PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

Issues Paper

on

Workplace Safety

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Terms of Reference

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

(a)   integrating management systems and risk management approaches aimed at reducing death and injury in the workplace;

(b)   social and economic costs to the community of death and injury in the workplace; and

(c)   the development of an appropriate legislative framework for regulatory reform and/or codes of practice in relation to occupational, health and safety in the workplace.[1]

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[1]   Minutes of Proceedings of the Legislative Council, 26 June 1996, p 284.

Committee Membership

The Hon Bryan Vaughan, MLC   Australian Labor Party
Chairman

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

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Committee Membership

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Chapter One
Introduction

1.1 Background

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

> That the Standing Committee on Law and Justice inquire into and report on workplace safety matters, with particular reference to:
>
> (a) integrating management systems and risk management approaches aimed at reducing death and injury in the workplace;
>
> (b) social and economic costs to the community of death and injury in the workplace; and
>
> (c) the development of an appropriate legislative framework for regulatory reform and/or codes of practice in relation to occupational health and safety in the workplace.[2]

The full background to the Committee's inquiry and the conduct of the inquiry to date are outlined in detail in the Committee's *Interim Report* on *Workplace Safety*, tabled in December 1997.[3] (Copies of the Committee's *Interim Report* are available free of charge from the Committee Secretariat).

The first stage of the Committee's inquiry, during 1997, was concerned with the operation of the principal piece of legislation regulating workplace safety in NSW, the *Occupational Health and Safety Act 1983*. The Committee's *Interim Report* dealt with a range of issues and recommendations for reform to the Act which were contained in the *McCallum Report*.[4] The Committee's *Interim Report* contained 32 recommendations, each of which had the unanimous support of all members of the Committee.

1.2 This paper

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[2] *Legislative Council, Minutes of Proceedings,* 26/6/96, p 284.

[3] Standing Committee on Law and Justice, *Report on the Inquiry into Workplace Safety - Interim Report*, Report No. 8, December 1997 (hereafter *Interim Report*).

[4] *Review of the Occupational Health and Safety Act 1983: Final Report of the Panel of Review*, February 1997 (known as the *McCallum Report*).

Having completed the first stage of the inquiry, the Committee is now ready to embark upon a wide ranging review of a number of challenging and difficult issues in relation to workplace safety. The second stage of the Committee's inquiry will be undertaken through 1998. This *Issues Paper* sets out the framework for the remainder of the Committee's inquiry. The Paper also contains a number of specific questions which the Committee would like to see addressed in further submissions.

In order to place the specific questions which are identified in some sort of context this paper also includes a brief discussion of some of the concepts and issues that will be considered during the second stage of the Committee's inquiry. The concepts of risk management and management systems are introduced, and some examples are provided of the use of risk management systems in managing workplace safety. There is a brief summary of some of the material that has been previously published on the economic cost of death and injury in the workplace, and some possible options for improving the disclosure of information about these costs are raised. There is a brief outline of the current legislative framework, together with some of the key challenges posed by the changing nature of work and the workplace. It must be emphasised that this *Issues Paper* does not purport to provide any serious analysis of these concepts and issues. Many individuals with expertise in the occupational health and safety field will already be very familiar with these concepts and issues. What the Committee has sought to do is merely to provide the minimum level of background information necessary to make sense of the specific questions which have been posed.

The Committee welcomes written submissions which address the specific questions identified in this paper. The closing date for submissions is Friday 29 May 1998. Submissions should be addressed to:

The Director
Standing Committee on Law & Justice
Legislative Council
Parliament House
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The Committee has already received a large number of detailed and worthwhile submissions. Some of these submissions have been referred to in the Committee's *Interim Report*. All of the submissions so far received will be of great assistance to the Committee and will be considered during the second stage of the inquiry. Any individual or organisation that has already made a submission is welcome to make a further submission which addresses the questions posed in this paper.

Chapter Two

A/ Integrating management systems and risk management approaches aimed at reducing death and injury in the workplace

2.1   What is risk management?

Risk management is a concept traditionally associated with insurance. It is however now commonplace in many other areas including environmental protection and occupational health and safety management. Put simply it is a process by which the likelihood and consequences of certain events are identified and evaluated, and then managed to eliminate or reduce such risk, in a systematic and consistent way. In the field of occupational health and safety, management of the risk or hazard is in accordance with a hierarchy of control measures, commencing with:

- elimination of the hazard or risk;

- application of engineering controls to prevent injury, such as guards on machinery;

- application of administrative controls to reduce risk, such as reducing levels of worker exposure to the hazard by adopting a roster system; and

- adopting Personal Protective Equipment - such as hearing protection or hard hats.

