

1991

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

OCCUPATIONAL HEALTH AND SAFETY (AMENDMENT) BILL 1991

EXPLANATORY MEMORANDUM

Circulated by Authority of the Chief Minister

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OCCUPATIONAL HEALTH AND SAFETY ACT (AMENDMENT) BILL 1991

The purpose of the Occupational Health and Safety Act 1989 (the Principal Act) is to promote and improve standards for occupational health, safety and welfare. Its objects are to secure the health, safety and welfare of employees at work, to protect persons at or near workplaces from risks to health or safety arising out of the activities of employees at work, to promote an occupational environment for employees that is adapted to their health and safety needs and to foster a co-operative consultative relationship between employers and employees on the health, safety and welfare of employees at work.

When the Occupational Health and Safety Act 1989 was enacted it was anticipated that the Commonwealth Government would amend the Industrial Relations Act 1988 to allow a reviewing authority to be established. This did not occur. As a result the review system referred to in the Act has not been used and there has been no adequate method of appeal from decisions under the Act.

The Occupational Health and Safety (Amendment) Bill (the Bill) will put in place a Review Authority before which appeals may be heard. It establishes the Authority, determines its constitution and powers, provides protection for the Authority and those who appear before it, determines the method by which parties will be informed of and may join a proceeding, and establishes a method of appeals from it. The Bill provides a reporting mechanism, by which the ACT Legislative Assembly will be kept informed of the activities of the Review Authority.

The Bill further amends the Principal Act with respect to two areas. The first is to provide for paid leave for health and safety representatives and deputy health and safety representatives to attend training courses necessary for their positions as representatives. The second is to provide that an injury which is required to be reported under the Act does not have to result from an accident but may also occur as a result of an illness or disease contracted at work.

The Bill will have no direct effect on income or expenditure.
Details of the Bill are included in the Attachment.

ATTACHMENT

OCCUPATIONAL HEALTH AND SAFETY (AMENDMENT) BILL 1991

Clause 1 deals with the short title and provides that the Bill may be cited as the Occupational Health and Safety (Amendment) Act 1991.

Clause 2 provides that in the Bill, "Principal Act" means the Occupational Health and Safety Act 1989.

Clause 3 deals with interpretation and amends subsection 5(1) of the Principal Act.

Subclause (a) inserts definitions of "Commission", "President" and "Review Authority".

Subclause (b) amends the definition of "health and safety representative" by omitting "section 39" and substituting "section 40". This corrects a typographical error in the Principal Act, which defines a health and safety representative as a representative selected under section 39. Section 39 does not deal with the selection of health and safety representatives.

Clause 4 amends section 12 of the Principal Act, which deals with the provision of an annual report by the Occupational Health and Safety Council on its activities to the Minister. The amendment will require the Council to also report on the operation of the Act, which will require it to report on the Review Authority. This ensures the ACT Legislative Assembly will be kept aware of the activities of the Review Authority.

Clause 5 amends section 45 of the Principal Act which sets out the duties of employers by adding a new subsection 45(1)(ea). It requires an employer to allow a health and safety representative to take time off work without loss of remuneration or other entitlements as is necessary and reasonable to allow him or her to undertake a training program approved under the regulations. This clause will facilitate the training of health and safety representatives. The first training course to be prescribed will be the basic training course.

Clause 6 deals with deputy health and safety representatives. It amends section 50 of the Principal Act by adding a new subsection (4). Subsection (4) places the

same obligation on employers with respect to deputy health and safety representatives as paragraph 45(1)(ea) places on them with respect to health and safety representatives.

Clause 7 provides that section 80 of the Principal Act is repealed and in its place provisions establishing the Review Authority and providing for its structure are inserted. Section 80 presently provides that a "reviewing authority" means the body or person declared by the regulations to be the reviewing authority. Instead of regulations declaring a "reviewing authority" this amendment will establish a Review Authority under the Act.

Proposed section 80 provides that a review authority called the "Occupational Health and Safety Review Authority" is established.

Proposed section 80A deals with the constitution of the Authority.

Proposed subsection (1) provides that the Review Authority will be constituted by a member of the Australian Industrial Relations Commission appointed by the President of that body.

Proposed subsection (2) provides that, where the person constituting the Authority is unable to complete the proceeding and the Authority is reconstituted in accordance with proposed subsection (1), the reconstituted Authority will complete the proceeding and, for that purpose, may have regard to the records and evidence taken by the previously constituted Authority. This means that where a member cannot complete a hearing, it will not be necessary to have the matter reheard completely.

Proposed section 80B deals with disclosure of interest.

Paragraphs (a) and (b) of proposed subsection (1) provide that where a person constituting the Review Authority has an interest which could conflict with the proper performance of the person's functions, the person will disclose the interest to the parties to the proceeding and not take part or any further part in the proceeding except with the consent of all the parties to the proceeding.

Proposed subsection (2) provides that where the President of the Industrial Relations Commission directs the member who constitutes the Authority not to take part, or any further part, in a proceeding, the member will not act, or act further, in the proceeding.

