Why the harmonised OHS laws should not proceed

Specific reasons why the model national OHS laws should not be implemented in South Australia
Sept 2011

1. Summary

The South Australia Government made an attempt in April 2011 to repeal the existing South Australian *Occupational Health, Safety and Welfare Act and* replace it with the national Model Work Health and Safety Bill. The model Bill failed to pass in the Upper House and was withdrawn.

This assessment argues against the adoption of the Model Bill on the basis that the Bill has significant and major problems compared with the current South Australian OHS Act. On examination of the Model Bill it would, if adopted:

- Reduce the capacity of South Australia to maintain current levels of work safety and improve them.
- Reduce human rights within an OHS criminal justice context, rights which are currently available to people in South Australia.

The recommendation is to retain the existing SA OHS legislation.

[This assessment compares the national Model Work Health and Safety Bill (version dated 23/6/11) with the South Australian Occupational Health, Safety and Welfare Act 2004 (version 4.9.2006).]

2. Overview

Upon reading the Model Bill, it is clear that there are significant differences to the current South Australian Act.

The Model Bill does have positives that currently exist within the South Australian Act. For example, it:

- Ties work safety responsibilities to what is 'reasonable and practicable'.
- Ensures the presumption of innocence.
- Gives the power of prosecution only to SafeWork SA (the designated regulator) or an inspector authorised by to do so, with a fall-back advisory role for the Director of Public Prosecutions.
- Has a layered worker and union consultation process with checks and balances.
- Has a layered approach to compliance, starting with cooperation and building to enforcement.

However, the model Bill fails significantly in that it will diminish both safety and criminal justice in South Australia:

Safety because it:

- Creates confusion over who controls workplaces and hence who has safety responsibilities. This is because of the introduction of a previously unknown concept within OHS legislation—namely, a *person conducting a business or undertaking*. This new, non-defined concept supersedes 'control' as the central identifier of who is responsible in workplaces as currently exists in South Australia. The behavioural consequence will be that people at work will be unsure about responsibilities—potentially weakening the focus on safety. This is a risk that should not be taken.
- Waters down the importance of codes of practice when compared with the current South Australian Act.

Criminal justice because it:

- Removes the right to silence and protection from self-incrimination—key rights under criminal law currently available in the South Australian OHS Act.
- Enables OHS authorities to seize businesses and their property without due process—something that is not a feature of the current South Australian Act.

The 4 major flaws

3. Flaw number One: The Bill introduces and applies a previously unknown concept in OHS legislation: a *person conducting a business or undertaking*

What the Model Bill does in this respect is highly confusing and difficult to comprehend.

OHS legislation has to define who is responsible for safety. Most legislation, along with the ILO Conventions, for example, does this by talking about employers and employees as the primary focus of the laws (see Part A of this assessment). In other words, employers have responsibilities to keep employees safe. Other parties are also included, such as suppliers, manufacturers of machinery and so on. However, because the employer–employee relationship is declining as a mode of workforce engagement, there's been a recognition of the need to broaden the definition of 'people at work'. Self-employed people (one-fifth of the Australian workforce) need to be formally brought in, for example.

This Bill seems to attempt this by creating a new concept, that of a *person conducting a business or undertaking* as an all-embracing concept to replace 'employer'. But it doesn't work. Worse, it creates confusion because its definition doesn't specify what a *person conducting a business or undertaking* is.

Further, the Bill supersedes the idea that persons who 'control' workplaces are responsible for safety. It mostly replaces the idea of a 'person who controls' with a '*person conducting a business or undertaking'* as being responsible for safety, something that is not defined. This is hugely confusing both for people at work and at law.

The Bill states

Model Bill 5 Meaning of *person conducting a business or undertaking*

(1) For the purposes of this Act, a person conducts a business or undertaking:
  (a) whether the person conducts the business or undertaking alone or with others; and
  (b) whether or not the business or undertaking is conducted for profit or gain.
(2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.
(3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.
(4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.
(5) An elected member of a local authority does not in that capacity conduct a business or undertaking.
(6) The regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.
(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.
(8) In this section, ***volunteer association*** means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

In effect, the Bill says that a *person conducting a business or undertaking* is a *person conducting a business or undertaking.* It leaves the meaning of this to the imagination. Yet this 'person', whoever that may be, is the primary 'person' responsible for work safety under the Bill.

The Bill states

Model Bill 19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
  (a) workers engaged, or caused to be engaged by the person; and
  (b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

On reading the next section of the Bill it could be mistakenly thought that a *person conducting a business or undertaking* is intended to be a person who has control of a workplace. Certainly many who have defended the creation of this idea of a *person conducting a business or undertaking* argue that it really means a person who controls a workplace.

The Bill states

Model Bill 20 Duty of persons conducting businesses or undertakings involving management or control of workplaces

(1) In this section, ***person with management or control of a workplace*** means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include:
  (a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or
  (b) a prescribed person.
(2) The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the

workplace and anything arising from the workplace are without risks to the health and safety of any person.

