worthwhile considering whether there is evidence that the reverse onus of proof has imposed additional economic burdens and whether there has been any perceivable safety return.
- 3.31 It is noted that a reverse onus may be preferred in circumstances where the defendant in proceedings is in a position to hold or obtain the information relevant to the matters under investigation. The Law Council submits that this will rarely be the case in prosecutions arising from alleged breaches of OHS law due to the availability of inspectors, expert witnesses and an objective (as opposed to subjective) standard of care in relation to the obligations set out under the legislation.
- 3.32 The Law Council supports the general principles of criminal liability contained in the Commonwealth Criminal Code Act. That establishes the presumption that serious criminal offences will have fault elements and that the prosecution will be required to prove these elements beyond reasonable doubt. OHS offences carry enormous fines in some jurisdictions and in some cases attach jail penalties for offences by natural persons. It follows that the offences should be dealt with in the same way as other criminal offences, in accordance with the criminal laws and procedures existing in each State and Territory, with the burden on the prosecution to prove that the workplace was not as safe as practicable.

Duties of Workers and Others

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- (25) How, and to what extent, should the model OHS Act specify worker's duties of care?
- (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?
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- 3.33 The legislation should contain a duty on employees to take all reasonably practicable steps to ensure both their own safety and the safety of other people at work, as is the case currently under the Commonwealth Act, s 21(1), NSW Act, s 20(1) and Victorian Act, s 25(1).
- 3.34 As stated above, in response to question 22, the Law Council considers that the employee's general duty should continue to extend to non-workers or members of the public who enter the workplace.
- 3.35 The duties of workers must be specified in general terms to capture a wide range of situations. This corresponding duty will enable an employer to insist on workers complying with its safety measures.

⁹ This point is also made in the Maxwell Report, *ibid*, paragraph 1720.

3.36 Obligations in respect of managers to employees is discussed below (see answer to question 127).

Appointed Persons and Officers

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

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

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

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

3.37 As the Law Council has indicated above, the model OHS Act would, if implemented, apply to all employers. However, it is noted that small businesses may not be able to appoint officers with specific OHS responsibilities.

3.38 Obligations in respect of managers and directors are discussed below (see answer to question 127).

Duties of Persons in Control

(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?

(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?

3.39 As noted above, obligations in respect of managers and directors are discussed below (see answer to question 127)

3.40 The Law Council notes that provisions for control already exist in some jurisdictions. For example, in WA the chain of responsibility arises from the control provisions in the WA Act. However, it is the application of the provision that causes difficulties. For example, on a construction site, when a developer hands over possession of a site to a Superintendent, a question may arise as to whether a developer is still able to exercise control by virtue of one of its representatives sitting in on a monthly Safety Committee meeting.

3.41 If there is no definition of control under the model OHS Act, the parameters will most likely be set by case law, which may create inconsistencies.

3.42 The Law Council suggests that, if a definition of control is not incorporated into the model OHS Act, the model Act should contain a test, including a list of factors that will guide employers, regulators and Courts in interpreting the nature and content of the employers' and relevant officers' obligations.

Activities Which Impact on Health and Safety

- (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?
 - (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?
 - (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)?
 - (36) Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?
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- 3.43 The Law Council considers that there should be provision in the model OHS Act to follow the chain of responsibility 'upstream', to establish consistent duties in all jurisdictions not just for employers but also for designers, manufacturers, suppliers and importers. However, any such provisions would need to be carefully drafted to eliminate any overlap with product liability and public liability schemes.
- 3.44 Consideration would also need to be given to the appropriate limitation period for actions against 'upstream' parties.
- 3.45 The general policy ought to be that any breaches occurring outside Australia will be prosecuted, despite any difficulties that may arise. The decision as to whether a manufacturer or designer is prosecuted will be determined on the basis of each party's culpability.
- 3.46 Perhaps the duties of care in a workplace setting should be extended to environmental issues. This might arise, for example, where the employer provides housing for staff on a remote mine site or remote drilling operation.
- 3.47 The national model OHS Act may also need to deal with new and emerging hazards or risks, including any duties that may arise in respect of an employer protecting employees against anti-terrorism activities.

4 – ‘Reasonably Practicable’ and Risk Management

Concept of ‘Reasonably Practicable’

- (37) Should a test of “reasonably practicable” be included in the model OHS Act?
 - (38) If not, what alternative standard should be included?
 - (39) How should the standard be defined? What level of detail should be provided?
 - (40) Should control be an element of the standard? (see Chapter 3)
 - (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?
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- 4.1 The Law Council submits that the test of “reasonably practicable” should be included in the model OHS Act.
- 4.2 An employer should not be liable for criminal sanction in circumstances where the employer took all reasonably practicable steps to remove the risk. The concept of “reasonably practicable” should deal only with reasonably foreseeable hazards/risks.
- 4.3 It is not necessary to define the expression “reasonably practicable”. Instead, the model OHS Act should adopt the approach recommended in the Maxwell Review in Victoria, and which currently exists under legislation in several jurisdictions, which set out a non-exhaustive list of factors under the legislation, which must be considered by courts (and which provide some guidance to regulators and employers) when assessing practicability.¹⁰
- 4.4 Control should be one factor listed as a consideration under the relevant provision. It is noted that it will also be necessary to provide guidance concerning the concept of ‘control’ under the legislation, which should consider whether the duty holder was, or should have been, in a position to assess and appropriately manage the relevant risk or hazard.
- 4.5 This does not preclude an approach in which various standards or requirements are mandated, such as scaffolding and lifts regulations.

¹⁰ Maxwell Review, *Ibid*, paragraph 496.

Risk Management

- (42) Should 'hazard' and 'risk' be defined in the model OHS Act?
- (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?
- (44) Should risk management principles and processes be specifically required by the model OHS Act in relation to the general duties, or otherwise?
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4.6 The Law Council recognises that the terms 'hazard' and 'risk' are fundamental to this area of law and should be uniformly applied in all Australian jurisdictions. However, as discussed in paragraph 2.16 above the Law Council believes that, if defined in the legislation, the definition should adopt the ordinary meaning of these particular terms.

