NSW Workplace Deaths Bill 2005: An Unsafe Act

1. Overview

Throughout Australia, under existing criminal law a person can be jailed if his or her criminal actions cause the death of person in a work (or any other) situation.

Since about 2003 the New South Wales government has been seeking to extend Occupational Health and Safety (OHS) legislation so that anyone found guilty of causing the death of someone at work would be sent to prison. In doing so it is adopting criteria for imprisonment that differ from those that apply under normal criminal law.

- The government first tried the Workplace Fatalities Bill 2004. It was a badly flawed bill that attracted widespread opposition. It has been withdrawn.
- The government is now making another attempt by introducing into Parliament on 27 May 2005 the Workplace Deaths Bill 2005.
  - It is an improvement on the first attempt.
  - **But** it has *major, fundamental flaws* that need fixing before it should be allowed to pass.

2. What's wrong with the Workplace Deaths Bill 2005?

The Bill applies different measures of work safety liability and responsibility to different persons for the same offence. This is unjust and makes workplaces unsafe. If

- a manager does something that causes a work death, the manager is likely to go to jail;
- an employee does exactly the same thing as a manager that causes a work death, the employee is unlikely to go to jail.

- This is wrong. Everyone — employees, managers, company directors, supervisors, union officials, politicians, independent contractors, public servants — should be held equally and similarly responsible for their actions.

This paper explains how the Workplace Deaths Bill 2005 creates this injustice and how it needs to be fixed.

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3. Urgent consideration

The Workplace Deaths Bill 2005 is currently before the NSW parliament for consideration. It should not be passed in the current session of parliament. It should at a minimum be subject to extensive scrutiny and review. It requires significant amendment before being passed.

4. The Institute of Public Affairs

This analysis is produced by the Work Reform Unit of the Institute of Public Affairs. The IPA is a free-market think tank which considers, and publishes material related to, issues related to good government. The Work Reform Unit focuses on work regulation and management. OHS laws are a vital aspect of work regulation.

The IPA has been studying work safety laws in New South Wales since mid-2004 after considerable concern was expressed in the NSW community about current NSW work safety laws. The IPA finds great fault with NSW OHS laws. The IPA:

- published articles on the subject in the *Australian Financial Review* on 23 November 2004 and 12 April 2005; and
- delivered a major analysis of NSW OHS laws at an *Australian Financial Review* industrial relations conference in Sydney on 31 March 2005.

These articles and the conference paper are available at **www.ipa.org.au** (go to Work Reform) and provide a background to this analysis.

5. The Workplace Deaths Bill in OHS context

In Australia work safety laws are primarily the responsibility of state governments. However, in March 2005 Australia assumed an obligation to adhere to international OHS principles under an international treaty.

The international obligations are set out in Convention 155 of the International Labour Organisation. Signatory countries are required to adopt OHS laws that apply liabilities and responsibilities according to what people 'control' within what is 'reasonably practicable' for them to do. These guiding principles impose obligations on all parties involved in all aspects of work situations. No one is exempted.

The Workplace Deaths Bill 2005 is an amendment to the NSW Occupational Health and Safety Act 2000. The Deaths Bill must be understood as structurally dependent on the 2000 OHS Act. Both the 2000 OHS Act and the Deaths Bill breach international OHS principles and obligations.

NSW OHS legislation can also be compared with the Victorian OHS Act 2004, which complies with international OHS principles and obligations. The Victorian OHS Act 2004 is a helpful model for improving NSW OHS legislation.

The Workplace Deaths Bill 2005 complies more closely with international obligations than its parent Act, but still not closely enough.

The key international principle of OHS law that the NSW 2000 OHS Act breaches holds that individuals are to be held responsible and liable for matters and events over which they have reasonable and practical control. Under the NSW OHS Act, people may be sent to jail for a second offence. The Deaths Bill provides for the imprisonment of people for first offences relating to matters and events over which they do not and cannot have reasonable and practical control.

This amounts to a breach of natural justice. It will result in liability denial and transference in the workplace, refusal to make decisions or to be accountable for them, and blame-shifting. This is a recipe for unsafe work cultures and practices. Increased workplace injury and death in NSW could be expected as a consequence.

6. How the Workplace Deaths Bill 2005 breaches international OHS obligations, creates injustice, and will lead to dysfunctional safety cultures in NSW workplaces

The key to understanding the Bill is section 32A, which states;

(2) A person

(a) whose conduct causes the death of another person at any place of work, and

(b) who owes a duty under Part 2 (of the 2000 Act*) with respect to the health or safety of that person when engaging in that conduct, and*

(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct
is guilty of an offence. [This means fines and/or jail.]

