

The Senate

Employment, Workplace Relations
and Education Legislation Committee

Provisions of the Occupational Health and Safety
(Commonwealth Employment) Amendment
(Promoting Safer Workplaces) Bill 2005

May 2005

© Commonwealth of Australia

ISBN 0 642 71514 9

This document was produced by the Senate Employment, Workplace Relations and Education Legislation Committee and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the Committee

Members

Senator Judith Troeth (appointed 14 April 2005 Chair from 10 May 2005)	LP, Victoria	Chair
Senator Gavin Marshall	ALP, Victoria	Deputy Chair
Senator David Johnston	LP, Western Australia	
Senator Guy Barnett	LP, Tasmania	
Senator Penny Wong	ALP, South Australia	
Senator Natasha Stott Despoja	AD, South Australia	

Former Chair

Senator John Tierney (resigned 14 April 2005)	LP, New South Wales
--	---------------------

Substitute Members

Senator Trish Crossin ALP, Northern Territory	for Senator Penny Wong
Senator Andrew Murray AD, Western Australia	for Senator Natasha Stott Despoja
Senator Kim Carr ALP, Victoria	for Senator Penny Wong

Secretariat

Senate Employment, Workplace Relations and Education
Legislation Committee Secretariat
Suite SG. 52
The Senate
Parliament House
Canberra ACT 2600
Phone: 02 6277 3520
Fax: 02 6277 5706
E-mail: eet.sen@aph.gov.au
Internet: www.aph.gov.au/senate_employment

Table of Contents

Membership of the Committee	iii
Majority report	1
Background to the bill	1
Commonwealth law covering this matter.....	2
Conclusion.....	3
Opposition Senators' report.....	5
Australian Democrats' minority report.....	9
Appendix 1	11
List of submissions	

Majority report

1.1 On 16 March 2005 the Senate referred to this committee the provisions of the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005, to report to the Senate on 10 May 2005.

1.2 The committee agreed to report to the Senate on evidence provided in submissions alone. Four submissions were received and are listed in Appendix 1.

Background to the bill

1.3 The Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill was re-introduced into the 41st Parliament by the Minister, the Hon Kevin Andrews MP, on 9 March 2005, following the lapse of the 2004 bill when Parliament was prorogued for the 2004 federal election. This bill amends the Occupational Health and Safety (Commonwealth Employment) Act by the insertion of a new section 11A.

1.4 This bill overrides the Australian Capital Territory (ACT) Government's *Crimes (Industrial Manslaughter) Amendment Act 2003*, which commenced on 1 March 2004. This Act amends the *Crimes Act 1900* by inserting a new Part 2A which adds two new offences of industrial manslaughter: section 49C (industrial manslaughter – employer offence) and section 49D (industrial manslaughter: senior officer offence).¹ Under Part 2A, Commonwealth authorities, Government business enterprises (GBEs) and employees of such bodies may become liable for prosecution for the industrial manslaughter offences contained in the part.² The charge of industrial manslaughter offences carries a jail term.

1.5 The main purpose of this bill is to exempt Commonwealth employers and employees from the current ACT industrial manslaughter laws and any similar legislation that may be introduced by other jurisdictions in Australia.³ The Minister stated in his second reading speech that the amendments reinforce and emphasise the Government's approach of 'preventing workplace injuries, rather than punishment after the event'.⁴

1 ACT Parliamentary Counsel, *Crimes (Industrial Manslaughter) Amendment Act 2003*, A2003-55, p. 2

2 *Explanatory Memorandum*, 69917 Cat. No. 0501704, 2004-2005, p. 1

3 Parliamentary Library, *Bill Digest no. 131, 2004-05*, 17 March 2005, p. 2

4 The Hon. Mr Kevin Andrews MP (Minister for Employment and Workplace Relations), 'Second Reading Speech': Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005', House of Representatives, *Debates*, 9 March 2005, p. 7

Commonwealth law covering this matter

1.6 Evidence provided by the Department of Employment and Workplace Relations (DEWR) stated that the Government has a strong commitment to the health and safety of Commonwealth employees in departments, statutory authorities and GBEs while at work. It has established a statutory framework in the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. Amendments to the OH&S Act in 2004 have improved OH&S outcomes in all Australian workplaces by preventing workplace injuries and fatalities by encouraging voluntary compliance, but also including strong sanctions for non-compliance.

