

**REVIEW OF THE OCCUPATIONAL
SAFETY AND HEALTH ACT 1984**

FINAL REPORT

R Laing

14 November 2002

Foreword and Acknowledgments

It is necessary to acknowledge and to express my gratitude to all those who contributed to this Review. Although few have been referred to in the report, the views of every contributor have been considered and taken into account. Not all will agree with all the results but where possible I have reconciled each contribution. Not all views were reconcilable and in those cases I have relied on the material and evidence available to the review in reaching my conclusions. Therefore, while I thank those who contribute, I accept the responsibility for this report.

I wish to record my thanks to Chris White the Executive Officer to the Review who assisted in all aspects of the Review and who helped prepare and edit this report. While I accept responsibility, most of the report is a collaborative effort and it would have been a diminished document without his valuable input and effort. I also thank Leonie Balcombe who ably assisted with editing the report.

Finally I acknowledge my family, friends and mentors from whom I have been separated while trying to get it done.

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Summary of Recommendations

- R:1 It is recommended the Act be amended to include a requirement to identify hazards, assess the risk associated with those hazards and reduce or control such risks as a duty of employers, self-employed persons and persons in control of workplaces. (p68)
- R:2 It is recommended the Commission consider and recommend options for improving the assistance given to, and the encouragement of, employers to observe their duties through systematic safety and health planning and consultation. (p69)
- R:3 It is recommended, consistent with the recommendations of the Commission, the Act be amended to include a limited duty of employers to provide safe accommodation, subject to the criteria:
- accommodation should be essential to the performance of the work and the employee is required to live there;
 - if a separate tenancy agreement or some other legal instrument applies, the new provision of the Act should not apply; and
 - no practicable alternative accommodation is provided or available. (p71)
- R:4 It is recommended *s.19(4)* of the Act be redrafted, in order to:
- ensure the provision can be readily understood by parties in the workplace;
 - clarify the meaning of “control”;
 - ensure the provision can be applied to agencies of the Crown; and
 - maintain the current exclusion of private persons. (p73)
- R:5 It is recommended the Commission develop a code of practice or guidance note covering the duties of principals and contractors. This should include guidelines for establishing safety requirements in contracts. (p73)
- R:6 It is recommended the Act be amended to require an employer to advise an employee of the action proposed to be taken in respect of any hazard or injury reported by the employee under *s.20*. (p76)
- R:7 It is recommended *s.21* of the Act be amended to:
- clarify those duties that apply to self-employed persons only, those that apply to employers only and those that apply to both; and
 - specify the duty of employers and self-employed persons to protect non-employees from adverse consequences of work so that it extends to all aspects of work including systems of work and hazards arising after direct work activity has ceased. The application of the section should be restricted to workplace initiated safety and health matters. (p79)
- R:8 It is recommended the Act be amended to require where practicable and reasonable, workplace visitors to comply with the directions of the employer or the person in control of the workplace in relation to securing occupational safety and health. (p80)
- R:9 It is recommended that *s.22* of the Act be amended to require employers and self-employed persons to inform those persons in control of workplaces of each situation that constitutes a hazard and which is the responsibility of the person in control of the workplace to remedy. (p81)
- R:10 It is recommended the Commission develop a code of practice on the duties of architects, engineers and designers. The code should address the separate responsibilities of designers and constructors. (p83)

Summary of Recommendations

- R:11 It is recommended that in addition to the penalties applied, *s.23(1)* of the Act be amended to provide that manufacturers, etc be made responsible for the repair, removal or alteration of reasonably foreseeable hazards in plant supplied to a workplace. (p84)
- R:12 It is recommended the Commission consider the means of amending *s.23* to:
- include “items” within its scope;
 - include a requirement to consider the handling of plant, substances and items in addition to the existing criteria of installation, maintenance and use; and
 - ensure consistent standards are applied where possible between locally made and imported equipment. (p84)
- R:13 It is recommended the Act be amended to provide power for regulations that place duties on the owners of plant used at a workplace. (p85)
- R:14 Notwithstanding any specific recommendations relevant to this issue, it is recommended the Act be amended to:
- extend coverage to a range of alternative arrangements that may currently fall outside both the traditional employer/employee relationship and the principal/contractor arrangement provided for under the Act. In particular, the Act should apply employers’ obligations to persons who are employed under labour only arrangements and subject to the direction and control of employers or principals; and
 - clarify its intent and to make clear that an employer’s duties under *s.19* apply to both labour hire firms and principals in relation to matters under the respective control of each party. (p90)
- R:15 It is recommended the Act be amended, at the earliest opportunity, to provide coverage for Police Officers. (p91)
- R:16 It is recommended the definition of “self-employed person” in the Act be amended so that where the context permits it includes a corporate entity. (p92)
- R:17 It is recommended the Act be amended to provide for:
- prosecution of State Government departments and agencies for breaches of the Act; and
 - the issuing of improvement and prohibition notices to State Government departments and agencies. (p94)
- R:18 It is recommended the Commission:
- develop and issue guidance or advisory notes incorporating information and advice on the preparation of workplace safety and health policies and the management of priority safety issues for businesses of all sizes; and
 - develop strategies for promotion of the benefits of effective occupational safety and health management systems. (p98)
- R:19 It is recommended the Commission develop guidance material on best practice approaches to occupational safety and health training including induction training. (p101)
- R:20 It is recommended the Commission review the adequacy of the existing approach to the approval of training providers. (p101)
- R:21 It is recommended the Commission develop strategies aimed at promoting the effective reporting of occupational safety and health performance by companies and Government agencies, including within Annual Reports. (p101)

- R:22 It is recommended that the Commission be directed to develop appropriate substitutes for *s.28A* of the Act with a view to the introduction of more suitable and effective provisions. (p108)
- R:23 It is recommended disputes over entitlements under *s.28* be resolved in the Occupational Safety and Health Tribunal. (p109)
- R:24 It is recommended that the Commission investigate and develop recommendations to Government to remove the use of occupational safety and health as a bargaining instrument in relation to other industrial claims. (p109)
- R:25 It is recommended WorkSafe and WorkCover WA revise their data sharing agreement to facilitate the use of data for operational purposes and to ensure WorkSafe receives adequate and timely advice of the incidence of serious injuries and diseases while observing WorkCover's confidentiality obligations. (p111)
- R:26 It is recommended the Act be amended:
- to require the notification of fatalities and specified injuries occurring to non-employees at a workplace by the person in control of the workplace; and
 - in relation to accident notification requirements, to stipulate a defined time period within which notification must occur. (p115)
- R:27 It is recommended that *r.2.4(1)(e)* of the Regulations be amended to make clear the date on which the employer's obligation to notify absences from work of greater than 10 days commences. (p115)
- R:28 It is recommended that the *Workers Compensation and Rehabilitation Act 1981* be amended as necessary to provide protection for injured employees dismissed contrary to *s.84AA* of that Act in accordance with the recommendations contained in the *Report on the Implementation of the Labor Party Direction Statement in Relation to Workers' Compensation (Guthrie Report)*. (p115)
- R:29 It is recommended WorkSafe review its processes for competency assessment and ensure sufficient allocation of resources so as to ensure the integrity of competency certification. The review should ensure all necessary audit and quality control mechanisms are in place to identify and remove assessors who do not fulfil their assessment obligations. (p118)
- R:30 It is recommended the Regulations be amended to require competent persons to report to the WorkSafe Western Australia Commissioner the outcomes of inspections of high hazard plant and equipment where recommended corrective work has not been carried out or where major faults are noted at the time of inspection which may lead to plant failure. (p119)
- R:31 It is recommended the Act be amended to provide for serious breaches of the *Occupational Safety and Health Act 1984* to be heard as indictable offences by superior courts. (p122)
- R:32 It is recommended the Act be amended to more clearly establish the accountability of corporations, their directors and senior officers for the occupational safety and health of employees. (p129)
- R:33 If the liability of corporate directors and senior officers is not extended, it is recommended *s.55* be amended to make clear the same maximum penalty as would apply to a body corporate applies to a person convicted under *s.55* of the Act. (p129)

Summary of Recommendations

- R:34 It is recommended the Act be amended to provide for negligent senior officers of corporations to be held accountable for the death or serious injury of employees. Offences would apply where a corporation owes a duty of care to the deceased or injured person, where senior officers have breached their duty of care and the breach amounts to gross negligence. In the event that investigation procedures under the *Criminal Code* and/or amendment of the *Criminal Code* provide an effective alternative process, this recommendation should lapse. (p132)
- R:35 It is recommended the maximum penalties in the Act be increased to reflect penalty levels in other jurisdictions and community expectations. These should include imprisonment for serious offences involving gross negligence resulting in serious injury or death. (p135)
- R:36 It is recommended the Commission and WorkSafe pursue the development and application of sentencing guidelines for offences under the *Occupational Safety and Health Act 1984*. If necessary, specific provision should be made in the Act for sentencing guidelines to be issued by an appropriate authority. (p136)
- R:37 It is recommended the Act be amended to provide for alternative non-monetary penalties, aimed directly at improving occupational safety and health, for lesser offences under the Act. (p137)
- R:38 It is recommended the WorkSafe Prosecution Policy be revised and to formalise the current practice whereby the reasons for each decision in respect of prosecutions are confirmed in writing. (p140)
- R:39 It is recommended WorkSafe develop policy and processes for the investigation and prosecution of breaches of the Act related to the health of employees. (p141)
- R:40 It is recommended the Act be amended to provide for a mandatory on-the-spot fine (subject to an appeal mechanism) for the offence at *s.48(4)* of failing to comply with an Improvement Notice by the due date. The imposition of the fine should not remove the obligation to comply with the notice nor preclude prosecution if warranted. (p148)
- R:41 It is recommended the Act be amended to:
- provide a simplified election process for safety and health representatives;
 - move the default (minimum) provisions for the election of safety and health representatives to the Regulations;
 - enable the WorkSafe Western Australia Commissioner to approve alternative arrangements for the election of safety and health representatives where the Commissioner is satisfied there is genuine agreement between an employer and employees; and
 - provide that any disputes in relation to elections be resolved by the WorkSafe Western Australia Commissioner with appeal to the Occupational Safety and Health Tribunal. (p160)
- R:42 It is recommended Regulations concerning the election of safety and health representatives:
- enable employers and employees to agree upon a workplace specific approach to casual vacancies as part of the consultation phase occurring prior to an election under *s.30(3a)*;
 - provide for the filling of casual safety and health representative vacancies; and
 - establish a default procedure for the filling of casual safety and health representative vacancies. (p160)

Summary of Recommendations

- R:43 It is recommended that as appropriate the Act or Regulations be amended to establish that responsibility for notification to the WorkSafe Western Australia Commissioner of a person's election as a safety and health representative rests with the person conducting the election. (p161)
- R:44 It is recommended that after necessary consultation, the Act or Regulations be amended as appropriate or necessary to ensure that the WorkSafe Western Australia Commissioner is informed when a person ceases to hold the position of safety and health representative. (p162)
- R:45 It is recommended that the relevant union conduct the election of safety and health representatives where there is at least one member and the majority of employees request the union to conduct the election. (p164)
- R:46 It is recommended *s.56* of the Act be amended to provide that where the facts of an alleged discrimination are proved, the onus of proof rests with the defendant to satisfy the Court that legitimate actions of the employee in relation to occupational safety and health were not the dominant or substantial reason for the discrimination. (p167)
- R:47 It is recommended the Act be amended to provide, in cases where discrimination is proved, for the Court to have the power to order the defendant to:
- pay the employee a specified sum as a reimbursement for lost wages and salaries; and/or
 - reinstate dismissed employees to their previous position or a similar position. (p169)
- R:48 It is recommended the Commission consider further amendments under the Act to extend the protection against discrimination on safety and health grounds to non-employees in the workplace. (p169)
- R:49 It is recommended *s.56(1)(d)* of the Act be amended to include the WorkSafe Western Australia Commissioner and relevant officers of the Department amongst those to whom an employee may complain in relation to discrimination. (p170).
- R:50 It is recommended the Act be amended to:
- provide a simplified process for the establishment of safety and health committees; and
 - move default (minimum) provisions for the establishment and operation of safety and health committees into the Regulations. (p172)
- R:51 It is recommended Regulations concerning the establishment of safety and health committees provide:
- the composition of safety and health committees to be as agreed by the employer, safety and health representatives and interested employees; and
 - disputes arising from the consultation of the parties shall be referred to the WorkSafe Western Australia Commissioner for resolution with appeal to the Occupational Safety and Health Tribunal. (p172)
- R:52 It is recommended the Act be amended to provide for elected safety and health representatives who have received a particular level of training, assessment and certification to be authorised to issue Safety Alerts (or Cautions) in relation to equipment or processes where the safety and health representative is of the opinion that a contravention of the Act or Regulations is occurring or that the operation or characteristics of the equipment or process has developed an additional risk. No other person would be authorised to remove the Safety Alert without the agreement of the safety and health representative or WorkSafe Inspector. (p180)

Summary of Recommendations

- R:53 It is recommended in relation to Safety Alerts the Act provide that:
- only elected safety and health representatives who have been assessed as competent following completion of a Commission accredited introductory training course, to have the authority to issue Safety Alerts;
 - safety and health representatives would not to have the right to issue the Safety Alert until the employer has been consulted and has refused to remedy the alleged defect, breach of the Act or Regulations;
 - safety and health representatives should be required, where practicable, to consult with another safety and health representative or appropriate person before issuing a Safety Alert;
 - employers to be able seek a review of a Safety Alert by an Inspector if the employer disagrees with the Alert;
 - safety and health representatives would have the right to notify WorkSafe if an Alert remains unresolved within the time specified or after a suitable period (perhaps 3 months) whichever is the later; and
 - sanctions would apply to safety and health representatives who misuse the power to issue Safety Alerts. (p180)
- R:54 It is recommended that the provisions concerning Safety Alerts would expire after five years unless confirmed after a further review. (p181)
- R:55 It is recommended the Commission revise its accreditation criteria for introductory training courses for safety and health representatives to provide for optional assessment of the competency of course participants. It is also recommended that the Commission review existing training arrangements to establish whether these optimise training or whether further change is required. (p186)
- R:56 It is recommended the Commission apply its accreditation criteria for introductory safety and health representative training so as to provide for:
- flexibility in the delivery and content of courses while ensuring maximum benefits for safety and health representatives;
 - joint training for safety and health representatives, managers and supervisors; and
 - competency-based training. (p188)
- R:57 It is recommended *s.35* of the Act and/or *r.2.2* of the Regulations be amended to require an employer to meet the reasonable costs of enrolment or attendance fees associated with the introductory training of a safety and health representative. (p189)
- R:58 It is recommended the Commission also review *r.2.2* to determine whether any changes are necessary to the payment entitlements of safety and health representatives attending accredited introductory and post-introductory training, including in relation to attendance at training when rostered off work. (p189)
- R:59 It is recommended the capacity of the Commission to contribute to policy development on legislation dealing with occupational safety and health be extended through the prescribing of all relevant statutes (including the *Petroleum Safety Act 1999*) for the purposes of *s.14(1)(b)* (p196)
- R:60 It is recommended the *Timber Industry Regulation Act 1926* be repealed as soon as possible. (p197)
- R:61 It is recommended responsibility for the *Explosives and Dangerous Goods Act 1961* be transferred to the Minister for Consumer and Employment Protection. (p199)

- R:62 It is recommended the Explosives and Dangerous Goods Division of the Department of Mineral and Petroleum Resources be transferred to the Department of Consumer and Employment Protection as a dedicated and specialist division. (p199)
- R:63 It is recommended that the objectives, general duties and processes common to all industry groups should fall under the *Occupational Safety and Health Act 1984* and that relevant provisions be transferred from the *Mines Safety and Health Act 1994* for that purpose and towards the eventual amalgamation of the legislation into a single statute. Specific residual and speciality operations of *Mines Safety and Inspection Act 1994* should be continued. This recommendation should be concluded in conjunction with relevant recommendations of the Report of the Review of the *Mines Safety and Inspection Act 1994* and as outlined in Part 8 of this Report. (p204)
- R:64 It is recommended the WorkSafe Commission, through its Construction Industry Safety Advisory Committee, develop options for legislative change to address the unique requirements of the construction industry in respect of occupational safety and health. (p212)
- R:65 It is recommended the Act be amended to provide for a specialist Occupational Safety and Health Tribunal to deal with all non-judicial matters. The Minister could appoint the Tribunal as part of the State Administrative Appeals Tribunal recently announced by the Government or in the alternative the tribunal could be formed from the Western Australian Industrial Relations Commission after consultation with the Chief Industrial Commissioner. The Tribunal should deal with occupational safety and health matters as a priority and have alternative duties when not functioning as the Occupational Safety and Health Tribunal. (p220)
- R:66 It is recommended the Commission and WorkSafe implement the Labour Ministers' agreement to reduce the number of Australian Standards referenced in the Regulations. It should minimise unnecessary reference material and make essential material freely available to the community or at minimum cost so that there is no misunderstanding of the existing minimum requirements. (p225)
- R:67 It is recommended WorkSafe recommit to the production and publication of statistical information on the incidence and characteristics of occupational safety and health in Western Australia. (p233)
- R:68 It is recommended WorkSafe and WorkCover WA jointly develop a program for the publication of occupational safety and health statistical information. (p233)
- R:69 It is recommended the Commission take an active role in the development of research, in particular in relation to identifying and developing effective means for establishing or calculating the incidence and impact of workplace injury and ill health beyond the data sources now available. Health issues should be regarded as a priority. (p235)
- R:70 It is recommended WorkSafe review and update the SafetyLine information services including the SafetyLine magazine and SafetyLine:Online Internet service with a view to ensuring they remain effective and authoritative sources of information on occupational safety and health in Western Australia. (p239)
- R:71 It is recommended WorkSafe develop an Information Plan dealing with the development and dissemination of occupational safety and health information. The Information Plan should provide for:
- the establishment and promotion of a high profile information service to assist the public to access information on safety and health obligations and supporting material;
 - the continued production of codes of practice and guidance notes having regard to the desirability of using "plain English"; and

Summary of Recommendations

- WorkSafe to continue existing services including distribution of information in print and on the Internet. (p242)
- R:72 It is recommended the Commission be continued and maintain its role in improving occupational safety and health in Western Australia. (p245)
- R:73 It is recommended the Government review the financial assistance provided to Commission members and consider more equitable alternatives. (p251)
- R:74 It is recommended *s.6(1)* of the Act be amended to:
- rename the WorkSafe Western Australia Commission as the “Commission for Occupational Safety and Health”; and/or “Occupational Safety and Health Commission”; and
 - provide that the Commission may use, and operate under the name, “WorkSafe Western Australia Commission” or similar. (p253)
- R:75 It is recommended *s.6(2)(d)(iii)* of the Act be amended to make clear that the Minister is entitled to consult parties in addition to UnionsWA and the Chamber of Commerce and Industry of WA in nominating the expert members of the Commission. (p256)
- R:76 It is recommended the Minister alter the terms of office of expert members of the Commission so that one expert position becomes available for appointment each year over a three-year cycle. (p256)
- R:77 It is recommended the Commission report to the Minister on the desirability of having the Commission Chair or other independent person chair meetings of advisory committees when these are formed. (p259)
- R:78 It is recommended Commission advisory committees and working parties, where relevant, have broader representation from organisations and individual experts beyond those represented on the Commission (p260)
- R:79 It is recommended the Act be amended to require UnionsWA and the Chamber of Commerce of WA to include at least one person with experience in the mining industry amongst their nominees to the Commission. Such nomination should be made after advice is received from the mining unions and the Chamber of Minerals and Energy respectively. (p263)
- R:80 Contingent upon implementation of Recommendation 63, it is recommended the Act be amended to provide for a Mining Industry Safety Advisory Committee to be established as a permanent advisory committee to the Commission. The Committee should:
- support the Commission as the pre-eminent body for occupational safety and health in the mining industry;
 - have a similar structure to the Commission and include members able to effectively represent their constituency and at least two members being members of the Commission;
 - have an independent chairperson; and
 - continue to advise the Minister responsible for mining safety and health on matters specific to the mining industry. (p263)
- R:81 It is recommended the Commission continue to be funded and supported at least at its present level with additional funds provided for further research. (p267)

- R:82 It is recommended Departmental administrative structures related to occupational safety and health be reviewed in two years to establish whether arrangements introduced in July 2001 have been effective and what, if any, further change needs be made to support effective administration of occupational safety and health in Western Australia. (p269)
- R:83 It is recommended WorkSafe implement further inspection activity. These should include strategies based on programmed “routine” inspections of workplaces selected according to geographic, industry or hazard priorities. Statistically generated program inspections and local area blitzes based on specific hazards should be undertaken regularly. (p273)
- R:84 It is recommended the number of active WorkSafe inspectors be increased. The increased resources should be used to support a higher level of workplace inspections. (p277)
- R:85 It is recommended WorkSafe undertake the employment of “trainee” or “graduate” inspectors. (p277)
- R:86 It is recommended *s.43* of the Act be amended to provide for a specific power of an inspector to provide information and advice. (p280)
- R:87 It is recommended *s.43(1)* of the Act be amended to:
- remove any implication that an inspector cannot interview persons he or she “finds” at a workplace after such persons have left the workplace; and
 - provide an inspector with the power to interview any person an inspector has reason to believe can provide information relevant to the inspector’s investigation. (p281)
- R:88 It is recommended that the two-year time period specified in *s.43(1)(k)* be amended to three years to be consistent with the time period for commencing proceedings for an offence against the Act. (p282)
- R:89 It is recommended the Act be amended to provide that either the inspector or the person being interviewed may, at any time, including after the interview has commenced, require the interview be conducted in private. (p282)
- R:90 It is recommended the Act be amended to provide that an inspector has the power to identify, by any reasonable means, persons who fail to provide their name and address when requested under *s.43(1)(m)*. (p282)
- R:91 It is recommended *s.45* of the Act be amended to provide that, where there is more than one employer in relation to a workplace, the inspector is required to take reasonable steps to notify each employer with employees at the workplace and relevant to the inspector’s activity, of the inspector’s presence. (p283)
- R:92 It is recommended *s.47(2)* of the Act be amended to specify the protection against self-incrimination that applies in relation to a company in circumstances where a director of the company is compelled to answer questions or provide information. (p283)
- R:93 It is recommended the Act be amended to clarify that “information” provided as required under the Act includes documents and is therefore protected where it is self-incriminating by virtue of *s.47(2)*. (p284)

Summary of Recommendations

- R:94 It is recommended the Act be amended to enable:
- the WorkSafe Western Australia Commissioner to appoint a person holding a position or appointment under a statute to be an honorary or supplemental inspector; and at the Commissioner’s discretion, to cancel any such appointment; and
 - an honorary or supplemental inspector, in respect of the State, or the area of the State for which he or she is appointed, be provided such of the powers conferred by or under the *Occupational Safety and Health Act 1984* on an inspector as are specified in the instrument of appointment. (p290)
- R:95 It is recommended a review of the operation of provisions relating to honorary or supplemental inspectors should take place within five years of their commencement. (p291)
- R:96 It is recommended WorkSafe establish a complaints policy providing for a transparent process for dealing with complaints against inspectors or other staff members. (p292)
- R:97 It is recommended the Act be amended to require the display of any modification to an improvement or prohibition notice as a consequence of a review, until the notice, as amended, has been complied with. (p293)
- R:98 It is recommended the Act be amended to give the WorkSafe Western Australia Commissioner the power to cancel a notice. Written reasons should accompany each cancellation. (p293)
- R:99 It is recommended WorkSafe ensure that all Improvement Notices are complied with or dealt with by review. (p294)
- R:100 It is recommended WorkSafe develop improved communication strategies to ensure better contact with occupational safety and health professionals. (p297)
- R:101 It is recommended a definition of “import” be included in the Act to make its meaning clear. This definition should extend to the bringing of plant or substances into the jurisdiction of the State, whether or not from overseas. (p299)
- R:102 It is recommended the definition of “supply” in the Act be amended to clarify whether activities such as conducting an auction and selling a business are included. (p299)
- R:103 It is recommended *s.53(b)* of the Act be amended to replace the existing averment in relation to an employer with two separate averments. The first being an averment that a particular person was an employer and secondly that an averment that a particular person was an employer of “particular persons”. (p300)
- R:104 It is recommended *s.53* of the Act be amended to include provisions enabling averments that:
- a particular document is a code of practice as defined under *s.3* of the Act;
 - a particular document is an “Australian Standard”; and
 - a complainant has authority to prosecute. (p300)
- R:105 It is recommended that “Australian Standard” be defined in *s.3* of the Act. (p300)
- R:106 It is recommended gender references be removed from the Act in accordance with modern expression. (p301)
- R:107 It is recommended legislative action be taken to address the anomalies arising from the enactment of *s.33(2)* of the *Acts Amendment (Occupational Health, Safety and Welfare) Bill 1987*. (p302)

1.0 Introduction

1.1 Report

1. This is a report to the Minister for Consumer and Employment Protection in conformity with *s.61* of the *Occupational Safety and Health Act 1984*.

1.2 Constitution of Review

2. *S.61* of the *Occupational Safety and Health Act 1984* provides,

“61. (1) The Minister shall carry out a review of the operations of this Act on every fifth anniversary of the commencement of this Act and in the course of such review the Minister shall consider and have regard to --

 - (a) the attainment of the objects of this Act;
 - (b) the administration of the Acts and laws relating to occupational safety and health administered by the Minister;
 - (c) the effectiveness of the operations of the Commission, any advisory committees and the department;
 - (d) the need for the continuation of the Commission and any committees established under this Act;
 - (e) such other matters as appear to him to be relevant.”
3. The Review was commenced by Senior Commissioner Fielding of the Western Australian Industrial Relations Commission. Upon the retirement of Senior Commissioner Fielding, I undertook the Review process and have had carriage of matters since that time. The processes commenced by Senior Commissioner Fielding were continued and further opportunities were given for submissions to be received by the Review. During the course of the Review a suggestion was made by the Hon Minister for State Development that a draft Report should be issued for public comment before the Report was finalised. I concluded that was a desirable course and, following endorsement by the Hon Minister for Consumer and Employment Protection it was put into effect. As a result, this final Report incorporates the comments and further submissions that have been made in response to the consultation draft Report.

1.3 Terms of Reference

4. The provisions of *s.61* were the essential terms of reference for the Review. These were read broadly and there was no requirement to add to them. I considered that paragraphs “(a) attainment of the objects of this Act” and “(e) such other matters as appear to him to be relevant” of *s.61* were adequate to cover remaining issues and this has proved to be the case. Those making submissions were not constrained from making any observation they considered relevant. I have referred in this Report to all matters considered relevant to the terms of reference.
5. Matters generally referred to in the submissions and some of the more significant issues relating to the terms of reference have been included in *Part 3: Some General Observations*. The remaining discussion and recommendations have been included under the specific topic headings which broadly follow the same format as the terms of reference.
6. I was also requested to review the *Mines Safety and Inspection Act 1994*. It was originally intended that both Reviews would be completed over a work period of three months. That was extended to four months work time completed over the past year or so following the decision to issue the draft reports for consultation. That has meant that the Reviews have concentrated on essentials rather than on a wide-ranging consideration of either the intellectual development of new initiatives or of any extensive review of what is taking place elsewhere in the world. That is not to say that this Report does not suggest new initiatives or that developments elsewhere have been ignored. It is simply that there has not been the opportunity to canvass all the areas that may otherwise have been explored. Indeed, unlike the earlier Review in 1992, I considered it was not necessary to do so because it is not too extreme to observe that despite the significant areas which need improvement, Western Australia now has an occupational safety and health environment which is comparable with best practice elsewhere in Australia. The WorkSafe Western Australia Commission itself has succeeded beyond earlier expectations and is capable of addressing most issues.
7. The legislation is fundamentally sound although in need of amendment to improve its operations. Many of the present difficulties are process-based and go to the way in which the legislation has been received and implemented. Other changes reflect the changing face of occupational safety and health and the maturing both of the legislation and the organisations that have applied the legislation to the way they work. While more time would have been useful, I am generally satisfied that I have been able to fulfill the essential requirements of my tasks.

8. It is necessary to note in relation to the terms of reference that some making observations about the consultation draft report expressed concern that it did not address what those correspondents termed the essential terms of reference. It was asserted the essential obligation was to establish only whether the Act has resulted in the promotion and improvement of the safety and health of persons in the workplace. In that regard, it was argued that the Review did not adequately recognise the advances and improvements in occupational safety and health over recent years or provide proof in support of the various contentions made in the report.
9. I consider that there is some basis to the criticism that the consultation draft report did not outline in great detail the successes of the last few years. While the level of success was noted, the Review was concerned more with the future than the past. In a similar vein, few praise the majority of motorists who drive safety when the road toll is discussed and business seldom praises the benefits of the existing institutional features of the economy preferring instead to seek and demand improvement. This Review does no more than to follow a similar course in the interest of improved occupational safety and health. It is accepted that much good work has been done and there is little reason to change some of the existing strategies that do work. However there is a great need to connect with those who are not participating in the process and for continued improvement.
10. The assertion that the Review should have concentrated on a single issue must be rejected, as must the contention that each conclusion should have been accompanied by proof. The Review is a survey of the existing legislative structures and operations in order to assist the Minister in considering the obligations under *s.61* which are far broader than the assertions suggest. I accept that the recommendations in the Report are not always based on irrefutable evidence. I rather suspect, however, that in the field of occupational safety and health no less than any other that if the community waited for the proof on each occasion any advancement would be piteously slow. As *s.61* provides the Minister a wide discretion as to the review process, that is the path taken in this Report. It is not always feasible to establish one way or the other whether assertions and conclusions in the Report can be sustained in an evidentiary sense. It has therefore been necessary to exercise judgement on the basis of the material and outcomes within the context of the known facts.

11. Similarly it is not possible to establish beyond doubt whether a particular outcome will operate as expected until implemented or trialed. However, consideration has been given to those aspects and a judgement made as to the most likely results. One of the advantages of the five yearly review process has been the opportunity to review past changes to see whether they have met their objectives and whether further change is required. *S.61* itself also invites the exercise of judgement and discretion. I have endeavoured to ensure that, so far as is possible, the suggestions and recommendations are based on solid reasons and sound judgement.

1.4 Review Conduct

12. In January 2001, submissions were invited from the public by way of a number of press advertisements. Senior Commissioner Fielding also invited comment from most key organisations and individuals involved in occupational safety and health. Some 37 submissions were received as part of the initial process.
13. With the transfer of the Review, a further opportunity for submissions was provided through a press advertisement. A total of 58 written submissions were received regarding the *Occupational Safety and Health Act 1984* over the initial and subsequent comment periods. Subsequent to the release of the draft consultation report, a further period of seven weeks was provided for comment. A further 29 written submissions were received by the closing date of 5 April 2002. All submissions have been considered in the course of the Review.
14. In addition to the written submissions and on request, parties provided separate or additional information through meetings and personal interviews. During the course of the Review, I also took advantage of many opportunities to discuss aspects of occupational safety and health with those interested or involved in workplace activities. Where possible, those seeking to add to their submission were interviewed although the time constraints limited some opportunities.
15. I met with representatives from most of the major organisations involved in occupational safety and health including the Chamber of Commerce and Industry of Western Australia (CCIWA), UnionsWA, (UWA) and the Chamber of Minerals and Energy (CME). Meetings were also held with some individual members of the WorkSafe Commission.

16. A meeting of the WorkSafe Western Australia Commission was attended on 5 September 2001. I also attended a seminar on construction safety conducted by the Commission on 12 September 2001.
17. A number of meetings were held with officers of WorkSafe and with the WorkSafe Western Australia Commissioner. In addition, a well-attended meeting was held with WorkSafe inspectors on 12 September 2001. Meetings were also held on request with some individual inspectors.
18. Following the release of the draft report, a series of meetings were held with those who wished to put their views and, despite the severe time constraints, most requests were met. These meetings provided an opportunity for more extensive explanation and discussion of the issues and for the parties to further outline their views. A number of changes made to this final Report and recommendations resulted from these meetings.
19. In addition to considering the submissions, a wide range of information was reviewed. This included the reports of other and earlier reviews, statistical information, academic research, Parliamentary questions and debates as well as news articles and reports.

1.5 References

20. Unless specifically indicated, references to “the Act” and “the Regulations” in this Report should be read as referring to the Western Australian *Occupational Safety and Health Act 1984* and the *Occupational Safety and Health Regulations 1996* respectively. References to “WorkSafe” relate to the WorkSafe Division of the Department of Consumer and Employment Protection (DOCEP). The “Department” has other responsibilities in the areas of labour relations and consumer protection. At the time at which it made its original submissions to the Review, WorkSafe was a separate department of the Western Australian public service. References to “the Commission” are to the WorkSafe Western Australia Commission. In some material the Commission is also referred to as the Commission for Occupational Safety and Health.

1.6 Submissions

21. As noted, 58 written submissions were originally received with some organisations making more than one submission. They ranged from detailed submissions covering many issues to some which referred to only a few matters of concern. Of the total, 14% may be termed personal submissions, while 64% represented the views of organisations. So far as can be ascertained, 11% were from employers and 11% from employees. Industry associations or unions accounted for 24%. Of the total, 21% were from the public sector, while 7% were from persons involved in academic institutions and 16% from occupational safety and health professionals or consultants.
22. Following the release of the consultation draft report, a further 29 written submissions were received. Most of these were responses to the draft report and from organisations or individuals who had made a previous submission although some were primary submissions.
23. The identity of those making submissions has not usually been disclosed in the body of the Report as it adds little to the material. While a list of those making written submissions has been attached to the Report¹, and although there were few, requests for confidentiality have been respected. The many and wide ranging verbal submissions, interviews and exchanges during the period of the Review and following the release of the draft report have not been detailed although they have all contributed to the final outcome.
24. While a considerable range of matters was covered in the submissions, there was widespread support for the existing legislative system to be retained. None suggested that the current structure ought be disbanded. Many suggested improvements and some provided significant criticisms. In that regard, a small number argued that some procedures or strategies had failed or were a misdirection of resources. Most, however, indicated that there had been satisfactory progress and, despite the need for improvement and change, argued that further developments should be incremental rather than any great change in direction. These matters have been included in the discussion and recommendations.

¹ See Appendix 3

25. Those making comment on the draft report often observed that the report did not place enough emphasis on education, consultation and co-operation as a means of achieving changed attitudes especially among employers. While it is true that much has been achieved through those processes and while it is expected that they will be continued, they are clearly not sufficient as many continue to ignore their obligations or give them low priority even in the face of knowledge and consultation.
26. Where duties are ignored alternatives must be developed. Merely because these include prescriptive elements does not mean that it is a return to a regulatory regime or prescription. Any general duties legislation will require enforceable provisions because not everyone will willingly fulfil their duties. In Western Australia no less than elsewhere, some like the idea of self-regulation where it means minimalist or no regulation. Like the self-regulatory taxation system, however, to be effective the power of the law also needs to be respected.
27. Similarly, a number of submissions in response to the draft Report either suggested alternatives or highlighted what were seen to be inadequacies in specific draft recommendations. In some cases, these have been issues of substance and the recommendations have been reconsidered. However, others go to expression or alternative ways of achieving the outcome. These have not always been changed because it is not the words of the recommendations that are important but the issues they address and the direction they propose. Professional safety and health advisers and legislative draftspersons will effectively convert the recommendations and suggestions into legislation and processes.
28. The submissions were continually reviewed in an endeavour to ensure all matters were properly considered. However, not all issues have been specifically referred to here. Some were more directly related to operational matters and those that are relevant will be referred to WorkSafe or the Commission; some have been incorporated in the general discussion and some were seen to have a lower priority and will need to be addressed only when more fundamental matters are in place.
29. It is also important to note that a number of organisations provided submissions that included significant, but well known, positions. For example, the union and employer organisations have again put their differing views on the benefits of a consultative and co-operative environment in comparison to a regulated environment and therefore the extent the Act ought interfere in workplaces. These have been addressed in the Report but primarily in terms of the detail rather than philosophy.

30. The Review was not provided with any substantial basis for moving away from what is known as the “Robens” model² and this Report accepts that as given. Instead the debate goes to how it is best implemented in both legislation and practice. In that context, it is accepted that where the general duty of care, co-operation and consultation is as comprehensive as Robens envisaged it should be, there may be little basis for interference by the legislature or the regulator. Where, however, that acceptance, co-operation and consultation are deficient, legislation and regulation is necessary to encourage greater co-operation and to provide protection in the workplace.
31. A number of submissions warned that the evident lack of substantial public debate was not an indication that present arrangements are satisfactory. Rather, it is an indication of an increasing problem of complacency where safety and health is simply not being considered. Those submissions were confirmed by some of the statistics that indicate that workplace involvement in initiatives to improve workplace safety and health may be decreasing rather than increasing. As well, the changing nature of work and the work environment is not conducive in many cases to dynamic and positive safety and health initiatives. As a consequence it is argued the legislation, while sound, has not achieved intended outcomes and relatively few workplaces have effective systems for safety and health. These issues are among those central to the “general observations” in Part 3 of this Report.
32. Another area of difficulty raised in the submissions came from those who had family members involved in workplace fatalities. Without exception these expressed concern about the low level of penalties applied in relation to those events. Each also referred to the apparent imbalance of treatment for those who infringe in other areas of the law compared to those who fail their duty under occupational safety and health legislation. It is impossible not to be affected by the knowledge that many, if not all of these fatalities, could have been avoided. It is also difficult to accept that the penalty system now in place is acceptable where penalties for much less serious matters in other areas of law are larger by several magnitudes. If the community more closely experienced some of these tragic and unnecessary events, it could result in a different attitude to occupational safety and health.

² See Part 2: Background to the Act

1.7 Structure of the Report

33. As noted, the Report is structured around the Review requirements of *s.61(1)* of the Act. There is considerable overlap between the terms of reference at *s.61(1)* and the objects of the Act at *s.5*. In many respects the review of the objects under *s.61(1)(a)* would cover most matters. To provide a basis for the Report however, and as noted, some general observations are included at Part 3. A broad distinction has been made between issues relating to occupational safety and health law (dealt with in Parts 4 to 6) and those dealing with the functions and operations of the Commission and WorkSafe (Part 8). Even though they may concern matters arising from an object or related to the Act generally, issues relating to the operation of the Commission and WorkSafe have largely been dealt with separately.
34. It has not been possible to put each topic into a specific compartment in every case and the placement of an issue has sometimes involved an arbitrary decision. Where possible, most have been included in the one area so as to avoid unnecessary replication, although some issues or parts of specific issues have been included in more than one place.
35. With reference to the detail, Part 2 of the Report provides the background and history of the development of occupational safety and health legislation in Western Australia. In Part 3 are general observations on what appear to be some of the major issues in occupational safety and health in Western Australia. The issues have been outlined and some directions established.
36. Parts 4 to 7 provide discussion and recommendations on the first two elements of the terms of reference: the attainment of the objects of the *Occupational Safety and Health Act 1984* and the administration of the Act and other occupational safety and health laws. Part 8 is concerned with the operations of the WorkSafe Western Australia Commission and the Department (i.e. WorkSafe). Part 9 deals with other matters.

2.0 Background to the Act

2.1 Background

37. The history of the *Occupational Safety and Health Act 1984* has been well canvassed elsewhere³ and for present purposes a brief summary is sufficient.
38. It is now generally accepted that the report of the British Committee of Inquiry into Safety and Health at Work, established in 1970 and chaired by Lord Robens, has had the greatest influence on occupational safety and health legislation in Western Australia. The report, which quickly gained acceptance, proposed general duty of care and consultative obligations in relation to occupational safety and health legislation which is now in force in this State.
39. As the submission from WorkSafe noted:
- “Robens made a number of criticisms of the then current (often referred to as “old-style” or “traditional” legislation) legislative framework, which was characterised by detailed prescriptive requirements. The report noted that there was an excessive amount of this legislation, that it was fragmented, inflexible, out of date, limited in its coverage, and its enforcement was not particularly effective. The report considered the existence of too much law to be counterproductive by conditioning people to rely on rules imposed by external agencies.”⁴
40. The then existing “regulatory” environment also meant that the laws often became complex. They were only irregularly reviewed and often only as a result of some calamitous event, penalties seldom matched the seriousness of the infringements and, even though they were the object of the attention, employees had no say in the system.
41. The Robens Committee reported:
- “The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them.”
- and:
- “The most fundamental conclusion to which our investigations have led us is this. There are severe practical limits on the extent to which progressively better standards of safety and health and work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system.”⁵

³ See Laing (1992) and Kelly (1991)

⁴ WorkSafe Western Australia Submission (2001)

⁵ Robens (1972) paras 28 and 41

42. While there was a number of inquiries during the early 1970's, it was the Robens Committee that proposed a flexible system under which:

“...employers and workers would consult and achieve a high degree of “self-regulation”, supported by general legislative requirements and voluntary codes and standards. It was recommended the existing statutory provisions be replaced with a new comprehensive enabling Act containing a clear statement of the general principles of safety and health responsibility. It was recommended the principal Act be supported by regulations and non-statutory codes of practice, with a preference for the latter “in the interests of intelligibility and flexibility, and as a means of providing practical guidance towards progressively higher standards.”⁶

43. The process of self-regulation was therefore to be supported by general legislative requirements (duties of care), regulations and guidance in the form of codes of practice and guidance notes. Under the Robens principles, there is a strong preference for non-statutory forms of guidance especially codes of practice.⁷
44. Another element of the Robens approach was a unified administrative structure designed to overcome the jurisdictional fragmentation that characterised traditional regulation. The Robens Committee proposed rationalising the laws and the agencies responsible for occupational safety and health to enhance efficiency and to remove inconsistency. Employers and employees were to be able to participate in the standard setting; there were to be regular reviews of standards; and new enforcement processes were to be introduced.
45. These principles have been incorporated into legislation in all Australian States and in a number of other countries. They have been included in the International Labour Organisation's (ILO) Convention 155 (1981) concerning Occupational Safety and Health that set national policy standards for occupational safety and health for ratifying member countries. The Convention has duties and obligations consistent with those proposed by Robens and deals with matters such as workplace co-operation; provision of information and training; and duties of designers, manufacturers, importers and providers of machinery, equipment or substances for occupational use. Western Australia was the first State/Territory to confirm its agreement for Australia to ratify this Convention and re-confirmed that position in 2000.

⁶ WorkSafe Western Australia Submission (2001)

⁷ See Robens (1972) para 146 and 147

2.2 Western Australia's Approach

46. Development of the Western Australian occupational safety and health legislation commenced in the early 1980's amid dissatisfaction with the State's existing prescriptive occupational safety and health laws and the spreading influence of the concepts embodied in the Robens Report.
47. The system in Western Australia at the time reflected most of the problems exposed by the Robens Committee. Western Australia's rates of occupational injury were unacceptably high, as were associated costs. The existing legislation was fragmented, out-of-date, highly prescriptive, and limited in its coverage of the workforce. The impetus for change, therefore, was similar to that which earlier applied in Britain. The legislative outcome also had some parallels and perhaps not surprisingly, even though on different sides of the world, after almost 30 years similar issues are again arising.
48. In adopting the Robens Committee approach in 1983, the Western Australian Government developed its proposals with the release of a Public Discussion document⁸ and through consultation with the various industry representatives. The resulting occupational safety and health legislation was introduced in Western Australia in two stages. The first, the then *Occupational Health, Safety and Welfare Act 1984*, was proclaimed in 1985. It provided for the establishment of a tripartite Occupational Health, Safety and Welfare Commission (now the WorkSafe Western Australia Commission).
49. The Department of Occupational Health, Safety and Welfare (now the WorkSafe Division of the Department of Consumer and Employment Protection) was established as the agency responsible for the administration of occupational safety and health laws in Western Australia.
50. The Commission undertook the development of the remainder of the legislation, which resulted in the proclamation of the *Occupational Health Safety and Welfare Amendment Act 1987* in September 1988. This introduced the substantive provisions of the Act dealing with the general obligations and duties of all parties having a role in safety and health at work. It also established the consultative framework that has become central to the Act.

⁸ See Minister for Industrial Relations (WA) 1983

51. The approach adopted in Western Australia combined many of the principles espoused by Robens and those contained in ILO Convention 155. WorkSafe noted that at the time of proclamation, four “old style” Acts and 21 sets of regulations were repealed, replaced by a single Act and the single set of *Occupational Health, Safety and Welfare Regulations 1988*⁹. The Act and Regulations applied to all industries with the exception of mining and petroleum.
52. A key feature of the Act was that it was written in “plain English”, which it is suggested, was an important factor in facilitating its implementation and in improving the accessibility and understanding of the law in the workplace.
53. The creation of the Commission and the specialist department with responsibility for occupational safety and health in 1985 was a substantial development and the statistics suggest these contributed substantially to the reduction of occupational injury, disease and fatalities in Western Australia.

2.3 1992 Report on the Review of the Act

54. In 1991, I was engaged by the then Minister to assist in the conduct of the Minister’s review of the *Occupational Health, Safety and Welfare Act 1984* in accordance with s.61 of the Act.
55. The Report that issued in March 1992, recommended a number of amendments to the Act. Many of these were further developed by the Commission and were subsequently implemented in 1995. One recommendation, that Police Officers be covered by the Act, is still in the process of being implemented. Some of the recommendations were not implemented and of these, a small number have again been the subject of submissions.

2.4 1995 Amendments to the Act

56. The Commission considered recommendations arising from the 1992 Review and agreed upon a number of amendments, which were included among the changes in the *Occupational Safety and Health Legislation Amendment Act 1995*. A number of other amendments, however, were made without reference to the Commission.

⁹ WorkSafe Western Australia Submission (2001)

Background

57. The amendments enacted in 1995 included a change of the title of the Act to the *Occupational Safety and Health Act 1984* and a change of the names of the Commission and Department to WorkSafe Western Australia Commission and WorkSafe Western Australia respectively. The changes also included the appointment of an independent part-time Commission chairperson; changes to the voting arrangements in the Commission; increases in penalties; the introduction of duties for persons who design or construct buildings or structures for use at a workplace; and changes to the resolution of issues procedures.
58. The concept of a “disentitled employee” was also introduced to prevent payment for lost time except in genuine cases directly affecting the employee concerned. Measures were introduced that sought to streamline various administrative processes including the election of safety and health representatives. The amendments also provided for the appointment of Safety and Health Magistrates and clarification of the evidentiary status of codes of practice to enable them to be admissible as evidence in proceedings under the Act. The earlier Review and the Commission’s recommendation that the *Occupational Safety and Health Act 1984* should cover Police Officers was not implemented.
59. In 1996, the Commission completed a major review of the *Occupational Safety and Health Regulations 1988* and issued new consolidated regulations.

2.5 1995 Industry Commission Report

60. In 1994, the Federal Assistant Treasurer commissioned the Industry Commission to undertake an inquiry into occupational safety and health in Australia. The Industry Commission made a number of specific recommendations, which received a mixed response. WorkSafe was concerned some recommendations failed to acknowledge the very substantial improvements in occupational safety and health throughout Australia over the preceding decade.
61. According to WorkSafe, the Industry Commission considered Australian Governments should¹⁰:
- streamline but strengthen regulation with fewer, simpler rules;
 - allow greater flexibility for workplaces to manage injury and disease;
 - strengthen enforcement of the key legal responsibilities;

¹⁰ WorkSafe Western Australia Submission (2001)

- strengthen financial incentives for safer workplaces;
- overhaul co-operation arrangements between Australian governments;
- provide greater contestability and transparency in research funding; and
- make occupational safety and health agencies more accountable for their performance.

2.6 1998 Report on the Review of the Act

62. In 1997 Mr Jeremy Allanson commenced a second Review of the Act. Mr Allanson's Report was tabled in Parliament on 25 November 1998.
63. The Report noted the extensive scope of the first Review of the Act. While Mr Allanson received submissions and recommendations from various bodies and individuals in the 1998 Review, his Report commented on only a small number of specific issues.
64. The key areas discussed in Mr Allanson's Report included¹¹:
- codes of practice;
 - environmental tobacco smoke (ETS) and employee health; and
 - coverage of Police Officers under the Act.
65. Mr Allanson discussed the disadvantages, for prosecution purposes, of relying on a general duty, while acknowledging the benefits of a non-prescriptive approach in focusing on outcomes. The Commission responded to the Minister advising of its general support for the existing legislative framework of the Act and Regulations, supported by approved codes of practice. The Commission acknowledged, that ongoing development and review was an essential element within this framework. It noted that the existing system provided for a mix of flexible and prescriptive requirements through a statement of general duties, a set of minimum standards, and practical advice contained in codes. It observed that the ongoing process of legislative development and review would ensure that the mix remained dynamic. The Commission supported the continued and ongoing development of codes of practice within the legislative framework.

¹¹ Allanson (1998)

Background

66. In relation to employee exposure to environmental tobacco smoke, the Commission noted that in practice, the task of establishing such an exposure standard would involve a number of difficulties, which at the time could not be overcome. For example, there was a lack of direct data on the atmospheric levels of environmental tobacco smoke over a particular period of time that would expose persons to the specified “acceptable” level of risk. As far as was known, no jurisdiction in the world had adopted an exposure standard for environmental tobacco smoke and while the proposal to set an exposure standard could provide a legislatively simple approach to the issue there was no confidence that it would be a correct outcome. The Commission considered it would be unable to do so, and referred the matter to the National Occupational Safety and Health Commission, which similarly had concerns and was not in a position to undertake the task.
67. The Commission supported the recommendation that Police Officers be covered by the Act. A joint submission by the then Minister for Police and the then Minister for Labour Relations was agreed by Cabinet on 6 June 2000, that coverage would be achieved by way of a Police Administration Bill. It was intended that the Bill would contain a precise definition of a Police Officer as an employee, thereby enabling Police Officers to be covered by the *Occupational Safety and Health Act 1984*. There were to be some limitations in relation to dangerous, covert and high-risk operations, similar to exclusions that apply in some other jurisdictions. A co-agency agreement was to be developed between the Police Service and WorkSafe in relation to the special needs of policing.
68. The Bill was not progressed to Parliament, nor had it been forwarded to WorkSafe. Consequently, no co-agency agreement had been developed. Subsequent to the change in Government it was understood that the Minister for Police had indicated that the change would be developed separately by way of an amendment to the *Occupational Safety and Health Act 1984*. Since the release of the draft report and recommendations again supporting the coverage of Police Officers the *Occupational Safety and Health Amendment Bill 2002* (which provides for coverage of police officers) was introduced into Parliament. At the time of writing the final outcome of the Parliament’s consideration of the Bill was not known.

69. The Commission also recognised that the definition of “employee” in the Act could leave other officers of the Crown without coverage. The Commission subsequently identified a number of these individual statutory offices. The Commission gave priority to Police Officers, however, as the largest single group of such persons. It is assumed that issues with the remainder have been concluded satisfactorily as there were no submissions in relation to other statutory office holders.
70. The 1995 amendments were the most recent substantive changes to the Act. There have been some minor amendments consequential to changes in other Acts.
71. The *Occupational Safety and Health (Validation) Act 1998* validated action and decisions taken under the Act by the former WorkSafe Western Australia Commissioner regardless of his appointment status. The Act itself was not amended.

2.7 National Framework

72. WorkSafe advised that, in December 1999, the Workplace Relations Ministers’ Council endorsed a National Occupational Health and Safety Improvement Framework. The Framework was developed by the National Occupational Health and Safety Commission (NOHSC) in co-operation with State, Territory and Commonwealth occupational safety and health regulatory authorities and with the peak bodies representing employers and employees.
73. The Framework provides a mechanism for guiding the activities of all occupational safety and health stakeholders towards significant reductions in the incidence of work-related injury, disease and death in Australia over the next ten years. WorkSafe provided considerable input during the development of the document.
74. In December 2000, the Workplace Relations Ministers’ Council released the first yearly report against the Framework, showing the breadth of activities that occupational safety and health authorities and stakeholders are covering to meet the goals outlined in the Framework. In brief these goals are to:
 - set the regulatory framework, compliance, enforcement and incentives for better prevention;
 - raise community awareness to strengthen workplace commitment and motivation for improved occupational safety and health;
 - develop and coordinate Australia’s occupational safety and health research capacity;
 - develop a broad occupational safety and health skills base within Australia;

Background

- focus prevention effort through improved data systems; and
 - develop Australia as a world leader in occupational safety and health.
75. The Framework also details nine national infrastructure requirements/action areas, which are summarised by the following headings:
- comprehensive occupational safety and health data collections;
 - a coordinated research effort;
 - nationally consistent regulatory framework;
 - compliance support;
 - strategic enforcement;
 - effective incentives;
 - greater community awareness;
 - occupational safety and health skills development; and
 - access to practical guidance.
76. It is understood that the Framework has been taken into account in the planning processes of WorkSafe and the WorkSafe Western Australia Commission. It is expected that further development of a national framework will take place over the coming years. This is a process which is fully consistent with the Robens model.

2.8 Outcomes 1992 – 2001

77. The material provided to the Review demonstrates that while there remains much to be done and that there is no room for complacency, in the past 10 years and particularly in the past four to six years there has been significant progress.
78. One of the significant improvements in the occupational safety and health system over the last decade has been the development of comprehensive and more reliable state and national statistics on occupational safety and health performance. In the 1992 Review Report it was noted,

“... the Commission and the Department cannot be fully effective without accurate and detailed information to identify priority areas.”¹²

¹² Laing (1992) p37

79. WorkSafe, in collaboration with WorkCover WA, has since developed and refined its statistical systems to enable the Commission and other parties to monitor outcomes and identify emerging trends and priorities. An extensive statistical resource has been publicly available¹³ through the “State of the Work Environment” series, interactive statistical databases on the Internet, and WorkCover WA publications. The “State of the Work Environment” publications are significant because they cover a wide range of safety and health activity and give a more complete understanding of the field. They also record achievements and provide the necessary confidence in order to move to new and sometimes difficult issues.
80. The latest publication in that series, however, was in 1999 and it is necessary for continuity of the data that it be continued with further releases.

2.8.1 Targets

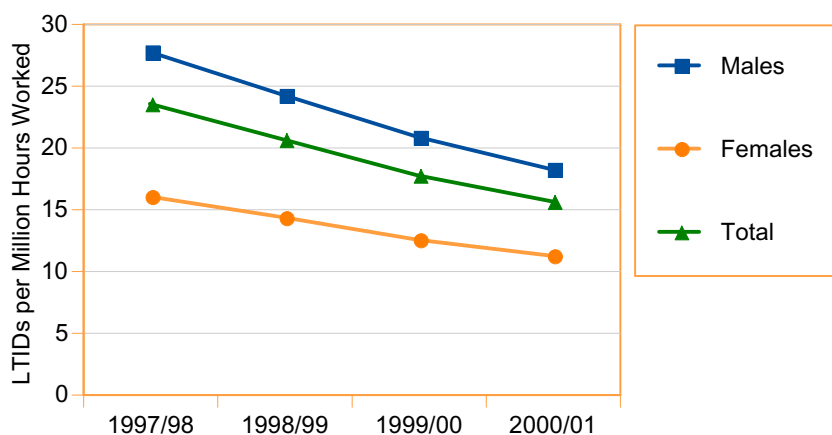
81. Throughout the 1990’s WorkSafe set itself a series of targets based upon reductions in the State’s overall rate of work-related injury and disease. In 1995, the five-year vision for WorkSafe was that by 2000:
- Western Australian work-related injury, disease and fatality rates would be at least 50 per cent lower than at June 1995; and
 - Western Australia would have the lowest injury, disease and fatality rates in Australia.
82. Although neither of these ambitious goals were met, they provided an important focus for WorkSafe. Significant reductions in the rate of work-related injury and disease were achieved and are continuing.
83. WorkSafe has set a new target for the 5-year period between July 2000 and June 2005. This is to achieve a continuous reduction in the rate of lost time injury and disease. This is also an ambitious goal. It is interesting to note that in the United Kingdom targets are now being established across the board as a major mechanism for reducing workplace injury.

¹³ See section 6.4 for a discussion of the sources of occupational safety and health statistics and associated issues.

2.8.2 Key Performance Indicator – Injury Rates

84. The key indicator of occupational safety and health performance is the frequency rate. That measure is the number of lost time injuries and diseases that occur for each million hours worked. A lost time injury or disease (LTI/D) is defined as a workers' compensation claim resulting in time lost from work of one day (or shift) or more. The frequency rate, although influenced by many external factors, is considered to be a primary indicator of the performance of the State's broad occupational safety and health system.
85. There has been a steady and long-term downward trend in the frequency of LTI/Ds in Western Australia.

Occupational Injuries WA 2000/01 FREQUENCY RATES

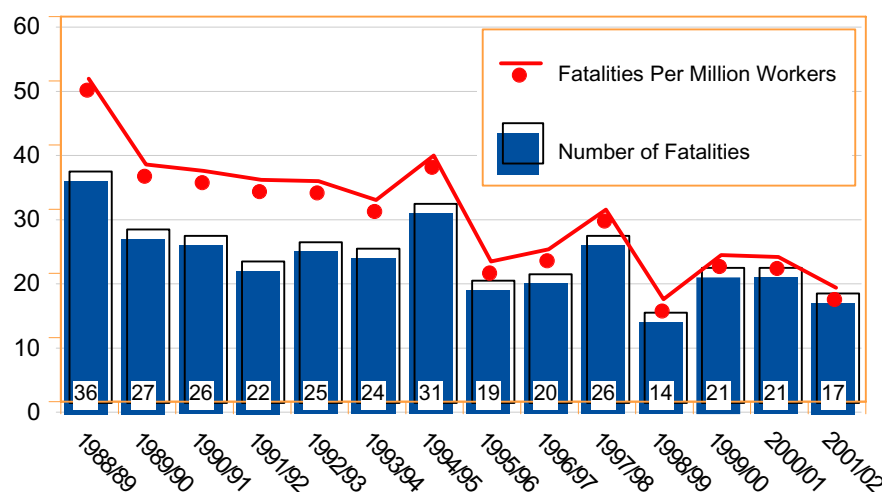


86. Between 1994/95 and 1999/00 (the term of the target set in 1995), Western Australia recorded a reduction in the lost time injury and disease frequency rate of 27.3%. Although short of the target of 50%, this figure represented an encouraging downward trend.
87. In 2000/01 there was an overall 12 per cent reduction in work-related injury and disease since 1999-00, continuing the long-term downward trend. The total rate of improvement since the *Occupational Safety and Health Act 1984* came into effect in 1988/89 is a remarkable 56 per cent, and the rate of improvement from July 1996 to June 2001 is 36 per cent. The only concerning aspect of these statistics is that the long term decline is not as marked in recent years and there is a possibility injury rates could plateau in future years.

2.8.3 Key Performance Indicator – Fatalities

88. WorkSafe uses its own data to measure trends in the rate of work-related fatalities. It collects and maintains a list of known traumatic work-related fatalities under the legislative jurisdiction of the Act.
89. There has been a significant downward trend in the incidence of work-related fatalities since the introduction of the Act in 1988/89.
90. A major reduction in the fatality rate for the target period 1994/95 to 1999/00 was achieved with a 41% difference in the annual fatality rates for the period. While important and significant reductions in the fatality rate were achieved during the early 1990s there are indications the incidence of fatalities is reaching a plateau.

Work-Related Fatalities WA 1988/89 - 2001/02 Number and Rate



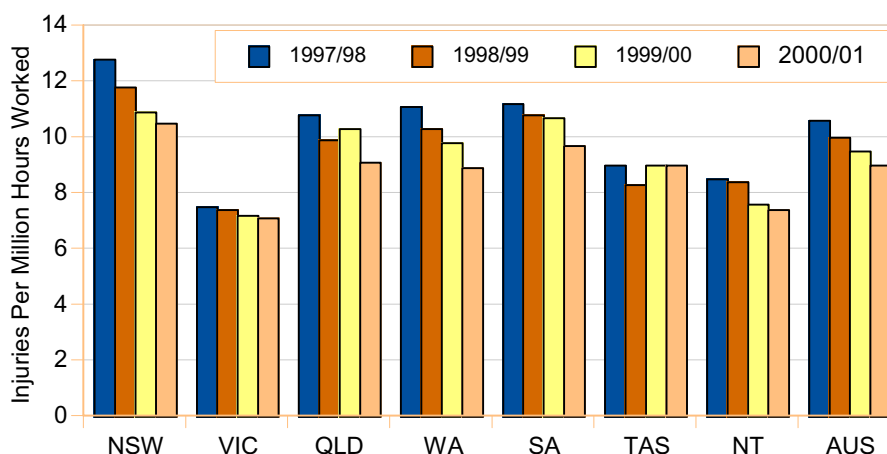
2.8.4 Key Performance Indicator – National Comparisons

91. In recent years, the Workplace Relations Ministers' Council has sponsored a project aimed at improving the national comparability of occupational safety and health statistics. The Comparative Performance Monitoring (CPM) project has produced some important results that enable Western Australia's occupational safety and health prevention performance to be compared with other jurisdictions.

Background

92. The national indicators used in the CPM project are standardised to overcome differences in the workers' compensation and occupational safety and health systems across the jurisdictions. They are different from the State based indicators referred to above.¹⁴
93. The CPM data show that the goal of having the lowest rate of injury, disease and fatality rates in the country was not achieved and, until 2000/01, Western Australia's rate has been slightly higher than the national average. However, the rate of improvement in the State's performance has continued to increase. Western Australia recorded the largest decrease in frequency rate (19.8%) of all jurisdictions over the period 1997/98 to 2000/01.

Standardised National Frequency Rates 1997/98 - 2000/01



Source: Workplace Relations Ministers' Council (2002)

¹⁴ The national benchmarks are based on the frequency of injuries resulting in 5 or more days of time lost from work and are standardised for the industry mix of the various jurisdictions. See Workplace Relations Ministers' Council (2001).

3.0 The Recent Context – Some General Observations

3.1 Challenges for Occupational Safety and Health

94. In the foreword to a major new initiative in the United Kingdom, “*Revitalising Health and Safety – Strategy Statement*” the Hon John Prescott, Deputy Prime Minister of the UK said,

“But 25 years on, it is time to give new impetus to health and safety at work. Too many deaths still occur at work. Each death or serious injury is a tragedy; a tragedy that causes devastation for workers, their families and loved ones; a tragedy which, perhaps, could have been avoided in the first place.

Society as a whole pays when things go wrong. We estimate that the total cost to society of health and safety failures could be as high as £18 billion every year. We can and should do something about this.”

and

“The work of the Health and Safety Commission and Executive will be vital in making *Revitalising Health and Safety* a success. Preventing accidents and ill-health, rather than dealing with consequences, must be their priority.”¹⁵

95. At the beginning of the new millennium, and despite the great distance, there are many parallels in the circumstances relating to occupational safety and health between Western Australia and the United Kingdom (UK). Mr Prescott was introducing a new program into the UK in an endeavour to generate new vitality and enthusiasm towards occupational safety and health. That has since resulted in the release in October 2001 of the UK Health and Safety Commission’s Strategic Plan for 2001-2004 which has three key elements:

“First, it concentrates on outcomes - what we plan to achieve, not what we plan to do. And what we want to achieve must be appropriate to the new economy as well as the old.

Second it looks beyond our traditional role of preventing harm. Our task for the future is no less than making all work whether in a foundry, a call centre, a trench in the road, or a care home a better, safer and healthier place to be.

Third it commits us to continuous scrutiny of our own effectiveness. We must be clear about what works, what works best and what is not worth the effort.”¹⁶

¹⁵ Department of Environment, Transport and the Regions (UK) (2000)

¹⁶ Health and Safety Commission (UK), (2001) p3

96. It is quite striking that the British Deputy Prime Minister's words might equally be said of Western Australia. The research undertaken here indicates that while there has been an ongoing and significant reduction in workplace death and injury over a number of years, unless there is a new approach and new vigour, there is a prospect that workplace injury and death will plateau; and despite the present positive statistical trends there could be a turnaround and the incidence of workplace death, injury and disease could again begin to rise. There are many reasons for such a conclusion and some of these are outlined later in this Report. What is significant is that the moment is opportune to re-commit to improving workplace safety and health and to drive further initiatives into place to ensure that injury and deaths continue to reduce.
97. In the first Review carried out in 1992 it was noted that the general obligations then being placed in the legislation were not all new. It was noted that:

"In relation to the general obligations under the Act and although major changes have taken place, it is too simplistic to suggest that the operation of the 1987 amendments has totally altered the responsibilities of those who own and control each of the workplaces throughout the State or the responsibilities of those who work in them. General duties of care obligations of employers and employees have existed in common law for many decades and in that respect little has changed. What is significant is the change in the legislation to incorporate those obligations into the statute, to place the responsibility more directly on those in the workplace to prevent injury and to ensure their own safety and health rather than relying on the legislation and the inspectorate. These are reflected in the broader and more general obligations contained in *Part III* of the Act (*s.19* to *28*).

The Act now in place follows the Robens philosophy and provides for effective self regulation by employers and employees without the strictures of detailed and specific regulatory requirements, but supported by a general obligation that activities be conducted in a safe and healthy manner.

S.19 requires employers to: "*so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall ...*" and, an employee, under *s.20(1)*, is obligated to take reasonable care "*(a) to ensure his own health and safety at work, and (b) to avoid adversely affecting the health or safety of any other person through any act or omission at work ...*"

S.21 to *23* provide for similar obligations on others associated with the workplace. This approach provides flexibility not available previously and ensures by virtue of the general obligations that all activity within a workplace is safe and healthy rather than only those elements specifically covered by the Act or regulation as was the case in the past.

