SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

QUESTIONS ON NOTICE BUDGET ESTIMATES 2009-10

Outcome 5

DEEWR Question No. EW0012_10

Senator Cash provided in writing.

Question

OHS Review Recommendation – reverse onus of proof for discrimination issues

What are the public policy elements that underpin and support Recommendation 128, dealing with the issue of reverse onus of proof for discrimination issues?

Answer

The National Review into Model Occupational Health and Safety (OHS) laws was conducted by an independent panel with OHS expertise and involved extensive consultation with a wide range of interested parties. The panel provided extensive rationale in its two reports for its recommendations. Chapter 29 (paragraphs 29.1 to 29.105) of the panel's second report deals with the issue of discrimination, victimisation and coercion, including who should bear the onus of proof in proceedings addressing these matters.

Recommendation 128 proposes that "A person alleged to have engaged in proscribed discriminatory conduct should bear the onus in a criminal prosecution of proving on the balance of probabilities that the reason alleged was not the dominant reason for which that person engaged in that conduct. A person alleged to have engaged in coercion should bear the onus of proving on the balance of probabilities that the person had a reasonable excuse for doing so. The prosecution should bear the onus of proof in relation to all other elements of an offence of engaging in proscribed conduct, beyond a reasonable doubt."

In making its recommendation the review panel noted in paragraph 29.81 that "the person bringing a claim under the model Act for discrimination, victimisation or coercion should bear the onus of proving all elements of the claim, other than the reason for the proscribed conduct or the existence of a reasonable excuse." The rationale for this view is provided at paragraphs 29.63 to 29.67 where the panel notes "The intention of the person who engages in discriminatory conduct, will be known to that person. As there may be reasons why conduct that subjects another person to detriment may occur (eg. termination for redundancy) it will be excessively difficult, if not impossible, for a prosecutor to provide the reason for the conduct."