

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

2004

**OCCUPATIONAL HEALTH AND SAFETY AMENDMENT
BILL 2004
Government Amendments**

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Industrial Relations
Katy Gallagher MLA

OCCUPATIONAL HEALTH AND SAFETY AMENDMENT BILL 2004

OUTLINE

The Occupational Health and Safety Amendment Bill 2004 (OHS Amendment Bill) establishes new offences for breaches of safety duties, increases maximum penalties, improves inspector powers, and broadens the range of compliance and enforcement measures available under the Act. The powers and measures are aligned with similar provisions in the *Dangerous Substances Act 2004*, to promote consistent use and understanding for inspectors, the courts and the community.

A number of the amendments to the OHS Amendment Bill, which are the subject of this Explanatory Statement, follow amendments to the Dangerous Substances Bill 2003 with the objective of maintaining consistency between the two bodies of safety legislation. The additional amendments to the Bill relate to the provisions establishing the right-of-entry to workplaces in relation to occupational health and safety. These amendments:

- address Scrutiny of Bills Committee concerns regarding the drafting of the right-of-entry provisions in the Bill;
- widen the definition of “authorised representative” in relation to the right-of-entry provisions to include employer organisations which are registered organisations under the *Workplace Relations Act 1996* (Cwlth);
- establish an additional accountability provision in relation to notification of the chief executive of the authorisation of a representative;
- establish a requirement for authorised representatives to have undertaken a course of OHS training before being authorised; and
- establish a requirement to provide a copy of the report of the authorised representative’s inspection to the chief executive as well as the occupier/employer.

Notes on Clauses

Clause 2 of the of the OHS Amendment Bill creates a new commencement clause. Specifically, **Item 1** defers commencement of the entry to workplaces by authorised representatives provisions (proposed division 4.3A) until 1 January 2005. The remainder of the provisions commence 28 days after the notification day.

Clause 16 creates a new **Division 4.3A** concerning entry to workplaces by authorised representatives of registered organisations. **Item 2** amends **proposed section 57A** of **clause 16** to do three things.

First, proposed section **57A** of **clause 16** replaces the concept of “employee organisation” with the concept of “registered organisation”. The Bill is currently drafted to provide for employee organisations registered under schedule 1B of the *Workplace Relations Act 1996* (Cwlth) to authorise representatives to exercise right-of-entry. The effect of the amendment is to allow all registered organisations, not just employee organisations, to authorise representatives. The amendment effectively extends the right-of-entry to authorised representatives of employer organisations.

Second, proposed section **57AB** of **clause 16** provides that an organisation may only authorise an officer or employee who has undertaken training required under the regulations. A related amendment is set out in **item 21** amends the Occupational Health and Safety Regulations 1991 to provide that an approved training program for health and safety representatives (HSRs) is required for appointment as an authorised representative.

New subsection 57AB(3) of **clause 16** creates a strict liability offence when a registered organisation authorises a representative who is not an employee or an officeholder of the organisation, or who has not completed the required training. The defence of mistake of fact is available for a strict liability offence.

Under **subsection 57AB(4)** of **clause 16** a registered organisation that has authorised a representative who has not completed the required training must revoke the authorisation. Failure to do is a strict liability offence.

New subsection 57AB(5) of **clause 16** establishes that an authorisation ends when a person ceases to be an employee of the registered organisation or ceases to be an office holder in the registered organisation.

Third, **proposed subsections 57AB(6)** and **57AB(7)** of **clause 16** effectively insert a notification scheme for representatives authorised to exercise the right-of-entry. A registered organisation must notify the chief executive when a representative is authorised to exercise the right-of-entry and, again, when a representative ceases to be authorised. The amendment also creates offences when an organisation fails to notify the chief executive of these developments within 1 week. Like the other offences against this section, these are a strict liability offences for which the defence of mistake of fact is available.

Item 3 substitutes the words “employee organisation” in **proposed subsection 57B(1)** of **clause 16** with the words “registered organisation”. This amendment is consequential to **Item 2** that extends the right-of-entry to all organisations registered under schedule 1B of the *Workplace Relations Act 1996* (Cwlth).

Item 4 also substitutes the words “employee organisation” in **proposed paragraph 57E(2)(b)** of **clause 16** with the words “registered organisation”. Similarly, the amendment is consequential to **Item 2**. **Item 4** also deletes the words “employees who are” to enable authorised officers to interview *members* (or eligible members) of their organisation, rather than *employees* who are members. This is consequential to **Item 2** and extends the power to interview persons to employer organisations. Adequate protections are preserved by the condition that interviews are conducted with the member’s (or eligible member’s) consent.

Item 5 amends **proposed paragraph 57E(2)(d) of clause 16** to rephrase the power to examine and copy documents as a “requirement”. The effect of the amendment is to involve the occupier of the premises when an authorised representative exercises powers to examine and copy documents. This ensures that the occupier has an opportunity to make an effective claim of privilege in relation to certain documents. Item 5 also inserts a note into the provision to alert people that it is an offence for a person (including an authorised representative) to disclose protected information obtained while exercising a function under the Act (in accordance with section 88).