Thus, consistent with the recommendations of the Robens Committee, employers and employees must accept that ultimately they are responsible for their actions

in the workplace and health and safety can only be improved by action in the workplace.”¹⁷ (emphasis added)

98. That challenge has largely been accepted and substantial improvements made. However, as with the earlier report, the process needs to adapt again and to be re-invigorated.
99. Most submissions made during the course of the Review supported the continuation of the existing Act and there was no support for any major change in legislative direction. Most also indicated that there had been progress towards meeting many of the objectives of the Act. Those views are consistent with the outcomes of research and consultation undertaken during the course of the Review. There is no advantage to be gained from removing the general duties and obligations from those who create and work with the risks into some other regulatory regime.
100. The submissions, however, point to deficiencies and inadequacies; particularly in the way systems were put in place (or not put in place) under the legislation. These deficiencies, as well as a review of the past 10 years, also make it plain that attention must now be focused on areas not previously covered, or inadequately covered, by the legislation. Recent events, including those in other States and overseas, demonstrate that self-regulation alone will not necessarily guarantee the safety of those at or in the vicinity of work. Work is now also more intricately part of the normal lives of many people and it is becoming increasingly difficult to separate work from other activity. Many for example, now work at home, work for labour hire companies or work in group training or “work for the dole” schemes. Therefore, while existing programmes should continue, new initiatives are also required.
101. The Act has had its major emphases on employers and their employees. This rested on the concepts of permanent and mainly full time employment. Recent ABS Labour force statistics, however, show that this group, while still large, is a declining proportion of the total labour force. As a result, traditional distinctions are not so clear and can be expected to change more in coming years. This changing environment needs be encompassed under the legislative framework if the Act is to be successful in fulfilling society’s requirements for safe and healthy workplaces.

¹⁷ Laing (1992) p51-52

The Recent Context

102. Another issue has been the development of what is referred to as the “re-regulation” process. In the past 10 years, there has been a steady output of new regulations, codes and guidance notes and other material, including references to Australian and National Standards. This has resulted in a proliferation of material that is often confusing, inaccessible or expensive to access.
103. Associated with these are continuing deficiencies in existing occupational information and data. Although existing statistics are a great improvement on the past and among the best in Australia, there are still major gaps, particularly in relation to health and disease. It is also clear that more can be done; even with existing data sources which have not been fully exploited or updated as regularly as in the past. The data has helped in a number of ways including targeting significant areas for further inquiry and investigation and can be extended. It must also be accepted that although the collection of new data material will be expensive and will require considerable planning, the planning should be commenced.
104. At present WorkSafe must rely on WorkCover WA data that is up to eighteen months old when more immediate results can be made available at little additional cost and inconvenience. The need to ensure WorkCover WA privacy and confidentiality has now been part of the data handling process for some years and has not led to difficulty. It is possible to maintain and respect personal and individual business confidentiality while utilising data inputs to improve workplace safety and health. WorkSafe should use both accident reports and contemporary workers’ compensation data in determining its inspection and accident investigation programs. It is also desirable that the WorkSafe inspectorate conducts an investigation as soon as possible after the occurrence of a significant injury. As a consequence, data timeliness is a matter that will need to be addressed in order to continue the progress made over recent years.
105. However, it is the statistics and some of the emerging issues which best show that the legislation has not yet satisfactorily provided the beneficial outcomes for which it was designed. They show that amendments will be required to deal with both existing deficiencies and new trends.

3.2 Some Issues for the Occupational Safety and Health System

106. On a cursory examination, it appears that the workplace consultative framework under the Act is working well in Western Australia. The Review received no submissions specifically questioning the importance of safety and health representatives and safety and health committees or suggesting that they be discontinued. Some did refer to process concerns and some conduct and training matters. A number of submissions also suggested legislative improvements in key aspects of the consultative framework. These have been referred to in the recommendations later in this Report.
107. The majority of submissions dealt mainly with those workplaces that have safety representatives and committees and where employers have responded to employee requests for representation whether in accordance with the Act or not. While that was re-assuring, some submissions noted that only a small proportion of all workplaces have safety and health representatives and/or committees and that these may be in decline.
108. Analysis of the material and statistics indicated that, while an appropriate legislative framework is in place, there remains a significant gap between obligations, rights and entitlements provided under the Act and the failure by the majority to take up or implement all or some of these. Specifically the failure to consult in respect of occupational safety and health issues under *Part III* of the Act and the failure to appoint and to develop safety and health representatives and committees has resulted in a less effective system than should be the case. They are important in improving safety and health in the workplace and in part help to explain why many organisations have failed to identify hazards, reduce risk, and develop workplace safety and health policy and safe work systems. The small and medium size business sectors in particular have been slow to take up these issues.

109. It is necessary to address inadequacies in the existing occupational safety and health arrangements if improvement is to continue. It is evident for example that relatively few workplaces have either safety and health representatives or committees. While those are not conclusive¹⁸ of an unsafe or unhealthy workplace, the material does support the notion that effective protection is not in place for many employees because employers remain insufficiently committed to improved occupational safety and health and employees have not exercised their entitlements. There appear to be both structural and process deficiencies underlying these issues.
110. There is no doubt that employers are central to whether a workplace is safe and healthy. Concerned and interested employers will likely implement effective strategies to reduce safety risks and to enhance health. They are also more likely to be engaged in cooperative and consultative safety processes with their employees. As a result, they would be expected to experience fewer occupational injury or health difficulties and there would be little need for the State to involve itself in their affairs.
111. However, the inspection statistics and injury data show that in a large proportion of workplaces, occupational safety and health has either a low priority or is not seriously considered at all until an incident or injury takes place. It is clear that some employers in those instances are either uninterested or some even antagonistic towards their obligations to improve occupational safety and health. They also take the same approach to employee requests to improve safety and health performance and systems. Indeed, as outlined shortly, there are a number of disincentives for employers to be involved. There are also good logical reasons for employers not to encourage employees to become involved in the consultative processes provided under the Act.

¹⁸ It must be accepted that safety conscious small business in particular is likely to involve employees directly in informal processes and neither employer nor employees would see any need for formalising those arrangements. Because of the employer's commitment and the participation of employees in the safety and health process, it is likely the business will have a effective occupational safety and health processes.

3.2.1 The Influence of the Employer

112. The Act permits and, by implication, encourages the election of safety and health representatives and the establishment of safety and health committees. However it does not address some of the practicalities of the workplace. In particular, it takes no account of the employer's influence or attitude. An employer is a powerful influence in the workplace and is able to influence actions, especially where employees believe they are vulnerable to unfair behaviour. If there is any discouragement of the employees to take the first step of requesting the establishment of a committee or the election of a safety and health representative, it is unlikely that many will take the risk unless there are substantial incentives and protections. In those circumstances, employees will often be reluctant even to raise serious safety issues with their employer.
113. Plainly, some employers do discourage employees from seeking their entitlements under the Act and even a neutral response might be taken as tacit disapproval by employees aware that it could involve them in a negotiation with their employer. While it is not possible to establish the number, the submissions and the obvious disincentives, including those under the Act for employers, both indicate it could be significant.
114. It seems illogical that legislation such as the Act that is designed to protect those at work does not provide adequate employee protection under the systems that it establishes in workplaces for consultation and for the election of safety and health representatives or committees. As a number of commentators have noted however, the Robens Committee Report did not take sufficient account of the unequal power relationship in the workplace. Employees must take the first steps in establishing formal consultation under the Act and do take account of their employers views. With the decline of union power, that imbalance is becoming marked and employees in many cases are very dependent¹⁹ on the goodwill of their employers.

¹⁹ See Bohle and Quinlan (2000) p 265

115. Lack of employer commitment is not illogical nor should it be surprising. Employers, faced with the decision whether to consult and to encourage employees to exercise their rights might well conclude that if they do so they will put themselves into a position where they take on a whole raft of additional responsibilities. They would also know that there will inevitably be issues raised by employees, committees and representatives and, under the legislation, once those structures are in place, as employers they are required to respond to them.
116. An employer who is trying to manage a business and to prioritise a busy work schedule will have even more issues to respond to and problems needing resolution. Even the decision to genuinely consult will result in issues to be resolved. If there are no representatives or committees there will be fewer queries and fewer problems apparent. If there is no consultation or only one-way consultation the issues and the problems might not arise at all. The risk of catastrophic failure is seen as remote and is perhaps, the only safety and health risk considered. More immediate costs and business needs take priority unless a safety or health incident arises.
117. The business priorities of course would also include the cost of training the employees in their safety and health roles. Employers pay for the safety training course and are obliged to release safety and health representatives from work for the training. When subsidies or tax incentives were in place the impost was perhaps more bearable, but where, as now, the employer must pay most of the costs it can be a substantial burden. Many, especially in small or medium sized enterprises, see it as providing no obvious incentive or benefit and as simply a cost. It is hardly surprising, therefore, that despite the risks, many employers do not see that there are many reasons for them to participate or to encourage their employees to exercise their rights. Perhaps the only benefits they would see for themselves would be avoiding a possible injury and a shared safety responsibility with the employees' in the event of an accident.
118. In addition there is the ongoing belief by some employers that encouraging employees to develop good safety and health representation and processes in the workplace will reduce their authority and/or encourage union membership and potential conflict with the union.

119. As a consequence, there is an understandable reluctance to develop employee involvement and consultation. While it is shortsighted, it does avoid the immediate need to deal with occupational safety and health matters. Some employers are content with that situation. They have control while the employees share the responsibility and the risks are seen to be small.
120. The limited regulatory environment and the fact that there are disincentives to establishing the consultative structures and processes recommended by the Robens Committee permits a *laissez-faire* attitude towards safety and health. The Act is designed to encourage but if nothing happens, then nothing happens and employers are under no obligation, other than by their own good sense and initiative, to make any efforts. Many employers do exercise that good sense and initiative but regrettably many do not. In those instances intervention is necessary.
121. It needs to be said that many employers do take up their obligations despite the disincentives because of their commitment to occupational safety and health. Some no doubt recognise that it may eventually lead to reduced workers' compensation costs. Others do so because they take their responsibility to their employees seriously. Most large companies have significant occupational safety and health policies in place and are no doubt part of the reason why improvements continue. However, it is also undeniable that some seem to be reluctant to take proper steps to implement the safety obligations of the Act.
122. The role of employers is not the only issue slowing the further development of the Robens model under the legislation. The next issue concerns employees themselves.

3.2.2 Employee Empowerment

123. There is now an almost intractable difficulty of attracting the interest and ongoing commitment of employees in becoming safety and health representatives and committee members. The material suggests that the situation is not improving and given the present lack of emphasis, it appears that the numbers of active safety and health representatives may be declining. Earlier reports have also indicated that only a fraction of workplaces undertake risk assessments and have safety policies and procedures in place.

124. The failure to encourage the broader development of safety and health representatives and committees goes beyond the “system” and employers avoiding perceived “unnecessary” problems as a result of participating with employees in the safety and health process. While it may be part of the problem it also goes to the extent that the Act itself might discourage employee involvement. History suggests that even if employers fail to encourage consultation and participation, where employees have sufficient incentives and protections they might well seek involvement. That coincidentally could lead to occupational safety and health improvements because it would require consultation on issues.
125. In dealing with these issues, it is necessary to consider the role of employees and their representatives under the legislation and the extent that they are inhibited from participating in the existing system. If employees believe they have no influence it seems more likely that they will not participate. Where they can be heard and be taken seriously, however, they will be encouraged to greater levels of involvement.
126. The capacity for employees to have influence goes to their entitlements and protections under the Act. The fundamental right of employees is of course, the right to be protected against injury or harm. The Act also provides limited rights and entitlements to employees so that they can protect themselves from being harmed. The entitlements are mainly found at *s.24*, *s.25* and *s.26* and under *Part IV* of the Act.
127. Under *s.26* employees can refuse to work where:
- s.26(1)* “Nothing in section 25 prevents an employee from refusing to work where he has reasonable grounds to believe that to continue to work would expose him or any other person to a risk of imminent and serious injury or imminent and serious harm to his health.”
128. Individual employees also have the right and indeed obligation under the Act to raise safety concerns with their employer and where there is an imminent and serious risk of injury or harm to health, the inspector may be notified under *s.25* of the Act. However, they have few other rights other than to seek to have safety and health representatives elected and/or committees formed under *Part IV* of the Act. They have a number of responsibilities however under *s.20*.

129. It is noticeable that, other than under *Part IV*, these rights are reactive rather than pro-active and are either in response to an incident or to the employer. The opportunity to be pro-active is in essence confined to reporting hazards to the employer. It is then in the employer's hands whether to consult or even to respond to a report about a hazard. There is no specific obligation to do so.
130. Submissions and a resulting review of the protections under the Act indicate that at present employees are often reluctant to assert their entitlements in relation to their safety and health for fear of losing their jobs. There are no specific protective provisions for employees who find their employment jeopardised because they have raised a safety concern and because of that it appears many do not raise them. While an employer may be fined under the Act for discriminating against an employee²⁰ who raises a safety issue, the discrimination itself is not redressed and the employee can continue to suffer for carrying out a duty under the Act.
131. It can be seen from the foregoing that, although the regulatory system has been substantially dismantled, some of the more effective alternatives developed through the consultative arrangements under the general duty of care regime have yet to be implemented or completed. That of course does not mean that employees are not protected at all because the general duty is in place with attendant and enforceable obligations. It does suggest, however, that safety and health is not improving as it should. In some instances it is being downgraded, particularly in the face of competition.
132. Downsizing and decentralisation have resulted in reductions in employee numbers in many enterprises. Increased workloads, reduced support and the threat of termination all add to the pressures to perform. There is also material suggesting that workplace training and employee induction is not taking place or has been inadequate in the majority of workplaces. The developments that have been implemented by WorkSafe and the Commission although useful, have not achieved the workplace changes necessary for better consultation and a systematic approach to occupational safety and health in many workplaces, particularly in small business.

²⁰ See s.56

133. The need for continued improvement and some reorientation of direction has been starkly outlined by Bohle and Quinlan in their publication *Managing Occupational Health and Safety: A Multidisciplinary Approach*.²¹ In that publication the authors outline their conclusions on the dimensions of the safety and health problem and the difficulties with existing data sources in providing an accurate assessment of the full extent of the problem.
134. They argue that while it is known the problem is already substantial²², existing data understate the loss and waste. The data fail to measure many dimensions of work activity and there is a large and hidden set of costs to the community. If for example, the cost of occupational disease is of the proportions suggested by the authors, with deaths at some five times the rate of deaths from industrial injuries, there is much to be done.
135. It appears that both the failure to access many workplaces in order to encourage the implementation of necessary OHS standards and to identify and deal with the hidden costs are matters that must be addressed. Complacency, now so apparent, must be arrested if continuous improvement is to be achieved.
136. The issues need to be followed through because it appears the existing situation could ultimately lead to a reversal in the encouraging downward trend in the injury statistics. With the removal of the previous highly regulated environment there is a reasonable concern that the replacement structures included under the Act have not been implemented as intended. For example, the WorkSafe material suggests that of around 25,000 safety and health representatives appointed only some 4,500 are now in place in a community with some 70,000 workplaces. While many of the appointments are reappointments and many workplaces are sole trader operations both the proportion (4,500 of 25,000) and penetration (4,500 of 70,000) are disturbing figures²³.
137. The critical feature appears to be the failure to ensure that all the mechanisms facilitated by the legislation have been put into effect in the majority of instances. The Act therefore will need not only to adapt to the changing environment but will need to be adapted to deal with deficiencies in existing arrangements.

²¹ Bohle and Quinlan (2000) p 5-7

²² *ibid* p 34-56

²³ Statistics provided by WorkSafe Western Australia

138. In considering future directions it is also becoming generally accepted that reliance on the Robens approach itself is not the complete answer to a comprehensive occupational safety and health program. It may not always provide adequate protection. For example, while it is accepted that it is necessary and appropriate that employers and employees should have the primary responsibility to collaborate in the workplace, it does not fully account for circumstances where the outcome of a failure of those at the workplace can have a broad and high cost impact on the community.²⁴
139. As detailed shortly, there are also many temporary workplaces with high staff turnover where there is neither time nor, in many cases, the inclination to develop good occupational safety and health practices.
140. As well, self-regulation may not give adequate protection where technical requirements and engineering standards need to be satisfied on a regular basis and where routine inspection by qualified personnel is necessary. Examples here might include boiler and lift inspections and certification. These and other instances should be and are more effectively dealt with by the continuation or implementation of specific regulations. They also suggest that more than a single dimension needs be followed in occupational safety and health.
141. Authors Gunningham and Johnstone²⁵ have proposed a “two-track” approach that brings together traditional regulation with a “systems” based dimension to take occupational safety and health compliance to higher levels. The two-track approach has been adopted in Western Australia and elsewhere and adds to existing strategies. It is consistent with current international standards that have eschewed any single stand-alone outcome as being most effective.
142. Nonetheless, the failure to engage and to more fully commit both employers and employees to improved occupational safety and health in the existing legislative environment are significant issues requiring attention. Some proposals for improvement are outlined in the following and developed later in the Report.

²⁴ Some also argue Robens does not entirely satisfactorily deal with the question of how much law is too much. For example, it has been claimed that the failure of the previous system was not that there was too much law but that it was not enforced adequately.

²⁵ See Gunningham and Johnstone (1999)

3.2.3 Incentives for Change

143. Two major problems were outlined in the previous sections. The first is that there are no strong incentives and a number of major disincentives for employers to participate in developing workplace structures, consultation and employee representation to enhance workplace safety and health. The second is the failure of the legislation to encourage employees to seek to improve workplace safety through consultation and representation. These need resolution if occupational safety and health is to be given renewed impetus and to avoid a resurgence of injury and health issues.
144. In turning to incentives to encourage employees to participate, it is somewhat surprising that society which supports involvement of responsible and mature adult human beings in other activity does not provide them a measure of control over safety and health in their workplace. It is surprising because they are after all, the ones who must face the consequences of failure and the legislation is ostensibly for their protection. People usually conduct themselves moderately and do not generally make a practice of outrageous acts or behaviour. Penalties usually apply to those who do not conform.
145. While the employer has most control and therefore most responsibility, both employer and employees have an interest in safety, and employees especially in enhancing safety. It is therefore legitimate to ask why the legislation does not provide more encouragement to employees.
146. It seems that employees are not to be trusted to take a reasoned and intelligent approach and instead those in higher positions must make decisions on their behalf. The concern seems to stem from a belief that employees might unduly interrupt or interfere with production. If this is correct, it implies that the prevention of occupational injury and ill health is only to be regarded as a cost of production. If that is so, it follows that those who assume the responsibility must face the full consequences if their failure ends in the injury and death of employees who have little control over the safety of their work. It also means that a community that accepts injury and health failures, and is not prepared to empower its workers, must ensure the employees do not bear the cost of injury and ill health.

147. Although it is conceded that the foregoing is a stark and extreme position, it is useful in highlighting the need to give those threatened by workplace injury and disease rights to better protect themselves. It also suggests that those who prevent or delay employees acquiring their entitlements should be made fully responsible for the consequences of their failure because in that circumstance employees are unable to exercise responsibility. In providing employees with the right to self-protection, they will do so best if they are trained to recognise, to understand and to effectively deal with the dangers. It might well be pointless empowering those who are unable to effectively or properly use that power. However, most employees understand their own job and with only minimal training they are able to halt the immediate work process in the face of imminent and serious risk. This is already provided for in the legislation (s.26). There are also many instances where employers have applauded their employees who, by exercising initiative, have protected production quality and outputs.
148. Similarly, if employees are not to be given the authority to match their existing responsibility, there must be a heavier onus placed on the employer to provide protections and much heavier penalties if they fail. A perusal of the existing prosecution records where serious injury and fatalities have occurred suggests that significant responsibilities have been placed on the employees concerned in respect of their misfortune. Where the employees have authority and control over their job such an attitude might be warranted. When, however, they are required to comply with employers' requirements and are not able to exercise any independent action it can hardly be held to be employees' fault if they are injured by faulty processes. Even if they err when putting their instructions into effect, unless the instructions are comprehensive and leave no room for discretion the employee cannot be held to be at fault because there is no basis to any such responsibility. The requirement to exercise "common sense" is frequently made by employers but unless there is a common understanding, the perception of common sense differs from person to person²⁶. Conversely, so long as they are properly trained, equipped and given discretion, the employees must then carry significant responsibility over their personal safety and that of their colleagues.

²⁶ The Longford disaster appears to be such an example because understanding of the significance of some of the events leading to the explosions and fires differed between personnel. What might have been "common sense" to some senior personnel was seen very differently by other employees.

149. Alternatives are available which would empower employees. If the legislation encouraged and protected consultation it is likely that it will increase. Equally, employees required to share responsibility for occupational safety and health would also share the need to ensure that the consultation processes are efficient.
150. As earlier outlined, there are few immediate incentives for employers to encourage the development of shared safety and health processes with employees in their workplaces. As a result, many employees have little or no involvement and because their employers have not complied with *s.19(1)(b)* of the Act to inform them how to avoid exposure to hazards, many would not even be aware of their limited entitlements or obligations. Employees without authority are forced to rely on their employers. The consequences of failure, however, as shown in Court outcomes, often fall on the employees.
151. As has been noted, the Robens Committee concluded that the fundamental responsibility for workplace safety and health resided with those engaged in the workplace, both in respect of those who own or control the workplace and those who work there. This conclusion underpins the focus of the Act on consultation and cooperation between employers and employees at the workplace. The active participation of employees is an essential requirement for effective management of occupational safety and health.
152. Of course Robens was concerned with the replacement of the structured regulatory environment with one which is largely self-regulatory. That has been generally accepted and endorsed. However, that merely becomes the replacement of one set of obligations with another. There must remain questions as to its effectiveness. For example, if the regulatory environment is replaced within a workplace with the employer's set of rules without the effective input of the employees, many of the problems evident in the formal regulatory environment will also become evident in the informal workplace environment.

153. While it must be accepted that employers' rules will usually be more relevant, more contemporary and better directed to the workplace, processes nonetheless change and it is equally likely that the rules created by the employer, in the corporate or specialist office can lose relevance and become meaningless at the workplace. It is a common complaint that "office" or the 'senior" staff of an organisation have "lost touch" or are not aware of what is occurring within the individual workplace. While these complaints are often exaggerated and many businesses have a good knowledge of employee activity, especially in relation to their outputs, the details of how the outputs are created is not always well known. In a changing work environment what may once have been accurate data may not remain so. To suggest therefore that only one of the two of the parties who, as so aptly put by Robens, "create the risks and work with them" can create all the rules, is not a sustainable position if continuous improvement is to be achieved.
154. These principles are reflected in the consultative framework established in the Act which provides for:
- the election of safety and health representatives and establishment of committees;
 - complementary duties on safety and health representatives to consult and cooperate, and on employees to cooperate; and
 - procedures for the resolution of occupational safety and health issues at the workplace.
155. There is a need to consider the steps that might be taken to bring the reality of many workplaces closer to what is necessary for an effective occupational safety and health system. It is perhaps useful to turn first to incentives for employees to participate.
156. The process can be re-invigorated by the enhancement of workplace consultation and representation especially in those organisations that until now have not become involved. By encouraging increased employee involvement, employers will necessarily take a more active interest in that part of their business including those who have relied on strong control and rigid company rules.
157. Employers will respond to employees who exercise their entitlement to be consulted and to consult under the legislation. It can be expected that employees who are properly protected by the legislation from discriminatory practices will also be more disposed to participate openly and without fear. As a result, even in workplaces without formal consultative processes and safety and health representatives, employees will be less inhibited in raising safety and health issues of concern to them.

158. Better protection against discrimination and unfair termination of employees or safety representatives who exercise their rights under the Act will contribute towards encouraging employees to express themselves. Present protection is inadequate because, while discrimination is an offence, there is no immediate redress to employees. An employer may be successfully prosecuted for discriminatory behaviour but the discrimination against the employee can continue. There are examples of dismissed employees remaining unemployed despite successful prosecutions against the employers concerned. There needs to be better protection and full redress where it is sought. No employee should be inhibited from raising a genuine safety or health concern for fear of losing his or her job.
159. Better employment security for employees who raise safety issues could also encourage more employees to establish formal representation through safety and health representatives or committees. The mere fact that safety and health representatives and/or committees are present will require even reluctant employers to respond and hopefully, in time, to come to accept that enhancing occupational safety and health is both fair and rewarding. It will achieve a heightened awareness of the issues. Employers, who previously could avoid the issues, will be required to deal with them in fulfilling their general duties obligations. Moreover, it does not place further demands on extended Government resources.
160. Giving employees a real capacity to contribute to improved safety and health would also be an incentive for more to take up the committee and representational role. This could also be enhanced through empowering qualified representatives or in providing potential career incentives which is discussed later.

161. In addition to improved employment protection there is a further step open to providing improved workplace protection. Trained, responsible and accountable safety and health representatives could, for example, bring specific notice to an employer of a need for safety improvement or of a safety issue by the issuance of provisional improvement notices (PINs) or of a safety alert or caution. These are dealt with later in section 5.5 of this Report but in effect are formal notices that are posted after a representative has consulted and failed to reach agreement with the employer on the need for the particular improvement or concern. A notice would only be posted after the safety and health representative had confirmed the need for such a notice with another representative, where available. Once posted the notice would not be removable without the safety and health representative's agreement or by direction of an inspector. The issuing of a notice could be disputed by the employer who would be entitled to refer it to an inspector. In other circumstances it would be subject to confirmation by an inspector after a specific time. Despite the notice, work would continue but other employees could take any necessary precautions through reading the notice.
162. It has been argued that any increase in authority of safety and health representatives will be used in industrial circumstances to add pressure to support industrial relations claims. However, with training as to the critical importance of safety and health and proper accountability controls, it is not unreasonable to suggest that the contrary will likely be the case and that there will be fewer safety and health disputes promoting industrial relations issues because the safety and health representative's own credibility would be "on the line". It is significant that in the past 10 years reliance by most unions on occupational safety and health as a bargaining tool for other objectives has reduced. It appears unions have accepted that such behaviour is counterproductive to the long-term interests of their own members.
163. Moreover, it would be less likely that there would be any basis on which others could then "manufacture" safety and health issues in order to advance industrial issues. Experience has shown that not all workplaces are safe or healthy. The employees therefore ought have rights to protect themselves. The fact that some could abuse that right is no basis for a failure to implement the process. Instead any abuse needs to be dealt with swiftly and firmly. Indeed, continual abuse of the right should carry significant penalties because that behaviour damages the credibility and impact of effective safety processes.

164. The introduction of provisional improvement notices or safety alerts should not be controversial as they will not directly affect employers' control but give relevant employees the opportunity and right to highlight safety and health issues and developing problems. Because of the requirement to consult, employers would have the opportunity to attend to any problem before there is a need to issue a notice and they will be comparatively rare occurrences. The fact that the power exists will give representatives both the right and indeed the obligation to raise concerns with employers and the present reluctance to do so should be removed. It could and should lead to significantly improved consultation. The entitlement has not lead to substantial difficulty in those areas where the entitlement already applies such as in Victoria and under Federal offshore petroleum industry legislation.
165. If society cannot trust employees to protect themselves in a responsible manner then it needs to find other ways of ensuring workplace safety because the present regime is inequitable. Employees are loaded with obligations to work safely, to ensure the safety of others, to report and to consult, but are not given adequate authority to help improve their own and their colleagues' safety.
166. While these notices could be applied generally to industry, there are some situations where they would not work effectively. It was pointed out that safety and health representation is a difficult issue where there are high turnover levels and short employment durations. Perhaps the most obvious examples of this occur in the construction industry. As a consequence, representative arrangements that are of doubtful legal standing often arise because of industry exigencies. It was also argued by building industry representatives that the alternatives in that industry are often undesirable and are not truly directed towards occupational safety and health. For example it was submitted that union appointed safety and health representatives use their safety role to achieve other concessions unrelated to safety. It was submitted that claims made in relation to safety issues are discontinued when other concessions such as pay increases and union membership issues were resolved.
167. Safety is a powerful and emotional issue on which to develop arguments. However, it is counterproductive and inimical to employees' long-term interests to have safety used as a bargaining instrument for other matters. The legitimate concerns of employees can be devalued in such an environment.

168. It appears that at least some of the difficulties arise because the short-term nature of the work does not provide a proper election, appointment and training process for safety and health representatives. As a result a union might propose or appoint a safety and health representative and seek to impose that representative within an employer's workplace without consultation. That might be an acceptable arrangement under some circumstances and not acceptable in others. Fundamentally, it should be the right of the employees to choose their representatives and if appointments are made because of the exigencies then confirmation ought be the entitlement of the employees. Moreover, there may need to be alternative or additional training arrangements put in place in such circumstances. Many in the construction industry favour formal induction training prior to employees working in the industry. Other options may also be available. For example, it may well be appropriate that if safety and health representatives are to be appointed and later confirmed, they should also be trained before being authorised to act on behalf of their colleagues.
169. In the absence of safety and health representatives and committees, perhaps those responsible for the construction activity should be required to develop an occupational safety and health plan for the work which would be approved before commencement and available throughout the work to employees and their representatives. The plan could include detail of a kind found in the safety case regime that is used extensively in the oil and gas industry and in major hazardous facilities.
170. All employees could be given a suitable induction; including advice on the plan and its relevance to each employee. Employees could have the entitlement to raise with their supervisor any reasonable concern as to the implementation or operation of the plan. Where employees are also properly protected from discrimination under the Act, any existing reluctance to raise matters in some workplaces would reduce and all parties could be required to comply with the plan.
171. The foregoing possibilities should be explored with other options that parties have proposed or may develop to discern whether they are practicable and effective.

172. The construction industry record in relation to workplace injuries and fatalities is relatively poor and it is necessary for better arrangements and processes to be implemented. At present a Construction Industry Safety Advisory Committee has been established under the auspices of the WorkSafe Commission. That Committee is ideally placed to consider the alternative mechanisms that might be developed and implemented. It should be directed to work on the issues with a view to developing options for consideration by the Commission. If it is unable to develop options or the Commission is unable to agree on specific proposals, the Department should undertake the work and report with recommendations to Government. Ongoing evaluation should be considered, as it would also indicate any bottlenecks or deficiencies in the processes. These considerations are further developed in Part 4 of this Report.
173. A further difficulty noted in a number of submissions went to the nature of the PINs themselves. There were three major issues raised. The first went to the difficulties outlined earlier of appointed rather than elected safety and health representatives operating as industrial representatives rather than being prepared to work as true safety representatives. The second and third go to the notices themselves. It was argued that PINS can too easily be confused with the improvement notices issued by Inspectors and which, unlike PINS, have mandatory elements. It is also argued that related to that is a concern that when contracts and tenders are being prepared the organisations concerned often require those tendering to advise how many improvement notices they have received. It appears improvement notices are commonly required information and are used as a measure of a company's safety performance record. There is concern PINs will be used in that way. These could badly distort a company's otherwise satisfactory record if used that way especially if subjected to scrutiny by an over-enthusiastic safety representative.
174. It is possible to utilise an alternative which has the characteristics of PINS but not these disadvantages. It is possible to have notices, either "safety alert" or "safety caution" notices" which are applied in the same way but are not "improvement," notices. Again they would require consultation and ultimately confirmation by the inspector but would more clearly express that it is a warning or caution put in place by the safety and health representative.
175. In turning to steps that might be taken to encourage employers, especially in small business, to take a more positive approach to consultative processes there are a number of options which require further exploration.

176. Firstly, various incentives have been considered. Perhaps ideally, financial incentives based on insurance cost savings should be designed. However, a review of existing schemes and various proposals indicates that they are not particularly viable under existing insurance arrangements. Most Australian incentive schemes have been introduced under single insurer environments and even then have not been notable successes. Other problems have arisen under the single insurer schemes. The earlier Review by the Productivity Commission recommended further work be undertaken on this issue. It is desirable that this should occur and could perhaps be undertaken on a National basis.
177. Secondly, later in this Report the traditional mechanisms of inspection, enforcement and promotion are all addressed and a number of recommendations made to continue and enhance the work. It is expected that they will each continue to contribute to the gradual improvements that have been evident over recent years. A variety of non-financial incentives are also listed shortly and should be further analysed by the Commission.
178. It has been argued in many submissions that if penalties were significantly increased, particularly with imprisonment as an option and/or with the additional penalty of industrial manslaughter, that it will help to achieve the protections sought and will heighten attention. These appear to argue that the penalties alone will provide a sufficient deterrent effect that will result in general improvements. While there may be justification for penalty increases and new penalties, these arguments are too simplistic in assuming that improvements will take place in future when they have not done so in the past. Although there are other reasons for an increase in penalties,²⁷ such as deterrence, public concern and legal profile and precedence, they offer only limited scope in encouraging additional consultation and representation.
179. Maximum statutory penalties were increased significantly in 1995 for example, with little apparent impact on occupational safety and health in most West Australian workplaces. There is little evidence that the significant increases had any impact on the number of safety and health representatives, the creation of safety and health committees or in employer/employee consultation, training or safety processes. Indeed even the level of penalty set down by the Courts did not increase markedly and certainly did not double in line with the increase in the maximum penalties.

²⁷ See for example Gunningham (1999) and Gunningham and Grabosky (1998)

180. In asking why the increases in maximum penalties had so little impact, one answer is plain. Neither employers nor employees saw the penalties as directly related to the day-to-day operations of their workplace. For an employer who did not want to be troubled by consultation, safety and health representatives or committees, it would perhaps, have meant taking a little more care to avoid prosecution and/or injury. In some cases it might have resulted in some greater emphasis in management-driven safety and health with employees being (better) instructed as to safe work practices. Employees would have seen little impact other than, perhaps, some further instructions from their supervisor. They could perhaps also have some increased confidence that their employer might become a little more conscious of not injuring them at their workplace.
181. As the Robens Committee reported, the employer alone cannot maximise safety. In that regard there is abundant evidence that, despite the integrity and concern of many employers to protect their employees, there are also a significant number who will exploit the situation and attempt to gain competitive advantage over their more concerned peers. History, including Western Australian history, is littered with examples of that behaviour. As well, as employees become more powerless and/or the economy falters, the tendency for that is likely to increase.
182. History has also shown that safety can deteriorate if economic pressures overtake employers. The material referred to by Bohle and Quinlan highlights the difficulties being faced in other parts of the world. In some parts of the developing world, where workplace injury and death are very high, occupational safety and health legislation is nonetheless comprehensive and based on the Robens model. It is not just the model that prevents injury but also the way it is put into action. The community has to make the choice of whether it wants first-world or third-world occupational safety and health in the way it develops the models into practical application.
183. As already noted and given the alternatives, those who assume full control by not participating with their employees in the processes but then fail in their duty should be required to face significant penalties for the damage inflicted by their action or inaction. The penalties should be large and should include prison for those events where they have been grossly negligent in disregarding their employees' safety to the extent that employees are killed or severely injured. In such cases they have in effect, accepted the costs that go with the full exercise of control and prerogative.

184. However, if penalties were better designed to align both with the particular issue and the nature of the failure, as well as deterring poor behaviour, they could be geared more towards encouraging desirable behaviour including consultative processes. The impact could be significant especially if linked to other incentives, including cost savings. That is an issue that ought to be explored more fully. For example, if the penalties discriminated in favour of those organisations that took their responsibilities under the legislation seriously, complied with their general duties fully and encouraged genuine consultation and safety and health representation, they could encourage more businesses to take that approach.
185. It is a well-established legal tenet that there cannot be differing penalties for the same offence. It is not possible therefore to directly discriminate between two parties who have offended in the same way as they either committed the offence or they did not. Differences between them however can occur in terms of the penalties to be applied. That will rely on the exercise of discretion by the Court and the sentencing regime that applies. A Court for example is able to view the same offences within the context of the individual circumstances and events leading to the offence. Two different organisations might have two completely different records and the Court will decide whether the differences warrant a different penalty. The Court might take account of the company's past record, its regard for its obligations and response to the incident.
186. While there is far less likelihood of a conscientious organisation offending, situations do arise where that does happen. The commitment to improving safety and health might well form a reasonable basis for determining penalty outcomes if a company offends.
187. Sentencing guidelines could require the Court to consider the extent that the organisation had complied or had attempted to comply with the provisions of the Act. They could also be used to encourage the Courts to apply more substantial penalties on those that choose not to adopt the approach to occupational safety and health inherent in the Act and who should carry greater responsibility for their failures.

188. Alternative penalties could also be incorporated into sentencing guidelines, or perhaps used in parallel with sentencing guidelines. A possibility could be reparation orders against an offending organisation payable to the injured or aggrieved party. Where for example an offending organisation had shown little or no regard to the obligations set down in the Act and where warranted, the court could require that damages or restitution be paid. Injured individuals and/or their families would achieve support without the need for additional litigation. It could in some cases help to pay for those matters not otherwise compensated. In situations where common law claims cannot be pursued, it could provide significant help to the employee.
189. Importantly, the existence of clear sentencing guidelines could also have insurance implications for offending organisations. It could provide some incentive for them to take their occupational safety and health obligations more seriously because penalties would be applied outside the (no fault) workers' compensation environment and instead would ascribe fault. The consequence could and should result in incentives for improved safety and health performance within companies.
190. If a matter did not require a payment of specific damages to a person or organisation, alternative orders for payment could be made to WorkSafe to be used in the community for safety and health advancement and promotion. This would be an adaptation of the "user pays" principle and would help to ensure that those who infringe, subsidise the remainder.
191. Such proposals would of course need consideration in the context of the legal implications and legal principles. The proposals should not apply to those situations where there had been gross negligence and serious injury or death had resulted. Certainly however, there is room for imaginative and novel outcomes in order to ensure occupational safety and health is taken seriously. While novel, these kinds of proposals would better target penalties to specifically focus on recalcitrant and unconscionable organisations that have poor safety standards in their workplace/s. Employers who are committed to occupational safety and health would have that fact acknowledged. The proposal should result in general improvement by significantly raising the cost of non-compliance.
192. New forms of penalties could also support these specific proposals. Existing monetary penalties in the Act should be augmented by measures aimed directly at improving occupational safety and health. These for example, could include:
- negotiated outcomes providing for a partnership or co-operative approach;

- supervisory orders and corporate probation;
 - community service orders;
 - publicity sanctions involving “naming and shaming”; and
 - dissolution sanctions.
193. Additional options are discussed in more detail in Part 4.
194. In encouraging better performance, the foregoing have some similarity with initiatives elsewhere. For example Gunningham and Johnstone²⁸ refer to a successful approach adopted in Maine in the US where 200 dangerous workplaces were identified. These organisations were offered a choice of a partnership to improve safety or stepped up enforcement. Most chose the former. While such a scheme could perhaps be adopted locally, the foregoing provides similar incentives without requiring the level of resources of the Maine program.
195. In another instance, the authors refer to a strategy trialed in Minnesota²⁹ where enforcement was more intensely applied to organisations that had been unresponsive to establishing a systematic approach to accident and injury prevention. In that instance, the industry association had also established a company to help small and medium-sized enterprises by providing auditing services for their members. Actions by those businesses responding to that audit process and taking steps to remedy the deficiencies were then taken into account when enforcement action/penalties were being considered.
196. Yet another alternative³⁰ found useful in the USA construction industry, where, as in Australia, there is rapid change and high turnover, was for inspectors to establish whether an effective safety program was in place and if so to then concentrate only on the top four hazards identified in the USA (falls, electrical shock, being struck by objects and crushed). Organisations that did not have an effective safety program were more comprehensively inspected. That priority approach has since been expanded due to the earlier success as enterprises chose to engage in developing more effective safety programs.

²⁸ Gunningham and Johnstone (1999) p81

²⁹ *ibid* p119-120

³⁰ *ibid* p108

197. It is interesting to note that the USA, which has a long tradition of business freedom, has also placed considerable emphasis to the protection of individual employees. While no doubt some of that would have come as a result of a desire to reduce litigation there is little hesitation by the authorities to interfere on behalf of employees if there is a perceived need to do so. That has been accentuated in more recent times with the development of a series of Federal policy initiatives and research projects. These are outlined in the Department of Labor's Occupational Safety and Health Administration (OSHA) web site³¹. An example of the action taken is a list of 14,000 workplaces with the highest injury/disease rates. These are named under the Administration's freedom of information obligations and the authority notes that 1,000 of the sites are to be inspected.³²

3.2.4 Occupational and Public Safety

198. There is increasing recognition that community safety and security can be compromised by workplace events. A fire in a Bellevue chemical storage facility on the outskirts of Perth in February 2001 was an example of a workplace incident having a major impact on the surrounding community. There are examples of other smaller and less dramatic incidents that have impacted beyond the workplace where they occurred. For example, building collapses and fires have occurred in the Perth central business district which could have compromised the safety of the public as well as employees.

199. Since the issuance of the draft report, a fire at a fireworks factory in the Perth hills suburb of Carmel has given additional impetus to this issue. Once again, the situation arose as a consequence of a workplace incident and only luck prevented a tragedy when significant explosions resulted from the incident. While it is not the concern of this Review to consider the issue of public safety generally, it does often have a significant interface with workplace activity and in that context requires consideration.

³¹ www.osha.gov

³² www.osha.gov/media/oshnews/aug01/trade-20010803.html

200. In considering the interface between occupational and public safety, the Bellevue fire is instructive because the fire involved both serious occupational and public safety and health issues. In a newspaper report on the fire³³, a Government pollution expert indicated he thought "...firefighters would die trying to contain the chemical fire". He described how an apparent lack of information on the chemicals stored at the site led to a "circle of misinformation" among Government agencies. Huge explosions occurred during the fire with "...red-hot drums sailing through the air". It appears that part of the major concern expressed about that fire was that no one knew what was burning, even though it was known that hazardous chemical substances were stored on the site. According to the report, "...an inspection of the premises by DEP³⁴ officers in July 1999 found it had inadequate chemical storage..."³⁵.
201. It appears at least possible that the site had not been closed as a deficient or inadequate facility because there were no adequate alternatives. However, the proximity of the site to retail precincts, communities and schools meant that the consequences of the incident could have been catastrophic. Disastrous events that are reported in other parts of the world could, in that case, have come from Western Australia.³⁶
202. Where people outside the workplace face the risk of being affected by workplace events, these need be taken into account in the design and implementation of workplace safety and health strategies to ensure that the risk is not understated, that it is controlled and that it becomes part of workplace planning. Workplace safety and health issues that have consequences for the community cannot be partitioned as if there is no connection.

³³ The West Australian, 20 October, 2001 p42

³⁴ Department of Environmental Protection

³⁵ *ibid*

³⁶ It is also of interest that the cost to the community of cleaning up the site was reported as \$2.7 million, far in excess of the initial estimate of \$500,000.

203. In the same context there is real potential for confusion between public and occupational safety. Sometimes the two are indivisible but it appears that, where events involving both occupational and public safety occur, the decision about WorkSafe's involvement may depend on the arbitrary decisions of emergency services authorities. Given that the emergency services own employees are also involved in such emergencies, it can be argued that it is appropriate that WorkSafe should be involved in all those circumstances. In other cases, WorkSafe takes action to ensure public safety in the absence of alternatives because of the public interest or expectation even though its obligations under the Act are perhaps arguable. Amusement devices at the Royal Show are an example of that activity.

204. In the United Kingdom, there is not the strong division between workplace and public safety arising from workplace activities. The Health and Safety Commission (UK) has as its first two functions:

“to secure the health, safety and welfare of persons at work”; and

“to protect the public generally against risks to health or safety arising out of work activities and to control the keeping and use of explosives, highly flammable and other dangerous substances;”³⁷

205. In light of the horrific events in the United States and Bali, it is appropriate that the relationship between public and workplace safety be considered again. Existing laws and/or arrangements in this State appear inadequate in providing consistent and comprehensive co-ordination in relation to safety and health. It is of note that all the US authorities co-ordinated to effectively deal with the events of September 11, 2001. For example, the Occupational Safety and Health Administration (OSHA) was directly and immediately involved in the World Trade Centre work and very quickly provided details on their website in relation to the Anthrax concerns for workplaces. Some days after the Anthrax issue arose there was still no advice in this State on relevant websites, although a number of press releases and statements were made. The issue is not that the community was not informed, as plainly it was, rather that it was not done in a pre-established and systematic way.

³⁷ See Health and Safety Commission (2001)

206. It is plain that the workplace impact on public safety and health needs to have broader coverage under the Act and to be more structured. The community should not have to rely on luck as it has with the two major fires at Bellevue and Carmel. There is no doubt that fatalities will result if steps are not put in place to protect the public as well as employees.
207. The foregoing also calls into question the administration of explosives and dangerous goods as well as major hazard facilities and whether such facilities should remain the responsibility of the Department of Mineral and Petroleum Resources. These activities are not only concerned with mining or petroleum production. In light of the recent incidents, the heightening of concern over public safety and re-organisation within Government Departments it is time to reconsider the relationship of the safety administration and the protection of the public. This should include consideration of the role the Department of Consumer and Employment Protection should play in the processes.

3.3 Changing Work Environment

208. It is significant that the existing Western Australian *Occupational Safety and Health Act 1984* was drawn up in a different work environment. Where previously more work was process or manufacturing based and undertaken by company employees, new technologies, work systems and employment arrangements have altered the nature of work. This includes, but is not restricted to, the growth of services, casualisation of much of the workforce, development and growth in self employment and small business, as well as new activities such as the proliferation of labour contracting and labour hire activity as well as downsizing, working at home, group training and work for the dole schemes.
209. Much of the new work is oriented to 24-hour operation with new pressures related to the technology used. For example, ten years ago call centres were rare but in recent years have proliferated. This has been accompanied by a significant decline in some other areas, such as in the number of craft and skilled employees and in the labour intensive and unionised manufacturing plants. The demographics are also changing. An aging workforce and increased vocational education have all impacted on the industrial landscape.
210. The WorkSafe submission highlighted a number of these trends which bear directly on the continued effectiveness of the Act:

The Recent Context

- growth in the service sector;
 - growth in the number of self-employed and those employed in small business. In Western Australia 48% of the workforce works in small business³⁸;
 - previous systems were predicated on the notion of workers having an employer whereas “modern” workplaces involve growth of the small business sector, an increase in self-employment, contracting, out-sourcing and sub-contracting;
 - growth in clerical, professional and managerial occupations;
 - decline in labour intensive and heavily unionised large manufacturing plants;
 - decline in craft and skilled manual occupations;
 - rapid technological developments enabling distance work, e.g. tele-working, home-based work, use of service activities (such as call centres) and 24-hour service delivery;
 - an increased percentage of casual employees in the workforce;
 - an increase in 24-hour operation, shiftwork and hours worked;
 - the aging of the workforce. [In Western Australia some 14% of the population is over 60 years of age. By the year 2016 this figure will rise to 20% and within the next 50 years over 25% of the population will be over 60 (Source: Office of Seniors Interests)];
 - an increase in vocational education; and
 - the emergence of new occupational safety and health hazards and a wider recognition of the impact of work on people’s health.
211. Submissions highlighted the fact that homes are often also workplaces, not only for residents but also for personnel who are required to work in homes as care givers or for other reasons. It was argued the Act needs to be more explicit in defining the home workplace.
212. In general the Act is able to address the changing work environment because the general duties of care and consultative processes under the Act are not dependent upon any particular workplace structure or set of technologies. In that regard, the Robens Committee’s approach of those engaged in workplaces dealing directly with hazards as they arise is well suited to an environment of rapid change. Workers and employers are usually able to identify and address new hazards. The alternative approach of regulatory intervention is unlikely to be as effective, as experience has shown that there is considerable and unavoidable delay between the emergence of a new hazard and the development and application of regulatory measures.

213. It is also likely that traditional regulations would not adequately address many new hazards. Psychosocial issues such as work-related stress and musculoskeletal disorders arising from work organisation and the like are complex problems that are difficult to effectively address through formal regulations.
214. The increase in non-traditional forms of employment, particularly those associated with the trend towards the use of contracting, sub-contracting and out-sourcing within workplaces, may well impact on the future effectiveness of the Act. This trend is evident across a wide range of industries and occupations. As a consequence, in many workplaces the labour force can be comprised of a combination of workers employed directly by the employer and others who may be self-employed or employed by another employer. Workers may be performing the same or similar tasks in the same workplace and be exposed to identical safety and health hazards but have different employment arrangements or contracts and therefore different entitlements under the Act. These concerns also apply to group schemes in which a training company employs apprentices and other trainees for the duration of their training. Apprentices are then “hired out” to various employers as part of a training program.
215. Some of these other contractual forms that fall outside traditional employment arrangements are the result of legitimate business processes aimed at enhancing flexibility and productivity. In other cases, they may well have been established specifically to avoid or to minimise the effect of the requirements of taxation or industrial relations laws.
216. The general duties and consultative processes in the Act are predicated on the existence of an actual or implied contract of employment between a worker and an employer. The Act “assumes” there is an explicit employment relationship between these two parties in assigning duties and providing for consultation. There are fundamental differences between the duties owed by an employer to his or her employees and those owed to other persons in the workplace. They cannot, for example, be elected as a safety and health representative for that workplace.
217. The momentum of change can be expected to continue and the legislation needs to be flexible enough to accommodate and adapt to the new demands and environments. WorkSafe in its submission went to the future role of the legislation and concluded:

³⁸ Source: WA Small Business Development Corporation

- legislation needs to keep pace with technical and social development, obsolete provisions need to be repealed and detailed technical solutions largely left for the workplace to decide so long as the results comply with the safety levels required. The legal framework must be flexible enough to address new risks and public concerns without constraining new technologies or working methods;
 - existing legislation needs to be simplified in order to make it easier for employers and employees to understand and apply;
 - notions of giving more responsibility to employers and employees at the workplace level need to be considered;
 - industry sector guidelines should support employers in risk assessment and other measures to be taken;
 - most jurisdictions support establishment of OSH systems and many legislate a requirement to undertake risk assessment – some jurisdictions take the extent to which a systematic risk assessment has been carried out into account when looking at whether an inspection will be done; and
 - many jurisdictions have increased maximum penalties and many others are currently considering doing so.³⁹
218. In considering the foregoing, it seems likely that there are not many incentives or demands for legislative change to accommodate those new arrangements. The present legislative requirements could sit comfortably with some of the significant players. For example, many employers are able to operate in a largely *laissez-faire* environment and to maintain workplace control without being too inconvenienced by safety and health issues.
219. Unions are able to justifiably claim that they have achieved advances in the safety and health environment that continue to have an influence and that they are busy with what they are doing under that environment. Government agencies can point to their largely successful efforts to establish the required environment for ongoing safety and health improvements and the improving figures without needing to go to the less comforting considerations of what may actually be taking place inside workplaces. As a result they may be too busy to raise the debate about what is not being done.

³⁹ WorkSafe Western Australia (2001) Submission

220. Of course, the foregoing is simplistic and many employers, union officials and government officers are very concerned, but there are warning signs that they may be in the minority. There are also warning signs about the cost of complacency. The burgeoning public health bill is one part of that scene with occupational health issues a significant component of the public health cost structure. A significant component of the road toll is also known to be work-related and the courts are of course, busy with various claims including those, such as the asbestos exposure issue and others, that are directly related to work.
221. There is a clear need to address the coverage of the Act in light of the changing work environment, new administrative arrangements within Government and the increasingly ‘blurred’ distinction between occupational and public safety. At the same time regulatory, information, inspection and administrative strategies need to be better integrated to meet the diverse needs of workplaces.
222. These new challenges call for a re-evaluation of occupational safety and health in Western Australia. It should not take a major tragedy to remind us of the need for revitalizing our initiatives.

3.4 Other Initiatives

223. In raising possible initiatives a number of those making submissions to the Review argued that better use could be made of existing expertise within Western Australia and some suggested the appointment of honorary or “ex officio” inspectors. That was seen as a proposal that would be especially useful for country areas, which do not normally have regular contact with the inspectorate.

224. It is noted that a number of Government agencies select and appoint persons who are not their employees in a variety of capacities including some enforcement and inspection activity. This is worth further consideration in relation to occupational safety and health because these personnel⁴⁰ could be appointed to take on tasks in certain situations and could work to specific directions. Those selected would already have some relevant training and would be further trained for specific work. It is envisaged that they would not necessarily be required to undertake complex investigations and inspections but would provide a presence and be visible enough to have an impact. Details in respect of training, payment of expenses and inspection duties would need to be finalised within the Department. The Commission might also have some role in the development of policy. This is further developed in section 8.2.5 of this Report.
225. What has become clear from a review of the literature is that no one single approach to intervention in workplace safety and health optimises the protection of workers. Rather a mix of the more effective approaches provides the greatest return. The two-step approach by WorkSafe is such an approach. There seems to be support also for the concept of the regulatory enforcement pyramid discussed by Gunningham and Johnstone⁴¹ as an effective tool although, as in so many other cases, somewhat less effective with small and medium enterprises.
226. Despite the deficiencies and failure of some to fulfill their obligations under the legislation there are also many who have accepted their responsibility under the general duties obligations and who have established the processes under the Act in consultation with their employees. It is appropriate that these further develop their systems perhaps by including some changes to the general duties obligations. These already imply that an employer should assess the potential risk of a particular activity and put in place steps to remove or at least to minimise that risk. Other jurisdictions have made that mandatory and it could be part of the legislation in this State.

⁴⁰ That is people who are both selected and willing to undertake the role and any associated training.

⁴¹ Gunningham and Johnstone (1999) p114-5

227. Occupational safety and health policies and procedures should be developed as part of controlling risk and should be key elements of any occupational safety and health management system. In many workplaces the absence of a formal safety system based on specifically designed policies and procedures would make it very difficult to establish the “safe systems of work” required by *s.19(1)*. The existence and use of policies and procedures are an essential element of structured occupational safety and health management systems and associated audit tools used by many employers. The safety case arrangements now in place in many workplaces are a clear example of what can be developed.
228. Further, the existence of such approaches to occupational safety and health will help identify intransigent organisations and perhaps more significantly those that deliberately do not comply with their obligations until the costs outweigh the benefits of their behaviour. These latter minimise their costs, usually with the short-term view of maximising (or making) profit rather than longer-term survival and profit protection. Auditing policies and processes in these workplaces would soon show the nature and extent of any deficiency so that corrective action could be taken.
229. It is accepted that small business, in particular has been severely impacted by regulatory requirements that in recent years have included substantial tax changes and insurance difficulties, as well as the ongoing requirements of various authorities. In order to survive, small businesses prioritise matters and the less immediately significant priorities may not be completed. Regretfully occupational safety and health might well continue to be given low priority unless small business operators are educated to those needs or they become aware that there are significant immediate incentives or costs.
230. It appears that in South Australia, where written policy and procedure is mandatory, they are not satisfactorily established by many small businesses. Such behaviour runs the risk of bringing the legislation into disrepute and it may be necessary to consider other approaches to encourage small businesses to participate and to gain wider acceptance. These could include some subsidisation of the processes or a widening of the existing incentives. There is a need to continue research into that area.

231. Training is also an area that requires further development. It appears from submissions that many employees are not being given adequate induction training, particularly in safety and health matters. That of course leaves employers vulnerable to later litigation but more importantly does nothing to prevent injury or worse. Similarly, safety and health representative training has a number of deficiencies and supervisory staff are often not provided adequate training in order to properly meet their obligations. These are matters that require attention.
232. There is now increasing evidence that safety and health training of those in the workplace does help to prevent and reduce occupational injuries and ill health. The U.S. National Institute for Occupational Safety and Health (NIOSH) for example, undertook and reported results on surveys it conducted in 1998 which indicate that almost any training helped employees to become more risk conscious and become more aware of adopting safe work practices⁴².
233. Implementation of the foregoing proposals and more attention on the problems will lift the profile of occupational safety and health. The proposals could of course, be phased into the small business sector to minimise the cost burden. These are issues that should form part of the strategic plans of the regulatory authorities. They should not however be unduly delayed if deterioration in occupational safety and health is to be avoided.

3.5 Application of the Act to the Crown

234. *S.4(1)* of the Act provides,

s.4(1) “This Act binds the Crown in right of the State and also, so far as the legislative power of the State extends, in all its other capacities”.

235. The status of the Crown (principally State Government departments and agencies) under the *Occupational Safety and Health Act 1984*, however, is not the same as other organisations. Government agencies are usually not the legal employer of the people who work in them. This can cause difficulties in applying provisions of the Act that turn upon the employee and employer relationship – in particular provisions related to enforcement. There are also legal principles that mean that as the Act currently stands it is not possible to prosecute Government agencies for breaches of the Act.

⁴² See for example www.cdc.gov/niosh/98-145-b.html

236. It is not appropriate that executives and departments be able to avoid their obligations. This is the subject of recommendations later in section 4.2.5 of this Report and since the release of the draft report has been the subject of new Government initiatives.

3.6 Extension of the Act

237. As the earlier discussion makes clear, there are presently no specific legislative or regulatory provisions under the Act that deal with the impact of work activity on persons outside the immediate sphere of work. That needs to be corrected to properly reflect the reality of the impact of work. Another example is the provision of accommodation which is necessarily used in the course of employment, for example, in remote locations. A fatality in one such case was not covered by the Act but plainly should have been. This is further addressed in section 4.1.2 of this Report.

3.7 Other Legislation - Representation

238. As discussed in the Report of the Review of the *Mines Safety and Inspection Act 1994* (MSI Act) there are powerful reasons for enhancing consistency and combining the general duties and policy directions of the *Mines Safety and Inspection Act 1994* processes into mainstream occupational safety and health. The thrust of the legislation is now almost the same, and the industry sectors have all adopted the Robens Committee's approach of a shared responsibility under a general duties legislative regime. Interestingly, the *Mines Safety and Inspection Act 1994* and *Occupational Safety and Health Act 1984* also mirror each other in relation to many of the procedural requirements and obligations.
239. There remain substantial reasons to continue the separation of mining from the remainder of industry. Many mining activities differ from industry generally. These are well known and will not be repeated at length here but are part of the reasons why mining was not originally included under the *Occupational Safety and Health Act 1984*. There is for example, simply no other activity like underground mining and it is necessary to ensure mining continues to have specialised administration in order to cater for the differences.
240. It is equally important however if occupational safety and health is to be properly co-ordinated and given necessary pre-eminence that, where a co-ordinated and consistent direction can be established, it should be implemented.

The Recent Context

241. No contributing organisation or individual argued against the need for co-ordination and consistency to enhance occupational safety and health in Western Australia. Many simply observed that all occupational safety and health should be the responsibility of WorkSafe. Most agreed that it would be beneficial to have some form of over-arching responsibility in the State in order to ensure that consistency and co-ordination of occupational safety and health is maintained.
242. Those supporting continued separation were more concerned to ensure that existing priorities were not diminished and that specialities were maintained and adequately represented.
243. It is possible to achieve each of the desired outcomes. The legislation could be combined to include common provisions such as the general duties and consultative mechanisms in one division and the uniquely specialist requirements, procedures and entitlements relevant to the mining industry in another division of the legislation. Alternatively specialist requirements could be retained within existing legislation. The composition of the Commission could also change to ensure it has mining industry representation. For example a member representative of CCIWA and of UnionsWA could be appointed from the mining industry. That could be through consultation with or, nomination from, the Chamber of Mines and relevant unions or, if necessary, by way of direct appointment by the Minister.
244. The recent appointment of a senior officer of the Department of Mineral and Petroleum Resources to the Commission could also be formalised under the legislation.
245. Under the composite legislation, the existing Mines Occupational Safety and Health Advisory Board (MOSHAB) could be re-structured to enhance its representation and it could become a permanent Standing Advisory Committee of the Commission with perhaps an independent chairperson and at least one other member who would also be a member of the Commission. It could retain a direct advisory role in relation to specialist mining activity to the relevant Minister.
246. The combined legislation and Commission would ensure that policy and consistency would be maintained in each industry sector and activity could be co-ordinated to maximise impact. At the same time the specialist functions could continue as separate activity. For example, the Mines Inspectorate would continue as a specialist team and would not be absorbed into the WorkSafe Inspectorate but would operate in conformity with the broad policy program and direction of the combined Commission.

247. It could also have advantages for career development for the officers concerned and ensure that administrative support is maintained. Such an arrangement would also help to ensure that occupational safety and health continued as a high priority in the context of Departmental restructuring.
248. Ultimately if, as suggested in many submissions, all or most occupational safety and health organisations eventually come under the general legislative and policy directions of the *Occupational Safety and Health Act 1984* and Commission, the Government ought find itself in the position of being able to establish a single major occupational safety and health Department with separate divisions so that occupational safety and health receives the significance that it should. While it must be accepted that the current Departmental structure has been only recently established, it will be necessary for it to remain under review to maintain the delivery of occupational safety and health services in Western Australia.
249. As noted in some of the later submissions, there is also a need to take account of particular work environments under the legislation because a “one size fits all” approach is not always satisfactory. The legislation needs also take account of specific industry’s or activity such as construction and farming and to the size of the business units. Both farming and construction have unique characteristics such as the discontinuous nature of the work and high turnover in construction and the wide variations in farming activity. While the legislation is generally suitable, some provisions may not always suit particular activity. The method of election of occupational safety and health committees and representatives under the Act for example is not suitable for the construction industry. By the time some of the required processes are completed the work has concluded and the particular employees replaced by those undertaking the next activity.
250. Similarly, farming often takes in a wide range of activity and farmers are not able to afford the cost or the training time necessary to bring equipment and personnel up to the standards that might be applied in specialist vocations. Farm employees may only use particular equipment once or twice each year and therefore it is necessary to take account of these in establishing the rules to be applied.
251. The farming sector is probably also the most isolated group and has limited capacity to contribute to or to learn from the Commission and Department.

3.8 Other

252. Some of the foregoing and many other matters are the subject of more detailed suggestions and recommendations in the following sections. Reasons for many of the proposed changes are based on the conclusions and considerations discussed in this section and these will not be repeated in detail under the individual proposals.

4.0 Control of Hazards – Objects (a) to (d)

253. In the previous section some of the more significant issues arising from the Review process were addressed. The submissions and an analysis of the material show that, although progress in many respects has been satisfactory, there is some concern. Chiefly, these come down to the low levels of the consultation and participation that the Robens Committee considered essential for an effective self-regulatory safety and health process.

254. While the legislative framework and structures have been relatively successful, the implementation of workplace initiatives has been slow and there is a possibility that the improvements made will slow or perhaps even reverse. In the previous Part of this Report, a number of possible initiatives were raised so as to promote the continuation of the improved outcomes recorded over the past decade or more. A number of these will require further development and are commended for consideration.

255. In this Part, consideration of the detailed terms of reference commences. The first under the provisions of *s.61(1)(a)* requires that the Minister:

“shall consider and have regard ... to the attainment of the objects of this Act”.

256. The objects of the Act are set out in *s.5* of the Act. The first four objects plainly go to the control of hazards and prevention of work-based injury and ill health and it is reasonable that they are considered collectively. The first four objects are:

- “(a) to promote and secure the safety and health of persons at work;
- (b) to protect persons at work against hazards;
- (c) to assist in securing safe and hygienic work environments;
- (d) to reduce, eliminate and control the hazards to which persons are exposed at work; ...”.

257. The Act seeks to achieve its objectives by establishing a regime in which the particular parties have enforceable duties related to safety and health. The Act and associated Regulations also institute a number of processes designed to assist parties to fulfill their duties. The Act applies sanctions on parties who fail to achieve their duties or otherwise comply with the Act.

258. The objectives related to the control of hazards are considered under the headings of duties and obligations; definitions and persons covered by the Act; processes required and followed under the Act; and penalties applied under the Act.

4.1 Duties and Obligations

4.1.1 The General Duties

259. The general duties set out in *Part III* of the Act establish the broad responsibilities of all parties in the workplace with regard to safety and health at work. These duties may be broadly summarised as:

- employers must, as far as practicable, provide a work environment in which their employees are not exposed to hazards;
- employees must take reasonable care for their own safety and health, and that of others, at work; and
- self-employed persons must, as far as practicable, ensure their work does not adversely affect the safety and health of others.

260. Under *s.19(1)* of the Act, employers have a duty to provide and maintain, so far as is practicable, a working environment that does not expose employees to hazards. Duties are also placed upon self-employed persons and persons in control of workplaces. *Regulation 3.1(r 3.1)* extends these duties by establishing a specific approach to dealing with hazards in the workplace,

“3.1. A person who, at a workplace, is an employer, the main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must, as far as practicable –

- (a) identify each hazard to which a person at the workplace is likely to be exposed;
- (b) assess the risk of injury or harm to a person resulting from each hazard, if any, identified under paragraph (a); and
- (c) consider the means by which the risk may be reduced.”

261. Together the general duties of *s.19*, *s.21*, *s.22* and the specific requirement of *r.3.1* establish the basis for occupational safety and health policy and practice in Western Australia. Almost all of the codes of practice and guidance notes issued by the Commission are predicated on the three-step process of identification, assessment and control. Awareness of the risk control process has been heightened in recent years through WorkSafe’s ThinkSafe-WorkSafe promotional campaign. This campaign directly promoted a simplified version of the risk control process.

262. The Review received a wide range of submissions commenting on the general duties. While a number proposed specific change, all were supportive of the role and broad content of the present general duties.

263. It is apparent that many of the concerns about the effectiveness of the general duties raised early in the Act's history have now largely dissipated. While a small number still express a desire to return to the certainties of regulations, most now accept that the general duties are able to be understood by employers and employees and are able to be enforced by the authorities.
264. It appears that some measure of consensus has emerged around the view that the general duties, when coupled with appropriate and performance-based regulations, (the so-called "two-track" approach) are likely to be effective in addressing safety and health outcomes in the workplace.

4.1.1.1. Risk Control

265. While there appears near universal acceptance of the efficacy of the combination of general duties and the hazard identification, risk assessment and control process, the current statutory and regulatory arrangements do not fully develop the latter. For example, there is no direct reference to risk control in the Act itself although it is implied, for example at *s.19(1)* of the Act. Given the pivotal role the process plays in occupational safety and health in the State and its implicit acceptance as the basis for all occupational safety and health prevention activity, it is appropriate that it should be explicitly established in the general duties of the Act.
266. Similarly, the risk control process in *r.3.1* is deficient in that it does not establish a requirement to reduce or control identified risks. Instead *r.3.1(c)* merely requires employers and others to "consider the means by which the risk may be reduced". As submitted by WorkSafe and others, the requirement to "consider" is not enforceable. There is no requirement under *r.3.1* for any action beyond consideration of possible means to deal with the risk even though the broader duties may be able to be applied and enforced.