4.7 As discussed in 2.17 and 4.1 above the Law Council advocates the inclusion of a test of 'reasonably practicable' within the model OHS Act. Such a test should be based upon the current Western Australian and Victorian definitions of 'reasonably practicable' and contain a similar list of considerations. The principles of risk management should not be incorporated into the test of 'reasonably practicable'. The concept of 'reasonably practicable' relates to the appropriateness of particular safety measures, whereas 'risk management' relates to the particular steps that should be taken to identify, assess and eliminate risks. A 'risk management' process may identify a particular risk and/or possible solution, however, that solution may not be 'reasonably practicable' for any number or reasons (availability, suitability, cost, etc).

4.8 The Law Council recognises that 'risk management' is an important concept that is used in OHS legislation across Australia. However, the way in which it is used and incorporated into legislation varies across different jurisdictions. In most jurisdictions the notion of 'risk management' is incorporated into the regulations and codes of practice. Often risk management principles will be defined separately within the regulations.¹¹ Regulatory requirements in relation to specific hazards will then be structured according to these principles. The general definitions of risk management principles focus on three key steps, namely:

- identification of each hazard to which a person at the workplace is likely to be exposed;
- assessment of the risk of injury or harm to a person resulting from each hazard, if any; and
- consideration of the means by which the risk may be controlled.

¹¹ For definitions of 'risk management' see: regulation 3.1 of the *Occupational Safety and Health Regulations 1996* (WA); regulation 17 of the *Workplace Health and Safety Regulations 1998* (Tas); regulations 1.3.2 - 1.3.3 of the *Occupational Health, Safety and Welfare Regulations 1995* (SA); and regulations 9 – 10 of the *Occupational Health and Safety Regulations 2001* (NSW).

4.9 'Risk management' as defined above is a systematic step-by-step process that details the specific way in which a duty holder can satisfy their general duty to prevent risks to health and safety. Therefore, the proper place for risk management provisions is within regulations rather than the principal Act, which is meant to focus upon general rather than specific duties. Therefore, the Law Council suggests that a provision defining the risk management process and principles is not necessary within the model OHS Act. However, to avoid confusion and to provide general guidance to duty holders, it may be useful for the regulations to contain a general 'risk management' provision, which specifies the three key steps of risk management.

5 – Consultation, Participation & Representation

Duty to Consult

5.1 The Law Council acknowledges that consultation between employers and employees is and should be an essential element of effective OHS management.

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

5.2 The Law Council submits that a duty of employers to consult employees and a reciprocal duty on employees to participate in consultation, and contribute insights into that consultation (as reflected in Section 32 of the NT *Workplace and Safety Act 2007*), should be enshrined in the legislation. Although effective OHS practice requires meaningful consultation, the Law Council is not convinced that a definition of “consultation” is a necessary legislative requirement. Section 35 of the Victorian Act also provides a useful starting point for a model provision in this regard.

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

5.3 The key relationship in respect of consultation should be between employers and their employees/workers. There may be circumstances in which it is appropriate for employers to consult with contractors and even other employers.

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

5.4 Whilst noting the response to question 46, above, there will inevitably be different levels of consultation required in different circumstances and it is inappropriate to attempt to legislate in respect of those differing standards.

(48) How should consultation be provided for:

- 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.
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- 5.5 In general, the key relationship of consultation is between employers and employees and the key focus for consultation should be particular worksites.
- 5.6 It follows that multi-employer worksites may require a joint employer coordinated approach to consultation and employers with operations across more than one worksite may need to establish multiple consultation mechanisms. The diversity of work sites, including the size of the business, location and activities, as well as the nature of the workforce, makes it difficult to be prescriptive in legislation.
- 5.7 The Law Council would support the development of a consultation code of practice.
- 5.8 Aside from the comments in respect of participation and representation below, the facilitation of consultation requires the support of industry organisations, employee organisations and, perhaps in some circumstances, cultural or community organisations.

Participation and Representation

- 5.9 Consultation requires the establishment of an appropriate framework to facilitate participation and representation of employees
- 5.10 The primary mechanism for this to occur is through the appointment of Health and Safety Representatives (HSRs) and Health and Safety Committees (HSCs).

(49) Should there be a requirement for establishing HSRs and HSCs?

(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?

5.11 There should be a legislative requirement for the appointment of HSRs and HSCs.

5.12 Participation and consultation should largely be done through HSCs.

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

5.13 All jurisdictions except the ACT make provision for HSCs, although the size of the workforce and circumstances vary under the relevant legislation. Most jurisdictions have adopted a 20 employee threshold.

5.14 All jurisdictions except the NT make provision for HSRs.

5.15 As a general “rule of thumb”, the larger the number of employees on site, the more likely there are to be OHS issues and the greater the need for a more formalised structure. The Law Council recommends a three tiered approach:

- (1) Employers/worksites over 50 employees must have a HSC.

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- (2) Employers/worksites of 20 or more employees must establish a HSC if petitioned by 10 or more employees to do so, unless otherwise required by the relevant authority or regulation.
 - (3) No requirement for a HSC if less than 20 employees, unless required to by the relevant authority, having regard to a poor OHS record, where the employment is particularly hazardous or some other special circumstance.

5.16 Formalised HSRs would only be necessary to supplement the work of HSCs. HSCs should determine the need for an HSR. However, this should be determined on the basis of at least one HSR for every 50 employees/workers.

5.17 For HSRs to be effective, they would need to be a staff member chosen by other employees. At least 50 per cent of the membership of HSCs should consist of representatives chosen by employees.

(52) Where an election is required, who should be entitled to vote?

5.18 Apart from observations above, the Law Council is of the view that it is not necessary to prescribe in legislation or regulation the mechanism for determining the membership of HSCs or the choice of an HSR.

(53) What should the powers and functions of HSRs be?

5.19 Although expressed in different terms across jurisdictions there is considerable uniformity in the power and functions of a HSR.

5.20 The range of powers expressed in ss 58 and 60 of the NSW Act reflect a reasonable legislative basis for the powers and functions of a HSR.

(54) What should the structure and functions of HSCs be?