Item 6 substitutes the word “or anyone at the premises” in **proposed paragraph 57E(2)(e) of clause 16** with “an employee or anyone else working at the premises”. The Bill is currently drafted to provide an authorised representative with the power to require *anyone at premises* to render assistance. The amendment limits that power by requiring assistance to be exercised only by employees or people working on the premises.

Item 7 amends **proposed subsection 57E(3) of clause 16** to require an authorised representative to produce his or her authorisation when requiring the production of documents for examination and copying. This supplements **proposed subsection 57E(3)** of the Bill that requires an authorised representative to produce his or her authorisation when requiring a person to give reasonable assistance.

Item 8 substitutes the words “employee organisation” in **proposed subsection 57G(1) of clause 16** with the words “registered organisation”. This amendment is consequential to the amendment in **Item 2** that extends the right-of-entry to all organisations registered under schedule 1B of the *Workplace Relations Act 1996* (Cwlth).

Item 9 substitutes the words “employee organisation” in **proposed subsection 57G(1) of clause 16** with the words “registered organisation”. This amendment is consequential to the amendment in **Item 2** that extends the right-of-entry to all organisations registered under schedule 1B of the *Workplace Relations Act 1996* (Cwlth).

Item 10 inserts the words “and chief executive” after the word “occupier” in **proposed subsection 57H(2) of clause 16**. The effect of the amendment is to require an authorised representative to provide a copy of a written report to both the chief executive and the occupier of the premises following exercise of the right-of-entry.

Item 11 amends the two notes following **proposed subsection 75A(1) of clause 19**. The first note, which explains that a reference to an Act includes a reference to the statutory instruments (including regulations) made or in force under the Act, is correct. The second note contradicts the effect of **proposed section 75E**, which displaces the application of the privilege against selfincrimination for **proposed Division 6.2**. This amendment effectively retains the correct note and removes the misleading note.

Item 12 inserts a new note into **proposed subsection 75E(3) of clause 19** referring to the provisions of the *Legislation Act 2001* that cover legal professional privilege.

Item 13 deletes **proposed paragraph 93C(2)(d)** of **clause 24**. Proposed section 93C allows the chief executive to publish details of convictions under the Act. The provision would allow the chief executive to publish the identity of the convicted person, details of the offence, the decision of the court and the penalty imposed. Proposed section 93C(2)(d) would also allow the chief executive to publish ‘any other relevant information’ about the offence.

A similar provision appeared in clause 197 of the Dangerous Substances Bill 2003. The Legislative Assembly passed an amendment that removed the equivalent of paragraph 93C(2)(d) from the Dangerous Substances Bill. Item 12 mirrors this amendment with the objective of maintaining the alignment of the OHS Act and the Dangerous Substances Act.

Item 14 is consequential to Item 13 and deletes the examples of publication for **proposed paragraph 93C(2)(d)**

Item 15 removes **proposed subsection 93C(5)** of **clause 24**. Proposed section 93C allows the chief executive to publish details of convictions under the Act. The provision would allow the chief executive to publish the identity of the convicted person, details of the offence, the decision of the court and the penalty imposed.

Proposed section 93C(5) provides that the information published by the chief executive is taken to be a fair report of a proceeding of public concern for the purposes of the *Civil Law (Wrongs) Act 2002* and clarifies the law, for instance, regarding whether defamation action could be brought against the chief executive. A similar provision appeared in clause 197(5) of the Dangerous Substances Bill 2003. The Legislative Assembly passed an amendment that removed the equivalent of paragraph 93C(5) from the Dangerous Substances Bill. Item 15 mirrors this amendment with the objective of maintaining the alignment of the OHS Act and the Dangerous Substances Act.

Item 16 removes proposed dictionary definition of *employee organisation* in **clause 27**. The removal of the dictionary definition is consequential to **Item 2**.

Item 17 deletes the words “an organisation” in the proposed dictionary definition of *office* in **clause 27** and replaces them with the words “a registered organisation”. This amendment is consequential to **Item 2** that extends the right-of-entry to all organisations registered under schedule 1B of the *Workplace Relations Act 1996* (Cwlth).

Item 18 inserts proposed dictionary definition of *registered organisation* in **clause 27**. The insertion of the new dictionary definition is consequential to **Item 2**.

Item 19 corrects the heading in **Schedule 1 Amendment 1.2 New section 4** to read New sections 4 to 4B.

Item 20 applies the ACT Criminal Code to offences in **proposed section 57AB**. The amendment is consequential to **Item 2**.

Item 21 amends the Occupational Health and Safety Regulations 1991 and is consequential to the requirement in **Item 2 (proposed section 57AB)** which stipulates that a person must have undertaken training required under the regulations before he or she can be authorised by a registered organisation. **Item 21** provides that an approved training program for health and safety representatives is required for appointment as an authorised representative.