The rationale for the introduction of risk management is that it allows for a consistent approach to assessment of hazards and risks in the workplace, and their management. From this process, appropriate action or control measures can be implemented in accordance with the risk management framework. This framework includes a consideration of the practicality of implementation of certain controls, as well as the financial cost of such controls.

Much of the newer style OHS legislation adopts a risk management approach to managing particular hazards. This is consistent with a systematic approach to general management, such as that found in various quality assurance schemes and standards.[5] The *Hazardous Substances Regulation 1995* adopts such an approach. It details procedures to be followed - a risk assessment, together with continual monitoring and evaluation of control measures. The *Petroleum (Submerged Lands) Act (Cth) 1967* also adopts a systems approach, with its requirement for submission of a Safety Case, containing details of the operator's safety management system.

2.2   What is integration?

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[5]   For example, the ISO 9000 range of standards.

Integration of risk management (as the tool to manage safety), in a general management system is a method of safety management promoted as cost effective and efficient. The synergies to be gained from a consideration of safety, within a risk management framework, through every level of management of an organisation or enterprise can easily be envisaged. Integration results in a consideration of safety at every level of the work environment, using a framework that identifies existing or potential hazards, assesses the risks posed and applies a hierarchy of control measures:

- from the ***design and layout*** of the workplace and equipment. This also requires a consideration of safety when purchasing workplaces or equipment.

- through to the ***system of work***, including not just the way in which the direct work is performed, but maintenance of equipment, the safety procedures used and the training given to workers and others at the workplace.

- as well as the ***location of the work*** and whether this poses any additional management or safety challenges, to either workers or members of the public. Examples of hazards posed to workers because of the location of the work include road work where the weather conditions are extremely hot or cold, work in a confined space etc. Examples of hazards posed to members of the public by the location of the work include, construction work where there is heavy pedestrian traffic, excavation where dust may pose a hazard, or where spillage of a hazardous chemical may pose a threat etc.

In this way, safety becomes ingrained in the fabric of the organisation or enterprise. The structure of the organisation, the responsibilities, practices, procedures, processes and resources of the organisation all address issues of safety.

2.3   Examples of safety management systems

At the Public Seminar to launch the Committee's Inquiry into Workplace Safety, several large companies gave presentations on the way in which their company addressed issues of safety management:

- Mr Geoff Kells, the Managing Director of CSR Limited spoke about the way in which the board of CSR Limited approach issues of safety. The board, acknowledging the need for a management driven commitment to safety, established a board safety committee. The Board Safety Committee has progressively visited each of the CSR work sites on a safety mission. At every board meeting, current safety statistics are considered, and the ten best and ten worst sites are identified. The worst

performing sites are required to report to the Managing Director on a monthly basis. Safety is also an element in the company's management promotion program. Mr Kells argues that for CSR, a company with non-executive directors, this is an effective way of enhancing safety performance.[6]

- For ICI Australia Operations Pty Ltd, the identification of safety as its primary corporate value is a significant element in achieving good safety outcomes. The late Mr Warren Haynes, Managing Director of ICI Australia identified three key areas for company focus - hardware, systems and behaviour. In each of these areas safety is considered. In the hardware area the company conducts hazard operability studies from the design stage, through construction and commissioning. Similar procedures are adopted for redesign. In the systems area regular audits are undertaken, not just for hardware maintenance, but to ensure the safe operating systems are implemented and complied with. Safe behaviour is addressed through its inclusion as a major accountability in all job descriptions, as well as in yearly job objectives and performance contracts. The Company looked to the example set by DuPont in the United States in an effort to measure their performance. ICI argues that whilst DuPont's record at 0.3 medical treatment injuries per million man hours, is the world's best, for ICI it is not enough. ICI aims to achieve a workplace free of injury, by taking a long term view and focusing consistently on the three identified key areas.[7]

- BHP Steel Newcastle also looked to the experience of DuPont America in systematically addressing safety management. BHP acknowledged the need for management commitment and the need to motivate all staff to achieve optimum safety outcomes. Techniques used include specific safety training, revised techniques for accident investigation and the use of safety observations (audits).[8]

All these examples highlight that the level of integration of safety management, within a general management system, depends on the organisational structure and culture. Some organisations find it relatively easy to integrate safety into every aspect of their work, whilst others find that integration in key management areas is the most effective method. For yet other organisations, integration of risk management, into a general management system is an unachievable goal given their lack of resources, or lack of will to achieve a high level of safety performance.

