NEW ZEALAND LAW SOCIETY

NZLS EST 1869

HEALTH AND SAFETY REFORM BILL

09/05/2014

SUBMISSION ON THE HEALTH AND SAFETY REFORM BILL

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Health and Safety Reform Bill (Bill).

2. This submission addresses the clarity and practical workability of the Bill, in relation to:
   (a) Health and Safety at Work, and Health and Safety Duties (Parts 1 and 2)
   (b) Engagement, worker participation, and representation (Part 3)
   (c) Enforcement, miscellaneous provisions and other matters (Parts 4 and 5)

A Health and Safety at Work, and Health and Safety Duties (Parts 1 and 2)

Interpretation – clause 12

3. The term "officer" is defined to include:

> "(b) … any other person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU (for example, the chief executive);"

4. There is a lack of certainty as to what is meant by "a substantial part of the business". If it is not possible to add further definition, it will be necessary to rely on the ordinary meaning of the phrase and on judicial interpretation. Without any further refinement of this definition, the risk is that the definition of "officer" extends beyond directors and senior management and exposes (possibly unintentionally) middle managers to positive duties of due diligence (and therefore the risk of criminal liability and significant personal financial risk). In the Law Society's view, there should be clarity (to the extent possible) for individuals so they can understand whether or not they face a risk of criminal liability.

Recommendation

5. That consideration be given to defining "a substantial part of the business" so that individuals below senior management level know about their risk of criminal liability.

Meaning of workplace – clause 15

6. The proposed definition of workplace is different from the definition of workplace in section 5 of the Employment Relations Act 2000 and as further defined by relevant case law. Consistency across legislation dealing with employees is desirable.

7. Nor does the clause 15 definition clearly recognise that a workplace may only be a workplace from time to time and not continuously, and that it may cease to be a "workplace" (this concept is recognised in the definition of "place of work" under the Health and Safety in Employment Act 1992, s 2). A workplace should not be a workplace for all time, but only while work is being carried out there, or is customarily carried out there. The explanatory note to the Australian Model Law makes it clear that it is intended that a workplace includes a place where work is carried out from time to time.

Recommendation

8. That consideration be given to amending the definition of "workplace" as follows:

> **15 Meaning of workplace**
> (1) In this Act, unless the context otherwise requires, a workplace—
> (a) means a place where work is being carried out, or is customarily carried out, for a business or undertaking; and
> (b) includes any place where a worker goes, or is likely to be, while at work.

Duties of PCBU [person who conducts a business or undertaking] who manufactures, imports or supplies plant, substances or structures – clauses 35 – 37

9. In discharging their duties to provide information under these sections, it is understood that in Australia PCBUs are grappling with how they discharge these statutory duties (particularly in respect of the requirement to provide information about the plant, substances or structures) whilst protecting their own intellectual property rights and possibly those of third parties.

10. Clause 37(1) arguably only applies to those PCBUs whose business is to supply plant, substances or structures. It arguably excludes PCBUs who supply plant, substances or structures on an ancillary basis. If the intention is to include all PCBUs who supply plant, substances or structures, the Law Society recommends that the clause is amended to make that clear.

Recommendation

11. That consideration be given to amending clause 37(1) by deleting the words "who conducts a business or undertaking" and replacing them with "who, whether such a supply is in the usual course of business for the PCBU or not, supplies:".

B Engagement, worker participation, and representation (Part 3)

Assistance from another person – clause 73

12. Clause 73 allows a health and safety representative to be accompanied or assisted by "another person" in the conduct of his/her duties under the Bill. The Law Society considers that this is too widely drawn and could potentially lead to inappropriate people being brought into the workplace and given access to secure areas or confidential information without corresponding duties to an employer.

Recommendation

13. That consideration be given to: (a) imposing a limit on who can assist the health and safety representative; and/or (b) including a specific provision in clause 73 that the other person is only granted access to a workplace for the limited purpose of assisting with health and safety matters.

Access to personal information – clause 79

14. Clause 79(1) prohibits a PCBU from allowing a health and safety representative to have access to personal information concerning a worker without that worker's consent, unless the information is anonymised. Clause 79(2) establishes an offence of contravening clause 79(1) and sets maximum fines on conviction of up to $10,000 for an individual and $50,000 for any other person.

15. Although the penalty levels in this clause are consistent with the Bill as a whole, they are not aligned with analogous New Zealand law on the unauthorised disclosure of personal information. Under the Privacy Act 1993, for example, there is no fine for disclosure, but any amount awarded is compensatory in relation to the harm or loss caused to the individual. Furthermore, there are no such fines for disclosure of sensitive health information under the Health Information Privacy Code 1994 and the Health and Disability Commissioner Act 1994, and levels of compensation for individuals in that jurisdiction are far below the proposed level of fines in the Bill. Moreover, by way of comparison, the maximum penalty for breach of secrecy requirements by an Inland Revenue officer is $15,000, but that represents an extremely serious breach of trust.