1.7 These amendments include encouraging voluntary compliance; creating a dual civil and criminal penalty regime; introducing remedies of injunctions, remedial orders and enforceable undertakings to enable Comcare to work towards removing risks before an inquiry or fatality occurs; and, substantially, increasing penalty levels to bring them into line with community standards.⁵

1.8 The matter of achieving voluntary compliance is under the jurisdiction of Comcare, which is able to accept written undertakings in relation to an obligation under the Act. These undertakings may be accepted whether or not civil proceedings have commenced. If they are not complied with, a direct order of the Court can be enforced.

1.9 With regard to the issue of monitoring and compliance, Comcare or an investigator may apply to a court for an injunction against a person who has breached the Act or its regulations. The court can place various injunctions on a person restraining them from performing acts in breach of the legislation or asking persons to perform acts to prevent a breach.

1.10 Those acts which result in death or serious bodily harm, especially if there is evidence of reckless or negligent actions by employers to an employee, incur a maximum penalty of \$495 000. A person who breaches a duty of care to another party, or there can be seen to have been negligent or reckless leading to death or serious bodily harm to another party may also be charged with a criminal offence. The maximum penalty is \$333 000.⁶

1.11 The committee also notes other evidence provided in the ACT Government's submission which outlines the punitive sentencing under OH&S laws in Queensland and Western Australia, ranging from six months to three years depending on the extent of the offence.⁷ It also notes evidence from the ACTU, and supported by the CPSU, which states that it is necessary to have industrial manslaughter legislation due

5 Department of Employment and Workplace Relations, *Submission 1*, paras 15-19

6 DEWR, *Submission 1*, paras, 23-29

7 ACT Government, *Submission 4*, pp. 8-9

to the barriers preventing prosecution of corporate employers in the event of workplace deaths. However, Government senators are not convinced by the argument of the ACTU that the ACT law provides incentives for employers to work towards safer workplaces.⁸

1.12 The committee considers it more likely that the introduction of the manslaughter legislation will create a climate of blame rather than one of prevention. The Government's policy of further education, advice and improved compliance strategies, is the best method for achieving safer workplaces.

1.13 Government business enterprises and agencies where industrial accidents are likely to take place are relatively few in the ACT. Supervision of OH&S regulation by Commonwealth authorities is rigorous, more so than would be found in most private enterprises. The committee believes that there is no demonstrative need to have such matters included in the umbrella Act introduced into ACT legislation. Work which would be likely to be dangerous in GBEs or government agencies are covered by the OH&S regulations and work practice standards are unlikely to deteriorate to an extent that employers would be liable for criminal offences.

1.14 The committee considers that the ACT's industrial manslaughter law is unbalanced in that it singles out employers and senior officers, unlike the OH&S Act which covers the conduct of persons, including manufacturers, suppliers and all employees. Those employed in CGBs are also subjected to criminal penalties, along with all Commonwealth employers. The committee is aware that the 2004 amendments removed statutory immunity from criminal liability for employees of the Commonwealth and Commonwealth authorities, and that this reflects the common law position that officers, servants and agents of the Crown can be charged under criminal law for acts of wrongdoing.⁹

Conclusion

1.15 In considering the evidence to this inquiry, the committee majority concludes that the Government's increased emphasis on preventing industrial accidents by education and voluntary compliance is the preferred approach, rather than the system of the ACT Government on punitive sentencing. The ACT Government, ACTU and CPSU have not demonstrated that the threat of punitive sentencing under the industrial manslaughter legislation offers increased protection for workers.

1.16 In line with Government's policy, Government party senators agree that criminal penalties should be reserved for serious contraventions of the OH&S Act and that severe penalties currently exist. The committee believes that under the ACT Crime Act the maximum penalty of 20 years imprisonment is excessive, and is not consistent with the law in other jurisdictions within Australia.

8 ACTU, *submission 2*, paras, 5-7

9 DEWR, *Submission 1*, paras, 26-29

Recommendation

The committee majority recommends that the Senate pass this bill.

Senator Judith Troeth
Chair

Opposition Senators' report

2.1 With the introduction of the ACT Government's *Crimes (Industrial Manslaughter) Amendment Act 2003 on 1 March 2004*, the ACT Government became the first jurisdiction to legislate an offence of industrial manslaughter. This triggered the Government's introduction of the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill in the last parliament, and its re-introduction in the current parliament.

2.2 The Opposition agrees with the rationale behind the ACT Government's legislation and supports the evidence provided by the ACT Government, ACTU and CPSU submitted for this inquiry. These submissions oppose the Commonwealth's bill which overrides the new insertions into Part 2A of the ACT Crimes Act, allowing for the prosecution of employers in Commonwealth authorities and Commonwealth government business enterprises on the charge of industrial manslaughter. A further concern for the Opposition is that this bill will also override any state or territory plans to introduce similar legislation.