267. The requirement for the person to “consider” rather than to “reduce” or “control” identified risks was apparently included in *r.3.1* because of some uncertainty over whether an adequate “head of power” exists under the Act to require identified risks to be controlled. While a review of the duties in the Act suggests this uncertainty may be unfounded, the matter could be readily addressed by amendment to the Act itself rather than relying on the Regulations. In moving the obligations for risk control into the Act the present regulatory requirement to “consider” would be replaced by a statutory duty to “reduce or control” identified and assessed risks in the workplace. While it would not materially alter the duties placed on employers and others, it would make clear the intention of the Act that so far as is practicable all workplace risks are addressed.
268. This would help reinvigorate the risk control process. It would be even more marked if trained and accountable safety and health representatives were empowered to issue notices where an organisation failed to take steps to reduce risk.
269. Comments made on the proposal were generally supportive although some employer representatives considered that it placed too great a burden on employers alone. It was argued that some hazards are not foreseeable, some difficult to control and some are generated by other persons. While it is accepted that these could eventuate, the recommendation must be seen in the context of the conditional “as far as is (reasonably) practicable” which underpins the various provisions of the Act. In that light, the requirements are not unreasonable and no doubt will be drafted within that context. It would also operate in context with Recommendation 9 and *s.20(2)(d)* of the Act in relation to the reporting of hazards.

R:1 It is recommended the Act be amended to include a requirement to identify hazards, assess the risk associated with those hazards and reduce or control such risks as a duty of employers, self-employed persons and persons in control of workplaces.

4.1.2 Employers' Duties

270. The importance of the role of employers in achieving occupational safety and health cannot be understated as they are critical to the success of any safety and health legislation or program. The duties and obligations of employers have been discussed at some length in Part 3 of this Report where options to make the legislation more effective were discussed. The extent of employers' duties is again addressed shortly. It is necessary to note however that small and medium size employers require assistance to fulfil their duties and that there may be a number of additional strategies beyond those raised in this Review that might be employed to achieve this. Some of the options were canvassed in the Industry Commission Report of 1995⁴³ and some recent steps could be extended.
271. For example, some insurers have undertaken advisory and assistance programmes to help their clients and these should be encouraged. Insurers are usually involved after injury but early involvement might help employers to fulfil their duties and obligations thereby reducing injury and the costs that would otherwise be incurred. As noted in the 1992 Review⁴⁴, insurers have been involved in incentive schemes in other parts of the world and the further investigation of incentives should again take place. The educative and resourcing role of insurers should receive particular encouragement because it is specifically directed towards helping their clients meet their direct obligations.

R:2 It is recommended the Commission consider and recommend options for improving the assistance given to, and the encouragement of, employers to observe their duties through systematic safety and health planning and consultation.

4.1.2.1. Volunteers

272. A number of submissions went to the duties owed by employers to volunteers and some expressed concern that the Act did not provide adequate protection for them. These implied that employers' duties should be amended to provide additional obligations.
273. WorkSafe has published information on the application of the Act to volunteers on its website⁴⁵. This document succinctly covers issues associated with the duties of employers regarding the safety and health of volunteers in the workplace.

⁴³ Industry Commission (1995)

⁴⁴ Laing (1992) p115-6

⁴⁵ WorkSafe Western Australia (1996)

274. Volunteers are not employees nor have any specific status under the Act. The duties owed to volunteers are the same as those owed to any other member of the public by virtue of *s.21* and *s.22*. The issue of volunteers is closely related to the general issue of public safety.
275. While volunteers often work alongside or under the direction of employees performing the same or similar tasks, employers and self-employed persons owe them different duties. The absence of an employment relationship means the duties of employers under *s.19* do not apply and instead the duties under *s.21(1)(b)* (duties of employers and self-employed persons to non-employees), *s.22* (duties of persons who have control of workplaces or the means of access and egress) and *s.20(1)(b)* (duties of employees to avoid adversely affecting the safety and health of another person) apply to volunteers. As noted elsewhere, even where these duties apply, their application is very limited. Recommended changes to *s.21* would considerably enhance the protection afforded volunteers⁴⁶.
276. Subject to the clarification and/or amendment of the scope of *s.21*, the present duties in relation to volunteers appear adequate. Alternative approaches, such as the application of employers' duties under *s.19* to volunteers are not practical given the tenuous connection with "work" in many volunteer situations.

4.1.2.2. Accommodation

277. A number of submissions argued that there needs to be an extension of the Act to cover the duties of employers where accommodation is provided as part of the work obligation. Employees working in remote areas are often obliged to make use of employer-provided accommodation, as there are no alternatives. So called "found" arrangements apply where the employee is provided, either free of charge or at a nominal cost, temporary accommodation while the work is being completed. An example of such arrangements would be where accommodation is provided to shearers on a sheep station or building employees constructing facilities at an isolated location.
278. These situations differ from arrangements where leased or let accommodation is provided in association with employment. In those situations, employees have a choice to accept the tenancy or lease arrangements and have some protection under relevant legislation; for example housing for a miner at a mining town.

⁴⁶ See section 4.1.6

279. It is clear there are presently no specific legislative or regulatory provisions that deal with the provision of accommodation in the course of employment and which form part of the employment obligations.
280. The Commission has considered the appropriate duties of employers in providing accommodation. This process included development and consideration of public comment on an issues paper. In 2000 the Commission recommended the Act be amended to include a general duty responsibility of employers to provide safe accommodation. This duty was to be qualified by a number of criteria.
281. This recommendation was accepted by the then Minister for Labour Relations but has not been progressed. While some suggested that the recommendation should be accompanied by a reciprocal provision requiring employees to take due care of accommodation and equipment particularly on farms, many of those commenting on the provision believed it should now be implemented without further debate. While the concern over damage is an issue for some farmers and could sometimes inhibit their ability to ensure that hazards are identified and risk minimised, they are entitled to expect reasonable behaviour from their employees and contractors, and can take steps to ensure that is the case. While they may sometimes believe that there are substantial reasons inhibiting those steps, it does not alter their entitlement to do so or their capacity to inform employees of the employees' obligations.

R:3 It is recommended, consistent with the recommendations of the Commission, the Act be amended to include a limited duty of employers to provide safe accommodation, subject to the criteria:

- **accommodation should be essential to the performance of the work and the employee is required to live there;**
- **if a separate tenancy agreement or some other legal instrument applies, the new provision of the Act should not apply; and**
- **no practicable alternative accommodation is provided or available.**

4.1.3 Principals and Contractors

282. The nature of the relative duties of employers and contractors they engage, along with the structure of the relevant provisions (*s.19(4) and (5)*) of the Act, has been a long-standing area of concern amongst many parties. The Review received submissions calling for clarification of the intention of *s.19(4)* through a re-drafting into “plain English” and for provisions similar to *s.19(4)* to be applied under other sections of the Act.

Control of Hazards

283. *S.19(4)* of the Act extends the application of the employer's duties, under *s.19* only, to a principal/contractor relationship. It deems the principal to be the employer of both the contractor and any persons employed or engaged by the contractor to carry out or to assist in carrying out work in relation to matters over which the principal has control. Conversely, the contractor and persons employed or engaged by the contractor are deemed to be employees of the principal. *S.19(4)* provides:

s.19(4) "For the purposes of this section, where, in the course of a trade or business carried on by him, a person (in this section called "the principal") engages another person (in this section called "the contractor") to carry out work for the principal -

(a) the principal is deemed, in relation to matters over which he has control or, but for an agreement between him and the contractor to the contrary, would have had control, to be the employer of -

(i) the contractor; and

(ii) any person employed or engaged by the contractor to carry out or to assist in carrying out the work;

and

(b) the persons mentioned in paragraph (a)(i) and (ii) are deemed, in relation to those matters, to be employees of the principal."

284. *S.19(5)* provides that nothing in *s.19(4)* derogates from the duties of the principal to the contractor, or the duties of the contractor to persons employed or engaged by the contractor. *S.19(4)* applies to the principal only "in relation to matters over which he has control or, but for an agreement between him and the contractor to the contrary, would have had control".

285. The intent of *s.19(4)* is sound. It extends coverage of the Act to many who would otherwise fall outside the Act's scope because of the lack of an employer/employee relationship. Secondly, in conjunction with *s.19(5)*, it introduces the concept of overlapping responsibilities, subject to the question of control.

286. In practice however, *s.19(4)* has proved to be one of the most difficult subsections of the Act for the "lay" person to read and understand. The most poorly understood phrase of the subsection is "or, but for an agreement between him and the contractor to the contrary, would have had control". This phrase is widely misunderstood to mean that a contract can be used to avoid responsibilities under this provision, the exact opposite of its intent.

287. While the matter can be addressed to some extent through information and education, and WorkSafe’s published material includes explanation of the provision, confusion is sufficiently widespread to warrant amendment of the Act.
288. There are also other concerns with *s.19(4)*. Firstly, WorkSafe has legal advice recommending consideration be given to clarifying the meaning of “control” in *s.19(4)(a)* to make clear that control encompasses a “capacity to control”. It is presently open for a party to claim that he or she has no control over a matter even though the party has the capacity to control but simply chooses not to exercise that control.
289. There is also uncertainty over the application of *s.19(4)* to Crown agencies. Legal advice has indicated that the phrase “in the course of a trade or business carried out by him” may exclude many Crown agencies (that do not carry out a trade or business). Private households and persons should remain excluded. Clarification is also required as to whether *s.19(4)* and (5) can be applied to Western Australian principals contracting for services from other countries or states.
290. Construction industry personnel were concerned that *s.19(4)* places a disproportionate burden on principals. While contractors are obliged to protect themselves they will not always do so. As a consequence a shared responsibility would probably be most effective. Additional provisions specific to the industry would also help ensure all parties accept their responsibilities. These issues are further addressed under section 4.2.2 of this Report.

R:4 It is recommended *s.19(4)* of the Act be redrafted, in order to:

- ensure the provision can be readily understood by parties in the workplace;
- clarify the meaning of “control”;
- ensure the provision can be applied to agencies of the Crown; and
- maintain the current exclusion of private persons.

R:5 It is recommended the Commission develop a code of practice or guidance note covering the duties of principals and contractors. This should include guidelines for establishing safety requirements in contracts.

4.1.4 Employees

291. Employees have a duty under *s.20* of the Act to take reasonable care for their own safety and health at work and to avoid harming the safety and health of others.

292. A small number of submissions referred to *s.20* with most advocating increased enforcement of employees' duties. It was suggested employers were uncertain over what action could or should be taken against employees who breach the requirements of the Act. It was argued employees, like employers, should be held accountable for their actions. Few, however, seemed aware that such action is undertaken and had assumed employees are not prosecuted. However, over the period January 1997 to September 2001, WorkSafe prosecuted 11 employees under *s.20(1)(b)* of the Act. In addition, employers also have the capacity to discipline employees who fail to comply with lawful safety and health instructions.
293. The submissions did not point to any particular deficiency with *s.20* and were concerned principally with its application. They appear to have taken the approach that employees need be prosecuted to make the workplace safer. While in some contexts that might be correct, it also suggests an emphasis that in many cases is more likely to deal with effect rather than cause.
294. As noted elsewhere, it is almost incomprehensible that it could be suggested that workers must be required to work safely and should be prosecuted if they do not when their workplace has neither policies nor procedures in place to ensure safety and health. In that context, so called "common sense" is not so obvious to the new, uncertain and uninitiated employees who need better guidance than that "they should know better". Employees can hardly be held accountable if they have not been trained or have had their obligations comprehensively explained. If employees are prosecuted in such a vacuum, it is tantamount to blaming the potential victims.
295. The issue of employee accountability can also be addressed in workplaces through safety and health committees. Employees with access to policies and procedures for working safely would better understand the consequences of non-compliance. These procedures would also provide mechanisms for employees to notify the employer of risks and work processes where they considered they were insufficiently trained or experienced to safely undertake a particular task. One of the main reasons for the establishment of safety and health committees is to educate and encourage employees to become involved in working more safely.

296. Employers have both the authority and right to discipline employees who fail to meet their safety obligations. That power is regularly exercised and as a consequence it can be expected that the prosecution of employees would be comparatively rare. The relatively low number of prosecutions is not necessarily an indication therefore that *s.20* is ineffective.
297. Employers also have the greater capacity and authority to make the changes necessary to ensure that the workplace conforms to the Act and if they choose not to do so they cannot expect their employees to carry the consequences of that decision. Perhaps the only circumstance in which an employee could be held liable in such cases would be as a result of some gross dereliction of the employees' duty.
298. Where organisations have assumed their responsibility and have established a safe workplace with effective site safety representation, enforcement of the rules on recalcitrant employees will usually take place, sometimes as a result of their colleagues concerns. Where, however, the primary responsibility has not been fulfilled, it is not unreasonable for WorkSafe inspectors to go first to the more fundamental and substantial issues in the workplace itself rather than to individual employees. Where employees continue to fail in their obligations, experience shows that dismissal can be an alternative which may be even more effective than prosecution.
299. The WorkSafe *Enforcement Policy* makes no distinction in regard to the enforcement of the duties of employers and employees. The Policy states, in part,
- “All provisions of the *Occupational Safety and Health Act 1984* and *Occupational Safety and Health Regulations 1996* are important in regard to requirements for compliance, and will be appropriately enforced.”⁴⁷
300. The requirements of *s.20* are clear and, as noted, are enforceable. There was no submission or material which indicates a failure or deficiency in relation to employees' duties that suggests any need for amendment.

⁴⁷ WorkSafe Western Australia (1998) Point 1

301. A submission pointed out that while it is an offence under *s.20* for an employee to fail to report a hazard or injury to his or her employer, there is no requirement for the employer to investigate or otherwise respond to the matter. This is inequitable and should be addressed. An employer organisation observed that r3.5 required an employer to investigate hazards reported by employees and it was appropriate that the employer should respond by force of the regulation after investigating the issue, rather than by an obligation under the Act.
302. There is, of course, no reason why a regulation should not provide the detail in relation to the report of the investigation as proposed. However, it seems desirable that the legislative provision which requires that employees report should also provide for the response. It is also useful that it is included in the Act as it is more likely that it will be seen and implemented. It is accepted that the employer already has obligations to inform and consult under *s.19(1)* and the proposal is an extension of these. Employees reporting hazards will expect a response and reporting habits could well change as a consequence. It appears likely it could result in a higher response because under the present obligations it appears many employers are not aware of their obligation.

R:6 It is recommended the Act be amended to require an employer to advise an employee of the action proposed to be taken in respect of any hazard or injury reported by the employee under *s.20*.

4.1.5 Employers and Self-Employed Persons

303. *S.21* of the Act places duties on employers and self-employed persons to take reasonable care to protect their own safety and health at work. So far as is practicable, they are also obliged to avoid adversely affecting the safety and health of other people, who are not employees, as a consequence of work undertaken.
304. WorkSafe has highlighted in its submission an anomaly in relation to *s.21*, between the way that “employer” must be interpreted in *s.21(1)(a)* and *s.21(1)(b)*. The duty at *s.21(1)(a)* for employers and self-employed persons to look after their own safety and health can logically apply only to a natural person and not to a corporation. As an employer who is a natural person must, by definition, be a self-employed person, the application of *s.21(1)(a)* to an employer is unnecessary and confusing.
305. Application of an employer’s duty under *s.21(1)(b)* to ensure that the work in which his or her employees are engaged does not adversely affect a non-employee must apply to corporations as well as natural persons.

306. In order to avoid difficulties in enforcing *s.21*, there is a need clarify those duties that apply to self-employed persons only, those that apply to employers only and those that apply to both.
307. In addition to this matter, a number of submissions identified problems with the scope of *s.21*. The current wording of *s.21(1)(b)* constrains the duty of employers and self-employed persons to protect non-employees from the adverse consequences of work to only those risks that arise “as a result of the work in which he or any of his employees is engaged”. This constraint has been viewed literally so that the duty is considered to arise only when “work” is actually being performed. This interpretation means the duty does not arise “after-hours” or in other circumstances where work is not presently occurring, even though the risk may be substantial and be unambiguously related to a work activity.
308. While this “narrow” interpretation of the section is at least arguable, there is some confusion as to its scope.
309. It is clear the narrow application of *s.21* was not originally the intention of the legislation which was to provide protection to non-employees from the consequences of work activities of employers and self-employed persons. As a result, the scope of *s.21* needs to be clarified to protect persons from being adversely affected by the consequences of a “system of work” as well as any direct work activity.
310. Submissions pointed out that clarifying the broad scope of *s.21* will likely lead to an increasing overlap between public and workplace safety that could have unintended consequences. The effects of a system of work can extend far afield from the workplace of an employer or self-employed person (for example into the area of road or transport safety). In some cases, a connection with work will exist but be relatively weak (e.g. complaints by protestors in forests).
311. The extent of the duties under *s.21* also need clarity in relation to volunteers and other non-employees who work at workplaces (e.g. family members and students), even though they are exercising their choice to be volunteers. If they are to be given additional protection it should be in recognition of the latter point not because they are in some way to be seen as “employees”.

312. While the case for the broad coverage of *s.21* is strong, it is important for it to be applicable only to issues that are genuinely work-related. For example, an adequate work-related definition incorporating terms similar to the expressions outlined in *s.21* or the Regulations could be developed. However, the preferred course may be for public assessment criteria to be used by the WorkSafe Western Australia Commissioner to determine the extent to which WorkSafe should seek to enforce the section. These criteria would be similar in content and application to WorkSafe's existing enforcement and prosecution policies.
313. There will need to be consideration of terms required to describe the activity because differing circumstances will apply. For example proximity will differ and those immediately affected will experience different impacts. It will also be necessary to establish whether people were lawfully conducting themselves or were, for example, illegally at a workplace.
314. Each case will need consideration of the particular circumstances and it might be appropriate to provide some discretion to the WorkSafe Western Australia Commissioner to make the decision on the merits of each case under a broad definition. So far as the Act is concerned, it will need simply to provide protection for those persons.
315. In commenting on the proposal, an employer organisation expressed concern that any extension would leave an employer liable but without necessarily providing the employer with any control of the situation. As a result it could act as a disincentive on employers to permit non-employees into the workplace, thereby restricting the activities of volunteers, observers, trainees and visitors. Non-employees would also have to be required to comply with safety procedures and take responsibility for their own safety and health. The situation faced by shopping centres and other venues where the public have free access were also raised.

316. As noted in the foregoing, care will be needed to protect people while avoiding unintended consequences. For example, it would not be appropriate to hold an employer responsible for the acts of a member of the public within a venue providing reasonable steps have been taken to ensure the environment does not contribute to, or exacerbate, the actions of the person leading to the unsafe event. While initially there might well be some time and expense involved in addressing public safety issues, there seems little doubt it would contribute to long-term savings as events should reduce and public liability insurance and other costs should diminish. As in an earlier example, the concerns expressed would only arise in extreme examples and in most instances the conditional “as far as is practicable” would protect against unreasonable obligations.
317. A union, although agreeing with the principle, suggested that the wording of the recommendation in the draft Report could be improved. It was suggested that an alternative provision contained in the Victorian Act would be most effective. While that may prove to be the case, as discussed earlier, the recommendations are made on the issues and principles, not necessarily with the specific words of legislative provisions in mind. The most suitable terms are a matter that ought be finally decided by the legislative draftsman in consultation with the relevant occupational safety and health authority. It is considered that the words of the recommendation and preceding explanation give adequate understanding of the issues.
318. UnionsWA proposed insertion into *s.21* of a provision similar to *s.19(4)* to make clear the application of the section to contractors. This seems unnecessary as contractors will be employers or self-employed persons and are accordingly subject to the section.

R:7 It is recommended *s.21* of the Act be amended to:

- **clarify those duties that apply to self-employed persons only, those that apply to employers only and those that apply to both; and**
- **specify the duty of employers and self-employed persons to protect non-employees from adverse consequences of work so that it extends to all aspects of work including systems of work and hazards arising after direct work activity has ceased. The application of the section should be restricted to workplace initiated safety and health matters.**

4.1.6 Duties of Visitors and Others in the Workplace

319. Employers and those in control of workplaces are usually able to oblige visitors to comply with safety and health requirements or to exclude them from the workplace. However, there appears no legal mechanism to ensure visitors comply with legitimate site safety and health requirements. It is also not always convenient or possible to remove visitors from a site. The behaviour of a workplace visitor, through a wilful act or as a result of ignorance, could compromise the safety and health of a workplace.
320. In the same way that the Act should apply to protect visitors to the workplace it is necessary to protect those at the workplace from the unsafe practices of visitors.
321. For example a submission commented specifically on visitors smoking in a workplace and argued that failure to regulate the behaviour of non-employees was a weakness in the general duties in the Act. While the Regulations regulate smoking by employers, employees and self-employed persons, there are no provisions relating to smoking by other persons in the workplace. The particular concern related to smoking by non-employees in workplaces that are not public places.
322. While supporting the intent of the proposed recommendation, a number of observations were made of likely problems of control and enforcement because, as noted, public roads and shopping centres are also workplaces. As a result, the Department suggested that the Commission should be requested to investigate the matter.
323. While it is true that the recommendation will require further consideration in respect of the drafting and therefore conversion into legislation, there is no substantial reason for further investigation. The consultation necessary to develop suitable provisions will demonstrate if, contrary to expectations, such provisions cannot be developed. In that situation it would be expected that the Commission would develop suitable alternatives to achieve the desired outcome. As necessary, the criteria of practicable and reasonable can be utilised to permit intelligent discretion to be exercised.

R:8 It is recommended the Act be amended to require where practicable and reasonable, workplace visitors to comply with the directions of the employer or the person in control of the workplace in relation to securing occupational safety and health.

4.1.7 Persons Who Have Control of Workplaces

324. People who have to any extent, control of a workplace are required to ensure under *s.22* of the Act that so far as is practicable, the workplace and all entrances and exits are safe so that people may enter, leave and use the workplace without exposure to hazards. The section applies where the person in control of the workplace is not the employer of the people who work there.
325. A submission raised concerns over the absence of any obligation for employers and self-employed persons using a workplace to report the existence of any relevant hazards to the person who has control of the workplace. In circumstances where the duties of *s.22* are relevant, it is likely the person having control will not often physically work at the workplace. Hazards may be difficult to recognise particularly as the person may have little or no control over the work activities occurring in the workplace.
326. While it is reasonable to expect persons in control to inform themselves regarding any hazards at the workplace, it is the case that work processes can change or new hazards arise that can only be remedied by the person in control of the workplace. It is a matter that should be addressed. The proposal received strong support particularly from those principal contractors who face the most difficulties. There were a number of observations that, while principals are targeted during the inspection process, the obligations of shared responsibility were not always accepted by those who needed to accept their responsibility.

R:9 It is recommended that *s.22* of the Act be amended to require employers and self-employed persons to inform those persons in control of workplaces of each situation that constitutes a hazard and which is the responsibility of the person in control of the workplace to remedy.

4.1.8 Manufacturers, Architects, Engineers and Designers

327. *S.23* of the Act places duties on designers, manufacturers, importers, suppliers and constructors to ensure that plant and buildings they design and construct so far as is practicable do not expose those installing, maintaining or using the plant to hazards.
328. Submissions raising concerns over the effectiveness of *s.23* were received specifically in relation to the safe design of buildings and structures. *S.23(3a)* in particular establishes the duty of designers and constructors of any building or structure to be used at a workplace to ensure persons constructing, maintaining, repairing, servicing or using it are not exposed to hazards. Submissions argued awareness of, and compliance with, this duty amongst architects, engineers and designers is low.

329. Contemporary examples were provided where commercial buildings continue to be designed without regard for the safety of persons required to perform tasks at heights such as maintaining air conditioning equipment, cleaning windows and gutters, and repairing and installing equipment on roofs. One submission suggested that the duties in *s.23(3a)*, concerning safe design of buildings or structures for use at a workplace, should be established as a “stand-alone” section as a means of distinguishing the specific issue of building design from the broader considerations of plant and substances.
330. WorkSafe, through direct mail campaigns and promotion through the SafetyLine magazine, has made efforts to communicate the requirements of *s.23(3a)* to key groups such as architects and engineers. While that has had some impact, it is considered that awareness would be greatly enhanced if a code of practice specifically dealing with the duties under *s.23(3a)* could be developed. It is not likely that an amendment to the Act would have the impact necessary as the duty already exists. However, a building industry employer association submitted that because codes of practice are not enforceable, some professionals did not take account of them. Earlier codes had been ignored and it was argued that there was no reason to expect any change of view.
331. Officers of the Department suggested that codes of practice should perhaps be made enforceable because it would give added authority and certainty. However, that would also significantly alter the occupational safety and health environment because codes developed for one purpose would take on a function for which they were not necessarily designed. As well, the codes could, in effect, become the new regulatory environment and would suffer the same deficiencies as earlier regulation.
332. The issue requires further attention and consideration should perhaps be given to further legislative change to ensure workplace safety if industry is not prepared to self regulate. It is also considered that if industry is informed that further regulation will result if self-regulation is not effective, it is possible or even probable that better self-regulation will occur. Industry associations could perhaps be advised that the implementation of a code of practice is, if necessary, the first step and further steps will be considered if warranted by industry performance. In the alternative, consideration could be given to ensuring an effective prosecution mechanism under the general duties of the Act because it is not acceptable that any individual or organisation should ignore the obligations set out under the Act. In either case, the development of a code of practice could prove to be a necessary part of the process. While not able to be used as a regulation, codes can be used to support the prosecution of parties.

R:10 It is recommended the Commission develop a code of practice on the duties of architects, engineers and designers. The code should address the separate responsibilities of designers and constructors.

333. WorkSafe also advised that notwithstanding its intent, in practice *s.23(1)* has not proved enforceable, pro-actively. It is not possible to determine when the duties to ensure safe “design and construction” and to “test and examine” must be met. In effect the only point at which these duties can be tested, is at the time of supply. By that time it is too late to influence the design or construction of the plant. The practical difficulties associated with *s.23* have therefore restricted its enforcement.
334. The means of overcoming the deficiencies with the section are not readily apparent. A brief survey of equivalent provisions in other Australian jurisdictions does not provide any guidance as all are cast in terms similar to *s.23*.
335. It may, however, be possible to incorporate cost recovery for the removal or alteration of the dangerous or offensive feature into penalties for breaches of *s.23* so that any successful prosecution could also require the correction of the feature. If that were done it might encourage additional design considerations. More importantly perhaps, the awareness of the penalty and liability might serve to heighten awareness of the obligation. One or two successful prosecutions could have significant results.
336. A major employer association observed that if cost recovery and repair requirements are implemented it will likely lead to difficulties for local plant manufacturers who would face a higher insurance cost. As a consequence there could be a reluctance to manufacture in this State. In addition it was suggested that such a provision would place a contingent liability on local manufacturers which cannot be placed on external manufacturers and is therefore also discriminatory. As well, it was argued that it is a matter that should fall under trade practices legislation if there are any deficiencies.
337. It is accepted that there might be some initial cost involved in improving safety and health, however, once established, public liability and other costs could decrease. It ought not be discriminatory against local business because the abbreviated “manufactures, etc” referred to would also include suppliers. Any additional cost would not only fall on Western Australian business. Trade practices legislation is not appropriate legislation to deal with these issues and while occupational safety and health remains under the State jurisdiction, it should be dealt with under the Act. As discussed, a number of advantages arise from a National approach to occupational safety and health and this is one. However, for the foreseeable future, it is an issue that must be remedied by State authorities.

R:11 It is recommended that in addition to the penalties applied, s.23(1) of the Act be amended to provide that manufacturers, etc be made responsible for the repair, removal or alteration of reasonably foreseeable hazards in plant supplied to a workplace.

338. Two further issues were raised in relation to *s.23* concerning the scope of the provision. Firstly, the provision currently applies to plant, substances and buildings or structures used at a workplace but does not extend to cover “items” or “articles”. Many items and articles used at workplaces can be hazardous as a result of their design and other physical properties. Secondly, issues associated with the handling and packaging of plant, substances and items need to be considered along with the installation, maintenance and use of these objects (see *s.23(1)(a)*). The size, shape, weight and packaging of plant, substances and items can determine whether it can be used or handled safely. The simple step of changing the size or weight of a packaged item for example, can significantly reduce manual handling risks.

339. A related issue goes to complaints that while local manufacturers are required to meet occupational safety and health standards, importers have freedom to import equipment that does not necessarily comply with the same standards. This problem arises from “mutual recognition” agreements between Australia and other countries. It is acknowledged that it is a national issue and is subject to international agreements. Safety standards in respect of plant, however, should be consistent and the Commission should, where it is able, achieve the same standards for imports as for locally made equipment. Part of that might be the pursuit of consistent national standards so that lesser standards introduced as a result of the international agreements into States with lower standards and then flowed elsewhere are reduced. Again, as discussed elsewhere, the pursuit of national benchmarks through a single legislative regime might well prove the optimal result. While that may be a long-term goal, in the interim necessary State legislation should not be deferred.

R:12 It is recommended the Commission consider the means of amending s.23 to:

- **include “items” within its scope;**
- **include a requirement to consider the handling of plant, substances and items in addition to the existing criteria of installation, maintenance and use; and**
- **ensure consistent standards are applied where possible between locally made and imported equipment.**

4.1.9 Owners of Plant

340. WorkSafe inspectors pointed to a deficiency of the legislation in regard to the duties of owners of plant used in workplaces. The repealed *Machinery Safety Act 1974* and the *Machinery Safety Regulations 1978* imposed a number of specific obligations on the owners of plant to ensure it was safe. These were not imported into the *Occupational Safety and Health Act 1984* as it was thought that the duties of the various parties under the Act would cover all circumstances in relation to plant. In practice, however, difficulties have arisen in circumstances where the plant is owned by a person other than the employer, particularly in relation to the responsibility to keep it in a safe condition to operate.
341. The repealed *Occupational Health, Safety and Welfare Regulations 1988* continued duties upon owners of plant by virtue of their history (having been sourced from the *Machinery Safety Regulations*) rather than as a reflection of the approach adopted by the *Occupational Safety and Health Act 1984*. These initially provided protection. When the regulations were reviewed, however, references to the owners of plant were omitted from the (then) new *Occupational Safety and Health Regulations 1996*.
342. Notwithstanding that the 1988 Regulations covered owners of plant, WorkSafe submits that power is required under the Act before any such regulatory provisions can be re-introduced. Because the only effective way of ensuring that plant that is supplied by persons other than the employer is properly maintained and kept safe is by way of regulation, it is necessary for that power to be included in the Act. There was general support for this recommendation.

R:13 It is recommended the Act be amended to provide power for regulations that place duties on the owners of plant used at a workplace.

4.2 Definitions and Coverage of the Act

4.2.1 Jurisdiction and Other Legislation

343. The issue of legislative coverage of the Act and its relationship to other legislation is mostly covered in Part 6: Policy Development and Administration of this Report. The references in this Part go mainly to those areas already covered by the Act or those closely related to the existing coverage. The only additional consideration here goes to the question of public safety and the variation of the Act to cover persons who should have been covered by virtue of their activity but who do not fall under existing definitions or those covered by new arrangements that were not contemplated in the drafting of the present Act.

4.2.2 Labour Hire and Alternative Working Arrangements

344. Employees are defined under *s.3* of the Act. Various obligations and entitlements of employees are included under *Part III* and *Part IV* of the Act.
345. As noted earlier⁴⁸, in recent years there has been an increase in non-traditional forms of employment associated with the growth in contracting, sub-contracting, pyramid sub-contracting and out-sourcing. There are an increasing number of workers who are either contractors themselves, work for a contractor or find employment through a labour hire firm.
346. A problem arising is that, in an increasing number of cases, it is not clear whether a contract of employment or some other arrangement exists between a person and the labour hire firm offering the person's services to another employer.
347. The matter is further clouded in terms of the application of *s.19(4)* by uncertainty over whether a business "engages" a labour hire firm. It can be argued that when a labour hire firm is engaged for the supply of labour, the business is not using the labour hire firm to "carry out work for the principal". This can also be an issue for group training and "work for the dole" programs. It is argued that because of the contracts, the relevant provisions of the Act may not cover some people who are in reality employees.
348. In its submission, WorkSafe raised specific concerns in regard to this issue. These have been addressed in the earlier discussion above⁴⁹ concerning the general duties and *s.19(4)* in particular. Here it is important to note that the Act, along with comparable legislation of most States, is deficient in its coverage of alternative forms of employment. The continued achievement of the object "to promote and secure" safety and health at work has been subverted by technical distinctions between workers. As argued by WorkSafe,

"To remain relevant in today's changing world of work, the Act must be sufficiently flexible to deal with arrangements that move beyond the traditional employer/employee relationship."⁵⁰

⁴⁸ See section 3.3

⁴⁹ See section 4.1.3

⁵⁰ WorkSafe Western Australia Submission (2001)

349. The Act addresses the safety and health of workers who are not direct employees of the employer through *s.19(4)* which deems a principal (the person engaging a contractor) to be the employer – for the purposes of *s.19* only - of both the contractor and any person employed by the contractor. The principal has duties towards these deemed employees only in relation to matters over which he or she has control. *S.19(5)* provides that the contractor continues to owe the duties of an employer to his or her employees. The effect of *s.19(4)* and *(5)* is to establish over-lapping duties which ensure the safety and health of workers is addressed by the appropriate party.
350. *S.19(4)* is an important provision which has been generally effective in its application. However, as already noted, the provision has been recognised as one that is difficult to understand for some. It has often been interpreted that contractors are able, by way of a contractual arrangement with a principal, to avoid responsibility for the safety and health of their employees whilst they are engaged in work for a principal.
351. *S.19(4)* is effective where there are clear employment relationships and contractual arrangements between the relevant parties. If either of these elements is not present, application of *s.19(4)* becomes problematic. In the current work environment it is not uncommon for a person to be working in a workplace under the day-to-day direction of an employer (the principal) without being an employee of that employer.
352. While it cannot be assumed that labour hire workers are not covered under present provisions (see for example, the reference to “persons engaged” under *s.19(5)(b)*) it does raise the question of who is responsible under the general duties under *Part III* of the Act. It could also operate so as to remove the important consultative and representational entitlements for many workers otherwise entitled under *Part IV* of the Act. The legislation has been drafted in a reasonable endeavor to cover and to protect all who may be at work or within the workplace. Some however may have reduced protection because of the changes in contract relationships.
353. The end result of uncertainty surrounding the application of *s.19(4)* to the labour hire industry is the possibility of a growing class of workers not being protected by the primary duties of the Act for no other reason than the particular nature of their employment. It matters little whether this occurs as a deliberate strategy on the part of some employers or as a by-product of other decisions. It remains that some persons at work may not have the level of protection to which they should be entitled.

Control of Hazards

354. In cases where employers have entered into arrangements so as to minimise or to avoid altogether obligations such as long service and other leave entitlements, workers' compensation and insurance, it seems possible that efforts will also be made to avoid safety and health obligations. These could result in "unsafe" worksites and/or for example, to prevent the election of appropriate safety and health representatives.
355. Fine distinctions between categories of employees should be of little impact in relation to occupational safety and health and where people choose alternatives it should not alter underlying obligations and entitlements in respect of workplace safety and health. If it means that some "contractors" become employees for all purposes of the Act, that should occur and they should continue to have the entitlements that they have traditionally enjoyed.
356. A number of submissions also addressed other applications of *s.19(4)*. These included:
- the need to clarify application of *s.19(4)* to principals in Western Australia who engage contractors from other countries or States;
 - the desirability of greater enforcement of safety clauses in contracts on contractors regardless of the attitude of principals;
 - allowing principals and contractors to be able to assign safety responsibilities to a specialist contractor with relevant expertise; and
 - the need to review the application of the section to the building industry.
357. These technical issues and the long-standing concern over "readability" could be addressed by redrafting the provision whilst preserving its intent. The equivalent provision of the *Victorian Occupational Health and Safety Act 1985 (s.21(3))* might provide a suitable model. A union submitted that *s.22* of the Victorian legislation might prove more effective.
358. However, clarifying the intent will not necessarily be sufficient to address the implications of the trend toward non-traditional forms of employment, particularly those emerging in the labour hire industry.
359. In responses to the earlier discussion to extend coverage to relationships outside of existing employer/employee arrangements, an employer organisation submitted that the term "employee entitlements should not be used and instead the "employers obligations" be referred to because employee entitlements go to other issues and other legislation. Otherwise this employer group generally supported the proposal.

360. Another major employer organisation, however, opposed the proposal on the basis that it interferes with the employer/employee relationship. It was submitted that any change to existing arrangements must recognise a joint responsibility based on the degree of control apportioned and exercised. While it was accepted that the host, contractor and other parties should have a responsibility, it was argued the host business should not be required to provide the full employee entitlements in labour hire arrangements.
361. A reasonable question arising from all the foregoing is perhaps why each category of person (employee, contractor, employee of contractor, etc) needs to be referred to at all when it is intended that all those in the workplace be protected. By specifying each category of person it leaves open the possibility for the creation of other (work) arrangements, which could be entered into in order to avoid the obligation. It seems the most effective course is to protect everyone and provide them with duties to protect themselves and others at the workplace. In that regard the employer might be specified as the co-coordinating agency or principal.
362. A way of achieving that could be to identify the responsible employer and to include provisions under which all of those undertaking a role on the worksite would have an obligation to work safely and to provide a safe environment for those to whom they hold a responsibility either as an employer or in another role.
363. Indeed, if it is now accepted that it is also desirable that protection should be given to other persons from workplace incidents, even if those persons are not in the workplace but nearby, such an encompassing coverage would be more easily drawn than the detailed specification now in the Act. It could also have the advantage of simplifying and of ensuring implementation and enforcement.
364. There may be difficulties with the proposal that have not immediately been discerned. However, if it can be developed and put into effect it would help make a number of other proposals easier to implement, including protecting the public from the consequences of work incidents. The British HSE legislation may provide some guidance in nominating the principal although it would also be useful if the principal had legislative support to direct others in the workplace to fulfill their obligations.

365. These concerns can be allayed where obligations could be shared as proposed in the foregoing but it is also critical that no-one should fall through the safety net and that a cross-over of responsibility should be provided. The recommendation is directed that way and if suitable expression can be developed to provide the protection within legislative amendments and at the same time better apportion responsibility that should be supported. However, protection should not be lost because of a concern as to who carries the greater responsibility. If necessary that could be left to the Court on the basis of what is practicable and reasonable.

R:14 Notwithstanding any specific recommendations relevant to this issue, it is recommended the Act be amended to:

- **extend coverage to a range of alternative arrangements that may currently fall outside both the traditional employer/employee relationship and the principal/contractor arrangement provided for under the Act. In particular, the Act should apply employers' obligations to persons who are employed under labour only arrangements and subject to the direction and control of employers or principals; and**
- **clarify its intent and to make clear that an employer's duties under s.19 apply to both labour hire firms and principals in relation to matters under the respective control of each party.**

4.2.3 Coverage of Police Officers

366. Police Officers are excluded from coverage under the Act due to their unique employment status. In Western Australia (as in all Australian jurisdictions) they are appointed by the Commissioner of Police and enter into an engagement to serve the Crown much like a commission. The appointment does not constitute a contract of employment and therefore a police officer is not an employee as defined in the Act.

367. Both the 1992 and the 1998 Review Reports recommended the Act be amended to include Police Officers within its scope. All submissions dealing with the matter support such an amendment. In many other jurisdictions throughout Australia and elsewhere in the world, Police Officers are seen as employees for the purposes of occupational safety and health obligations.

368. The Review received a number of submissions advocating the immediate amendment of the Act to ensure coverage of Police Officers. For example a union submitted:

“It is inequitable and anomalous to continue to deny Police Officers coverage under the OSHA.... while the employment status of Police Officers is common throughout Australia, Police Officers in other jurisdictions and in the United

Kingdom are covered generally without contention by their respective federal and state occupational safety and health acts.”⁵¹

369. The Review was informed that in June 2000 the previous Government agreed in principle to extending coverage and that responsibility for implementing the change was in the hands of the Police Minister but was not finalised. It appears that it was intended that the *Police Act 1892* would be amended so as to provide the coverage. Amendment of that Act could lead however to other complications, including perhaps, inadvertent appointment of Police Officers as employees for purposes other than or beyond occupational safety and health. That may not be an acceptable outcome or be in the interests of officers.
370. During the course of the Review, the State Government announced⁵² its intention to proceed with an amendment to the *Occupational Safety and Health Act 1984* to ensure all Western Australian Police Officers are covered under the provisions of the Act. Subsequently the *Occupational Safety and Health Amendment Bill 2002* was introduced into the Parliament. This Bill appears to provide the coverage earlier recommended but, as at the time of writing, the Bill had not completed its passage through the Parliament and it is considered the existing recommendation should remain.

R:15 It is recommended the Act be amended, at the earliest opportunity, to provide coverage for Police Officers.

4.2.4 Definition of Self-Employed Person

371. WorkSafe submitted that a change is required to the definition of “self-employed person” in *s.3*. Legal advice suggests that the definition of “self-employed person” under the Act refers to a natural person only. This potentially opens a gap in the coverage of the legislation where a corporate entity does not have any employees, for example where the work is undertaken by labour hire workers. If the entity is neither an employer nor a self-employed person, then the duties under *s.19* and *s.21* of the Act do not apply. Similarly, a number of regulations impose duties on an employer, self-employed person or main contractor and a corporate entity that falls outside the respective definitions will not be covered.

⁵¹ Submissions (2001)

⁵² Hon Michelle Roberts, Minister for Police, Press Release, 9 October 2001

372. It is possible, in the event that the legislative proposals recommended earlier in relation to labour hire and contract employees are able to be implemented (see section 4.2.2), that the definition of self-employed person would also be encompassed by the new legislative provisions. If, however, they are not included, the definition will need amendment.
373. Comments received generally supported the proposal.

R:16 It is recommended the definition of “self-employed person” in the Act be amended so that where the context permits it includes a corporate entity.

4.2.5 Status of the Crown

374. The status of the Crown, under the Act is not the same as other organisations. The Crown is comprised principally of State Government departments and agencies, which are not usually the legal employer of the people who work in them. This can cause difficulties in applying provisions of the Act that turn upon the employee and employer relationship and in particular, those provisions related to enforcement. There are also legal principles that mean that, as the Act currently stands, it is not possible to prosecute Government agencies for breaches of the Act. WorkSafe outlined the present legal and practical difficulties associated with undertaking prosecution and other enforcement action against Government agencies in its submission.
375. The application of the Act to the Crown was canvassed in the 1998 Allanson Review of the Act. Mr Allanson noted that where, as in the *Occupational Safety and Health Act 1984*, there is no explicit legislative reference on this issue, there is a strong presumption by Courts against assigning criminal liability to the Crown. Mr Allanson concluded that, while the Crown is still bound by provisions of the Act by virtue of *s.4(1)*, it is effectively exempted from the criminal consequences of any breach of the Act.
376. *S.4(1)* of the Act provides,

“This Act binds the Crown in right of the State and also, so far as the legislative power of the State extends, in all its other capacities.”

377. WorkSafe submitted that Government departments and agencies should be liable for prosecution under the Act. There is no justifiable reason for the Crown in the form of Government departments and agencies to continue to enjoy immunity from prosecution under the Act. The original justification for exemptions from liability does not apply to the kinds of circumstances where executives and CEOs manage public sector organisations like competitive businesses. The employees of those organisations should also be entitled to work in an environment free from any uncertainty over the application of the Act.
378. The recent New South Wales *Occupational Safety and Health Act 2000* addressed this issue comprehensively. In addition to establishing the legislation as binding on the Crown, *Part 7 Division 3* of this Act explicitly provides that the Crown may be prosecuted for an offence against the Act and associated regulations. The NSW Act also contains provisions in respect of the responsible agency in prosecution proceedings, penalties and the issuing of improvement and prohibition notices to agencies.
379. The approach of the New South Wales legislation in unambiguously applying the occupational safety and health legislation to the public sector is preferable to alternatives; such as deeming the agency or its Chief Executive Officer to be the employer for the purposes of the Act. These perpetuate the uncertainty of the standing of Government agencies. It is preferable to establish a clear legislative basis for the full application of the Act to Government agencies.
380. Comments generally supported the proposals and some also submitted that it should extend to the Ministers of the Crown responsible for portfolios and therefore, it was assumed, for Departments. These argued that Ministers are often the driving force behind Departments and therefore should face the same responsibilities as would apply in the private sector.

381. While the notion of Ministerial responsibility under the Westminster system is for the Minister to be responsible for the Department it would not be correct to assign the daily administrative responsibility for a Department to the Minister concerned. If that occurred the corollary would be for Ministers to take the place of the Department's Chief Executive Officer for the day-to-day running of the Department. That does not occur under the Westminster system even though the relevant Minister might well have considerable influence over the Department. The Chief Executive Officer is paid for and carries the responsibility for the day to day running of a Department and also responsibility for the occupational safety and health of the employees. To make the Minister responsible would dramatically alter the nature of the responsibilities of each and cannot be supported because of the implications of political interference in the operations of the public service. Ministers are accountable to the Parliament and in that sense ultimately accountable to the community.

R:17 It is recommended the Act be amended to provide for:

- **prosecution of State Government departments and agencies for breaches of the Act; and**
- **the issuing of improvement and prohibition notices to State Government departments and agencies.**

4.3 Processes

4.3.1 Occupational Safety and Health Policies

382. Although the Act does not require employers to maintain written occupational safety and health policies or procedures, it is difficult to see how they can be effective unless they are in a form that can be conveyed to employees and others associated with the workplace. If the reduction of hazards is to be successful, these should usually be part of written policies and procedures. Plainly the success of the safety case regime in many high hazard environments lends support to that proposition.

383. The Robens Committee pointed out that occupational safety and health management systems need to be developed and maintained through consultation with employees, safety and health representatives and committees, to ensure all are in tune with and indeed, add to the process. Providing living or organic systems are developed they can provide the necessary information for continuous evaluation and management which in turn can result in continuing strategies directed to removing or controlling the risk.

384. Importantly, ongoing review suggests a need for reliable performance indicators to ensure that work safety plans remain active. These indicators should include processes which initiate renewal and continuous education by the use of time frames and trigger mechanisms. There should be no scope to rely on sterile policies or plans that never leave the library shelf.
385. Progressive occupational safety and health legislation, as well as an effective WorkSafe and inspectorate do not guarantee that major failings will be avoided. The results of the Longford Royal Commission in Victoria suggest that organisations may become preoccupied or satisfied with the creation and the structure of safety systems and place insufficient emphasis on their effectiveness. No matter how elegant a safety system is, it will be worthless if it is not effective. Indeed if people rely on a safety system which will fail them, it can add to the level of danger and may even be worse than no system at all. On the other hand, developing and creating systems does help identify safety and health issues and help analyse and manage risk.
386. The only Australian jurisdiction with such a requirement is South Australia where *s.20* of the *Occupational Health, Safety and Welfare Act 1986* requires every employer to prepare and maintain policies and procedures relating to health, safety and welfare in the workplace.
387. It was submitted by union representatives that the general duties in *s.19* of the Act would be enhanced by the addition of a provision similar to the South Australian obligation that employers have written safe working procedures that make clear what is expected of employees. It was proposed that the procedures would be produced through a consultative process and be disseminated to employees. It was also recommended that employers be required to prepare and maintain a safety and health policy in consultation with employees.
388. As noted, occupational safety and health policies and procedures are key elements of any effective occupational safety and health management system. In many workplaces the absence of formal policies and procedures would make it very difficult to establish the “safe systems of work” required by *s.19(1)*.
389. In the 1992 Report it was noted,
- “It also means the duty of care obligation places an onus on all those at the workplace to anticipate and thereby prevent safety and health hazards. The way this might be done, and indeed is being done, by employers who have accepted

the challenge, is to develop and implement policies, procedures and practices specifically designed to eliminate or at least reduce workplace hazards.

It is also part of the strategy of the Department in its targeted inspection programme. Instead of the traditional site or floor inspection, inspectors now, as a preliminary step, examine and assess the employer's safety policy and procedures to ensure an appropriate framework is properly in place. If the organisation develops its policy, procedures and practices in consultation with the employees to put an effective safety regime in place, the likelihood of dangers and hazards in the particular workplace will diminish. Any subsequent workplace inspection will, or should, demonstrate to the inspector whether the policy is effective. If unacceptable hazards are found, it will lead to questions on the effectiveness of the policy or its implementation. If the inspector is not satisfied the process is genuine, further action, including prosecution may be taken.

This approach, perhaps expressed most clearly by the CWAI in the context of fostering co-operation and consultation, is equally significant in expressing the fundamental point that a self-regulatory system based on the duty of care places an onus on the employers in that system to develop policies, procedures and safety practices. ...

It is perhaps almost trite to say this is neither more nor less than good business practice and is little different from planning in other areas of business that have significant cost or profit considerations. Few businesses would neglect planning their finances, sales, personnel policies or promotions. Workplace safety is no less important and appropriate policies and practices can be a major determinant as to whether a business survives or not. An employer who implements appropriate procedures can be protected not only against costly legal and other actions but could be in a better position to take advantage of savings which flow from the implementation of such policies. It also demonstrates to employees and unions that the employer is concerned to make the workplace safe and it lessens the likelihood of unwelcome intervention.

In the light of information gathered during the enquiry, it is reasonable to conclude the principal obligations and duties imposed by the Act are fundamentally sound. There are, however, powerful reasons for suggesting the implied obligation on employers to develop and implement policies, procedures and safety practices within the workplace becomes an explicitly expressed obligation. If this occurs, there should also be a requirement that ensures the policies, practices and procedures are developed by the employer in consultation with employees, rather than bought "off the shelf".⁵³

390. The establishment of obligations in relation to policies and procedures was a recommendation not included in the amendments of the legislation subsequent to the 1992 Review. One of the reasons for that was undoubtedly the additional burden that would fall on small and medium business in particular.

⁵³ Laing (1992) p87-90

391. There is also the fundamental and serious difficulty of effective compliance. Small business in particular in recent years has been severely impacted with other issues including substantial tax changes, insurance difficulties and transport problems. In order to survive, most small businesses prioritise matters and those seen as less immediate are in many instances neglected. Regretfully, development of safety and health policy might well be prioritised lower than coping with the tax burden. Until business and the community is educated to the significance of good occupational safety and health, there will continue to be an unsatisfactory level of response to such initiatives.
392. It is clear that most small businesses do not have active occupational safety and health policies and procedures. It is also unlikely that there will be substantial compliance with some requirements even if they are included in the legislation. Where there was compliance, it would likely follow the same course as has happened often in other jurisdictions where the policies and procedures are developed only to satisfy the requirements of the legislation not as organic and comprehensive safety mechanisms within the business concerned. No doubt “off the shelf” policies and process would also proliferate. That could result in higher costs, significant distortion and in many instances, ineffective outcomes. Such behaviour runs the risk of bringing all the legislation into disrepute and it may be better, at least initially, to take alternative approaches.
393. That is not to suggest that the issue be ignored, the reasons for it are sound, but gaining acceptance will require more than new laws. Traffic laws exist throughout the world but in many cities they are almost totally ignored. It is also an issue where acceptance by business itself is vital because anything less than a substantial commitment to a systematic approach will not bring results. While it is possible an employer could be prosecuted for failing to prepare or to have written policies, if they are prepared solely to satisfy the regulator rather than to enhance safety they are likely to be of little real use.
394. The proposed legislative obligation for written policy and procedures therefore seems problematic. The process however should be encouraged so that there is better understanding of the benefits and wider acceptance within small and medium businesses, particularly if the requirements on small and medium sized enterprises are simple and logical.

395. This could be undertaken initially through the development and publication of a guidance note promoting the effective management of occupational safety and health.
396. The proposal attracted considerable support providing there was not a “one size fits all” approach in the development of such guidance notes and account was taken of the size and needs of business so that inappropriate strategies were not promoted. The Commission itself also pointed out that there is considerable material already available. Certainly, the development of guidance or advisory notes would need to take account of differing business needs and there is material presently available. However, if the Commission were to develop and promote suitable material it would provide both credibility and a direction for the community which does not presently exist.

R:18 It is recommended the Commission:

- **develop and issue guidance or advisory notes incorporating information and advice on the preparation of workplace safety and health policies and the management of priority safety issues for businesses of all sizes; and**
- **develop strategies for promotion of the benefits of effective occupational safety and health management systems.**

4.3.2 Training

397. A number of submissions supported mandatory employee safety and health induction training. Although many businesses undertake general induction it appears that in many workplaces safety and health induction may be referred to only in passing, if at all. That is inconsistent with the requirements of *s.19(1)(b)* of the Act and employers may leave themselves vulnerable to prosecution or other enforcement action where the training is not given. It was submitted that mandatory safety and health induction will avoid that difficulty and, more importantly, will ensure employees and the employer are more conscious of safety from work commencement of. In that regard, an occupational safety and health professional submitted that training helps to counter-balance the disinclination of people to avoid safety related activity because of discomfort, loss of time and inconvenience. As indicated in Part 3 of this Report, research has also shown that even minimum training helps encourage additional effort.

398. A submission also suggested that employers often interpret *s.19(1)(b)* to refer to training of safety and health representatives only⁵⁴. Clearly the requirement to provide training applies to all employees and it must be provided to the extent necessary to enable employees to work without exposure to hazards where possible and to minimise risk in other circumstances. However it also seems likely training is not provided because employers are not generally aware of the obligation. That of course is consistent with the earlier discussion about business priorities and awareness levels.
399. If mandatory induction training is to be considered it would perhaps be better to require all employers to complete a formal induction process with each new employee and to cover in that induction a checklist of safety and health topics that the employer must include. This could be undertaken in every workplace and would assist both employers and employees to understand their rights and responsibilities as well as giving additional clarity to their relationship. An initial introduction to occupational safety and health could be completed in a few minutes in many workplaces. The employee could sign off on the extent that it has been given.
400. Some of those supporting more immediate mandated training also argue that it will take some of the existing emphasis from the major contractors who face most of the scrutiny at present while those at lower levels receive little attention.
401. The concern here is with the application and emphasis on induction training rather than any specific defect with *s.19(1)(b)* where it is clearly implied. There is no requirement to extend the legislative duty of employers as it already exists. Unlike the previous issue, prosecution would assist rather than inhibit effective awareness and prosecutions could perhaps be taken after some warning.
402. The importance of safety and health training within workplaces could also be addressed by a renewed focus on induction training by the Commission and WorkSafe prior to any prosecutions. This could involve development of a guidance note on best practice approaches to occupational safety and health training including perhaps, an online publication of a directory of occupational safety and health trainers and their courses.
403. These issues should be developed by the Commission as it requires further analysis of what is now taking place in workplaces as well as the possible consequences.

⁵⁴ See section 5.6 on safety and health representative training

404. Many submissions gave in principle support to re-emphasising training although a number raised concerns or questions. While a number saw it as a priority issue others did not, even though providing support for the principle. The Department and others caution against seeing mandated training as a panacea for existing failures. The Department also advised that a new publication has recently issued for those new to the job and this is now in use. The Department is also concerned that any directory of trainers produced by the Department might be seen as endorsing particular trainers or of assuring quality.
405. While the Department's concerns in relation to listing trainers within a directory have been considered, the proposal should not be discarded or dismissed because there are a number of good reasons in support of the Department providing such a service. Moreover there are also substantial arguments supporting the view that the Department should undertake its own assessments of the training given by training providers. Some submissions expressed concerns that existing training is sometimes inadequate and some training providers are more concerned with repeat business than with adequate training.
406. The directory of trainers need not be seen as any endorsement by the Department provided it is made clear from the outset that the Department does not endorse any particular service provider. However, if the Department did assess or at least ensure a measure of quality control, it is more likely that the training would be better. Indeed the concern of the Department about endorsement implies that there is a concern about existing standards. Listing need not be a complex process and could merely state that those listed have reached a particular standard and should be capable of providing adequate training. It is likely that it could result in a gradual improvement in overall training levels and bring fewer complaints about the adequacy of training.
407. While it is also accepted that occupational safety and health induction training ought not be a panacea, it could form another link in a chain of measures designed to improve workplace safety and health in a similar way to the Department's new publication. Each component will assist in raising workplace consciousness.
408. Similarly, concerns that induction training might be too brief or not sufficiently relevant need be taken into account in the design and construction of appropriate processes. It is likely that even brief training will bring improvement as it provides an up front message that it is important.

R:19 It is recommended the Commission develop guidance material on best practice approaches to occupational safety and health training including induction training.

R:20 It is recommended the Commission review the adequacy of the existing approach to the approval of training providers.

4.3.3 Performance Reporting

409. A submission proposed that companies and Government agencies should be required to provide safety and health information in their Annual Reports.
410. There are currently no requirements for employers to place their occupational safety and health performance on the public record. Many large companies and almost all Government agencies, however, currently publish occupational safety and health performance information in their Annual Reports. Almost all those with best practice programs include safety and health data and other material in their Reports as a matter of course and it is desirable that business is supported and encouraged in that regard.
411. It does not seem to be an issue amenable to legislation, as many small and medium businesses do not presently report and to require the production of a written Annual Report only for safety and health does not seem practical. It is an issue that should be referred to the Commission because the concept might be able to be developed. It is not difficult to envisage encouragement of reporting, for example by way of practical awards, and as part of workplace policy and planning.
412. The proposal received considerable support and it is noted that there has been some recent public debate about the desirability of corporate reporting. It appears that cost and time constraints within small and medium size business might continue to be an inhibiting factor. As a result it may be useful to have any proposal implemented or trialed first within public and registered companies. In the alternative, it is possible that all businesses could be made to provide a brief report to the Department to maintain their business registration.

R:21 It is recommended the Commission develop strategies aimed at promoting the effective reporting of occupational safety and health performance by companies and Government agencies, including within Annual Reports.

4.3.4 Resolution of Issues

413. The Act specifies consultative and co-operative problem-solving processes for the resolution of workplace safety and health issues through *s.24* to *s.28A* of the Act. In particular, there is an explicit obligation for parties to attempt to resolve safety and health issues before involving WorkSafe and its inspectors. *S.24* provides for workplaces to develop their own procedures and, where no workplace procedures exist, *r.2.6* provides a default procedure that must be observed.
414. Where an issue cannot be resolved through consultation between the parties in the workplace and the risk of injury or the risk of harm to health is “imminent and serious” *s.25* of the Act provides for an inspector to be notified. Inspectors do not usually become directly involved in the resolution of an issue unless it is “imminent and serious”.
415. The Review received a small number of submissions about the provisions of the Act concerned with the resolution of issues. While all supported the primary focus of workplace consultation in the resolution of issues, the submissions of employer and union parties indicated different views on the degree to which WorkSafe inspectors should be involved in the process.
416. Employer representatives mostly supported the existing resolution of issues process and, in particular, the emphasis on issues being addressed and settled through workplace consultation rather than through the involvement of third parties. That included support for the present requirement that involvement of inspectors is conditional on the relevant issue being “imminent and serious”. It was submitted, however, that *s.25* is deficient in that it does not require an inspector to be satisfied that there has been an attempt to resolve the issue at the workplace and that the issue is “imminent and serious” before attending the workplace. It was proposed that *s.25* should be amended to provide for that prior to attending the workplace.
417. In their observations relating to resolution of issues, a number of employers and representative organisations took a different approach and referred to the desirability of early intervention by inspectors to assist the resolution of matters. The greatest support for this approach came from the construction industry which sought a higher level of certainty than other industries. The views of employers were not unanimous on the issue but it seems clear that where business is more vulnerable to high cost from any delay, the issue of certainty becomes a higher priority.

418. Union representatives proposed broadening the range of circumstances in which an inspector may become involved in the resolution of issues. Unions submitted the “imminent and serious” condition has unreasonably restricted the ability of inspectors to attend workplaces to adjudicate on unresolved matters. They proposed that the restriction could be overcome by enabling inspectors to attend workplaces where an unresolved issue involves a risk of injury or harm to health that is “imminent or serious”.
419. Unions expressed some concern that these proposals have not been adopted and further submissions were made in favour of the “imminent or serious” criteria. These were based on concerns that significant matters are not being addressed. As a result it was suggested that the objectives of the Act are not being met and employees continue to work in high-risk situations.
420. Despite shortcomings, the provision has been reasonably effective and balanced. As a result the need to change the present provisions away from the workplace would need to be substantial before any amendment could be recommended. The emphasis on the process of workplace consultation for resolving most safety and health issues should remain. In that regard the existing practices and policies of WorkSafe for dealing with unresolved issues require inspectors to ensure the requirements of *s.25(1)* have been met.
421. WorkSafe’s publication *Enforcing Work Safety and Health Laws*⁵⁵ outlines its *Enforcement Policy* and provides that in instances where the appropriate process (*s.25* of the Act) for resolving a safety and health issue has not been followed, the inspector will discuss the steps outlined in the *Guidance Note on Election of Safety and Health Representatives, Representatives and Committees and Resolution of Issues*⁵⁶ and if necessary direct the information to a supervisor for action.

⁵⁵ See WorkSafe WA (1998a)

⁵⁶ See WorkSafe Western Australia Commission (1996)

422. Over the years there has also been much debate over the scope of the “imminent and serious” condition in *s.25*. On balance the condition has protected employees and has served to ensure the resources of WorkSafe are efficiently applied with the onus on the parties in the workplace to resolve most issues themselves. While parties may prefer alternatives, these need to be balanced with the resources and personnel available. Change from the existing terms may result in a misallocation of resources and should not be implemented without confirmation or at least a reasonable probability of success or benefit. It is noted that, where pressing issues have arisen, even if not necessarily imminent and serious the Inspectorate has often had an involvement. It is desirable that the flexibility is maintained and for the inspectorate to exercise a reasonable discretion in each case.
423. If the unions preferred position was to be adopted it is likely inspectors would not have sufficient time to carry out other critical work. If an Inspector is too accessible, parties would be far less likely to meet their own obligations and in effect there would be a reversion to the regulatory regime with inspectors filling that regulatory function. Therefore, while it is accepted that the concerns are real, there appears to be no better option presently available.
424. It is an issue that should also be kept under review by the Commission and WorkSafe. In the event it becomes necessary, the Commission and/or WorkSafe could consider further recommendations to the Minister.
425. A number of submissions were received advocating the repeal of *s.28A* of the Act. That section deals with the entitlements of employees who refuse to work on the grounds that to do so would involve a risk of injury or harm to the health of any person. The provision, introduced in 1995, precludes payments to employees who do not follow the processes of the Act (*s.26-8*) in refusing to undertake work they consider to be unsafe.
426. Submissions and discussions with various parties made clear the provision is not effective and is in effect unenforceable. However, subsequent strong and consistent submissions have been made by employers who wish to retain the provision and from the Department which suggests that the provision has had a deterrent effect.

427. Significantly, the Department submitted that before *s.28A* was included in the Act inspectors attending sites to resolve safety concerns often found that they could not because the employees had walked off the job. This reduced when the provision was included in the Act. It also submitted that the penalties are even handed as both employer and employees are equally liable.
428. The Commission itself also suggests that the matter is open for further debate. It appears alternatives might be developed which could prove more effective. These observations lend support for the views of some employer associations that the provision supports the intent of the Act to ensure all parties remain on site to assist in the resolution of the matter. While that is clearly the case, it is also an example of an external authority being used in what should essentially be a matter between the parties at the workplace.
429. As noted, parties at the workplace are usually best placed to determine entitlements in circumstances where safety and health issues are involved. Confirmation of that is found in the arrangements concluded by parties in the existing environment notwithstanding the legislation.
430. Where there are unresolved disputes over such matters, they are best resolved in specialist forums. Later in this Report⁵⁷ a role is proposed for an Occupational Safety and Health Tribunal in relation to administrative appeals under the Act. That Tribunal, will have particular and separate responsibilities and powers over occupational safety and health matters. Appeals over disputes about alleged unsafe work will go to that Tribunal with other matters. It could be expected that it would not permit genuine safety and health matters to be compromised by unsustainable claims.
431. It is also of note that the existing legislative proscription in the *Industrial Relations Act 1979* preventing the Western Australian Industrial Relations Commission (WAIRC) from hearing matters arising out of safety and health has been repealed. This will enable the WAIRC as necessary to again deal with industrial disputes arising from safety and health matters.

⁵⁷ See section 6.2.1

432. With the inclusion of other proposals recommended in this Report into the legislation, employees will have significant entitlements to protect their interests. It is all the more important therefore that they follow those procedures and processes rather than taking unnecessary industrial action which in many respects is counterproductive to securing an effective safety and health system.
433. It does appear from the material that in some industry sectors, some employees and their unions do encourage, and take, unilateral action that is not consistent with the Act. That has the effect of discouraging others, including the employers concerned, from complying with their obligations particularly those providing employees with rights and authority. It also makes convincing those parties of the merits of increasing employee involvement more difficult. It is no coincidence that employers most resistant to change in that regard are often those that have suffered economically from unilateral employee action.
434. There are two issues in relation to work stoppages over occupational safety and health that need to be dealt with under the legislation. The first is whether a particular work stoppage constitutes industrial action or whether it is a legitimate refusal to work by employees because they face an imminent and serious threat to their safety. Obviously that issue is a factual circumstance. The second is what should happen if the facts demonstrate that employees have engaged in industrial action. That will also require a process to deal with stoppages which are not justified on the facts but were undertaken because at the time the employees had a genuine belief their safety was subject to imminent and serious threat. Consideration also needs to be given to whether there is any justification for leaving the workplace in such circumstances. The WAIRC dealt with these issues in the past. The WAIRC remains the authority to deal with industrial issues and any industrial issue should go to it. The only difference here might be an argument that a work cessation may not be seen to be industrial action if commenced because of the imminent and serious threat to the safety of employees. There may be some basis in that instance for some other tribunal to establish the facts and the consequences of particular action.