Duties under Part 2 of the OHS Act 2000 allocate liabilities and responsibilities substantially differently between managers and employees. Part 2 states:

6.1 Managers and Directors

8 (1)An employer must ensure the health, safety and welfare at work of all the employees of the employer.

This breaches international OHS obligations. This simple sentence omits the words 'reasonable,' 'practical' and 'control', which would make the Act consistent with international obligations. The 2000 Act thus imposes an absolute obligation on the employer: that is to say, the mere fact that an accident happens, whether or not the employer did anything to cause the accident, makes the employer automatically guilty of an offence under the Act.

This is reinforced by the defined responsibility under the 2000 Act that requires employers to 'ensure' safety. The Industrial Relations Commission (IRC), through which prosecutions are conducted, has interpreted the word 'ensure' to mean 'guarantee, secure, make certain'. The application of this interpretation replaces the

international obligation of ‘reasonable, practical control’ with an unreasonable obligation to provide absolute guarantees.

In its present form the Act assigns responsibility and liability to employers for accidents over which they did not have reasonable and practical control. Employers (directors and managers) continue to be prosecuted and fined under the Act for matters over which they did not have control.

In effect, a manager is declared guilty before a trial occurs. It is only in attempting to disprove such statutorily predetermined guilt that managers can use in their defence ideas of reasonable and practical control. This is a distortion of OHS international obligations, not an application of them.

6.2 Employees

Compare the duties of an employee, which are set out under Part 2 thus:

> *20 (1) An employee must, while at work, take reasonable care for the health and safety of people who are at the employees place of work….*

The insertion of the word ‘reasonable’ creates the wide discrepancy between the ways managers and employees are treated. The use of the word ‘reasonable’ is in compliance with international OHS obligations and prevents the employee being presumed guilty just because an incident has occurred. To put it bluntly: a prosecution against an employee must prove the employee’s guilt, whereas a manager must disprove his or her predetermined guilt.

This distinction between the presumed guilt of the manager and the presumed innocence of the employee is a key feature of the OHS Act 2000. It is carried over into the Workplace Deaths Bill 2005, and as a result a manager is much more likely to be jailed than an employee for exactly the same offence. This amounts to inequality, unfairness and injustice.

6.3 Comparison with Victoria.

The NSW approach differs strongly from that of Victoria, which complies squarely with international OHS obligations. The Victorian 2004 OHS Act states;

> *Clause (21) 'An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health'.*
>
> *Clause (25) '(1) While at work, an employee must -*
> *(a) take reasonable care of his or her own health and safety and*
> *(b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace'.*

Under the Victorian Act, employers, employees and all other parties involved in work situations are treated equally. The Victorian Act consistently allocates responsibilities to all persons in any situation according to what the person can *'reasonably'* do '*…in relation to matters over which the person has management or control'.*

7. Discussion

OHS laws should be considered as akin to driving laws.

The purpose of driving laws is

- to establish clear and fair guidelines and to educate drivers with a view to creating safe driving cultures and practices in the community; and
- to prosecute people who break the laws.

Safe driving cultures and practices, along with safe roads and safe cars, are seen as keys to reducing injury and death on the roads. However, we accept that, even with the safest roads, the safest cars and the best driving cultures and practices, drivers do not have full control at all times, crashes will still occur and people will be injured and killed. But public policy aims to bring the number of car accidents and deaths down to zero. This may be a dream, but the community rightly aims to realise it.

So it should be with work safety laws. Public policy must target a dream of zero deaths and injuries in the work situation. We must attempt to realise this dream. As a consequence, we are prepared to jail drivers and people at work who flagrantly break the law. But in designing and applying road laws we hold every driver to be equally responsible for his or her actions. We do not make drivers wearing white shirts more or less guilty of an offence than drivers wearing red shirts. We do not say that drivers from a particular ethnic background or sex are more or less guilty of offences than drivers of another ethnic background or sex. We know that such discrimination would be unjust and nonsensical.

If driving laws declared that drivers from one ethnic group were less safe drivers that those from other ethnic groups, those deemed 'unsafe drivers' would stop driving or claim they belonged to another ethnic group. Conversely, those deemed 'safe drivers' would be encouraged to drive badly, knowing that if they were involved in an accident with an 'unsafe driver' the latter would automatically be guilty. The logic of this is so obvious that no one would remotely contemplate such legislation.

