

Tuesday, 8 July 2008

National OHS Review Secretariat
Department of Education, Employment and Workplace Relations
64N1 GPO Box 9880
CANBERRA ACT

Email: publicsubmissions@nationalohsreview.gov.au

Dear Secretariat,

On behalf of the Australian Council of Built Environment Design Professions (BEDP) I would like to thank you for the opportunity to comment on the recently released Issues Paper '*National Review into Model Occupational Health and Safety (OHS) Laws.*'

We welcome this review as being an opportunity to '*contribute to creating a model OHS Act that will be used to harmonise OHS laws across Australia and improve occupational health and safety*'

The Australian Council of Built Environment Design Professions (BEDP) Limited

BEDP is the peak body for the built environment design professions. Through its member organisations, it represents more than 100,000 architects, engineers, planners, quantity surveyors, lighting designers and landscape architects throughout Australia. Collectively these professions form the nucleus of the built environment design consulting industry. BEDP's mission is to advocate to Government, industry and the community on how to create a world class built environment.

Membership of the Australian Council of BEDP is comprised of the following organisations:

- Association of Consulting Architects Australia (ACAA).
- Association of Consulting Engineers Australia (ACEA).
- Australian Institute of Landscape Architects (AILA).
- Australian Institute of Quantity Surveyors (AIQS).
- Engineers Australia (EA).
- Illuminating Engineering Society of Australia & New Zealand (IESANZ).
- Planning Institute of Australia (PIA).
- Australian Institute of Architects.

Background

For some years BEDP has advocated the need for a uniform system across all States and Territories across Australia. At present, each State and Territory administers its own independent OHS legislation and policy, in addition to Federal legislation and regulation. This often means that organisations are working in different jurisdictions which have completely different regulations to comply with. This ultimately leads to excessive regulatory burden and misunderstanding, and an environment where organisations may inadvertently not follow proper procedure, despite the best of intentions.

The aim of this submission is to further support the views put forward by our member organisations, the Australian Institute of Architects and the Association of Consulting Architects Australia (ACEA) in their own independent submissions in this review process.

Key components of a model OHS Act

Model OHS Act should be relevant to workplaces, where a workplace is defined as any place where work is, or is to be, performed by a worker; or a person conducting a business or undertaking.

The key components of a model OHS Act is that it should be reasonable, practicable and transparent. Its overall aim is to ensure a healthy and safe work environment and that the health, safety and welfare of people in the workplace is maintained. Employers and self-employed persons should be proactive, and take all reasonable and practicable measures, to minimise or eliminate risks at workplaces and in the conduct of undertakings.

In addition, the model OHS Act should not overlap with other Acts and Building Codes which prescribe safety. There should also be reference to employees being responsible for their own actions in the workplace.

OHS obligations – who is responsible?

The ability of designers to achieve their OHS obligations (i.e. safe design) is now heavily influenced and burdened by the relationship with other key stakeholders. Therefore, safe design is not the sole province of the designer, but rests with a range of stakeholders, starting with the client who commissions the work and including, construction contractors, owners and developers whose influence can have a major impact on the safety outcomes of a design.

In order for designers to be in a position to adequately understand the scope of their obligations under the model OHS Act it is important that they provide an adequate definition of exactly what constitutes a designer for the purposes of the Act.

It is necessary for all employers to exercise reasonable caution and take all practical precautions to ensure safety in the workplace. It is essential that the approach should be proactive rather than reactive.

Reasonably Practicable vs. Reasonable and Practical

BEDP supports ACEA's submissions stating that the test of 'reasonable' and 'practical' is the more appropriate test for duty holders in meeting their OHS obligations as it allows businesses the flexibility to respond within their operational and commercial capabilities.

Distinction in the design process

There must be a clear distinction between the safe 'design' of a building and the safe 'design' of a construction site. Architects and engineers design buildings, not construction sites and these two need to be differentiated.

Legislation should reinforce that the building contractor has the responsibility for selecting construction methods, not the designer. Legal requirements that dilute or confuse this role should not be introduced.

Some jurisdictions place an additional duty on designers of buildings and structures to ensure the safety of those who construct, maintain, repair or service the building or structure, as well as for those who use it. By contrast, the Victorian *OHS Act 2004* only requires the design of buildings and structures to be safe for persons using them as a workplace (s.28).

BEDP highly recommends that the national OHS Act support this Victorian legislation. In addition, BEDP does not support the extension of the building designers duty to the construction of the building.

Model OHS Act should not place duties regarding the construction of a design project on designers as they are not constructors, and a separate definition of a designer of construction sites and construction work processes should be defined and included.

The designer is responsible for the safety of the end users of the building or structure. The contractor is responsible for the safety of the building during construction. The building designer may participate in determining the construction method but the ultimate responsibility rests with the contractor. This means to contractor has the ultimate control of the site.

Risk

It is impossible to design risk out of every building. However, BEDP recommends that designers identify any potential hazards in buildings which may not be apparent to the duty holder and or owner. The aim is to minimise hazards but it is impossible to believe that all risks can be eliminated.

Need for an OHS Regulator

The role and the function of the regulator should do more than enforce OHS law. A Regulator should be the primary driver of OHS safety culture with employees, industry and the community because they are the most appropriate body to influence and assist stakeholders to achieve improved OHS performance through education, advice and assistance.

Importantly, as a public administration a model Regulator should also be transparent, accountable and independent from any possible social, political or economic influence or power that may impact on their role or function. In addition, any advice given to an employer by the Regulator should not be admissible as evidence against a prosecution of a breach of the model OHS Act.

The model OHS Act should provide for the appointment, powers, and functions of OHS inspectors. The model OHS Act should also set out the conditions and limitations that the OHS inspector has in relation to their powers and functions.

Warnings and breaches

It's recommended that before any enforcement option is imposed on a duty holder for an OHS breach, that all other measures (i.e. advice, persuasion, warnings and negotiated outcomes) to change behaviour etc have been explored and considered. It may be that these measures aren't suitable or warranted due to the gravity of the breach but in other situations these measure may be appropriate and proportionate to the OHS breach.

Breach of the model OHS Act should remain a criminal offence and therefore prosecution and penalties should be administered and enforced through the basis of criminal law. The onus of proving that a defendant breached a duty under OHS laws should fall on the prosecution, as applicable with current Victorian legislation.


Conclusion

A regulated National OHS system will remove any uncertainty and ensure that all organisations are aware of what is required to maintain a safe working environment and future maintenance of the projects they design. Organisations, particularly smaller ones, also need to be supported in designing and implementing an OHS management system. In addition, OHS training is essential for all stakeholders within organisations, not just the employer.

BEDP requests that in order for the views of the design professions to be fully represented during this review process, we ask that a design professional be appointed to or closely liaise with the advisory panel to ensure that any decisions made are not detrimental to our industry sectors. Fundamentally, the aim is to ensure that OHS system is endorsed by the three stakeholders in industry – clients, contractors and the design professions.

If you would like to discuss this submission further, please do not hesitate to contact Johanna Gastevich, Executive Officer.

Yours sincerely



Richard Green

Chair

Australian Council of Built Environment Design Professions Limited