



WILL INCREASING PROSECUTIONS IMPROVE OCCUPATIONAL SAFETY AND HEALTH PERFORMANCE?

*Presented to WA Safety Conference 2008
Safety Institute of Australia (WA)*

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Evolution of Occupational Safety and Health Legislation in Western Australia

The Robens Committee Report of 1972 in the United Kingdom, which led to the Health and Safety at Work etc Act 1974 in that country, was the reference point for the development of the Occupational Safety and Health Act here in Western Australia.

Virtually all OHS legislation in Australian states and territories follows closely the principles espoused in the Robens Committee Report.

The Robens Report identified that the greatest single contributing factor to accidents at work was human apathy, an entrenched societal deficiency also identified by the deaf-blind Helen Keller who noted that “science had found a cure for most evils; but it has found no remedy for the worst of them all – the apathy of human beings.”

The Robens Report suggested that this apathy would not be cured so long as people are encouraged to think that safety and health at work can be ensured by an ever-expanding body of legal regulations enforced by an ever-increasing army of inspectors. Rather,

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. The point is quite crucial.

Any appreciation of occupational safety and health legislation in Australia requires a careful and objective examination of the catalyst for its emergence – the Robens Report, which took two years to complete and followed informal discussions with inspectors, administrators, industrialists, trade unionists, professional institutions and others both in the UK and other industrialised countries including Canada, Germany, Sweden and the USA.

The recommendations of the Report were clear and concise and warrant the careful and objective examination referred to earlier.

Interestingly, the full Report comprises only 158 pages (plus appendices) and should be required reading for all those contemplating a career in the absorbing discipline of occupational safety and health.

My experience is that relatively few have actually done so.

The Western Australian OHS Act 1984 was true to the Robens principles of:

- An effective self-regulatory system in which employers and employees and their representatives accept primary responsibility for reducing occupational accidents and disease;
- Workers participate in establishing and monitoring the arrangements for safety and health in workplaces; and
- The basic function of safety inspectorates is the provision of expert and impartial advice and assistance to industry.

Subsequent amendments have further developed these principles without diluting the underlying philosophy.

The Role of Safety Regulators/Inspectors and their Approach to Prosecutions

The Robens Committee findings and conclusions on the role of regulatory authorities were clear and concise:

- The inspectorate has learned from experience that recourse to legal sanctions is only one means of achieving the objectives of safety legislation and that it is rarely the most apt or the most effective.
- There are far too many workplaces and far too many regulations applying to them for anyone to contemplate anything in the nature of continuous official supervision and rigorous enforcement.
- We believe that as a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activities of the inspectorate.

Inspectors should:

- Seek to raise standards above the minimum level required by law;
- Advise on better organisation;
- Be concerned with the broad aspects of safety and health organisation at workplaces they visit;
- Discuss safety and health problems with work people and their representatives.

With regard to prosecutorial approaches the Report was once again clear and concise:

- Any idea that occupational safety and health standards should be rigorously enforced through the extensive use of legal sanctions is one that runs counter to our general philosophy.
- We do not believe that the traditional sanction commands any very widespread degree of respect or confidence in the occupational safety and health field.

- The sanctions of criminal law have only a very limited role to play in improving standards of health and safety at work. Criminal courts are inevitably concerned more with events that have happened than with curing the underlying weakness that caused them.
- The typical infringement or combination of infringements arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency.
- The real need is a constructive means of ensuring that practical improvements are made and preventative measures adopted.

Until more recent times, the regulatory authorities in most states of Australia have carried out the roles envisaged by the Robens Committee. In the mining industry in Western Australia the role was clearly outlined by the former State Mining Engineer, Jim Torlach following the introduction of the Mines Safety and Inspection Act 1994:¹

“The most effective approach for the inspectorate in the future will be to concentrate on auditing, advising, educating and fostering a self-regulatory approach by the industry in the correct sense of the term.”

The provision of this expert and impartial advice and assistance to industry has continued despite the difficulties of attracting and retaining the quality personnel necessary for the inspectorate to carry out its responsibilities effectively.

¹ New Legislative Directions, J.M. Torlach, Minesafe 1996 Conference Proceedings

Prosecutions – Was Robens Wrong?

At the Minesafe International Conference held in Perth in 2000 delegates were told that the role of safety inspectorates needed to be rethought because, to quote:

Occupational safety and health enforcement had lagged behind the introduction of safety management systems.

Experts agreed that the long standing debate about whether to retain a Robens-type system of ensuring compliance using an advisory and persuasive methodology *or* an enforcement of statutory obligations by formal sanctions was best resolved by a judicious mix of the two approaches.

It was further suggested that the decriminalizing of occupational safety and health regulation and bypassing/underutilisation of criminal sanctions should be arrested and reviewed by a vigorous, carefully targeted, flexible and highly publicised prosecution strategy. Agencies should encourage, facilitate and negotiate compliance with OHS standards within the shadow of potentially large penalties and the stigma of criminal sanctions.

OHS prosecutions should be made more visible and effective in the expectation that that strategy will reduce the need for prosecutions to be more numerous i.e. prosecutions will improve OHS performance.

