INDUSTRIAL FOUNDATION FOR ACCIDENT PREVENTION

CONFERENCE ON LAW REFORM IN OCCUPATIONAL SAFETY AND HE

PERTH, 22 FEBRUARY 1984

# WORK HEALTH AND SAFETY : THE KEY ISSUES

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# WORK HEALTH AND SAFETY : THE KEY ISSUES

The Hon Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission *

## MATTERS BEYOND DISPUTE

I now come to my second 'performance'. I am listed to speak on the subject 'practicable activities for direct and early impact on occupational safety and health policies'. This somewhat cumbersome topic was so inelegant that I decided not to adopt it. Indeed, with the arrogance that it is only possible if you are a judge, I have decided to focus my attention somewhat more narrowly. I am a lawyer. I have already announced my reservations about the role of the law in promoting occupational safety and health. I repeat my caution against over-estimating the impact at the workface of organisational, legislative and bureaucratic rearrangements. We should not deceive ourselves that there is a panacea to be found in legislation that will, if only we can get the words right, provide instant relief to the pain and suffering of occupational injury and disease.

Yet once I stray outside the narrow confines of the law, I am no expert. There are many in this room who would have far greater qualifications (or access to people with such qualifications) to speak of work face initiatives to improve occupational safety and health. Lawyers are good for limited things. Some unkind spirits even doubt that assertion. But it is a good lawyer who realises the frontiers of his craft. It is not for me to speak about the very practical changes that can be introduced in the workplace to reduce the risks of accident or disease or to minimise their impact. You would do better in this regard to read carefully the bulletin of the Industrial Foundation for Accident Prevention or other expert journals with practical advice on in-house safety. For example, recent articles in this bulletin, which I have seen, deal with such highly practical topics as:

- the design of VDUs to reduce work-related disabilities[1];
- the improvement of investigation of injuries in order to isolate causes and prevent recurrences[2];
- better induction of new employees so that health and safety procedures are understood by them from the very outset[3];
- provision of safety consultation on such matters as noise control, personal protective equipment and so on.[4]

It is clear from the literature and from a reflection on the increasing moves of our community into the new technology of informatics that fresh attention must be paid to the implications of new technology for work health and safety. Just as Premier Burke warned us against neglecting problems of occupational health, he also offered a warning against stereotyping occupational problems in terms of heavy industry and dangerous machinery in large factories. True it is, these problems remain with us. But as an increasing proportion of our work force moves into the information and service sector, it is important that our policies and laws should deal with the community we have and the occupational health and safety problems of today.[5] In this new world, as Mr Burke has pointed out, stress and alienation may be just as real a problem for the employee as the visible frank physical injuries of the past. It may be more difficult to perceive and diagnose psychological dislocation or tenosynovitis. But from the point of view of the victim and of the employer and the economy, the problem is just as real and serious.

## A CHECKLIST

In these closing remarks, I have decided not to venture a detailed proposal for top priorities of the workface variety. I will leave that to the experts. Nor do I propose to go over what I take to be the common ground in the current wave of legislative reform on this topic, passing through Australia. Clearly this includes:

- enactment of new comprehensive legislation to state the goals and to establish new machinery;
- setting up of tripartite commissions or councils to provide a new focus for future legislation, administrative policies, research and education;
- establishment of specialist advisory committees on topics requiring highly specific attention;
- improvement of the administration of health, safety and welfare legislation;
- enhancement of the numbers and powers of inspectors charged with the monitoring, supervision and enforcement of the law;
- imposition of certain new duties on employers and employees alike in the defence of health and safety;

- provision of defences against legal proceedings where it can be shown that the employer was not reasonably at fault;
- establishment of systems of safety representation including, in appropriate cases, the creation of work committees;
- the devotion of more funds to education, training and research;
- new attention to compensation laws so that these are more closely aligned with the policies of rehabilitation. All too often, the interposition of insurance has reduced the pressure upon employers to improve their work situation. It has also led to the unhealthy cross-subsidisation by safe employers of those who are indifferent to occupational health and safety.[6]

Instead of going over this territory, which seems now to be generally agreed by most observers, I propose to endeavour to identify the areas of disagreement in the Australian debate. It is this that should have our primary attention.