5.21 Most jurisdictions provide for similar powers and functions for HSCs. HSCs generally enable consultation in respect of reviewing or assessing health and safety risks, assisting and reviewing safety measures and making recommendations about health and safety matters including employee training.

(55) What training and qualifications should members of HSRs and members of HSCs have?

5.22 The Law Council is of the view that it is inappropriate to impose overly prescriptive requirements on employers to provide training to HSRs and HSCs.

5.23 It would be sufficient if the obligation was to allow and assist HSRs to obtain appropriate OHS training and to make available information, including safety information, to HSCs.

(56) Are there alternative mechanisms that should be considered?

5.24 The legislation and its regulations should not be so prescriptive as to discourage innovations in consultation, particularly in the circumstances of smaller or remote employers.

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

5.25 Consistent with the rest of this submission, the model OHS Act should reflect the general principles, with details set out in subordinate legislation.

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

5.26 The Law Council is unable to comment on this issue apart from observing that the preferred solution, if required, should not be legislative.

Right of Entry

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

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

(61) In what circumstances should the right of entry be exercisable?

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

5.27 The Law Council notes that the issue as to whether unions should be authorised to enter workplaces to inspect for health and safety is a sensitive one.

5.28 A right of entry exists in some form in around half of the jurisdictions. The Council is strongly of the view that, whatever policy decision is taken in the model OHS legislation, there should be a consistent approach across all jurisdictions.

5.29 As a general comment, it is noted that supporters of a right of entry for unions regard the role that unions play as helpful to employees, who are not otherwise represented on OHS matters and where they may not fully understand whether their employer is in compliance with OHS law. Reports on the experience in NSW suggest that the right has generally been exercised by unions conservatively¹² and has received anecdotal support from employers, who have benefited from a better understanding of OHS issues from properly qualified union officials.

5.30 The right of entry has been criticised, however, on the basis that it may lead to 'bullying tactics' by union officials who abuse their power, or enter 'non-unionised' workplaces for the purpose of recruiting new members. It is also argued that if the regulator is properly resourced, operating effectively and properly undertakes its statutory functions, there would be no need for a right of entry by anyone other than the regulator. Employer groups suggest that, accordingly, the function of union officials in this context is unnecessary and excessive to the extent of any overlap with the functions of regulators and inspectors.

¹² Maxwell, *Ibid*, paragraph 999.

5.31 On balance, the Law Council supports a limited right of entry by union officials in respect of OHS matters, in a prescribed set of circumstances. The *Workplace Relations Act 1996* (Cth) recognises the right of association of employees, requiring employers to observe an employees' right to be (or not to be) a member of an industrial organisation. It is not difficult to imagine circumstances in which employees, who have less power and knowledge than their employer, may require the assistance of such an association in respect of an OHS issue, which could include entry onto a site.

5.32 However, such a right of entry should be restricted, as follows:

- the right of entry must be limited to a trade union official with appropriate certification or training;
- the trade union must have members on site;
- the official must have reasonable grounds for suspecting a contravention of OHS; and
- the entry must be in respect of that purpose only.

5.33 It is noted that Part 8 of the Victorian Act contains provisions that may provide an appropriate basis for model provisions in this area. In particular, the Law Council supports a model whereby a system of entry permits is used, with power vested in the relevant workplace authority to make appropriate orders against authorised representatives who abuse the right of entry.

5.34 In addition, as noted below, unions should not be empowered to prosecute breaches of OHS law. This function is properly reserved for prosecuting agencies, which have appropriate legal/analytical capacity and ethical responsibilities, including responsibilities to the Court.

5.35 Although as a practical matter it is unlikely to occur, there should be similar rights of entry to a registered industry/employer body, with similar limitations.

Issue Resolution

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

(64) When should issue resolution procedures be activated?

(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?

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

5.36 Ideally, problems are resolved by negotiation between employers and the relevant HSR or HSC, quickly and informally.

5.37 The legislation should make provision for disputes to be resolved in accordance with agreed procedures. If there are no procedures, resolution should be carried

out, by default, in accordance with appropriate regulations. In this respect, s.73 of the Victorian Act and its regulations (part 2.2) provide an appropriate model.

- 5.38 If resolution is still not possible, the relevant authority and its inspectors would become involved.
- 5.39 It would be useful to have a model dispute resolution clause in the regulations following the model in the *Workplace Relations Act* (Cth).

Right to Cease Unsafe Work

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- (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?
- (68) Should a model OHS Act provide for the right of a 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?
- (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?
- (70) In addition, or alternatively, should the model OHS Act provide for the resolution of disputes associated with cessation of work?
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- 5.40 Given the object of the model OHS legislation, it is difficult not to support, in principle, a right of a worker or workers to refuse or cease to work if they consider their workplace or duties unhealthy or unsafe.
- 5.41 A difficulty arises with respect to the potential for abuse of this right. To overcome this concern, there needs to be a series of mechanisms to deal with the resolution of safety issues promptly.
- 5.42 In the first instance, the right should arise only if there is an immediate risk and no steps can be taken immediately by the employees or the employer to remedy the situation.
- 5.43 For the right to be meaningful, it needs to be exercisable by an individual worker or group of workers. The concern would need to be notified to management and the HSC or HSR as a matter of urgency and, if management does not respond within a reasonable period (having regard to the nature of the risk), the dispute should be referred to the relevant workplace authority.
- 5.44 In circumstances where the employee ceased to work as a result of a bona fide concern regarding a health or safety issue on reasonable grounds, then that employee should be paid for the period.