Since that time, a plethora of papers from the National Research Centre for OHS Regulation at ANU have promoted this position, though a more reasoned version has appeared more recently. ²

² Prosecution for OHS Offences: Deterrent or Disincentive? Neil Gunningham, Sydney Law Review, Vol 29;359

Particular mention is made of the reluctance of the Mines Inspectorate in Western Australia to commence prosecutions.

Little attempt has been made to measure occupational safety and health performance under the Robens-type philosophy in these studies calling for increasing safety and health enforcement.

Recent Developments in Victoria

In Victoria, which is considered progressive in terms of occupational safety and health, a new OHS Act has been operating since 2004.

This Act demanded that consultation be the key ingredient in workplace safety. It provided for increased participation and involvement of employers, workers and their representatives in workplace health and safety issues and paved the way for increased compliance by making it easier for employers and workers to understand their safety obligations while at the same time cutting red tape and compliance costs.

These innovations followed Maxwell's review of the 1985 Act which had found that although the original Act was sound, some reforms were needed to make it work better in order to meet the needs of workplaces in the future.

A recent independent review of the 2004 Act³ to assess whether it was promoting improved safety outcomes, including protection of workers who raise OHS issues, found as follows:

- Employers were positive about the changes which they saw as promoting safety outcomes particularly the duty of employers to

³ A report on the Occupational Health and Safety Act 2004 Administrative Review. Bob Stensholt, Dec 2007

consult with employees and the power of inspectors to give advice on compliance;

- Unions considered that WorkSafe had a very conservative enforcement policy with Victoria having a low level of prosecutions compared to other states e.g. NSW, Qld. They recommended that HSR's be given the power to initiate prosecutions as was the case in NSW.

The key recommendations of the review were to increase the level of resources of its prosecutions and enforcement branch of WorkSafe and to review WorkSafe's prosecution policy in the public interest.

Key indicators of performance recorded in the Review:

- Workers' compensation claims have dropped significantly since the 2004 Act was introduced;
- The lowest number of workers being injured on record was recorded in 2005/06;
- Victoria has the lowest number of reported injuries across Australia by a significant margin.

The failure of the Review to give due recognition to the effect - as reflected in the key performance indicators – of the increased participation and involvement of all parties in the workplace and the more conciliatory and advisory role of the safety inspectorate is inexplicable.

Recent Developments in New South Wales

In New South Wales an aggressive approach to prosecution, particularly following fatalities, has provoked an ongoing dispute, employer organisations on one hand and safety regulators and trade unions on the other.

In the mining sector prosecutions have been initiated not only against mine managers but also against other statutory duty holders.

Gunningham⁴ concludes:

“...vengeful prosecution against those who neither intended harm nor were reckless in their behavior is widely perceived to be unjust and this has caused the law to lose its legitimacy in the eyes of the duty holders. It has also generated a defensiveness on the part of duty holders that results in an unwillingness to examine the root causes of accidents and incidents for fear of being prosecuted.”

⁴ Ibid.

Enforcement Activity in Australia by Jurisdiction 2005/06

The ninth edition of the Workplace Relations Ministers' Council Comparative Performance Monitoring Report issued in February 2008 compares occupational health and safety and workers' compensation schemes in Australia including enforcement activities by jurisdiction.

	NSW (2.86m)	VIC (2.24m)	QLD (1.61m)	WA (.92m)	SA (.66m)
Inspectors/10,000 employees	1.1	1.1	1.3	1.2	1.4
Legal processes commenced	459	136	174	37	71
Prosecutions resulting in conviction	340	70	143	41	51
Incidence rate of injuries/disease	16.9	12.9	18.0	13.3	18.0
Standardised average premium rate	2.35	1.76	1.36	1.67	3.06
% premium reduction 03/04–05/06	4.5	21.78	.74	13.03	.32

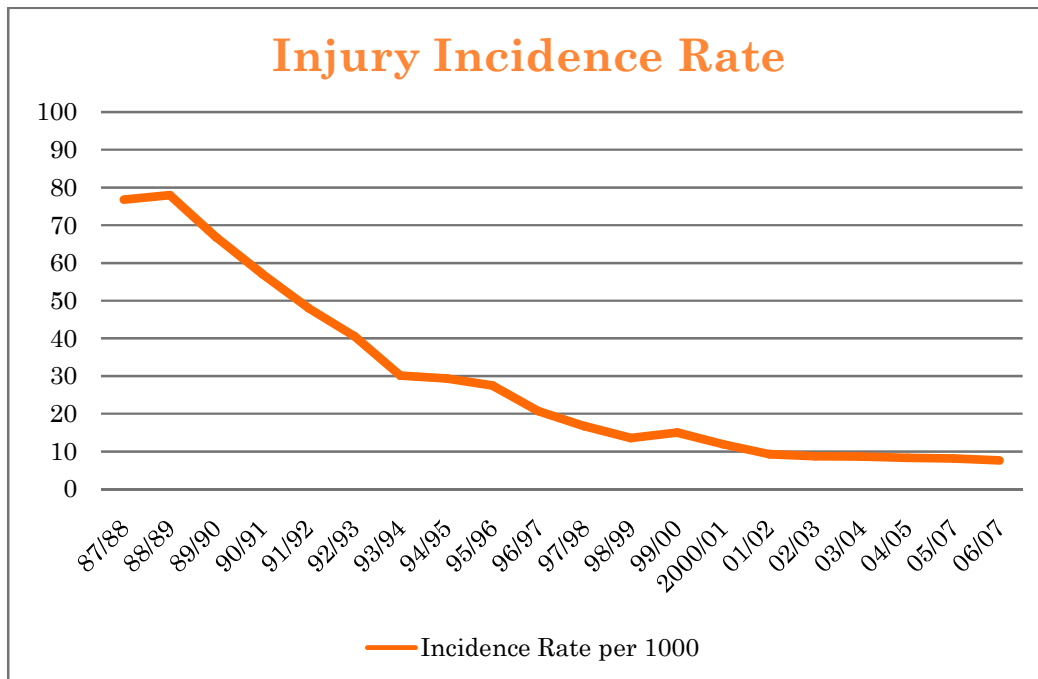
This data shows that Victoria and Western Australia, who have the lowest rate of prosecutions resulting in conviction, also have the lowest incidence rates of injury and disease and importantly enjoy the greatest reduction in average workers' compensation premium rates over the three years to June 2006 by a wide margin.