2.4   Small Business

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[6]   *Proceedings of the Public Seminar on Workplace Safety,* 18 February 1997, pp 78-82.

[7]   Ibid, pp 38-42.

[8]   Ibid, pp 56-60.

The Report of the Small Business Deregulation Task Force, and the Industry Commission Report, *Work, Health and Safety*, both comment on the difficulties small businesses encounter with implementing modern approaches to managing workplace health and safety. Most of these difficulties stem from lack of understanding of OH&S, either from difficulties with accessing the legislation or lack of understanding of the need to manage safety.

To adopt techniques of risk management and implement them effectively, most organisations need some level of core OHS expertise. Risk management also requires a systematic approach to managing safety risks. As Professor Michael Quinlan has stated:

> (T)he problem is that most small businesses do not have systems for anything. So asking them to introduce a system in relation to occupational health and safety management is a bit of a tall ask.[9]

On the other hand, the Committee has received briefings from the operators of small and medium sized businesses which have been able to effectively utilise risk management systems in order to achieve significant improvements in their health and safety record. For example, the Committee received an enthusiastic presentation from Mr Charles Richardson, of SuperDrives, a small Victorian paving company, employing 8 workers. Changes to work practices and documentation were the effective tool for this company to achieve a high level of safety performance. SuperDrives developed a standard quotation form, which included the preparation of a "risk identification plan" and "site safety plan". These plans identify the hazards in the workplace and the actions that will be taken to eliminate or reduce those hazards. SuperDrives received high level accreditation under the Victorian WorkCover Authority's SafetyMAP (Management Audit Program).

The challenge for legislators is to fashion a regulatory model that offers an incentive to organisations to pursue ever improving levels of OHS performance, in a cost effective way. Such legislation must also ensure that those organisations which are unwilling or unable to follow this path, still provide their workers with a working environment that is safe and free from risk. All workers are entitled to a safe work place regardless of the size or nature of the workplace.

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[9]   *Transcript,* Public Hearing, 9 September 1997, p 11.

One solution is to retain a level of prescription in OHS legislation. However this has been criticised as adding to the compliance burden for small business. Other suggestions have included the development of Codes of Practice for specific industry hazards or the specification of enterprise specific OH&S management systems developed in conjunction with, or sponsored by, industry groups.

2.5   The role of Government in encouraging the use of risk management systems

In evidence before the Committee in August 1997, the NSW WorkCover Authority advised that it is investigating a graduated approach to management systems. The Authority acknowledges that whilst smaller organisations do not have the capacity to implement complete, integrated management systems, some medium size enterprises are able to implement crucial elements of a system. Yet larger organisations need a flexible legislative regime to allow them to adopt their own form of safety management system. The WorkCover Authority envisages a prescriptive risk management framework for enterprises at the smaller end of the scale, with legislation detailing the exact steps to be taken. Medium and larger size organisations may require a facilitative regime with Codes of Practice, containing critical components of a safety management system. Those organisations with resources and skills to implement a total safety management plan may only require a self-audit program similar to that currently operating under the "self-insurers" program.[10]

In the *Interim Report into Workplace Safety* the Committee recommended that the NSW WorkCover Authority consult with companies who have achieved improvements in their safety performance in an effort to identify elements that herald such improvement. WorkCover could then present this information to industry. Additionally, the Committee recommended that WorkCover review the Victorian SafetyMAP program with a view to developing an audit tool suitable for NSW companies wishing to implement a safety management system.[11]

Many organisations would then have the opportunity to select particular elements that lead to improved safety outcomes, and which could easily be integrated into their existing management systems or practices.

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[10]   *Transcript*, 5 August 1997, Evidence of Mr Geoff Mansell, pp 73 - 74.

[11]   Recommendation 7 & 8, *Interim Report into Workplace Safety*, op.cit.