Protection from Discrimination and Victimisation

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- (71) What provision should be made in the model OHS Act to protect persons from discrimination or victimisation and who should be protected?
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- (72) Who should be able to bring an action for unlawful discrimination? Should the model OHS Act allow representative actions?
 - (73) Should a breach of the provisions be the subject of criminal or civil proceedings or both?
 - (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?
 - (75) Should specific powers be available to the regulator to provide protection from ongoing discrimination or victimisation pending proceedings?
 - (76) What remedies should be available to the victims?
 - (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?
 - (78) Are there any other issues in relation to consultation, participation and representation that should be addressed in the model OHS Act?
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- 5.45 The Law Council accepts that any model OHS legislation must contain provisions that prevent discrimination or victimisation of those raising concerns with respect to OHS matters or carrying out health and safety functions, or refusing to undertake unhealthy or unsafe work.
- 5.46 At a civil level, this would make it unlawful to dismiss, threaten or alter a workers employment as a result of the above. The onus of proof would be on the employer, at a civil level, and remedies would include reinstatement and damages.
- 5.47 The Law Council considers that the WA and Victorian Acts provide a useful model.
- 5.48 Although it may be difficult to enforce, the protection against victimisation ought to be extended to non-employees if it can be shown that they were discriminated against as a result of raising concerns with respect to OHS matters.
- 5.49 The Law Council does not favour criminal sanctions in this area.

6 – Regulator Functions, Powers & Accountability

Role and Functions of Regulators

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- (79) Should the model OHS Act provide for the establishment, functions, powers and accountability of regulators? If so, what should be provided?
 - (80) Should the model OHS Act require regulators to publish enforcement and prosecution policies?
 - (81) Should the model Act include provisions that allow the making of interpretative documents?
 - (82) Are there any functions and powers that should be available to an OHS regulator that should not be exercised by an inspector?
 - (83) Should the advisory and enforcement functions of an OHS regulator be separated? If so, how and why?
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- 6.1 The Law Council considers that the model OHS Act should clearly provide for the establishment, functions, powers and accountability of regulators. This should include the extent of all powers of the regulator, including in relation to enforcement, education and any other function.
- 6.2 In particular, the Law Council considers that the power and decision to prosecute under the model OHS law should be exercised exclusively by the regulator.
- 6.3 The publishing of enforcement and prosecution policies would be useful and mirrors what is happening in criminal matters being dealt with by the DPP. Any such publication would usefully contain detailed statistics on the nature and target of prosecutions and all other relevant information. The various regulators in each jurisdiction should strive for a common policy with respect to enforcement and prosecution.

Inspectors

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- (84) How should the model OHS Act provide for the appointment, qualifications, powers, functions and accountability of inspectors?
 - (85) Should the model OHS Act strengthen the role and capacity of inspectors to provide advice and assistance? If so, how?
 - (86) Are there any circumstances in which an inspector should be independent from direction, instruction or review by a regulator?
 - (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?
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Investigation

- 6.4 There must be clear and proportionate powers for the regulator (or another nominated investigative body) to conduct investigations at workplaces. However, these powers would not extend to include the power to require persons to answer questions that might incriminate them, with the protection that their answers cannot be used against them in a subsequent prosecution.
- 6.5 It may also be desirable to establish a standard process of certification for inspectors which would facilitate mutual recognition.
- 6.6 The Law Council is aware of a draft international standard¹³ which may provide a useful model for certification of inspectors.

Incident notification and reporting

- 6.7 There should be standard systems requirements for notification and reporting within organisations, so that safety incident or breaches and remedial actions can be monitored and investigated, irrespective of whether an injury occurs. The scheme should include identification of those serious breaches that need to be notified to the regulator.

Internal Review of Inspectors' Decisions

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- (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?
- (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?
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- 6.8 Internal review of decisions of individual inspectors is important to ensure that, where there is only one inspector for a particular industry, he/she is dealing appropriately and fairly with administering the statute and is treating employers and employees equally without fear or favour.

¹³ The International Association of Labor Inspectorates has released a draft 'Global Code of Integrity', which establishes a code of conduct for workplace inspectors and staff. A copy of the draft code can be found at http://www.ialii-aiit.org/iali/event_docs/IALI_Draft_Global_Code_of_Integrity.pdf

7 – Compliance & Enforcement

- 7.1 The key principles to be embraced are that workers are likely to be protected most effectively and efficiently where:
- those who are accountable have both an awareness of, and the capacity to fulfil, their obligations; and
 - there is a maximum incentive to correct deficiencies in systems and/or equipment as a priority and before harm occurs.

Enforcement Measures

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- (90) Should the model OHS Act include a hierarchy of enforcement measures in order of escalation? What should such measures consist of?
- (91) Should these be statutory principles or requirements for the appropriate use of enforcement measures? If so, should they be contained in the model OHS Act, regulations or other policy or guidance documents?
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- 7.2 The model OHS Act should provide for a range of measures that can be taken. The legislation need not mandate an order of escalation of these measures. These are matters that should be dealt with by appropriate prosecutorial guidelines (discussed further below).
- 7.3 The range of measures would include the following measures in addition to prosecution.
- **Education and support** – Any occupational health and safety system ought to provide education and training for managers, as well as information as to appropriate technical support to assist managers in fulfilling their risk management obligations. Consideration should be given to regulation or accreditation of safety training providers to ensure training for workers is of an appropriate standard.
 - **Prohibition orders** – The regulatory authority should be empowered to make immediate orders with respect to serious and/or ongoing breaches of OHS obligations, where such breaches present an imminent risk of harm.
 - **Fines** – The regulatory authority should be empowered to impose fines in respect of certain minor contraventions, provided that there is capacity to challenge the imposition of any fine in court and appropriate review mechanisms otherwise exist.
 - **Enforceable undertakings** – Regulatory bodies should have the capacity to enter into enforceable undertakings as an alternative to prosecution. This would enable an employer/duty holder to take active steps to address health and safety risks, and prevent further breaches of OHS obligations.
 - **Mediation and dispute resolution** – The legislation should attempt to minimise costly administrative and judicial disputes by providing for mediation in relation to alleged breaches and penalties where appropriate.