435. In some respects there are differences between stoppages over safety issues as compared to other disputes. For example safety stoppages have a higher priority than other disputes and attract more immediate responses simply because safety issues are involved. Safety stoppages which are not genuine, therefore, have the potential to degrade the system because after a series of false alarms claims will not be taken as seriously. As a consequence, when a genuine safety issue arises, the response may not be as effective as it should.
436. Similarly, there is a legitimate basis for the continued payment of wages to employees who cease work because of a genuine and serious safety concern. Payment does not usually arise as a consequence of other stoppages and parties carry the cost of their actions. However, there are situations where safety has been claimed merely to justify the payment of wages for the duration of stoppages over other issues. Again this has the potential to degrade the integrity of the process and for resistance to develop to any payment or for payments to be made in every case because it is less expensive than a continued stoppage. Plainly this will have a deleterious effect on the way that safety can be dealt with and destroys confidence as to the sincerity of the participants. Because *s.28A* precludes payment in certain circumstances, it was intended that it would address such issues.
437. It is accepted that at least in some industries, *s.28A* does have an impact and that it should not be removed before an adequate less punitive alternative is developed. As noted elsewhere, it is of concern that employees without any substantial authority or power under an Act, which is purportedly designed to protect them, can face substantial penalties for trying to enhance the protection afforded them under the Act. As well, and despite the penalty regime, it could be inequitable in being applicable to employees but not, for example, to subcontractors. It is also possible to conceive of situations where employees absent themselves and the employer subsequently accepts the justice of the action or some other mitigating conditions. Penalties should apply only where employees deliberately and wilfully fail their duty, certainly not in the face of genuine or misplaced concerns. If, as frequently argued by employer representatives, education and training should be given to employers instead of penalties, employees should also be provided similar opportunities.

438. It is of note that penalties have rarely, if ever, been applied and the change will not substantially impact on employees. As a consequence, it is appropriate that the coverage continue while the Commission develops a suitable alternative provision. This could perhaps go to improved occupational safety and health obligations within the workplace concerned, additional training and information to show why unilateral action is inimical to the interests of the employees.
439. Earlier it had been recommended that s.7(3) of the *Industrial Relations Act 1979* be repealed to permit disputes over occupational safety and health matters to go before the Western Australian Industrial Relations Commission. It is understood that such a provision has been included in recent amending legislation. As a consequence the recommendation may be superfluous. It is noted however, that a number of employers and employer associations objected strongly to the proposal.
440. It was submitted that in the construction industry in particular, occupational safety and health is regularly used as leverage for industrial campaigns. Examples were given of workplace stoppages for allegedly unsafe work. However when other issues were resolved, it is argued that the safety issues often evaporated and work recommenced. The regularity and strength of these allegations suggest that there is at least some incidence of an inappropriate use of safety as a bargaining tool and that some appear incapable of realising the damage that such action causes. That is especially concerning given the relatively poor safety record of the industry.
441. It is suggested in Part 3 of this Report that some specific distinctions be made for the construction industry because of its different history and safety record. It is possible that specific measures could be implemented to address such issues including improving the mechanisms for providing evidence to the Industrial Relations Commission and for enhancing the authority of the Commission or the proposed occupational safety and health tribunal authority to issue enforceable orders. Perhaps specific provisions could be introduced in relation to alleged workplace safety and health disputes to ensure that they cannot be used as additional leverage and if they are, to ensure that specific remedies be available. The New South Wales legislation could also be reviewed to establish whether initiatives in that jurisdiction could be adopted in Western Australia.

R:22 It is recommended that the Commission be directed to develop appropriate substitutes for s.284 of the Act with a view to the introduction of more suitable and effective provisions.

R:23 It is recommended disputes over entitlements under s.28 be resolved in the Occupational Safety and Health Tribunal⁵⁸.

R:24 It is recommended that the Commission investigate and develop recommendations to Government to remove the use of occupational safety and health as a bargaining instrument in relation to other industrial claims.

4.3.5 Accident Notification

442. Under *s.19(3)* employers are required to notify the WorkSafe Western Australia Commissioner of the death of an employee or the incidence of an injury or disease of the kind prescribed in the regulations (*r.2.4* and *r.2.5*). Notifications contain information about the injured worker, the injury suffered and the circumstances of the incident. WorkSafe reviews each notification and identifies trends to determine investigation and inspection priorities.
443. WorkSafe, which does not publish statistical analysis of injury and disease notifications, advised the number of notifications has been declining in recent years from 2,333 in 1998/99 to 1,590 in 2000/01. While no detailed analysis has been undertaken, it is evident that less than 20% of notifiable injuries are being reported.
444. Notifications are an important element of the strategies used by WorkSafe to intervene in workplaces. However, the data is at present of limited value because of the extensive under-reporting. Typically only a few are fulfilling their notification obligations. Others are either ignorant of the requirement to notify or seek to reduce the likelihood of an investigation by failing to notify. Regrettably, even where organisations report, some at least are under-reporting incidents of injury and health failures. As well there are disturbing reports that some organisations have altered the way in which they address workplace injury in an endeavour to avoid reporting at all. That goes to the way some definitions are interpreted and implemented and other recommendations made in this Report will help reduce these. Nonetheless, the inclination by some to avoid disclosure has significant implications.

⁵⁸ See R:65

445. It seems that a significant improvement in notifications could only be achieved with the redirection, at least initially, of considerable inspectorate resources. A number of prosecutions will be necessary to achieve effective reporting although full reporting would provide significant additional benefits. This will become more important if the protections under the Act are extended to members of the public because other data collections will not collect that information. Currently WorkSafe also collects other information, including its own fatality information, from daily public reports and has to rely substantially on that material.
446. Comparatively up-to-date information on the incidence of serious injury and disease can be made available in the workers' compensation system where insurers report all new claims to WorkCover WA within one month of lodgment of the claim. At present however, there are no arrangements for information on notifiable injuries to be made available to WorkSafe. The existing data-sharing agreement does not cover use of claims data by WorkSafe for "operational" purposes such as determining accident investigation and inspection priorities.
447. That information could provide a number of additional research and operational benefits without additional cost or prejudice to any party and would significantly supplement existing data sources.
448. Some employer representatives disagreed that data sharing between WorkCover WA and WorkSafe be improved on the basis that it is not the role of WorkCover WA to participate in enforcement. It was also suggested that because the information is not collected until sometime after the occurrence of an injury it is of less value and that steps should instead be taken to improve compliance with the existing reporting requirements.
449. It is not proposed that WorkCover WA should engage in enforcement activity. Neither is it the intention that information regarding individuals be provided to WorkSafe. The existing identity and confidentiality protections should remain in place and information should be aggregated to protect privacy. However, the protections in Western Australia are already at a high level and in many other States and overseas the workers' compensation authority and work safety authority are a single organisation or indistinguishable. Invaluable information is collected as part of the workers' compensation insurance process and, provided reasonable safeguards from unwarranted intrusion are in place, use should be made of this information.

R:25 It is recommended WorkSafe and WorkCover WA revise their data sharing agreement to facilitate the use of data for operational purposes and to ensure WorkSafe receives adequate and timely advice of the incidence of serious injuries and diseases while observing WorkCover's confidentiality obligations.

450. If there is no agreement or legislative requirement for WorkCover WA to provide the data, the Commission and/or WorkSafe would need to focus entirely on the reporting system because it would then provide the only valid material. Greater emphasis on full collection in that case would be necessary and worthwhile.
451. The collection of the data from all employers would also help keep the issue of workplace safety and health to the forefront but, in its present form, conscientious employers alone carry that burden.
452. This Report proposes that the coverage of the Act be extended to deal with workplace safety and health which has a wider impact in the community. However, the WorkCover WA data which covers employees is limited in that it does not cover others including some contract and other non-traditional workers. As a result there would be a significant deficiency in the material if reliance were to be placed only on the WorkCover WA data.
453. No submissions were received concerning the coverage or the types of injury and disease that are required to be reported by the operation of *s.19(3)* of the Act and *r.2.4*. However, if the reporting is to be effective there is a strong case for broadening the scope of the current notification obligations to include a requirement to notify fatalities and specified injuries that are associated with work activity but involve non-employees.
454. The occurrence of a fatality at a workplace is self-evidently a serious matter that should be notified regardless of the employment status of the person concerned. Similarly, the occurrence of the specific injuries required to be notified under *r.2.4* (fractures, amputations and loss of sight) to a non-employee at a workplace should also be classified as serious and investigated. It is impractical to require the notification of the incidence of work-related diseases to non-employees but, as noted elsewhere in this Report, it is an issue that should be further researched.
455. An employer organisation argued that the collection of the data would be prohibitive in some instances such as in shopping centres and hospitals. As well it was argued that fatalities can occur at a workplace but not be the result of workplace activity and/or that the person in control may not be aware of the incident.

Control of Hazards

456. The concerns expressed refer to a broader context than should apply. For example the reporting of every death within some hospitals would be an unreasonable impost and serve no useful purpose. The recommendation goes only to those injuries and fatalities that might reasonably be attributable to the work process and/or work environment. Again, while that could require some further interpretation, there is adequate expertise within the Commission and Parliamentary Counsel's Office to draw up appropriate provisions.
457. The duty to notify fatalities and injuries to non-employees must rest with the person who has control of the workplace. The obligation should therefore be added to *s.22* of the Act. The duty cannot be placed on employers except where they have control of the workplace because the requirement to notify arises from the location, specifically the workplace, at which the fatality or injury occurs.
458. Although it would require an effort, the present reporting deficiency could be corrected. It appears that failures to notify arise either because employers ignore the obligation, are not aware of the obligation or because there is an ambiguity within the provisions which provides notifiers, either deliberately or unwittingly, a reason for not reporting.
459. Submissions on this latter issue related to an apparent "loophole" that permits long-term injuries to go unreported. These highlighted the difficulty of determining exactly when an injury or disease becomes notifiable under *s.19(3)*. The current wording of the provision turns upon the requirement to notify "forthwith" which is vague particularly as it applies to the application of *r.2.4(1)(e)* which requires the notification of,
- “(e) any injury other than an injury of a kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10 days of the day on which the injury occurred.”
(emphasis added)
460. In cases where the consequences of an injury or disease are not immediately apparent, it can be difficult to determine when the obligation to notify arises. The extent of the employer's obligation after the worker has already been absent for 10 days is also unclear. In some instances the uncertainty has also permitted employees to be dismissed when some at least would otherwise have legal protection.
461. This uncertainty could be overcome by amending *r.2.4(1)(e)* as suggested by the Safety Institute of Australia to read,
- “(e) any injury or illness resulting from a workplace incident, other than the kind referred to in paragraphs (a) to (d) which, in the opinion of a medical practitioner, is likely to prevent the employee from being able to work within 10

days of the day on which the injury occurred or within 10 days of the day in which the symptoms resulting from the incident became apparent to the medical practitioner.”⁵⁹

462. When cast in this manner, the time at which the employer’s duty to notify commences can be clearly determined and, if necessary, enforced. Further clarity would be added by amending *s.19(3)* to replace “forthwith” with a defined maximum time period during which notification must occur.
463. Given that the means of notification established by WorkSafe are readily available to employers (phone, fax, email), the period for notification could be expressed as “as soon as practicable and within a certain number of hours or days”. In that regard the NSW requirement of notification being required as soon as practicable but no later than seven days may be appropriate.
464. In that regard, *s.84AA* of the *Workers’ Compensation and Rehabilitation Act 1981* makes it an offence to dismiss employees who are in receipt of compensation. However, that appears to be inadequate because there is no obligation to reinstate or re-engage the employee. It appears that some have also relied on the notification “loophole” and it has been claimed that employees have been dismissed during that period and as a consequence the employers concerned have been able to avoid prosecution. If termination of service is being used to avoid the legislative obligations, then reinstatement should be the primary remedy. It was difficult to get adequate details on this issue but if there is a significant injustice, it ought be corrected.

⁵⁹ Safety Institute of Australia (2001) Submission

465. Employee protection can be enhanced by ensuring the closure of the loophole and by providing redress to employees dismissed for the purpose of avoiding the obligations under workers' compensation legislation. Earlier it had been proposed that employers be required to notify WorkSafe of any injured employees dismissed within 10 days of being injured. Subsequently, however, the *Report on the Implementation of the Labor Party Direction Statement in Relation to Workers' Compensation*⁶⁰ (the Guthrie Report) has recommended enhanced protections for employees under the *Workers Compensation and Rehabilitation Act 1981*. It is understood the Government is proposing to amend the Workers' Compensation and Rehabilitation Act 1981 to require an employer to give an injured worker 28 days notice of an intention to terminate employment with simultaneous notification to WorkCover WA and the employer's insurer.
466. Some employer representatives disagreed with the proposed requirement to notify of dismissal of any injured employee and argued that existing protections were adequate and that the proposed requirement unduly onerous. Further consideration of the issues suggests the proposal may, in any event, have been ineffective. The alternatives proposed in the Guthrie Report take employees' protection somewhat further by providing a transparent process relating to the termination of the employment of injured employees.
467. The conclusions that can be drawn from the foregoing are that the present data collection is deficient both in terms of what it covers and the fact that only a fraction of employers are providing reports. If no changes are made to the process it ought be discontinued, as it is an impost on those organisations that are reporting. In the context of the other recommendations, however, rather than discontinuing the collection, it should be improved so as to be more relevant and useful. While that will involve some difficulties, the potential benefits would make it worthwhile.
468. If, as proposed, the data collection continues, it needs to be adapted to also collect data from those who control workplaces under s.22 in relation to non-employee injury and death as well as those under s.19 of the Act. Moreover the Commission and WorkSafe should then be in a position to make more use of the data for both research (Commission) and inspection (WorkSafe).

⁶⁰ Guthrie (2001)

R:26 It is recommended the Act be amended:

- to require the notification of fatalities and specified injuries occurring to non-employees at a workplace by the person in control of the workplace; and
- in relation to accident notification requirements, to stipulate a defined time period within which notification must occur.

R:27 It is recommended that *r.2.4(1)(e)* of the Regulations be amended to make clear the date on which the employer's obligation to notify absences from work of greater than 10 days commences.

R:28 It is recommended that the *Workers Compensation and Rehabilitation Act 1981* be amended as necessary to provide protection for injured employees dismissed contrary to *s.84AA* of that Act in accordance with the recommendations contained in the *Report on the Implementation of the Labor Party Direction Statement in Relation to Workers' Compensation (Guthrie Report)*.

4.3.6 Information

469. The general duties for occupational safety and health are incorporated in the legislation and should not require a large accumulation of regulation. It is accepted that some regulation is essential to cover those areas where parties have insufficient resources or where there is a need to ensure continued safe work environments for potentially dangerous equipment. Some also have consequences that go far beyond the individual workplace and need additional specification. However, there should be no general re-regulation of the self-regulatory environment. Indeed there should be a continuing rationalisation of the obligations to ensure that those who need protection are protected while those who should be responsible for their own and others protection make the effort to do so.

470. During the early 1990's, the rationalisation of the legislative environment reduced the volume of regulation. However, more recently the legislation has been supplemented by new regulations, by a number of codes of practice and guidance notes as well as advice notes. In addition, some of these in turn either rely on or directly refer to National (NOHSC) Standards as well as Australian Standards or other references. The Australian Standards and other references are not always accessible or available and can sometimes be costly.

471. As a result there has been some re-regulation occurring in relation to Western Australian workplaces without, it appears, sufficient regard for how those at the workplace can obtain information materials. There is now no single place where businesses or employees are able to establish all their safety and health obligations. While that may not pose an insurmountable hurdle for occupational safety and health professionals, it is difficult especially for small and medium sized businesses. A significant number of complaints were received and inquiries confirmed some of the difficulties. An example was provided in which a former WorkSafe inspector was unable, without some difficulty, to gather the necessary occupational safety and health information for a significant project. If an expert has that difficulty it is little wonder that some are again complaining that they do not know where or how to access their obligations. As noted elsewhere in this Report⁶¹, Australian Standards may not be readily accessible to small businesses and this is an issue that also needs to be evaluated.
472. The existing SafetyLine Internet service is one effective resource which should be maintained and expanded so that information in relation to the published material can be accessed.⁶²
473. There is need for a “one-stop-shop” so that those engaged in the workplace are able to access the available information quickly. In that regard it would be desirable for WorkSafe to provide limited advice to supplement the availability of the information. That advice should be provided by staff who are not inspectors so that users can be confident that their enquiry will not result in an inspector’s investigation.
474. The role of WorkSafe in providing information and advice is further discussed and recommendation made in relation to improved information in Part 7.1 of this Report.

⁶¹ See section 6.3.3

⁶² See section 7.1.2

4.3.7 Competency Certification and Maintenance Reporting

475. WorkSafe issues certificates of competency under the Regulations covering a range of hazardous processes including erection of scaffolding and the operation of cranes and hoists. Over the past decade there have been significant changes to the certificate of competency framework as a result of the adoption, in all jurisdictions, of the *National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment* [NOHSC: 1006 (1995)] issued by the National Occupational Health and Safety Commission. The Standard was revised in 2001.
476. WorkSafe is no longer involved in the direct training and assessment of persons seeking to obtain certificates of competency. Under the framework, training is now undertaken through the vocational education and training system (i.e. TAFE and private training bodies). Accreditation and “quality control” of trainers involved with certificates of competency training occurs within the training system and does not necessarily involve WorkSafe.
477. WorkSafe does have a continuing role in the assessment process through the requirement that the WorkSafe Western Australia Commissioner registers assessors who test competency for certification. Criteria for assessor registrations are contained in the National Standard which also provides that assessors are subject to audit by WorkSafe. WorkSafe therefore does not conduct the assessments but issues certificates of competency on the basis of advice from the assessors. Assessors can also register with bodies conducting training.
478. A submission and some of those interviewed expressed concern and some alarm at the present training and assessment arrangements associated with certificates of competency. In short these submitted that certificates of competency were being issued not so much because the recipients had necessarily demonstrated the required competence but more because the assessors would not be contracted for further assessments if they were too strict with their assessments. As a result, it was submitted that persons are being assessed by some assessors as competent to a level beyond their actual competency.
479. Concern was expressed that WorkSafe devotes insufficient resources to the auditing of assessors. Moreover it was submitted that WorkSafe only reacted to complaints of sub-standard training and inadequate assessment and was not taking a sufficiently proactive role.

480. A submission suggested certificates should initially be issued with a probation period during which the certificate holder could not supervise “unticketed” workers.
481. A comment by an organisation in relation to the issue was to the effect that WorkSafe should review assessors providing the training. In addition, it was proposed that WorkSafe undertake a final assessment and that newly qualified personnel should undertake a probationary period during which the person should only supervise 2 uncertificated employees.
482. There does not appear to be evidence of widespread problems with the current framework even though difficulties have been reported. While there is some basis for the concerns, a balance must also be struck between efficiency and the cost of providing additional protection consistent with the self-regulatory obligations under the Act. It is also clear, however, that the effectiveness of the framework is dependent on the quality of the training available and the rigour of the assessment process. It is legitimate therefore that WorkSafe should ensure the integrity of the system it oversees. The allocation of sufficient resources and an explicit audit and quality control program are fundamental requirements in this regard.

R:29 It is recommended WorkSafe review its processes for competency assessment and ensure sufficient allocation of resources so as to ensure the integrity of competency certification. The review should ensure all necessary audit and quality control mechanisms are in place to identify and remove assessors who do not fulfil their assessment obligations.

483. On a different but related issue, a submission from a professional association noted that qualified professional service contractors and maintenance staff often came across potentially dangerous plant and machinery that was not being serviced or had been modified contrary to manufacturers’ directions. WorkSafe does not register these contractors but they have a role in inspection and maintenance of plant as “competent persons” under the Regulations.
484. It was submitted that “competent persons” should be required under the legislation to report all unsafe or potentially unsafe plant covered by *Part IV* of the Regulations. At present a significant number are not notifying WorkSafe out of concern over the possible loss of future work.

485. It was argued that voluntary reporting does not work because the owner or user of the equipment would know who had reported the failure or deficiency and could transfer their business. As a result the professionals carrying out their public duty lose business. If the proposal is implemented there would be no advantage for an owner to use an alternative competent person, as each would have the obligation to report if the owner refused to ensure the equipment was serviced or repaired correctly. It was argued that competent persons would respond to a legal obligation to report and although they may lose some business it would provide safer workplaces.
486. Obviously the legislation would need to provide that a report could not be made until the owner was given the opportunity to have the failure corrected. The nature of high hazard plant, however, requires employee and public safety be protected. Areas and activities would include those recognised under the Act and Regulations as requiring inspection, maintenance and certification to operate such as lifts, elevators and pressure vessels.
487. An employer organisation opposed the proposal on the basis that private contracts between assessors and employers should not be the subject to interference, however, the alternative appears even more intrusive. If, for example, the Department alone as the enforcement agency is obliged to follow up on these issues, it is likely that regulations or other standards would need to be developed because of the volume of the potential work. While that would permit ready and quick inspection, it is not consistent with the self-regulatory approach of the Robens model. Similarly, because of the significance and potential for injury and damage beyond the workplace, it is not an issue which should be left entirely to operators and owners.

R:30 It is recommended the Regulations be amended to require competent persons to report to the WorkSafe Western Australia Commissioner the outcomes of inspections of high hazard plant and equipment where recommended corrective work has not been carried out or where major faults are noted at the time of inspection which may lead to plant failure.

4.4 Penalties and Sanctions

4.4.1 Background

488. In Part 3 of this Report there is a discussion on utilising sanctions both as a deterrent and where possible to encourage more effective occupational safety and health behaviour. Broad proposals were also raised for amendment of the existing sentencing laws towards achieving those objectives. It is necessary here to further develop these issues. This will go initially to the submissions and the issues they raise, then to the use of the existing penalties including the *Criminal Code* especially in relation to the prosecution of Directors and senior officers for serious offences and proposals for penalties where culpable behaviour leads to serious injury and fatalities.
489. The issue of penalties was addressed in many submissions. Most were in favour of increasing penalties and many expressed concern that senior executives were not held personally liable or penalised for, the injuries and deaths that occurred at their workplaces and for which they carried a responsibility. Some also expressed concern that the Courts were too lenient in relation to workplace death and injury in comparison to other matters.
490. It is important to note that many of those making these submissions were referring principally to cases involving serious injury or fatalities. There was a substantial consensus that lesser matters should remain before the Local Courts although some sought increased penalties as a reflection of the community concern. A number of suggestions were also made to change the penalty regime, many with a view of linking the penalties more directly with the offences. A number of these are worthy of more detailed consideration.
491. A number of employer representatives argued that penalties were already high; they opposed any alteration of penalties and argued that there should be further research conducted on the application and effect of penalties before any further change. Some submitted that increases would likely only increase resistance. Guilty pleas would be less likely and matters would be defended more vigorously. As a consequence more would be spent on defending cases and less spent on occupational safety and health improvements. It was suggested that it could also result in changes in employers' attitudes which could become less tolerant.

492. In comments relating to the options being developed, employer representatives and some individual correspondents were concerned that significant new penalties would be recommended. Most argued that other strategies such as education and information were likely to be more effective.
493. As noted elsewhere in this Report, there is no intention that existing information and education strategies should be discarded simply to be replaced by increased penalties. Indeed there are a number of recommendations emphasising the need to continue and to improve those initiatives. Instead, penalties are addressed to deal with those relatively rare occasions where other strategies are ineffective or the actions taken (or not taken) are so reprehensible as to affront a civilised community with a concern to improve occupational safety and health.
494. While it seems that there would be little doubt that further research could provide further insight into the implementation and impact of penalties, it is already evident that existing penalty levels and processes are deficient in comparison to other jurisdictions and other States. As well there is also some evidence that penalties and especially personal penalties do have an effect on behaviour.
495. A literature review undertaken by WorkSafe, in respect of penalties, referred to NOHSC research that sought to establish the most important motivators of behavioural change for senior executive staff⁶³. It concluded that offences that provided for personal liability reinforced by credible enforcement are the most significant motivators of senior staff.
496. If there is no change to penalties it is unlikely that the results from Court proceedings would take a different path in future. If the community seeks to have the Courts place greater emphasis on the deterrent value of penalties there needs to be change to those penalties and processes.
497. Regretfully, many organisations seem to regard the duty of care as someone else's duty and refuse to accept their responsibilities in the context of the Robens model. Many, for example, will not provide employees a legitimate role and instead engage in management styles that provide little capacity for employees to contribute in any meaningful way. Self-regulation without sanction in that environment will likely do little to improve occupational safety and health.

⁶³ See NOHSC (2001)

498. One issue where there was no significant disagreement was that the Courts had not applied the maximum penalties. Some argued this was consistent with the proper exercise of discretion under which the Courts judged the severity or otherwise of particular matters. Others argued that the level of penalties reflected a tolerant attitude that is no longer acceptable in the rest of the community and there needs to be greater accountability. Whichever is correct, it is evident that without other steps being taken merely increasing penalties in the Act would not have a great impact.
499. In Part 3 of this Report it was concluded that penalties should be substantial where it can be demonstrated that those with responsibilities have not complied with their obligations and that some matters should be indictable offences put before superior courts. It is argued that these would give greater prominence to those matters. A small number of submissions also noted however, that superior Courts sometimes appeared even less inclined to impose heavier penalties than the Local Court. That is an issue in itself that requires attention and was the subject of a number of observations by a former Coroner and others that were directed towards getting a better response. Part of that is getting the serious nature of the offences recognised and despite the recent history there is a reasonable expectation that placing more significant matters before the superior courts will bring a better recognition of their significance.

R:31 It is recommended the Act be amended to provide for serious breaches of the *Occupational Safety and Health Act 1984* to be heard as indictable offences by superior courts.

4.4.2 Prosecution of Directors and Senior Officers

500. *S.55(1)* and *(2)* of the Act provide for personal responsibility of directors, officers and members of a body corporate in cases where a body corporate is found guilty of a breach of the Act. If the offence was attributable to the action or inaction of a director, officer or member of the body corporate, then such person is also guilty of the same offence.
501. There has been some confusion over the circumstances under which *s.55* applies and the relevant penalties. WorkSafe has submitted that changes are required to *s.55* to clarify the applicable penalties. Another important consideration is the extent of the personal liability of directors, officers and members of a body corporate in circumstances where systems of work have lead to death or serious injury. The section presently makes such persons liable only in respect of actual acts or omissions leading to the breach. It does not cover situations where persons are not directly involved in the breach but fail to perform their organisational responsibilities.

502. As noted earlier, a literature review undertaken by WorkSafe concluded that offences that provided for personal liability reinforced by credible enforcement are the most significant motivators of senior staff. Loss of corporate image and credibility were also significant. Interestingly, the review noted the importance that was placed on “safety pays” as a motivation but that there was a range of circumstances where safety did not pay. As a result it was a limited strategy in some circumstances. Other important motivators, however, included safety and health management systems in larger businesses, the perceived legitimacy of the legislation as a moral guideline, supply chain pressure, information strategies and leverage for small and medium sized business.
503. It is clear from this that any offence that has direct application to individuals would carry a greatest impact. Certainly the possibility of a director or Chief Executive Officer personally facing charges appears the most significant and effective penalty. The willingness in some jurisdictions to establish a “systems approach” to penalties also increases the accountability of senior executives. It opens up that possibility as the need to have evidence of the direct involvement of senior personnel in events involving fatalities or serious injury may not be required. Instead it requires only that the responsible executives permitted the unsafe circumstances to develop without taking reasonable steps to ensure safety and prevent failures. That style of legislation, if implemented, could make prosecutions more effective and the Act more enforceable.
504. The Victorian and Queensland Governments have recently considered new offences and penalties to address circumstances of a serious breach of the occupational safety and health laws with the objective of ensuring a director or other senior corporate officer can be held liable if he or she was in a position to influence the circumstances of the corporation’s offence and did not exercise due diligence to prevent the offence. While these proposals ultimately did not proceed, they are indicative of strong community concern over the apparent lack of accountability of directors and senior officers.

505. Similar concepts are found in corporation law where company Directors can be precluded from that role for certain periods when they have been found to have failed in their obligations as Directors. In those cases the applicable criteria include the requirement of due diligence which in a number of respects is not very different from the general duties in relation to safety and health that apply in the workplace. It is interesting to note that there is currently considerable public debate over the possibility of prison sentences being applied in some additional areas for corporate financial misbehaviour. In some instances corporations support the increased penalty. Unless the community considers dollars more important than workplace safety and health, no lesser penalty should apply to culpable executives who ignore their occupational safety and health obligations.
506. These approaches to offences and penalties were first recommended in the 1992 Report⁶⁴ and since that time have been taken up in other jurisdictions. Modern management clearly places the obligation on managers and supervisors to be answerable to their CEO's, Boards of Directors and shareholders. Boards and management have made advances in capital utilisation and in profit improvement in recent years by holding those operating and working in each component part of the organisation more immediately accountable to shareholders for profit and output. It is time Boards and senior managers also shared the burden of accountability to their employees and the community for the safety and health of their employees. Too many employees have been seriously injured or have died because there has not been adequate boardroom or executive attention given to the safe operations of their business.
507. Corporations, their directors and senior officers must be accountable for occupational safety and health and that could involve the creation of new offences and penalties including imprisonment for serious offences involving gross negligence.
508. In their responses to the issue of penalties, a number of employer representatives argued that those matters are already dealt with under the *Criminal Code*.
509. However there appears to be a disinclination to use the *Criminal Code*. A brief review of some relevant parts of the *Code* is illuminating.
510. Under s.277 of the *Criminal Code* unlawful homicide is defined as:

⁶⁴ Laing (1992) p219-222

“Any person who unlawfully kills another is guilty of a crime which, according to the circumstances of the case, may be wilful murder, murder, manslaughter or infanticide.”

511. The definition of manslaughter is found at *s.280* which provides:

“A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter”.

512. Under *s.266*:

“It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”

513. Under *s.267*:

“When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”

514. Under *s.274*:

When a person causes a bodily injury to another from which death results, it is immaterial that the injury might have been avoided by proper precaution on the part of the person injured, or that his death from that injury might have been prevented by proper care or treatment.”

515. While under *s.303*:

Any person who, being charged as a master or mistress with the duty of providing necessary food, clothing, or lodging for a servant or apprentice under the age of 16 years, unlawfully fails to perform that duty, or in any other manner does any bodily harm or causes any bodily harm to be done to such servant or apprentice, whereby, in either case, the life of such servant or apprentice is or is likely to be endangered, or his health is or is likely to be permanently injured, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.”

516. And finally *under s.306*:

“Any person who unlawfully does any act or omits to do any act which it is his duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a crime, and is liable to imprisonment for 5 years.

517. It is plain that prosecutions under the *Code* can apply to workplaces or any other situations and that some of the penalties are significant. Most have been in the *Criminal Code* for a long time. Unlike the *Occupational Safety and Health Act 1984* they include prison in the range of penalties.
518. The issue is not so much that provisions exist but that there does not appear to have been a capacity or inclination to act on them. It seems reasonable to suggest that it could be because there are now other legislative instruments which deal with occupational safety and health; in particular the *Occupational Safety and Health Act 1984* and the *Mines Safety and Inspection Act 1994*. While it also appears that the *Criminal Code* may still be applicable to small to medium size workplaces where the person/s responsible are proximate to the work, that is unlikely to be the case in modern businesses where those who issue the instructions about the work are often considerably removed from the actual workplace and are not directly involved in the workplace events.
519. These also raise questions as to the respective roles of the relevant Departments, Police Officers and WorkSafe and Mines Inspectors. If, for example, Police Officers are not as familiar with little used *Criminal Code* provisions because of a belief that workplace safety is the responsibility of another Department, should they continue to carry the onus for the enforcement of the provisions in relation to workplace accidents? If the provisions have ossified because of their irrelevance or because they cannot be applied to the modern workplace, is it not time that they were modernised and made relevant to the 21st century? Should they be transferred into the applicable occupational safety and health statutes?
520. At present there is a real likelihood that there is a gap in the proper protection of persons in the workplace. A person may be killed as a consequence of a failure of the kind envisaged by the *Criminal Code* but under occupational safety and health laws there is no similar provision which may be used as a basis to prosecute. History has shown that there is not much likelihood of a comprehensive Police investigation let alone a prosecution under the *Criminal Code* if the incident is a workplace fatality.
521. It appears that in some cases the workplaces have not been properly secured and it was claimed that there have been instances where the equipment and machinery involved has been interfered with before investigations completed.

522. Fatality investigations are never pleasant and the officers might well be anxious to be concluded or have the investigation disposed of by passing it over to a WorkSafe or Mines inspector. There may be good reason for that because of the expertise of the Inspectors. There should, however, be no interference with the proper conduct of an investigation. There should be no resumption of work which will interfere in an investigation until the investigation is complete. If needs be the Coroner should be required to certify that to be the case. If a fatality is likely to result in longer down time it simply provides another reason to avoid fatalities.
523. If an investigation is conducted by a WorkSafe or Mines Inspector, the likelihood of an offence under the *Criminal Code* being pursued or proven is remote. Firstly, most Inspectors are unlikely to be aware of the range of offences under the *Criminal Code* going to criminal negligence and criminal responsibility. If a Police Officer considered a particular case an industrial accident, there may well be no contemplation of *Criminal Code* charges. Similarly an individual Police Officer would not usually be aware; and should not be expected to be aware, of the range of offences under the *Occupational Safety and Health Act 1984*. As a result, even if officers believed there was some basis for prosecution, they may still simply rely on the WorkSafe or Mines inspectors in the belief that the issue is covered under that legislation.
524. As a consequence there is a real likelihood that penalties which should apply where a death arises in the workplace could be avoided. A brief analysis of a series of cases, where prosecutions have been pursued by WorkSafe or the Department of Mineral and Petroleum Resources indicates there is no recent record of charges under the *Criminal Code* in relation to workplace fatalities or serious injury where there is no immediate and direct link between the fatality and the senior executive. It is difficult to believe that in all of the fatalities in WA in recent years that there has not been a case of criminal neglect or culpability.

525. If the *Criminal Code* is to be retained as the only penalty structure in relation to workplace fatalities that are applicable where culpable negligence by senior executives is a factor, then two things need to occur. Firstly, the *Criminal Code* will require amendment to ensure it is compatible with modern business organisation. Account would need be taken of characteristics such as absent supervision and the measure of control wielded by Boards and external management. In modern business with varying levels of control and responsibility there is little doubt that a chief executive or Director in another city or place can still have the most profound impact on the individual workplace. If they are capable of putting employees in danger of their lives, they should be capable of taking responsibility for their actions.
526. Even substantial fines are a small proportion of some business funds and individual executives do not generally face personal penalties. Even in those cases where fines could be applied, the income levels of very senior executives would again suggest that even a substantial fine could have little real impact.
527. The second requirement is that there will need to be a more structured approach to investigation of workplace fatalities and serious injury. At present investigations of workplace fatalities by Police Officers are informal in comparison to potential criminal investigations especially in the case of homicide. It appears that in many instances either the WorkSafe or Mines Inspectors are called in immediately and inquiries by Police Officers are relatively superficial. Those carried out in the country especially may be investigated by relatively inexperienced officers.
528. If the *Criminal Code* is to continue to cover workplace fatalities, there will need to be specific arrangements put in place to ensure that the investigations that take place are able to take proper account of that Code as well as possible offences under the *Occupational Safety and Health Act*. That suggests either joint investigations or at least far better liaison between the Police Service and other inspection authorities than exists at present.

529. Possibilities include a requirement in Police investigation of workplace fatalities for the officer/s concerned to certify that the incident does not involve a breach or likely breach of the particular criminal provisions applicable under the *Criminal Code* before it is passed to WorkSafe or Mines Inspectors. Alternatively, if during an investigation, a Mines or WorkSafe Inspector is of the view that negligence or criminality may be involved in a particular fatality, they should have authority to refer the matter for further Police investigation. That will require Inspectors becoming more aware of the *Criminal Code* and for sites to be left undisturbed while those investigations continue. It would also require some obligation upon the Police to conclude such an investigation.
530. Another possibility is that each workplace fatality should commence as a possible homicide investigation with the accompanying rigorous procedures being applied. That at least, would provide suitable instruction for the Police Officers immediately concerned, especially those at remote locations, and would provide proper control over the site while the Police and Inspectorate staff liaise as to the on going investigation. In that way proper consideration can then be given to more effective implementation of the relevant *Criminal Code* and *Occupational Safety and Health Act* provisions.
531. At the present time the material suggests investigation processes in relation to workplace fatalities and serious injury are flawed. If Police stand aside, officers who have no authority under the *Criminal Code* investigate the matters. If only police investigate, critical occupational safety and health matters can be missed or not sufficiently connected to future risk management. The ideal is co-operative and joint involvement.
532. Alternatively some relevant provisions of the *Criminal Code* could be modernised and incorporated into the *Occupational Safety and Health Act*. The *Criminal Code* could then retain its present form and all inspections in relation to occupational safety and health would be carried out under the relevant occupational safety and health legislation. Whichever alternative is selected, it is necessary to clarify the role of the legislation and to ensure greater probability that it will be applied in any particular case.

R:32 It is recommended the Act be amended to more clearly establish the accountability of corporations, their directors and senior officers for the occupational safety and health of employees.

R:33 If the liability of corporate directors and senior officers is not extended, it is recommended s.55 be amended to make clear the same maximum penalty as would apply to a body corporate applies to a person convicted under s.55 of the Act.

4.4.3 Culpable Behaviour Causing Death or Serious Injury

533. In dealing with fatalities and serious injuries, a number of submissions specifically sought to have new offences brought into Western Australia of “industrial manslaughter” and “negligently causing serious injury”, as recently proposed in Victoria. Similar penalties apply in the United Kingdom and Canada for cases where negligence has resulted in fatalities and serious injury.

534. In Victoria it was noted that:

“the ability to prosecute senior officers of a corporation for criminal offences if they have contributed to the commission of a criminal offence by the corporation is a new and difficult area. It is necessary to ensure that senior officers take their responsibility to provide safe workplaces seriously, while also ensuring that the offences only impose criminal responsibility where it is appropriate to do so.”⁶⁵

535. The Victorian legislation was apparently intended to be limited to only the most serious of cases:

“Existing common law principles for establishing whether the corporation owed a duty of care in particular situations will continue to apply. The standard of care owed by the corporation will be the standard of care that a reasonable corporation would have exercised in the circumstances. In determining whether the Corporation has breached the standard of care, the corporation’s conduct may be viewed as a whole and/or in relation to specific activities.

Traditionally, corporate criminal liability has depended on the demonstrable culpability of one senior person. Since modern corporate decision making often involves more than one person, the collective responsibility or the organisational blameworthiness of the corporation will be emphasised in the new offences.

Mere negligence will not be sufficient: the corporation must be grossly negligent. The common law principles of gross negligence will continue to apply, and the offence must be proven by the prosecution beyond a reasonable doubt. This means that there must be such a great falling short of the standard of care that a reasonable corporation would exercise in the circumstances, and such a high risk of death or really serious injury, that the conduct merits criminal punishment⁶⁶.”

⁶⁵ Minister for WorkCover and Attorney-General (VIC), (2000)

⁶⁶ Ibid

536. As seen earlier, similar difficulties exist in this State in prosecuting senior executives who are in the position to influence the circumstances of an offence and do not exercise due diligence to prevent the offence. As noted, corporations may be fined but their senior officers usually are not. The level of the fines on corporations is also very small in relation to their overall budgets and is of limited deterrent effect. Similarly, even large fines will have only a limited impact on senior executives who in some instances are earning many multiples over the earning levels of some years ago.
537. Within Australia, as with the rest of the world, globalisation has had a major impact on the priorities of business organisations particularly in the pursuit of profit and corporate survival. The dominance of economics has led to important changes in cultural attitudes toward work. Traditional concerns of being “good corporate citizens” appear to have changed for some from social, community and employee issues to ensuring that they meet their legal requirements and promoting their products. As a result, unless incentives are included in legislation, executives may not as a matter of policy, place the necessary emphasis on safety and health in the workplace. While it is acknowledged that workers' compensation costs, public image and senior staff remuneration and promotion may in part be assessed on occupational safety and health performance it is not inevitably the case and there are few other reasons for executives to spend the time, the effort or the money.
538. In Western Australia as earlier noted it is possible for police to lay charges under the *Criminal Code* against persons who have caused harm or death by negligent acts related to occupational safety and health. However, in practice that does not occur and there are considerable limitations on the application of such provisions to the modern workplace. There is no vicarious liability for example, which could enable an employer to be charged when an employee undertook the direct action.
539. If the *Criminal Code* is not to have application, the introduction of new offences and penalties specifically directed towards ensuring corporate responsibility would assist in developing a new awareness of occupational safety and health in this State. It could also help to ensure that some incidents which are presently not followed through because they fall somewhere between the *Criminal Code* and offences under the *Occupational Safety and Health Act* are followed through in the future.

540. It is understood that the Victorian proposals have been discontinued. Notwithstanding this outcome, there is a need to continue to address the problem because the failure of the law to match contemporary business practice and the changing work and corporate environment will continue to add to and intensify, rather than to reduce, the difficulties.
541. A number of comments opposed any further penalties against executive officers. One argued for example that it departed from the concept of mutual responsibility and that it focuses on penalties rather than prevention. Such arguments, however, do not withstand close scrutiny, as there are penalties under the *Criminal Code* and similar requirements already apply in relation to financial and other obligations. It is plain that supervisors and executives directly in charge of employees are already vulnerable to criminal offences including manslaughter if they fail their responsibilities and are grossly negligent. Similarly small business proprietors are vulnerable under the existing law. The proposals and recommendations here will not alter the situation markedly for small business except perhaps, to the extent of re-alerting them and the community to the possibilities that already exist. The major impact is to ensure those who presently have great authority and power over employees, but who have little likelihood of being held responsible for their actions because of the deficiencies in the law, are able to be held to account.
542. Most importantly, those who fulfill their reasonable obligations would need have no concern as they would not be subject to prosecution. Prosecution would only apply to those who are grossly negligent.
543. The term “manslaughter” however carries connotations and implications that are not usually relevant to the workplace. If an alternative term can be used it might help in the understanding of the substance of the issue and may allay the not unreasonable fears of some who have a particular understanding of the word. One suggestion is “culpable behaviour causing death” although there may be better alternatives.

R:34 It is recommended the Act be amended to provide for negligent senior officers of corporations to be held accountable for the death or serious injury of employees. Offences would apply where a corporation owes a duty of care to the deceased or injured person, where senior officers have breached their duty of care and the breach amounts to gross negligence. In the event that investigation procedures under the *Criminal Code* and/or amendment of the *Criminal Code* provide an effective alternative process, this recommendation should lapse.

4.4.4 Penalties

544. Existing penalties under the *Occupational Safety and Health Act 1984* are manifestly inadequate and the maximum fine levied so far in Western Australia in the case of a workplace fatality is \$35,000⁶⁷. In recent times a fisherman was fined \$90,000 for not recording his abalone catch⁶⁸ and a medical association reportedly faced fines of \$240,000 for engaging in non-competitive practices⁶⁹. It is difficult to accept that the lives of employees are worth considerably less than abalone records or allegedly inappropriate fee arrangements.
545. Some argued that these examples are irrelevant and emotive and should not have been used. While there is an unavoidable emotional element to them, the reason for presenting the differences was not to suggest that there was some equivalence in the seriousness of the matters but to highlight both the relatively small penalties existing under the Act and the disinclination of the Court to apply even those levels. It appears that frequently defendants have put and the Courts have accepted, that the person killed or severely injured was the instigator of the incident or in some other way carried a responsibility for the event.
546. Plainly those who have died cannot put an alternative view. However, the event would not have occurred if the employees were not at work. That is why employers carry a greater level of responsibility in the workplace. They have control over both the work environment and process and carry responsibility for the safety of their employees. Where there is a failure, an investigation should be made of the extent of that failure. Of course, an employee can sometimes be so grossly negligent that the employer simply could do nothing about the events. Often, however, employers could have done more than to blame the deceased or injured employee. That is convenient but importantly does not lead to strategies ensuring such events do not re-occur. Increasing penalties and encouraging the Courts to apply relevant penalties by way of sentencing guidelines is necessary.

⁶⁷ Source WorkSafe Western Australia

⁶⁸ The West Australian October 20, 2001 p 17

⁶⁹ *ibid*, p19

547. In addition it can be argued that when admissions of guilt are made in Court, the penalties are sometimes too low because the Court is not made aware of the seriousness of the failure. Indeed, it is likely that a guilty plea and explanation of the alleged mitigating circumstances including the role of the employee sometimes results in very small penalties for significant failures. The prosecution should ensure that the Court is given all the detail about the events rather than a summary, if necessary accompanied by evidence. While there may be a reluctance to press the Court's time it is one way that the true significance of the failures can be brought out and realistic penalties considered.
548. At present the maximum penalty applying to employers under the Act is \$100,000 or, if the offence results in death or serious harm to an employee, the penalty is \$200,000. For employees the maximum penalty is \$10,000 or, if the offence results in death or serious injury to a person, the penalty is \$20,000. Under the Victorian *Occupational Health and Safety Act 1985* the maximum penalties are \$250,000 for employers and \$50,000 for individuals. The Victorian Government has indicated an intention⁷⁰ to increase the maximum penalties for most offences to \$750,000 for employers and \$150,000 for individuals and to provide for 12 months imprisonment.⁷¹
549. The New South Wales *Occupational Health and Safety Act 2000* provides maximum penalties of \$825,000 in the case of a corporation being a previous offender, \$550,000 in the case of a corporation not being a previous offender, \$82,500 for an individual who is a previous offender and \$55,000 for an individual who is not a previous offender.

⁷⁰ See Department of Justice, Department of Treasury and Finance, Victorian WorkCover Authority (2000)

⁷¹ Higher penalties are proposed for the new offences of industrial manslaughter and negligently causing serious injury.

550. The penalties presently in the WA *Occupational Safety and Health Act 1984* are out of step with those applying in other jurisdictions and should be amended. The comparatively low maximum penalties and the even lower actual penalties imposed by the Courts have contributed to an undermining of the authority of the Act. It is imperative that notional and actual enforcement penalties be strong enough to act as an effective deterrent against failing to meet acceptable occupational safety and health standards. In both regards, the Western Australia experience has been unacceptable. While measures are needed to address the issue of penalties applied by the Courts, there remains the need for the maximum penalties in the Act to be increased to signal the seriousness with which the community views the issues.

R:35 It is recommended the maximum penalties in the Act be increased to reflect penalty levels in other jurisdictions and community expectations. These should include imprisonment for serious offences involving gross negligence resulting in serious injury or death.

551. The issue of the actual penalties applied by the Courts could be addressed through guidelines established for the Courts when sentencing under the *Occupational Safety and Health Act 1984*. A framework for sentencing under Western Australian statutes is established in the *Sentencing Act 1995* and applies to offences against the *Occupational Safety and Health Act 1984*. The *Sentencing Act 1995* requires Courts to consider a range of aggravating and mitigating factors in determining sentences. A range of sentencing and reparation options are specified. There is also provision for the Full Court of the Supreme Court or the Court of Criminal Appeal to issue “guideline judgements” containing guidelines to be taken into account by Courts when sentencing offenders (*s.143 Sentencing Act 1995*). No sentencing guidelines have been issued in respect of the *Occupational Safety and Health Act 1984*.

552. Sentencing guidelines could ensure that those who show little or no regard for the safety of their workplace/s would face the full extent of the penalty whereas those with a demonstrably good occupational safety and health record could be shown some leniency. In that regard, specific identified issues such as the extent of consultation, training, including induction training, and co-operation or encouragement of employees to take responsibility for safety with the election of representatives or committees could become part of the considerations. The sentencing guidelines might also limit the discretion of the Court in some circumstances or specify a priority or significance in relation to any particular failing. The guidelines could perhaps also incorporate minimum sentences for some offences.

553. Plainly a superficial or token effort would not attract significant concession or remission, whereas one which took all efforts into account and had resulted in a comprehensive safety environment could perhaps attract significant concessions, particularly if the nature of the event was unforeseen by those involved in the safety and health program at the enterprise. Plainly in the latter case, such events would be very rare but when they did occur there is greater justification for a more broadly shared responsibility. The recently proclaimed New South Wales *Occupational Health and Safety Act 2000* provides (s.124-131) for the Full Bench of the NSW Industrial Relations Commission in Court Session to issue guideline judgements on application from the State's Attorney General.

R:36 It is recommended the Commission and WorkSafe pursue the development and application of sentencing guidelines for offences under the *Occupational Safety and Health Act 1984*. If necessary, specific provision should be made in the Act for sentencing guidelines to be issued by an appropriate authority.

4.4.5 New Penalties

554. Submissions also addressed a number of other issues in regards to penalties for lesser offences including the capacity to impose novel but effective penalties. These could include work orders, community contributions of various kinds, implementation of various safety programs in persons workplace/s and others. The following are among those proposed:

- supervisory orders and corporate probation such as: internal discipline orders requiring the organisation to investigate the contravention, discipline those responsible, and return a compliance report to the Court; organisational reform orders, which require organisations to report regularly to the Court on their efforts to develop a compliance program and to reform its occupational safety and health management system; and punitive injunctions, where the Court requires the organisation to introduce an occupational safety and health management system;
- negotiated outcomes providing for a partnership or co-operative approach to regulation. Under such an approach an organisation or workplace is able to negotiate with the regulatory agency and agree to particular undertakings, such as adopting a safety management system. The regulatory agency can then enforce such undertakings. Where the regulatory agency is satisfied the undertakings are in place they may agree to minimise inspections and other regulatory activity in that organisation or workplace. The negotiated outcomes concept, as a co-operative approach to regulation, has been adopted under the *Trade Practices Act 1974*, whereby enterprises negotiate outcomes or formal undertakings with the Australian Competition and Consumer Commission who can then enforce breaches of these undertakings;
- community service orders requiring the duty holder to carry out an occupational safety and health - related project using the duty holder organisation's resources, involving top management and conducted during normal business hours; and

- dissolution sanctions, where the most serious offenders are required to cease their activities until their occupational safety and health management systems are reformed, or wound up permanently if the Court decided that the offenders are incorrigible.
- publicity sanctions involving “naming and shaming” by adverse publicity, through the media and other high profile channels, of organisations that are prosecuted;

555. Similar penalties to these have been included in the New South Wales *Occupational Health and Safety Act 2000*. An employer organisation also suggested that the Court should perhaps decide how any fines might be spent in enhancing occupational safety and health. That could ensure that, instead of going into consolidated revenue, the fines are used to enhance occupational safety and health.

556. Most commenting on the proposals supported the alternative penalties although some suggested that adequate protection would also need to be included. A small number objecting to the proposals argued for example, that naming and shaming would not lead to enhanced workplace safety and health. While that point is conceded and it might not be an appropriate remedy in many instances the Court should be left to exercise its discretion in designing the best remedy. Clearly actions that enhance safety and health will be preferred and there are many alternatives that could be used. There may, however, be an occasion where alternatives such as naming could be necessary.

557. The Commission observed that it wished to review and consider each of the penalty provisions and that is no more than would be expected. However, if it means that the Commission will only put forward those issues on which it can agree or which suit only its members, that would not be satisfactory. The Commission has the responsibility to take account of the broader picture and to provide the Court with wide discretion. While the Commission has probably the most representative structure possible at present, it does not represent all the community and needs be open to alternatives.

R:37 It is recommended the Act be amended to provide for alternative non-monetary penalties, aimed directly at improving occupational safety and health, for lesser offences under the Act.

4.4.6 WorkSafe Prosecution Policy

558. WorkSafe utilises a written *Prosecution Policy*⁷² when considering whether or not to take particular matters before the Courts. This Policy underlies the prosecutions made by WorkSafe and was developed together with WorkSafe's *Enforcement Policy*⁷³.

559. In describing its purpose, the Policy recognises the role of the public interest in determining whether a prosecution or appeal will be initiated. Under the heading "The Decision to Prosecute" the policy provides that a prosecution that satisfies the relevant criteria will only be initiated where "...it is considered in the public interest, including there be a reasonable prospect of success". It also provides that consistency will be developed as prosecutions are instituted on a like with like basis with other prosecuting Departments.

560. Under the heading "The Public Interest" the Policy also provides,

"If a *prima facie* case exists the prosecution of the offence must also be in the public interest.

This requires the balancing of a broad range of factors, as they relate to a particular case. The presence of a particular factor does not necessarily mean it would be against, or in, the public interest to proceed with a prosecution, and the same factor could equally weigh in favour of prosecution in one particular case, yet weigh against it in another. Ultimately, it is all the relevant factors taken together which will determine, on balance, whether it is in the public interest to proceed.

As mentioned earlier in this policy, it is the role of the courts to determine guilt or innocence. While all prosecutions must be in the public interest, the test of public interest must be applied in a manner which does not remove the central role of the courts in the prosecution process. As is the case with other issues relating to the public interest, it is a matter of balance and the exercise of appropriate judgement.

It is in the public interest that prosecutions be conducted fairly and impartially.

A prosecution which is conducted for improper purposes, capriciously or oppressively is not in the public interest."⁷⁴

⁷² See WorkSafe Western Australia, (1998b)

⁷³ See WorkSafe Western Australia, (1998)

⁷⁴ See WorkSafe Western Australia (1998b)

561. The two final points are clear enough and raise little argument. The earlier description of the exercise of discretion, however, is somewhat reminiscent of the script of “Yes Minister” but appears to say that, in the exercise of discretion, matters should be balanced. It does not however define “public interest” nor does it provide sufficient definitive criteria for the exercise of the discretion. Obviously it could still result in arbitrary value judgements that are neither open nor disclosed.
562. The Policy goes on to describe under the headings “Evaluation of the Public Interest” and “Reasonable Prospects of Conviction” a number of points which give a good indication of whether or not a particular prosecution, in effect, would be a waste of resources because of its poor prospects for success. The Policy also goes on to list “factors which may weigh against prosecution” despite the existence of a *prima facie* case. Plainly many of the factors weighing against prosecution are valid and relevant; for example it would not be in the public interest to pursue a trivial or technical matter in all circumstances, especially if the prospect of gaining a conviction is remote because of unreliable witnesses and if it will be a long and expensive trial. These are clear factual circumstances that can be justified under the glare of accountability. It is more difficult, however, to accept that some of the criteria can be seen in a similar light.
563. Some of these appear to go to matters of doubtful validity. These include, “whether the alleged offence is of minimal public concern” or “the youth, age or health or special infirmity of the victim, alleged offender or a witness” or again, “the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court...” as well as others. Indeed, instead of leaving the discretion to the Court as asserted at the commencement, it appears that it could be exercised out of sight of public scrutiny before being sent to the Court.

564. The public interest test under the Policy does not appear to remove the potential for idiosyncratic or arbitrary decisions because the exercise of the discretion remains open to “political” or subjective decision-making. It could also encourage departmental timidity because it provides any number of bases upon which a decision not to prosecute could be found. Indeed, a number of complaints argued that had been the case. Importantly, on occasion it might well be necessary to follow up an alleged offense because of the importance of the issue for particular reasons when in other respects it would not be worth the while. Establishing a principle may call for the prosecution of a matter even if costs are high and success not guaranteed. The existing policy is soundly based but does require refinement to ensure it is less likely to result in deficiencies.
565. While it can be argued, with some justification, that the present administration may not misuse the discretion, that is to miss the point because it remains that such outcomes could occur. The *WorkSafe Prosecution Policy* should be reviewed with a view to reducing the capacity for arbitrary decisions.
566. In all cases, the reasoning used to decide the progress of a matter should be in writing and open to scrutiny to ensure impartiality. While that does not necessarily mean public scrutiny, it should nonetheless be open to scrutiny by other relevant authorities. Given the relatively small number of prosecutions, such a process should not prove too onerous but would assist public confidence in the process. While the Department noted in its comments that decisions are currently confirmed in writing, this should be formalised in the Policy.
567. The criteria requiring special consideration in the case of environmental tobacco smoke under the Policy is peculiar and should also be reviewed.

R:38 It is recommended the WorkSafe Prosecution Policy be revised and to formalise the current practice whereby the reasons for each decision in respect of prosecutions are confirmed in writing.

568. A submission noted that health issues are rarely the subject of WorkSafe prosecutions although occupational health issues are common in workplaces. In light of the significance of health issues, it is important that they not be ignored because of the difficulties that arise. While it must be accepted there are difficulties in the enforcement of health issues, that should not prevent the development of new approaches.

569. One employer organisation, in giving support to the concept, argued that prosecution should only arise where the work activity is the sole cause of the particular disease. That gives rise to a major issue in relation to health matters which are only now being given attention. Examples abound but the relationship of allegedly work related respiratory issues with other activity, including cigarette smoking, is a case in point. The relationship between lifestyle and long working hours is another gaining more recent prominence. In each of these, as in so many other cases, considerable further research and investigation is needed. While in principle it is accepted that only those issues that arise as a consequence of work should be pursued, the investigation and prosecution policy may need to account for a wide range of variables and activities and it would not be appropriate to unduly limit the recommendation.
570. A medical practitioner commenting on these issues, expressed disappointment that more emphasis had not been given to occupational health issues and argued there should be more recommendations dealing with health matters.
571. The concern is accepted. However, to ensure that health issues have some priority, there must be a higher research effort to enable parties and the authorities to more effectively identify the likely health impacts of various workplace activities. That is addressed later in this Report. Health issues are often difficult to discern and may sometimes involve long latency periods. Careful observation and specific investigations of suspicious health outcomes appear to be among the relatively few options available in discovering emerging health concerns. As with other matters, the Commission and the Department have an ongoing role in this regard. That is supported by the specialist research capacities available to them. These investigation policy processes discussed here will also heighten awareness.

R:39 It is recommended WorkSafe develop policy and processes for the investigation and prosecution of breaches of the Act related to the health of employees.

572. A submission that other organisations should be able to bring prosecutions when WorkSafe refused to do so reflects similar submissions that were put in 1992. The Crown ought prosecute any breach of legislation that results in an alleged offence. The alternative of citizens or organisations, even responsible citizens, pursuing prosecutions would lead to numerous difficulties and would in effect be impracticable. If the reason for the submission is dissatisfaction with the conduct of WorkSafe in relation to prosecution there are mechanisms available to ensure WorkSafe or another authority carries out its duty. If necessary, prerogative writs may be sought to require Government agencies to carry out their obligations.

4.4.7 Prosecuting Inspectors

573. Under present arrangements prosecutions for offences against the Act are processed under the control and direction of legal counsel from the Crown Solicitor's Office who are seconded to WorkSafe for particular periods. There was or is no criticism of the work undertaken by those personnel but there were complaints both that WorkSafe undertakes an inadequate number of prosecutions in order to provide a sufficient deterrent and that prosecutions that should have been taken were not. It was confirmed that matters were discontinued because counsel concluded the evidence simply was not strong enough to sustain an action. As a result of prosecutions being undertaken by legal counsel it is apparent that inspectors and other staff do not always provide adequate material. As a consequence, much of counsels' time was also involved in constructing and preparing briefs. These could and should have been more complete prior to being passed to the legal officers.

574. A mechanism used in other jurisdictions to better train and inform inspectorate staff of prosecution processes is for the inspectorate to have its own specialist prosecution section or activity to deal with routine matters while legal counsel continues to deal with the more significant prosecutions. This has resulted in other jurisdictions in highly effective specialist groups who train their colleagues as to what is required. There is less avoidance because inspectors know that their success or failure depends largely on themselves. The inspectors are also closer to the issues and more rapidly establish the particular facts. Importantly, they are also in a position to make judgements as to the significance of particular cases and where the limited resources available may be put to best use. While counsel would have a training and support role, nonetheless the priority would go to more significant matters and counsel would be more effectively utilised.

575. The work quality could be maintained because, unlike counsel who work at WorkSafe over a particular cycle and then return to Crown Law, inspectors could permanently be appointed to the work. Prosecuting Police Officers and the Industrial Inspectorate work in a similar way and have reasonable success. They also keep costs down and are available when needed. Counsel would continue to have sufficient work, as higher-level matters will still require a significant effort and detailed legal knowledge. Initially there would also be a significant training function across the enlarged organisation. However, the process would bring it back to more direct inspectorate involvement and ownership and would provide additional opportunity for those who wished to progress their careers.
576. Concern was expressed in some responses to the proposal that implementation would not enhance the efficiency or number of prosecutions. However, a senior and legally qualified commentator supported the proposal as more likely to enhance the effectiveness of the Department. It was argued that the Department had a stronger interest in ensuring effective prosecution and was less concerned with success rates than counsel might be. It was also accepted that the Department could build a level of expertise notwithstanding the complexity of prosecutions under the Act. As well it was argued that Departmental commitment to effective prosecution processes would be enhanced by implementing the suggestion.
577. While the proposal is not formalised as a recommendation, it is suggested that the Department consider the issue and report its conclusions to the Minister.

4.4.7.1. On-The-Spot Fines

578. A number of submissions argued that the Act should provide for “on-the-spot fines”. The question of whether inspectors should have the power to issue penalty notices which have an attached direct monetary sanction (i.e. on-the-spot fines) has, however, been a matter of contention since the introduction of the Act.
579. The concept of on-the-spot fines is similar to that of the familiar speeding or parking fine. Implementation would involve providing inspectors with the power to issue a notice (usually termed a penalty or infringement notice) where the inspector has formed the opinion that a breach of the Act or Regulations has occurred in circumstances that warrant the imposition of a deterrent penalty. The ability to issue improvement and prohibition notices would still be available to inspectors. Penalty notices would be issued at the discretion of the inspector.

Control of Hazards

580. The penalty notice would carry a fixed monetary fine. The person to whom the notice is issued could pay the fine by the due date, choose to have the notice reviewed by the WorkSafe Western Australia Commissioner where relevant or, ultimately, to have the matter heard before the Court. Failure to pay the fine would result in Court proceedings. No criminal liability would be incurred if the fine were paid.
581. On-the-spot fines have been implemented in New South Wales (NSW) and the Northern Territory (NT).
582. Those in favour of on-the-spot fines argue existing regulatory tools available to inspectors should be broadened to address the evidentiary and cost difficulties experienced in undertaking prosecutions for breaches of the Act and Regulations. At present the only mechanism for an employer or employee to suffer any penalty for breaching the Act or Regulations is through a formal prosecution. It is argued in many circumstances that while a prosecution may not be justified, the offender should suffer some sanction or penalty as a means of deterrence. On-the-spot fines provide the deterrent but do not tie up the resources of WorkSafe inspectors, the Crown Solicitor's Office, lawyers and the time of the Courts.
583. The alternative view is that on-the-spot fines have the potential to turn inspectors into "revenue collectors" and in the process de-value the deterrent impact of notices. Fixed fines are also seen as inequitable in their impact on small enterprises. An identical on-the-spot fine may constitute an insignificant penalty for a large employer and a substantial penalty for a small enterprise.
584. Other concerns are that inspectors will inconsistently or selectively apply the fines. The discretion that would necessarily be available to inspectors could lead to the perception or reality of favoritism or corruption. It is also argued on-the-spot fines are inconsistent with the self-regulatory philosophy of the Act and are likely to have only a short-term impact rather than leading to lasting change.

585. An evaluation of the efficacy of on-the-spot fines in NSW and NT, conducted on behalf of the National Occupational Health and Safety Commission, was released in 1999⁷⁵. This evaluation showed that most penalty notices were issued in situations where there was a minor risk to safety. They were not issued where an injury or disease occurred. The main offences dealt with by way of penalty notices were highly specific such as not wearing a safety helmet, although some had been issued for failure to comply with an improvement notice, and not providing or maintaining a safe system of work. The overwhelming majority of fines, in both NSW and NT, were issued in the construction industry. The study also indicated approximately 20% of penalty notices in NSW were appealed and of these about 20% were successful.⁷⁶

586. The evaluation concluded,

“The particular appeal of on-the-spot-fines is to broaden the scope of regulatory tools available to inspectors, and in so doing, provide a stepping stone between advisory actions or compliance notices and criminal prosecution. Provided that use of these fines does not become a substitute for more serious enforcement action in serious or repeat cases ... and provided they do not serve to trivialise OHS offences through misuse, then they have most value when viewed as a component of an integrated prevention and enforcement strategy.”⁷⁷

587. The submissions arguing in favour of on-the-spot fines may be summarised by a union observation,

“A more simplified approach [for processing breaches of the Act] may be found in ... a schedule of “on the spot fines” which could be targeted at relatively minor breaches of the Act or Regulations where questions of fact are involved. ... This approach would allow Inspectors to spend a greater proportion of their time on active field duties rather than spending valuable time at the office preparing submissions to Crown Counsel for a prosecution.”⁷⁸

588. For its part, WorkSafe was not in favour of on-the-spot fines although its submission to the 1998 Review of the Act sought the introduction of on-the-spot fines as a means of dealing with simple breaches of the legislation. The proposal was not supported in the Allanson Report of the 1998 Review, which concluded,

“The issue of infringement notices for minor or clear breaches seems also to sit uncomfortably with the existing notice system. The existing system is directed primarily to ensuring that a breach is not continued and is removed. In an

⁷⁵ Gunningham, Sinclair, and Burritt (1998)

⁷⁶ Ibid p2

⁷⁷ Ibid p36-37

⁷⁸ Submissions 2001

infringement notice system the focus seems to be shifted from identifying a hazard and how it is to be rectified, to writing a “ticket”.⁷⁹

589. WorkSafe has indicated it accepts the concerns raised in the Allanson Report.
590. The reservations expressed by Mr Allanson remain valid. There would seem to be a real risk that recipients of on-the-spot fines would regard them differently to improvement and prohibition notices which are clearly aimed at achieving compliance with the law and nothing else. Issuing on-the-spot fines for minor or technical breaches of the law at the discretion of an inspector would seem to contribute little to the objective of changing behaviour particularly where they are issued to a large employer. To act as an effective deterrent, on-the-spot fines would need to automatically apply where relevant breaches of the law are identified by an inspector (i.e. analogous to a speeding fine). This could be seen to turn inspectors into “revenue collectors” with consequent detrimental impact on their effectiveness. There would also be the possibility that inspectors could be subject to complaints of corruption particularly in the exercise of discretion on whether to issue an infringement notice or not.
591. Minor breaches of occupational safety and health laws involving low risk should be dealt with quickly through the existing enforcement tools available to inspectors (i.e. verbal directions, improvement and prohibition notices, and where necessary, prosecutions). If a minor breach is indicative of a more fundamental disregard for occupational safety and health, prosecution, rather than on-the-spot fines, is the appropriate enforcement response.
592. Inspectors are already faced with considerable responsibility in administering the Act. The power to directly levy a fine would add further pressures and complexity to the decisions they are now required to make. The enforcement instruments presently contained in the Act are generally sufficient to enable inspectors to promote, encourage and force compliance with occupational safety and health laws. The only area where on-the-spot fines may provide some additional benefits is in relation to compliance with improvement notices.