The Industry Commission reviewed the OHS legislation in every Australian state and territory and recommended that principles of risk management should be contained in the principal OHS legislation.[12] As previously noted, in NSW these principles can be found in some regulations, rather than in the OHS Act. The Industry Commission also recommended that the legislation be amended to explicitly acknowledge that the use of safety management systems, prima facie, satisfies the statutory duty of care.

If the NSW OHS Act contained an obligation to adopt risk management techniques this could encourage a greater move towards an integrated systems approach to safety management.

However such an approach could also be seen as imposing an unfair burden on industry. Risk management can be a complex concept to understand, and there is still debate in academic circles about the nature of risk.[13]

In the *Interim Report into Workplace Safety*, the Committee supported the use of risk management systems as a means of achieving ever improving levels of health and safety performance. The Committee made no finding on whether risk management should be prescribed by legislation as the method of satisfying the obligations contained in the general duties of the OHS Act or whether risk management, whilst prescribed in the legislation, should remain only one way of satisfying the general duties.

> **1. How can risk management approaches to workplace safety best be integrated into management systems?**

> **2. To what extent should small business be expected to adopt a risk management approach to workplace safety?**

> **3. What role should Government play in encouraging the use of risk management systems, particularly in relation to small business?**

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[12]   Industry Commission Report, Volume 1, p 59.

[13]   See for example Holmes, N., "Risk communication in occupational health and safety", *Journal of Occupational Health & Safety - Aust NZ 1993*, 9(4): 339; Glendon I & Waring A, "Risk Management as a framework for occupational health and safety", *Journal of Occupational Health & Safety - Aust NZ 1997*, 13(6): 525-532.; Cross J, "Risk Management in OHS" , *Journal of Occupational Health & Safety - Aust NZ 1994, 10(5) : 415*

Chapter Three

B/ Social and economic costs to the community of death and injury in the workplace

3.1   Economic Costs

The primary concern of any workplace safety legislation is the prevention of workplace death, injury and disease. The pain and suffering caused by poor standards of workplace safety make prevention imperative. Preventative strategies also reduce the costs of injury and disease for business, the community and government.

In a 1995 study the Industry Commission reported that the economic cost of workplace injury and disease was more than $20 billion per year. The Commission estimated the direct and indirect costs to the employer, the worker and the community:

- 40% of the average cost of a workplace incident is borne by the employer. This includes costs of loss of productivity, legal penalties, rehabilitation, damage to equipment and costs of retraining

- 30% of the average cost is borne by the worker. This includes costs such as loss of income, future earnings, cost to family for care

- the remaining 30% cost is borne by the community. Costs include community services and provision of health and medical services.

The Commission found that there is significant cost shifting from the employer to the community and the worker where a worker suffers a severe injury. The Commission argued:

> *"Since the community is bearing a significant share of the costs of workplace incidents, it has a strong interest to ensure that workers are not exposed to hazards that result in long-term incapacitation."* [14]

Source: Work, Health and Safety Inquiry into Occupational Health and Safety, Report No 47, Industry Commission: 1995.

3.2   Social and human costs

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[14]   Industry Commission Report, Volume 2, p 105.

The Committee has also heard much evidence from individuals on the personal cost of workplace injury. In the *Interim Report into Workplace Safety* the Committee recommended the continued use of Victim Impact Statements in OHS prosecutions.[15] Since the publication of the *Interim Report* the Industrial Relations Commission has rejected the use of such statements in one OHS prosecution stating that the *Victims Rights Act 1996* does not apply to breaches of safety standards.[16]

The impact on this particular family, of these breaches of safety standards was one of the submissions the Committee received which highlighted the personal tragedy behind the failure to take reasonable care. The Committee considers that the use of such statements affirms to the victim and their family that their suffering is acknowledged. Additionally such statements send a strong message to the community of the high personal cost of such injuries. The Committee affirms its commitment to the use of such statements and will consider the issue of whether there needs to be an amendment to the *Victims Rights Act,* to make clear the application of that Act to OHS matters*,* in the second part of its inquiry.