Measures Exercised at Workplace

- (92) What provision should be made for PINs, improvement notices and prohibition notices in the model OHS Act?
 - (93) Should PINs, improvement and prohibition notice contain recommendations about how to achieve compliance?
 - (94) What provisions should be made to allow for the review of PINs, improvement and prohibition notices?
 - (95) Should there be a specified minimum timeframe to allow for compliance with PINs, improvement or prohibition notices?
 - (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?
 - (97) Should the model OHS Act provide for infringement notices? If so, when and for what offences should they be issued?
 - (98) Should the administration of infringement notices occur under OHS law or individual state legislation?
 - (99) What amounts should be specified as fines for infringements?
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- 7.4 PINs, improvement notices, prohibition notices and infringement notices should all be provided for under the model OHS legislation, to ensure a fulsome range of enforcement tools are available to regulators. These instruments should contain recommendations to guide affected parties toward achieving compliance. The model OHS Act should contain provisions specifying the forms of offences or breaches for which the relevant notices can be issued.
- 7.5 Review of notices issued under the OHS legislation should be carried out by the HSC in the first instance.
- 7.6 A minimum timeframe to enable compliance should be set under the model Act, with discretion vested in the regulator to vary the time frame based on the circumstances.
- 7.7 If an application for internal review of a decision to issue a notice is lodged, the relevant notice should be suspended until the application for internal review is resolved.
- 7.8 The Law Council does not express a view about who should have responsibility for administering notices or what amount any fines specified under OHS legislation should be. However, the amounts for fines should be uniform across jurisdictions.

Measures Exercised Beyond the Workplace

- (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?
- (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?
- (102) Should the giving of an enforceable undertaking result in an admission of fault or liability?
- (103) Are there any other issues in relation to compliance and enforcement that should be addressed in the model OHS Act?
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7.9 The Law Council considers that the model OHS Act should provide for injunctions. Power to apply for an injunction should be exercised by a regulator only and must be issued by a court of competent jurisdiction, based on evidence that an employer is in breach of an OHS law or regulation and that an injunction is the most appropriate remedy in the circumstances

7.10 Enforceable undertakings should be provided for under the model OHS legislation.

7.11 Although no fault should be inferred by the giving of such an undertaking, a breach of the undertaking should be punishable.

8 – Prosecutions

Criminal or Civil Liability

(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?

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

- 8.1 Breaches of the general duties set out in the model OHS Act should constitute criminal offences.
- 8.2 Breaches of procedural requirements should be dealt with by civil penalties.
- 8.3 However, as outlined below in discussion with respect to workplace death and serious injury, the Law Council submits that there should not be a crime of “industrial manslaughter”. In the case of a death involving gross negligence, the normal criminal law provisions should be applied. Gross negligence should be treated in the same way whether it occurs in the workplace or elsewhere.
- 8.4 The liability of corporations for deaths in the workplace should follow provisions setting out rules of attribution in the *Criminal Code Act 1995* (Cth).

Where Prosecutions Should Be Heard

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

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

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

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

Court

8.5 Currently OHS prosecutions are heard in different courts across Australia. In some States, such as New South Wales, the legislature has seen it as appropriate to refer the power to a specialist industrial court.

8.6 The Law Council submits that criminal offences under OHS legislation should be dealt with in accordance with existing procedures and in the relevant court appointed in each jurisdiction. It should be a matter for the relevant prosecuting

authority to determine the forum in accordance with the level of seriousness or established prosecution policy in each jurisdiction.

Appeals

- 8.7 Defendants in OHS prosecutions are entitled to the same safeguards in terms of appeals as other defendants, ultimately to the High Court. This is particularly important in respect of criminal law where the potential sanctions include imprisonment. Beyond this, the primary appeals process should be determined under preferred arrangements in each jurisdiction.
- 8.8 The harmonisation of OHS laws will ultimately lead to the development of an Australia-wide jurisprudence and, accordingly, much greater consistency in the application of legal principles and practice.

Who May Commence Prosecutions and Relevant Procedures

- (110) Who should be entitled to commence criminal proceedings?
- (111) If the model OHS Act provides for civil proceedings for breach, who should be entitled to commence such proceedings?
- (112) What should appropriate time limits be for the commencement of a prosecution and why?
- (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?
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- 8.9 The Law Council notes that in some jurisdictions, bodies other than the relevant regulator, such as unions, currently have the power to commence OHS prosecutions.
- 8.10 In the Law Council's view criminal prosecution should only be commenced by the regulatory authority or relevant state/territory prosecution agency. This has the benefit of ensuring a consistent prosecutorial policy and practice.

Prosecutorial policy

- 8.11 Even where laws are consistent, significant differences in the practice of OHS law can arise if prosecuting authorities take different approaches.
- 8.12 Accordingly, the Law Council considers that a key aspect of the harmonisation process should be in respect of prosecutorial policy. Such a policy would:
- (a) emphasise the importance of education and other steps to encourage compliance;
 - (b) reserve prosecution for cases involving serious breaches and cases where a prosecution would achieve an important strategic purpose, e.g. to educate an industry; and

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- (c) otherwise permit the prosecutor to use a range of compliance options including imposing a fine or seeking an enforceable undertaking.

Evidence

- (114) Should the model OHS Act contain specific evidentiary procedures for OHS prosecutions? If so, why and what procedures?
- (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?
- (116) What should be the evidentiary status of codes of practice, regulations and other subordinate instruments?
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- 8.13 The model OHS Act should not contain specific evidentiary procedures. The relevant evidentiary and procedural requirements should be drawn from the uniform Evidence Acts in each jurisdiction.
- 8.14 As noted below, the Law Council does not support a reversal of the onus of proof, particularly where criminal sanctions are concerned.
- 8.15 Codes of practice, regulations and subordinate instruments should be evidence of the standard of care required by employers and workers.

The Burden of Proof and Defences

- (117) Is 'reasonably practicable' an appropriate standard for the model OHS Act?
- (118) Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?
- (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?
- (120) What, if any, defences should the model OHS Act provide?
- (121) Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?
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- 8.16 As noted throughout this submission, the Law Council generally takes the view that in respect of criminal sanctions a reverse onus of proof will rarely be appropriate.
- 8.17 In relation to criminal liability under Commonwealth Criminal Code Act, there is a presumption that serious criminal offences will have fault elements and that the prosecution will be required to prove these elements beyond reasonable doubt. Serious penalties apply for OHS offences, including million dollar fines in some jurisdictions and, in some cases, custodial penalties. The Law Council considers therefore that the offences should be dealt with in the same way as all other

criminal offences carrying comparatively serious penalties and that the prosecution should have to prove that the workplace was not as safe as practicable.