Do Prosecutions Improve OHS Performance? The WA Mining Industry – A Case Study

The mining industry in Western Australia provides an ideal opportunity to assess the Robens philosophy on the role of prosecutions in improving occupational safety and health performance.

The Mines Safety and Inspection Act, although not proclaimed until 1995, was effectively implemented on site by the industry in the late 1980's following the passage of the Occupational Safety and Health Act in 1984 and corresponding changes to the then current Mines Regulation Act 1946 embodied in a 1990 Amendment Act.

Industry safety performance since that time has been remarkable over a period in which the workforce has increased from 30,000 to over 60,000.



Reduction in incidence = 80.17

Source: DOCEP – Resources Safety, Safety Performance in the WA Mineral Industry Accident and Injury Statistics

Workers' compensation premiums have been reduced accordingly.

Industry Sector	1986/87 % Payroll	2007/08 % Payroll	% Reduction
Underground	15.0	3.04	80
Surface - Gold	5.0	1.45	80
Surface - Mineral Sands	5.0	1.17	77
Surface - Iron Ore	2.2	.47	79

Source: Workcover Western Australia Premium Rates 2007/08

Comparative Major Industry Sectors Average Premiums 2007/08

	% Payroll
Mining	1.80
Manufacturing	2.37
Construction	3.68
Agriculture	5.04

The reduction in injury incidence and the consequent lowering of workers' compensation premiums can be largely attributed to the holistic adoption of the Robens philosophy by the mining sector.

The mining industry in Western Australia provides an outstanding example of what can be achieved by the adoption of, and commitment to, the key Robens principles referred to earlier:

- An effective self-regulatory system in which employers, employees and their representatives accept primary responsibility for reducing occupational accidents and disease;
- Workers participate in establishing and monitoring the arrangements for safety and health in workplaces; and
- The basic function of safety inspectorates is the provision of expert and impartial advice and assistance to industry.

Empowerment of the workforce has been a major factor in the improvement of safety and health and the commitment of employers to this process is best exemplified in the record of training of safety and health representatives.

Industry Sector	Number of Safety & Health Reps trained per 1000 employees	Average Workers' Compensation Premiums 2007/08	Total Number Trained 2000/01 to 2006/07
Agriculture, Forestry, Fishing	2.33	5.04	434
Construction	5.15	3.68	1245
Manufacturing	3.23	3.36	1522
Transport and Storage	4.09	2.37	1012
Mining	27.88	1.80	5354
Electricity, Gas, Water	10.42	1.27	624

Source: WorkSafe Commission for Occupational Safety and Health Accredited Training Courses for Safety and Health Representatives Annual Report 2006/07

Why the achievements of the industry and perhaps more importantly the process by which they have been achieved have not been promoted in the public interest I cannot explain.

Why is the key principle of worker participation in establishing and monitoring arrangements for safety and health in workplaces ignored by the promoters of safety and health conferences and seminars?

Why is the importance of electing and educating safety and health representatives not recognised by major industry sectors?

The Victorian Government is now demonstrating that consultation, participation and the collective involvement of employers, workers and their representatives can have significant workplace safety and health benefits, something that has been evident in the mining industry here in Western Australia for 20 years.

My belief is that the law could be changed to require the appointment and training of a safety and health representative in every workplace. It is plausible and relatively inexpensive and would change the face of occupational safety and health to an extent unprecedented.

Proposing to increase prosecutorial resources as a means of improving occupational safety and health is misguided and foolhardy.

The following comments from the Robens Report are as valid today as they were some 36 years ago:

“The character of criminal proceedings against employers is inappropriate to the majority of situations which arise and the processes involved make little positive contribution towards the real objective of improving future standards and performance.

The sanctions available should provide scope for distinguishing between situations where the accent should be on punishment, and the most frequent situations where the accent should be on constructive remedial action.”