16. The fines are in addition to an individual's right to lodge a complaint and seek compensatory relief under the Privacy Act 1993, and so there is a risk of some doubling up of sanctions. Furthermore, there is no provision for any mitigation or excuse for a PCBU's liability, such as an urgent situation, or where the individual is unable (whether permanently or temporarily) to give consent.

Recommendation

17. That the maximum fines in clause 79(2) be reviewed in light of penalties in other legislation for the unauthorised disclosure of personal information.

Health and safety representative immunity – clauses 83, 84 and 85

18. Clause 83 provides that there are no duties imposed on a health and safety representative in that capacity. Together with the immunity from civil and criminal liability in clause 84, this could lead to a health and safety representative acting inappropriately (albeit in good faith), without the PCBU being able to deal adequately with this. Under clause 85 the right to remove a health and safety representative does not reside with the PCBU (and nor with the work group, as is the case under the Australian Model Law, see section 64(2)), but with the regulator. This appears to amount to the regulator 'stepping into the employer's shoes'.

19. The work group ought to have the right to remove a health and safety representative who, in the opinion of the majority of the members of the group, is no longer best placed to represent workers in that business or undertaking. If that power is not available, there is a risk that a health and safety representative who is ineffective as a result of not having the support or respect of workers, remains in office because there are insufficient grounds for the regulator to remove the representative from office.

20. Further, a PCBU ought to have the right to remove a health and safety representative where the representative's conduct is directly affecting the PCBU's business and workers. A PCBU's lack of power in this regard may be further compounded by the PCBU's fear of falling foul of the provisions of subpart 6 of Part 3 of the Bill, in terms of adverse, coercive or misleading conduct.

21. The Law Society notes that clause 224 provides for matters such as elections, eligibility and term of office to be prescribed by way of regulations. However, that clause does not include any power to prescribe matters relating to the removal of health and safety representatives by way of regulation.

Recommendation

22. That consideration be given to:

    (a) incorporating section 64 from the Australian Model Law, which sets out the circumstances in which a representative may be removed from office (note that section 64 also covers matters

that the Bill proposes to deal with by way of regulations under clause 224 (e.g. term of office) and so consideration should be given to removing any overlap); and

(b) including a specific power for a PCBU to remove a health and safety representative from office.

C Enforcement and other matters (Parts 4 and 5)

23. Clauses 122 to 139 deal with the four types of enforcement notices that may be issued by an inspector, including an improvement notice, a prohibition notice, a non-disturbance notice and a suspension notice.

Service

24. Clause 138, "Issue and giving of notice", provides that a notice may be issued or given to a person "(a) by delivering it personally to the person or sending it by post, fax or electronic transmission to the person's usual or last known place of residence or business". The section no longer requires the notice to be delivered to the worksite and given to a person who appears to be in charge of the worksite, as in the current section 42(1) of the Act.

25. It is not clear whether it is intended that mere service to the last known address is adequate, without any additional requirement of service at the workplace as an additional safeguard in the event that personal service has not been undertaken.

Recommendation

26. Clause 138 should be reviewed to determine whether service at the workplace is required as an additional safeguard.

Enforceable undertakings – clause 148

27. Clause 148(2) provides that the court "may make one or both of the following orders:

(a) An order directing the person to comply with the undertaking:
(b) An order discharging the undertaking."

28. These two orders appear to be mutually exclusive. It is not clear that the court would ever require the power to make both orders at one time, unless it is envisaged that the discharge of an undertaking was an order to be made at a later date.

Recommendation

29. Clause 148(2) should be reviewed to consider whether the power to make both orders at once is required or whether the wording should be amended to "may make any of the following orders …".

Reviews and appeals – clause 155

30. Clause 155 deals with a "Stay of reviewable decision on internal review", and provides that the regulator may stay the operation of a decision pending an internal review. A decision to refuse such a stay does not appear to be appealable to the District Court. It is not a decision that is covered within the defined areas of "appealable decision" as set out at clause 151.[1] A notice could have serious consequences for duty holders under the Bill, and it is appropriate that a decision refusing to stay such a notice is itself appealable to the District Court. The question of any stay pending such an appeal could be dealt within the context of the application itself.

Recommendation

31. Consideration should be given to whether the Bill itself ought to provide that the decision to decline to stay a reviewable decision is an "appealable decision" under clause 151, or whether clause 221(l) should be amended to refer expressly to appealable decisions (as it does to reviewable decisions).