## MATTERS IN CONTROVERSY

General legislation. The first contentious question about the design of new legislation on occupational safety and health is the extent to which it should replace and substitute for the plethora of old statutory and common law principles that have grown up since the Industrial Revolution. Indicative of the problem is the fact that, despite the variety, copious length and detail of much existing State legislation, very large proportions of working population still fall outside its protection, in practice. For example, it has been estimated that 1.5 million employees in New South Wales had no real legal coverage in respect of occupational health and safety legislation prior to the 1983 Act. It was pointed out that the figure represented approximately two-thirds of the New South Wales work force.[7] It is a figure that bears out Lord Robens' comment that the law simply failed to keep up with the technology of employment.

The Williams Report on Occupational Safety and Health in New South Wales, which preceded the 1983 legislation, called attention to at least 26 major statutes relevant to occupational safety and health. Just to name the legislation gives an indication of the specificity of the approach that has been taken to date. It includes the Aerial Spraying Control Act; the Liquified Petroleum Gas Act; the Pesticides Act; the Radioactive Substances Act; and the Workers' Compensation (Brucellosis) Act. Of course, in addition to the statutes of limited application, there were others of more general operation, including notably the Workers' Compensation Act.

Under the 1983 NSW legislation, one of the objects is eventually to replace the 26 individual statutes (or parts of them) so that, in due course of time, a single law will contain, in effect, a codification of all occupational health and safety legislation operating in the State. This aim is to be achieved by the vehicle of regulations which will, in turn, incorporate the detail of relevant existing legislative provisions.[8] One question that must be faced by reforming legislators at this time is the extent to which the objectives cited by Robens and Williams can best be achieved by leaving on the statute books (as a companion to the new general legislation) the statutory obligations of the past. Of course, no-one would suggest the sudden repeal of important and carefully focused statutes, at least until appropriate substitute legislation was in place. But it is probably fair to say that enacting a general law (even one which takes precedence over the special laws of the past) and leaving those special laws on the books, is a formula for confusion, a lawyer's delight in working out the interaction between the statutes, an obfuscation of the statutory intent and a deviation from the professed objection to get the legal act together. By obscuring the legislative message, the educative impact of simple laws may be lessened. The respective places of a general statute and the preserved pre-existing laws must be worked out with great care. But they must be worked out quickly lest pressure of work, apathy, present entrenched careers or other reasons intervene to frustrate the achievement of true law reform, whilst the enthusiasm for it exists.

Safety committee. Another controversy has surrounded the right to set up occupational health and safety committees. It will be recalled that this idea, generated in Scandinavia, was a central feature of the United Kingdom legislation. Its effectiveness as contributing to the reduction of work-related disease or injury, cannot yet be fully assessed. However, early reports from the United Kingdom provide some encouragement, just as one would expect. There is a good review on 'Do joint health and safety committees work?' in a report of a study from the University of Glasgow published in the IFAP bulletin.[9] Again, the impact of institutional approaches should not be over-estimated, nor should there be excessive optimism. Setting up a committee of itself does nothing. As pointed out in the article, much depends upon how the committee is organised, how frequently it meets, how management services it, how suggestions are carried into practical effect and so on. But it can at least be said that the idea appears to be having some impact.

Against this background, the issues arises as to whether there should be an absolute right in employees to have such a committee established. This was the view expressed by Mr J D Garland, a former General-Secretary of the Amalgamated Metal Workers' and Shipwrights' Union and now a member of the Upper House of New South Wales in discussion on the 1983 NSW Bill.[10] That Bill confines the right to have an occupational health and safety committee established at a workplace to circumstances where either:

> (a) there are 20 or more persons employed ... and a majority ... requests the establishment of such a committee; or
>
> (b) the [Occupational Health, Safety and Rehabilitation Council of New South Wales] directs the establishment of such a committee at the place of work.[11]

A number of commentators, particularly from the union movement, expressed reservations about these qualifications to the right to a committee. They suggest that health and safety in small establishments is just as important as in large to the people involved, yet employees in such places may be vulnerable to pressure not to push the occupational health and safety angle.