2.3 The Opposition is concerned about the Government's action. It erodes the ACT Government's power to protect the community without federal intervention. The CPSU supports this view and states that:

...ACT territorians, like all Australians, have the democratic right to vote for their chosen representatives...to enact legislation that best represents the policies of that government.¹

2.4 Reasons for the ACT's legislation are outlined in the submission of the ACT Government. The ACT Government's evaluation of OH&S laws identified problems in regard to private employers who are responsible for OH&S administration, and who could evade the responsibility of breaches of OH&S legislation by hiding under a corporation blanket. The same possibility exists for similar evasion by managers and senior executives in the public sector who are responsible for ensuring the enforcement of OH&S rules. The ACT authorities also responded to public opinion that the charges and penalties were deficient in cases where accidents resulted in deaths in the workplace.

2.5 The ACT Government blamed cost-cutting as a threat to compliance with OH&S with regulations. Employers were likely to cut costs in areas which are classed as 'frills', such as OH&S, and fail to maintain an appropriate level of supervision over OH&S measures.²

1 CPSU, *Submission 3*, p. 4

2 ACT Government, *Submission 4*, p. 3

2.6 Prosecution of corporate employers is difficult. The ACT industrial manslaughter legislation now provides an improved mechanism to facilitate prosecution of companies and individuals. In defining a corporation as a legal person, able to be prosecuted for a criminal offence, the ACT Government intends that the law will be a forceful deterrent to those companies which evade their responsibility in providing a safe workplace. The Opposition believes that this is an innovative move to encourage corporations to apply effective OH&S principles and procedures.

2.7 Under current OH&S legislation it is easy to prosecute companies for any breach of the OH&S laws. Fines, rather than jail terms are imposed on these companies because the legislation does not differentiate between breaches which results in minor injuries, or death. In the case of breaches which result in workplace deaths, these have proven difficult to prosecute and do not impose appropriate penalties.

2.8 The *Occupational Health and Safety Act 1989* (ACT) provides a fine for failure by an employer to 'take all reasonably practicable steps to protect the health, safety and welfare at work of [their] employees' attracts a maximum penalty of \$25,000 for an individual employer or \$125,000 for a corporate employer.³

2.9 Those who argue for the industrial manslaughter laws state that more substantial penalties would be effective as the charges would be seen as genuinely criminal rather than quasi-criminal under the current OH&S regulatory regime. Clearly the existing OH&S legislation is:

... 'remedial rather than punitive in nature', ie they are there to improve the conditions of work, not to make the employer or employee suffer penalties for breaches of the law.⁴

2.10 Changes to the law in regard to workplace deaths, so as to put these within the criminal jurisdiction, will emphasise the value which society places on human life and on the dignity of employment. Current attitude to safety in some workplaces carries with it the notion of employees as assets which are attached to a business. This is not much further advanced than a past practice of seeing employees simply as units of labour, and by extension, the property of employers. The symbolism of industrial manslaughter legislation is therefore of equal significance to regulations enforcing practical OH&S measures. With prosecution administered by the police and Director

3 Bills Digest No. 135 2003-04, *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004*, p. 3: extract from 'Section 27, *Occupational Health and Safety Act 1989* (ACT)'

4 Bills Digest No. 135 2003-04, *ibid.* p. 3

of Public Prosecutions, rather than by an OH&S inspector, industrial manslaughter legislation ensures that workplace death is understood to be an intolerable risk, treated with greater severity than that of other OH&S infringements.⁵

Recommendation

Opposition senators recommend to the Senate that the bill be rejected.

Senator Gavin Marshall
Deputy Chair

5 ibid.

Australian Democrats' minority report

The Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 seeks to exempt employers and employees covered by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* from Part 2A of the *Crimes Act 1900 (ACT)* and any other similar industrial manslaughter legislation if enacted in other States or Territories.

Through former ACT MLA Roslyn Dundas the Democrats supported the introduction of the industrial manslaughter laws in the ACT. The Democrats are also aware that a similar law is being considered in NSW.

The Democrats support the view that the application of the criminal law of a State or Territory should not depend upon whether the employer is a Commonwealth authority or not.

The Democrats will formalise their position when the Bill is before us in the Senate chamber.

Senator Andrew Murray

Appendix 1

List of submissions

Sub No:	From:
1	Department of Employment and Workplace Relations
2	Australian Council of Trade Unions
3	Community and Public Sector Union, PSU Group
4	ACT Government