⁷⁹ Allanson (1998)

593. There is scope for the use of on-the-spot fines where organisations ignore improvement notices issued by inspectors. At present these must be enforced by way of prosecution. Cost, the investment of inspectors' and the Courts' time, the low penalties and other administrative obligations means that these are not enforced as regularly as they should be with the result that the notices are sometimes ineffective. If the inspector was able to issue a fine for non-compliance, it is likely that improvement notices would receive a higher priority with some organisations.
594. The improvement notice process is different from others and is more amenable to on-the-spot fines. While the concerns raised in the foregoing should not be ignored, they are not all as relevant. For example, the improvement notices themselves are subject to review and a party objecting can have that concluded before being subject to any penalty. The fines would not be discretionary in the sense that they would only apply for a specific and identified failure not to the general exercise of an inspector's discretion. They would only concern improvement notices issued by inspectors not provisional improvement notices or safety alerts that may be issued by safety and health representatives. These could not be enforced without confirmation by an inspector who would issue an improvement notice.
595. An employer organisation argued that in some industrially active workplaces the possibility of on-the-spot fines would encourage some employees and unions to increase agitation for improvement notices to increase pressure on employers for other purposes. These concerns go mainly to activity in the construction industry which remains industrially volatile. While recognising that it could possibly raise new difficulty the Department and Inspectors could monitor the situation to ensure they are not drawn into any industrial campaigns. In addition it might be necessary for alternatives to be developed should the intent and effectiveness of the Act be jeopardised by inappropriate activity or the processes put into doubt by the use of unfair or unreasonable strategies.

596. Another employer organisation argued that on-the-spot fines and subsequent prosecution of those who refused to comply despite the fine created a situation of double jeopardy. In effect it was argued that it was a situation where the employer would be penalised twice for the same offence. That submission, however, cannot be accepted as it is no more double jeopardy than any other situation where continuing offences attract a continuing penalty. Improvement notices are issued to improve safety not to penalise. The person getting the on-the-spot fine has the opportunity to comply or, as noted, to object in the first instance. The necessity for the matter to go to prosecution would depend entirely on a refusal to comply.
597. Perhaps the most significant concern raised in opposition to the proposal was concern that on-the-spot fines will not be consistently applied and that inspectors could take an arbitrary and unfair approach to their task. It was argued that one of the existing concerns with the inspection process is inconsistency and different standards applied by individual inspectors.
598. The number and regularity of these concerns suggest that consistency could be an ongoing problem unless standards are applied and comprehensive training provided to inspectors. As a result it will be necessary to ensure resources for training are provided. It should also be tightly monitored and regularly reviewed to ensure that reasonable and fair as well as consistent standards are adopted.
599. While therefore on-the-spot fines are not generally supported there is an arguable case for them in that limited circumstance.

R:40 It is recommended the Act be amended to provide for a mandatory on-the-spot fine (subject to an appeal mechanism) for the offence at s.48(4) of failing to comply with an Improvement Notice by the due date. The imposition of the fine should not remove the obligation to comply with the notice nor preclude prosecution if warranted.

4.4.8 Investigation Processes

600. Submissions were received from relatives of employees who had been involved in fatal and serious workplace events. Some expressed concerns at what they believed were incomplete investigations. Concerns were also raised that they had not been fully informed of decisions made about the cases especially in relation to prosecutions arising from fatalities. These concerns are dealt with in somewhat more detail both earlier in relation to penalties and later in the discussion on WorkSafe (see section 8.2.4). For the moment it needs be noted that there is a need for family members to be fully informed and, where necessary, for explanations to be given for particular decisions. It is noted that WorkSafe has improved its procedures in that regard but it appears that consideration needs be given to each case so that all concerns receive a response.
601. In going to the investigation process, it may also be necessary for inspectors to become more acutely aware that organisations vulnerable to prosecution may have reasons for not being prepared to assist proper and full investigations. As a consequence, they should not rely only on the goodwill and/or advice of the personnel concerned and should have contingencies available on each occasion.
602. It is also understood that inspectors are not always able to access investigation sites promptly because of the activity of other authorities including Police and Fire and Emergency Services. It is possible for the inspector's investigation to be prejudiced especially if the site is not secured. If additional powers and authority are required for inspectors to secure sites for investigation and to assist in the conduct of investigations, this should be provided. As noted earlier, that may also require further amendment to other legislation and for protocols to be established with other authorities. This is also related to the desirability for good co-ordination between the respective authorities when public and employee safety is compromised by workplace events. These are dealt with further elsewhere in this Report in considering the role of WorkSafe (see section 8.2.4).

5.0 Consultation and Co-operation – Object (e)

5.1 Consultation Framework

603. Reducing hazards was the main issue considered in the previous section. It is now relevant to turn to perhaps the most significant mechanism for achieving ongoing improvements.

604. The fifth object of the Act is,

“s.5(e) to foster co-operation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;”.

605. The Robens Committee concluded⁸⁰ that the fundamental responsibility for workplace safety and health resided with those engaged in the workplace, both in respect of those who own or control the workplace and those who work there. This conclusion underpins the focus of the Act on consultation and co-operation between employers and employees both in occupational safety and health policy development and at the workplace.

606. At the workplace level, the general duties are supported through consultation and co-operation. The Act provides a framework under which there is:

- establishment of a duty on employers to consult and co-operate with safety and health representatives, if any, and other employees, regarding occupational safety and health;
- provision for the election of safety and health representatives and establishment of committees;
- provision of complementary duties on safety and health representatives to consult and co-operate, and on employees to co-operate; and
- procedures for the resolution of occupational safety and health issues at the workplace.

607. Since the Act was introduced in 1988, the Commission and WorkSafe have promoted the key role of safety and health representatives and committees in providing a link between employers (or management) and employees.

608. The second major aspect of the object at s.5(e) is achieved through:

⁸⁰ See Robens (1972) para 28

- participation of nominees of UnionsWA (formerly the Trades and Labor Council of WA) and the Chamber of Commerce and Industry of Western Australia (Inc) on the WorkSafe Western Australia Commission and its advisory committees and working parties;
- calls for public comment on draft safety and health standards, proposals and information products – enabling individual employers and employees to comment, as well as representative associations;
- invitations from the Commission, and its advisory committees and working parties, to a broad range of parties affected by proposed changes, and to other interested parties and experts; and
- participation in industry forums.

5.1.1 Policy Development

609. As anticipated, under the present legislation most of the outcomes have developed at the above-mentioned second level of participation. Indeed, at the Commission and policy levels the results are perhaps even better than originally anticipated when it was envisaged that it would take 20 years for the system to evolve⁸¹. The consultation processes within the Commission have achieved high levels of consensus and are usually effective. The only areas requiring attention are considered in Parts 3 and 8 of this Report and will not be repeated here, except to note that they mainly concern a broadening of the input into the Commission from industry and the community and in relation to the completion of some issues. In regard to the former and while the Commission has been effective, it has not always successfully tapped into the reservoirs of knowledge available outside the immediate sphere of its members. In relation to the latter, it is possible for members who disagree with issues to delay and perhaps even prevent matters being brought to a conclusion. While infrequent, those actions may have prevented matters being concluded. Inconsistency of response has also caused difficulty from time-to-time. However, while there are some concerns, it is also very apparent that the Commission has been successful.

⁸¹ See Minister for Industrial Relations (1983), Laing (1992) and Kelly (1991)

610. Similarly, it must be said that WorkSafe, after considerable readjustment, has achieved a contact with the community that is better than some originally expected. That is not to say that things may not have been done better and the outcomes of some programs are yet to be fully evaluated. However, some of the promotion materials have been effective and results of evaluations that have been undertaken are generally encouraging. Suggested improvements, which go mainly to improving responsiveness, are addressed elsewhere in this Report.
611. It is worth noting, however, that WorkSafe, despite considerable efforts particularly in the mid-1990's, has not been as successful as hoped in generating consultation and improvements within individual workplaces, especially in the small business sector. There are also ongoing concerns that inspectors are not seen enough within industry and programmed random inspections, sectoral blitzes and the public announcements of these activities appear to have declined as part of the overall approach.

5.1.2 Workplace Consultation

612. In turning to industry and employees at the micro level, first impressions give the appearance of significant success. The statistics and examples indicate that continuing improvements are being made and that it has been helped by those at the workplace engaging in the consultative and other processes set out in the Act. Indeed, some employer representatives submit that WorkSafe Inspectors have turned self-regulation in the consultative environment into worker decision-making. These argue that the employers should carry the prerogative for occupational safety and health because they carry the responsibility and are held accountable.
613. These particular arguments apply to only a small number of organisations mainly in the construction industry and larger businesses, as the evidence suggests that few, if any now remain where the employees hold the prerogatives. More significantly perhaps is the impression that might be gained from the robust consultation that takes place in some workplaces. Even in these workplaces, however, the employer ultimately has the power and authority to put decisions into effect and must therefore carry the major responsibility. Generally, in workplaces that have complied fully with their obligations, the consensus seems to be along the lines that the processes are working successfully. Both employers and employees have participated in the improvements which are reflected within the constantly improving statistics.

614. That, however, is only half of the picture and while progress for some, particularly larger organisations, has been reasonable and in some cases very promising, there is an increasing need to refocus efforts particularly in smaller workplaces. The statistics are showing that a leveling out of improvements could occur over the longer term, large numbers of workplaces have little or no specific safety and health activity and inaction will permit increasingly uncertain and potentially dangerous circumstances to develop. There also appears to be a significant turnover in safety and health representatives with the number of active representatives declining. Continuing and effective co-operation and consultation is essential if the rate of improvement is to continue.
615. As noted in Part 3 of this Report, there are a number of disincentives to genuine consultation for both employers and employees. In Parts 3 and 4 both penalties and incentives were considered in order to encourage employers to engage with their employees to improve consultation, including the potential of a differential penalty regime for infringements. In that regard, it is far more likely that employers who engage with their employees will not face any penalties, as they will be far less likely to infringe. However, even in the unlikely event that does arise, their record and commitment should stand them in good stead.
616. Employees also face disincentives to being involved in consultation and other safety and health activity even though there are also very sound and substantial benefits in engaging with the employer. However, even employees who are well aware of the benefits that should flow from an active safety and health process, appear to have withdrawn in large numbers from safety and health activity. Plainly, the significant costs of being involved as well as the risk of jeopardising their jobs have outweighed the benefits for those employees.
617. As noted, many employers are unable and, in some cases unwilling, to go beyond the minimum to ensure safety in the workplace and the Inspectorate is unable to cover the large numbers involved. It is essential therefore to involve those at the workplace and to use every reasonable measure to ensure that is the case. The past effort has been commendable but it is necessary to reinvigorate the process if improvements are to continue at the high rates achieved. Consultation is essential because it is the only way all safety and health problems in the workplace will be aired and all options and solutions considered. There is a cost to be carried but that could be minimised and compensated over time by a continuing reduction in the cost of injury and ill health.

Consultation and Co-operation

618. If the existing patterns continue and safety and health representatives discontinue at current rates and there are insufficient new representatives engaging in the process, the Act will not achieve the coverage and involvement suggested by the Robens Committee as necessary to properly sustain a general duties environment. In that instance, the situation in Western Australia could become like that in some developing economies where the structures are in place but are ignored by the community they are designed to protect. The consequences could well be a resurgence in injury and fatalities.
619. It would also likely result in community pressure for greater resourcing, principally from Government but also from industry.
620. Under the Act employees have a number of obligations to work safely in order to protect themselves and their colleagues. Although few would have an interest in taking it further without the support of their employer, experience has shown that employees will work to safety systems and can be kept conscious of the benefits of enhancing safety and health.
621. The key groups for ensuring continuous improvement are employers and their safety personnel including safety officers, other technical personnel, employee safety and health representatives and committee members. These have the technical knowledge and necessary interest to create a safer workplace. However, safety officers, technical personnel and safety and health representatives each face particular challenges.
622. Company safety professionals responded to the review proposals with a number of observations although few contributed submissions initially. Most of these were concerned to point out that they often found themselves in the middle over safety issues. Some indicated they wanted to improve safety but were obstructed by the unwillingness of their employer to make the additional commitment or by employees who were uninterested. Some argued that there should be some formal role under the Act prescribed for company safety personnel while others suggested formal registration or licensing of qualified safety staff.
623. It became clear in discussion with safety personnel that many held the belief that more could and should be done to improve safety even within their own organisations. It was suggested that supporting professional safety staff would help in that regard

624. While qualified safety staff should be supported, it is difficult to envisage what legislative change could achieve which is not already being addressed. Many safety personnel are members of professional associations and these have active programs and personnel who promote both safety and the role of their members in safety. Other recommendations made in this Report, including those going to job security will also assist to provide confidence to safety staff that they can carry out their job in the knowledge that their employment is also more secure. However it is difficult to see what additional role the Act could provide them as many already have considerable authority in workplace safety and health.
625. The distinction between independence of action and obligation to their employer is a fine line which safety staff walk daily. Any legislation would likely be a blunt and ineffective instrument and could even be counterproductive. It is, however, an issue which should receive further consideration because safety personnel often have a critical role in their organisations. Both supported training and employee involvement in continuous improvement processes could provide some additional support to those personnel.
626. As noted in Part 3, there are significant disincentives, especially for safety and health representatives to take up and to continue in the role, particularly where the employer is antagonistic or even neutral to the process. It is appropriate therefore to consider those employees at the outset.

5.2 Safety and Health Representatives

5.2.1 Election

627. The election of safety and health representatives and the constitution of safety committees are fundamental if genuine consultation is to develop in workplaces. Without the authority provided under the Act, almost any other consultative approach will result in unequal relationships and consultation may be one sided or tainted by the incapacity to openly and fearlessly put the necessary issues for discussion. As a consequence, while there may be considerable talk there may be little consultation.

628. In Western Australia it is apparent that considerable effort by many organisations has improved safety. Often, however, it has been driven and controlled by the employer and employee involvement has been limited to suggestions. Employee participation is often confined to "toolbox" meetings where directions are issued and some feedback obtained. In many cases there is a conscious desire on the part of management for employees to contribute but not always a willingness to provide a role or authority that has the potential for disruptive or troublesome behaviour. In a number of cases there is no election of safety and health representatives or committee members even though conscious steps have been taken to improve workplace safety.
629. The Act provides for safety and health representatives and committees as important contributors in the necessary consultation that must occur if safety is to continue to improve. In those workplaces without safety programs they can be central in getting a program in place. In those that have safety programs, but little employee involvement, they can be essential in opening up and/or continuing discussion so that safety can continue to improve and not simply stabilise.
630. The provisions of the Act dealing with the election of safety and health representatives are however highly prescriptive and inflexible. Some submitted the level of prescription with regard to elections is also inconsistent with the Robens emphasis on effective workplace consultation. These were concerned that the prescriptive nature of the election process inhibited the appointment of representatives and committees. Concerns were also raised on the inter-related issue of the term of office and appointment process for safety and health representatives.
631. This issue was considered in the 1992 Review⁸² where it was concluded the prescriptive requirements were appropriate given the relative infancy of the safety and health representative system. At that time, the obligations were new, there was a concern that the process could be corrupted and that controls needed to be applied in order to ensure that they were fair and effective. The result, however, is that the "protections" probably created greater difficulty than the feared outcomes. It is now clear that there is support across the board for increased flexibility.

⁸² See Laing (1992) p66-7

632. The earlier fears of potential abuses are no longer present to the same extent although concerns continue to be expressed in a small number of industries. The prescriptive election and term of office requirements of s.29-32 of the Act are now considered to be excessive and inconsistent with the basic self-regulatory principles that underpin the legislation.

633. Occupational safety and health legislation in most other Australian jurisdictions deals with the matter far more simply. The *Occupational Health and Safety Act 2000* in New South Wales establishes the right of representatives to be elected as,

“[17] (2) An OHS representative is to be elected for the purposes of consultation under this Division if at least one of the persons employed by the employer requests the election of the representative or if WorkCover so directs. The employees may elect more than one OHS representative if the employer agrees or if WorkCover so directs.”

634. The election process is supported by a regulation⁸³ setting the minimum requirements for the election process. This provides,

“r.25 The procedures with respect to the election of OHS representatives (as required by s.16(b) of the Act) must comply with the following requirements:

- (a) the OHS representative must be elected by and from the employees in the relevant workgroup the person represents,
- (b) the election must be conducted in a manner that is consistent with recognised democratic principles,
- (c) the election may be conducted by a Federal or State industrial organisation of employees if a majority of the employees concerned request the organisation to conduct the election,
- (d) an OHS representative is to be elected for a maximum period of 2 years (but the term of office may be shortened in connection with a change in OHS consultation arrangements),
- (e) a person elected as an OHS representative is eligible for re-election.”

⁸³ r.25 NSW *Occupational Health and Safety Regulation 2001*

635. New South Wales has the most recent occupational safety and health legislation in Australia and it developed from similar considerations to those now being heard in Western Australia. There is a strong case for following the NSW model by amending the Act to remove the unduly prescriptive requirements for the election and terms of office of safety and health representatives. The Act should only establish the right of employees to elect safety and health representatives. The details of eligibility and term should be determined in the workplace subject to minimum requirements set out in the Regulations. The New South Wales regulation provides a reasonable example.
636. If this approach is accepted, other issues raised in submissions concerning safety and health representatives also become matters to be addressed in supporting regulations.
637. Under *s.32* of the Act, safety and health representatives are elected for a fixed term of two years. The Act does not enable other terms of office to be agreed. As well, there is no provision in the Act for the filling of a “casual vacancy” following the resignation of a safety and health representative. The Act requires the entire consultation and election process of *s.29* through *s.31* to be undertaken for each election. This leads to excessive difficulty, unnecessary cost and inefficiency.
638. The requirements of the Act also preclude the co-ordination of elections across and within workplaces. It was submitted that the complexity of the process of re-electing a safety and health representative whose term has expired may well result in reluctance to undertake the process. In circumstances where a further election does not occur, the workplace effectively reverts to unsatisfactory informal consultative arrangements outside the Act.
639. The problems are particularly acute in large organisations with many workplaces and safety and health representatives, where fixed terms of office, and the conduct of a full round of consultation for each election lead to substantial and unavoidable administrative requirements. While first elections may have been held simultaneously, the resignation of safety and health representatives before the completion of their term over time results in the organisation having representatives with terms concluding at different times.

640. To ensure compliance with the Act, those workplaces must continually facilitate the appointment of delegates, consultation on the number of safety and health representatives for each workplace and elections even where the representative arrangements are well established and the immediate requirement is merely to fill a “casual vacancy”. That contributes nothing to improving safety and health in the workplaces concerned and indeed could well have the opposite effect.
641. The available evidence suggests that because of these issues, the election processes followed in many organisations do not conform to the Act. This raises a question as to the status and protection of these safety and health representatives. There is some doubt as to whether the protection provided by s.33(3) applies where there is a technical or other defect in the manner of a person’s election.
642. There is a need to improve the flexibility of the provisions relating to the terms of office and re-election of safety and health representatives. Providing a mechanism for the filling of casual vacancies could readily enhance flexibility.
643. In many organisations the existing consultative framework of the Act (enhanced by the ability to fill casual vacancies) will be sufficient to ensure effective workplace communication and participation on safety and health matters. However, in a small number of workplaces the “default” structure may not be effective. Parties may seek different arrangements for the election or re-election of safety and health representatives and the establishment of safety and health committees. An example could be an election based on particular occupational or professional groups rather than the physical workplace. Employers and employees should have the capacity to agree to vary the process while preserving the intent and integrity of the consultative framework.
644. The WorkSafe Western Australia Commissioner should have the authority, subject to appeal, to decide disputed matters. While WorkSafe indicated some reluctance to make major changes to the election of safety and health representatives in the face of other proposed major changes including providing more authority to safety and health representatives and committees, it is unlikely that those changes will result in any reduction in employee representation. Indeed it could enhance the process, as it should streamline the appointment of representative employees. The Department’s concerns appear to reflect an overly cautious view on what could and should be effective changes.

645. In commenting on the proposals, the Commission indicated that it would consider the particular recommendations through its advisory committees as it encouraged elections and training. It is understood that if the Government chooses to refer the recommendations to the Commission and other parties that might well be the result. However, it may be a slow or ineffective process if it is intended that the Commission again consider the merits or otherwise rather than simply take responsibility for implementation of the process.
646. While employers and their organisations generally supported or were neutral on the proposals, some opposed appeals going to the Occupational Safety and Health Tribunal.

R:41 It is recommended the Act be amended to:

- provide a simplified election process for safety and health representatives;
- move the default (minimum) provisions for the election of safety and health representatives to the Regulations;
- enable the WorkSafe Western Australia Commissioner to approve alternative arrangements for the election of safety and health representatives where the Commissioner is satisfied there is genuine agreement between an employer and employees; and
- provide that any disputes in relation to elections be resolved by the WorkSafe Western Australia Commissioner with appeal to the Occupational Safety and Health Tribunal⁸⁴.

R:42 It is recommended Regulations concerning the election of safety and health representatives:

- enable employers and employees to agree upon a workplace specific approach to casual vacancies as part of the consultation phase occurring prior to an election under *s.30(3a)*;
- provide for the filling of casual safety and health representative vacancies; and
- establish a default procedure for the filling of casual safety and health representative vacancies.

⁸⁴ See R:65

5.2.1.1. Notification of Election

647. As a consequence of the particular role, authority and obligation of safety and health representatives under the Act, WorkSafe records each election. *S31(10a)* of the Act requires a person elected as a safety and health representative to notify the WorkSafe Western Australia Commissioner of his or her election within 14 days of being elected. Failure to notify is an offence under *s.31(10b)*. Elections are conducted by a person agreed to by the employer and employee delegates as part of the consultations required under *s.30(4)(c)*. *S.31(10)* requires the person conducting the election to notify the employer of the results of an election.
648. Submissions to the Review argued the obligation of the safety and health representative to notify under *s.31(10a)* of the election is inappropriate and instead the person conducting the election should have the duty to notify the Commissioner along with the existing duty to notify the employer.
649. The onus of notification was changed to the elected employee in 1995 for reasons that are not readily apparent. It is common practice, however, in other electoral contexts for the person conducting an election (the returning officer) to be responsible for completing the administrative and legal processes associated with an election. The person conducting the election is more likely to be aware of those requirements than any nominating employee and there appears no logical basis for different persons to notify the different parties.
650. While it may be argued that, by informing the WorkSafe Western Australia Commissioner, the safety and health representative is more immediately accessible to WorkSafe, any administrative difficulty in relation to notification such as ensuring correct personal details can conveniently be covered by regulation.
651. If the election of safety and health representatives is to follow the processes recommended earlier and the NSW system is implemented, the party conducting the election should carry the responsibility. Should the existing provisions be retained, it is recommended that existing *s.31(10a)* and *(10b)* be amended to delete the reference to “safety and health representative” and substitute “person conducting the election”.

R:43 It is recommended that as appropriate the Act or Regulations be amended to establish that responsibility for notification to the WorkSafe Western Australia Commissioner of a person’s election as a safety and health representative rests with the person conducting the election.

652. Where a person ceases to hold the position of safety and health representative prior to the expiration of his or her term of office there is no requirement for the WorkSafe Western Australia Commissioner to be notified. There is evidence to suggest the “turnover” in safety and health representatives is high as a result of resignations, transfers, promotions and the like. This has meant WorkSafe’s records of current safety and health representatives are unreliable. It leads to inefficiencies where inspectors attempt to contact safety and health representatives who are no longer at the workplace or are not currently holding the position. Other communication strategies aimed at safety and health representatives (such as direct mail) are also compromised. It was submitted that WorkSafe should be informed of changes.
653. It is also desirable that WorkSafe hold a record of current safety and health representatives.
654. An employer association commented that the proposal did not add to workplace safety but would place an additional administrative burden on employers. It instead suggested that an improved system would be for the Department to survey those workplaces that have safety and health representatives as that would also permit the monitoring of other activities including training and performance issues.
655. WorkSafe itself observed that as it would be a new duty under the Act it is desirable that it be discussed with stakeholders to ensure the most effective outcome.
656. It is accepted that the comments make good sense and should be further considered particularly if an alternative can provide the necessary and improved information.

R:44 It is recommended that after necessary consultation, the Act or Regulations be amended as appropriate or necessary to ensure that the WorkSafe Western Australia Commissioner is informed when a person ceases to hold the position of safety and health representative.

5.2.2 Role of Unions

657. In 1995 *s.30* and *s.31* of the Act were amended to remove the then pre-eminent role of unions in the process of electing safety and health representatives. *S.30* now provides for employees at the workplace to select delegates to consult with the employer on matters related to the election of safety and health representatives. These matters include the determination of who will conduct the election.

658. Unions have sought reinstatement of the pre-1995 role of unions in the safety and health representative election process in their submissions to the Review. This would enable a union to appoint a delegate from amongst its members at a workplace. The proposal would also mean unions would automatically conduct an election at a workplace where any of the employees is a member of the union.
659. No other submissions were received on this issue initially and there was no evidence of any significant problems in the election of safety and health representatives. Under the current arrangements unions can and do conduct elections where there is agreement between the parties in the workplace. Unions should have an entitlement to be involved where there are members on site and a request is made for the union to be involved. This should be incorporated in the same way as in r.25 of the New South Wales *Occupational Health and Safety Regulations 2001* including where the majority of employees so request, the election should be conducted by the union.
660. It may not be reasonable for the union to have the right to conduct the election where the majority of employees are not members and do not want the union's involvement.
661. A number of submissions and comments were received in relation to the proposal mainly from employers and employer organisations. Most objected on the basis that in all other areas of the Act the parties at the workplace decide the processes for themselves in accordance with the processes set out in the Act. There is minimal external interference permitted. Some argue that it will involve industrial relations parties in safety and health issues and that there is already a right for the unions to be involved if those at the workplace agree.
662. It is likely that in workplaces which have a significant union presence that the union will be asked to conduct elections, however, there is merit in the argument that even though the majority of employees might be union members there may not be support for the union to conduct the election. To provide an automatic entitlement would be contrary to the right of the workplace to decide its own process. It is not always appropriate, therefore, to have a union conduct an election merely because the majority are union members.

663. That leaves only the objection raised to the election being conducted by a union where one or more members are present in the workplace and the majority vote for the union conducted election. Such a process accords far better with the employees in a workplace being able to decide for themselves and is consistent with democratic principle. It cannot, for example, be seen to be outside interference in the workplace. The only difficulty with it is that the process can become complicated and prolonged because it may be necessary, in some cases, to have two votes; one to establish whether the majority wants the union to conduct the election and then the election itself. Some employers argue that the recommendation should be discarded because of that concern.
664. It is, however, somewhat disingenuous to argue that employees at a workplace already have the capacity to have a union conduct an election under the present provisions of the Act and then to note that if there are union members on a site that the election process can be too complex and prolonged. Similar considerations exist in both cases and where agreement needs to be reached to have a union conducted election, the same difficulties apply.

R:45 It is recommended that the relevant union conduct the election of safety and health representatives where there is at least one member and the majority of employees request the union to conduct the election.

5.2.3 Deputy Safety and Health Representatives

665. The Act does not presently provide for the election or appointment of deputy or acting safety and health representatives. In workplaces where there is only a small number of safety and health representatives, the exigencies of shiftwork, leave and other factors can result in disadvantage to employees denied access to a safety and health representative. An associated constraint on the effectiveness of safety and health representatives can arise with shiftwork arrangements where it may not be possible for all representatives to attend a safety and health committee meeting.
666. While workplaces may deal with these difficulties through informal mechanisms, such arrangements presently have no standing under the Act. A person acting as safety and health representative who has not been formally elected also does not have the protection afforded to safety and health representatives under *s.33(3)*.

667. Unions submit these problems warrant an amendment of the Act to provide for the election of proxy or deputy safety and health representatives. It was proposed that persons elected as deputies should have the same training, responsibilities and powers as safety and health representatives and would be elected through a simplified election process as the need arises.
668. While it is desirable that employees should be represented and there is clearly a range of circumstances that are less than optimal, in the present environment the establishment of deputy safety and health representatives would add a level of complexity and cost which may not be outweighed by the benefits.
669. If “deputy” representatives were to be able to perform all the functions of a safety and health representative, it is logical that all the provisions of the Act relating to safety and health representatives (qualifications, training, election process, etc) would also need to be applied. Any other approach would undermine the status of the safety representative. At present it is difficult to ensure workplaces have one safety representative and it could create additional issues if two or more employees were to carry out the functions.
670. The issue of ensuring coverage by safety and health representatives at all times would perhaps be best addressed during the workplace consultation phase of the election process. Parties should establish the number of representatives with appropriate responsibilities (*s.30(4)*) to ensure employees have appropriate access to representation given the particular circumstances and types of work at the workplace. The effectiveness of the arrangements for safety and health representatives should be reviewed regularly and elections held to optimise representation.
671. It is accepted that an ideal system would include appropriate arrangements for deputies. However, at present most workplaces in the State are without any safety and health representation at all. Any process that might be a disincentive should be avoided at least until there is adequate representation and the community is able to be confident that the benefits of representation outweigh the costs. As noted earlier, there are already disincentives to encouraging safety and health representatives and these should not be compounded by the legislation.

672. On a similar note, a union submission argued that the election of safety and health representatives should be mandatory on all construction sites. While there would be some advantages in this, the practicality of mandatory “volunteers” is questionable. If no one will stand or the nominated person does not understand the role, the situation could worsen not improve. Construction sites and others with high turnover of employees are, as noted elsewhere, a major problem at present. The relatively poor occupational safety record of the construction industry accentuates these problems. The proposals addressed in this Review may go some way to reducing the issue but greater co-operation than has previously been evident will also be required before the matters are improved. Effective on-the-job occupational safety and health representation will certainly help to chart a new and more effective course.

5.3 Discrimination

673. *S.56* of the Act establishes offences where employees or prospective employees are discriminated against by an employer for the dominant or substantial reason that the employee had undertaken a legitimate action in relation to safety and health at work. These actions relate to performing the duties of a safety and health representative or safety and health committee member, giving assistance to an inspector or making a complaint.

674. In 1995, *s.56* was amended to remove safety and health action by the employee as the “sole” reason for the discrimination alleged and replaced it with the present criteria that it is the “dominant or substantial reason”.

675. There have been two prosecutions under *s.56* since January 1997. In October 1997 a timber contractor was fined \$20,000 plus \$1,600 costs for dismissing an employee after the employee provided information to an inspector concerning the safety of a vehicle. In September 2000 a manufacturer was fined \$4,000 after an employee was dismissed after making a complaint to WorkSafe regarding work in confined spaces.

676. Notwithstanding the sanctions contained in *s.56*, it was submitted that both direct and indirect discrimination against safety and health representatives as well as employees continues to be a problem. While the 1995 amendment was an improvement, in most cases of discrimination it has been difficult, despite the legitimacy of the complaint, for WorkSafe to obtain the required evidence to sustain a prosecution. This arises because the employers concerned seldom concede that they took the action because the employee exercised their entitlements.

677. It was submitted that in cases of alleged discrimination on safety and health grounds, the onus of proof should rest with the employer. It was proposed that the employer should be required to demonstrate that the safety and health activity by the employee was not the dominant or substantial reason for the discrimination against that employee.
678. This approach is implemented in similar terms in the New South Wales *Occupational Health and Safety Act 2000*⁸⁵ and the Victorian *Occupational Health and Safety Act 1985*. The Victorian legislation provides *at s.54(4)*,

“In proceedings for an offence against this section, if all the facts constituting the offence other than the reason for the defendant’s action are proved, the onus of proving that the act of discrimination was not actuated by the reason alleged in the charge shall lie on the defendant”. (emphasis added)

679. It is plain in these circumstances that the prosecuting agency has the obligation to establish the facts and only upon doing so does the onus swing to the defence to show that the action taken was not because of discrimination.
680. While a change in the onus is not a step to be taken lightly, it appears warranted to ensure employees and safety and health representatives in particular can carry out their responsibilities under the Act without discrimination. Perhaps of equal importance, if employees are to be encouraged to take on the difficult role of safety and health representative, they need to be properly protected. A similar onus already exists in some unfair dismissal jurisdictions where employees are summarily dismissed and the employer is obliged to establish the reasons for the dismissal.

R:46 It is recommended s.56 of the Act be amended to provide that where the facts of an alleged discrimination are proved, the onus of proof rests with the defendant to satisfy the Court that legitimate actions of the employee in relation to occupational safety and health were not the dominant or substantial reason for the discrimination.

681. At present, where a safety and health representative is dismissed as part of the discrimination and the employee seeks reinstatement, application must be made to the relevant Industrial Tribunal. In dealing with penalties, the Court could also be empowered to order, upon application, the reinstatement of the safety and health representative upon a finding of discrimination against the defendant and as part of the redress associated with the penalties. That would save additional proceedings and leave the community in no doubt that safety and health representatives will be protected in the lawful conduct of their functions.

Consultation and Co-operation

682. Employees should have immediate access to unfair dismissal protections if dismissed because they have carried out their safety and health functions under the Act. Again, in Victoria employees may be paid damages and/or reinstated to their former position. For example, the Victorian legislation provides (*s.54(5)*) that the Court,

“(a)... may order the offender to pay within a specified period to the person against whom the offender discriminated such damages as it thinks fit to compensate that person;

(b)... may order that the employee be reinstated or re-employed in the employee’s former position or, where that position is not available, in a similar position or that the prospective employee be employed in the position for which the prospective employee had applied or a similar position”.

683. In Western Australia *s.56* does not presently enable the Court to order reinstatement or require compensation to be paid where discrimination has been proved. While an employer may be fined, the Court has no means of providing redress to the employee affected. That is plainly inequitable and may well discourage employees from taking on the safety and health role. It is plain that employees are aware of the limited protection now available and may not volunteer because of reasonable concerns that any challenge to their employer may leave them vulnerable.

684. Some opposed the proposal and argued that existing protections are adequate and that there should not be two unfair dismissal jurisdictions. A review of cases and material however makes it plain that present protections are not adequate. In addition the proposal does not involve a further jurisdiction for unfair dismissal. As noted, reinstatement would be just one of the remedies available to the Court to redress proven discrimination. Any suggestion this creates another jurisdiction is fallacious.

685. While the very nature of the safety and health activity should not be controversial, some employers could easily regard attempts at consultation as an interference with their right to manage. Although the reality is that it is part of responsible management, it can and does sometimes result in conflict. The employees who are most vulnerable in such cases are those in those workplaces where there is least regard for occupational safety and health. It is essential that these employees and their representatives have protection from arbitrary actions. Those who behave in an arbitrary, unreasonable or unfair manner, whether employer or employee, should be held accountable through appropriate process.

⁸⁵ See *s.94 Occupational Health and Safety Act (2000) (NSW)*

686. *S.56* should be amended to reflect the foregoing and in particular should provide, upon proving that discrimination has occurred, employees dismissed as a consequence of the discrimination should be entitled to be reinstated and/or paid compensation. No employee should fear losing his or her job by raising a genuine safety issue or concern.

R:47 It is recommended the Act be amended to provide, in cases where discrimination is proved, for the Court to have the power to order the defendant to:

- **pay the employee a specified sum as a reimbursement for lost wages and salaries; and/or**
- **reinstate dismissed employees to their previous position or a similar position.**

687. As noted earlier, there is an increasing trend towards non-traditional forms of employment. While *s.56* protects employees from discrimination on safety and health grounds, it does not apply in the absence of the traditional employee/employer relationship. This means protection under the Act is not available to contractors or other non-employees who may be discriminated against by principals.

688. Some employer representatives opposed the proposal to provide protection for contractors and argued that it could unduly interfere with contractual arrangements between the employer and contractor. However, other submissions, including some small contractors, referred to their incapacity to protect themselves because the contracts were made on a take it or leave it basis and they could not negotiate any improvements.

689. This issue also requires further consideration particularly in the context of other issues related to the impact of changing employment patterns and the transfer of employees to other forms of employment.

R:48 It is recommended the Commission consider further amendments under the Act to extend the protection against discrimination on safety and health grounds to non-employees in the workplace.

690. WorkSafe sought a technical amendment to *s.56* to overcome a problem with the enforcement of the section. *S.56(1)(d)* provides protection against discrimination to an employee who,

“makes or has made a complaint in relation to safety or health to a person who is or was his employer or fellow employee or an inspector, a safety and health representative or a member of a safety and health committee”.

691. WorkSafe has legal advice that the WorkSafe Western Australia Commissioner is not an inspector. Accordingly, where an employee lodges a complaint directly with the Commissioner or an officer of the Department who is not an inspector, the protections afforded by *s.56* are not available to the employee. That has resulted in an inequity and could do so again if some officer other than an inspector is notified.
692. An employer representative, however, also submitted that complaint reports are sensitive and significant issues and that they should not be made available to any Departmental officer. It is accepted that that should be the case, however, the suggestion that it be confined to inspectors and the Commissioner seems unduly restrictive. There may be other suitable senior officers who could be nominated by the Commissioner.

R:49 It is recommended *s.56(1)(d)* of the Act be amended to include the WorkSafe Western Australia Commissioner and relevant officers of the Department amongst those to whom an employee may complain in relation to discrimination.

5.4 Composition of Safety and Health Committees

693. Safety and health committees are established under the Act within workplaces to identify and resolve safety and health issues. The committees are comprised of employer and employee representatives and have a range of consultative functions.
694. The Act (*s.36* to *s.41*) defines the processes for establishing a committee as well as specifying its composition and functions. As with the election of safety and health representatives, the provisions of the Act relating to safety and health committees are unduly prescriptive and afford little flexibility – particularly in regard to employee representation. Consistent with earlier comments in relation to the election of safety and health representatives, provisions relating to procedures for the establishment and operation of safety and health committees should be dealt with by Regulation.
695. In workplaces where safety and health representatives have been elected *s.38* provides they exclusively comprise the employee representatives on the workplace safety and health committee. In these circumstances, the safety and health committee must comprise the safety and health representatives and the person or persons appointed by the employer as management representatives. No other employee representatives can be members of the safety and health committee.

696. Where there are no elected safety and health representatives for the workplace, the number of employee members of the committee is as agreed by the employer and the employees of the workplace. The employees at the workplace elect employee members of the committee. Regardless of whether employee representation on the committee comprises safety and health representatives or elected members, at least half the members of a safety and health committee must be employee representatives.
697. A number of submissions raised concerns over the inflexibility of the Act in regard to the composition of safety and health committees. Submissions also highlighted confusion over the apparent dual requirements of the Act that, where they have been elected, safety and health representatives must be employee members of committees and there must be at least 50% employee representation on the committee. This has led to differing understandings as to the entitlements for committee membership.
698. The Act also makes no provision for a “hierarchy” of committees in large organisations with multiple workplaces. While *s.37(4)* provides for one safety and health committee to cover more than one of an employer’s workplaces, this means all safety and health representatives for all the workplaces concerned are automatically members of the safety and health committee.
699. Similarly, the Act does not take into account common circumstances of organisations with high employee turnover, shift work or where two separate businesses share physical premises.
700. Some submissions suggested the inflexibility of *s.38* and related provisions has led to the situation where many safety and health committees, while operating effectively, are not established and structured in accordance with the requirements of the Act.

701. By comparison to the prescriptive situation in this State, the equivalent provisions in other Australian jurisdictions are more flexible. In Victoria the *Occupational Health and Safety Act 1985* contains only general provisions relating to the composition and functions of safety and health committees and requires consultation between the employer and safety and health representatives on the composition and functions.⁸⁶ The South Australian *Occupational Health, Safety and Welfare Act 1986* provides that the composition of a safety and health committee shall be determined by agreement between the employer, the safety and health representative and any interested employees.⁸⁷
702. There seems no reason why the Act should continue the existing requirement as to the composition of safety and health committees. Given the primary purpose of safety and health committees is to promote and foster workplace consultation, the Act should leave employers, safety and health representatives and employees to determine the most effective composition of their committees. The Act should continue to set only broad parameters for the establishment and operation of committees and provide mechanisms to resolve disputes where agreement cannot be reached.
703. The Department submitted that consultation would need to take place on the form of the changes to ensure the most effective way of implementing the recommendations. While that would help, there should also be time limits placed on the extent of the consultation.

R:50 It is recommended the Act be amended to:

- **provide a simplified process for the establishment of safety and health committees; and**
- **move default (minimum) provisions for the establishment and operation of safety and health committees into the Regulations.**

R:51 It is recommended Regulations concerning the establishment of safety and health committees provide:

- **the composition of safety and health committees to be as agreed by the employer, safety and health representatives and interested employees; and**
- **disputes arising from the consultation of the parties shall be referred to the WorkSafe Western Australia Commissioner for resolution with appeal to the Occupational Safety and Health Tribunal.**

⁸⁶ See Victorian *Occupational Health and Safety Act 1986*, s.37

⁸⁷ See South Australian *Occupational Health, Safety and Welfare Act 1986*, s.31(2)

5.5 Provisional Improvement Notices/Safety Alerts

704. As noted in the discussion at Part 3 of this Report⁸⁸, it is plain that some level of authority and empowerment is necessary for employee representatives if they are to be effective and to be encouraged to take up what are quite onerous obligations. At present, they have little authority, many obligations and few substantial protections. It is necessary if the Act is to function as intended that many more workplaces elect representatives.
705. In 1992 it was suggested that suitably trained, accountable and elected employees should have some authority in their workplaces. A number of submissions recommended that safety and health representatives should be given the power to issue Provisional Improvement Notices (PINs) to their employers.
706. The concept of PINs involves providing safety and health representatives with the power to issue notices requiring their employer to address specified safety and health matters in the workplace. PINs are similar to the improvement notices issued by inspectors except that they are provisional and would be issued where the authorised safety and health representative is of the opinion that a breach of the Act or regulations is occurring and is not immediately remedied by the employer.
707. The PIN could only be issued after the safety and health representative had consulted the employer and there had been a refusal by the employer to attend to the matter. The Act could also require the safety and health representative to consult with another safety and health representative where convenient or where another is available. If an employer disputed the PIN and sought its cancellation, the notice would be subject to a review by an inspector who could confirm, amend or cancel it. As in other jurisdictions, there would be sanctions against safety and health representatives who misused their authority in relation to PINs.

⁸⁸ See section 3.2.2

Consultation and Co-operation

708. The legal rights to implement PINs are unexceptional and are consistent with existing provisions for employees to raise matters under *s.20(2)(d)* and are less onerous than the existing common law right to refuse to work. As noted in Part 3 they already exist in a number of other jurisdictions. It is also a logical extension of workers' statutory right to a safe work environment and potential victims should have the right to protect themselves and their colleagues. It is but a small step to provide the further protection for specifically trained, responsible and accountable employees to bring specific notice to an employer firstly and then, if unresolved, by the issuance of PINs.
709. There is now evidence from other States and elsewhere that PINs have been used responsibly and are not abused. They are also not dissimilar to powers available in some European systems.
710. Another view presented to the Review suggested the authority to issue PINs could result in an adversarial approach developing if safety and health representatives become "de facto inspectors". It was argued that it could change employer attitudes towards safety and health representatives. It was also submitted safety and health representatives already have considerable powers, which, along with a worker's right to refuse to undertake unsafe work, is sufficient to protect workers from imminent and serious risks of injury or ill health. It has also been argued that any increase in authority will be used in industrial circumstances to add pressure to support industrial relations claims.
711. If the latter point is accepted, it is plain that any increase in authority at all could be rejected on the grounds that it might result in industrial disputes. However, with training as to the critical importance of safety and health and accountability controls, it is not unreasonable to suggest that the contrary will be the case and that there will be fewer safety and health disputes promoting industrial issues. The safety and health representative's own credibility and entitlements would be "on the line". Moreover, it would be less likely that there would be any basis on which others could then "manufacture" safety and health issues in order to advance industrial issues. Even if that were to be the result it would still be appropriate to grant the right.

712. What is fundamental is the right of employees to have safe and healthy workplaces. Experience has shown that not all workplaces are safe or healthy. The employees therefore must have rights to properly protect themselves. The fact that some might abuse this right is no basis to remove or restrict it. Instead the abuse needs be dealt with swiftly and firmly. Indeed, continual abuse of the right should carry heavy penalties because the abusive behaviour damages the credibility and impact of effective safety processes.
713. Given an educated workforce with trained representatives, if employees cannot be trusted to protect themselves in a responsible manner, then the community needs to find other ways of ensuring workplace safety because the present regime would be inequitable. Employees are loaded with obligations to work safely, to report and to consult, but are not given authority to ensure their own and their colleagues' safety. Responsibility without authority is not likely to bring improvements.
714. As noted, providing the authority in other areas has not resulted in industrial anarchy. If Western Australia wants to avoid third-world outcomes it also must implement first-world processes as well as the legislative structures.
715. Unions have traditionally been important in supporting workplace safety and health as they have supported and resourced employees. The decline of unions may well reduce safety and health effectiveness⁸⁹ and supports the notion that more authority should be given to employees.
716. As noted in 1992⁹⁰, the level of competence of safety and health representatives is a crucial factor in determining whether the right to issue notices should be introduced. There are valid concerns that without training safety and health representatives could, through ignorance or otherwise, misuse the power. It would be necessary therefore for authorised safety and health representatives to be trained. This is discussed further in the section on safety and health representatives and it also relates to career development and competency training for safety and health representatives⁹¹. Only appropriately qualified and competent representatives however should be empowered to issue PINs.

⁸⁹ See Bohle and Quinlan (2000) p302 on

⁹⁰ Laing (1992) p70 and 71

⁹¹ See R:55

717. The 1992 Review concluded that the power to issue PINs was desirable. However it also identified the lack of authority of, and respect for, safety and health representatives and the fear that the power to issue PINs might be used for industrial purposes unrelated to safety and health, as impediments. The 1992 Review concluded,

“... there are strong grounds for suggesting the community should carefully but steadily progress towards a situation where these obligations and rights are able to be fully implemented. This will necessitate higher levels of education and training for health and safety representatives commensurate with a gradual increase in their authority and responsibility and strong sanctions against those who usurp their proper role. This could be implemented in a series of steps with increased authority matched with higher levels of training, and increased responsibility.”⁹²

718. It is evident that, since 1992, there has been an increase in the maturity of the safety and health representative system. The Review received no submissions suggesting safety and health representatives are abusing their existing powers and many indicated strong support for the role played by safety and health representatives. A number submitted that safety and health representatives had too little security or support for the important tasks that they fulfill. Some suggested that by providing the safety and health representatives with some authority and protection it would not only improve workplace safety but could encourage more employees to undertake the role.

719. It is an appropriate time to introduce the process in Western Australian workplaces. It would, as noted however, not be reasonable for untrained safety and health representatives to be asked to take responsibility to issue PINs. The relevant training should be the safety and health representative training course but it is recommended the authority of the safety and health representative to issue notices should only be recognised if the representative had been assessed as competent after completion of the course. That would give confidence not only to the employee but would give reassurance to employers. As noted elsewhere, it could also become the first step in a career development process for those who decided to make occupational safety and health a career option.

720. Moreover, whether the authority is continued should be judged in the light of experience. A sunset clause could be applied and/or a review could take place after a certain period. In the event that review finds that the power is being unduly abused or that it is ineffective, it could lapse.

⁹² Laing (1992) p72

721. The foregoing is proposed as a tentative step towards enhancing protection at the workplace level and is in preference to the more general and potentially more contentious authority under which safety and health representatives could issue work cessation notices which is another possibility considered during the earlier Review. It is already open to an individual employee to refuse work where the risk of injury is imminent and serious and an effective safety and health representative could be expected to provide relevant and proper advice to the employee.
722. The safety and health representative can also request an inspector to come to the workplace where those conditions apply. There is not, therefore, the immediate need for the safety and health representative to have that level of authority. Given the potential risks, it is also better that the authority be gradually increased so that it is less likely that a well-intentioned proposal results in unnecessary and unproductive dispute and controversy.
723. It could be expected that upon the authorisation of safety and health representatives for the issuance of PINs that very few would actually be issued. In part this would be due to the readiness of employers to respond positively to the pre-notice request by the safety and health representative in the knowledge that the representative has the power. Moreover, once issued, a PIN might result in a visit from the inspectorate.
724. It could also be expected that employers will only reject a request if it is excessive or unduly onerous and in that circumstance the employer would be entitled to seek its removal. It should also be noted that most notices would issue in those organisations that are reluctant to take even the most basic and straightforward action to ensure or enhance safety. It will also help remove the most common complaint from safety and health representatives that supervisors will not respond to their requests.
725. Finally it would link well with other proposals supporting those organisations that would wish to avoid major penalties. Instead they would take the socially responsible course of enhancing and improving their safety and health by consultation, and by encouraging the appointment of safety and health representatives and effective safety and health committees to improve and implement safety strategies in the enterprise.

Consultation and Co-operation

726. Responses to the proposals and to the foregoing observations included many from employer organisations objecting to notices as an undue interference in the workplace and providing too much power to insufficiently trained representatives. Employers in the construction industry in particular expressed a concern that it would licence some union representatives to issue notices accompanied by industrial demands which employers will be required to accede to in order to buy peace. It was submitted that representatives would also be inclined to demand that on-the-spot fines be levied.
727. Given the protections and conditions that are also recommended, it is difficult to see how these concerns will eventuate in those industries. For example, union appointed safety and health representatives in the construction (and other) industries would not fit the criteria of election and training and would not be authorised to issue notices under the Act. Where safety and health representatives are appointed in accordance with the Act as there will also be adequate protection against improper behaviour.
728. A union submission objected to the proposal that a safety and health representative be required to consult with another representative before issuing a PIN. It also objected to the proposed sunset clause and sanctions against the improper exercise of the right to issue PINs. In almost every instance where the issue was raised, however, it has been accepted that protections are needed if the provision is to be seriously considered. It is better to approach the matter cautiously and to achieve some change than it is to be adventurous and risk the process entirely.
729. However, as also noted in Part 3 of this Report there were other significant concerns raised about the implementation of the PINs proposal even though those notices would be provisional in every sense.
730. The first objection is that PINs will be confused with the improvement notices issued by inspectors. That was particularly significant in light of the recommendation that improvement notices should be made enforceable by way of "on the spot" fines. That is reinforced by the second concern that records of the numbers of PINs issued could be used in contract arrangements as a measure of whether an organisation has a good safety record or not. While it is possible to prohibit the use of PINs for that purpose on the basis that they are unsubstantiated until an Inspector confirms or cancels the PIN, it does not help the perception that they are the same as an improvement notice.

731. A third concern raised was that there is already significant inconsistency between inspectors in issuing improvement notices. It was submitted that there would be even greater inconsistency as a consequence of inspectors reviewing PINs and confirming or dismissing the provisional notice. That, however, can be corrected as it comes down to how inspectors address them. While training Inspectors and achieving consistency are also issues addressed in this Report, it is clear that the control can and will be applied at that level.
732. The first two concerns are, however, relevant and provide a substantial argument for a variation of the proposals. It would be inappropriate to encourage any confusion between the two distinct but different activities of improvement notices and provisional improvement notices. It is considered that the concerns can be accommodated by redefining the nature of the notices while retaining the training and other fundamental protections. Therefore, while all the conditional elements and protections would continue to apply, the form of notice could change from "Provisional Improvement Notice" or "PIN" to "Safety Alert" or perhaps "Safety Caution".
733. The name change to, "Safety Alerts" would not then suggest that they are "improvement" notices. They would have the additional advantage of alerting people to a perceived difficulty without suggesting that it may need "improvement" when it might instead require other or different attention. It would also not be seen as the representative enforcing safety improvements but of emphasising that an issue remains unconcluded. When attached to machinery or processes, the Safety Alert would also highlight the need for care in operating or working with the particular process for other employees. While it would not interfere with the operations of the workplace, it would give additional precautionary warning.
734. Safety Alerts would have the same attributes as PINs but would not carry the same inferences and would stand alone within the occupational safety and health system. Inspectors would confirm the Alert with an improvement or prohibition notice or cancel the Safety Alert if satisfied that the risk does not warrant further steps be taken. Again, however, the qualified representative would still be obliged to discuss the proposed Alert with the employer before issuing an Safety Alert at the worksite.

735. Some employers, including large employers in Western Australia, already have internal systems under which employees are provided considerable authority over the work processes. In addition, some qualified and competent personnel engaged in occupational safety and health specifically endorsed the proposals as did some employers. A major employer employing some thousands of employees in the State observed that the proposals should be supported on the basis that those who were committed to occupational safety and health should have no concerns. As already noted, similar provisions already operate in the offshore petroleum industry without substantial concern in this State.
736. The change from PINs to Safety Alerts (or Cautions) accommodates some of the more fundamental concerns of employers and will provide relief in relation to perhaps most of the major objections.

R:52 It is recommended the Act be amended to provide for elected safety and health representatives who have received a particular level of training, assessment and certification to be authorised to issue Safety Alerts (or Cautions) in relation to equipment or processes where the safety and health representative is of the opinion that a contravention of the Act or Regulations is occurring or that the operation or characteristics of the equipment or process has developed an additional risk. No other person would be authorised to remove the Safety Alert without the agreement of the safety and health representative or WorkSafe Inspector.

R:53 It is recommended in relation to Safety Alerts the Act provide that:

- **only elected safety and health representatives who have been assessed as competent following completion of a Commission accredited introductory training course, to have the authority to issue Safety Alerts;**
- **safety and health representatives would not to have the right to issue the Safety Alert until the employer has been consulted and has refused to remedy the alleged defect, breach of the Act or Regulations;**
- **safety and health representatives should be required, where practicable, to consult with another safety and health representative or appropriate person before issuing a Safety Alert;**
- **employers to be able seek a review of a Safety Alert by an Inspector if the employer disagrees with the Alert;**
- **safety and health representatives would have the right to notify WorkSafe if an Alert remains unresolved within the time specified or after a suitable period (perhaps 3 months) whichever is the later; and**
- **sanctions would apply to safety and health representatives who misuse the power to issue Safety Alerts.**

R:54 It is recommended that the provisions concerning Safety Alerts would expire after five years unless confirmed after a further review.

5.6 Safety and Health Representative Training

5.6.1 Flexible Delivery⁹³

737. In the 1992 Report, considerable attention⁹⁴ was given to the then controversial safety and health training process for safety and health representatives which at that time was limited in its scope to one training organisation. Since then the training has been expanded and, although not without some continuing concerns, is now undertaken by a number of training providers. Complaints, though more muted, still arise as to the limitations of the existing training, its scope and coverage. Complaints have also been made that some training is not accepted or recognised by industry participants.

738. Under *s.35(1)(e)* of the Act, safety and health representatives are entitled to take time off work with pay to attend accredited training courses. *R2.2* and *R2.3* of the *Occupational Safety and Health Regulations 1996* establish specific requirements for introductory safety and health representative training. Accreditation of these courses is the responsibility of the Commission under *s.14(1)(h)* of the Act.

739. The key elements of *r.2.2* provide for five days paid attendance at an accredited introductory training course for safety and health representatives and require that they must “endeavour” to attend an introductory training course within 12 months of election (*r.2.2(3)*).

740. The structure and content of introductory training courses for safety and health representatives are stipulated in the Commission’s *Guidelines and Criteria for Accreditation of Introductory Training Courses for Safety and Health Representatives*⁹⁵. These criteria require the content of the course to cover five areas:

- occupational safety and health legislation;
- risk management approach to controlling workplace hazards;
- specific workplace skills for safety and health representatives;
- communication and representation skills; and
- consultative and administrative arrangements.

⁹³ See also section 4.3.2 regarding occupational safety and health training generally

⁹⁴ Laing (1992) p73-83

⁹⁵ See WorkSafe Western Australia Commission (2001a)

Consultation and Co-operation

741. The content on occupational safety and health legislation must be delivered using Commission developed training guides.
742. A number of submissions expressed concern over various aspects of the present training arrangements. The concern most often raised was the perceived inflexibility of the existing regulations and accreditation criteria that together prescribe the content and delivery of the training courses. The Commission's preference for the courses to be delivered over five consecutive days was also the subject of particular concern.
743. In October 2001 the Commission revised its accreditation criteria. In respect of the delivery of courses, however, the criteria have not changed and state,
- “The preferred option for delivery of an introductory training course is in a block of 5 consecutive days. Whilst consideration will be given to alternative delivery arrangements if the circumstances satisfy a variation, the Commission considers Modules 3, 4 and 5 should be delivered only in a formal learning environment. ...
- Applications to vary the delivery of courses from the preferred block of 5 consecutive days will be considered on their individual merits.”⁹⁶
744. It is understood that part of the reason for the preference is to permit course attendees to become sufficiently familiar and confident of the course providers and each other that they are prepared to fully engage in the process. If they were required to attend on an irregular basis, the value of participation would be diminished and the only substantial opportunity available to them would also diminish.
745. Some submissions argued, however, that it was difficult for workplaces to provide coverage for employees attending training for the whole working week. For small workplaces in particular, the absence of even one person can have a major cost and productivity impact. In larger workplaces where perhaps many safety and health representatives need to be trained, it is sometimes difficult to structure attendance at training within the required 12 month period without impacting substantially on the workplace.
746. A number of submissions proposed that flexibility of introductory training be increased by enabling course providers to deliver the course as a series of modules that safety and health representatives could attend over differing periods of time rather than as a single 5-day course.

⁹⁶ WorkSafe Western Australia Commission (2001a), point 2.3.1

747. It was submitted that a move to a “modularised” approach would also enable concerns about the largely fixed content of introductory safety and health representative training courses to be addressed. While the Commission’s criteria for introductory courses does provide some ability for providers to tailor course content to particular audiences, the preference to deliver the course in a single 5-day block and the relatively small number of representatives being trained means that only broad-based courses are available. These courses are directed primarily at the large industry sectors such as manufacturing, construction and health care.
748. It was argued that there are few, if any, introductory safety and health representative courses relevant to smaller industry sectors including professional service companies working in areas such as engineering, architecture and legal services. With increased flexibility it would become viable for training providers to offer a mixture of standard “core” modules along with others that specifically address particular safety and health issues relevant to small industry or occupational groups.
749. A submission also expressed concern at the absence of “refresher” or second stage training for safety and health representatives who are re-elected after an initial term of office. Under *r.2.3* continuing representatives,
- “may take such time (with or without pay as is agreed between the representative and his or her employer) off work for the purpose of attending a post-introductory course agreed with his or her employer.”
750. The application of *r.2.3* is limited to courses accredited by the Commission and until recently the Commission was unable to consider courses for accreditation due a lack of assessment criteria. It is understood that, in the absence of any post-introductory training courses, many continuing representatives have been attending the introductory training course again as they are entitled to do under *s.35(1)*. This is clearly not as satisfactory as it could be.
751. In October 2001 the Commission issued criteria and application guidelines that included criteria for the accreditation of post-introductory training courses. In the light of the evident demand for post-introductory training amongst representatives, the Commission should take steps to ensure that such training is readily available.

5.6.2 Career Development and Competency

752. Employer representatives also pointed out the criteria used by the Commission to accredit introductory safety and health representative training are not competency-based. It was submitted that this is inconsistent with the significant shift towards competency-based training that has occurred across the entire area of vocational training.
753. The present criteria do not provide for any assessment (knowledge or competencies) as part of safety and health representative training. This prevents any recognition of safety and health representative training in the broader vocational training framework. The Commission's criteria state,
- “Introductory safety and health representative training does not provide a qualification or formal assessment of competence, e.g. pass or fail. Although introductory safety and health representative training does not provide for formal assessment, it is underpinned by the general principles of competency-based training outlined below. It seeks to provide safety and health representatives with skills and knowledge to enable them to carry out their representative functions effectively and with confidence.”⁹⁷
754. There is a need to retain safety and health representatives to ensure the effective operation of the Act and to add efficiency to the safety and health equation. Moreover, many safety and health representatives appear to take up the role because they have developed an interest in the role and in the matters covered.
755. Given the nature of the submissions and the importance of training to the effectiveness of the safety and health representative system, it is appropriate for the Commission to again review the training issue. That should ensure that training arrangements can lead, when sought, to representatives obtaining the necessary assessed competencies and knowledge through a flexible training regime. This could well be linked to other objectives.
756. It should be necessary, for example, that safety representatives have appropriate training before being authorised to issue Safety Alerts or provisional improvement notices (PINs). There is also a reasonable basis for the concern by employers that there is no indication of the competency levels achieved by the particular person from training and therefore the capacity of representatives to speak with any authority.

⁹⁷ *ibid* point 2.3.2

757. In addition there is a concern that safety and health representatives who become interested in safety and health as a possible career option obtain no recognition from their initial training. There are now a number of professional safety personnel who initially developed their interest in their vocation from working in other positions and taking an active role in safety at work. Those who become interested undertake the introductory safety and health representative course but it is of little promotional advantage because they do not receive any recognition for that training within any other course or activity.
758. At the same time, however, there are substantial reasons for not introducing a compulsory competency based assessment process. It is necessary instead to encourage employees to take up the role and to be trained. If employees were to be given the choice of competency testing during or at the conclusion of their training, those who are tested and found competent could be authorised to issue notices and to have their course recognised. Those who do not undertake or complete the competency testing would not be under any obligation but would still gain from the training.
759. While there would be no obligation on safety and health representatives, those who did not undertake competency testing would have no change to their present authority. Those who do, could not only have the authority in relation to Safety Alerts but could also have that competency outcome recognised.
760. It is beneficial to the representatives, the employer and the community if representatives achieve a higher level of training and suitable competency standards. It would have the additional advantage to the employees concerned because those interested could take advantage of the training as a forerunner to a career in occupational safety and health. Because training is costly for employers it will help minimise the cost burden on employers.
761. The implementation of these kinds of proposals would also help encourage interested employees to take up their safety and health roles and would provide incentives to continue and for them to become more professional.

762. It is desirable that the training also be available on a wider basis than at present. In that regard, employees who are interested in occupational safety and health, but who are not safety and health representatives, should also be able to undertake the training if supported by their employer. Some organisations are sufficiently committed to be willing to pay for the course and the employees should not be prevented from undertaking the course. All employees completing the training could gain status and qualifications. These would help them to undertake their own safety and health role more effectively. It also has the advantage, as each of these combine, of having an accumulating impact on safety in the workplace.
763. In commenting on the proposals, WorkSafe suggested that there should be a full review of training including the Commission's role in accrediting training courses. It appears there are other mechanism for ensuring the quality of vocational education and training operating under State and Federal auspices. The WorkSafe suggestion has merit and should be followed up in development of a more effective and targeted training environment.

R:55 It is recommended the Commission revise its accreditation criteria for introductory training courses for safety and health representatives to provide for optional assessment of the competency of course participants. It is also recommended that the Commission review existing training arrangements to establish whether these optimise training or whether further change is required.

5.6.3 Joint Supervisor Training

764. Joint training of both safety and health representatives and employer supervisory staff was raised by a number of submissions. The main point put was that safety and health representatives return to work with new information and enthusiasm. Almost immediately they need to deal with their supervisor.
765. Unless the supervisor has undertaken training there could be a significant imbalance in the knowledge and enthusiasm that each has and how safety matters might best be resolved. In short, enthusiastic and confident representatives may confront their supervisors with their new knowledge and the supervisors may be left defensive. That is not a good basis for productive consultation and supervisors ought receive, at least, the equivalent training as safety and health representatives. Preferably, some of that training should be delivered jointly to both supervisors and representatives so that each could also gain an appreciation of the other's viewpoint in the training environment.

766. Experience has shown that unless the employer is committed to effective occupational safety and health, the employee sometimes in the most difficult position can be the safety officer or supervisor. Those persons must work with the employer, who may not be as safety conscious but who has the authority, and other knowledgeable employees. The supervisor might well face censure from both employer and employees for not reaching the right outcome. It is suggested that the Commission revisit the issue of supervisor education along with other courses to improve workplace communication and agreement on safety issues in its consideration of training issues.
767. The Review also received a number of submissions advocating joint introductory training for safety and health representatives, managers and supervisors. This again has been a long-standing and controversial issue since commencement of the Act and was addressed in the 1992 Report⁹⁸. It is noted that the Commission's recently revised criteria do also provide for persons other than safety and health representatives to attend some parts of the introductory training course,

“Whilst introductory training courses are designed and generally conducted for safety and health representatives only, Modules 1 [occupational safety and health legislation] and 2 [risk management approach to controlling workplace hazards] could be open to members of safety and health committees, supervisors and managers.”⁹⁹

768. The view put in a number of submissions is that there are benefits associated with ensuring that all those with responsibilities and duties regarding safety and health in the workplace have sufficient skills and similar knowledge. Apparently occupational safety and health training for managers and supervisors has not been strongly supported in recent years. Anecdotal evidence suggests, in many workplaces, safety and health representatives can often have more knowledge of the requirements of the Act and of safety than managers and supervisors who have not training. Proponents of joint training suggest that manager and supervisor training will increase when employers are able to send all relevant staff to integrated and consistent training. It was argued that this in turn, would contribute to more effective operation of the consultative processes in the Act.
769. As earlier noted, there is now substantial evidence that training helps to reduce workplace injury and death and this is an area where benefits would flow from any improvement.

⁹⁸ See for example Laing (1992) p 81

⁹⁹ WorkSafe Western Australia Commission (2001a) point 2.3.1

770. In the 1992 Report it was noted¹⁰⁰ that there are obvious advantages in providing joint training for safety and health representatives, managers and supervisors. It was observed that any concerns about possible intimidation could be addressed by the appropriate design and presentation of courses. It also seemed a simple matter to divide course participants into appropriate groups where necessary.
771. There was considerable support for joint employer/ employee training in responses to the proposals. There is little doubt that attitudes are changing and the past opposition has reduced. A trainer noted for example that competent training organisations can ensure in their programs that employee as well as employer representatives can receive the separate and different training necessary to deal with the specific issues that arise for them. Some union trainers also indicated support for joint training.
772. Plainly the proposals raised here require the detail to be developed in consideration of the courses and assessment processes. As noted, it could however be seen as the first step in a comprehensive training program for those sufficiently interested to pursue occupational safety and health as a career option and who, after the first step, would be prepared to continue and to pay for their training.