Non English-speaking workers. Much attention has been given in the Australian debate to the special predicament of non English-speaking employees, particularly in heavy industry. Disappointment has been expressed about the failure specifically to address special needs for instruction and education in health matters, a topic lately touched upon by Sir James Gobbo of the Supreme Court of Victoria.[12] On the other hand, Mr P D Hills, the NSW Minister for Industrial Relations and Technology, acknowledging the special vulnerability of employees not fluent in England, has said that they could be represented on the Council, on committees and on a special committee to be established as one of three standing statutory committees of the Council:

> The first committee will enable the Council to investigate and make recommendations on the problems of the migrant workforce. The second committee will concern itself with the rehabilitation of injured workers and handicapped persons. The third committee, as I previously mentioned, will be the committee on mining safety. As well, the Council may establish such other committees as it believes appropriate.[13]

Right to stop work. In certain circumstances the common law already protects a worker faced by dangerous or unhealthy work conditions to stop work.[14] On the other hand, in times of economic downturn, it is often difficult to enforce that right without fear of retaliation. An experienced industrial lawyer in New South Wales went so far as to say that he would 'swap the whole of the provisions of the proposed legislation [in the 1983 NSW Bill] for the right of workers to stop work to enforce safety provisions'.[15] Such a provision exists under certain Canadian legislation, guaranteeing workers the right to refuse without penalty work which is unsafe or unescapably dangerous to health. Of course, there are exceptions for 'normal dangers', for cases where the risk is not directly to the worker in question or where the risk is very remote. There are also exceptions where the very nature of the work is dangerous (such as police, firefighters, correctional workers etc). But the right to refuse and to compel management to rectify unsafe or unhealthy conditions is now a well developed right in North America. It is based on the principle that prevention is much more valuable than cure. In New South Wales, there was considerable discussion within the labour movement about the statutory enactment of a right to stop work for safety reasons, without retaliation. In the result, the provision was not included in the Bill. Its omission caused anxiety on the part of a number of Labor Members of the NSW Parliament. Clearly, this is an issue that will not go away.

Safety onus. The recent NSW legislation imposes absolute and wide-ranging obligations on various persons. The main obligations imposed on employers are expressed in general terms. They have the effect of ensuring a guarantee of the health, safety and welfare work of all employees. The obligation extends also to the provision and maintenance of a working environment consonant with one of the expressed objects of the Act, namely 'to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs'.[17]

A comparison between the legislation of the United Kingdom and that of the Australian States modelled on it, on the one hand, and the NSW Act, discloses that there is a choice to be made. The United Kingdom model imposes obligations in similar terms to those set out in the NSW Act except for what has been described as 'one distinct difference':[18]

> That other legislation expresses each obligation in terms that include the qualification 'so far as is reasonably practicable'. This allows for a consideration of factors pertaining to the manner and method of operation of a person's business or undertaking. It might be argued that [the NSW] Act achieves the same purpose because it allows for a consideration as to whether something was 'reasonably practicable' by way of the defence contained in s.53. The short

> answer to this is that whereas the safety legislation which exists in the United Kingdom and the other States of Australia presumes, like most criminal legislation, that a person is innocent until proven guilty, the manner in which [the NSW] Act is framed will have the effect of assuming that a person is guilty unless he proves that he is innocent. This is because the obligations contained in s.15-18 are framed in such wide terms and are so absolute in their expression, that it will be virtually impossible for any person subject to their terms to be able to escape a breach of these obligations in the case of an injury or some risk to health or safety'.[19]

This approach attracted opposition criticism to the NSW legislation when it was in Parliament.[20] It was asserted that only with the good will of employers would the new legislation work. Certainly, the shifting of the onus is a significant legislative development. Generally it may be considered undesirable in criminal matters. But as a means to addressing a long-neglected area of legitimate social concern, time will tell whether it proves such an effective weapon as to change unsafe or unhealthy occupational practices.