- 8.18 In addition to the above, the Law Council notes that, in the absence of provisions reversing the onus of proof, offences under most OHS enactments are already subject to a lower burden of proof for conviction than would ordinarily apply to an offence under the general criminal law. For example, under the generally accepted rule in *Nydam v R* [1977] VR 430:

“...In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”¹⁴

- 8.19 In the context of OHS legislation, however, to find a corporation (and relevant officers) guilty of manslaughter or serious injury, the prosecution would need to demonstrate mere negligence, in the form of a failure to remove or control a foreseeable risk when it was practicable to do so. In this regard, the term ‘reasonable practicability’ has been interpreted to import the notion of common law negligence into claims or charges against an employer under the OHS legislation.¹⁵ Accordingly, once it is determined that a duty of care was owed and it is demonstrated by the prosecution that the employer did not address all reasonably foreseeable risks, and by that act or omission caused serious injury or death to a worker, the employer will be guilty in the absence of other intervening factors.
- 8.20 The existence of this lower standard in respect of OHS prosecutions may exist to compensate for the lack of any successful attempt to apply a corporate criminal responsibility regime under State and Territory OHS law, similar to the scheme that exists in the Commonwealth Criminal Code. This matter is discussed further below, in relation to liability of company officers and sentencing options.

Liability of Officers

(122) Should ‘officers’ of a corporation be liable to an offence because the corporation has committed an offence?

(123) How should officer be defined?

(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?

¹⁴ [1977] VR 430, at 455 per Young CJ, McInerney and Crockett JJ.

¹⁵ Bluff, L and Johnstone, R, National Research Centre for OHS Regulation, Working Paper 27: *The Relationship Between ‘Reasonably Practicable’ and Risk Management Regulation*, September 2004, Australian National University, page 5.

(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?

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

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

8.21 Presently in some jurisdictions, senior managers and directors may be held liable for breaches of the legislation by their corporation. This approach is taken currently by the NSW Act at s 26, the Victorian Act at s 144 and Queensland Act at s 167(1). The SA and Tasmanian Acts take an approach of requiring a body corporate to appoint at least one officer to be responsible for health and safety and then create obligations in relation to and on that individual: see SA Act, s 61 (but see also s 59c of the SA Act) and Tasmanian Act, s 10. The WA Act at s 55 takes the approach of restricting the liability of directors or managers to those circumstances where it can be proved that the offence of the corporation was *“committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of”* the relevant director or manager.

8.22 The Law Council is aware that employer organisations representing employers in NSW strongly advocate against provisions such as s 26 of the NSW Act, which deem senior managers and directors guilty of offences of the corporation. Those who criticise the approach in NSW prefer provisions akin to s 55 of the WA Act (as outlined above).

8.23 On the other hand, the Law Council acknowledges that others strongly advocate in favour of holding senior corporate leaders responsible for serious breaches of OHS legislation, regardless of whether they were personally at fault, to ensure as far as possible that corporations take the best approach to occupational health and safety.¹⁶ In circumstances where corporations engage in criminal conduct with the potential to cause real harm to third parties some legitimately argue that it is appropriate to deem relevant officers of that corporation liable for the same offence, subject to appropriate defences (including that they were not in a position to influence the conduct of the corporation in relation to the relevant contravention and they used all due diligence to prevent the relevant contravention by the corporation). That is the approach taken under the Corporations Act in respect of insolvent trading: see ss 588G and 588H (similar provisions are found in tax and environmental laws). It might be thought that there is no obvious reason why the position is significantly different in respect of offences with the potential to cause death or serious injury.

8.24 The Law Council is unable to comment on which approach has resulted in better safety outcomes. The Law Council suggests that the Review may wish to examine whether deeming provisions in certain jurisdictions have achieved better outcomes than in those jurisdictions that subjectively assess personal liability of company officers.

8.25 It is worthwhile noting that this matter has been the subject of significant inquiry and review by Federal agencies, with differing approaches to the question of deemed liability and reversal of the onus of proof.

¹⁶ See for example *Lessons from Gretley*, Professor Andrew Hopkins, CCH, 2007.

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- In 2002, the Australian Law Reform Commission concluded, in its Final Report on Federal Civil and Administrative Penalties in Australia,¹⁷ that:

The ALRC makes no recommendation in relation to the reversal of the onus of proof in relation to deeming provisions. Whether or not it is appropriate to reverse the onus of proof will depend on the legislative scheme. The ALRC acknowledges that in some legislative schemes reversing the onus of proof will be justified due to, for example, the seriousness of the offence or contravention, difficulties of proof or assigning liability and the nature of the regulated community. However, it is the ALRC's view that legislators must always balance efficacy arguments for reversing the onus of proof against fairness issues such as the harshness of the penalty and the impact on the segment of the regulated community that is likely to be subject to the deeming provision.¹⁸

- In September 2006, the Corporations and Markets Advisory Committee released its report into 'personal liability for corporate fault' and concluded that:

The Committee is of the view that, as a general principle, individuals should not be made criminally liable for misconduct by a company except where it can be shown that they have personally helped in or been privy to that misconduct, that is, where they were accessories. There was strong support for this position in submissions.

The Committee is concerned about the trend in various pieces of legislation to treat directors or other corporate officers as criminally liable for misconduct by their company unless they can make out a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the criminal law.¹⁹

Law Council position

8.26 As previously stated, the Law Council considers that deemed criminal liability or criminal liability established on a reversal of the onus of proof will rarely be appropriate. Most OHS laws provide for serious criminal offences and deeming provisions are regarded as offensive to the general criminal law. The Law Council believes that directors' and officers' liability should be determined on the standard principles of criminal responsibility, both direct and ancillary. This policy is reflected in the *Criminal Code Act 1995* (Cth).

8.27 On balance, the Law Council is of the view that there should not be separate offence provisions for directors and officers. Their liability should be dealt with in the same ways as other employees. Their scope of duties and responsibilities to take reasonable care will set the ambit of their liability. It is already exceptional in the criminal law to render people criminally liable for simple negligence. Normally, gross negligence would be required (see *Criminal Code Act 1995* (Cth) s 12.4).

