

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Work Health and Safety Bill 2011*.

Overview of Bill

The object of this Bill is to amend the *Occupational Health and Safety Act 2000* (**the OHS Act**) to adopt the following proposed national work health and safety reforms pending the enactment in New South Wales of the proposed *Work Health and Safety Act 2011*:

(a) the general duties under the OHS Act to ensure health, safety and welfare (and the duties under the regulations) will be qualified by the inclusion of “so far as is reasonably practicable” (thereby requiring the prosecution to prove what was reasonably practicable and removing the need for the defendant to establish that it was not reasonably practicable to comply with the duty),

(b) a duty will be placed on officers of a corporation to exercise due diligence to ensure that the corporation complies with health, safety and welfare duties (with this duty to replace the existing provision that deems directors and managers of a corporation to be guilty of offences committed by the corporation),

Explanatory note page 2

Occupational Health and Safety Amendment Bill 2011

Explanatory note

(c) the secretary of an industrial organisation of employees will no longer be entitled to institute proceedings for an offence under the OHS Act that concerns members of the organisation.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Schedule 1 Amendment of Occupational Health and Safety Act 2000 No 40

Qualification of health and safety duties—onus of proof

Currently, the duties under the OHS Act to ensure health and safety are expressed in unqualified terms (with provision of a defence in section 28 of the Act relating to reasonable practicality). **Schedule 1 [2], [3] and [5]–[7] and Schedule 2** qualify these duties and the health and safety duties under the regulations so that they will apply only so far as is reasonably practicable. **Schedule 1 [8]** makes a similar amendment to the duty of employees to co-operate as necessary with health, safety and welfare requirements at work, so that the duty will be a duty to co-operate so far as is *reasonably* necessary to enable compliance with those requirements.

In addition **Schedule 1 [1]** inserts proposed section 7A into the OHS Act to clarify that a duty imposed to ensure health and safety so far as is reasonably practicable requires the elimination of risks so far as is reasonably practicable and the minimisation of those risks so far as is reasonably practicable (if elimination is not reasonably practicable). The matters that are relevant in determining what is reasonably practicable in relation to ensuring health and safety are also set out in proposed section 7A.

Schedule 1 [10] omits section 28 of the OHS Act which currently provides a defence in proceedings under the Act (in addition to the general provisions of the criminal law that exclude criminal liability) if it is not reasonably practicable for the person to comply with a duty or if the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision. The omission of the defence is consequential on the qualification of duties under the Act and regulations so that they apply “in so far as is reasonably practicable”.

Schedule 1 [13] amends section 90 of the OHS Act so that a failure of the occupier

of premises to comply with an investigation notice is qualified by the defence of “reasonable excuse”.

Schedule 1 [11] makes a consequential amendment.

Explanatory note page 3

Occupational Health and Safety Amendment Bill 2011

Explanatory note

Liability of officers of corporations

Section 26 of the OHS Act currently provides that a director or person concerned in the management of a corporation is liable for any contravention of the Act or regulations by the corporation unless that person used all due diligence to prevent the contravention by the corporation or was not in a position to influence the conduct of the corporation in relation to its contravention of the provision. **Schedule 1 [9]** substitutes section 26, replacing the current provision with a new provision that imposes a duty on officers of a corporation to exercise due diligence to ensure that the corporation complies with its occupational health and safety duties. **Schedule 1 [4] and [12]** make consequential amendments. Proposed section 26 also provides that an officer who is a volunteer (that is, a person who does community work on a voluntary basis as defined in the *Civil Liability Act 2002*) is not liable to be prosecuted under the section.

Prosecutions by trade unions

Schedule 1 [14] abolishes the entitlement of the secretary of an industrial organisation of employees to institute proceedings for an offence concerning members of the organisation.

Miscellaneous

Schedule 1 [15] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [16] contains provisions of a savings and transitional nature. In particular, the amendments made by the proposed Act will not apply to contraventions occurring before the enactment of the proposed Act, except that the amendment relating to prosecutions by trade unions will apply on and from the date of introduction into Parliament of the Bill for the proposed Act.

Schedule 2 Amendment of Occupational Health and Safety Regulation 2001

Schedule 2 [2] provides (as outlined above) that any duty in the *Occupational Health and Safety Regulation 2001* to take or refrain from taking any action for the protection of health or safety applies only so far as it is reasonably practicable to take or refrain from taking that action. **Schedule 2 [1], [3] and [4]** make consequential amendments.