But what this really does is clarify that a *person conducting a business or undertaking* who also has management and control is responsible. However, look again at 19 (1) (b) and it becomes clear that a *person conducting a business or undertaking* who does not 'control' a workplace but only who influences or directs a worker is responsible.

The Bill states

Model Bill 19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
  (a) workers engaged, or caused to be engaged by the person; and
  (b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

By comparison, the current South Australian OHS Act is entirely clear. Persons who have control or management of workplaces have responsibilities to safety. This is an all-embracing, easy-to-understand and legally sound concept that ensures that every person involved in work has responsibility for safety.

The current South Australian Act states:

South Australian Act 19 Duties of employers

(1) An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular—
  (a) must provide and maintain so far as is reasonably practicable—
    (i) a safe working environment;
    (ii) safe systems of work;
    (iii) plant and substances in a safe condition; and
  (b) must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and…
  (h) monitor working conditions at any workplace that is under the management and control of the employer; and
  (i) ensure that any accommodation, or eating, recreational or other facility, provided for the benefit of the employer's employees while they are at work, or in connection with the performance of their work, and under the management or control of the employer (either wholly or substantially), is maintained in a safe and healthy condition.

This is reinforced throughout the South Australian Act. For example:

South Australian Act 22—Duties of employers and self-employed persons

(2) An employer or self-employed person must ensure, so far as is reasonably practicable, that any other person (not being an employee employed or engaged by the employer or the self-employed person) is safe from injury and risks to health—
  (a) while the other person is at a workplace that is under the management and control of the employer or self-employed person; or

Discussion

The Model Bill is entirely confusing when it comes to establishing the core structure of responsibilities under work safety law. The current South Australian Act, by comparison, is entirely clear and specific. People know that if they have control of things at work, then they have a responsibility to safety.

The new concepts identifying safety responsibilities in the Model Bill are confusing. For example the idea that OHS responsibilities extend to persons who only *influence* or have a measure of *direction* over work activities extends way beyond the idea of control. The Bill fails to define this and it is left to the imagination to give this meaning.

OHS and criminal lawyers are locked in furious debate and disagreement over the possible meanings. It is incomprehensible to the layperson.

Some understanding of this confusion can be had by thinking about road laws. When we drive a car, we know that we are responsible because we have control of the car. If we do the wrong thing and cause a crash, we will be held responsible and liable. But imagine what might happen if new road laws stated that persons who *influence or direct* cars are also responsible. Would *involved* and *influence or direct* mean passengers, car washers, authors of car books, commentators on cars? These are silly examples. But if the law is not clear, the answers are unknown. Equally, the use of these new definitions in the Bill is silly.

The courts will have to sort this out. The likely scenario is as follows:

- People will face prosecution over OHS incidents where they did not have control of the workplace or the incident but because they conducted a *business or undertaking* and may (or may not have) had *influence*.
- Before a lower court can hear the case, there will be argument over what *conducting a business or undertaking* and *influence* or *direction* means. Because this is new and unknown law, without any pre-existing court interpretations, a single judge will have to declare what she/he thinks the law means.
- Whatever the court rules, the party who loses will appeal to a higher court. Appeals will continue to the High Court where a final decision will be made.
- This is likely to occur several times before clear definitions are determined—definitions that are effectively non-existent in the Bill.

On the basis of past observations of these sorts of situations, it can be expected that each appeal process would drag out for 3–4 years, at least. If this were to occur over several cases, it could easily be contemplated that obtaining clarity about the harmonised OHS laws would be a 10-to-15-year process. This is bad for work safety across South Australian and Australia and it is entirely unnecessary. Clarity is needed now and it is available now.

Conclusion

The solution to the problem created by the Model Bill is simple. It should not be adopted.

The introduction of a totally new concept of a *person conducting a business or undertaking* is unnecessary, confusing, damaging to work safety objectives and should be dropped.

The known concept of reasonable and practicable control should be the guiding high-end principle applied in national OHS laws. This is currently the central design feature of the South Australian OHS Act and should be retained.

4. Flaw number Two: The Bill waters down the importance of codes of practice

Under the current South Australian Act, codes of practice are accorded high status under the legislation. Codes of practice are the practical rules that industries adopt that are sanctioned under the Act and which tell them what is a safe or unsafe practice. For example, the electrical code of practice will specifically instruct electricians about how and when power should be isolated. The codes are hugely important practical tools for ensuring safe work practices. Compliance with the codes literally saves lives and prevents injuries.

The South Australian Act gives the codes the highest of importance by declaring that failure to comply with a code means that the Act has been breached. By reverse implication this means that compliance with a code gives people certainty that they have complied with the Act. They know what is legal and illegal and what is required to be safe. It is like having clear speed limit signs on roads.