8.28 Prosecutions for more serious criminal offences should be dealt with under the general criminal law offences relating to manslaughter/gross negligence in

¹⁷ ALRC Report 95, *Principled Regulation: Federal civil and administrative penalties in Australia*, 2002, Commonwealth of Australia.

¹⁸ Ibid, paragraph 8.61

¹⁹ CAMAC, *Personal Liability for Corporate Fault*, September 2006, Department of the Treasury, Commonwealth of Australia, page 33.

inflicting serious injury. The liability of officers for these offences could be direct or via accomplice liability. Directors and officers should be in no better and no worse position than anyone else in relation to these offences.

- 8.29 It follows therefore that the Law Council does not support any provisions in a model OHS Act containing deeming provisions, which would supplant the ordinary approach under the criminal law.
- 8.30 There should not be any test for determining an officer's liability under the model OHS Act – the officer's liability, either as an accessory or principal offender, should be established in the ordinary way under the general criminal law. Similarly, there should be no requirement for specific defences for corporate officers or employees.
- 8.31 The standard should be the same in respect of officers of unincorporated associations and volunteer organisations.
- 8.32 What ever approach is taken under the model OHS Act, the Law Council strongly believes that there should be a consistent national approach to this issue.

Adequacy of existing penalty provisions

- 8.33 While the Law Council considers deeming provisions and the reversal of the onus of proof to generally be inappropriate where criminal sanctions are concerned, the Law Council recognises that there is a legitimate concern that prosecutions against companies and officers for criminal breaches of health and safety laws are, in some cases, incapable of generating a sufficient deterrent or incentive for employers.
- 8.34 In particular, laws with respect to corporate criminal liability in most jurisdictions may limit the extent to which traditional concepts of *mens rea* and *actus reus* under the criminal law can be applied to the conduct of a corporate entity.
- 8.35 There is also a significant gap in penalties in some jurisdictions for individual officers of a corporation. For example, in NSW the maximum penalty for a first offence by an employee is \$3,300, while a first offence by a supervisor or director in respect of the same breach carries a maximum penalty of \$55,000. The lack of intermediate penalties for all company officers limits the extent to which negligent or criminal conduct can be addressed in accordance with the level of culpability. It is noted that the existence of deeming provisions in NSW and Queensland may be obviated by incorporating a more rigorous penalty structure for all company officers, which could be applied according to the 'reasonably practicable' standard.
- 8.36 The Law Council suggests that the review panel may wish to consider:
- (a) strengthening and broadening the existing penalty provisions for individuals and employers under the model OHS Act; and
 - (b) incorporating or linking provisions with respect to aggregation of corporate criminal conduct based on part 2.5 of the *Criminal Code Act 1995* (Cth).

Sentencing Options

Fines

- (128) For which offences should monetary penalties (fines) be imposed?
- (129) Should maximum fines be provided in the model OHS Act, or is there an alternative approach?
- (130) Should the level of fines be different for the various offences? If so, for what offences and at what levels?
- (131) Should there be a statutory minimum fine for some offences? If so, what?
- (132) Should the level of penalties depend on culpability (recklessness) or outcome (death) or repeat offences?
- (133) Are there options that could facilitate more consistent outcomes across the jurisdictions, such as a national register of decided cases?
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8.37 The Law Council notes that penalties across jurisdictions should be harmonised as far as possible. As noted above, the Law Council also considers that the range of penalties and offences should be broadened to ensure conduct can be addressed in accordance with the relative culpability of the offender.

8.38 All penalties and offences should be consistent with comparable penalties and offences under the general criminal law.

Other Sentencing Options

- (134) What penalty options should be available in addition to or instead of fines?
- (135) Should the model OHS Act provide for terms of imprisonment for specified offences? If so, which offences and what maximum periods of imprisonment?
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8.39 The options of adverse publicity orders, improvement orders and health and safety undertakings as set out in ss 135-137 of the Victorian Act should be available.

8.40 It is also appropriate that serious offences, and serious breaches of OHS law, carry possible custodial sentences.

Workplace Death and Serious Injury

- (136) Should there be specific offences relating to workplace death or serious injury? If so, what?
- (137) Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?
- (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?
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- 8.41 The Law Council does not support the creation of a separate crime of “industrial manslaughter” under the proposed model OHS Act.
- 8.42 The Law Council notes that there already exist well developed legislative provisions and jurisprudence for manslaughter in the general criminal law. There is no basis for establishing a different standard for manslaughter committed in the context of a work environment. The Law Council considers that the appropriate context in which to examine a separate ‘industrial manslaughter’ offence is not the present review. Development of industrial crimes, if it is to be considered, should be the subject of a separate review of the criminal law.
- 8.43 As a general comment, the Law Council notes that minor breaches of OHS duties may result in outcomes that range from death to minor injury. Equally, a substantial breach of OHS duties may not result in any harm whatsoever.
- 8.44 It follows that outcomes, whether they be death or serious injury, do not provide a proper touchstone against which the seriousness of a breach of OHS duties may be properly assessed. At present, the principles that underlie existing OHS duties are based on the elimination or, alternatively, the management/control of risks to health and safety in the workplace that can not be eliminated. It is the nature and extent of the risk, rather than the outcome, which provides the touchstone against which the seriousness of an offence is to be measured.
- 8.45 Nonetheless, the more serious consequences of a breach such as death or serious injury are proper matters to be taken into account in the determination of penalties. In accordance with current principles, such consequences may be taken into account where they are a reflection of the nature and extent of the subject breach.
- 8.46 The creation of an “industrial manslaughter” offence raises a range of complex and vexed questions (such as corporate liability), which given the terms and time constraints of the current process, cannot be adequately addressed.
- 8.47 Most significantly, however, it would be contrary to principle to create an offence of “*industrial manslaughter*” that is to be the subject of some lesser test or standard than that which applies to manslaughter and/or other offences concerning death caused by recklessness or negligence.
- 8.48 It follows, should a specific offence be created with respect to “workplace deaths”, that a definition of the level of “*criminal negligence*” and/or

“recklessness” necessary to constitute the offence would need to be defined in the Act and that an appropriate range(s) of penalties be set. It also follows that in determining the definition of the fault element of any such offence and in determining the penalties to be applied, consideration will need to be given to whether the proposed offence should provide for a separate offence of manslaughter within the industrial context, or some lesser offence of “negligently” causing death.