R:56 It is recommended the Commission apply its accreditation criteria for introductory safety and health representative training so as to provide for:

- **flexibility in the delivery and content of courses while ensuring maximum benefits for safety and health representatives;**
- **joint training for safety and health representatives, managers and supervisors; and**
- **competency-based training.**

5.6.4 Payments

773. Unions raised concerns regarding the responsibility for payment of enrolment fees for introductory safety and health representative training. Under *s.35* and *r.2.2*, the employer is required to pay the wages of a safety and health representative attending an accredited training course. However, no provision is made regarding payment of course enrolment or attendance fees that can amount to significant sums¹⁰¹.

¹⁰⁰ *ibid*

¹⁰¹ Fees are estimated to range between \$500 and \$700 for each trainee

774. In practice, employers usually pay the fee in addition to the wages of the safety and health representative. However, some employers have refused to bear this cost. In those cases the safety and health representative is left to pay and it usually means that no training is undertaken. That result assists no one.
775. The arrangement is unsatisfactory because there is no personal benefit gained by the safety and health representative with the main beneficiary being the workplace. Unions have also provided information that indicates the Australian Tax Office will not allow deductions for safety and health representatives who do pay for their own training, as they derive no extra income as a result of the training. Tax deductions are, however, available to employers who pay the cost of the training for their employees.
776. Unions also submitted there are additional deficiencies relating to the payment of safety and health representatives whilst they are attending introductory training. *S.35(3)* and *r.2.2* provide for safety and health representatives to continue to receive their normal salary and most allowances while completing the introductory training. They do not however make provision for travel or accommodation costs nor for situations where training requires the safety and health representatives to attend when they would otherwise be rostered off work. While it is reasonable to expect representatives might miss some of the additional benefits, it is an issue that calls for further investigation and consideration. However, as the major benefits of safety and health training accrue to the workplace, it is not unreasonable that most be paid by the employer, especially in light of the tax savings available to business.

R:57 It is recommended s.35 of the Act and/or r.2.2 of the Regulations be amended to require an employer to meet the reasonable costs of enrolment or attendance fees associated with the introductory training of a safety and health representative.

R:58 It is recommended the Commission also review r.2.2 to determine whether any changes are necessary to the payment entitlements of safety and health representatives attending accredited introductory and post-introductory training, including in relation to attendance at training when rostered off work.

6.0 Policy Development and Administration – Object (f)

- The penultimate object of the Act goes mainly to the process of policy development and administration of the Act.

“s.5(f) to provide for formulation of policies and for the co-ordination of the administration of laws relating to occupational safety and health;”.

6.1 Legislative Coverage

777. Since the early 1980’s the predominant legislative direction in Australia for occupational safety and health has been based on the findings of the Robens Committee.¹⁰² The most recent major example of this is the New South Wales *Occupational Health and Safety Act 2000*¹⁰³ proclaimed in September 2001. No significant Australian occupational safety and health legislation has taken any other approach during that period.

778. While that is hardly surprising, there remains a significant body of older legislation that relies on the regulatory approach and is inconsistent with the recent trends. While that may not be a major concern in itself, inconsistency could lead to confusion or misunderstanding of the obligations and the possibility of a breakdown of process. It is important, that where possible, legislation dealing with the same kinds of issues should have broadly the same characteristics. No submission argued to the contrary.

779. Much has also been made in recent years of different Departments having coverage of industry sectors. That continued in this Review with many submissions calling for either a single set of legislative controls or consistent legislation and regulatory process. The issue is important because, until comparatively recently, differing Departments also approached occupational safety and health administration differently and alternative directions were taken. With the introduction of increasingly consistent legislation, administrative consistency has in many respects improved. However, similar legislation in itself is now being shown as insufficient to guarantee consistency and it is becoming apparent that there is a need for some form of overarching policy direction so as to provide better and more consistent outcomes. At the same time, there is a legitimate need to ensure specialties are not lost as has been the case in the past. Those issues take up much of the discussion in the following section.

¹⁰² Robens (1972)

¹⁰³ See *Occupational Health and Safety Act 2000* (NSW)

6.1.1 Exclusions

780. While the *Occupational Safety and Health Act 1984* is the pre-eminent occupational safety and health statute in Western Australia it does not apply to all workplaces. Moreover, it is not the only statute dealing with occupational safety and health that may apply in a workplace.
781. The application of the Act is limited by *s.4(2)* and does not apply to work carried out on a mine, petroleum well or petroleum pipeline to which the following legislation applies:
- *Mining Act 1978*;
 - *Mines Safety and Inspection Act 1994*;
 - *Petroleum Act 1967*;
 - *Petroleum (Submerged Lands) Act 1982*; or
 - *Petroleum Pipelines Act 1969*.
782. Responsibility for occupational safety and health in the mining and petroleum industries rests with the Department of Mineral and Petroleum Resources (DMPR) through the *Mines Safety and Inspection Act 1994* and the *Petroleum Safety Act 1999* (unproclaimed at the time of writing). These Acts contain “parallel” provisions to the *Occupational Safety and Health Act 1984* on the general duties and consultative processes as well as other industry specific obligations.
783. While DMPR has ultimate responsibility for mining safety and health, the Commission has a role in policy development under *s.4(2a)* of the *Occupational Safety and Health Act 1984* and *r.2.1* of the Regulations which enable *Part II* of the Act to apply in respect of workplaces covered by the *Mines Safety and Inspection Act 1994* and *Mining Act 1978*. The Commission does not have a similar capacity however in relation to other legislation such as safety in the petroleum industry or in respect of explosives and dangerous goods (see below).

6.1.2 Other Legislation

784. In industries other than mining and petroleum, the Act co-exists with other legislation covering occupational safety and health. This includes diverse areas such as the safety of energy workers, explosives and dangerous goods, shearers’ accommodation and safety in the rail, transport and timber industries. Many of these statutes deal with a specific industry and most are not based on the general duty of care concept and are regulatory in approach.

785. The complexity of the occupational safety and health framework in the State is also compounded by the spread of administrative responsibility for relevant statutes across a range of Government agencies and departments. Examples include:

- *Explosives and Dangerous Goods Act 1961*, administered by the Department of Mineral and Petroleum Resources; and
- *Radiation Safety Act 1945*, administered by the Health Department of Western Australia.

786. The Commission specifically addressed the implications of overlapping legislation and has submitted to the Review,

“It is the view of the Commission that all workers in Western Australia should be protected by the *Occupational Safety and Health Act 1984* and that inclusion or duplication of occupational safety and health provisions in other legislation is neither necessary nor desirable. The Commission is therefore opposed to industry specific occupational safety and health legislation.”¹⁰⁴

787. There are some 30 other statutes that contain some reference to occupational safety and health.

788. A number of submissions addressed the inter-related issues of duplication of legislation and overlapping administration. Some noted that the operation of numerous statutes and regulations dealing with occupational safety and health was contrary to the Robens Committee principle of unified legislation and administration,

“... the excessive fragmentation of the legislation and of its administration is a serious obstacle to the creation of a more modern code of law, to its effective implementation, and to the development of a clear and comprehensive strategy for the promotion of safety and health at work.”¹⁰⁵

¹⁰⁴ WorkSafe Western Australia Commission Submission (2001)

¹⁰⁵ Robens (1972) para 98

789. In its submission to the Review the Commission provided an example of some of the difficulties created by the overlapping legislation in the *Timber Industry Regulation Act 1926*. This Act has not been amended to reflect the contemporary duty of care approach to safety and health in workplaces. Administration of the *Timber Industry Regulation Act 1926* was transferred to the Minister for Labour Relations (and WorkSafe) in 1990. As the timber industry is not excluded from application of the *Occupational Safety and Health Act 1984* the continuing existence of the *Timber Industry Regulation Act 1926* with its prescriptive requirements and references to non-existent statutory positions is simply confusing. In May 1998, the Commission endorsed the repeal of the *Timber Industry Regulation Act 1926*.
790. It is not good practice in a small market the size of Western Australia to have alternative approaches to occupational safety and health policy. There is almost no disagreement on that issue and it is appropriate for the Commission to be able to assist policy development across the board. Amending *s.14(1)(b)* by prescribing all the statues applying occupational safety and health standards is a sensible and necessary step in that direction.

6.1.2.1. Petroleum Industry

791. In comments on the proposals, DMPR raised a number of issues which, it argued, preclude implementation of the proposal as it related to the petroleum industry. Among these are the relationship between Federal and State legislation as it applies to the petroleum industry; the existence and present use of "Schedules of General Directions for OHS 1993" which relate to onshore petroleum installations in Western Australia; and the general implementation of a "safety case" regime within the petroleum industry which is seen by some to be inconsistent with the general occupational safety and health regime operating within Western Australia. It was also pointed out that there are now significant steps being undertaken in all States and the Commonwealth to develop a single National Offshore Petroleum Safety Authority.
792. Petroleum industry representatives supported the DMPR position and arguments were put that the safety case regime now in place provides more effective protection to personnel in the industry. It was submitted that heavy investment and commitment to the safety case regime has resulted in great improvements in the industry both offshore and onshore and any interference is seen to jeopardise that circumstance.

793. As a consequence of the new submissions it was necessary that further analysis of the existing circumstances relating to the petroleum industry be undertaken. In brief, this revealed that there is a significant distinction between the regulatory environment for offshore and onshore petroleum activity and between the petroleum industry and industry generally. In relation to offshore activity, Federal legislation applies, principally through *s.140H* and *s.140I* of the Commonwealth's Petroleum (Submerged Lands) Act 1967 and through Schedule 7 of that Act.
794. In the absence of State legislation, the Commonwealth, in effect, has exclusive coverage. The relevant provisions found mainly in Schedule 7 of that Act provide extensive coverage in relation to occupational health and safety and in some respects are more extensive than similar provisions in the *Occupational Safety and Health Act*. For example, the issuance of Provisional Improvement Notices, which is dealt with in Part 4 of this Report, already exist.
795. It appears that in some other onshore circumstances, "The Schedule of General Requirements for Occupational Health and Safety - 1993" has application. It applies where the Minister has given directions to licence holders and other persons with respect to whom regulations may be applicable under the State *Petroleum Pipelines Act 1969*. It has also been submitted that it has general application to persons other than licence holders so long as a copy has been provided to them or it is displayed in a prominent place frequented by such persons. In short it is operative where a person is given notice of the direction. The maximum penalty applicable is \$10,000. However, prosecutions may be difficult to achieve because it is necessary to prove the defendant had been given notice of the direction.
796. Safety onshore, it appears, is at least partly contingent on either Ministerial notice generally, by condition of licence, condition of approval or by agreement with the operator. That is cumbersome and potentially unreliable should steps in the notification process be missed. Clearly, it has not yet presented as a major issue because the industry parties are aware of, and committed to, ongoing safety, and generally have safe workplaces and procedures in place. Occupational safety and health is an element of the safety management system required under the safety case regime. In the longer term however it is not a satisfactory arrangement as changing circumstances rather than the legislation could control ongoing industry performance.

797. It is also of note that it was submitted that the State *Petroleum Safety Act 1999*, proposed for promulgation soon, is consistent with Federal legislation and will therefore also provide consistency for both offshore and onshore petroleum activity. If that is put into effect and remains identical or consistent with the Federal legislation a decision will also need be made whether to continue the Federal rather than State linkages. It is, of course, entirely consistent with the Robens philosophy that a national industry should have national occupational safety and health standards and regulation.
798. In the longer term it will clearly be desirable that national petroleum legislation apply so as to have consistent standards throughout the country. If a comprehensive Federal Act were developed, that would be a very desirable step towards a single comprehensive workplace safety and health regime.
799. From time-to-time such issues are raised and discussion takes place. The State should continue the dialogue in the expectation that at some in the future point the maturity of the system will permit such progress. Plainly these issues will take some years to reach fruition. In the meantime, any moves in that direction should be supported while simultaneously ensuring maximum safety and health outcomes are achieved within the State.
800. It is also worth noting that the safety case regime is not inconsistent with the existing *Occupational Safety and Health Act 1984*. Recommendations made in this Review also supplement progress towards an even more consistent outcome. However, the recommendations in this Report have been limited to hazard identification and risk assessment processes along with risk reduction or removal which does not require the very heavy expenditure of time, effort and money that comes as a consequence of a fully and properly functioning safety case regime. The high investment levels and risk potentials make the safety case regime viable in the petroleum industry when it would not be within reach of most small business. However, the principles can be adapted and applied.
801. Perhaps the most important immediate feature relating to safety in the petroleum industry is, as earlier mentioned, that onshore petroleum facilities do not at present have statutory protection and instead are covered by Ministerial Direction and/or licensing conditions or agreement. As a consequence, it is clear that employees in onshore petroleum facilities do not have the underlying protections enjoyed by other West Australians.

802. It appears that situation would be addressed if the *Petroleum Safety Act 1999* were to be proclaimed. However, there has been significant delay in the process of finalising suitable regulations to accompany the legislation. Numerous reasons have been given for that with the most recent being that the draft recommendations arising from this Review of the Act would be responsible for delaying completion if implemented. However, the emphasis of the Review has been to ensure proper coverage of persons at work and there has been no suggestion that effective steps should be delayed or not completed because of the Review. It would not be inappropriate to finalise the *Petroleum Safety Act 1999* and Regulations while the longer-term legislative directions are established. To assert otherwise lends credibility to the jaundiced view of some that the delay is less a function of process than it is an excuse.
803. It is possible to speculate that some parties may be satisfied with the existing situation and are being tardy in completing their obligations. That may be of no particular concern while the industry parties fully comply with their obligations. However, the inspection and other monitoring systems that can only be undertaken under legislative protection are not as available. As events in the gas industry in Victoria have shown, even good systems can fail. At present it appears that there may be some overemphasis on employer self-regulation in onshore petroleum activity and it is desirable that employees in the State have at least the threshold protections provided by statute rather than relying on less certain instruments.
804. So far as the *Occupational Safety and Health Act 1984* is concerned there is no basis for arguing that the WorkSafe Commission, by having an authority to make recommendations to the Minister, will jeopardise or create inconsistency within the petroleum industry if it is provided with a role under *s.4(2a)* and *s.14(1)(b)* of the Act. Indeed, the contrary might well be the case and the industry might well contribute to safety elsewhere in the State. Similarly the Minister, Government and Commission will, no doubt, take proper account of existing Federal legislative protections and would likely support cohesive legislation for the industry across Australia as consistent with both Robens and the best safety regime. It would seem likely that it would also support a Federally based inspection authority when such a structure is formed. In the interim, proper account would need be taken to ensure consistency of the legislation and regulation presently applying both within and between States and the Commonwealth.

R:59 It is recommended the capacity of the Commission to contribute to policy development on legislation dealing with occupational safety and health be extended through the prescribing of all relevant statutes (including the *Petroleum Safety Act 1999*) for the purposes of *s.14(1)(b)*.

R:60 It is recommended the *Timber Industry Regulation Act 1926* be repealed as soon as possible.

6.1.2.2. Explosives and Dangerous Goods Act 1961

805. While the problems with the *Timber Industry Regulation Act 1926* are primarily concerned with legislation, administrative arrangements also have the capacity to limit the effectiveness of efforts to promote occupational safety and health. WorkSafe submitted that problems of this kind are evident in the present arrangements relating to the administration of explosives and dangerous goods legislation. This legislation is administered by DMPR but is applicable across all industry sectors. WorkSafe submitted in relation to the *Explosives and Dangerous Goods Act 1961*,

“While arguably the legislation provides for public safety, those managing and working with the hazards are largely parties (employers, employees, self-employed persons, manufacturers) covered under the *Occupational Safety and Health Act 1984*.”¹⁰⁶

806. There seems no reason why, at the very least, the Commission should not have a role in policy development related to explosives and dangerous goods equivalent to the role it has with mining safety and health.

807. Perhaps the most logical outcome, however, would be the transfer of responsibility and administration of the explosives and dangerous goods legislation from DMPR to WorkSafe. A dedicated and specialist explosives and dangerous goods division or unit within the WorkSafe inspectorate could then be established to avoid any loss or dilution of expertise. The legislation itself could eventually be absorbed into the Act, as there is already considerable overlap.

808. In responding to the proposals, DMPR argued that there should not be any transfer of responsibility for the *Explosives and Dangerous Goods Act 1961* to WorkSafe and concern was expressed that the proposal was not raised for the Department’s comment before it was recommended.

¹⁰⁶ WorkSafe Western Australia Submission (2001)

809. It is evident that if every party had been asked for their views on each significant issue before the draft report was issued, that draft would still be in progress. Perhaps more importantly, the original submission of DMPR was brief and stood in contrast to the comprehensive submissions of many other parties who ensured that their views on all significant issues were known. It is a little disingenuous to not even put a position when others have made their views known and then to complain.
810. The objections to the transfer, however, have substance. It must be conceded, for example, that the mining industry does have extensive experience with explosives. It can also be accepted that there are a number of synergies between matters related to explosives and dangerous goods and DMPR generally as mines inspectors also work closely on occasion with inspectors appointed under the *Explosives and Dangerous Goods Act 1961* in relation to the storage, manufacture, import and sale of explosives and dangerous goods.
811. It was also argued that location of responsibility for the *Explosives and Dangerous Goods Act 1961* within DMPR is consistent with a number of earlier reviews which concluded that it should remain associated with mining activity. Accordingly, it was argued the present Review should conclude that DMPR should retain responsibility for the administration of the *Explosives and Dangerous Goods Act 1961* and associated regulations and that a the proposed merger between DMPR's Mining Operations Division and Explosive and Dangerous Goods Division be supported. It is understood that this merger has already been effected. Plainly the proposals were not seen as inhibiting those developments.
812. DMPR also submitted that the existing *Explosives and Dangerous Goods Act 1961* has been reviewed and a Bill for a new Act is proposed to be debated in Parliament shortly. It is intended that the new Act will adopt relevant Federal handling and storage requirements. It was also submitted that the new Act would facilitate a review of subsidiary regulations. Again, in this instance it was argued that a review in the context of the *Occupational Safety and Health Act 1984* would delay these developments.

813. Recent events have shown that existing arrangements may not be entirely satisfactory as it is generally accepted that only luck prevented fatalities or serious injuries in the explosions and fire which occurred in a Carmel fireworks factory in March 2002. It is also a fact that while inspectors from DMPR might have considerable contact with explosives because of mining activity, the bulk of work under the *Explosives and Dangerous Goods Act 1961* is not connected with mining. Much of the work is connected with occupational and public safety associated with the transport and storage of explosives and dangerous goods. While mining is the major user of explosives, it is not the only activity. Moreover there are a variety of explosives used within the community and the knowledge held by Explosives and Dangerous Goods Inspectors should have broad relevance rather than being restricted to materials used by the mining industry.
814. As demonstrated by the Carmel incident, many installations are in proximity with industry generally rather than mining. Despite there being some significant arguments for the retention of responsibility for the *Explosives and Dangerous Goods Act 1961* within the Department of Mineral and Petroleum Resources, it is considered that the more effective longer term arrangement would be for the responsibility to fall under the amended *Occupational Safety and Health Act*.

R:61 It is recommended responsibility for the *Explosives and Dangerous Goods Act 1961* be transferred to the Minister for Consumer and Employment Protection.

R:62 It is recommended the Explosives and Dangerous Goods Division of the Department of Mineral and Petroleum Resources be transferred to the Department of Consumer and Employment Protection as a dedicated and specialist division.

6.1.2.3. Mining Safety Legislation

815. The issue of the most appropriate legislative and administrative arrangements for occupational safety and health in the mining and petroleum industries has been contentious since the Act was first proposed. The maintenance of separate legislation and administration for these industries has also been a matter of continuing Government policy. The debate was particularly intense when there were substantial legislative distinctions between the relevant Acts. Some of the debate also turned upon the perceived conflict of interest between the responsibility of the Department of Mineral and Petroleum Resources and its predecessors, to promote the growth and expansion of the mining industry and its duty to ensure the safety and health of mining and petroleum workers.

816. The 1991 *Enquiry into Occupational Health and Safety in the Mining Industry in Western Australia* conducted by Mr E.R. Kelly AM canvassed this issue extensively. The Enquiry concluded,

“In relation to the Department of Mines I have concluded that its predominant interest lies in mining as a total endeavour rather than in occupational health and safety as a specialist endeavour ...”¹⁰⁷

817. A number of submissions argued those conclusions remain relevant today. Some argued that as a result of consolidation of the Department and the expansion of activities as a consequence of the Machinery of Government (MOG), DMPR has become even more oriented towards minerals and energy production. Some safety professionals and others also submitted that the emphasis on safety will decline as a result of the Machinery of Government changes and have urged that a single occupational safety and health authority be established to re-focus on the significance of safety.

818. For its part, the mining industry has generally argued that it requires both a separate statute and inspectorate. In general, the industry supports the current *Mines Safety and Inspection Act 1994* and its intent, and in particular, considers the regulation of mine safety by DMPR as the most efficient way of recognising and addressing the specific risks and operating environment that is peculiar to the mining industry.

819. Some sections of the mining industry acknowledged the similarity of the legislation and do not seek a return to the earlier more regulated legislative environment. The preference for coverage under the *Mines Safety and Inspection Act 1994* appeared to rely most on the specific administrative arrangements appropriate to the industry and some small but apparently significant differences in the legislation. The most significant issue appeared to be the industry’s concern that the specialist inspectorate should continue because of the unique and specialist characteristics of the industry. There appeared to be no substantial objection to a more consistent policy approach overall so long as the Inspectorates remained separate.

820. The Mining Operations Division of DMPR also supported a continuing separation but agreed on further integration of some of the legislative requirements and some operating arrangements especially at the policy level.

¹⁰⁷ Kelly (1991) Vol 1, p132

821. There is a discernable change in attitude from those expressed in 1992. A number of employees in DMPR itself, for example, acknowledged that its work has moved on from the early 1990's and accept that with the parallel legislation that there is now far less justification for the separation. Many acknowledged that the policy and legislative structures should be the same so as to ensure consistency and efficiency.
822. In commenting on the issues, a major mining company saw no difficulty in combining the legislation and made the observation that organisations committed to safety would have little difficulty with the proposals. While most responses were considerably less supportive and the mining industry generally opposes a single Act, many accepted the need for greater consistency of legislative obligations and policy. It is of note in that regard that a small number also gave specific support for a national legislative structure.
823. As noted concerns to maintain the existing structures appear to rely mostly on the need to retain specialist skills and knowledge and to avoid any dilution of those capacities. There was, for example, general acceptance that it was not appropriate that a WorkSafe inspector should be involved in mine technology such as mine design or engineering for the underground mining industry. Plainly, there is a need to retain the specialist skills particularly in mining engineering and there should be no dilution of specialist records. Some argue that so long as these capacities are retained there are good reasons for accepting that both WorkSafe and mining inspectorates coming under the one administrative arrangement. Specialist divisions and individual specialists within divisions of a Department are obvious ways that may be achieved without losing skills and specialties.
824. It was recognised by some of those making a contribution to the Review that the recent changes in the various Departments arising from the Machinery of Government (MOG) process had removed some of the earlier arguments for retention of individual entities to deal with industry occupational safety and health matters. Some also suggested that it was an appropriate time for occupational safety and health to be placed under one Ministerial portfolio, so as to enhance the overall effort. That arose from concern over the apparently reduced emphasis on occupational safety and health resulting from the amalgamation of agencies. These argued that the integration of the separate occupational safety and health agencies into the new larger organisations could mean safety priorities would be downgraded. It was argued that it is necessary for the occupational safety and health agencies to combine to increase the effort to maintain or increase the safety and health profile.

825. It is of significance that the directions established under the legislative framework are largely identical and the substantial change came about earlier as a result of promulgation of the *Mines Safety and Inspection Act* in 1994. That changed the mining industry obligations to reflect those of industry generally under the general duties regime of the *Occupational Safety and Health Act 1984*. The fundamental distinction between the Acts was thus removed and gave rise to the not unreasonable question of what then justified an ongoing distinction in the treatment of the mining industry when they could be combined and still provide for the specialist administrative arrangements and structures.
826. Certainly some of those who proposed the additional step of combining the safety administration and inspectorates also noted that a more effective inspection regime could be established and that the career advancement for inspectors would be enhanced by a single structure. It would also have the additional advantage of enhancing separation from industry which would in turn help to ensure that inspectors could not be subject to assertions that they are part of the industry that they are obliged to inspect although it is necessary that a good working relationship would need to continue.
827. A number of submissions relied on arguments along the lines that the present arrangements are working satisfactorily and should not be changed for change sake. However, these ignore the extent of change that has already taken place and the likelihood of ongoing change. In addition, a more proactive approach is likely to better position the organisations to assist industry and give the community increasingly effective service; and to enhance the reasonable aspirations of employees of the organisations. To a considerable measure, the status quo has already been broken and it might be the time to commence a consolidation into a new and effective structure.
828. As has been noted, the old regulatory regime would have been more effective if it had been possible to implement it in full. The same can be said for the Robens based approach. Unless all the component activities are effectively combining in a single operation or process it is almost inevitable that the model will not be optimised. Divergent legislation and major policy differences must ultimately reduce the overall effectiveness of the systems. Employees, as a consequence will have different standards of protection. That is even more important under a general duties regime where many parties carry a shared responsibility.

829. This issue is more fully canvassed elsewhere in relation to the mining industry¹⁰⁸ and it is not repeated in full in this Report. However, it can be noted that there are no major impediments in the *Occupational Safety and Health Act 1984* that would prevent coverage of the mining and petroleum industries. Similarly there are no insurmountable administrative obstacles to integration of inspectorates dealing with mining and petroleum safety into the Department of Consumer and Employment Protection, even though that is not recommended at this time. Even if they were, it would be essential that they be maintained as separate divisions because of their specialities.
830. Changes to legislative structures should be on the basis of combining the best elements of both Acts into a single statute that effectively and efficiently covers occupational safety and health across all industries. As noted, the legislation is now almost consistent and the logic for totally separate structures has largely fallen away. It is also consistent with trends elsewhere¹⁰⁹. It is accepted, however, that there has been a long history and there is also a need for the community to be confident that change will be for the better. This is likely to be developed best by firstly ensuring full consistency of policy and direction. The DMPR submission provided some support for that in its acceptance that the objectives of the legislation should perhaps be the same.
831. While there is a strong argument for only one legislative framework incorporating all the existing Acts; particularly in the context of the Robens ideal of a single legislative structure, practicalities, including strong support for the existing *Mines Safety and Inspection Act*, dictate that it would not be appropriate to implement it immediately.
832. It is recommended, therefore, that the common provisions of the *Occupational Safety and Health Act 1984*, and the *Mines Safety and Inspection Act 1994* be amalgamated under the *Occupational Safety and Health Act*. Only those issues specific to the mining industry would be retained under the *Mines Safety and Inspection Act 1994*. In that regard, the objectives, general duties obligations and procedural steps such as for elections should be incorporated into the *Occupational Safety and Health Act*. Specialist and industry applications, such as that contained in the existing Part 4 of the *Mines Safety and Inspection Act* would remain within the specialist legislation.

¹⁰⁸ *Review of Mines Safety and Inspection Act 1994: Draft Report* (2001)

¹⁰⁹ See for example the integration of mines safety and health research in the USA National Institute for Occupational Safety and Health (NIOSH) - www.cdc.gov/niosh

833. The structure of the WorkSafe Commission should also be amended so that mining industry representatives are among the appointed members of the Commission. The Mines Occupational Safety and Health Advisory Board (MOSHAB) should be restructured and become a standing advisory committee of the Commission¹¹⁰ as well as continuing as the mining industry advisory body for specific mining activity. This would integrate mining into the mainstream while maintaining the industry's identifiable character and specialists pre-eminence. It would however provide for continuity of policy direction and policy administration.
834. In commenting on these proposals, an employer organisation suggested that amalgamation of the legislation might dilute the focus on industry specific requirements. That is a relevant consideration and needs be accounted for in developing the legislation. It is also a reason for retention of the specialist inspectorates.
835. As a result of consideration of submissions concerning the petroleum industry¹¹¹, it is no longer proposed that the *Petroleum Safety Act 1999* be transferred or absorbed into the *Occupational Safety and Health Act 1984*, providing the *Petroleum Safety Act 1999* is proclaimed promptly and maintains consistency with the Federal offshore petroleum safety and health regime. In the event that there is to be further delay, the WorkSafe Commission should consider further recommendations. In the interim, DMPR should take every step necessary to continue to ensure that employees working in the onshore installations of the State are effectively covered by Direction, specification and/or agreement.

R:63 It is recommended that the objectives, general duties and processes common to all industry groups should fall under the *Occupational Safety and Health Act 1984* and that relevant provisions be transferred from the *Mines Safety and Health Act 1994* for that purpose and towards the eventual amalgamation of the legislation into a single statute. Specific residual and speciality operations of *Mines Safety and Inspection Act 1994* should be continued. This recommendation should be concluded in conjunction with relevant recommendations of the Report of the Review of the *Mines Safety and Inspection Act 1994* and as outlined in Part 8 of this Report.

¹¹⁰ See *Part 5: Commission and Department* for a full outline of the proposal.

¹¹¹ See section 6.1.2

6.1.3 The Construction and Agriculture Industries

836. A number of submissions from the Construction and the Agriculture industries argue that, like mining, they also have unique characteristics that are not fully compatible with the existing legislative regime.
837. There is, as a consequence, a need to take account of particular work environments under the legislation and a “one size fits all” approach is not always satisfactory. Both farming and construction have unique characteristics such as the discontinuous nature of the work, location, high turnover and the wide variations of work activity. Construction and farming often involve short-term employment. As well, the changing nature of the industries with increasing use of sub-contract are increasingly common. Relationships are established and then dismantled as soon as the work is concluded. It is difficult to maintain ongoing development of occupational safety and health within those workplaces because the continuity so necessary for commitment and trust does not exist.
838. While the legislation is generally applicable, some provisions may not suit particular activity. For example; the election of safety and health representatives and committees; the capacity to consult to optimise workplace safety and health arrangements and the capacity to implement continuous improvement in occupational safety and health is limited. By the time some of the required processes under the Act are completed the work may have concluded and the particular employees replaced by those undertaking the next activity.
839. It was also argued in relation to Agriculture that the range of work is broad and if all the detailed requirements under the legislation were followed, farmers would not be able to afford the cost or able to devote the training time necessary to bring equipment and personnel up to the standards that might be applied in other industries. A farm employee may only use particular equipment once or twice each year while in other industries employees might use similar equipment almost continuously.
840. There were a also number of observations from within the industry pointing out that the agricultural sector is probably the most isolated and distant group from the Commission and Department and has limited capacity to contribute to or to learn from the Commission.

841. It was pointed out that safety and health representation is also a difficult issue where there are high turnover levels and short employment duration. Perhaps the most obvious examples of this occur in the construction industry. It appears that at least some of the difficulties for that industry arise because the short-term nature of the work does not provide a proper election, appointment and training process for safety and health representatives. As a result, the union might propose or appoint a safety and health representative and seek or to impose that representative within an employer's workplace with or without consultation. That might be an acceptable arrangement under some circumstances and not acceptable in others.

842. As a consequence of the industry exigencies, other arrangements that are of doubtful legal standing also arise.

6.1.3.1. Construction

843. In considering the construction industry specifically, it is necessary to recognise differences from industry generally. For example it was submitted that in the construction industry, occupational safety and health continues to be used as leverage for industrial campaigns. It was argued that union appointed safety and health representatives are also inclined to use their safety role to gain other concessions unrelated to safety.

844. Examples were given of workplace stoppages over claims of unsafe work. It is alleged, however that when other issues such as pay and union membership claims are resolved the safety issues are discontinued and work recommenced. The regularity and strength of the allegations suggest that there is at least some incidence of the inappropriate use of safety as a bargaining tool and some are unable to realise the damage that such action causes. That is especially concerning given the relatively poor safety record of the industry.

845. It also appears to be a significant reason why construction industry employers and their organisations object to any additional authority being given to safety and health representatives. Employers in the construction industry in particular expressed a concern that it would licence some representatives to issue Safety Alerts or Provisional Improvement Notices and then make industrial demands on employers who will be forced to accede in order to buy peace. It was submitted that representatives would also demand that on-the-spot fines be levied on employers merely to add pressure.

846. As earlier noted, the concerns in relation to Safety Alerts or PINs are based on a misconception. Appointed safety and health representatives in the construction (and other) industries would not fit the criteria of election and training and would not therefore be authorised to issue Safety Alerts or PINs under the Act. There is, however, a more significant issue because properly appointed representatives should have authority to issue PINs or Alert notices because along with other recommendations these should help to reduce the relatively poor safety record of the industry.
847. It is clear that, even though there has been a significant reduction in the rates of injury and death in the construction industry in recent years, the level remains higher than other sectors and more needs to be done. It may well be that a recognition of the differences in the construction industry can be used to develop alternatives which are more effective. It can be argued that not only is the industry inherently less safe but that attitudes have contributed to the problems, particularly in failing to get the required improvements.
848. A feature of the construction industry is that it remains considerably more adversarial in its conduct than industry generally and it is considered this may contribute to the safety and health failures notwithstanding the high level of apparent safety consciousness in the industry. The history between the industry parties means that they often put considerable energy into attacking/defending their respective positions rather than working together to develop improved safety.
849. Great emotional energy is generated and outcomes sometimes do not fit the events and circumstances. For example, payments have been substituted for safety. This can occur either before or after a safety incident with allowances paid for associated risk and strike pay for safety disputes. In the latter, the issue of pay can sublimate the original reason for the dispute. Employers become cynical when that occurs and come to believe that employees are only interested in the money. Employees also become cynical when payments are made in substitution for safety and higher demands may be made where employees believe there is little likelihood the employer will make a real effort to improve safety.
850. This should not be understood as occurring all the time, because there have been considerable advances and the parties often do work well together. However, when adversarial issues arise, each can and often does take strong positions and compromise is seen in the context of a win or a loss.

851. As a consequence, the adversarial environment results in positions and understandings that are not helpful for improving safety. They also promote inaccurate assumptions by the industrial parties about the other's interests. During the course of the Review almost none of all those interviewed could be said to have been uninterested or uncommitted to occupational safety and health. However, many believed that those opposite them in industrial and safety negotiations did not have the same commitment. Both employer and employee representatives claimed the other was more interested in power or money. These attitudes were almost endemic in the construction industry where company/union adversaries are legend.
852. It is difficult to isolate safety and industrial issues and probably a waste of time doing so because the genesis of the modern union movement came mostly from the safety concerns of industrialising England in the 18th and 19th centuries. Unions will always be interested and involved in safety issues while their members have a concern. It is also clear that industrial activity of various kinds will come as a consequence of safety concerns.
853. As a result, no doubt brought about by at least an implicit recognition of the culture of the industry, there is already a higher proportion of WorkSafe Inspectors engaged in construction activity than in other industries. Indeed it has been argued that there is an over concentration of inspectors in construction in comparison to industry generally. Inspection is certainly more regular and intrusive than in any other industry with the exception of mining.
854. It is important to address the substantive issues rather than appearances because while adversarial attitudes prevail there can only be limited understanding that the other side is willing and able to contribute to more effective occupational safety and health. It will also bring with it a recognition that Robens was correct in that only those who create and work with the risks will be able to protect themselves and formal inspection by an inspector cannot achieve as much as the parties themselves.
855. Safety is a powerful and emotional issue on which to develop arguments. However, it is counterproductive and inimical to the industry's long-term interests to have safety used as a bargaining instrument for other matters. The legitimate concerns of employees are devalued in such an environment.

856. In considering the construction industry, it is necessary to recognise its differences and for the legislation to take account of that. While single overarching legislative responsibilities, general duties and obligations are viable and necessary, it is important to accept that specific activity and processes need to be taken into account.
857. If it is accepted that construction activity has special requirements, it should have provisions specific to the needs of the industry. Some already exist such as the Commission's Construction Industry Safety Advisory Committee. Others may need to be developed. There may be a need for alternative or additional training arrangements to be put in place when employees join the industry. Many in the construction industry favour formal induction training prior to employees working in the industry. It may be appropriate if safety and health representatives are to be appointed and later confirmed, they should be trained before being authorised to act on behalf of their colleagues. If employees are also properly protected from discrimination under the Act, any existing reluctance by individuals to raise matters in some workplaces will reduce. Action could then also be taken over those who choose not to comply.
858. In the absence of safety and health representatives and committees, an alternative that could be implemented is to require those establishing and responsible for the construction activity to develop an occupational safety and health plan for the work. The plan would require approval before commencement of the work and be available to employees and their representatives. A more comprehensive systems approach to construction activity could be mandated with as much detail as required depending on the size and complexity of the project. The more successful projects in terms of occupational safety and health (as well as other aspects such as cost control) are those that have developed detailed work plans. These are better able to take account of risk and to arrange contingency planning. Project planning is not new to the industry and a safety and health plan would supplement project design and safety.

859. Consideration could also be given to the development of equivalents to the safety case regime now widely used in the oil and gas production industry and major hazard plants around Australia. While it is not suggested that there is always sufficient project work to justify a fully developed safety case regime, some projects are large enough for that to occur. Other projects could perhaps benefit from the safety case approach being adopted though perhaps not with all the accompanying detail. Employees should also all be given a suitable induction; including advice on the site safety program or plan and its relevance to each employee. Every employee could be entitled to raise any reasonable concern as to the implementation or operation of the safety case or plan with his or her supervisor.
860. The deficiencies in the legislation will also require attention. Further steps need be taken to introduce substitute arrangements for the election of safety and health representatives and to make them capable of dealing with safety and health issues independent of other workplace activity. Even the safety case regime does not necessarily deal with employee contribution and involvement. If it is subject to any criticism, it is because the safety case regime is frequently command and control driven.¹¹²
861. Employees should be entitled to choose their safety and health representatives and if appointments must be made because of workplace exigencies then confirmation ought be an entitlement of the employees. That might well mean an appointment process before any elections can be held. That, for example, could involve the employer and employees representatives putting forward suitable nominations for appointment by the WorkSafe Commissioner with each able to raise objections or concerns if there is disagreement.

¹¹² While it is accepted that military style discipline might well be necessary in dealing with significant incidents where everyone must act in a co-ordinated and systematic way, it is not necessarily the most suitable approach in ensuring employees are committed to making a full contribution in the development and implementation of the safety case. It may be a technologically sound but it does not sufficiently recognise the social and psychological characteristics of the employees. The military now recognises that leadership gives better results than mere command. All elite military facilities have learned to place great emphasis on the individuals capacity to contribute to the team effort and to develop individuals accordingly. It seems doubtful that the same understanding has permeated some industry which remains pre-occupied with control because of concern that individuals with “too much” authority might be too great a risk. Australia’s somewhat turbulent industrial relations history probably only adds to that reluctance to permit employees much latitude.

862. It might be reasonable to suggest an alternative form of employee representation along the lines, perhaps, of the Mines Workman's Inspectors or a similar arrangement. These would be fully trained and provided with specific powers and capacities to inspect. Many variations are possible and these need to be canvassed within the industry by the parties away from the intensity of day-to-day issues. Any reasonable proposals should be considered in that context.
863. A union submission argued that the election of safety and health representatives should be mandatory on all construction sites. While there would be some obvious advantages in this, the practicality of mandatory "volunteers" is questionable. If no one will stand or the nominated person does not understand the role, the situation could worsen not improve. Again the issue arises as to what stage of the construction project should elections be held and should the representatives change when employees change? However, it should be considered within the context of other options so that an effective set of outcomes can be developed.
864. It is also reasonable to give consideration to an extended role for construction industry Inspectors and Regulations to make the industry safer as well as more codes and advisory guidelines. The industry's willingness to train both by way of compulsory induction training and perhaps, safety and health representative training suggests that training can be further developed. This would also provide the union with a pro-active rather than re-active role.
865. The Construction Industry Safety Advisory Committee established under the auspices of the WorkSafe Commission is ideally placed to consider alternative mechanisms that might be developed and implemented. It should be directed to work on the issues with a view to developing suitable options. If it is unable to develop options, the Department should undertake the work and report with recommendations to Government. Ongoing performance evaluation should also be introduced to indicate any bottlenecks or deficiencies in the processes.
866. After improvements have been put in place, it would be reasonable to expect all parties to meet a code of standards of workplace behaviour with a rapid response capability to deal with any safety disputes. These would help separate safety from "industrial" issues and remove industrial relations outcomes from safety matters. Misconduct outside of the accepted arrangements by any party should not be tolerated because it will inevitably result in a breakdown of the safety and health protections.

867. Specific measures could be implemented in that regard to address such issues including improving the mechanisms for providing evidence to the Industrial Relations Commission and for enhancing its authority to issue enforceable orders. Specific provisions could perhaps be introduced in relation to alleged workplace safety and health disputes to ensure that they cannot be used as additional leverage and, if they are, to ensure that specific remedies be available. Development of an effective substitute for s.28A would assist in that regard. The legislation of other States should also be reviewed to establish whether initiatives could be adopted in Western Australia.
868. Above all, employees and their unions should be encouraged to ensure that the processes work effectively because it is their workmates and members who will otherwise be injured or killed. That will require discipline and commitment. As a consequence there also needs to be a capacity for the union to communicate any concerns it has to the industry for attention so as to avoid the need for on-the-job industrial action. There needs to be an effective circuit breaker to ensure there is no resurgence of past conflict which has hindered rather than promoted workplace safety.

R:64 It is recommended the WorkSafe Commission, through its Construction Industry Safety Advisory Committee, develop options for legislative change to address the unique requirements of the construction industry in respect of occupational safety and health.

6.1.3.2. Agriculture

869. The Agriculture industry does not suffer some of the organisational difficulties of the Construction industry but as noted has similar problems with short term work arrangements, resources and communications. It suffers particularly from its isolation and the fact that the predominance of employers are in the category of very small business. Some earlier arrangements have also led to difficulty. While for example, the “FarmSafe” program was initially closely linked to farming organisations, there was some disagreement and now there is inadequate communication between some farming organisations and FarmSafe.

870. It is clear that farmers and farming organisations have great concern that farmers are vulnerable to prosecution and that communications with WorkSafe and the Commission are believed to be inadequate. A proposal that communications be arranged under a zone system suggested by a farm organisation is designed to ensure that businesses within the particular zone are informed and advised of WorkSafe activity including inspections arranged for the area. It was submitted that farmers do not expect to be exempt from inspection, however, they need to be informed of the priorities and requirements.
871. That concern derives from the wide ranging nature of farming and the need for farmers to understand what is expected of them. In many respects they suffer from limited resources and competing priorities for their time much as is the case for most small business. The additional dilemma for farmers is the extraordinary wide-ranging nature of their activities. One farmer commenting on the issue suggested that if every employee were fully trained in every activity there would be no time for work.
872. It was apparent that the claims of the difficulties facing farmers do not take account of some of the protections available under the Act. It appears, for example, that little attention had been given to the “reasonably practicable” context of the legislation. Where it was considered, it was argued that there was some justification for pessimism because in the past Inspectors had taken little account of it when inspecting farm operations. However, any operation needs to be seen within its own contextual environment and the low level of prosecutions suggests that the Inspectorate does not make a point of specifically targeting the industry. Instead the evidence suggests WorkSafe deals with concerns in the same way as in other industries and has attempted where necessary to inform and to educate.
873. While it is not considered that a specific recommendation is warranted in relation to the Agriculture industry, both the Commission and WorkSafe should continue to ensure communications with the industry are kept open. The recent establishment of an Agriculture Industry Safety Advisory Committee by the Commission is a positive step in this regard. In addition the concept of organisation of occupational safety and health initiatives at the zone or regional level is commended for consideration and development. It would appear such an approach might provide a catalyst for ongoing education and support in the industry.

6.2 Safety and Health Magistrates

874. All judicial and quasi-judicial functions relevant to the operation of the Act are heard by Safety and Health Magistrates established in *Part VIA* of the Act. By virtue of *s.51B* of the Act, Magistrates appointed under the *Local Courts Act 1904* are also appointed Safety and Health Magistrates. Safety and Health Magistrates hear prosecutions under the Act as well as dealing with disputes and further reviews against certain administrative decisions of the Commissioner (see *s.51C*). Matters arising under the Act are allocated to Safety and Health Magistrates at the discretion of the Chief Magistrate. There are no “specialist” Safety and Health Magistrates. Instead matters are allocated in the normal way and may be heard by any Stipendiary Magistrate.
875. Some submissions argued that a specialist Safety and Health Tribunal should be established to hear all matters under the Act. It was argued Local Court Magistrates, whilst familiar with the law, were not focused on workplace issues generally and the objects and philosophy of the Act in particular. A specialist Tribunal comprising a specifically appointed Magistrate and “lay” representatives of employers and employees is seen by some as offering a higher level of understanding of the Act and its underlying duties. It was submitted that it would also result in greater consistency in judgements and in penalties that better reflect community attitudes.
- The number of prosecutions mounted by WorkSafe and heard by the Safety and Health Magistrates is not large. Recent statistics are outlined in the Table 2 below.

Table 2

Prosecutions – WA 1998/99 – 2000/01	
Year	Prosecutions
1998/99	65
1999/00	56
2000/01	37
2001/02	55

Prosecutions Authorised by WorkSafe
Source: WorkSafe Western Australia Annual Report 2001/02

876. The number of administrative matters dealt with by Safety and Health Magistrates is even smaller than the prosecutions. In 2001/2002 there was one request to a Safety and Health Magistrate to further review an improvement notice under *s.51A* of the Act. The Safety and Health Magistrate affirmed the notice. One application was also lodged under *r.2.16* for a Safety and Health Magistrate to review a decision made by the Commissioner under the Regulations. The application was subsequently withdrawn. There were also few cases in earlier years.
877. In considering the jurisdiction of Safety and Health Magistrates, it is also important to distinguish between the issues associated with prosecutions and other matters. Concerns relating to low penalties imposed by the Courts have led many to propose the establishment of a dedicated Tribunal to deal with all matters under the Act including prosecutions. However, that does not seem to be a substantial basis for the creation of a new specialist body. The numbers alone do not justify such a step. The participation of “lay” representatives in a judicial process would also be problematic and the costs of establishing and maintaining a specialist Tribunal would be high.
878. The magistracy remains the appropriate place for prosecutions because these matters are clearly judicial and should be dealt with in the Courts. They also have significant potential punitive consequences and the application of legal principle should be maintained.
879. Not all prosecutions should necessarily continue to be heard by a Safety and Health Magistrate, however, as there is a range of matters discussed earlier in this Report which should involve indictable hearings before superior Courts¹¹³. The specific concerns over the penalties issued by Safety and Health Magistrates are also better addressed in other ways as outlined in Parts 3 and 4 of this Report.

6.2.1 Administrative Review and Appeals

880. While there are good reasons why offences should continue to be dealt with by the Courts, the rationale for Courts to deal with merit reviews and administrative “appeals” is far more difficult to justify.

¹¹³ See R:31

881. Whereas a prosecution is clearly a judicial matter to be decided according to the rules of law and evidence, administrative appeals and disputes resolution are also concerned with judgements about “merit” issues and in this case, other issues such as technologies and the assessment of risk. Matters of this kind currently referable to a Safety and Health Magistrate include:

- disputes over entitlements where a worker refuses to perform unsafe work (*s.28*);
- unresolved matters concerning the election of safety and health representatives (*s.30(6)* and *s.31(11)*);
- applications for the disqualification of safety and health representatives (*s.34*);
- disputes over the entitlement of safety and health representatives to time off work to undertake their duties or attend accredited training (*s.35(3)*);
- unresolved matters concerning the establishment of safety and health committees (*s.39*); and
- further review of a review of a notice by the Commissioner (*s.51A*).

882. A specialist review authority may more effectively deal with these appeals and hearings.

883. Appeals from the decisions of the WorkSafe Western Australia Commissioner on matters such as the review of improvement and prohibition notices under *s.51A* go mainly to the facts of the relevant matter and the desirability or otherwise of the particular action. Each is intimately connected to safety and/or health at the particular workplace. Similar considerations apply on whether a safety and health representative should be disqualified (*s.34*) or on the composition of a safety and health committee (*s.39*). A Court is not always best equipped to deal with these matters which can also be complex and lengthy.

884. While the magistracy has undoubted legal and other experience, it is not a specialist safety and health body. Therefore, it also seems inappropriate to ask a Magistrate to correct or to amend a decision of the WorkSafe Commissioner who has been appointed at least in part on the basis of expert knowledge.

885. It is also incongruous that decisions of the WorkSafe Commissioner, who is appointed at a very senior level, are reviewable in the lower Courts on matters of merit. In that regard the status of the WorkSafe Western Australia Commissioner, WorkSafe itself and occupational safety and health generally could be diminished. To be seen as subservient does not establish the image necessary to authoritatively promote occupational safety and health as an issue of major importance.

886. As well, the Local Courts are not necessarily able to respond quickly in the resolution of disputes. This can be a major disadvantage where the issue might involve an immediate and serious safety issue or a matter of great cost for an employer.
887. The Chief Magistrate, among other observations, informed the Review that the jurisdiction of Safety and Health Magistrates under *s.51C(1)(a)* has not been widely used. These matters are normally allocated to a Magistrate sitting in a Local Court and can present a problem in that, for both practical reasons and to satisfy the Act, they must be heard “as quickly as practicable”. It was noted that the issues involved can be quite lengthy and it is not possible to allocate what may be a multiple day trial without canceling other matters that may have been set down for some time. While the small number of matters arising under the Act has enabled the Court to deal with these inconveniences, an increase in activity would create difficulties.¹¹⁴
888. The ideal structure would appear to be a new specialist Tribunal but despite the attractiveness of that proposition, and as noted earlier, the very low level of appeals and other activity also means that it is simply not justified.
889. Prior to 1995 “appeals” (reviews) against administrative decisions of the WorkSafe Western Australia Commissioner were heard before the Western Australian Industrial Relations Commission (WAIRC). There were no problems apparent in the discharge of this function by the WAIRC prior to 1995 and the reasons for the legislative change other than the mix of industrial with occupational safety and health issues were unclear. The WAIRC was well placed to deal with unresolved matters arising out of the administration of the Act and its structures and procedures enabled disputes to be quickly heard. The WAIRC also had the experience and expertise to consider the merits of issues where the law was not prescriptive.

¹¹⁴ Chief Magistrate, Reply to enquiry by Fielding SC (2001)

890. It is acknowledged that concern has been expressed, particularly on the part of some employers that appeals and reviews heard by the WAIRC would be seen as, or could gain the flavour of, “industrial relations” issues. This was strongly emphasised by employer representatives. In most cases, these strongly objected to any situation where there was a mix of industrial relations and occupational safety and health. They did not agree that a specialist Tribunal derived from the Western Australian Industrial Relations Commission would resolve that issue. Instead it was argued that it would be perceived as an industrial relations structure and would undermine occupational safety and health processes that have been successfully established. While it is accepted that it is appropriate that any Tribunal hearing matters under the Act should have some specialist knowledge and be able to respond quickly to applications, they argue it should not have any industrial relations connection.
891. Some submitted that existing structures within the construction industry in particular are not consistent with the Industrial Commission dealing with matters because of the history of strike pay claims. It was argued the Industrial Commission had not prevented strike activity being disguised as lost time related to occupational safety and health to in order to justify payment. In that circumstance, it was argued that the companies concerned had been placed under intolerable pressure and in effect were forced to comply. It was submitted that no such claims have been made to the Safety and Health Magistrates.
892. It is plain that the construction industry has some different characteristics as compared to industry, some of which is due to the transient nature of each construction job. Not only do the problems of consistent and effective safety and health representation arise but it is also clear that large and expensive jobs, undertaken within a very short time frame and often under difficult environments create numerous difficulties additional to those faced by industry generally. The industry is vulnerable to short term decision-making which may be inimical to the longer-term interests of the industry and its employees.

893. While concerns have been directed at the Industrial Relations Commission, it is clear that in many instances the industry participants themselves were not prepared to stand against inappropriate claims but expected the Tribunal to do so on their behalf. There are past examples of the Industrial Relations Commission taking firm action in the construction industry only to have those actions subverted through concessions once peace had been established. In such cases, the Industrial Relations Commission could be reluctant to take action in the face of subsequent concessions by employers. Where employers in other industries might well resist claims they believe are excessive, many construction industry employers will comply in order to get the job done.
894. Both employees and employers find that references to safety and health is effective and others can be blamed for the failures. Clearly, if construction industry employers consistently resisted, the inappropriate claims would fall away. Equally clearly, if safety and health issues did not arise, there would be no basis for claims nor would employees be in a position to accept or to claim payments as a compromise for improved safety and health.
895. There are also a number of reasons why claims may not have been put before the Safety and Health Magistrates other than those referred to in submissions including the form of application, hearing process and time constraints.
896. In light of all the foregoing, the best option remains the creation of a low cost specialist Safety and Health Tribunal empowered to deal with administrative issues arising under the Act. Earlier it had been considered that appointment to the Tribunal should be from among members of the WA Industrial Relations Commission. The Minister would have made these appointments in consultation with the Chief Commissioner. The appointment would be on the understanding that occupational safety and health duties would take priority over other normal duties. It would operate in similar fashion to a number of specialist Tribunals that are required only for limited periods but must be readily available, have some expertise and be independent. Both consultation and appointment by the Minister would provide the opportunity for the most suitable appointments to be made. This was considered to be the most cost efficient option because the Tribunal would sit only as required and the members would otherwise continue to function as usual. It would relieve the Local Court of the work.

897. It is apparent, however, that many were unable to accept that the role would be seen as different in the community and argued that it would be inevitable that matters would take an industrial flavour. While I consider these views to be incorrect, it is clear that they are strongly and genuinely raised.
898. On 4 July 2002 the Attorney General announced the formation of a State based Administrative Appeals Tribunal which, it appears, will operate in a similar way to the existing Federal Administrative Appeals Tribunal. Providing it is able to fulfill the role proposed for the recommended Occupational Safety and Health Tribunal, the Administrative Appeals Tribunal would be an appropriate Occupational Safety and Health Tribunal once it gained occupational safety and health expertise. It would also be consistent with the Attorney General's objective of consolidating administrative appeal functions.
899. It appears that occupational safety and health is an administrative matter that should go before such a tribunal in the normal conduct of Government activity. In that respect it is noted that it is also broadly consistent with the submissions and views of most parties.

R:65 It is recommended the Act be amended to provide for a specialist Occupational Safety and Health Tribunal to deal with all non-judicial matters. The Minister could appoint the Tribunal as part of the State Administrative Appeals Tribunal recently announced by the Government or in the alternative the tribunal could be formed from the Western Australian Industrial Relations Commission after consultation with the Chief Industrial Commissioner. The Tribunal should deal with occupational safety and health matters as a priority and have alternative duties when not functioning as the Occupational Safety and Health Tribunal.

6.3 Regulations

6.3.1 Role of Regulations

900. A small number of submissions addressed the role of regulations, codes of practice, guidance notes and standards. Although these varied, most submissions indicated concerns about the availability, the access and the volume of material. Some went to the specific detail of regulations although, in the main, those issues do not impact on the Review and will be forwarded as appropriate to WorkSafe and the Commission for further inquiry.
901. The Robens Committee's approach, with its focus on self-regulatory processes, placed emphasis on the use of codes of practice and guidance notes in preference to the prescription of formal regulations. The Robens position is clear,

“Regulations which lay down precise methods of compliance have an intrinsic rigidity, and their details may be quickly overtaken by new technological developments. On the other hand, lack of precision creates uncertainty. This is a problem to which our attention was repeatedly drawn during the course of the Inquiry. The need is to reconcile flexibility with precision. We believe that, wherever practicable, regulations should be confined to statements of broad requirements in terms of the objectives to be achieved. Methods of meeting the requirements may often be highly technical and subject to frequent change in the light of new knowledge. They should, therefore, appear separately in a form which enables them to be readily modified.”¹¹⁵

902. It is doubtful whether the Western Australian occupational safety and health system fully embraced the Robens view of regulations. The 1992 Report summarised the prevailing direction as,

“It follows that if the regulations are to give effect to the purposes of the Act, they should underpin the general duty of care approach contained in the Act. That is, they should be consistent with the duty of care obligations, general in their application although specific in expression and should provide broad but minimum standards where standards are necessary.”¹¹⁶

903. The initial amalgamation of regulations that occurred in 1987/88 and the review that culminated in 1996 saw a substantial body of regulations remaining central to the practice of occupational safety and health.

904. In the present Review a major employers’ group has suggested:

“... while on the surface it may appear that there has been a substantial move towards performance-based regulation of occupational safety and health, at a fundamental level this is not the case. In fact, the body of law relating to occupational safety and health is actually increasing and the inherently desirable aspects of self-regulation are gradually being lost rather than enhanced.”¹¹⁷

905. Those comments reflect other views that a gradual process of re-regulation is taking place. It was also submitted that the recent review of the legislation in the United Kingdom¹¹⁸ is in part designed to address the same issues and to clarify and modernise with simple, clear and relevant guidelines.

¹¹⁵ Robens (1972) para 138

¹¹⁶ Laing (1992) p228

¹¹⁷ Chamber of Commerce and Industry of Western Australia, Submission (2001)

¹¹⁸ Department of Environment, Transport and the Regions (UK) (2000)

906. A review of the material suggests that the prevailing attitude is that some measure of prescription is important for ensuring occupational safety and health. This view holds that the Robens self-regulatory approach, in effect, is incomplete because it relies on the full co-operation of parties in the workplace and, because of other demands, that is rarely the case.
907. In circumstances where self-regulation is not operating effectively, the absence of regulations – with specific, prescriptive requirements – can enable participants and especially employers to ignore their obligations. Self-regulation without control can mean no regulation. Secondly, while alternatives to regulation such as codes of practice and guidance notes provide flexibility in outcomes, they can engender confusion and uncertainty over required minimum standards. Many especially small employers, continue to express a preference for the certainty of a prescriptive approach over the more modern instruments.
908. There seems little argument that for cases where the risks and appropriate control measures associated with standards for a specific hazard are well known and accepted or where it is necessary to protect the public, regulations should specify prescriptive minimum standards. This kind of regulation acts to provide clear guidance (in a self-regulatory context) as to the minimum action that must be taken in relation to the hazard. They also provide a means of forcing the uncommitted and the unwilling to take required action.
909. This modification of the Robens model is the approach to state intervention on occupational safety and health adopted in practice, to varying degrees, in all Australian jurisdictions. There also appears little reason for this to change while the Robens model is not fully implemented in workplaces. This is not to say there should be an ever-increasing level of regulation. As noted in the quote referred to earlier, there is already a substantial body of regulation which, when combined with codes of practice, Australian standards and guidance notes is difficult to absorb.
910. While there is an important role for regulation, it is also imperative regulations only be used where the level of risk and knowledge of control measures warrant it. The views of the Robens Committee remain pertinent in this regard,

“We have advocated that statutory regulations should be simpler in style and that the procedure for formal consultation on regulations should be less cumbersome. We go further than this. We recommend that in future no statutory regulation should be made before detailed consideration has been given to whether the

objectives might adequately be met by a non-statutory code of practice or standard.”¹¹⁹

911. For hazards where the associated risks or the means of controlling the risk are not clear-cut, codes of practice and guidance notes remain the most effective instruments for assisting workplaces to address hazards. These instruments have much greater flexibility than regulations in providing up-to-date and relevant information on existing and emerging hazard identification and risk control strategies. The Commission in that respect has usually proven itself to be effective in producing practical guidance in the form of codes of practice and the like.
912. Nonetheless, the Commission’s regulation review processes should continue to rigorously test the need for each existing and proposed regulation and where possible codes of practice or other non-statutory instruments should be used. Codes and the like should also be reviewed regularly to ensure they remain relevant. For example, a submission pointed out the existing Code relating to excavation was now in need of review. Plainly, as the Robens model is more fully adopted in the workplaces of the State, more regulations can be removed.
913. It is also desirable that the Regulations be practical and relevant to the workplaces they are designed to control. Some submitted that industry should be consulted to ensure not only the necessity but also the relevance of particular Regulations. Where practicable, and in order to optimise the Regulations and to increase compliance with them, it should be the case that the industry or the interest group concerned is consulted. It is also important that Regulations either be enforced or be dispensed with as they otherwise could lead to a false perception of security. Recent events in Western Australia demonstrate that the community was put at risk notwithstanding existing regulatory requirements.
914. A submission proposed that an existing code of practice in relation to first aid material should be a regulation because of the requirements that material be available in an emergency. That will be forwarded to the Commission for specific consideration because the point is relevant. There needs be careful consideration, under various criteria, by an expert committee as to whether an issue is most appropriately dealt with by way of regulation, a code of practice or other instrument.

¹¹⁹ Robens (1972) p142

915. The capacity for particular industries to develop codes of practice for approval by the Commission should continue to be supported provided these are of benefit to the community rather than merely providing profit to the proponents. Standards generated within an industry are likely to have a high degree of “ownership” and therefore to be effective. Provided they can be readily available, relevant and low cost, the Commission should utilise the resources available to produce as many codes as are necessary. In that regard, a number of submissions argued the Commission should liaise more effectively with interested parties and individuals in developing codes¹²⁰.
916. It is, however, imperative that codes are generally available and that the community understands and knows where to obtain free or low cost copies. As recommended¹²¹ an information service should be established to provide these as well as through the WorkSafe Internet site.

6.3.2 Australian Standards

917. A particular issue associated with the Regulations is the referencing within the Regulations of Australian Standards, issued by Standards Australia and National Standards, issued by the National Occupational Safety and Health Commission. Australian Standards are technical advisory instruments providing very detailed guidance on a range of occupational safety and health issues. It appears, however, that the status of these standards as providing minimum or optimum guidance has never been determined.
918. There are 56 Australian Standards referenced in the Regulations (see *Schedule 1* of the Regulations) with many of these referring to other Standards that may be relevant. *Regulation 3.2* requires an employer or main contractor to enable employees to peruse a copy of the Act, the Regulations and all Australian Standards and NOHSC documents referred to in the Regulations, and relevant codes of practice etc that apply to the workplace. Copyright requirements prevent the reproduction of Standards and, if required, all must be purchased separately. That can involve considerable cost.

¹²⁰ See R:78

¹²¹ See R:71

919. In 1997 Labour Ministers agreed to remove referencing to Australian Standards in occupational safety and health regulations. In some jurisdictions this was pursued vigorously, whilst in others, including Western Australia, relatively little progress has been made. It is recognised that removing references to Australian Standards is difficult in the absence of alternative authoritative sources of technical information. In that regard the National Commission has been unable or unwilling to take up the task of developing suitable standards to take the place of the referenced Australian Standards.
920. The Commission however, should establish a policy of minimising unnecessary referenced material and it should ensure that material can be made available, so far as is possible, at no or little cost. While the Commission advised that it has adopted a policy in relation to this issue, it needs now to develop the processes to implement the Ministers' decision.
921. WorkSafe observed that before removing the standards, replacements would be required. A union opposed the proposal for similar reasons as it was concerned that with the removal of the "standards" that the field would then be de-regulated because necessary alternatives may not be developed. WorkSafe also submitted that existing codes may not be adequate for enforcement purposes and that as a result there may be a need to vary the role of codes of practices so that they may be used in evidence for some purposes.
922. The issues raised would require the Commission to consider the implications of each standard that is to be considered for removal. It may also call for consideration of a regulation or detailed code in specific instances. If the concerns of WorkSafe have significant safety implications it might call for a particular or unique response. However, there would be a need be consider all the implications before altering the role of codes of practice, particularly in respect of their legal standing.

R:66 It is recommended the Commission and WorkSafe implement the Labour Ministers' agreement to reduce the number of Australian Standards referenced in the Regulations. It should minimise unnecessary reference material and make essential material freely available to the community or at minimum cost so that there is no misunderstanding of the existing minimum requirements.

6.4 Data Sources

6.4.1 Background

923. The availability of reliable and up-to-date information on the incidence and characteristics of occupational injury and disease is essential for the effective operation of the Commission and WorkSafe. All involved in the occupational safety and health system need access to statistical information that measures outcomes and identifies emerging trends.
924. Over the last decade there has been significant development in the scope and quality of occupational safety and health data and WorkSafe has been at the forefront of efforts to set national standards for data collection and the publication of statistical information. As recommended by the 1992 Review, WorkSafe and WorkCover WA also collaborate in the collection, analysis and dissemination process. Both organisations publish statistical information in print and on the Internet. It is also proposed in this Report that further collaboration on data should occur between WorkSafe and WorkCover WA.¹²²
925. There is scope and the need to further enhance the use of statistical information and build on the existing data collections. Achieving this improvement will require better use of existing data, improving data collection systems and development of new data sources. As noted earlier, much can be done with the existing data and better co-ordination and co-operation in using existing sources is a relatively low cost way of enhancing the statistical information. New collections, which may become necessary in the future, will have significant associated costs and are discussed later in this Report.
926. The two main sources of occupational safety and health data in Western Australia are fatality, injury and disease notifications to WorkSafe and claims for workers' compensation. In both cases, occupational safety and health data is derived as a by-product of the operation of other systems.
927. Fatality, injury and disease notifications are discussed in some detail in section 4.3.5 of this Report.

¹²² See R:25

6.4.2 Workers' Compensation Data

928. Data derived from workers' compensation claims is the primary source of occupational safety and health data in Western Australia (and all Australian States). The data collection process involves the recording of summary information for each claim for compensation made under the *Workers' Compensation and Rehabilitation Act 1981*. Insurers provide the source data to WorkCover WA where the summary data is recorded according to various standards including the *National Data Set for Compensation-based Statistics* (NDS) issued by the National Occupational Safety and Health Commission (NOHSC)¹²³.
929. On the basis of a formal data sharing agreement, WorkCover WA periodically provides WorkSafe with extracts of claim data to enable statistical analysis for research and planning purposes as well as the publication of relevant reports. As part of the data sharing agreement, the data provided to WorkSafe does not disclose the identity of injured workers.
930. In recent years there has been considerable public discussion of the limitations of workers' compensation-based data in terms of both quality and scope¹²⁴. However administrative and technological improvements involving insurers and WorkCover WA have considerably improved the quality of data derived from the compensation system in this State. These improvements and the relative stability of the insurance and benefit structure of the State's compensation system have engendered a high degree of confidence in the reliability and relevance of compensation-based occupational safety and health data in Western Australia. A summary of recent trends in this data is provided elsewhere in this Report.¹²⁵
931. The usefulness of the workers' compensation-based data, however, must be tempered by recognition of its limitations. These include:
- lack of coverage of some workers, particularly the self-employed;
 - lack of coverage of occupational diseases;
 - the limited range of data collected in respect of each claim; and
 - inconsistent recording of work-related fatalities.

