

Shop, Distributive & Allied Employees' Association



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NATIONAL PRESIDENT
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11th July 2008

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

Dear Panel Members,

RE: NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

The Shop, Distributive and Allied Employees' Association welcomes to opportunity to comment on the Issues Paper regarding the harmonization of Occupational Health and Safety laws.

Yours sincerely,

A handwritten signature in black ink that reads "J. de Bruyn". The signature is written in a cursive, flowing style.

NATIONAL SECRETARY
JOE DE BRUYN



**Submission on the National Review into
Model Occupational Health and Safety
Laws.**

July 2008

**Shop, Distributive & Allied Employees'
Association**

The SDA is Australia's largest single trade union with over 200,000 members. Its principal membership coverage is the Retail industry. It also has members in warehousing and distribution, fast food, petrol stations, pharmacy, hairdressing and beauty and the modeling industries.

The SDA fully supports the submission made by the Australian Council of Trade Unions (ACTU) to this Review. However there are a number of areas which the SDA would like to particularly emphasize to the Review panel. Anything not explicitly addressed in this submission should be read as supporting the position adopted in the ACTU submission.

SDA position:

The Association supports a 'Robens' style model as the basis of safety legislation in Australia with a prescriptive duties hierarchy ranging from specific to general duties.

The Association supports the model legislation being called the 'Occupational Health, Safety and Welfare Act'

The Association supports the introduction of nationally consistent occupational health and safety laws so long as the *primary* focus and objective is to make all workplaces safer and to reduce the incidence of workplace injury and illness. Therefore any move towards nationally consistent laws should ensure that a 'best practice' legislative framework is adopted.

Principles and Objects

The legislation should set out the Objects of the Act and the Principles which underpin the Act, along similar lines to those in the Victorian OHS Act 2004.

One of the key Objects of the Act should be to ensure that hazards and risks are eliminated at the source.

Definitions:

Workplace

The definition of 'workplace' needs to be sufficiently broad to ensure the Act is applicable to all modern working arrangements. It must include those conducting work, a business or an undertaking.

Work

The definition of work needs to be broad and include those under contract for services, such as trolley collectors. Any definition needs to go beyond current industrial relations interpretations of 'worker' and 'employee'.

Consultation:

Consultation with employees is fundamental to the effective operation of health and safety legislation. This is supported by the Robens review and more recently the Maxwell review. Consultation and worker participation is fundamental to eliminating and reducing workplace injury and illnesses. Any national model legislation should reflect the importance of consultation and enshrine key principles and legislative minimums which will ensure that workers (of all descriptions) are genuinely consulted.

Consultation is not merely information sharing. It should involve genuine engagement and interaction with workers and taking on board the comments and views of workers. A duty holder must be able to demonstrate why they chose to ignore or accept comments/advice received during the consultation process. This should be the subject to strict enforcement by the regulator. Special attention needs to be given to the practice of employers who presently view consultation arrangements as informing employees of impending actions. Employers tend to consider feedback given at a 'trial' site sufficient and therefore considered applicable to all sites. However this is unsatisfactory. Employers must consult at the site level and consider the views of those at the specific site; as the issues in each site vary.

Consultation requirements should apply to those affected or likely to be affected. This requires some forethought from the employer as to those who may be affected.

Victimisation, bullying and harassment:

All employees must be afforded protection against victimization, bullying and harassment when raising OHS issues. There should be a general duty against victimization for anyone raising an OHS issue. There should also be a specific duty in relation to HSR's and committee members raising safety issues.

A HSR or worker, and/or their representative must be able to make application to the appropriate OHS tribunal or court to have a matter relating to victimization and/or harassment heard. There must be an ability to seek an immediate hearing in relation to claims of victimization and harassment of HSR's and workers.

There must be significant penalties imposed for breaches of provisions in this area which act as a genuine deterrent to those engaging in this type of conduct.

Penalties:

Penalties should be a combination of both criminal and civil depending on the nature and severity of the offence. Penalties should include the ability to withhold profits from corporations.

OHS Jurisdiction:

A specialist OHS court or tribunal would be preferable. Any tribunal or court process should be cheap, effective, fast and have specialist knowledge.

There should be an ability to seek injunctive relief particularly regarding issues of immediate risk.

A tribunal should operate with a view to resolving issues and also imposing penalties for breaches. However matters relating to workplace death and serious breaches of the Act should be heard by the superior courts so as to reflect the gravity of the offence.

Matters should not be heard in the Magistrates court as decisions are unreported. This can make it difficult to determine consistency and the development of case law. It is more appropriate that case law develops in an open and transparent manner which encourages and promotes consistency in the law. This promotes public policy and the efficacy of the legislation.

There must be a legislative right to judicial and administrative review of all decisions.

Regulations and Codes of Practice:

The Act should be comprehensive and inclusive and should be supported by regulations and codes. Regulations should not be downgraded in legal status.

Duty of Care: Offences and Defences:

All duty holders should have non-delegable duties. They cannot be apportioned or abrogated. Each duty holder has a concurrent and overlapping duty. The liability of one duty holder cannot affect the liability of another duty holder.

Duty holders should also include those who loan or hire, those who provide workplace safety programs to businesses, installers, and de-commissioners of plant.