- 8.49 Manslaughter, whether at common law (as in NSW) or pursuant to statute, is an offence which incorporates a “fault” or “mental” element involving either “*criminal negligence*” or “*recklessness*”.
- 8.50 “*Criminal negligence*”, in the context of manslaughter, does not require foresight. In that sense, the test is an objective one. As set out in *Nydam v R* [1977] VR 430, “...In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”.
- 8.51 In a civil case the extent of liability of a defendant depends not on a degree of negligence, but the amount of damage done. By contrast, in criminal proceedings the degree of negligence or recklessness is the determining question.
- 8.52 However, the criminal law does distinguish between levels of “negligence” as is evidenced by the existence of different offences involving “negligence” and differing penalty regimes: manslaughter; culpable driving; and so forth. Arguably, this is also reflected in the penalty applicable to a conviction for manslaughter under s 18(1)(b) of the *Crimes Act* 1900 (NSW) (i.e. 25 years imprisonment) and the maximum penalty applicable under s 32A of the OHS Act 2000 (NSW) (i.e. in the case of a corporation \$1,650,000 and in the case of an individual a maximum penalty of 5 years imprisonment and/or a fine of \$165,000.)
- 8.53 The issue of the creation of an “industrial manslaughter” (or even some lesser offence of “*negligently*” causing death in a work context) is complicated by the role of corporations in every aspect of industrial activity. In the absence of a mechanism which enables the aggregation of acts and fault within a corporate context, the creation of such an offence will be effectively an academic exercise except in the case of small companies where the directors and management have a direct “hands on” role in safety.
- 8.54 As a consequence of the legal fiction that a corporation is an independent legal person, a corporation *may* be subject to liability for manslaughter by criminal negligence, or recklessness. But, as manslaughter requires both an act or omission and a fault element, there are obvious problems in attaching what is essentially personal criminal responsibility to a fictitious legal entity in the form of a body corporate.
- 8.55 In the absence of a code which permits the aggregation of acts, omissions and fault elements, such as that which has been enacted in the Commonwealth *Criminal Code Act 1995*, the attribution of criminal responsibility to a corporation for an offence involving a fault element is inappropriate where an individual cannot be identified as having acted “*as the company*”.

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- 8.56 Both theoretically and practically, the difficulties of attribution of a fault element to a body corporate means that even potential liability is limited to corporations in which senior management and directors have a direct “hands on” role in the day to day operations of a company, including relevant safety management obligations. This, of course, has the tendency to limit liability to small corporations – if not “one man companies”.
- 8.57 It follows that any provision for a “specific offence” relating to workplace death must be considered in the broader context of attributing criminal responsibility to corporations where the proposed offence, by definition, must involve a fault element such as “*gross negligence*”, “*recklessness*” or, even, some lesser measure of negligence. In this context, provision should be made for the “aggregation” of acts/omissions and the relevant fault element so as to enhance the regulation of corporations under harmonised OHS laws.
- 8.58 Consideration also needs to be given to the scale of penalties available so as to ensure that there are adequate sentencing options available to the Courts for the purpose of dealing with varying levels of potential individual and corporate culpability.
- 8.59 The Law Council suggests that the provisions set out in the *Criminal Code Act 1995* (Cth) would be an appropriate basis for a model provision which establishes the various elements of corporate criminal responsibility. However, any such provision would need to be implemented uniformly into State/Territory law in order to be effective.

Enforcement of Penalties

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- (139) What, if any, provisions should be included in the model OHS Act for the enforcement of penalties imposed by a court?
- (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?
- (141) Are there any other issues in relation to prosecutions that should be addressed in the model OHS Act?
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- 8.60 Provision should be made in the model OHS Act to ensure that appropriate orders made by a properly constituted body are enforceable under OHS legislation.

9 – Other Issues

Regulation Making Powers

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

(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?

9.1 The power to make regulations under the model OHS Act should be the same as regulation making power under any other enactment.

9.2 Regulations should provide for lesser offences and may well set prescriptive standards, such as those that exist in respect of scaffolds and lifts in various jurisdictions.

Codes of Practice

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

9.3 The legislation should provide a mechanism for the development and approval of codes of practice by either the Workplace Relations Ministerial Council or by the successor to the Australian Safety and Compensation Council (ASCC) after consultation with industry.

Notification of Incidents and Reporting

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

9.4 It is critical that comprehensive and consistent data is collated and published by all jurisdictions. An important step is the development of a standard incident reporting notice at a national level by the regulatory authorities.

External Appeals and Issue Resolution

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

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

9.5 Decisions of the regulator should be subject to the same administrative law remedies as any other regulatory scheme.

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- 9.6 Appropriate dispute resolution procedures would obviate the need for a separate 'merits review' forum or process.

Tripartite Mechanisms

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

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

- 9.7 The model OHS Act should facilitate tripartism, consistent with the Robens model. This approach should be facilitated by establishing a successor to the ASCC which involves representatives from industry, unions, insurers and the legal profession.

Mutual Recognition

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

(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?
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- 9.8 The Law Council supports the incorporation of provisions for mutual recognition of permits and licences under the model OHS Act.

9.9 A useful model to consider may be the mutual recognition provisions under the model national legal profession laws, which enable legal practitioners, who are admitted and hold a legal practising certificate in one jurisdiction, to practice in other Australian jurisdictions.

9.10 In addition, penalties and other restrictions should be communicated amongst regulators and imposed across jurisdictions, as currently occurs in respect of motor vehicle licences, registrations and penalties.

Cross-Jurisdictional Cooperation

(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?

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- 9.11 The Law Council supports harmonisation of laws through a national model OHS Act as the first step toward reducing or minimising regulatory overlap. This process can be complemented by instituting mutual recognition of inspectors' certification, industry codes of practice, etc.
- 9.12 The Law Council supports the establishment of a national advisory body to support ongoing research and cooperation in this area, similar to the former National Occupational Health and Safety Authority or the current Australian Safety and Compensation Council.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.