Some submissions to the Committee have commented on the deficiencies of the current system in meeting the challenge of workplace disease. Professor Michael Quinlan referred the Committee to WorkSafe Australia research which "estimates that at least 2,280 Australian workers die as a result of occupational disease each year - over four times the number dying as a result of injuries in the workplace".[17]

As the incidence of workplace disease often involves a long lead time, it is difficult to identify the particular workplace or work activity which caused, or contributed to, the disease. Also, it is usually some years before the impact is recognised. For this reason there needs to be systematic management of workplace hazards, with recording of details, particularly for hazardous substances, to enable research and identification of the cause of disease. The Committee is interested in strategies which can integrate such obligations with general management systems, in a cost effective way.

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[15]   Recommendation 18.

[16]   Fisher J, *NSW WorkCover v North Power*, No IRC 5182 of 1996, reported in *Occupational Health Newsletter,* No. 411.

[17]   *Transcript,* 5 August 1997, p 9.

The Committee has also heard evidence from individuals about the circumstances of their workplace injury. Whilst issues of workers compensation are beyond the scope of this inquiry the Committee is concerned about the number of workers who appear to fall through gaps in current safety laws. Their personal hardship, as well as their pain and suffering, clearly demonstrate that workplace safety laws are not providing universal protection.[18]

3.3 Compilation and presentation of information by Government

The Committee has heard evidence from many people that information on the causes and costs of workplace accidents is difficult to obtain. Mr Garry Brack, from the Employers' Federation, states that his organisation looks to providing practical solutions to their members to prevent workplace injury. He argues that is very important to learn from the mistakes of others, and the availability of such information would enhance employer safety performance. In hearings in Sydney Mr Brack commented on the difficulty in obtaining succinct and meaningful information.[19]

Some mechanisms that could convey such costs are considered below.

"State of the Workplace Reports"

The Committee has heard much criticism about the accessibility or usefulness of information provided on workplace safety. Information relating to injury causes, prosecution outcomes and workforce participation are provided in a range of diverse forums. For example, the Federal Department of Workplace Relations provides information on workforce participation/industrial relations issues every five years,[20] the NSW WorkCover Authority publishes annual statistics on workplace injury for the NSW workplace, as does WorkSafe Australia for national statistics. However, there are limitations - for example WorkCover's statistics do not take into account the mining industry, nor as the Committee has heard, are the statistics provided in a user friendly manner.

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[18]   See *Submissions,* Volume Two.

[19]   *Transcript*, 5 August 1997, p 40.

[20]   See Morehead A, Steele M, Alexander M, Stephen K, Duffin L, *Changes at Work, The 1995 Australian Workplace Industrial Relations Survey*, Commonwealth of Australia: 1997.

The Committee is interested in the concept developed by the Environment Protection Authority of a *State of the Environment Report*. The State of the Environment Report provides a comprehensive overview of the condition of the environment. The report is aimed at a wide audience, with information provided in a variety of forms.

The Committee considers that this concept could ideally present a wide range of diverse material, in an accessible form. A State of the Workplace Report could contain information on:

- major prosecutions undertaken during the year;
- details of workplace accident investigations;
- highlights of the good safety performance of some organisations;
- details of annual workplace fatalities and injuries;
- trends in prevention and workers compensation; and
- annual costs of compensation.

3.4   Disclosure of workplace safety performance by organisations

Many large organisations with good health and safety performance highlight the need to change workplace culture to one which values a safe working environment. This change must be driven by senior management, as well as at board level. It is only when senior management include safety issues in the everyday management of an organisation, that it becomes an integrated organisational norm.

The Committee recommended in its *Interim Report into Workplace Safety* that government organisations publish details of their occupational health and safety performance in their annual reports.[21] The Committee believes that public accountability is important in facilitating cultural change. The Industry Commission also considered this form of reporting commenting that it *"would raise awareness and help encourage a more proactive approach to health and safety ".*[22]

In the private sector the financial reporting requirements are regulated by the Corporations Law.[23] There are no specific provisions for the mandatory reporting of safety performance or safety policies. Nor are there requirements for inclusion of workplace injury or fatality statistics. The Industry Commission recommended that the Institute of Company Directors

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[21]   Recommendation 31.

[22]   Industry Commission Report, p 193, Volume I.

[23]   Parts 3 and 6.

consider preparation of draft guidelines for disclosure by companies, of their health and safety performance, in their annual reports.[24]

The Committee is also interested in other methods of encouraging reporting of health and safety performance by organisations.

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4. How can the compilation and presentation of information by Government about the social and economic costs of death and injury in the workplace be improved?

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5. How can organisations be encouraged or compelled to report upon their workplace safety performance?