Worker duties should be limited to:

- taking reasonable care; and
- not knowingly endangering others or themselves

Workers must have the right to refuse unsafe and unhealthy work.

Employer Duties:

Employers must have a duty to consult with all workers.

An employer must have a duty to ensure a safe and healthy workplace with the onus on being the employer to demonstrate they have met this duty.

The defence of 'reasonably practical' is appropriate. It should not be defined in the Act as the concept is well established and defined by case law. Leaving the legislation silent as to the definition of 'reasonably practical' allows the courts to exercise their judicial analysis on a case by case basis. The test of 'reasonably practical' is well established in case law and trying to encapsulate a test into the legislation may leave the Act open to a further round of judicial interpretation which will only hinder and delay the practical use of any new OHS Act.

The employer is the party in the best position to mount the defence of 'reasonably practicable' as they have all the necessary information available to them to be able to demonstrate the argument. It is more onerous, costly and timely for the prosecution to have to show that the employer has done all that is reasonably practicable. This is particularly so when employers are encouraged by their legal representation to use professional legal privilege as a way to avoid disclosure of information such as risk assessments, maintenance reports and other important information sources. Legal privilege is used in suspected OHS breaches as a tactic to delay and frustrate timely and effective prosecutions. It is therefore important that the duty holder must bear the onus of proof.

There is a great deal of misconception surrounding the notion of reverse onus of proof.

1. *It is unusual to have reverse onus in criminal proceedings.*

MYTH: There are a number of criminal areas where the onus proof lies with the defence rather than the prosecution. This is particularly evident in areas concerning public safety, such as the environment and road laws. Criminal law differs in its application across various jurisdictions to reflect public policy considerations. In the area of OHS it is public policy that the death or injury of a worker is a serious matter and as such warrants criminal sanctions. However criminal proceedings in this area have been adapted to reflect the nature of the criminal offence itself. For example it is recognized that breaches of the OHS Act(s) require no element of *mens rea* that is the need to demonstrate an 'intention' to kill or injure. In fact 'where mens rea has been regarded as inappropriate it is not uncommon to find a reversal of the normal onus of proof.'¹

¹ Neil Forster. Submission to the National Review into Model Occupational Health and Safety Laws. 2008. P5.

2. Reverse onus of proof in criminal proceedings is a breach of human rights.

MYTH: The *Victorian Charter of Human Rights and Responsibilities Act 2006* is modeled on international Human Rights legislation and jurisprudence. The UK courts have addressed the issue of reverse onus of proof in their OHS Act (which is drafted in a similar way to the NSW OHS Act.) When the issue of reverse onus of proof was challenged on human rights grounds, the UK courts found there was no breach of human rights.

The UK Human Rights Act 1998 came into force in October 2000 and therefore there have been several years of development of jurisprudence. While the UK is only one human rights jurisdiction it is still of importance and relevance to judicial interpretation in Australia. This is especially so in light of section 32(2) of the *Victorian Charter* which provides that:

“International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.”

It is therefore highly unlikely that a reverse onus of proof in OHS legislation offends the *Victorian Charter of Human Rights and Responsibilities Act 2006*.

It is also worth noting that the original UK OHS legislation (of 1961) was phrased in a very similar manner to that of the current Victorian OHS Act (2004). It was interpreted by the courts that the onus of proof rested on the defence to show that they had done all that was reasonably practical. It is unclear why this legislative interpretation was not applied consistently with the UK legislative interpretation.

3. The NSW legislation of reverse onus of proof is unjust.

MYTH: it must be noted that not all criminal proceedings are treated the same. It is a matter of public policy that consequences in the OHS jurisdiction are not the same as in other criminal jurisdictions. For example the imposition of jail time is a rare if at all exercised remedy for breaches of the OHS Act (s). While jail time is an available remedy for the courts to impose, the reality is that public policy dictates that other remedies are more readily utilised.

It is also important to note that a lower burden of proof is required of the defence; that of ‘balance of probabilities’, rather than ‘beyond reasonable doubt’. Therefore it cannot be said that the reverse onus in criminal proceedings is unjust or a breach of human rights. The offence/ defence structure represents a fair and balanced legislative framework.

Prosecutions

Unions must have the right to initiate prosecutions. The NSW provision has not been used excessively or in a vexatious manner. In fact where this right has been exercised, usually where the statutory authority has refused to prosecute, the result was a successful prosecution.

Industrial Manslaughter:

The Association supports the criminal offence of industrial manslaughter or like equivalent. There must be an ability to take proceedings against Directors and Corporate Officers who willfully or negligently engage in behaviour which causes death and serious injury/illness.

Penalties should include the ability to levy a portion of a corporation's revenue.

ASIC should be empowered to investigate Directors and Corporations who evade payment through company restructures and closures.

Health and Safety Representatives

HSR's are fundamental to improved safety outcomes.

Provisional Improvements Notices (PINS) are an important and useful resource. They provide an extra and very important compliance arm especially as the inspectorate cannot physically get to every workplace.

Union Right of Entry

There must be a separate Right of Entry provision contained in the OHS Act which is distinct from Workplace Relations legislation.

Enforcement:

Effective enforcement of OHS legislation is vital to reducing workplace death, injury and illness. The inspectorate must be fully resourced to ensure that effective enforcement occurs and breaches of the Act are prosecuted.