Not so with NSW workplace laws. These laws are based on the assumption that some people (employers) in the workplace can be deemed legislatively guilty and others (employees) innocent regardless of how an accident occurs.

Victoria considered this approach in 2003/04 when its OHS laws were scrutinised by the Maxwell Review. The Review strongly rejected it, as did the subsequent 2004 Victorian OHS Act.

In NSW, however, the OHS laws are a discriminatory nonsense that encourage the type of unsafe practices that everyone knows would emerge if the same logic were applied to road laws. The NSW Deaths Bill envisages jailing managers simply because they are classified as managers. The same persons, if classified as employees, would not be jailed.

8. What to do?

The Workplace Deaths Bill 2005 should not be passed in its current form. The 2000 OHS Act should be repealed and replaced with law that conforms to international OHS treaty obligations. The Victorian OHS Act 2004 provides a workable model as a starting point.

Nevertheless, the Deaths Bill has begun to move away from the breaches of international obligations contained in the 2000 Act.

9. How the Deaths Bill improves on the 2000 Act

- A right of appeal to the Criminal Court against imprisonment is allowed. The 2000 OHS Act allows no right of appeal even for jailing on a second offence.
- A defence of 'reasonable excuse' is added to the defences allowed under the 2000 Act. However, this is only a mild improvement compared with the strong defences available to employees presumed innocent.
- The 2000 Act holds directors and managers of corporation to be guilty of the offence of a corporation even if the directors and managers were not involved. At first glance the Deaths Bill appears to have been removed this provision, but this is subject to legal concern that the apparent removal is a subterfuge. The wording of the deaths bill needs to be checked closely on this point.
- The 2000 OHS Act gives unions powers of prosecution. The Deaths Bill removes these powers, but concern exists that the Minister may have the authority to authorise a union to undertake prosecution leading to the jailing of a manager. The wording of the Deaths Bill needs to be checked closely on this point.
- The 2000 OHS Act provides for appeals against acquittals. That is, it creates 'double jeopardy' by enabling a person to be charged again for the same offence even after being found innocent on the first occasion. The Deaths Bill removes this provision.

10. Other undesirable elements of the Bill

Other parts of the Deaths Bill are defective and should be rejected. Most of the problems arise because the Deaths Bill has to be considered a creature of the 2000 OHS Act. Many of the fundamental flaws of the 2000 OHS Act are carried over into the Deaths Bill.

- A right of appeal against imprisonment jailing is allowed but a right of appeal against fines is not.
- Second offences still can lead to jail under the 2000 Act, but none of the improvements made in the Deaths Bill apply to second-offence prosecutions.
- Prosecutions occur under the jurisdiction of the IRC, whose purpose is to manage the alleged culture war between employers and employees. The IRC is an instrument of industrial politics and is not an appropriate jurisdiction for OHS issues. The IRC should have no powers over criminal matters and no power to jail.

11. Why no community outrage in New South Wales?

With bad law, it often takes a little while for people to understand what is happening. They start doing so only when it begins to affect them personally.

If a law were passed today saying that the earth was flat, people would treat it as nonsense and ignore it. However, if a government then tried to police such a law and stopped ships sailing further than 100 km from the shore for fear that they would fall off the earth, there would be a popular demand that such nonsensical legislation be repealed.

The 2000 OHS Act is bad law whose effects were not immediately obvious in 2000. It takes time for accidents to occur and prosecutions under bad law to have an impact. The impact of the OHS law is limited to a small number of people subject to rorted prosecution processes. But this small number of people experience personally the full aggression and might of an unjust state. They become beaten, cowed and usually silent.

However, in NSW enough prosecutions have now occurred for knowledge of the full impact of the Act to begin to seep into community consciousness. There is a slowly emerging realisation of the injustice the 2000 OHS Act.

The Deaths Bill is designed on similar lines to the 2000 OHS Act, which masks its injustice. If passed in its present form, it will take some time for the community to realise the extent of injustice in the Act. Some people will be imprisoned unjustly. Who serves the jail terms will be determined by luck rather than justice. Somewhere in the NSW community are some managers and directors whose unhappy fate it is to work in a business where a death may occur. If this occurs where they work, they will find themselves predetermined as guilty and prosecuted accordingly, find that disproving their guilt under the NSW OHS Act is near-impossible, and spend time in jail.

These individuals will be broken by the full force of an unjust state. The only question is: who are these unknown people?