¹²³ See NOHSC (1988)

¹²⁴ See for example Bohle and Quinlan (2000) p35-8

¹²⁵ See section 2.8

932. In addition there are also questions about the reliability of the data as the most accurate way of measuring occupational safety and health incidents. As a consequence of, among other things, increasing insurance costs there appears to be a small but growing trend towards employees choosing to make fewer compensation claims in relation to relatively minor injuries occurring in their workplaces. It appears that employers are meeting the costs associated with these injuries (including wage and medical costs) rather than using the compensation system in order to avoid possible insurance premium increases. In addition, as a result of limits on the amount of weekly benefits payable under the compensation system, some injured workers choose to make use of available sick leave entitlements¹²⁶.
933. Many remuneration packages and performance appraisal measures now also include occupational safety criteria. As a consequence there is increased pressure on executives and supervisors to have a good safety record. Remuneration and reputation are powerful incentives for minimising reports of workplace injury and considerable ingenuity can be applied to ensure that the statistics do not reflect badly on the person or organisation concerned. While some of these are very positive and are derived from enhanced safety awareness of executives who direct safety and health programs and in encouraging rehabilitation, in others it merely reflects a capacity to manipulate the statistics.
934. An extensive consideration of issues associated with the use of workers' compensation-based data can be found in the NOHSC publication *The Role of Workers' Compensation-Based Data in the Development of Effective Occupational Health & Safety Interventions*¹²⁷.

6.4.2.1. Self-Employed Workers and Contractors

935. The compensation-based data does not encompass all work-related injuries and diseases that occur in the State. The exclusion of self-employed workers and independent contractors from coverage under the workers' compensation scheme means that information is not available for approximately one quarter of the workforce. The compensation-based data is also particularly limited in those industries such as Agriculture where the proportion of self-employment is high.

¹²⁶ Under workers compensation entitlements now in force, employees earning more than 1.5 time average weekly earnings do not receive their full pre-injury income whilst on workers' compensation.

¹²⁷ Foley (1996)

936. The emerging trends in employment discussed elsewhere in this Report also indicate the coverage of compensation-based data is likely to be further eroded in the future by trends toward forms of employment that are outside the scope of the workers' compensation system. As with other aspects of the changing labour market, there are no immediately obvious solutions to that problem. There are no existing administrative systems that could give data on injuries and diseases amongst the self-employed. Potential sources of information such as the health system, private insurers and broad-based surveys would be costly to access and may not be able to produce reliable results.

6.4.2.2. Occupational Disease

937. Workers' compensation-based data is limited in its coverage of occupational disease and only those diseases having a clear and unambiguous relationship to work are covered. The key difficulty lies in determining whether and if so to what extent disease is actually work-related. It may be difficult to identify or to quantify occupational causal factors for many diseases even though they may be present. Some diseases may also involve long latency periods during which the link to work is lost or difficult if not impossible to prove.

938. These factors act as barriers to the lodgment of successful workers' compensation claims for disease with the disease usually treated as part of the broader health system. The cost implications however are obvious and lead to criticism by researchers that the most significant work-based problems are hidden from scrutiny.

939. While the limitations of compensation-based data for identifying and monitoring trends in occupational disease has long been understood, no effective alternative data sources have yet been developed. Other data sources are equally susceptible to the "uncertain aetiology, potential non-occupational causes that are difficult to exclude, long latency periods, and/or uncertain diagnostic criteria"¹²⁸ that affects compensation-based data. Only a major investment in research will throw more light on the impact of work-related disease in the workplaces of the State. This is discussed further at section 6.4.4 of this Report.

¹²⁸ *ibid*

6.4.2.3. Data Collection

940. As noted, the range of data collected for each workers' compensation claim is determined by the *National Data Set for Compensation-Based Statistics* (NDS) originally adopted by NOHSC in 1988. The NDS has been adopted by all jurisdictions as a means of promoting the collection of nationally comparable data on occupational injuries and disease. The NDS uses a number of standard classifications for data items. The data items were selected on the basis of balancing their usefulness, the availability of source data and the cost of collection.
941. While existing data items provide a good summary of characteristics of the injured person, the employer, the nature of the occurrence, and the outcome, there are many significant items that are not collected. Examples include training received by the injured worker, job experience, level of supervision, time at work before the occurrence, weather factors, ethnicity, etc. The NDS is regularly reviewed by NOHSC, most recently in 1999, with no significant increase in the range of data items.
942. Given the wide consultation that has occurred in the development of the NDS, it would seem impractical for one State to significantly extend the range of data beyond the items already collected. The addition of further data items would be costly relative to the benefit obtained and without widespread support from other jurisdictions it may not be practicable.
943. An alternative to extending the data available would also be through surveys of injured workers and their employers using the claim data as a base. WorkCover WA has the information to facilitate surveys of workers who have suffered a particular type of injury to collect relevant detailed additional information. Surveys could address questions where there is no data collected, such as training, experience and supervision. Data could be collected on specific areas of interest such as assessing the training received by young workers injured at work, without the requirement to change or add to the NDS reporting requirements. Cost in such cases, although significant, would not be prohibitive. Moreover, other States could be encouraged to participate and a national picture could gradually be developed. National co-ordination would clearly be the optimum course to follow.

944. While privacy and confidentiality in the WorkCover WA data need to be respected, the difficulties are not insurmountable. Research and ethical protocols could be developed to ensure the research is properly conducted. Any legislative amendments to the *Workers' Compensation and Rehabilitation Act 1981* regarding constraints on the use of data in this way could be developed in tandem with changes to the *Occupational Safety and Health Act 1984*. These should be addressed at the earliest opportunity.
945. An employer organisation opposed any extension of workers' compensation data for these research and inspection purposes. This highlights the need for sensitivity and protection of confidential information although the information gained would be no different from that already collected in other States without compromise to privacy. The situation in Western Australia differs from other States which have combined workers compensation and safety regimes.
946. While it is accepted that workers compensation data is collected for the purposes of workers' compensation administration not for injury prevention, if the data can be used in a way that reduces injury it will serve both purposes. Providing confidentiality is protected, there seems no fundamental reason why the material should not be used.

6.4.2.4. Data - Work-Related Fatalities

947. The limitations of workers' compensation-based data are particularly relevant to efforts to monitor the incidence and characteristics of work-related fatalities. WorkSafe data indicate approximately 15% of work-related fatalities occur to self-employed persons and others (students, bystanders, etc) who are not covered by the workers' compensation system and not included in WorkCover WA data on compensated fatalities. The workers' compensation-based data on work-related fatalities also includes fatalities that, while compensated, are not necessarily directly related to work or workplace hazards (e.g. heart attacks at work, some road traffic and aviation accidents).
948. In the light of these limitations, WorkSafe has published separate statistics of work-related fatalities. WorkSafe statistics for example, have included those compensated fatalities considered to be directly related to work as well as other traumatic work-related fatalities, such as those involving self-employed persons of which it becomes aware.
949. Statistics on deaths associated with occupational disease are not reported by either agency.

950. The available data on work-related fatalities will be significantly enhanced as data become available from the National Coroners' Information System (NCIS) being established by the Monash University National Centre for Coronial Information (MUNCCI) on behalf of the Australian Coroners' Society. This system is a national Internet-based data storage and retrieval system for all coronial cases in Australia. The objective of the data collection is for more timely and efficient access to coronial data through the NCIS which should contribute to a reduction in preventable death and injury in Australia. NOHSC has made a substantial commitment to the NCIS as a source of quality data on work-related fatalities. It has developed an occupational safety and health module to be used to capture relevant information from coronial investigations of work-related fatalities.
951. The process by which WorkSafe identifies and classifies non-compensated traumatic fatalities has been a matter of some contention that WorkSafe has addressed through the publication of an *Information Paper on Recording of Traumatic Work Related Fatalities*.¹²⁹ This paper describes the categories of work-related fatalities recorded by WorkSafe and explains the process by which recording decisions are made.
952. The WorkSafe and WorkCover WA information systems relating to work-related fatalities have also been recently reviewed. While this review will lead to improved co-ordination and communication between the two agencies on the recording of work-related fatalities, both will continue to publish separate statistics reflecting their particular policy obligations. This approach should ensure the continued availability of consistent and comprehensive data on trends in the incidence of work-related and compensated fatalities.¹³⁰

¹²⁹ WorkSafe Western Australia (2000)

¹³⁰ See also section 4.3.5

6.4.3 Dissemination of Statistical Information

953. In 1990 WorkSafe commenced publication of statistical reports in the form of the *State of the Work Environment* series. The Workers' Compensation and Rehabilitation Commission funded this series for a number of years. Some thirty-seven reports have been issued, the last being in 1999. The reports covered topical issues as well as annual reports of outcomes. Additional information is published on the WorkSafe Internet service "SafetyLine".¹³¹ In 1999 WorkCover WA assumed responsibility for publication of an annual report on both workers' compensation and occupational safety and health data. Four publications of WorkCover WA's *Workers' Compensation Statistical Report* have been released, the latest in August 2002. WorkCover WA has also published reports on claims by female workers and on work-related stress.
954. There has been a reduction in the amount of statistical information being published in recent years. Apart from publication of the major industry performance indicators on its Internet site, WorkSafe has not printed any statistical reports since 1999. Publicly available analysis of occupational safety and health outcomes in major industries is now considerably out-of-date as is information on major hazards. This information is important to industry bodies, training institutions and industry itself in maintaining awareness of current occupational safety and health outcomes and issues. There is an increasingly urgent need, therefore, to reinstate the priority previously attached to the publication of the statistical information.

R:67 It is recommended WorkSafe recommit to the production and publication of statistical information on the incidence and characteristics of occupational safety and health in Western Australia.

R:68 It is recommended WorkSafe and WorkCover WA jointly develop a program for the publication of occupational safety and health statistical information.

955. While the comments by WorkSafe that it produced and published information are accepted, it is necessary to ensure that these continue and in some respects are enhanced. In light also of the foregoing there is some suggestion that the Department is not placing the same emphasis on that material as it has in the past. As it is critical information it is essential that it be continued and it is not unreasonable to expect the organisation periodically to review and to recommit to such an important activity.

¹³¹ See <http://www.safetyline.wa.gov.au/sub10.htm>

6.4.4 Alternative Data Sources

956. Notwithstanding limitations in coverage and scope, it is clear that compensation-based data will continue to be the primary source of information on trends in occupational injury and disease in Western Australia. The existing limitations are the result of fundamental aspects of the compensation system that are unlikely to change quickly. Overcoming the weakness of compensation-based data will require the use of alternative data sources that address specific occupational safety and health issues.
957. In that regard, a number of those contributing to the draft report, including medical practitioners, proposed a variety of alternative measures of workplace injury and health incidents. Perhaps one with the most potential is a requirement that all injuries rather than time losses should provide the fundamental unit of measure. That would avoid some of the existing difficulties with lost time statistics although it would also present other difficulties.
958. It is noted that the National Occupational Health and Safety Commission (NOHSC) has adopted the development of occupational safety and health data as one of nine key action areas under its National OHS Strategy for 2002 – 2012¹³². Work in this area should include consideration of the most effective means of developing new and existing data sources and performance indicators.
959. NOHSC has undertaken considerable work to identify alternative sources of occupational safety and health data. In Western Australia, sources of occupational safety and health data include by-products of administrative processes such as inspection and enforcement activity, results of health and hazard surveillance projects, data from the health system (especially hospital admissions), and broad-based surveys and research surveys.
960. The Commission has not played a particularly active role in the area of occupational safety and health statistics and statistical research. It would be appropriate for the Commission to take a more pro-active role in identifying priorities for publications and for commissioning research.

¹³² NOHSC (2002)

961. Building industry representatives observed that there should be a more rigorous evaluation of material in the building sector to establish differences between residential and commercial building activity. It was argued that there is a discernable difference that will have implications for those involved in each sector. In 2002 the Commission established the Performance Measurement in the Construction Industry Working Party to address these concerns.
962. In commenting on the draft Report, a safety industry association again reinforced an earlier submission that more support should be made available for extra mural research.

R:69 It is recommended the Commission take an active role in the development of research, in particular in relation to identifying and developing effective means for establishing or calculating the incidence and impact of workplace injury and ill health beyond the data sources now available. Health issues should be regarded as a priority.

7.0 Education and Community Awareness – Object (g)

7.1 Information and Communication Strategies

963. The seventh object of the Act is,

“s.5(g) to promote education and community awareness on matters relating to occupational safety and health.”

964. The issues arising under this object go specifically to occupational safety and health promotion and education in the community. Information, data and statistics and other related matters that impinge upon promotion and education have been discussed in the previous section. These and a number of other issues touching on Object (g) have also been addressed under other headings and it is not necessary to repeat them here.

965. Dissemination of information and promotion of awareness of occupational safety and health within workplaces and the general community is an important function of WorkSafe. WorkSafe and the Commission both have roles in the area and in recent years have sought to co-ordinate their information activities¹³³. For its part, WorkSafe has pursued three main information dissemination strategies in recent years:

- SafetyLine magazine;
SafetyLine:Online Internet information and education service; and
- ThinkSafe mass media campaign.

966. The use of the various media to promote the WorkSafe message should be the subject of further research. While the present indicators suggest past efforts have been successful, it is not known if they could have achieved even better outcomes. While promotion plainly is the responsibility of WorkSafe, some further independent assessment would also be desirable. If for example the recent improvements in trends in the number of workers' compensation claims can be ascribed to the effectiveness of the various information and education campaigns (e.g. ThinkSafe - WorkSafe, Spot the Hazards... etc) it would provide valuable insights for future activity.

¹³³ See section 8.1.10

967. On the other hand, if the improvements cannot be related to the campaigns it may well mean that the Department could utilise the financial resources on other, more effective instruments. There seems little doubt that some of the improvement has come about as a consequence of increased information being provided to workplaces but how much is not known. Significant funds may be saved by better directing resources to where they are most needed.

7.1.1 SafetyLine Magazine

968. The SafetyLine magazine commenced in 1988 and some 50 quarterly editions have been published. The magazine has been used as a vehicle to promote Commission codes of practice and guidance notes, to highlight emerging issues, to publish safety alerts, and to give publicity to organisations receiving awards under the WorkSafe Plan assessment programme. It is sent to approximately 10,000 workplaces and is the primary way in which WorkSafe communicates with safety and health representatives.

969. WorkSafe is currently reviewing the future role for the magazine based on a survey of readers. It is understood consideration is being given to a range of options including adoption of more frequent newsletter style publications and/or an Internet “e-zine” that would enable more effective targeting of relevant information toward specific groups such as safety and health representatives and industry sectors.

970. Whatever form the magazine takes in the future, it is essential WorkSafe continues to actively disseminate information to key parties in the occupational safety and health system. While information sources such as libraries and online services can meet the needs of those seeking specific information, there will continue to be a need for WorkSafe to bring new information and issues to the attention of those who may not be aware of developments. It is also useful in keeping occupational safety and health high in the public profile. A magazine such as SafetyLine is also a valuable resource for casual readers, workplace visitors and staff personnel who would be otherwise unlikely to come into contact with safety and health material. Spare copies in staff rooms, rest areas and waiting rooms are also frequently perused by people using the facilities who would not otherwise see a copy. While other resources may also be of considerable value, it appears that the SafetyLine magazine has unique benefits that should not be lost.

7.1.2 Internet Information Services – SafetyLine: Online

971. In 1995 WorkSafe made an early commitment to the Internet as a communication and information dissemination medium. All Commission and WorkSafe publications were made available online through the SafetyLine:Online information service (www.safetyline.wa.gov.au). Educational, statistical and administrative information was also published on the service. The service and the “brand name” of SafetyLine have been widely promoted by WorkSafe.
972. WorkSafe received both praise and criticism for its emphasis on the Internet, particularly during the mid-1990s when access to technology was relatively limited and WorkSafe chose to publish some information only on the Internet. In more recent times, however, SafetyLine:Online has become an accepted and more valued part of occupational safety and health in Western Australia, particularly as many businesses including small businesses, which are notoriously difficult to contact, have now embraced the new technologies. It is understood that many employees and safety and health representatives make use of the service. The submissions indicate that it is important that continuity be maintained and that the “brand name” be continued.
973. Some submissions on SafetyLine:Online raised a concern that the commitment to the Internet information service may have diminished because of the reduced publication of new material and the lack of maintenance of existing content. A further concern was expressed that with the integration of WorkSafe into the Department of Consumer and Employment Protection, SafetyLine:Online might be subsumed into a larger departmental web site. This concern went both to reduced access to the existing occupational safety and health site and the disappearance of the name.
974. An examination of SafetyLine:Online appears to confirm that little new material has been added recently apart from Commission codes of practice and guidance notes, and significant incident summaries. In addition, much of the new material is available only by downloading a large document (i.e. a complete code of practice) which may discourage users from browsing the document or locating specific information through the search capabilities of the site. The focus appears to be on using the service to disseminate documents rather than providing information directly. That also has disadvantages where users do not have fast downloading capacities; especially in country areas where other information is also not so readily available.

975. The use of the Internet for the dissemination of occupational safety and health information is now part of the mainstream. Elsewhere in this Report, the problem of the perception of “information overload” on the part of many small and medium sized enterprises is highlighted and the requirement for a “one-stop-shop” approach to the provision of occupational safety and health information is recommended. Online information services must be part of that approach and would be an important component of any Information Plan¹³⁴.
976. In responses to the proposals, UnionsWA submitted that information should be provided in both hard copy and electronically. Housing industry parties suggested that there should be joint involvement in the development and publishing of material. A safety educator argued that more attention should be given to establishing the priorities and that a group should be formed for that purpose.

R:70 It is recommended WorkSafe review and update the SafetyLine information services including the SafetyLine magazine and SafetyLine:Online Internet service with a view to ensuring they remain effective and authoritative sources of information on occupational safety and health in Western Australia.

7.1.3 ThinkSafe

977. Since the mid-1990s WorkSafe has run a series of media campaigns under the theme of ThinkSafe. Television, radio and press advertisements have been used to promote general awareness of occupational safety and health and a practical approach to dealing with hazards in the workplace (i.e. “spot the hazard, assess this risk, and make the changes”). Evaluation of the campaigns indicates the ThinkSafe SAM character and the three-step process associated with the campaign have achieved a high level of recognition amongst targeted audiences.
978. WorkSafe has also run other media campaigns including one promoting the election of safety and health representatives. In 2001 a new direction for ThinkSafe was launched under the banner of “take the next step”. This is focused on small business and provides practical assistance for assessing risks in the workplace together with guidance in eliminating or minimising those risks.

¹³⁴ See R:71

979. The available broad-based and mass media campaigns promoting awareness of occupational safety and health are important. The success of the ThinkSafe campaign could perhaps be developed by a carefully targeted ongoing strategy including measures to reinforce existing awareness and acceptance. WorkSafe should consider evaluating and better linking past to present promotional campaigns to reinforce them and to gain the benefits of existing community awareness.
980. For the reasons outlined earlier, it is also desirable for WorkSafe to give additional support for the wider involvement of small and medium sized organisations in occupational safety and health through co-ordinated processes. That could again involve linking existing programs for that purpose. The submission from a farming organisation which suggested establishing a zone network with local committees as in Queensland should be considered along with other strategies.

7.1.4 Access to Information

981. As noted in section 4.3, the Review received a number of submissions highlighting the difficulty of gaining and maintaining an awareness of legislative and regulatory obligations relating to occupational safety and health. These obligations are built upon the inter-related provisions of the Act, Regulations, Commission codes of practice and guidance notes, National (NOHSC) Standards and Codes of Practice and Australian Standards.
982. Apart from the substantial cost of purchasing relevant instruments, it is sometimes difficult for employers and employees alike to establish what provision of the Act, Regulations and other information is relevant to their workplace or to a specific occupational safety and health issue. One submission suggested the combined volume and cost of information associated with the Act was such that WorkSafe should provide free access to relevant information so that those covered by the Act and Regulations could properly research and identify their obligations in order to fulfil them.
983. It is somewhat ironic that in the “information age”, management, communication and dissemination of information are major issues for regulatory agencies. WorkSafe’s response by innovative use of the Internet in disseminating occupational safety and health information has been widely acknowledged. However, concerns remain that too much time and effort is being used establishing whether there are requirements associated with particular work and, if so, where and what are the particular obligations.

984. With even more information being produced and available for dissemination in the coming years, the challenge is to ensure parties in the workplace know their obligations and are able to access relevant information.
985. WorkSafe does have extensive information resources that are available to the public on request. It is also effective in providing information. Where necessary anyone can access the expertise of inspectors and other staff through telephone enquiries and obtain published information in print and online. The WorkSafe library has an extensive collection of occupational safety and health books, journals and videos and is open to the public. The resources are centralised in the WorkSafe head office however and, with the exception of SafetyLine:Online, it appears WorkSafe has not promoted its information services.
986. Notwithstanding the availability of these resources it is also evident from submissions that many in industry are not aware or do not know how to access them. Some are also intimidated by the volume and complexity of the information and the difficulty of understanding the information.
987. Country people in particular are at a major disadvantage and no doubt that is one reason why compliance levels are often deficient in those areas where inspections are also very irregular.
988. In view of the pivotal role of information in enabling employers and employees to improve occupational safety and health in their workplaces, there is a need for WorkSafe to better integrate and promote its information activities through a dedicated information service. This service should take the form of a high profile “one-stop-shop” for occupational safety and health information. The service should have a strong “user friendly” customer focus and should seek to assist employers and employees to:
- obtain the information needed to establish their legal obligations and rights; and
 - access technical information relevant to specific occupational safety and health concerns or issues.

989. The service should operate as an “information broker” linking people with the occupational safety and health information they need. Particular emphasis should be given to providing access and information to more remote customers unable to visit the facility. The service should make clear to users that it does not include providing risk assessment or technical advice on the particular standards that should be applied to a specific workplace. This is not WorkSafe’s role which is confined to providing the information generally. Detailed assessment of each workplace is the employer’s obligation and where necessary they should use consultants and other service providers.
990. Employees and employers should be able to use the service without the fear of their enquiry leading to an investigation by an inspector. The service should, therefore, be “at arms length” from the inspectorate to overcome possible conflict between enforcement and information roles. As noted earlier, the staff of the service should not be inspectors.
991. In response to the proposals, UnionsWA submitted that public library services throughout the State should also be utilised and information provided through the education system to schools. The Safety Institute of Australia argued that greater publicity should be given to the outcomes of the work.
992. WorkSafe is well placed to develop an occupational safety and health “information plan” based on an assessment of information needs and trends in information dissemination (Internet and print). The “one-stop shop” could be used in association with an information plan to assist parties find information relevant to their occupational safety and health needs. This could also include integration of library services with the current provision of technical information by inspectors and the proposed information service.
993. Adequate financial provision should be made available to WorkSafe to establish and continue the information service.

R:71 It is recommended WorkSafe develop an Information Plan dealing with the development and dissemination of occupational safety and health information. The Information Plan should provide for:

- **the establishment and promotion of a high profile information service to assist the public to access information on safety and health obligations and supporting material;**
- **the continued production of codes of practice and guidance notes having regard to the desirability of using “plain English”; and**

- WorkSafe to continue existing services including distribution of information in print and on the Internet.

7.2 Statistics

994. WorkSafe has produced various statistical and data reports over the past 10 years. Most, including the “State of Work Environment”, have proven very useful for industry and researchers in establishing major issues and assessing future strategy.
995. Statistical and other research should assist in establishing and directing Commission and WorkSafe priorities. In 1999 the Commission commissioned a significant project focusing on both quantitative and qualitative research on workplace change¹³⁵. That research into a very challenging topic has proven useful and similar projects should be encouraged.
996. As noted, however, there appears to have been some reduction in the emphasis given to the production of statistical materials. If the reductions are based on budgetary limitations, the community should be prepared to contribute increases in this area as it could well have considerable value by reducing both injury and disease costs in future. Further discussion on these issues is to be found in section 6.4.3 of this Report.

¹³⁵ See WorkSafe Western Australia Commission (1999a)

8.0 Commission and Department

8.1 Commission

997. The review of the operations of the WorkSafe Western Australia Commission, advisory committees and Department is established under *s.61(c)* and *(d)* of the Act. These require consideration of the effectiveness of those bodies and the need for the continuation of the Commission and advisory committees.
998. A number of observations about specific matters arising from the Commission's responsibilities have been considered elsewhere in the Report under specific activity or topic headings. In this Part, attention is focused more directly on the operation of the Commission itself, although there is of course, considerable crossover.
999. As noted in Part 3, the Review received no submissions proposing the WorkSafe Western Australia Commission be discontinued or subsumed by any other agency or forum (see *s.61(1)(d)*). All submissions referring to the Commission supported its continuation with most arguing that it had been effective. A number of those submissions supported the Commission as the pre-eminent occupational safety and health authority in Western Australia and argued that it should have responsibility for all occupational safety and health legislation and policy. There were, of course, many suggestions for improvement of the Commission and in relation to its activities.

8.1.1 Background

1000. The WorkSafe Western Australia Commission was established in April 1985 (as the Occupational Health, Safety and Welfare Commission) under *s.6* of the then *Occupational Health, Safety and Welfare Act 1984*. The name of the Act and the Commission changed as result of amendments in October 1995.
1001. The Commission is unique in Australia. It has continued as the State's most responsible and authoritative forum for occupational safety and health while similar bodies in other States have disbanded or combined with workers' compensation authorities. There is little doubt the Commission's long existence is a consequence of its effectiveness and status in the community.

1002. The Commission is comprised of a Chairperson appointed by the Minister, members nominated by the peak employer and employee organisations in Western Australia, the WorkSafe Western Australia Commissioner, officers of the Public Service, and members with knowledge and experience in occupational safety and health (“expert” members). Only employer, employee and expert members are entitled to vote at Commission meetings. The Commission has had an independent chairperson since 1996.

1003. Since its inception, the Commission has enjoyed the benefit of having members of significant standing within their constituency or profession. This has added considerably to the effectiveness of the Commission and the broad acceptance of the legislation and guidance material it has produced. The level of representation and direct access to the Minister has also enabled the Commission to make a significant contribution to occupational safety and health in Western Australia.

1004. The comments of a Commission member reinforced an earlier submission that the Commission should have its activity confined to strategic issues only. This would include policy direction and priorities, advice to the Minister and review of policy and draft legislation as well as codes of practice. It was argued that the Commission should not get involved in the detail of legislation or of the production of guidance materials. A more unified structure and relationship with the Department is also supported. Other comments supported the existing structure and arrangements.

1005. Most of the activity of the Commission does include those matters referred to by the correspondent although it is clear that the Commission does undertake other work where it believes it has a role. By and large the Commission appears to exercise appropriate judgement where it ought not involve itself. It has contributed effectively to earlier legislation and has achieved a reasonable level of consensus in a controversial area. In the face of wide support for the continuation of the Commission’s existing role, it would require some strong reasons for change, especially towards a structure that was acknowledged as deficient in the past. While the Commission remains effective, it should be supported.

R:72 It is recommended the Commission be continued and maintain its role in improving occupational safety and health in Western Australia.

8.1.2 Functions

1006. The Commission's functions are established in *s.14* of the Act and can be summarised as:

- provision of advice to the Minister, particularly with respect to legislation, codes of practice and guidance material, licensing, and the establishment of public inquiries (*s.14(1)(a), (b), (c) and (i)*);
- provision of advice to and co-operation with other relevant organisations (*s.14(1)(d)*);
- formulation or recommendation of standards or other forms of guidance (*s.14(1)(e)*);
- promotion of occupational safety and health education and training, and the development, approval and accreditation of courses (*s.14(1)(f), (g) and (h)*);
- collection, publication and dissemination of information on occupational safety and health (*s.14(1)(j)*);
- formulation of reporting procedures and monitoring arrangements for the identification of hazards (*s.14(1)(k)*); and
- commissioning and sponsorship research into occupational safety and health (*s.14(1)(l)*).

1007. Most submissions indicated that the functions of the Commission continue to be broadly appropriate. No submissions were received proposing significant changes to the Commission's functions. However, a small number submitted that change was required in terms of how the functions should be fulfilled because of the concern that Commission members were not specialists. The concern in effect was that technical matters are put before an inexperienced Commission. The results of Commission decisions therefore fail, or could fail, to have proper regard to the technical requirements or engineering parameters of a particular issue.

1008. While those observations are legitimate and perhaps from time-to-time there have been deficiencies, it is not proposed to recommend substantial change. The submissions appear to take insufficient account of the totality of the Commission's members and the environment in which the Commission operates. It is simply not possible in any event for the Commission to have the complete range of technical information or skills for every matter. However, there are sufficient numbers of the Commission's members who are technical specialists to ensure that where necessary, proper technical consideration is applied to an issue before decisions are concluded. Moreover, the Commission has ready access to technical and engineering knowledge and skills so that advice should always be available.

1009. The Commission is also the body that is required to adapt particular technically based activity and information into communications to be understood by non-technical persons such as employers, employees and supervisors. Clearly, from time-to-time, important considerations may be lost in the translation but these should be rare. More important perhaps is that where the Commission translates technical issues into lay terms, it succeeds in ensuring employee safety.
1010. Perhaps one area where the concern has validity, goes to the compromises that are sometimes made in the Commission as it strives for consensus between its members. Where compromise might result in sub-optimal outcomes, it may be necessary for issues to be revisited in order to achieve better outcomes later and they should never result in a worse rather than better safety or health outcome. The Commissioner and “expert” members of the Commission have a particular responsibility in that regard and are fulfilling their functions when alerting other members of the Commission to those considerations.
1011. Another related aspect goes to the changes that may occur between the conclusions proposed by advisory committees and the Commission’s final documents. There is the possibility that variation of advisory committee recommendations by the Commission may compromise the quality of the technical elements simply because the technical membership of the advisory committee may not be replicated in the Commission. That however, can and should, be avoided by the Commission testing amendments with advisory committees and by releasing draft documents for public comment.
1012. The advantages of the Commission presenting codes and guidance material in lay terms are significant and it means that there is an effective outcome where in some circumstances technical direction would not be as effective. The Commission’s authority, status and acceptance in the community give credibility to its decisions and materials. These clearly outweigh the deficiencies in technical quality where, on balance, there is improvement in occupational safety and health.
1013. The Commission should, however, undertake a regular and ongoing review of those significant matters that it has been unable to conclude. Because it functions mainly as a consensus driven organisation, delay arises because of the difficulties where members are unable to reach agreement. As a consequence, the Commission should consider better impasse-breaking strategies for issues where agreement is not possible. That may include a ballot or vote after the impasse strategy has been concluded. In that way, significant matters may not be unduly delayed and can be brought to a conclusion.

1014. The Commission operates through its strategic plan. The Commission's current strategic plan *Working Together: Occupational Safety and Health 2001-2003* establishes the Commission's goal as,

“a reduction in the risk of work-related injury and disease through improved prevention performance in Western Australian workplaces”.¹³⁶

1015. This is to be achieved through actions in the areas of raising awareness; practical advice and guidance; education and skills development; legislative framework; and research and data collection.

The Commission's strategic plan appears to continue its sound approach towards achieving improvements. It provides a reasonable balance of functions and is a good basis for the productive use of its resources. The only apparent weakness in the approach is that there does not appear to be much emphasis on evaluating the effectiveness of its outputs and services. While it is acknowledged that evaluation may be relatively costly, over the long term it is also essential for ensuring that resources are appropriately allocated and the needs of the target groups are being met.

1016. Some submitted that the Commission should focus on the functions related to development of legislation, codes of practice and guidance notes. It was suggested that awareness raising and data collection is more effective if carried out by WorkSafe. By implication this could result in fewer Commission resources devoted to awareness raising, education and skills development and, research and data collection.

1017. Certainly the Commission, by virtue of its tripartism, is best placed to “add value” in work associated with the legislation and provision of high-level information.

1018. In its submission, WorkSafe noted that since its creation the Commission has delivered a substantial regulatory package supported by the progressive development of codes of practice and guidance notes. During the current review period, a significant proportion of the Commission's time has been spent on formulating advice for the Minister, reviewing legislation and developing codes of practice and other guidance material. Since 1995 in particular, the Commission has produced a significant number of documents providing advice on a wide range of occupational safety and health issues for varied targeted groups. This aspect of the Commission's work is arguably the area where it is most effective and this can be seen in the material at Appendix 1.

¹³⁶ WorkSafe Western Australia Commission (2001)

1019. The Commission has also overseen some important research work¹³⁷ and that is an area in which it could have greater impact in the longer term. There is growing evidence, for example, that occupational health incurs far greater costs for the community than workplace injury but as yet it is poorly researched and will require considerable effort over a long period. The Commission is one of few organisations that could undertake such work.
1020. The particular research topics will depend upon the Commission's priorities and the foregoing is used only as an example. Certainly research itself should be a priority and funding should be made available for that purpose. The Commission has shown that with even modest funding it is able to produce credible material.
1021. A submission suggested the Commission should sponsor additional research. That is an issue that ought to be given further consideration although Government will need to consider the level of funding it will support. Certainly similar kinds of bodies sponsor and promote research as one way to increase the pace of change with limited resources. A number of those commenting on these proposals endorsed further support for research to be sponsored by the Commission and/or Government. It was submitted that the existing research effort is very small in comparison to the operating budgets concerned and that a modest commitment could bring substantial outcomes. A number of alternatives were raised, including the utilisation of academic institutions, greater use of contract safety and health personnel and associations.
1022. Submissions generally confirmed that *s.14* of the Act remained relevant as an outline of the Commission's functions. A small number of submissions proposed reducing those functions and some noted that some of the functions have not, or have rarely been carried out by the Commission. While that is in part correct, the Commission has in some instances only an occasional requirement for some and, in response to priorities, may well carry out others later or as required. There is no substantial reason to change any of the functions at this time.

¹³⁷ See for example WorkSafe Western Australia Commission (2001a)

8.1.3 Operation of the Commission

1023. The tripartite composition and consultative processes of the Commission ensure that varied and sometimes differing views are considered in the formulation of advice for the Minister, and in developing codes of practice, guidance material and reviewing legislation. The Commission's tripartite and largely consensus processes significantly enhance the end result even if at times it is a lengthy process because of the need to take account of the views of all members. So long as the tripartite process does not obfuscate or prevent worthwhile initiatives, it is probably the most effective process.

1024. It also seems clear that members of the Commission have usually fulfilled their obligations towards the Commission relative to their constituencies. While members are appointed by way of nomination, they are appointed as individuals in their own right and not as "representatives" of the organisations that nominate them. Although some difficulties were experienced in the early years of its operation, Commission members have demonstrated a shared commitment to advancing occupational safety and health. This is not to say that there are no disagreements, however, the Commission has been able to effectively work through difficult issues to produce effective codes of practice, guidance material and legislation that enjoy the support of all parties.

1025. A later comment raised one concern. It was suggested that individual members could not only inhibit progress, but could ensure that a matter before the Commission was not concluded. It was argued that, although comparatively rare, it had happened and what were claimed to be worthwhile projects had not concluded.

1026. Although there was no confirmation sought or obtained about the claims, if they were to occur that would be inconsistent with the thrust of the Act. It also gives some emphasis to the Commission itself establishing rules or protocols about such issues and in particular for ensuring delayed matters are brought to a conclusion. It is also a reason for the major participants to provide a broad based selection of members. If the representative union or employer participants provide members from the same interest groups the additional members are in effect, superfluous. The organisations have been nominated because of their broad representation and a range of views will likely come from the wider membership. It also promotes better debate and discussion.

1027. The only other submissions that indicate dissatisfaction with the processes go to the technical aspects raised earlier where it was noted that Commission members do not all have technical knowledge. While this is accepted as a valid concern it is not realistic to expect that all technical areas can or should be within the technical competence of all the members. Providing proper account is taken of the technical and engineering advice available to it, the Commission should reach outcomes that include those limits. Importantly, the Commission usually prepares and interprets its codes for non-technically proficient employers and employees and in that regard can be very effective in incorporating critical technical limits in reasonably user-friendly documents.

8.1.4 Remuneration

1028. The members of the Commission do not receive remuneration for their participation but are entitled to sitting fees at a rate determined by the Salaries and Allowance Tribunal. These fees are available only for attendance at Commission, advisory and working party meetings. UnionsWA and the CCIWA also receive annual grants to support their substantial contribution to the work of the Commission.

1029. It is clear that the payment does not compensate for the time and effort that is required for preparation and consultation with various interests. Much of this work is undertaken out of formal session and requires more time than attendance at meetings. The employers of the members are, in effect, subsidising the Commission.

1030. It is time for reconsideration of the remuneration of Commission members and their employers.

R:73 It is recommended the Government review the financial assistance provided to Commission members and consider more equitable alternatives.

8.1.5 Commission Name

1031. The Commission's submission to the Review pointed to some confusion about the Commission's identity. The name of the Commission as "the WorkSafe Western Australia Commission" is easily confused with the WorkSafe Western Australia Commissioner and WorkSafe. Media reports, the Parliament and investigations undertaken by the Commissioner for Public Standards have all failed to correctly identify the particular body when referring to one or the other. While WorkSafe has now become a Division of the Department of Consumer and Employment Protection, it is understood the name WorkSafe will continue to be used to refer to the inspectorate. This will continue the dilemma.

1032. The Commission has sought to overcome this confusion by raising public awareness of its role, functions and outcomes through promotional material about the Commission and what it does. However, it was submitted confusion would likely be reduced if the Commission's name were changed. It is understood there was support from the previous Minister for a change of name.
1033. Some, however, expressed doubts on changing the name. These see considerable benefit in maintaining the use of the widely recognised "brand name" of WorkSafe for all bodies involved in occupational safety and health, particularly as "WorkSafe" will continue to be used.
1034. There is no reason why the Commission should not be able to be referred to by its current title for day-to-day operations if it chooses so that it can be readily associated with the State's broad occupational safety and health system. However, it is perhaps almost as essential that it has control of the title and of the "brand" "Occupational Safety and Health Commission" for identifying accurately what the organisation represents and to ensure it is not used by any other organisation. There is also a need perhaps to ensure that the name "WorkSafe" is registered as a trade name to ensure that commercial enterprises cannot use the name inappropriately.
1035. The title "Commission for Occupational Safety and Health" and/or "Occupational Safety and Health Commission" is more appropriate than "WorkSafe Western Australia Commission" in the context of what the Commission does. It is not an operational arm of WorkSafe and has a broader occupational safety and health policy role. It would also add status to the policies and information it produces. In the private sector context there is no reason that it should not be the "Occupational Safety and Health Commission" trading as the "WorkSafe Western Australia Commission" although such a formality may not be necessary in the context of Government operations.

1036. In commenting on the proposals, an employer representative stated that the alternatives suggested in the draft are not helpful and would not address the reasons the Commission sought the name change. That commentary appears to be based on a concern that the Commission might continue to be required to be called the WorkSafe Western Australia Commission. That was not the intention and instead it was intended that the Commission should have the choice. If the name is to be changed, it was also suggested others be prevented from calling themselves the discontinued name so as to permit the Commission to continue to protect its identity and its earlier deliberations and decisions. Without such control it may not be possible for the Commission to ensure the continuity of its records.

R:74 It is recommended s.6(1) of the Act be amended to:

- **rename the WorkSafe Western Australia Commission as the “Commission for Occupational Safety and Health”; and/or “Occupational Safety and Health Commission”; and**
- **provide that the Commission may use, and operate under the name, “WorkSafe Western Australia Commission” or similar.**

8.1.6 Composition of the Commission

1037. A number of submissions suggested the present provisions for nominating members of the Commission are too narrow. It was submitted, for example, that UnionsWA does not represent all workers and the Chamber of Commerce and Industry of Western Australia (CCIWA) does not cover all employers. Some submissions proposed that other bodies should have a right to nominate Commission members. For example, it was submitted that while small business is significant in the incidence of injury it is not directly represented on the Commission. Similar concerns were expressed in regard to the representation of the housing, construction and agricultural industries. One submission also recommended Commission members, including Government members, should have limited membership not exceeding five years and not be eligible for reappointment for a further five years.

1038. As discussed in some detail earlier in Parts 3 and 7 of this Report, there is also a strong argument that the mining industry should be more closely linked to industry generally through policy directions and processes so as to achieve better consistency and efficiency. That could best be achieved by combining the already similar *Occupational Safety and Health Act 1984* and *Mines Safety and Inspection Act 1994* and by co-ordinating and combining the activities of the Commission and of the Mines Occupational Safety and Health Advisory Board (MOSHAB). Following commentary on the draft proposals, however, it has again been reviewed and an alternative developed which provides for the specific and specialised activity to remain within the existing legislation while the general and common obligations and duties to be provided under the *Occupational Safety and Health Act 1984*.
1039. In turning first to the existing representation, it is desirable that wide coverage is achieved. However, there are no other organisations as widely representative of industry and community as those presently involved. While it is necessary to recognise the legitimacy of the concerns, it is difficult to identify any alternative arrangements in the nomination process that would provide more than the breadth of coverage now available.
1040. Moreover, the member organisations and the representatives concerned have devoted immense time and personal effort on behalf of the Commission. Given their effectiveness and the fact that there was no serious dissatisfaction with either the Commission or the performance of the representatives, there is insufficient reason at present to follow a different process or to replace existing members.
1041. Apart from the proposals outlined in relation to the mining industry (see below) there would need to be major and fundamental reasons for additional change to justify further disturbing what has been a successful approach to occupational safety and health policy development in this State.
1042. The nominating bodies have a responsibility to ensure the persons they nominate for membership of the Commission reflect a diversity of views within their constituency and are not confined to a narrow range of interests. If they fail to do that, further consideration would need to be given to expanding or changing the membership. There were some comments that insufficient consideration has been given to that necessary diversity; particularly in recent times. However, it is also clear that there has been a variety of members over the years and while the parties remain committed members of the Commission, there is no pressing requirement for change.

1043. As noted, a number of correspondents did observe that the existing membership of the Commission was too narrow and/or that existing members did not represent or understand the difficulties experienced in some sectors in particular small business, farming and construction.
1044. Some of the concerns appear to be based on a view that having representation in the Commission would mean that a more “understanding” attitude would be developed, particularly in relation to inspection and enforcement. That is unlikely because, as has been noted, the Commission is not responsible for enforcement of the Act and members obligations are to the Commission not the nominating organisations. It is also true that every part of the community cannot be represented by membership of the Commission. The best that can be achieved is to ensure that the membership is as representative as reasonably possible.
1045. In light of the concerns expressed, however, there may be justification for the establishment of working parties of the Commission to be formed to establish what, if anything needs be done for particular industry sectors. As noted earlier, a farmers’ organisation suggested improved two-way information flows. A working party incorporating farming representation could consider this and other proposals relating to the farm sector. The Commission in deciding on any recommendations or outcomes arising from the working party's work could also decide whether the working party should continue in its work or be disbanded having completed its tasks.
1046. The foregoing would have the dual advantage of hearing from each industry and of providing feedback to the sector concerned. Most of those making submissions recognised that not every interest group in the State can be represented on the Commission but each seeks to make an input. Such a structure and process will provide that opportunity and would ensure important issues are not overlooked. While it is not considered necessary to provide a recommendation to the Commission for that purpose it is commended for further consideration and action by the Commission.

8.1.7 Expert Members

1047. In regard to the nomination of “persons having knowledge of or experience in occupational safety and health” or expert members under *s.6(2)(d)(iii)*, a number of submissions challenged the assumption that only CCIWA and UnionsWA should contribute advice in appointing those Commission members. Some have also sought to be consulted in future so that they can offer their organisation’s input. It is understood, that Ministers have not been constrained by the legislation to consult only those organisations in the past. However, it is unnecessary, that the Act should even imply that the Minister could be restricted to consulting only with the two organisations in the appointment of the expert members of the Commission. More importantly perhaps, it is not appropriate that it can be suggested that any right of veto or the like is implied by the Act in the appointment of these members. Plainly, the Minister should have the discretion.

R:75 It is recommended *s.6(2)(d)(iii)* of the Act be amended to make clear that the Minister is entitled to consult parties in addition to UnionsWA and the Chamber of Commerce and Industry of WA in nominating the expert members of the Commission.

1048. A submission, that changing the present practice of having identical terms of office for the expert members, raises a useful consideration. Rather than having the terms of all the experts expire at the same time every three years, it was suggested that it might be more effective to “cycle” the terms of office so that one position would be renewed each year over a three-year cycle. This would enable new expert members to be regularly introduced to the Commission without major disruption. This approach would not require amendment of the Act. In its response to proposal, the Commission indicated that it would consider the recommendation. All others who commented on the recommendation supported the proposal.

R:76 It is recommended the Minister alter the terms of office of expert members of the Commission so that one expert position becomes available for appointment each year over a three-year cycle.

8.1.8 Advisory Committees

1049. *S.15* of the Act provides that advisory committees may be established by the Commission at any time or when requested by the Minister to assist the Commission in the performance of its functions and duties. Advisory committees consider matters referred by the Commission and make recommendations on aspects of occupational safety and health that are relevant to the area of expertise represented on the committee or working group. The Commission in accordance with its policy and practice determines the membership and develops the terms of reference of advisory committees.

1050. There was some discussion in earlier parts of this Report about the continuation of the Commission's Construction Industry Safety Advisory Committee (see section 6.1.3). Similar committees for the Agriculture and Aged Care industries have recently been established. This also relates to the considerations about the formation and work of working parties referred to above. There will need be decisions made about whether an advisory committee or working party would more appropriate in relation to some of the issues raised. Clearly the Commission should invite the broader input and it should come from the most authoritative sources available.

1051. Where concerns go to the direction of the legislation, policy and the work of the Commission, it may be necessary that they be dealt with through the advisory committee process. Some of the more technical and process concerns could be developed through working parties. The Commission should consider and decide in each case what is required. Aggrieved or concerned parties who are prepared to provide substantial reasons should be entitled to seek reconsideration by the Commission of those decisions. The Minister should be kept informed of those matters through the office of the Commission Chairperson or the Commissioner. .

1052. Under existing arrangements, and where possible, the chair of each advisory committee is also a member of the Commission. The terms of reference for matters to be considered normally follow a consistent format, which comprises a general reference followed by up to four specific terms of reference. Advisory committees are free to determine their own strategies for achieving their terms of reference subject to any direction that may be given by the Commission.

1053. The Commission presently has three industry-based advisory committees and four other groups dedicated to implementing the Commission's strategic plan in relation to Awareness and Promotion, Education and Skills Development, Legislation and Safety and Health Hazards¹³⁸. A member of the Commission chairs each of these key committees.
1054. It may be appropriate and productive for the Commission Chair or other independent person to chair these committees. This would prevent any apprehension of conflict of interest, facilitate the exchange of information, and provide additional flexibility in the composition of committees and working groups. It is accepted that it would also be necessary for a Commission member to continue to be an advisory committee member to ensure consistency and for reporting purposes.
1055. In responses to the proposals, some commented that the workload would be too onerous for one chairperson. A smaller number were concerned that the chairperson would also become too involved in individual matters and not bring as independent a position to some matters as might be required. Others thought it an effective strategy.
1056. In the context of the existing workload and although possible, it would be unlikely that the chairperson would become exhausted or an advocate for a particular view. In the context of the earlier suggestion, however, that the Commission establish a number of additional working parties to establish what, if any, ongoing activity is required for particular industries, the task could become onerous. It would be unlikely, however, that all the industries referred to would require a standing committee and any additional workload is likely to be temporary.
1057. In that circumstance consideration could be given to the desirability or otherwise in each situation of the need for an independent chair or the appointment of more than one chairperson. Even if an ongoing role is established for a particular advisory committee, the Commission would need to decide how and under what arrangements it would continue. Where a committee finished its work, or the work became a low priority or where a committee became ineffective, it would be disbanded. An independent chair would help establish the answers to such questions and be of considerable service to the Commission.

¹³⁸ A list of advisory committees established by the Commission is provided at Appendix 2.

R:77 It is recommended the Commission report to the Minister on the desirability of having the Commission Chair or other independent person chair meetings of advisory committees when these are formed.

1058. As the proposals in relation to the mining industry are progressed, it may become necessary for legislative amendments to be made in relation to the proposed Mining Industry Standing Committee¹³⁹. As a permanent Committee, it would need recognition under the legislation as well as under the *Mines Safety and Inspection Act 1994* in the event that it continues to advise the Minister responsible for mining activity in relation to mining issues.

1059. While it is not proposed to recommend further changes to the membership of the Commission beyond those outlined, there is considerable justification for broad participation by other representative bodies and individuals in the advisory committees and other less formal consultative processes of the Commission.

1060. The Commission's advisory committees and working parties play an important role in the development of policies and guidance materials. It is also important that advisory committees and working parties have access to relevant expertise through representation of relevant stakeholders and interest groups.

1061. This issue was considered in the 1992 Report which suggested,

“The Commission should make use in advisory committees of a wider range of specialists and other interested parties. It should periodically call for expressions of interest from individuals and organisations and establish and maintain a register of specialists and those interested in making a contribution to its work. This will broaden the Commission's access to suitable committee members and reduce claims that the interest groups represented on the Commission are too narrow.”¹⁴⁰

1062. It is of concern that the principle behind the proposal was not more widely taken up.

1063. In responses to the proposal, existing Commission members, while not opposed to broader representation, warn against cumbersome arrangements that could reduce rather than enhance effective developments. In that respect some argue that the Commission now consults broadly and appoints the specialist representatives necessary to achieve the best outcomes.

¹³⁹ See R:80

¹⁴⁰ Laing (1992) p253

1064. None opposed the objective of getting the best and broadest representation that is available. The Commission, however, needs to exercise careful judgement in the appointments and needs to be conscious of the contribution others could make. It should not become introspective.

1065. Another means of obtaining input from a variety of sources is through the public comment processes. The Commission has generally sought public comment late in the development process by releasing draft codes of practice prior to their final release. The Commission should consider releasing discussion documents or similar earlier. This would assist in identifying issues and interested parties. Industry forums and seminars can also be used to seek wider views as part of a development process. An industry forum would also provide a suitable test of whether proposed codes of practice are really required.

R:78 It is recommended Commission advisory committees and working parties, where relevant, have broader representation from organisations and individual experts beyond those represented on the Commission.

8.1.9 Jurisdiction of the Commission

1066. It is accepted that occupational safety and health in the mining industry has developed in a unique way in the State and it is reasonable, in light of its significance and separate development, that it be specifically recognised under the legislation. However, as noted earlier¹⁴¹, there is declining justification for separate mining safety and health legislation.

1067. Importantly, to ensure policy co-ordination and efficiency there needs to be greater integration of occupational safety and health legislation and policy for all industries at the Commission and advisory committee levels. There was considerable agreement across the industry groups, on the need for over-arching legislation to provide policy control and co-ordination. Many submissions also argued that improved co-ordination and consistent policy direction would be enhanced if all the occupational safety and health legislation, which set policy parameters, were the same.

¹⁴¹ See 6.1.2

1068. In key areas the existing mining safety legislation differs little from the broader occupational safety and health legislation. While there will continue to be a need for different inspectorate activities and therefore separate divisions, there is good reason why the relevant parts of the *Mines Safety and Inspection Act 1994* should be combined with the *Occupational Safety and Health Act 1984*.¹⁴²
1069. As noted, there are some advantages to be gained from separate specialist legislative provisions and the relevant parts of the *Mines Safety and Inspection Act 1994* could be retained. These would provide the necessary specialist base while the general objectives, duties and obligations, and some procedural requirements would be incorporated into the *Occupational Safety and Health Act* in a similar way as the existing New South Wales legislation. The fundamental objective is to ensure there is one legislative framework so as to develop and maintain consistency of direction and performance.
1070. Most submissions in relation to the proposals, sought to continue the existing mining specialties and where there is sufficient reason to maintain these it could be achieved without compromise to the essential directions and policy framework. Some argued that the Commission should take responsibility for all mining safety activity, but it is plain this would not be a satisfactory outcome because of the significance of the industry and its impact in the State. Industry representatives and the Mines Occupational Safety and Health Advisory Board (MOSHAB) have a legitimate role to fulfill at the most senior levels.
1071. However, both the industry and MOSHAB should be represented in the Commission. That could follow a process where one each of the CCIWA and UnionsWA representatives are persons with a mining background and nominated jointly by CCIWA and the Chamber of Minerals and Energy in the case of the employers' representative and UnionsWA and the mining industry unions for the union representative. That would satisfy the need to have broad representation and would also recognise the specific importance of the mining industry.
1072. There is reason for confidence that the process would work successfully as previous CCIWA representatives on the Commission have included mining or Chamber of Minerals and Energy personnel. In the event of disagreement, the Minister might simply appoint from nominees who would be required to have a mining background.

¹⁴² See discussion in Part 4.2

1073. It was generally accepted that MOSHAB could be more effective and productive and there are structural as well as procedural bases for that conclusion. On the other hand, the advisory committee process under the WorkSafe Western Australia Commission has been successful. It is proposed, therefore, that MOHSAB be restructured and become a permanent advisory committee of the Commission dealing with specific mining industry safety issues. It should include high-level representation with not less than two Commission members. In recognition of the existing legislative foundation, the advisory committee should be established by legislation rather than as a decision of the Commission or Ministerial direction and the industry should have additional representation.
1074. The restructured MOSHAB should also continue as the highest level body providing advice directly to the Minister responsible for mining in relation to the specialist mining activities. It is unlikely that any role conflict would arise because of the more limited legislative and general policy role but also because MOSHAB will have influence in the Commission and good advice will be followed. MOSHAB and the Commission will, unlike the present, be fully aware of the other's activities and, because there will be considerable integration, consistency of policy direction will develop. The major elements engaged in occupational safety and health in this State will take the same essential direction even without full integration.
1075. In commenting on the proposals, it was apparent that many misunderstood the recommendation and believed that it had also been proposed to transfer Mines Inspectors from DMPR to WorkSafe. That was not and is not the case.
1076. In many respects, it is of no great consequence whether the inspectorates were administered by WorkSafe as a division of the Department of Consumer and Employment Protection or Mining Operations Division of DMPR. The key objective is to maintain the specialist functions but with co-ordination of the legislative policy and functional direction. Because of the concerns within the mining industry and the need to establish confidence, it is not proposed that there should be a change in administration of the Inspectorates.

1077. It is necessary to note that there are a number of alternatives or variations of these proposals that could be considered. A flexible timeframe could also be applied to ensure that the arrangements could be optimised. As a minimum, however, it is fundamental that the general obligations, duties and processes under the legislation be the same and that the Commission, as co-ordinating authority, is able to recommend and direct strategic occupational safety and health policy. It should also be responsible for providing the necessary assistance and resources including advice on occupational safety and health legislation for Government and codes of practice.

1078. In their responses to the proposals some simply reiterated their view that some nominees from UnionsWA and CCIWA should be removed and replaced by their own representatives. Unions accepted the recommendation provided the Commission's existing mining representation is discontinued. Some employer representatives argue that the proposal for specific mining industry representation is discriminatory and should not occur. They also argue that specific representation is unnecessary because if MOSHAB becomes a Committee of the Commission it will ensure that the Commission will directly address the mining industry's concerns.

1079. None however appear to provide any more acceptable alternatives than those proposed. The Commission has been an effective organisation and if change is too profound there is the possibility it could become ineffective. The proposal will also help to allay concerns expressed that the nominated members of UnionsWA and CCIWA are under any pressure to follow the organisation's "party line" rather than putting forward their own considered views on issues.

R:79 It is recommended the Act be amended to require UnionsWA and the Chamber of Commerce of WA to include at least one person with experience in the mining industry amongst their nominees to the Commission. Such nomination should be made after advice is received from the mining unions and the Chamber of Minerals and Energy respectively.

R:80 Contingent upon implementation of Recommendation 63, it is recommended the Act be amended to provide for a Mining Industry Safety Advisory Committee to be established as a permanent advisory committee to the Commission. The Committee should:

- **support the Commission as the pre-eminent body for occupational safety and health in the mining industry;**
- **have a similar structure to the Commission and include members able to effectively represent their constituency and at least two members being members of the Commission;**
- **have an independent chairperson; and**

- **continue to advise the Minister responsible for mining safety and health on matters specific to the mining industry.**

1080. Other than adding coverage of petroleum industry matters to the Commission's jurisdiction in accordance with *s.14* of the Act and in consideration of the existing Federal offshore coverage, it is not proposed that the offshore petroleum industry should come under the provisions of the *Occupational Safety and Health Act 1984*. It would be preferable if the *Petroleum Safety Act 1999* were proclaimed because it is understood that it provides equivalent protections as under the Federal offshore provisions. In that case it will help ensure consistency with national standards and within the industry overall. However, it is necessary to ensure proper legislative protection of onshore employees. As a consequence, if the equivalent of the offshore coverage is not provided by other legislated means it should come under the *Occupational Safety and Health Act 1984*.

8.1.10 Relationship with the Department

1081. The relationship between the Commission and the Department (i.e. WorkSafe) was a major issue in the 1992 Report¹⁴³. In the intervening decade, many of the issues raised at that time have been addressed and an effective relationship established. In its submission to the Review the Commission indicated,

“Strategies developed to achieve the objects of the Act are the collaborative effort of the Commission and WorkSafe (the Department). The Commission has joined with the Department on a number of projects primarily designed to eliminate work-related fatalities, reduce lost time injuries, reduce the risk of acute and long term occupational disease and promotional activities aimed at achieving these outcomes. There is a high degree of consistency between Commission priorities and the Department's priorities and operational plans.”¹⁴⁴

¹⁴³ Laing (1992) p145-8

¹⁴⁴ WorkSafe Western Australia Commission Submission (2001)

1082. The integration of work between WorkSafe and the Commission has been reasonably effective and the Commission has been sensitive to WorkSafe's obligations as the enforcement agency. It has not been the subject of great controversy in recent years and should remain that way. However, as noted earlier in this section, it is worthwhile addressing some issues raised in submissions that go to the work that each undertakes. There has been some "crossover" and it is apparent that in some areas both see that they have obligations; (for example information dissemination and promotion of occupational safety and health). Each however has "natural" constituencies and each has the capacity to more effectively undertake particular matters. In times when resources and priorities need be carefully considered, it is preferable that there be no duplication and that each should concentrate on areas where they have particular expertise.

1083. In that regard, the Commission should take up those tasks under *s.14* of the Act at which it has proven particularly effective. Those matters best covered by the Commission appear to include provision of advice to the Minister, the development of legislation, codes of practice and guidance notes, and research. In general, the Commission can best add value at the policy level. It should continue to focus on strategic outcomes that broadly influence occupational safety and health.

1084. While the Commission should not be constrained in carrying out the obligations of *s.14* and should where needed undertake new tasks or activities, it should not specifically involve itself in matters that more directly are, or should be, the responsibility of WorkSafe. These include publication and dissemination of information, awareness raising and promotion of occupational safety and health. There are areas of crossover where the Commission develops the policy proposals and initiatives and WorkSafe implements them. The line ought be kept as clear as possible in order to save unnecessary duplication and inefficiency. The submissions did not point to any major difficulty but these could develop, particularly if the Commission, as recommended, revisits some of the pre-existing and in some cases, difficult issues.

1085. In a context where occupational safety and health is no longer the sole focus of the Department with responsibility for administration of the Act¹⁴⁵, there is an apprehension the Commission may face pressure on its future resources. The Commission already operates with a modest operational budget (\$160,000 in 2000/01) with only a small secretariat and research support group along with some assistance from the Policy and Education division of WorkSafe (secretariat and research salary costs are met by the Department). It is essential that the Commission retains a reasonable level of independent funding and a modest increase for new research beyond the existing level should be provided.

1086. In its response to these observations, the WorkSafe in effect argued that the inference that support is limited is not correct. In particular it was submitted that the Department's policy officers and Secretariat provide the Commission with substantial support.

1087. Those observations can be accepted because it was not suggested that existing resources provided to the Commission are inadequate. Rather it was intended to show that on any reasonable basis, they are not excessive and that there is a need both to ensure that they are maintained and where necessary expanded to cover any new activity. It is vital that there is no future reduction. That was and remains a particular concern in relation to the need for a continued focus on occupational safety and health within a much larger Department with a number of other priorities. Research is a particular concern.

1088. In that regard and among others, academic, occupational safety and health consultants and a professional association all argued strongly for broader research priorities and support. It was also suggested that a group to develop and monitor research should be established. These were supported by the submissions of medical practitioners and researchers already engaged in primary research. These often placed an emphasis on health aspects arguing that the existing research in this area is inadequate and that much could be achieved at relatively modest cost. Where possible, the Commission should support effective research and develop a strategic approach towards supporting both internal and extra-mural research.

¹⁴⁵ See section 8.2.1

R:81 It is recommended the Commission continue to be funded and supported at least at its present level with additional funds provided for further research.

8.2 WorkSafe

8.2.1 Background

1089. The requirements of the terms of reference under *s.61(1)(c)* include a review of the effectiveness of the operations of WorkSafe (“the Department”). In other sections of this Report, various aspects of the activity of WorkSafe are discussed under specific topic headings. To establish WorkSafe’s role in each of those, it is necessary to go to each for example, enforcement activity and information collection and distribution. In this section the focus is more directly on WorkSafe itself and its Inspectorate.

1090. Following recent administrative re-arrangements, the agency with responsibility for the administration and enforcement of the Act is the Department of Consumer and Employment Protection. The WorkSafe Division of this Department has day-to-day responsibility for the Act. Until 1 July 2001 WorkSafe was a separate agency specifically dedicated to the safety and health of the State’s labour force. In the interests of clarity, the following refers to “WorkSafe” in respect of the organisation with actual responsibility for occupational safety and health. The “Department” has other responsibilities in the areas of labour relations and consumer protection.

1091. The submissions that referred to WorkSafe were generally more supportive than was the case in the earlier 1992 Review, although concerns were expressed in relation to the functions of the inspectorate and the organisation’s role in a number of areas.

1092. Many submissions expressed concern about the absorption of WorkSafe into the much larger Department of Consumer and Employment Protection. Although it was understood the WorkSafe identity is to be retained and funding continued, concern remained high about the risk of a loss of focus on occupational safety and health.

1093. At present it is accepted that both the Acting Director-General of the new Department and Minister are committed to maintaining the high priority attached to the ongoing work in occupational safety and health. If circumstances change, however, this will not necessarily be the case for the future. Some of the promotional work in particular, must have continuity if the earlier impact is not to be lost. It would be counterproductive to have any of the existing structures and mechanisms downgraded when so much effort has been put into providing WorkSafe with a public face and role in the community.

1094. As noted in Part 3 of this Report, it is recognised and accepted that Government has exercised its prerogative by establishing fewer larger Departments. Plainly, it is intended to enhance efficiency and to achieve cost savings. Some submissions argued that cost savings should also be considered in the context of a continuing development of the most effective service delivery structures to the community while at the same time maximising occupational safety and health.
1095. The Commission's submissions went to a proposal which in effect result in a single organisation for the State and covering all occupational safety and health activity. Clearly such a Department would be valuable in maintaining continuity of the work and in raising the profile of workplace safety and co-ordination in all areas. However, the new departmental structures are now in place and are unlikely to be changed in the near future. They also need to be given sufficient opportunity for their effectiveness to be tested, as they may prove effective. If as efficient as envisaged, it would need only be decided how the existing occupational safety and health processes best fit the new Departmental models.
1096. It is important, however, that there is ongoing assessment of the effectiveness of the new structures in relation to occupational safety and health and that any necessary adaptation take place promptly so that momentum is not lost. If the new structures are not sufficient to keep the occupational safety and health profile and work to the forefront, it may well be necessary for further changes to be made. These would include perhaps the development of a specific Department with a safety and health orientation across the various industry sectors. That of course does not preclude the need to provide greater consistency through a single process in a combined and co-ordinated Commission for policy development.
1097. In a response to the proposals, a union specifically argued for structural improvements in the inspection and administrative processes. These were supported by a number of other observations which will be addressed shortly. It is sufficient to note here that while some continue to argue for a single organisation dedicated to occupational safety and health, most accept the need to see how existing arrangements operate. There was no disagreement that the Departmental structure be reviewed in two years to establish whether the newly formed Department is the optimum administrative arrangement for occupational safety and health within Western Australia.

R:82 It is recommended Departmental administrative structures related to occupational safety and health be reviewed in two years to establish whether arrangements introduced in July 2001 have been effective and what, if any, further change needs be made to support effective administration of occupational safety and health in Western Australia.

8.2.2 Inspection Strategies

1098. Most of those making submissions have had an involvement of one sort or another with WorkSafe. There is some evidence, however, that there are many in the community and especially in small businesses who are simply not aware of the role and obligations of WorkSafe nor of the assistance that can be provided. That is despite an active inspection process which is designed to visit a significant number of workplaces. The submission of a small business organisation is illustrative of this. From the results of a survey undertaken by that organisation, some 38% of small businesses are not confident that they know their obligations and 37% are not confident about WorkSafe and whether it can or will support them.

1099. These add to the concerns expressed earlier that for all those workplaces that have established occupational safety and health consultation and representation processes, there is a far larger number that have little or no direct safety and health involvement and no contact with WorkSafe. Most, no doubt, apply “common sense” or what they may perceive to be their obligations in relation to safety and health at work.