Licensing danger. Generally speaking we have given insufficient attention to sanctions and remedies in law reform. What remedies work in given circumstances and why? The provision of private criminal prosecutions was the subject of much debate in the NSW Parliament.[21] Should it be limited to requiring the consent of the Minister or would this impose the dull hand of bureaucracy on worker self-protection? Should on-the-spot fines be permitted or could they become an instrument of bureaucratic oppression?[22] I have seen a suggestion in the Western Australian discussion paper of the introduction of licensing of work places. In its recent investigation of aspects of the insurance industry, the Australian Law Reform Commission discussed the differential utility of licensing, registration and other forms of control.[23] Generally speaking, licensing is extremely manpower-intensive and often cost ineffective. It typically requires a large bureaucracy to service and police the licence arrangement and sometimes descends to little more than the issue of paper certificates. Licensing may be appropriate in specially dangerous vocations such as the long-neglected area of chemical or chemical-related occupations. A legitimate debate exists about the circumstances in which licensing systems are effective elsewhere and should be introduced. We should be aware of that debate.

Regulations. I have also mentioned the debate about the scope of the new wave of legislation. In the New South Wales debate there was significant criticism about the extent to which important matters were being left to regulation.[24] In defence, the government pointed out that it was virtually impossible to incorporate specific provisions of high detail in the general statute:

> The Bill will provide the framework for a concerted and serious reform in the area of occupational health and safety. It will not be the cure-all. Some of the critics of the Bill have complained that it does not prescribe for every conceivable situation. I regard that as a virtue of the Bill. It will provide the mechanism by which a concerted effort could be made. It would be impossible to incorporate into an Act of Parliament all of the prescriptions that hopefully will be made by regulation. If that were attempted it would mean that it would be many years, perhaps decades, before a comprehensive Bill would be introduced. The Bill will enable the making of regulations in respect of the work environment, every hazardous occupation and every dangerous substance or chemical. It will apply to all employees in New South Wales, not just the one-third of employees who are presently covered by legislation of this kind.[25]

Statistics and Research. In hard times, the first victim of economies is often the researcher and the statistician. Their work may be seen as a luxury that cannot be afforded as money goes on other things — such as, here, more inspectors, more industrial magistrates, more government safety officers etc. Of course, the other expenditures are worthy. But it is important for us to look to the long-term and to realise the importance of proper design of social policy. This can only be done effectively with the aid of better understanding of the dimension and nature of the problem of occupational health and safety.[26] Everyone concedes that the present state of our health and safety statistics in Australia is lamentable. Higher priority should be given to this subject, not least to monitoring the operation of new legislation. It should not be naively assumed that the new legislation will be effective, simply because it is enacted by Parliament.

The Federal role. Finally, I address the Federal role. I referred to this in a paper I delivered in November 1982 at the First National Conference on Industrial Safety held in Sydney.[27] In my paper I called attention to the national approach taken by interactive Federal and State legislation in the United States. I drew attention to the importance of the initiatives of Federal funding in the United States. I discussed the constitutional problems that stood in the way of the enactment of a single Federal Act in Australia dealing with occupational health and safety in this country.

Since that address, there have been a number of relevant developments:

. First, the statement of accord by the Australian Labor Party and the Australian Council of Trade Unions regarding economic policy was signed in February 1983. It deals in detail with occupational health and safety. It lists a number of specific initiatives, some of which have already been followed, as a means of involving employers and unions in the establishment of health and safety standards at the national level.[28]

. Secondly, in March 1983, the change of government brought to the Federal Treasury benches the Hawke Labor Government. So far, that government has pursued the approach of establishing committees and other authorities, Federal in character but with direct State involvement, to introduce the pressure for reform at a national level. Clearly, some of these initiatives provide an organisational framework within which more attention might be given to a national approach.

. Finally, it is apt to mention the decision of the High Court of Australia in the Tasmanian Dams case. That decision was handed down by the Court on 1 July 1983.[29] It is important in a number of respects for occupational health and safety. First, it makes clearer the power of the Federal Parliament to enact laws with respect to trading corporations. By such power, the Commonwealth Parliament could certainly already enact occupational health and safety legislation encompassing protection for the overwhelming majority of Australian workers. Secondly, the Court, by a majority, clarified the 'external affairs power', including the authority of the Federal Parliament to enact laws based on international instruments such as the Occupational Safety and Health Convention 1981 of the International Labour Organisation (No 155). I do not say that Federal legislation is necessary or would be more efficacious than State legislation. But the Australian community and its economy has a legitimate interest in the safety and health of workers everywhere throughout the continent, in all States. I have no doubt that the scope of the Commonwealth's legitimate constitutional power will be, and should be, examined before too long, if this is not already happening.