Sentencing for offences – clause 169, sentencing criteria

32. Clauses 168 – 180 prescribe the sentencing criteria to be applied by the court; provide for orders (other than fines and reparation) that may be made in sentencing; deal with the prohibition on indemnification of fines (by insurance or otherwise); and deal with the attribution of liability to a body corporate for the acts of employees, agents and officers.

33. The clauses achieve their apparent objectives, and the Committee's attention is directed only at clause 169(2)(f) (sentencing criteria).

34. Clause 169(2)(f) requires the sentencing judge to have particular regard to "financial capacity or ability to pay any fine to the extent it has the effect of increasing the amount of that fine". The clause is capable of two meanings: (1) that an offender who can afford to pay a fine should have those financial circumstances taken into account to increase a fine; and (2) that there may be cases in which an offender's ability to pay a fine may warrant the sentence being increased compared with

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1 The Law Society notes that clause 151(e) contemplates some types of decision being prescribed as appealable decisions by regulation. Presumably this would occur under clause 221(l), although that clause does not refer expressly to appealable decisions (unlike reviewable decisions) or under clause 221(w).

a defendant who could not afford it, and their financial circumstances may be taken into account in those cases.

35. It appears that the second interpretation is intended, not the first. This may be resolved by case law.

36. The Sentencing Act already provides for the court to take into account the financial capacity of an offender (including whether to increase or decrease any fine). There is case law on that provision which links the issue to deterrence.

Recommendation

37. Either delete clause 169(2)(f) as unnecessary or at least amend it to make it clear that financial capacity can increase or decrease the fine.

Offences relating to providing false or misleading information, and confidentiality of information – clauses 219 – 220

38. Clause 220, confidentiality of information, prohibits the regulator from publishing or disclosing any information or document obtained in the course of performing or exercising any function, power or duty under the Act or Regulations.

39. The prohibition is against publishing or disclosing such information or document unless a number of exceptions apply. Clause 220(2)(c)(i) provides an exception if the publication or disclosure is for the purposes of or in connection with the performance or exercise of any function, power or duty conferred on "the person". This does not however refer to "the regulator", which the opening part of clause 220(2) treats as separate from a "person" directed by the regulator. It is not clear whether the exception is intended to apply only to a person who is directed to publish or disclose by the regulator, or is meant to include the regulator.

Recommendation

40. That clause 220(2)(c)(i) be amended as follows: "… duty conferred or imposed on the *regulator or the* person …".

41. Clause 220(2)(c)(iii) provides that publication or disclosure can occur if "the person" disclosing information is satisfied that the recipient has a proper interest in receiving it. Again, it would be useful to clarify whether the intent is that this applies to "the person" disclosing the information or to "the regulator" disclosing the information.

Recommendation

42. That clause 220(2)(c)(iii) be amended as follows: "to a person who the *regulator or the* person disclosing the information …".

Codes of practice – clauses 229 – 233

43. Clauses 229 – 233 provide for the Minister to approve Codes of Practice developed by the regulator, after consultation with unions, employer organisations and other affected parties. Existing Codes may be carried over without consultation. The regulator must publish the Codes once approved. Publication is conclusive proof that the Code was validly made (see clause 232).

44. Clause 233 provides for the effect of Codes in court proceedings. This clause goes beyond the equivalent section in the existing Act (section 20B). Section 20B enables proof of such Codes by production of a document purporting to be the Code, and allows a court "... in determining whether or not a person charged with failing to comply with any provision of this Act has complied with the provision, have regard to any approved code of practice …". Under the Bill, the court may rely on the Code as determining what is reasonably practicable, and also have regard to a Code as evidence of what is known about a hazard or risk or risk control. A party to a proceeding may however introduce evidence of compliance in a different manner from that provided in the Code, if it provides a standard of work health and safety "that is equivalent to or higher than the standard required in the code".

45. In relation to this change the Law Society observes that Codes will thus become potentially (as a practical matter) more definitive of liability. The processes for their making should accordingly be more rigorous.

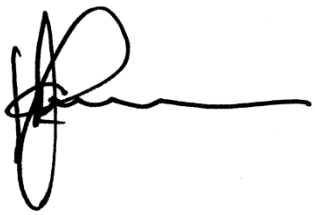
46. It is also noted that the "Compare" note under clause 233 possibly mistakenly refers to "s 20(11)" of the Health and Safety in Employment Act. This is a reference to an earlier version of the current equivalent section in that Act, which is section 20B.

Recommendation

47. That consideration be given to whether, given the increasingly definitive role Codes may play in court proceedings under clause 233, the process for making (and potential challenge to) Codes is sufficiently rigorous. For example, should there be a mechanism for an industry participant to trigger consideration (only) of the need for a review of a Code?

Conclusion

48. The Law Society does not wish to be heard.



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