Clause 8 deals with review of decisions and amends the Principal Act to provide for a Review Authority established under the Act rather than a reviewing authority established under the regulations.

Paragraphs (a) to (d) consequentially amend subsections (1), (2), (3), (4) and (5) of section 84 of the Principal Act to reflect the change from a reviewing authority to the Review Authority.

Paragraph (e) adds a new subsection (6) to section 84 which requires the Authority to give written notice of its decision to each party to a proceeding. Section 13C of the Interpretation Act 1967 provides that as the Authority is required to give "reasons" it must also set out its findings on material questions of fact and refer to the evidence or other material on which those findings were based.

Clause 9 provides that the following sections are inserted in Part VII after section 84 of the Principal Act.

Proposed section 84A deals with parties to proceedings before the Review Authority.

Subsection (1) provides that the parties to a particular proceeding before the Review Authority are any eligible person who, in writing, requests the Authority to review the reviewable decision, the person who made the decision, and any other person joined as a party to the proceeding by the Authority in accordance with subsection (2).

Subsection (2) provides that the Review Authority may, on application in writing by a person who is either an eligible person in relation to a reviewable decision or whose interests are affected by a reviewable decision and by notice in writing to the applicant, join the applicant as a party to a proceeding for the review of the decision. This ensures that all parties whose interests are affected are given an opportunity to be involved in a proceeding. An eligible person is defined in section 82 of the Principal Act. A reviewable decision is a decision listed in section 81 of the Principal Act.

Section 84B deals with representation before the Review Authority. It provides that a party to a proceeding may appear in person or may be represented by some other person. This allows not only legal representation but union representation should a person require it.

Section 84C deals with notice of proceeding. It provides that before the commencement of a proceeding, the Review Authority shall give each party a notice specifying the time and place for the proceeding and the matters to which the proceeding relates.

Section 84D relates to the procedure of the Review Authority.

Subsection (1) provides that the Authority is not bound by the rules of evidence, that the procedure of the Authority is, subject to Part VII, within the discretion of the Authority, that the proceedings be conducted with as little formality and technicality as possible within certain restraints, and that the Authority may give directions relating to procedure.

Subsection (2) does not limit the generality of subsection (1), but provides that the Review Authority shall ensure that each party to a proceeding is given a reasonable opportunity to call or give evidence, examine or cross-examine witnesses, inspect certain documents, and make submissions.

Section 84E provides that hearings are to be in public except in special circumstances.

Subsection (1) provides that, subject to the section, a proceeding before the Review Authority shall be in public.

Subsection (2) provides that where the Review Authority believes on reasonable grounds that it is desirable to do so because of the confidential nature of any evidence or matter or for any other reason, the Authority may direct that a proceeding (or part thereof) take place in private and give directions as to the persons who may be present; give directions prohibiting or restricting the publication of evidence given before the Authority; give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Authority, or of the contents of a document lodged with the Authority or received in evidence by the Authority, in relation to the proceeding.

Subsection (3) directs that a person shall not contravene a direction given by the Authority under paragraphs 2(b) or (c) and provides a penalty for natural person and body corporate offenders.

Section 84F deals with the reference of questions of law to the Supreme Court.

Subsection (1) provides that the Review Authority may, of its own motion or at the request of a party, refer a question of law arising in a proceeding before it to the Supreme Court for decision.

Subsection (2) provides that the Supreme Court has jurisdiction to hear and determine a question of law referred to it under this section.

Subsection (3) provides that where a question of law arising in a proceeding has been referred to the Supreme Court under this section, the Authority shall not, in that proceeding, give a decision to which the question is relevant while the reference is pending, or proceed in a manner, or make a decision, that is inconsistent with the determination of the Supreme Court on the question. This ensures that the Authority will not anticipate a decision by the Court, or depart from it once made.

Section 84G deals with appeals to the Supreme Court.

Subsection (1) provides parties to a proceeding with a right of appeal to the Supreme Court on a question of law from any decision of the Authority in that proceeding.

Subsection (2) provides that an appeal by a person under subsection (1) shall be instituted within 28 days after the day on which a document setting out the terms of the decision of the Tribunal is given to the person or within such further time as the Supreme Court allows. This is designed to allow a person wishing to appeal a reasonable time to do so, as well as providing certainty to other persons affected by the decision once a reasonable time has expired.

Subsection (3) provides that the Supreme Court has jurisdiction to hear and determine appeals instituted in that Court in accordance with subsection (1).

Subsection (4) provides that the Supreme Court shall hear and determine the appeal and may make certain orders with respect to it. It may affirm or set aside the decision, remit the case for rehearing with or without the hearing of further evidence by the Authority, or make such further order as the Court thinks appropriate.

Section 84H deals with the powers of the Review Authority. It provides for the manner in which the Authority obtains information.