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[24]   Recommendation 35, *Work, Health and Safety: Inquiry into Occupational Health and Safety,* op.cit.

Chapter Four

C/ The development of an appropriate legislative framework for regulatory reform and/or Codes of Practice in relation to occupational health and safety in the workplace.

4.1   Robens based legislation and the NSW Occupational Health and Safety Act (1983)

The New South Wales *Occupational Health and Safety Act 1983* implemented many of the reforms to workplace safety that were proposed, and subsequently implemented, in Britain. These reforms arose out of the Report of the Committee on Safety and Health at Work, chaired by Lord Robens, in 1972 (hence the term the Robens Report).[25] The Report recommended a co-operative and self-regulatory approach to workplace safety, together with a consolidation of the myriad of industrial safety legislation.

Many other common law jurisdictions adopted the Robens reforms: specifically the concept of a single unifying statute, establishing general duties and rights for employers and employees. A key element of the reform framework was worker consultation and participation in managing occupational health and safety.

New South Wales was the first Australian jurisdiction to adopt the Robens reforms. The primary obligation in the *NSW Occupational Health and Safety Act 1983* is that of employers to ensure the safety of their employees. Section 15(2) of the Act provides some detail of the employers obligation, such as the requirement to provide information, instruction, training and supervision. Other provisions impose a general duty on employees, self employed persons, those in control of workplaces, plants and substances, as well as manufacturers and suppliers, to ensure the safety of others.

The NSW Act eschewed the prescriptive approach that was a feature of the older style industrial safety legislation, such as the *Factories, Shops and Industries Act 1962* and the *Construction Safety Act 1912*, and their regulations. Indeed one of the objects of the *Occupational Health and Safety Act* was to repeal this legislation in stages.[26]

The OHS Act, and many of the new regulations, prescribe outcomes to be achieved. The method of achieving such outcomes is left to the individual

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[25]   Robens Committee (Committee on Safety and Health at Work) 1972, *Health and Safety at Work: Report of the Committee 1971-1972*, HMSO, London.

[26]   S.5(1)(d) *Occupational Health and Safety Act 1983*.

employer, although regulations and Codes of Practice can provide details of the process to be undertaken to achieve such outcomes. This approach can be described as performance based regulation.[27]

4.2 Recent legislative developments: systems based OHS legislation

Many civil law jurisdictions have not adopted the general duties, performance oriented approach advocated in the Robens Report. Scandinavian countries have adopted a system standard form of regulation, which focuses on internal controls to achieve an integrated and systematic approach to safety. The legislation contains a clear articulation of the actions, obligations, and documentation required.

In Sweden, the *Work Environment Act,* requires a consideration of all aspects of the work environment, including design of the workplace, work methods and systems, and use of substances. Partnership with workers, in this holistic approach to the working environment, is a fundamental element of the legislation.

Denmark also adopts a social partners approach to OHS regulation although its legislation acknowledges the difficulty of imposing a universal systems approach, and instead adopts industry specific strategies.[28]

Professor Adrian Brooks referred the Committee to a new Spanish law on the prevention of occupational risks (law 31 of 1995).[29] The law prescribes the rights of the employees (a different approach to that of the NSW OHS Act, which prescribes obligations on employers and others), and details particular elements that are required to comply with the law. These elements all form a fairly comprehensive safety management system.

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[27] Gunningham N, Johnstone R, Rozen P, *Enforcement Measures for Occupational Health and Safety in New South Wales: Issues and Options,* Report to the NSW WorkCover Authority, April 1996, p 16.

[28] *Submissions*, Volume 1, Professor Michael Quinlan, p 20.

[29] *Transcript*, 7 August 1997, pp 29-30.

> **6. Does the current Robens based Occupational Health and Safety legislation provide an appropriate legislative framework for the regulation of workplace safety into the 21st century? To what extent does European legislation promoting a systems approach to workplace safety provide a model for future developments in the Australian legislative framework?**

4.3   Challenges of the modern work environment

The reality of work in the late twentieth century is that workers are less likely to be employed within the traditional employer - employee relationship, nor work in the one workplace. There has been an increasing trend to sub-contracting and self-employment, as well as growth in the labour market participation of women, often in casual and part-time work.[30] The service and information industry sector are now major employment sectors, eclipsing the traditional manufacturing sector. Additionally, rapid technological change, including the use of computers, changes to organisation structure and work practices, including out sourcing and shiftwork, all have implications for the regulation of workplace health and safety.