1100. As well, general education and awareness of the need to be more safety conscious at work, employer awareness, the development of better engineered workplaces and equipment, employee action and concern over litigation also appear to have had an impact. The much-improved recent statistics could also be showing the lagged response to effective campaigns. Plainly, WorkSafe and the Commission have contributed to these and WorkSafe’s part should not be minimised. Other than through media promotion, however, there is not a lot of evidence in terms of any direct workplace impact by WorkSafe . That in part is perhaps due to the changing role of WorkSafe and the strategies employed.

1101. Because of an ever-growing number of workplaces and a reduced number of inspectors, over the years WorkSafe has moved away from strategies based on regular or “routine” inspections of workplaces. Current inspection strategies are focused on:

- improving the occupational safety and health performance of large companies;
- strategic projects addressing particular hazards or issues; and

- reactive interventions following accidents or complaints.
1102. WorkSafe submits that the changing nature of the workplace has also had an impact. The Inspectorate is now dealing with issues that are complex, often psychosocial in character and time consuming in the interactions required. These include issues such as work-related stress, hours of work, staffing levels and fatigue management.
1103. It is noteworthy that in recent years the number of workplace visits (inspections) has increased significantly and the number of individual workplaces actually visited has also increased. The WorkSafe objective for every workplace to be visited by an inspector at least once every five years seems reasonable but it will depend on what the inspection involves. Achieving that objective requires consideration of the range of inspections and compliance strategies open to WorkSafe. It remains the case that the workplaces of most small and medium sized enterprises rarely if ever receive a visit from an inspector and the objective seems optimistic.
1104. Many comments raised concerns that WorkSafe's plans were too limited and that in reality most small businesses will never see a WorkSafe Inspector. It was also observed that the number of visits on average by each Inspector is very low. It was also submitted in some cases that Inspectors appear to have definite preferences and that some workplaces get regular inspections while others none.
1105. A survey of workplaces conducted by WorkSafe during 2000/01 showed that employers in those workplaces that had been visited by inspectors had greater knowledge and more extensive systems for dealing with occupational safety and health matters than those who had not been visited. That result is consistent with other research and is very significant in that inspectors were seen as important sources of information.¹⁴⁶ It may also be concluded that the organisations concerned developed a heightened awareness as a result of the visit and it underscores the importance of the contact.

¹⁴⁶ See WorkSafe Western Australia, (2001), *Annual Report*

1106. A small number of submissions complain that WorkSafe is too timid and will not prosecute even where the facts are reasonably clear. The complaints went to a Government Department in one case and it was argued that the Inspectorate had failed to prosecute even though legitimate concerns had been expressed and in the face of clear breaches. The number of complaints was not large although seriously made. Alternative prosecution proposals were made in the event that WorkSafe continues to refuse to prosecute including the capacity for private action.
1107. There were a significant number of later submissions concerned with inconsistency and /or the failure of Inspectors to understand the operations on which they were making judgements. The issue of technical competence appeared to be of significance in more complex workplaces. Complaints were also made about the refusal by some inspectors to discuss or outline the concerns that caused them to issue improvement or prohibition notices. One gave an example where the inspector commented that the operation was satisfactory only to find later that the inspector had made out notices without any reference, discussion or query to the company. A number of observations also suggested that inconsistency created great difficulties. It was submitted that some Inspectors were accepted particular standards while others did not.
1108. Clearly, it would not be expected that inspectors would be so consistent that differences would never arise, as that would be to deny that Inspectors are also individuals. Many of those expressing concern however argued that the differences were so great as to go beyond that distinction. In some cases, it appeared that the Inspectors did not want to be involved in any disagreement and simply made out their notices and left before there could be any dispute. Other less charitable comments were to the effect that Inspectors had to achieve a certain number of notices and did so by unilaterally issuing them and refusing to discuss why.
1109. Some also reiterated earlier concerns that some inspectors would not provide even the most basic of advice.

1110. Earlier observations that there had been a discernable improvement were not accepted by some of those commenting in later interviews. In the discussion most acknowledged that Inspectors' work can be difficult and complex and that no one person can hope to understand every operation. However, most complaints went to processes or activity that should be understood by trained officers and it was argued that in some cases inspectors were exercising their individual prerogatives rather than those of WorkSafe. Some also saw Inspectors as more concerned with their own authority not being questioned than with getting to the right result.
1111. These issues have not been raised with WorkSafe and it is not known whether all or some of the claims are valid. However, it is clear that most were genuinely raised and even if there was a reasonable explanation for the relevant Inspector's actions it appears they were not conveyed to the complainants. It also appears that some inspectors may not be confident enough while others too confident of their own capacity. Both individual and broader strategies may need to be put in place to achieve improvements.
1112. In the past, strategies included programmed inspections and periodic blitzes in a geographic location, addressing a particular hazard or within an industry. These had the advantage of giving the WorkSafe Inspectorate a profile as well as indicating what was not acceptable in individual workplaces. Specific target organisations were selected according to particular set criteria. Individual inspectors had little choice of where they inspected which permitted a more structured process and less anxiety for the inspector. Complaints that they had personally selected the particular inspection target were not in issue and the Inspector would inspect according to the program.
1113. If these and perhaps similar workplace inspection initiatives were regularly re-instituted, the programmed selections would not necessarily require a full inspection of every aspect of the workplace. It could cover only those elements highlighted for testing by the selection process and/or discerned during the course of the inspection. In effect, it would be somewhat similar to the Department's priority investigation strategy (see 8.2.2). In addition, as a consequence of the process, information could be provided on site of the good business case for adopting a systematic consultative approach to occupational safety and health policy and practice. This could be linked to the other incentive schemes including those promoting employee involvement. If undertaken on a regular basis, it would seem that eventually many of those presently not contacted or involved might be brought into the process. With a statistically based selection process, many workplaces could be visited and the Inspectorate "presence" established.

1114. Clearly somewhat different arrangements would be made for country areas, although inspections could be similarly structured in larger centres. As noted earlier, a submission from a farming organisation sought to have inspectors notify the organisation of any specific areas of concern before traveling to a particular area. It was argued this would provide the advantage of increasing awareness because the organisation concerned could pre-publicise concerns and use the opportunity to have deficiencies highlighted and corrected. The visit would then provide an opportunity for further education and reinforcement of the message. It would have the additional advantage of reducing any likely conflict or confrontation. The selection of particular areas and issues to target would depend in substantial part on what information can be derived from available statistics. Similarly, the statistics would provide the population base on which the sample would be drawn. While total reliance should not be put on the statistics, they should be used to establish random topics and the respondents to be interviewed.

1115. WorkSafe advised that it already undertakes inspection activity of the kind recommended. However, a professional organisation noted that even if it does, it does not publicise the work or the effect it is having on the workplaces concerned. It was argued that these can be as important as actually undertaking the inspection work.

1116. While it is accepted that some selected inspection activity is now undertaken, it is necessary to enhance and to regularize the inspection processes so they are visible and seen as part of the overall activity of WorkSafe. That will involve a more rigorous approach than in the past and in some areas the development of a more systematised inspection regime.

R:83 It is recommended WorkSafe implement further inspection activity. These should include strategies based on programmed “routine” inspections of workplaces selected according to geographic, industry or hazard priorities. Statistically generated program inspections and local area blitzes based on specific hazards should be undertaken regularly.

1117. In considering WorkSafe’s inspection strategies, it is apparent that the number of active inspectors may have reduced over recent years and their classification structure has not been adjusted recently, although it appears that most have maintained their pay relativity in comparison with other employee groups. Some inspectors suggested that they are underpaid in relation to their responsibilities and the community’s expectations, however, it is also apparent that some had increased their remuneration by promotion.

1118. There is insufficient material to reach any concluded view on the general issue of remuneration. It is noted in that regard that other public sector employees at similar remuneration levels carry similar responsibilities. There is little doubt that inspectors carry onerous responsibilities and it would be appropriate if the reward system recognised the different capacities of particular officers. There were a number who commented that effective inspectors were often attracted to other employment and that as a consequence it was difficult to maintain peak effectiveness.
1119. In making that observation, it must also be said that some very effective long serving inspectors have not moved because of personal choice. Nonetheless the system does protect those who are not so effective and who inhibit the capacity of the organisation to perform up to expectation. Unfortunately, most complainants were unwilling to take matters any further when challenged to follow through their complaints. Some expressed a concern that their business interests could be harmed. These argue that inspectors have considerable power over the business because of the Inspector's capacity to significantly increase business costs.
1120. It also appears that there might sometimes be deficiencies within workplaces that require attention but which for various reasons are not followed up by inspectors. It is therefore difficult to get to the facts. However, there is sufficient concern expressed to suggest that there are issues requiring attention. One way of achieving better performance is to develop a reward system under which effective employees could be better paid. That would need to ensure clarity of the issues and performance and would need to guard against inappropriate payments. It is a matter that should be reviewed within the Department, particularly in the context of changing duties and responsibilities.
1121. A business organisation observed that inspectors are inclined to choose easier targets. As a consequence, it was submitted, reputable businesses, which are conscientious in their occupational safety and health, can be targeted because they are amenable to inspection requirements while more difficult, aggressive and "backyard" operators are seldom or never inspected. Whether this is a substantial general concern is not known. However, it is a matter that WorkSafe should periodically test because there could be an inclination for individuals to follow such a path. There have been instances where conscientious businesses have been prepared to be open about their problems and these have resulted in considerably more attention from the authorities and media than for those who are less open.

1122. Inspectors indicated to the Review that they were under pressure to maintain the level of inspections even though the number of inspectors has been reduced. Information provided by WorkSafe indicated that while inspector numbers have fallen, more workplaces had been visited – see Table 3 below. However, an examination of these statistics suggests that the overall number of workplaces visited per inspector is also low. Assuming there are 50 active inspectors with a working year of 46 weeks (ie taking account of leave and other duties), the figures in Table 3 indicate that on average an inspector makes contact with three workplaces* and issues four improvement notices per week. Some of these workplaces may be visited several times in a year (ie “workplace visits”). These figures include the activity of the Construction Inspectorate which typically conducts a higher level of fieldwork and inspection. Exclusion of the Construction inspectors would likely lead to an even lower average number of workplace visits. It does not seem unreasonable to expect an inspector to average at least one workplace visit per day.

Table 3

WorkSafe Inspection Statistics¹⁴⁷				
Activity/Year	1998/99	1999/00	2000/01	2001/02
Inspectors	75	74	75	78
Improvement Notices	9,542	9,224	8,460	9,818
Prohibition Notices	805	943	736	887
Workplaces Visited*	6,385	7,331	7,388	7,015
Workplace Visits	10,079	11,885	11,671	10,838

1123. It is also apparent that not all inspectors are routinely engaged in inspection activities. A number of professional and executive staff may be appointed inspectors but perform other duties. Exclusion of these staff from the calculation above would improve the average number of workplaces visited per inspector but still leave it lower than what would seem an acceptable level.

¹⁴⁷ Information provided by WorkSafe

1124. The information provided by WorkSafe itself suggests its effectiveness is constrained by the work practices and small size of the inspectorate. If it is accepted that workplace inspections are an important enforcement strategy, there is a need to refocus resources in that area. This could be achieved by improving the inspection productivity of the inspectorate as well as increasing the number of active inspectors. Other States have substantially increased the size of their Inspectorates in recent years to reflect the priority given to workplace safety and health.
1125. In response to earlier comments, WorkSafe advised that inspectorate numbers had been increased by 13 between February 2001 and 2002. While that is positive, it does not answer all of the concerns or assist if “inspectors” are not engaged in inspection activity.
1126. A union submitted that safety and health representatives should accompany Inspectors on site visits because they can point out issues of concern and to ensure that the inspectors were not diverted. It was argued, for example, that some safety devices are reset only when the inspector is on site. Union representatives also argued that the Department’s Fatalities and Special Investigations Branch should be re-established, as it was an effective mechanism both in relation to expertise in investigations and in liaison with other authorities including the Coroner’s office. These views should be considered by the Department.
1127. Consideration should also be given to the employment of “trainee” or “graduate” inspectors, particularly to undertake the proposed programmed “routine” inspections and the priority investigations referred to earlier. These inspections and investigations would provide important training for new inspectors. Graduate inspectors could also be utilised in information dissemination in the “one-stop-shop” and information services recommended elsewhere in this Report¹⁴⁸ prior to their appointment as inspectors in order to gain experience.

¹⁴⁸ See R:71

1128. In responses to the proposal for appointment of graduates, a number of employer organisations indicated concern with such a scheme on the basis that inexperienced or “academic” inspectors may not have the industry experience necessary. Others suggested that they should spend time with industry in order to gain familiarity. One organisation also suggested that competency guidelines be developed and be accompanied by structured training. WorkSafe itself observed that it already employs graduates although it appears it is not a structured policy.

1129. Each of the comments and suggestions are valid and will require the Department’s attention. In relation to graduates, it is accepted that WorkSafe would not require an inexperienced graduate to undertake complex inspection activity without suitable training because the organisation is acutely aware of its own duty of care. There may also be other ways of enhancing existing processes in addition to the foregoing proposals. Certainly standards and consistency can be improved.

R:84 It is recommended the number of active WorkSafe inspectors be increased. The increased resources should be used to support a higher level of workplace inspections.

R:85 It is recommended WorkSafe undertake the employment of “trainee” or “graduate” inspectors.

8.2.3 Inspectors - Powers

1130. The powers of inspectors are found under *s.43* of the Act and include the right to:

- enter, inspect and examine workplaces;
- conduct examinations and enquiries;
- take samples, photographs, records and measurements;
- take possession of materials;
- require that the workplace be left undisturbed;
- interview any person at the workplace; and
- obtain assistance from any person at the workplace.

1131. The Review received a number of submissions suggesting changes to the powers and responsibilities of inspectors.

1132. It was submitted that Inspectors should face penalties if they threatened or abused employers or employees however no detail was provided about specific events. While it is conceivable that such an event could occur, additional penalties in such circumstances seem superfluous because Inspectors may already be disciplined under public sector legislation. Particular complaints can be directed to the WorkSafe Western Australia Commissioner or the Public Sector Standards. It would be an effective strategy, however, for the Department to establish and promote a confidential complaints process so that issues can be dealt with while protecting both the complainant and Inspector concerned.

8.2.3.1. Information

1133. ⁴³ does not establish that an inspector has the power to issue information and advice although it is an important and common practice that assists in the prevention of injury and disease. It is also a practice that was recommended by the Robens Committee and supported elsewhere in this Report. The absence of a specific function to provide information and advice has also raised some doubts as to whether inspectors who do so are protected from liability under *s.59* of the Act.

1134. It has been suggested that inspectors should not give information and advice as to what might be acceptable where regulations and codes are not available. These argue that it is the parties' responsibility in an environment where they carry the general duty of care. This has been an issue of some contention for both inspectors and parties at the workplace. It is, however, an issue that is related to the parties' own conduct. Where, for example, a workplace has met the obligations and processes under the Act, it is unlikely to be a major difficulty because the parties themselves will have established their standards. If an inspector indicated that those standards were inadequate, consultation between the parties would soon establish alternatives.

1135. It is more likely to be an issue in a workplace that has not finalised its internal occupational safety and health affairs or in one that remains unaware that self-regulation is the basis of the regulatory framework. It seems likely that the majority of these will be small businesses. Naturally enough, if an inspector declares that a particular process or safety feature is deficient, a demand is made to tell the parties what is sufficient. The inspector can include directions in improvement or prohibition notices citing relevant standards.

1136. Where there is a range of approaches to achieving compliance with the law or where the technical solution is not readily apparent, the situation is less clear. The inspector is entitled in those cases to inform the parties that there are no regulations or codes relevant and that they must establish their own standards and that the only advice that can be given is whether or not the alternatives they propose are deficient. However, that is not all that the inspector should inform the parties.
1137. There is no reason, for example, why an inspector could not outline why a particular proposal has been judged to be deficient and what generally, in the inspector's judgement, may be needed to remove the deficiency. In that way the inspector is able to offer advice and information without compromising the judgement of what is not acceptable for any future proposals. Of course the inspector would also remind the parties of the Act and their obligations to comply with the Act. Moreover, if the inspector is unsure, as may be the case from time-to-time, then all that can be provided is the known information. Alternatively it may be appropriate to make additional enquiries.
1138. The provision of information and advice does not extend to conducting risk assessments or researching possible solutions that suit specific circumstances. Parties in the workplace should undertake this with the assistance, if necessary, of consultants or technical specialists.
1139. While it could be argued that provision of advice is not a function or a duty of an inspector, there are circumstances where the inspector has an obligation to assist the parties. The uncertainty about inspectors' authority and protection should be removed and the entitlement made clear.
1140. WorkSafe submitted that use of the term "advice" will cause confusion. The Commission observed that there needs to be a suitable balance between advice and enforcement.
1141. Both are important observations and the WorkSafe concern goes to situations where "advice" could prejudice the Inspector and Department. However with suitable training and direction it should be possible for such issues to be avoided. Mines Inspectors already provide "advice" without apparent difficulty. While it is accepted that a WorkSafe Inspector may have a wider range of activity, it could be expected that no "advice" would be given where the Inspector was unsure. Where answers may be clear enough, good advice would be effective.

1142. It would also be expected that in implementing the proposal, the Department would ensure relevant protections are included.

R:86 It is recommended s.43 of the Act be amended to provide for a specific power of an inspector to provide information and advice.

8.2.3.2. Interview Entitlements

1143. The Act provides an inspector with power to interview persons and to require such persons to answer questions. When read together *s.43(1)(k)* and *s.43(1)(l)*, provide that the inspector may interview:

- any person the inspector finds at a workplace; or
- any person the inspector has reasonable grounds to believe, is or was at any time during the preceding two years, an employee working at a workplace.

1144. WorkSafe has highlighted difficulties with these provisions. The first is whether the inspector must immediately interview a person he or she finds at the workplace, or whether an interview can be held at a later time. The reason for the doubt arises by the use of the word “finds” in the Act rather than “found”. Clearly it is not always possible for inspectors to interview all relevant people before they leave the workplace and on any given occasion some might well leave before the inspector arrives.

1145. The second concern is that an inspector has no power to interview and to compel answers from persons who are not employees and who have left the workplace. This limits the ability of inspectors to pursue non-employees known to be at the workplace at the relevant time, but who are not present when the inspector arrives. It also limits the ability to interview a person, such as the employer, who may hold information relevant to the investigation or may have influenced events that occurred at the workplace, without being physically present.

1146. Another concern relates to the two-year time limitation under *s.43(1)(k)*. Under that provision, a person can be interviewed where the inspector has reasonable grounds to believe the person is or was an employee at the workplace at any time during the preceding two years. On 12 January 1999, the Act was amended by way of the *Occupational Safety and Health (Validation) Act 1998*, to provide for a three year period, from the date of offence, during which proceedings for an offence against the *Occupational Safety and Health Act 1984* can be commenced.¹⁴⁹ It was submitted that *s.43(1)(k)* has not kept up with other changes to the Act and therefore requires amendment.

1147. The need to have the two timeframes aligned is particularly relevant with respect to those cases involving a failure to report an accident where WorkSafe does not become aware of the matter until some considerable time after the event. The timeframe under *s.43(1)(k)* needs to be amended to bring it into line with the amended period for commencing a prosecution. The Commission and others observed that there should be no duress and that the timing be sensitive to the individual's needs. Employer representatives submitted that three years is excessive and that it might be an unprincipled position to pursue an issue after such a lengthy period after the events.

1148. While those observations have substance and any investigation should be prompt, it is not always open for the inspectors to proceed immediately. While WorkSafe should be required to make a conscious decision based on sound reasoning in order to proceed after such a long period there might well be circumstances where it is warranted, for example, in the case of a work-related disease that is not apparent for some time. It is noted that the time is considerably less than the limitations in other areas of law and that under criminal law there is no limit. Three years is not excessive in that context. If the provision is abused or it is found that WorkSafe fails to consider such issues the Commission should review the matter with a view to further amendment of the Act.

R:87 It is recommended *s.43(1)* of the Act be amended to:

- **remove any implication that an inspector cannot interview persons he or she “finds” at a workplace after such persons have left the workplace; and**
- **provide an inspector with the power to interview any person an inspector has reason to believe can provide information relevant to the inspector’s investigation.**

¹⁴⁹ See *s.52(3)*

R:88 It is recommended that the two-year time period specified in s.43(1)(k) be amended to three years to be consistent with the time period for commencing proceedings for an offence against the Act.

1149. A further issue of concern in relation to interviews conducted by inspectors is the attendance of other persons during the interview. While *s.43(1)(k)* has generally been read to imply the inspector has the discretion to hold interviews in private or otherwise, the provision is not clear as to who is able to make such a decision. The inspector needs such discretion sometimes in order to get the facts and the person interviewed also has an entitlement to privacy.

1150. In responding to the proposals, an employer organisation raised the concern that a person ought have representation if they choose. It argued, therefore, that if a person is to be prevented from having representation, then strict guidelines should apply.

1151. It appeared that the major reason for the suggested recommendation was to provide both the person concerned and inspector a level of privacy to deal with sensitive and/or confidential issues. Where it is to provide the Inspector access, without interference by a third party it should be permitted although it is accepted that there will be reasonable limits to that entitlement. Legal process usually permits legal representation to be present and it is expected that, in developing the legislative changes, the Commission and the draftspersons will take account of proper process.

R:89 It is recommended the Act be amended to provide that either the inspector or the person being interviewed may, at any time, including after the interview has commenced, require the interview be conducted in private.

8.2.3.3. Identification

1152. *S.43(1)(m)* does not cover the situation where a person fails to identify himself or herself when requested by an inspector. Provision needs to be made for an inspector to be able to take reasonable steps to identify, by some other means, the identity of a person who refuses or fails to state their name and address when required.

R:90 It is recommended the Act be amended to provide that an inspector has the power to identify, by any reasonable means, persons who fail to provide their name and address when requested under s.43(1)(m).

8.2.3.4. Notification by Inspector

1153. *S.45(1)* requires that all reasonable steps be taken by an inspector to notify the employer of the inspector's presence, upon entering a workplace. This does not deal with the situation where there are multiple employers (such as on a construction site where there may be many contractors on site who are employers in their own right). WorkSafe's interpretation of the provision is that the inspector is required to take reasonable steps to notify each and every employer with employees at the site, regardless of whether the inspector's visit is relevant to a particular employer. In such cases it may be difficult and onerous to comply with this requirement.

1154. WorkSafe and the Commission suggest the difficulty could be perhaps be avoided by better training of Inspectors. If that has not been effective to date it is possible it may continue as an issue. It may well be appropriate that it be removed by implementing the recommendation.

R:91 It is recommended s.45 of the Act be amended to provide that, where there is more than one employer in relation to a workplace, the inspector is required to take reasonable steps to notify each employer with employees at the workplace and relevant to the inspector's activity, of the inspector's presence.

8.2.3.5. Offences

1155. *S.47(2)* of the Act provides that a person is not excused from complying with a requirement under the Act to answer a question or provide information on the grounds that such answer may incriminate him or her. However, the answer or information so obtained cannot be used as evidence against that person other than in relation to an offence under the Act relating to the false or misleading nature of such information or perjury.

1156. WorkSafe submitted that the question has arisen as to when a director of a company may be compelled to answer questions or provide information, and whether that information can be used against that company (as opposed to the natural person who is a director of the company). Also in relation to *s.47(2)*, the question has arisen as to whether the "information" referred to in the subsection includes documents.

R:92 It is recommended s.47(2) of the Act be amended to specify the protection against self-incrimination that applies in relation to a company in circumstances where a director of the company is compelled to answer questions or provide information.

R:93 It is recommended the Act be amended to clarify that “information” provided as required under the Act includes documents and is therefore protected where it is self-incriminating by virtue of s.47(2).

8.2.4 Investigation Processes

1157. As noted in Part 4¹⁵⁰, a number of submissions were received from family members of employees who had died as a result of workplace incidents. Some were concerned that investigations into the fatalities had not been complete and/or that there could have been interference with the work site, which prejudiced the investigation process. In some instances, the investigations had not included interviews of family members who wished to inform the investigators of facts conveyed to them about the workplace. Some were also distressed over the manner that they were informed of the fatality and/or of the failure of either the company or investigating authorities to inform them at all about the processes following the events. One reported that she had not been told where her son had been taken and had to telephone various hospitals to try and find his body.

1158. It is noted that WorkSafe has endeavoured to be sensitive to the concerns of close relatives and has now produced an information booklet to help the families of deceased workers understand the WorkSafe and Coronial investigation process. It is understood that inspectorate staff also visit and interview family members. These are positive developments and are to be encouraged. Because each event has its own characteristics however, each case will require individual consideration of any further steps that might be required.

1159. There were a small number of submissions that raised specific concerns that the Inspectorate had failed to adequately investigate or prosecute cases involving fatalities. While detailed investigation of specific cases was not undertaken because of the nature of the Review and time constraints, in some instances details of the particular concerns were provided by way of interview. Some concerns were understandable. Too often the families and those close to the employee who had died or had been seriously injured were not given adequate attention and original explanations were sometimes insufficient and or left unanswered questions. In others, the follow up was insufficient for family members to understand why WorkSafe had chosen to take a particular course of action in preference to others, particularly where penalty levels were low.

¹⁵⁰ See section 4.4.8

1160. In some investigations the subsequent prosecution and appeals processes were not always explained or understood, as they should have been. Certainly some of these events have given impetus in this Review to recommendations concerning the nature and level of penalties which have often been manifestly inadequate (see for example section 4.4). Sometimes of course, the full extent of the failures was not made obvious because of the guilty pleas of those charged. As a consequence the relatives and friends of the persons who died were justifiably concerned and distressed. A former Coroner suggested that in those cases the prosecution should prevail upon the Court to hear the extent of the failure even in the face of guilty pleas as that could help achieve more realistic penalties.

1161. In relation to the investigation process, inspectors should perhaps be more aware of the possibility of investigation sites being interfered with and of tampering with evidence. There is a natural desire for others at the workplace to resume normal work as soon as possible to help reduce distress, however, that should not include alteration or removal of evidence that is, or may be, needed for further investigation. An organisation that is vulnerable to prosecution may have reasons for a quick return to normal activity other than minimising distress and that should not be permitted to affect proper investigation processes. As noted earlier, the inconvenience of not being able to resume normal work is another incentive to work safely.

1162. It is also understood that inspectors are not always able to access investigation sites promptly because of the activity of other authorities including Police and Fire and Emergency Services. That could prevent proper investigation. In at least one instance, it was claimed a fatality was investigated by a relatively junior Police Officer and inspectors arrived later and only after the employer had directed that more work be undertaken on the site. It is at least possible in such circumstances for an inspector's investigation to be prejudiced.

1163. Although, plainly, Police Officers should be able to investigate the site of a sudden death without interference, if it is associated with a work-related incident, the inspectorate should also have access provided that it does not interfere with a criminal investigation. As noted earlier in relation to penalties, these are rare. Inspectors should also assist the Police in the coronial inquiry process because they may well bring different dimensions to the investigation. Because they are not specialists in workplace safety and health, it is unreasonable to expect that police investigations would cover all the technical detail of workplace events and processes. They do not have the background safety knowledge necessary to conduct such investigations. There are bases for concluding that some past investigations have been inadequate and there is a need to ensure in the future that such concerns do not arise.
1164. If WorkSafe requires additional powers or authority to secure sites and to assist in the conduct of investigations, these should result in amendment to the Act. As discussed earlier in relation to prosecutions for serious injury and workplace fatalities, that may also require further amendment to other legislation and for protocols to be established with other authorities.
1165. It is also closely related to other observations and proposals made earlier about the desirability for good co-ordination between the respective authorities when public and employee safety is compromised by workplace events. There should be no need of any reminder, after the events in the USA and Bali, of the importance of the relevant authorities being co-ordinated and in control when disaster strikes.
1166. It is also understood that WorkSafe has disbanded the specialist fatalities unit which previously undertook all investigations of serious injury and fatalities. While it is reasonable for the Department to decide how it should carry out its functions and it is accepted that it will not necessarily reduce the quality of the work, it is essential that such matters be investigated by suitably experienced and qualified personnel. WorkSafe should be required to periodically report to the Minister on the investigation policy and strategy involved in serious incidents. It should also report on these in its annual reports.

8.2.5 Supplementary Inspectors

1167. Under s.42 of the Act, inspectors must be “officers of the department” appointed by the WorkSafe Western Australia Commissioner. This means the Commissioner is precluded from appointing persons who are not officers of the Department of Consumer and Employment Protection as inspectors even in circumstances where this would assist in the administration of the Act. WorkSafe submitted this is unnecessarily restrictive and observed:

“This clause is limiting, particularly in view of the vast regional areas of the State and the variety of circumstances in which occupational safety and health matters present.

From time to time circumstances arise where it could be effective to utilise, as an Inspector, a public servant who is not an officer of the department. In particular, a person who is an Inspector of another agency dealing with safety or health matters ... could, if appropriately appointed, undertake investigations or inspections of matters relating to occupational safety and health. Such situations might include cases where WorkSafe and another agency both have jurisdiction over a particular matter.”¹⁵¹

1168. This has long been WorkSafe’s position and was considered in the 1992 Review Report where it was concluded,

“...Before the Department is subjected to any further major changes, the Inspectorate should first stabilise its structure, activity and operations. The recommendations are also inconsistent with the thrust of the Robens approach for a well co-ordinated, highly qualified, well trained and well paid Inspectorate because it is not likely that the recommendations could be encompassed and made fully effective if co-ordination and control of Inspectors is shared. Questions of consistency, uniformity of approach and access would all be difficult to implement for the organisation.”¹⁵²

¹⁵¹ WorkSafe Western Australia, Submission (2001)

¹⁵² Laing (1992) p204

1169. While those questions of consistency and uniformity remain, it seems clear that some of the concerns raised in 1992 are no longer relevant. The WorkSafe Inspectorate and the associated administrative structures have now developed to the extent that it could be expected that appointment of inspectors from outside WorkSafe would not necessarily impact negatively on its operations. It is appropriate in some limited circumstances for the Commissioner to have the capacity to appoint persons as inspectors from outside the Department. For example, in relation to isolated areas other persons might well be able to undertake some functions under instruction from the Commissioner in circumstances that do not justify an inspector's travel. For example, health and environment professionals employed by Local Government Authorities under with the *Local Government Act 1961* may have knowledge and skills that are relevant in these situations.

1170. In providing the Commissioner with the flexibility to appoint inspectors from outside the Department, it is important the status and authority of the existing Inspectorate not be compromised in any way. For this reason those appointed from outside the Department should have a different title and be limited in their jurisdiction and the duration of their appointment.

1171. Suitable models for these appointments appear to exist with the "honorary fisheries officers" appointed under the *Fish Resources Management Act 1994* and perhaps others such as transport and licensing personnel and those assisting the Department of Conservation and Land Management in the management of National Parks.

1172. Under *s.179* of the *Fish Resources Management Act 1994*:

"(1) The Executive Director may, by instrument in writing, appoint any person to be an honorary fisheries officer for the whole or any specified area of the State.

(2) An honorary fisheries officer has, in respect of the State, or the area of the State for which he or she is appointed, such of the powers conferred by or under this Act on a fisheries officer as are specified in the instrument of appointment and to that extent is taken to be such an officer."

1173. It is accepted that it would not be appropriate for unpaid “volunteers from the community to be appointed to as inspectors. However, limiting eligibility to “public servants”, as suggested by the Department, may be unduly restrictive, as many “Government” employees do not fall within the formal definition of the public service. For example neither a Police Officer nor a nurse working in a public hospital are public servants. This difficulty may be overcome to some extent by providing that persons who hold an existing position or appointment under statute be eligible for appointment as honorary or supplementary inspectors under the Act. It is important that any person appointed as a supplementary inspector is subject to appropriate direction and accountability whilst holding the appointment.
1174. It will be necessary for the Commissioner to exercise the authority to appoint honorary inspectors judiciously. Authority as an supplementary inspector should also be able to be withdrawn at the discretion of the Commissioner. Appointments should not displace vacancies that should be provided from normal operating budgets. Moreover, the operation of the process should be subject to specific review after a reasonable period and so that interested parties can be given an opportunity to express their views before it is continued. If it can be made to work as expected it could provide great value to the community but it must be acknowledged that it is essential to ensure that it is carefully controlled.
1175. Despite the extensive caveats and protections suggested in the foregoing, a number of correspondents opposed this proposal. Most of the objections were based on the possibility of an inexperienced but enthusiastic honorary inspector bringing a workplace to a halt or significantly adding to costs for an employer. It was noted that protecting the business or seeking redress from the arbitrary and wrong decisions of the supplementary Inspector would have great cost considerations.
1176. Some employers were also concerned that because they are “appointed by statute”, union officials could be appointed honorary inspectors as a matter of course.
1177. In taking the latter point first, the statutory base referred to would not permit the appointment of a union official merely because they hold positions recognised under the various industrial relations laws. The statutes referred to include those, which specifically apply to occupations, or employment situations that go beyond the public sector; such as health or building inspectors specifically recognised under the *Local Government Act 1995*, Police Officers and health professionals.

1178. In going to the former arguments, it is both highly unlikely that a WorkSafe Commissioner would prejudice the Department or his or her own role by the appointment of an unsuitable person and, as noted in the foregoing, even if that did occur it could be rescinded immediately.
1179. It seems likely, in light of the observations made, that a number of those objecting to the recommendation may not be clear on what is intended despite the explanation. It is intended to have extremely limited application and at the discretion of the Commissioner who would be responsible for the consequences. It is not intended that unsuitable or inexperienced persons be appointed but that where appropriate persons with an existing competence and stature are available that they could be directed with specific instruction to undertake a limited activity.
1180. There is already wide crossover between mining and construction activity in outlying areas. It seems sensible, after consultation with the individual concerned and the Chief Executive responsible for the Mining Inspectorate, for the Commissioner to temporarily appoint a Mines inspector an “honorary” WorkSafe Inspector to complete a particular task providing there were no other legal or logical reasons preventing such an appointment. Similarly it might well be efficient and effective to have Police Officers check vehicle operations at outlying regions.
1181. While the terminology “honorary” may have led to some confusion there is no doubt that adequate protection against improper or unilateral conduct is also possible within the legislation. The concerns going to consistency are equally applicable to existing inspectors and the directions accompanying any appointment will likely leave little discretion to the supplementary inspector. The benefits of the proposal substantially outweigh any potential disadvantage.

R:94 It is recommended the Act be amended to enable:

- **the WorkSafe Western Australia Commissioner to appoint a person holding a position or appointment under a statute to be an honorary or supplemental inspector; and at the Commissioner’s discretion, to cancel any such appointment; and**
- **an honorary or supplemental inspector, in respect of the State, or the area of the State for which he or she is appointed, be provided such of the powers conferred by or under the *Occupational Safety and Health Act 1984* on an inspector as are specified in the instrument of appointment.**

R:95 It is recommended a review of the operation of provisions relating to honorary or supplemental inspectors should take place within five years of their commencement.

8.2.6 Notices

1182. The primary instruments of enforcement under the Act are improvement and prohibition notices. Inspectors issue improvement (*s.48*) and prohibition (*s.49*) notices as written directions requiring a person to correct an alleged breach of the Act or Regulations. In the case of a prohibition notice, the relevant work process or activity must cease until the breach is remedied.

1183. As noted in the table below, there was a significant increase in the number of improvement notices issued by WorkSafe in 2001/02. This reversed the downward trend of recent years.

Table 4

Improvement and Prohibition Notices – WA 1998/99 – 2000/01		
Year	Improvement Notices	Prohibition Notices
1998/99	9,542	805
1999/00	9,224	943
2000/01	8,460	736
2001/02	9,818	887

Source: WorkSafe Western Australia Annual Report 2001/02

1184. The Review received a small number of submissions that addressed improvement and prohibition notices. The issues raised were mainly of a technical nature and are discussed below. Submissions in relation to the role or structure of notices went to whether it was desirable that prohibition notices should be issued as often as at present. A submission also questioned WorkSafe's apparent preference for issuing notices to principals or main contractors where sub-contractors are in breach (see *s.19(4)*).

1185. In considering the role of notices, a major employer organisation suggested self-regulation was more effective in bringing about compliance,

“The issuing of large numbers of Improvement Notices within workplaces is not conducive to encouraging and assisting employers to develop and adopt appropriate workplace standards. The standards adopted will be those that will meet the subjective views of the Inspector issuing the notices. In addition the

approach taken by the Inspector is frequently influenced by the industrial relations climate at the workplace. The employer will feel no ownership of any alterations made and no incentive is established for further or continued improvement. External intervention of this type creates fear response on the part of the employers as the meaning of compliance in these terms is reduced to meeting requirements of a government notice.”¹⁵³

1186. While there is a legitimate debate over the balance between self-regulation and enforcement and there is a need for consistency between inspectors, there seem to be no insurmountable problems with the present provisions relating to improvement and prohibition notices. In an environment where there are plainly inadequacies in the extent of coverage under the Act, these are necessary adjuncts to ensure minimum safety and health standards are being met. Prohibition notices in particular are powerful tools for reminding parties of their obligations. Once again, if the coverage of occupational safety and health issues was better in the State’s workplaces, there would be a greatly reduced need for the notices as parties would exercise more extended self-regulation.

1187. There were a number of submissions which complained at what was alleged to be discriminatory actions by inspectors in the issuing of notices. It would be very useful and perhaps even essential for WorkSafe to establish a transparent complaints process providing an opportunity for complainants to put their concerns and arguments. If complainants successfully demonstrate their complaint, the Commissioner could then take appropriate action to correct the behaviour concerned. It should ensure that any concerns over discriminatory practices would be addressed. A review process could also be available to the Occupational Safety and Health Tribunal from the Commissioner. There should be no reduction in an inspector’s authority arising from this process.

R:96 It is recommended WorkSafe establish a complaints policy providing for a transparent process for dealing with complaints against inspectors or other staff members.

¹⁵³ Submissions (2001)

1188. The Act requires improvement and prohibition notices to be displayed at a prominent place at or near the workplace affected by the notice until the requirements of the notice have been satisfied. The Act also provides on application for notices to be reviewed by the Commissioner (*s.51*) who may confirm the notice with or without modification or cancel the notice. There is no requirement, however, for the display of any modification to the notice as a consequence of a review by the Commissioner. That deficiency should be corrected.

R:97 It is recommended the Act be amended to require the display of any modification to an improvement or prohibition notice as a consequence of a review, until the notice, as amended, has been complied with.

1189. While the Commissioner has the power to cancel a notice following a request for a review, there is no power to do so where no review is sought or when the period for review has passed. In such circumstances, and in the absence of the inspector who issued the notice, there is no means to cancel an invalid notice and take it “off the books”. While the removal or cancellation of notices should not be without good reason, it is necessary for the Commissioner to have the authority to remove defunct notices. To avoid any claim of impropriety, the reasons for each cancellation should be provided in writing at the time of cancellation.

1190. A union opposed this proposal on the basis that the authority already exists after the review process. It may, however, merely be a misunderstanding of the proposal as there is no intention under the recommendation for the arbitrary cancellation of an effective notice. There have been circumstances, however, when there has been a need to cancel an ineffective or irrelevant notice.

R:98 It is recommended the Act be amended to give the WorkSafe Western Australia Commissioner the power to cancel a notice. Written reasons should accompany each cancellation.

1191. It appears that until recently WorkSafe procedures did not specifically follow-up improvement notices where it had not received compliance advice. Moreover, prosecution of those who fail to comply with a notice or seek a review by the due date is apparently not a common practice due to the cost of such actions and the low penalties applied. This represents a disturbing situation that has the potential to compromise the integrity of the notice system. If non-compliance with an improvement notice has little or no consequence, notices may be ignored.

1192. WorkSafe should view non-compliance with an improvement notice as a serious matter that could hold serious consequences. To this end, it would seem essential that a sanction be applied where a notice is not complied with. This could be either by way of an “on-the-spot fine” as earlier recommended or a prosecution. While “on-the-spot fines” have not been recommended generally by this Review, this is one instance where they would be of considerable impact. Failure to comply with notices could result in fines although again the imposition of such fines would need to be exercised consistently.
1193. Certainly if the Act provided for an automatic fine for failure to comply with an improvement notice or failure to notify compliance by the due date, notices would be taken more seriously and inspectors could enforce them more promptly than at present. Plainly any aggrieved party would continue to be entitled to seek a review by the Commissioner¹⁵⁴.
1194. Another cost effective option for prosecuting those who fail to comply with improvement notices could be the appointment of suitably trained inspectors to prosecute these matters. The case for this approach to some prosecutions is made in Part 4¹⁵⁵.
1195. Failure to comply with a Prohibition Notice is a much more serious matter that should be dealt with by prosecution.
1196. The response from WorkSafe in relation to improvement notices argues that the significance of the notices is well understood and that prosecutions are made not for failure to observe the notices but because of the substantive issues which led to the notice. As a result it was argued that the foregoing distorts the situation and does not accurately reflect WorkSafe’s activity. WorkSafe, however, supports the recommendation as necessary. It also observes that there must be some exercise of discretion in applying on-the-spot fines according to the particular circumstances.

R:99 It is recommended WorkSafe ensure that all Improvement Notices are complied with or dealt with by review.

¹⁵⁴ See **R:40**

¹⁵⁵ See section 4.4.7

1197. Another issue raised by employer representatives is the failure of inspectors to inform employers of the reasons why prohibition notices have been issued. It was submitted that employers are left to speculate on what is required. Generally, employers will know why the notice was issued as *s.49(3)(b)* of the Act requires the inspector to state the “reasonable grounds for forming the opinion”. The explanation would not need to be lengthy. While it does not seem necessary to include an amendment in the Act it is an issue the inspectorate should take into account and could form part of the reporting process.
1198. A submission made by a farming representative proposed that where improvement (and presumably prohibition) notices had been made incorrectly, the costs associated with the notice should be reimbursed. It was submitted that adequate compensation would ensure that notices were only issued where necessary and where the inspector had some certainty of the position taken. It was argued that it would ensure that “casual” or “inaccurate” notices would be reduced. In the particular instance, it was argued that only half of a number of notices had been verified as warranted.
1199. The submission is of interest because it follows strategies put in place by other agencies. For example the Australian Tax Office, Telstra and others have compensation models for aggrieved users. While it is not suggested such a scheme should be implemented, the Department should take account of the schemes within the context both of performance management and organisational effectiveness and in the individual performance. The inspectorate has a role to ensure workplaces reach accepted standards. There is no less an onus on the Inspectorate itself to reach and maintain reasonable standards.

8.2.7 Relationship with Consultants and Service Providers

1200. A number of submissions were received recommending a more active relationship with occupational safety and health consultants and service providers. It was suggested WorkSafe could significantly increase its reach and impact by utilising the efforts of the many independent occupational safety and health professionals throughout the State. This could be achieved by WorkSafe establishing regular and high quality communication specifically targeted at this sector. A submission suggested WorkSafe should also focus on communicating more effectively with company safety officers.

1201. Occupational safety and health professionals are not required to register with or be approved by WorkSafe. WorkSafe has contact with some service providers through the OSHNET network of service providers interested in marketing their services internationally and through the operation of the WorkSafe Plan scheme.
1202. While OSHNET is independent of WorkSafe, the Department has facilitated meetings of OSHNET and assisted in promoting the State's occupational safety and health expertise at the inter-governmental level. One submission did not support this initiative arguing occupational safety and health trainers and consultants who wish to export their services are adequately supported by the Department of Industry and Technology. WorkSafe was seen as duplicating and confusing these efforts.
1203. The WorkSafe Plan is an assessment process that is used to rate occupational safety and health management systems and to direct attention to areas that could be improved. WorkSafe has set up a system where private Assessors complete WorkSafe Plan assessments. The Assessors are trained by an independent training agency and accredited by WorkSafe when they have successfully completed all parts of a competency-based assessment. The Assessors are required to meet certain selection criteria before they begin training in how to use WorkSafe Plan. They are usually well-qualified and experienced work safety and health consultants. The Assessors are subject to random audits of their assessments, but at all other times, they operate independently of WorkSafe.
1204. With the exceptions of OSHNET, the WorkSafe Plan Assessor programme and indirectly through the SafetyLine magazine, WorkSafe does not appear to have communication strategies aimed directly at occupational safety and health professionals. There is merit in WorkSafe making an additional effort to ensure occupational safety and health professionals are aware of its current priorities and the contemporary support materials available so as to harness the resources and expertise of the occupational safety and health community. Similarly, occupational safety and health professionals should be kept abreast of current policy and information projects with a view to encouraging their participation in the development process.
1205. Observations on the proposal gave support to the concept of informing professional organisations although an employer representative argued that the information should be provided to all involved in occupational safety and health.

1206. It is accepted that all significant matters be conveyed to the general occupational, safety and health community and there is no suggestion that present communications should be limited or reduced. Instead it suggests that establishing a regular and detailed dialogue with professional organisations might well help generate new initiatives and resolve issues before they develop into major problems. Professionals and their associations also see the emergence and development of new issues and an advantage may be gained from more regular communication. Periodic issue forums and speakers could be ways of enhancing that activity.

R:100 It is recommended WorkSafe develop improved communication strategies to ensure better contact with occupational safety and health professionals.

8.2.8 Performance

1207. WorkSafe publishes measures of its effectiveness and efficiency generally as part of the formalised performance reporting requirements in the public sector. The measures, which include key performance indicators, are published in WorkSafe's Annual Report.¹⁵⁶

1208. The WorkSafe performance indicators measure the effectiveness of its regulatory activities by monitoring the outcomes of "priority investigations" that focus on seven priority areas. These include: work at heights, forklifts, electricity, hazardous substances, demolition, manual handling, and young people in the workplace. Priority investigations take the form of investigations (which workplace inspections) conducted in a standard format using a checklist of minimum standards relevant to the particular priority area. Compliance with the elements of the checklist is recorded across a wide range of workplaces and a measure derived of the extent to which workplaces comply with acceptable standards in the priority area. The measure reflects compliance levels in workplaces visited by inspectors and therefore may not be representative of all workplaces in Western Australia. Inspectors usually take account of, and focus on, high-risk situations and workplaces where accidents and incidents occur.

¹⁵⁶ See WorkSafe Western Australia (2001)

1209. The 7,093 priority investigations conducted by WorkSafe in 2000/01 produced disturbing results. The overall average compliance level reported was 81%. This suggests that even after many years of regulatory and enforcement activity and scrutiny, compliance with minimum requirements in priority areas is not satisfactory. Of particular concern is the relatively low level of compliance in high-profile areas such as falls from heights, forklifts and hazardous substances. The results in these areas suggest that past and present strategies need to be supplemented to be more effective in informing, encouraging and requiring workplaces to achieve compliance with minimum occupational safety and health standards. Even electricity, with an 86% compliance rate, is of concern in light of the nature of risks. Recent tragic events make it clear that much has yet to be done.
1210. There is a need to maintain a commitment to this investigation process as an effective measure. Establishing an accurate database is a further good reason for continuing the priority investigation process. The use of a standardised approach enables the accumulation of comparative data across industries and over time. The priority investigation approach reflects some of the more effective processes implemented elsewhere including those in the USA referred to in Part 3 of this Report.
1211. WorkSafe is to be commended for establishing the priority investigation system and associated performance measures. It is pleasing to note the substantial increase in priority investigations that occurred in 2001/02. It demonstrates the application and commitment of the organisation to establishing the factual situation even where it may be difficult and point to its own failures. That gives some confidence that it is becoming more professional and effective.
1212. The compliance measures provide an important means of identifying where inspection and information resources should be applied and should be extremely useful in planning processes. The measures provide targets that can drive inspection and other regulatory activity as well as better information. The 2000/01 compliance measures, for example, suggest WorkSafe should have on-going programmes specifically addressing falls from heights, forklifts and hazardous substances. Improvements in compliance in these areas will have a significant positive impact on occupational safety and health in the State.

9.0 Other Matters

9.1 Definition of “Import”

1213. The question has arisen of whether, for the purposes of the Act, an “importer” or “person who imports...” (see *s.23(1)*) relates only to a person bringing plant or substances into Western Australia from overseas, or if it extends to a person who brings plant or substances into the jurisdiction of the State from elsewhere in Australia.

1214. Neither the Act nor the Regulations define the term “importer” or “import”. In relation to plant, *r.4.25* states:

“If neither the person who designed plant nor the person who manufactured the plant is within the jurisdiction of the State, the person who imports the plant must ...”

1215. This implies the importer is a person who brings plant into the jurisdiction of the State, whether or not from overseas. This is not necessarily the commonly accepted meaning of “importer” or to “import”.

1216. It is noted that the question of National Competition Policy considerations may arise, should the meaning of import incorporate the entry of goods into Western Australia from other States and Territories. These considerations are not insignificant given that duties of importers under the Act are similar to those applying to suppliers, who may source their goods from Western Australia, interstate or overseas.

R:101 It is recommended a definition of “import” be included in the Act to make its meaning clear. This definition should extend to the bringing of plant or substances into the jurisdiction of the State, whether or not from overseas.

9.2 Clarification of Definition of “Supply”

1217. Although the Act defines the word “supply”, it is unclear whether the activities of auctioneers are covered, or whether the action of selling a business (and the plant owned by the business) constitutes “supply”.

R:102 It is recommended the definition of “supply” in the Act be amended to clarify whether activities such as conducting an auction and selling a business are included.

9.3 Evidentiary Provisions

1218. *S.53* of the Act contains averment provisions where in prosecution proceedings, in the absence of evidence to the contrary, specified matters are taken to be proved. This enables the trial to concentrate on the substantive elements of the case without being “bogged down” in having to hear evidence, in each and every case, on matters such as whether an inspector is an inspector.

1219. WorkSafe has submitted that in recent years, it has become evident that additions and modifications to the averment provisions are required. On a number of occasions WorkSafe has been required to present documentary evidence to the court on matters such as:

- a particular code of practice (approved by the Minister) is in fact a code of practice approved by the Minister in accordance with *s.57* of the Act;
- an Australian Standard is an Australian Standard; and
- the complainant instituting a prosecution is authorised to do so in accordance with subsection *52(1)* of the Act.

1220. These requests take up the Court’s time and add nothing to the case.

1221. The recommendations below address these concerns. In particular it makes the averment in relation to an employer more effective by separating the concept of a person being an employer generally, from the concept of a person being the employer of someone in particular. The proposal also omits any reference to “at a workplace”, which does not appear in *s.19* or *s.21* of the Act under which these averments would primarily be used.

R:103 It is recommended *s.53(b)* of the Act be amended to replace the existing averment in relation to an employer with two separate averments. The first being an averment that a particular person was an employer and secondly that an averment that a particular person was an employer of “particular persons”.

R:104 It is recommended *s.53* of the Act be amended to include provisions enabling averments that:

- a particular document is a code of practice as defined under *s.3* of the Act;
- a particular document is an “Australian Standard”; and
- a complainant has authority to prosecute.

R:105 It is recommended that “Australian Standard” be defined in *s.3* of the Act.

9.4 Gender References

1222. A number of submissions have pointed out the Act makes frequent reference to the male gender. As noted in the 1992 Review¹⁵⁷, this is inconsistent with modern expression. By way of contrast the *Mines Safety and Inspection Act 1994* is gender neutral.

R:106 It is recommended gender references be removed from the Act in accordance with modern expression.

9.5 Miscellaneous Issues

9.5.1 Roll-Over Protective Structures (ROPS)

1223. At the time of the introduction of the general duties into the then *Occupational Health, Safety and Welfare Act 1984*, a number of related repeals and amendments to other legislation were actioned through the *Acts Amendment (Occupational Health, Safety and Welfare) Act 1987*. One of these amendments involved repeal of the *Machinery Safety Act 1974*. (This repeal was effected by s.33(1) of the *Acts Amendment (Occupational Health, Safety and Welfare) Act 1987*.)

1224. At the time, there was some concern from the rural sector regarding the potential for changes to be made to the then current requirements for the provision of roll-over protective structures (ROPS) on tractors. In particular, the *Machinery Safety Act 1974* and the *Machinery Safety Regulations 1978* required the fitting of ROPS on tractors manufactured after 1 September 1979, but not on those manufactured prior to that date. The rural sector's concern centred on the potential to require the fitting of ROPS on pre-1979 tractors, on repeal of the machinery safety legislation.

1225. An amendment to the *Acts Amendment (Occupational Health, Safety and Welfare) Bill 1987*, to purportedly deal with the issue, was moved in the Legislative Council. The result was s.33(2), which stated:

“Notwithstanding the repeal effected by subsection (1), the provisions of s.75(1) of the *Machinery Safety Act 1974* and those of the *Machinery Safety Regulations 1978*, so far as each relates to the provision or otherwise of a protective cab or frame on a tractor manufactured later than September 1 1979, shall continue in force as if this Act had not been passed.”

¹⁵⁷ Laing (1992) p257

1226. The intended effect of the subsection was to preserve the relevant provisions of the machinery safety legislation so that any tractor manufactured later than 1 September 1979 would be required to have the ROPs, but any tractor manufactured prior to that date would be governed by the preserved legislation and would not be required to have ROPs. The amendment never, in fact, achieved this aim. Firstly, it referred to the incorrect section of the *Machinery Safety Act 1974*. Secondly, even had the correct reference been made, nothing would have prevented another Act or Regulations making different provisions.

1227. The proposed repeal will have no legislative effect, and is required simply to remove a meaningless provision, the existence of which is confusing.

R:107 It is recommended legislative action be taken to address the anomalies arising from the enactment of s.33(2) of the *Acts Amendment (Occupational Health, Safety and Welfare) Bill 1987*.

9.5.2 Equal Opportunity Legislation

1228. A submission identified potential conflict between the Act and the *Equal Employment Opportunity Act 1984*. It is important in applying the Act to take account of other legislation and where possible a judgement needs to be made about which shall apply. However, as in other areas, each matter will need to be considered on its individual merits. The Commission should consider the issues however and offer policy solutions.

9.6 Miscellaneous Regulatory Issues

1229. The Review received a number of submissions addressing specific occupational safety and health issues. These included a number of health-related matters such as smoking, solar radiation, exposure to carcinogens, and work-related stress. Other issues raised included alcohol and drugs in the workplace, first aid requirements, and the need for standards in the call centre industry.

1230. While these submissions provided an insight into contemporary occupational safety and health issues, the matters raised are outside the scope of the present Review. The matters would be appropriately addressed through regulation or inclusion in a Commission code of practice or guidance note. The relevant submissions will be brought to the attention of the Minister for referral to the Commission or other relevant authorities.

1231. These submissions highlighted the importance of the public comment processes used by the Commission in its Regulation Review program and in the development of codes of practice.

1232. Continuous review of the *Occupational Safety and Health Regulations 1996* is an important function of the Commission. The substantial size and breadth of the Regulations make periodic reviews of the entire body of regulations impractical. The Commission's dual approach of reviewing discrete Parts of the Regulations along with consideration of new and emerging issues is to be commended.

10.0 Appendix 1 – Commission Publications

10.1 Commission Codes of Practice

Codes of practice developed by the Commission and approved by the Minister for application in Western Australia in accordance with *s.57* of the *Occupational Safety and Health Act 1984* include:

- Abrasive Blasting, 2000.
- Control of Noise in the Music Entertainment Industry, 1992, 1999 and 2002.
- Control of Styrene in the Fibreglass Industry (superseded by Styrene), 1990.
- Excavation, 1996.
- First Aid, Workplace Amenities and Personal Protective Equipment, 1996 and 2002.
- Legionnaires' Disease, 1989 and 2000.
- Management of HIV/AIDS, Hepatitis at Workplaces, 1991, 1997 and 2000.
- Managing Noise at Workplaces 2002.
- Manual Handling, 1991, 1992, 1996 and 2000.
- Noise Control in the Workplace [superseded by Noise Management and Protection of Hearing at Work NOHSC: 2009 (1993)] 1989 and 1991.
- Prevention of Falls at Workplaces, 1990 and 1997.
- Safe Work on Roofs (superseded by Prevention of Falls at Workplaces), 1990.
- Safety and Health of Children and Young People in Workplaces, 1999.
- Spray Painting, 2000.
- Styrene, 1996.
- Workplace Violence, 1999.

10.2 Commission Guidance Notes

Guidance Notes developed and published by the Commission for the purposes of *s.14(1)(e)* include:

- Alcohol and Other Drugs at the Workplace, 2000.
- Asbestos Materials in the Automotive Maintenance & Repair Industry, 1999.
- Controlling Hazards in the Electroplating Industry, 2000.
- Controlling Isocyanate Hazards at Work, 2000.

- Controlling Wood Dust Hazards at Work, 2000.
- Electricity: Residual Current Devices, 1998.
- Election of Safety and Health Representatives, Representatives and Committees and Resolution of Issues, 1990 and 1996.
- Environmental Tobacco Smoke (ETS), 2000.
- Guidelines for the Development of Industry Codes of Practice Approved under the *Occupational Safety and Health Act 1984*, 1998.
- Mobile Phones, 2001.
- Gas Welding Safety Flashback Arresters, 2002.
- Plant Design – A guide for designers, manufacturers, importers, suppliers and installers of plant, 2001.
- Plant in the Workplace – A guide for employers, self-employed persons and employees, 2001.
- Prevention of carbon monoxide poisoning from petrol and gas powered plant, 2001.
- Reducing the Risk of Fatigue at Workplaces, 2001.
- Safe Movement of Vehicles at Workplaces, 2001.
- Safe Use of Woodworking Machinery (Guarding), 2001.
- Safe Use of Chemicals in the Woodworking Industry, 2002.
- The General Duty of Care in Western Australian Workplaces, 1992 and 1996.
- Soldering in the Workplace: Rosin Fluxes, 2000.
- Working Alone, 1999.
- Making the Workplace Safe, 2002.
- Safety and Health in the Workplace Depends on YOU, 2002.
- Working Safety With Forklifts, (video) 1998.

10.3 Commission Approved Instruments

Instruments developed and published by the National Occupational Health and Safety Commission (NOHSC), the Standards Association of Australia alone (AS) or jointly with the Standards Association of New Zealand (AS/NZS), and industry associations recommended by the Commission to and approved by the Minister as codes of practice under the Act include:

- Safe Removal of Asbestos [NOHSC: 2002 (1988)].

Appendix 1

- Safe Use of Vinyl Chloride [NOHSC:2004(1990)].
- Safe Use of Synthetic Mineral Fibres [NOHSC: 2006 (1990)].
- Safe Use of Ethylene Oxide in Sterilisation/Fumigation processes [NOHSC: 2008 (1992)].
- Prevention of Occupational Overuse Syndrome [NOHSC: 2013 (1994)].
- Control and Safe Use of Inorganic Lead at Work [NOHSC: 2015 (1994)].
- Management and Protection of Hearing at Work [NOHSC: 2009 (1993)]; revoked in 2002 [superceded by Managing Noise at Workplaces 2002, WorkSafe Western Australia Commission].
- Control of Scheduled Carcinogenic Substances [NOHSC: 2014 (1995)].
- Workplace Hazardous Substances [NOHSC: 2007 (1994)].
- Preparation of Material Safety Data Sheets [NOHSC: 2011 (1994)].
- Labelling of Workplace Substances [NOHSC: 2012 (1994)].
- Guidance Note for the Assessment of Health Risks Arising from the Use of Hazardous Substances in Workplace, [NOHSC: 3017 (1994)].
- Guidance Note for the Control of Workplace Hazardous Substances in the Retail Sector, [NOHSC: 3018 (1994)].
- Guidance Note on the Interpretation of Exposure Standards for Atmospheric Contaminants in Occupational Environments, [NOHSC: 1003 (1995)].
- National Guidelines for Occupational Health and Safety Competency Standards for the Operation of Loadshifting Equipment and Other Types of Specified Equipment
- AS/NZS 4576:1995 Guidelines for scaffolding.
- AS 3610-1995 Formwork for concrete.
- AS 4024.1-1996 Safeguarding of machinery Part 1: General principles.
- Health and Safety in Welding Technical Note 7, Welding Technology Institute of Australia: (TN 7-94) and (TN7-98) 1994, 1998.
- Fatigue Management for Commercial Vehicle Drivers, Department of Transport 1998;
- Safe Use and Application of High Pressure Water Jetting Equipment, Australian High Pressure Water Jetting Association.
- Safety and Health within the Waste Management and Recycling Industries, Waste Management Association of Australia, 2001.

11.0 Appendix 2 – Commission Advisory Committees

Advisory committees and working parties established by the Commission are listed below:

1994/1995 and 1995/1996

- Workplace Health and Safety Advisory Committee.
- Education and Training Advisory Committee.
- Research Advisory Committee.
- Regulation Review Advisory Committee.

1996/1997

- Education and Training Advisory Committee.
- Regulation Review Advisory Committee.

1997/1998

- Fatalities Working Group.
- Health Hazards Working Group.
- Workplace Change Working Group.
- Education and Training Advisory Committee.
- Regulation Review Advisory Committee.
- Employment of Children and Young Persons Working Party.
- Employee Accommodation Working Party.

1998/1999

- Fatalities Working Group.
- Health Hazards Working Group.
- Workplace Change Working Group.
- Education and Training Advisory Committee.
- Legislation Advisory Committee.
- Employment of Children and Young Persons Working Party.
- Employee Accommodation Working Party.

1999/2000

- Fatalities Working Group.
- Health Hazards Working Group.
- Workplace Change Working Group.
- Legislation Advisory Committee.
- Education and Training Advisory Committee.
- Construction Industry Safety Advisory Committee.
- Employer Provided Accommodation Working Group.
- Dangerous Goods Legislation Working Group.

2000/2001

- Awareness and Promotion Advisory Group
- Education and Skills Development Advisory Group
- Legislation Advisory Group
- Safety and Health Hazards Advisory Group
- Construction Industry Safety Advisory Committee
- Accreditation Panels

2001/2002

- Awareness and Promotion Advisory Group
- Education and Skills Development Advisory Group
- Legislation Advisory Group
- Safety and Health Hazards Advisory Group
- Construction Industry Safety Advisory Committee
- Accreditation Panels
- Agricultural Industry Safety Advisory Committee
- Aged Care Industry Safety Working Group
- Performance Measurement in the Construction Industry Working Party
- Call Centre Reference Group

12.0 Appendix 3 - Written Submissions

12.1 Government

Chief Magistrate, Mr S Heath

Disability Services Commission
Chief Executive Officer, Dr R Shean

Department of Mineral and Petroleum Resources
Director-General, Mr J Limerick

Education Department of Western Australia
Safety Consultant, Mr J Heyward

Minister for Health
Hon RC Kucera MLA

Office of Energy
Director of Energy Safety, Mr A Koenig

Royal Perth Hospital
Risk Management Co-ordinator, Ms A Summers

Sir Charles Gairdner Hospital
Director, Occupational Health, Dr P Carravick

Water Corporation of Western Australia
Managing Director, Dr J Gill

Western Australian Police Service
Director, Human Resources Directorate, Mr J Frame

WorkSafe
WorkSafe Western Australia Commissioner, Mr B Bradley

WorkSafe Western Australia Commission
Chair, Mr T Cooke

12.2 Individuals

Mr R Ainsworth MLA

Mr and Mrs F and E Allen

Mr L Figueiredo

Associate Professor Dr B Galton-Fenzi

Ms P Heaton

Mr D A McCann

Mr CE Munyard

Ms L Parry

Mrs MA Ryan

Mr N Sharp

Ms J Stribling

Mr A Syme

Mr G Taylor

Mr J Volkofsky

Dr KC Wan

Mr S Wickham

Mr J Zeidler

12.3 Unions

Australian Manufacturing Workers' Union

State Secretary, Mr J Ferguson

State School Teachers Union of Western Australia

OHS Organiser, Ms J Barrett

Western Australian Police Union of Workers

General Manager, Mr K See

UnionsWA

Occupational Safety and Health Officer, Mr B Bryant

12.4 Employers and Employer Organisations

Apprentice and Traineeship Company – Midwest
Manager, Mr G Van Eede

Australasian Institute of Engineering Inspection of Western Australia Inc
Chairman, Mr N Platts

Chamber of Commerce and Industry of Western Australia
Manager Occupational Safety and Health and Workers' Compensation, Ms A Bellamy

Civil Contractors Federation of Western Australia
Executive Director, Mr M Morris

Coles Myer Limited
OH&S Manager, Mr P Wagner

Contract Carpenters Association of Western Australia Inc
President, Mr F Sharp

Devaugh Pty Ltd
Safety/HR Manager, Mr D Gordon

Electrical Contractors Association
Mr C Martin

Farm Machinery Dealers Association of Western Australia (Inc)
State and National Secretary, Mr S Lewis

Halpern, Glick, Maunsell
Chairman, Occupational Safety and Health Committee, Mr S Gibson

Housing Industry Association
Director, Mr J Dastlik

Master Builders Association of Western Australia
Director, Mr M McLean

Master Cleaners Guild of Western Australia
Executive Director, Mr I Westoby

Master Painters Australia
Chief Executive, Mr S Henry

Appendix 3

Master Plumbers and Gasfitters Association of Western Australia
Chief Executive, Mr S Henry

Pindan Constructions
Managing Director, Mr G Allingame

Sotico Pty Ltd
Human Resources Manager, Mr G Van Hazendonk

Western Australian Farmers Federation (Inc)
A/Executive Director, Mr D Parker

Western Power
Managing Director, Mr D Eiszele

Western Australian Shearing Contractors Association (Inc)
Executive Officer, Mr P Brunner

Western Australian Small Business and Enterprise Association Inc
Executive Director, Mr P Achurch

12.5 Occupational Safety and Health Organisations

Accidental First Aid Supplies
Mr SM Ball

Curtin University of Technology, Occupational Safety and Health Program, School of
Public Health
Director, Professor J Spickett

Industrial Foundation for Accident Prevention
Executive Director, Mr D Blyth

Safety Institute of Australia, Western Australian Division
President, Mr G Taylor

12.6 Other Organisations

Australian Medical Association
Deputy Executive Director, Mr PL Jennings

Australian Council on Smoking and Health
Director, Mr R Edwards

Cancer Foundation of Western Australia Inc
Chief Executive Officer, Mr M Daube

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NOHSC (2002), *National OHS Strategy 2001 – 2012*, National Occupational Safety and Health Commission, Canberra

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Occupational Health and Safety Act 1985 (Vic)

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