The South Australian Act states:

South Australian Act 63A—Use of codes of practice in proceedings

Where in proceedings for an offence against this Act it is proved that the defendant failed to observe a provision of an approved code of practice dealing with the matter in respect of which the offence is alleged to have been committed, the defendant is, in the absence of proof to the contrary, to be taken to have failed to exercise the standard of care required by this Act.

The Model Bill, however, diminishes the importance of codes of practice. Under the Model Bill, compliance with a code of practice can only be used as part of the defence in a prosecution. It does not constitute of itself non-compliance or compliance. This means that people at work cannot be sure that if they have complied with a code that they have high certainty of having acted safely. It's like having road speed limit signs that say '60 maybe'. As a result, people are not sure what is safe. They become confused and uncertain. It's illogical to do this, but worse, confusion reduces people's focus on safety.

The Bill states:

Model Bill 275 Use of codes of practice in proceedings

(1) This section applies in a proceeding for an offence against this Act.

(2) An approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with.

(3) The court may:

(a) have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and

(b) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

Conclusion

The solution to this problem created by the Model Bill is simple. It should not be adopted. The current provisions in the South Australian Act should be retained.

5. Flaw Number Three: The Model Bill removes the right to silence and protection from self-incrimination—key human rights under criminal law

Prosecutions under OHS law are criminal prosecutions. Basic rights under criminal law protect accused people from abuse of power by the authorities. One of these basic rights is the right to refuse to answer questions on the grounds of self-incrimination. These rights are central to the integrity of the criminal justice system and people's confidence in the justice system. The current South Australian OHS Act secures this basic right.

The South Australian Act states

South Australian Act 48—Procedures of the committee

(9) A person is not obliged to answer a question under this section if the answer would tend to incriminate that person of an offence, or to produce a document, object or material if it or its contents would tend to incriminate that person of an offence.

By comparison, the Model OHS Bill removes this basic human right under criminal law. (See the underlined sentences in the sections below.)

The Model Bill states:

Model Bill 171 Power to require production of documents and answers to questions

(1) An inspector who enters a workplace under this Division may:

(a) require a person to tell the inspector who has custody of, or access to, a document; or

(b) require a person who has custody of, or access to, a document to produce that document to the inspector while the inspector is at that workplace or within a specified period; or

(c) require a person at the workplace to answer any questions put by the inspector.

(d) A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.

Model Bill 172 Abrogation of privilege against self-incrimination

(1) A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.

Conclusion

The solution to this problem created by the Model Bill is simple. It should not be adopted. The current provisions in the South Australian Act should be retained.

6. Flaw Number Four: The Model Bill enables OHS authorities to seize businesses and their property without court oversight.

The South Australian OHS Act gives an inspector the power to seize things in the course of gathering evidence of an offence, and take control of a workplace or part of a workplace where persons at the workplace have ignored safety orders and take whatever action is reasonably necessary to secure safety.

The South Australian Act states:

South Australian Act 45—Action on default

(1)Subject to subsection (2), where a person is required by an improvement notice or prohibition notice to take any specified measures and the person fails to comply with the notice, the inspector who issued the notice may have those measures carried out and, for that purpose, the inspector or any person authorised by the inspector may, after giving reasonable notice to the person required to take the measures, enter and take possession of any workplace, or any other place where any plant to which this Act extends by virtue of Schedule 2 is situated (taking such measures as are reasonably necessary for the purpose) and do, or cause to be done, such things as full and proper compliance with the notice may require.

The Model Bill, however, goes much further. It gives an inspector the power to seize property of a business, and indeed an entire 'workplace' at an inspector's discretion. (See the underlined sentence below.) Although the Bill seems to apply some safeguards through required process to an inspector's powers, the powers could also be read as essentially unrestrained except by the inspector's 'reasonable belief'. This can be taken as a wide extension of inspectors' powers beyond anything seen in standard OHS legislation. The required processes need clarity.

Model Bill 176 Inspector's power to seize dangerous workplaces and things

(1) This section applies if an inspector who enters a workplace under this Part reasonably believes that:
  (a) the workplace or part of the workplace; or
  (b) plant at the workplace; or
  (c) a substance at the workplace or part of the workplace; or
  (d) a structure at a workplace,

is defective or hazardous to a degree likely to cause serious injury or illness or a dangerous incident to occur.

(2) The inspector may seize the workplace or part, the plant, the substance or the structure.

Conclusion

The solution to this problem created by the Model Bill is simple. It should not be adopted. The current provisions in the South Australian Act should be retained.

7. Final conclusion

The national OHS Model Bill is fundamentally flawed and unsound.

- It is structured around a new, unknown and legally untested concept that will take many years for the courts to resolve. It diminishes confidence in the codes of practice. Thus it will create confusion in workplaces about work safety responsibilities and, as a consequence, threaten safe work itself.
- It removes basic criminal justice rights and protections currently in place in South Australia and extends inspectors' powers in an unnecessary, unrealistic and harmful way.