Workplace hazards are no longer merely those from machines without proper guarding, or substances which cause immediate injury. The development of hazardous chemicals means many workers are now exposed to substances, with little known of the long term effects of such exposure. For those workers in the service sector, involved in activities such as cash handling, welfare services, security or hospitality, violence and stress may be workplace health and safety problems. For those working on a contract basis, at a variety of workplaces - contract cleaners, tradesmen, caterers, etc - the dynamic nature of the workplace poses a threat to health and safety. Workers who provide personal services in domestic premises, instead of in an institutional setting, also challenge traditional notions of regulating health and safety.

Any workplace safety legislation must regulate for a complex workforce, in diverse and dynamic work environments - from small, one person undertakings performing one particular type of work, through to large corporations with multiple geographical locations, and multiple work tasks.

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[30]   Casual employees are now a feature of 70% of workplaces, with part-time work increasing from 18% in 1990 to 25% in 1995: Morehead A, Steele M, Alexander M, Stephen K, Duffin L, ;*Changes at Work: the 1995 Australian Workplace Industrial Relations Survey*, Department of Workplace Relations and Small Business, Commonwealth of Australia, 1997.

Such legislation must promote optimum OHS outcomes, and encourage economic activity. It must be sufficiently flexible to encourage those organisations with the resources to achieve a high level of OHS performance, beyond mere compliance with minimum standards. It must also exert a stronger coercive force to influence the behaviour of those organisations which do not have the resources and/or will to achieve OHS outcomes above the minimum standard.

The *Occupational Health and Safety Act* is based around traditional employment concepts of employer and employee. There are also some additional obligations on those who control a workplace or plant or substances, as well as manufacturers and suppliers of plant and substances (and who may not be an employer), and self-employed persons.

However, the paradigm remains based very much on the traditional employer/employee relationship. Workers under a contract for service, such as outworkers and truck owner/drivers fall through the regulatory gaps.

The continued focus on traditional forms of employment is artificial and does not recognise the modern, contractually based employment relationship. Whilst some would argue that the current obligations are sufficiently broad to capture changing employment relationships, such legislation does not reflect the reality of the modern workplace.

> **7. How can the current legislative framework be modified to meet the challenges posed by the changing nature of the workplace?**

> **8. How can the current legislative framework be modified to better address the particular occupational health and safety needs of people with disabilities, women, people from non-English speaking backgrounds and Aborigines and Torres Strait Islanders?**

4.4   Should mine safety be included in the general occupational health and safety framework?

Mines are currently regulated, as are most other workplaces in NSW, by the *Occupational Health and Safety Act, 1983*, although none of the other regulations made under that Act apply to mines. There is one major additional piece of industry specific regulation for each sector - for coal mines, the *Coal Mines Regulation Act 1982* and for other mines, the *Mines Inspection Act 1901*. Both Acts have supporting regulations.

The various Mines Acts contain detailed requirements for either coal or metalliferous mines. These are supported in turn by varying levels of prescriptive regulation. The regulatory framework, whilst theoretically unified by the umbrella OHS Act, is quite distinct for each mining sector, with major differences between the two. A recent review of mine safety found that there appeared to be little conscious knowledge of the obligations under the OHS Act, concluding "for most people the OHS Act simply doesn't exist."[31]

The mining sector is moving away from its traditional prescriptive approach to safety, with new regulations in each sector adopting a modified form of risk assessment. Some though have questioned the risk management approach for this industry, where a low probability event may pose a high level of risk[32].

The Department of Mineral Resources is charged with administration of the mines legislation and the OHS Act, in the mining industry. The Department is responsible for not only safety aspects, but also development of the State's mineral resources. The WorkCover Authority administers the OHS Act for all other workplaces. Both bodies have separate inspectorates. Some concerns have been raised about the conflict between the policing and promotion roles of the Department of Mineral Resources, as well as the maintenance of separate inspectorates. [33]

During a visit to an open cut coal mine in the Hunter Valley the Committee was struck by the similiarity between the open cut mining operations and the earthmoving operations often undertaken at a large construction site. Both workplaces involve the use of heavy equipment to move large amounts of earth. The continued distinction between these workplaces appears difficult to maintain.