## CONCLUSIONS

Once again, I have strayed beyond my time. I have cautioned you against excessive faith in laws. I have suggested that higher on the priority lists may be work face initiatives. Yet laws may encourage, facilitate and promote these initiatives. I have

catalogued what I see to be the matters outside debate, as the wave of legislative reform reaches the various jurisdictions of Australia. Finally, I have proposed a checklist of controversies that should have the attention of those designing the new legislation. That task is a worthy one. Ultimately, we all meet here to address very human concerns : the prevention of death, the reduction of pain, the relief from disease, the avoidance of injury and the restoration of and compensation and redress to those who unavoidably suffer.

## FOOTNOTES

* The views expressed are personal views. The Australian Law Reform Commission does not have a current reference on occupational health and safety.

1. P Taylor, Ergonomics, The Role of Ergonomics and VDUs, in IFAP Bulletin, February-April 1983, 6, 7.

2. 'Safety at Kwinana', in IFAP Bulletin, August-October 1983, 4.

3. ibid, 5.

4. Industrial Foundation for Accident Prevention (IFAP), Descriptive brochure, 6.

5. B T Burke, Address at Opening of Industrial Safety Week, in IFAP Bulletin, February-April 1983, 15, 16.

6. This point is made by Mr R B Rowland Smith in the NSW Parliamentary Debates (Leg Council), 29 March 1983, 5178, 5181.

7. Mr Neilly MP, in NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4672, 4674.

8. F Marks and J Churchill, 'Understanding the Occupational Health and Safety Act, 1983 (NSW)', CCH, 1983, xi.

9. IFAP Bulletin, August-October 1983, 12.

10. Mr Garland is referred to by Mr Petersen MP in NSW Parliamentary Debates (Leg Assembly), 22 March 1983, 4862, 4868.

11. Occupational Health and Safety Act 1983 (NSW), s.23.

12. J Gobbo, 'Law in a Multicultural Society', Address to the Second Biennial Meeting, Australian Institute of Multicultural Affairs, 17 October 1983, mimeo, noted [1984] Reform 30.

13. Mr P D Hills MP (Ministry for Industrial Relations and Minister for Technology) in NSW Parliamentary Debates (Leg Assembly), 1 December 1982, 3683, 3687.

14. This point was discussed by Mr K Ryan MP in NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4682, 4684.

15. R Madgwick, quoted by Mr Petersen, ibid, 4868-9.

16. See eg Mr Petersen, 4862, 4868; Mr Rogan MP, NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4689, 4693; Ms E Kirkby, NSW Parliamentary Debates (Leg Council), 29 March 1983, 5201, 5202.

17. Occupational Health and Safety Act, 1983 (NSW), s.5.

18. Marks and Churchill, x.

19. ibid.

20. P S M Philips, NSW Parliamentary Debates (Leg Council), 29 March 1983, 5185, 5191.

21. See eg Mr Petersen, op cit.

22. Mr Armstrong MP, NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4663, 4664.

23. Australian Law Reform Commission, Insurance Agents and Brokers (ALRC 16), 71f.

24. ibid, Child Welfare (ALRC 18, para 419ff); ibid, Privacy (ALRC 22), Vol 2, 20ff.

25. Mr Armstrong MP, 4666; Mr Philips, 5185.

25. Mr M R Egan MP, NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4680.

26. Cf Mr Walsh MP, NSW Parliamentary Debates (Leg Assembly), 16 March 1983, 4666, 4668.

27. M D Kirby, 'Industrial Safety and Law Reform, Paper for the First National Conference on Industrial Safety, 16 November 1982 (74/82), mimeo.

28. Australian Labor Party and Australian Council of Trade Unions, 'The Statement of Accord Regarding Economic Policy', February 1983.

29. The Commonwealth v Tasmania (1983) 57 ALJR 450.