Subsection (1) sets out the power of the Authority to take evidence on oath or affirmation, require a person attending before the Authority to take an oath or make an affirmation, administer an oath or affirmation, proceed in the absence of a party who has been given notice of the proceeding under section 84C, and adjourn the proceeding from time to time. Section 84C provides that before commencing a proceeding, the Review Authority shall give each party notice of the time and place of the proceeding and the matters to which the proceeding relates.

Subsection (2) provides that the Authority may (in writing) direct a person to attend a proceeding as specified in the notice and to give evidence and produce any document in the person's custody or control as required by the notice.

Subsection (3) provides that where a person is directed to produce a document and the document is not in writing, written in the English language or decipherable on sight the person shall also produce a statement written in the English language and decipherable on sight which contains all the information in the document, or, if the document is not in writing, the person shall produce only the statement written in the English language.

Section 84J deals with inspection and retention of documents.

Subsection (1) provides that the Review Authority has power to inspect and retain any document produced before it for such period as is necessary for the purposes of Part VII and make copies of or take extracts from those documents.

Subsection (2) provides that where a document is retained by the Authority under subsection (1) a person otherwise entitled to possession of the document is entitled to be supplied by the Authority with a certified copy of the document on request. A person who would be entitled to inspect the document if it were not in the possession of the Authority, or a person authorised by such a person, may at any reasonable time inspect, make copies of, or take extracts from, the document.

Section 84K deals with the failure of a person to attend before the Commission and other procedural matters.

Subsection (1) provides that a person directed under subsection 84H(2) to attend proceedings before the Review Authority shall not, without reasonable excuse,

fail to comply with the direction, fail to attend from day to day unless released or excused from further attendance by the Authority or fail to produce a document in accordance with the direction. A penalty of \$5000 or 6 months imprisonment or both is provided. Subsection 84H(2) provides the Authority with power to direct a person to attend a proceeding, give evidence and produce documents.

Subsection (2) provides that a person appearing as a witness before the Authority shall not, without reasonable excuse, fail to take an oath or make an affirmation when so required under subsection 84H(1). A penalty of \$5000 or 6 months imprisonment or both is provided. Subsection 84H(1) provides the Authority with power to require a person attending before the Authority to take an oath.

Section 84M deals with contempt and provides that a person shall not, without reasonable excuse, obstruct or hinder the Review Authority in the performance of its functions or disrupt proceedings of the Authority. A penalty of \$5000 or 6 months imprisonment or both is provided.

Section 84N deals with false information. Penalties of \$5000 or 6 months imprisonment or both with respect to a natural person and \$25000 with respect to a body corporate are provided.

Paragraph (a) provides that a person shall not give the Authority information that is to the person's knowledge false or misleading in a material particular.

Paragraph (b) provides that a person shall not give the Authority a document containing information that is to the person's knowledge false or misleading in a material particular.

Section 84P deals with the operation and implementation of a decision that is subject to appeal.

Subsection (1) provides that, subject to the section, the institution of an appeal to the Supreme Court from a decision of the Review Authority does not affect the operation of a decision or prevent the taking of action to implement the decision.

Subsection (2) allows the Court or a Judge of the Court sitting in chambers to make an order staying or otherwise affecting the operation or implementation of a decision of the Authority (or a part of that decision) or of the decision to

which the proceeding before the Authority related (or a part of that decision) as appropriate to secure the effectiveness of the hearing and determination of the appeal.

Subsection (3) provides that where an order of the Supreme Court or of a Judge of the Court made under subsection (2) is in force, the Court or a Judge of the Court sitting in chambers may (by order) vary or revoke that order. An order which has already been varied under this subsection may also be varied or revoked.

Subsection (4) provides that an order of the Supreme Court or of a Judge of the Court made under subsection (2), including an order that has been varied under subsection (3), is subject to the conditions specified in the order and has effect until whichever occurs first of either the end of any period of operation specified in the order or the giving of a decision on the appeal.

Section 84Q deals with the protection of the Review Authority.

Subsection (1) provides the Review Authority, while performing its functions, with the same protection and immunity as a Judge of the Supreme Court.

Subsection (2) provides a barrister, solicitor or other person appearing before the Authority on behalf of a party, including the party if the party appears personally, with the same protection and immunity as a barrister has in appearing for a party in proceedings in the Supreme Court.

Subsection (3) provides that, subject to the Act, a person directed to attend or appearing before the Authority as a witness has the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the Supreme Court.

Section 84R deals with fees.

Subsection (1) provides that the Minister may, by notice in the *Gazette*, determine fees payable for appealing to the Review Authority.

Subsection (2) provides that a determination with respect to fees payable under subsection (1) is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

Clause 10 deals with notice of events. It amends section 85 of the Principal Act, which sets out that certain injuries and occurrences which result from accidents must be reported to the Registrar. However, as the section stands employers are not required to report industrial cancers and similar illnesses, as these are not the result of an accident. Accordingly the section has been reworded to omit the reference to an accident.

Clause 11 deals with the regulation making power. It amends section 97(2)(u) which provides the power to make regulations with respect to the training of health and safety representatives by providing that it also applies to deputy health and safety representatives.