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9. Should mine safety be included in the general occupational health and safety framework?

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[31]   *Review of Mine Safety*, A Report to The Hon Bob Martin MP, Minister for Mineral Resources and Fisheries, ACIL Economics and Policy Pty Ltd, 14 March 1997, p 64.

[32]   Stiller, L, "Safety in Mining - failing the test", *Australian Safety News*, November 1997p 30.

[33]   *Review of Mine Safety*, op.cit.

4.5 Miscellaneous issues concerning the legislative framework raised in earlier submissions/evidence

Should individuals be able to bring a prosecution for a breach of workplace safety legislation?

WorkCover and secretaries of trade unions are currently the only persons authorised to institute a prosecution under the *Occupational Health and Safety Act*. Individuals may bring a prosecution action, but only with the approval of the Minister (s.48 *OHSA*). To date, there have been no prosecutions brought by an individual in NSW since the commencement of the Act.

Prosecution by individuals, without requiring the initial consent of the Minister for Industrial Relations, could allow government resources to focus on other areas of prevention.[34] It would also be another avenue of public accountability in workplace safety performance. Additionally, in the absence of a prosecution policy,[35] it removes any suggestion of political influence in prosecution decisions.

Conversely private prosecutions for breaches of criminal law could be problematic. Responsibility for prosecutions for criminal breaches of the law has traditionally been a function of the State. Currently only WorkCover inspectors have extensive rights to entry and inspection of workplaces. Whilst the OHS Act also confers limited powers on authorised union officers to access a workplace, the power to question workers or obtain information is limited to WorkCover inspectors. *Without the right to question witnesses or take statements the task of preparing a prosecutable case is difficult, if not impossible.*

Is the current legislative framework too complex?

The current OHS framework includes three Acts, in excess of 25 regulations and over 20 Codes of Practice. Many of the Codes of Practice and regulations make reference to Australian Standards, such as the Code of Practice *Noise Management and protection of hearing at work*, which references 8 Australian Standards. This level of regulation cannot be conducive to compliance. Although the recent *OHS Amendment Act* makes provision for repeal of much of this legislation, and the consolidation of the remaining regulations into one "super" regulation, this has not yet happened.

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[34]   *Submissions*, Volume 1, Mr Joe Tripodi MP.

[35]   Recommendation 11, *Interim Report into Workplace Safety*, December 1997.

Should written OHS policies be mandatory?

Many submissions already received by the Committee call for cultural change. One of the techniques for raising awareness of OHS and focusing management attention could be the development of a safety policy. A safety policy can also assist in the move to adopting a safety management system by detailing the objectives of the policy and specifying the resources committed to achieving these objectives.

Legislation could specify content and format, as well as worker accessibility to the document. Whilst a policy on its own, without the commitment by management of resources, is meaningless, compulsory legislative requirements for its development could be a tool to highlight the importance of OHS.

Should there be a provision for conscientious objection to the right of entry to a workplace by a union?

Under the *Industrial Relations Act 1996* and the *Occupational Health and Safety Act 1983*, registered trade unions have a right of entry to a workplace to carry out inspections.[36] Under the *Industrial Relations Act 1996*, a person may conscientiously object to membership of an employee industrial organisation. The Industrial Registrar may grant a certificate exempting such person from the right of entry provisions of the Act. Such an exemption does not exclude the right of entry of government officials, such as Department of Industrial Relations Inspectors.

The Christian Fellowship, known as the Brethren, have submitted that a similar exemption should be available in the OHS Act. The Brethren draw a parallel between Christian teachings and the duty of care under the OHS Act. The Brethren submit that their religious beliefs preclude them from joining an employer organisation and more importantly, from allowing a union official to intervene in their workplace activities. The Brethren's religious beliefs do recognise the legitimacy of government intervention in workplace affairs, and they acknowledge the right of WorkCover Inspectors to enter their workplace.

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[36]   S.31AG *Occupational Health & Safety Act 1983* and Parts 5 and 7 *Industrial Relations Act 1996.*

10.1 Should there be any changes to make it easier for individuals or unions to bring prosecutions for breaches of the Occupational Health and Safety Act?

10.2 Is the current legislative framework too complex?

10.3 Should written OHS policies be mandatory?

10.4 Should there be a provision for conscientious objection to the right of entry to a workplace by a union?