

OCCUPATIONAL HEALTH AND SAFETY ACT REVIEW

March 2004

Chris Maxwell

REPUBLIC OF KENYA

MINISTRY OF WATER AND POWER

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
ABBREVIATIONS	3
ACKNOWLEDGEMENTS	5
EXECUTIVE SUMMARY	6
INTRODUCTION	15
CHAPTER 1: A CONSULTATIVE INQUIRY	15
CHAPTER 2: THE SAFETY CONSENSUS	20
PART 1: NEW CHALLENGES FOR OHS	24
CHAPTER 3: THE CHANGING LABOUR MARKET	24
CHAPTER 4: NEW AND EMERGING RISKS	29
PART 2: THE REGULATORY STRUCTURE	46
CHAPTER 5: A BIFURCATED AUTHORITY	46
CHAPTER 6: RELATIONS WITH GOVERNMENT	54
CHAPTER 7: THE NEED FOR A TRIPARTITE MECHANISM	60
CHAPTER 8: DUPLICATION AND THE REGULATORY BURDEN	71
PART 3: GENERAL DUTIES: SCOPE AND LIMITS	96
CHAPTER 9: THE ROBENS MODEL: HISTORICAL BACKGROUND	96
CHAPTER 10: SAFETY AND PRACTICABILITY	100
CHAPTER 11: CONTROL AND RESPONSIBILITY	110
CHAPTER 12: SAFETY AND COST	120
CHAPTER 13: PROTECTING WORKERS AND THE PUBLIC: SS.21 AND 22	135
CHAPTER 14: A SYSTEMATIC APPROACH	141
CHAPTER 15: THE HIERARCHY OF CONTROL	159
CHAPTER 16: DUTIES OF EMPLOYEES	163
CHAPTER 17: DUTIES OF OFFICERS	169
PART 4: UPSTREAM DUTIES	177
CHAPTER 18: DESIGNING FOR SAFETY	177
CHAPTER 19: CLARIFYING S.24	186
PART 5: CONSULTATION, PARTICIPATION AND REPRESENTATION	192
CHAPTER 20: WORKPLACE	192
CHAPTER 21: UNION RIGHT OF ENTRY	215
CHAPTER 22: STAKEHOLDER ENGAGEMENT	222
CHAPTER 23: PUBLIC SECTOR AS OHS EXEMPLAR	227
PART 6: COMPLIANCE	233
CHAPTER 24: INCENTIVES FOR COMPLIANCE	233
CHAPTER 25: THE NEED FOR ADVICE	258
CHAPTER 26: EDUCATION AND INFORMATION	272
PART 7: ENFORCEMENT - ADMINISTRATIVE	284
CHAPTER 27: THE ROLE OF THE INSPECTORS	284
CHAPTER 28: FUNCTIONS AND POWERS OF THE INSPECTORS	293
CHAPTER 29: IMPROVEMENT AND PROHIBITION NOTICES	328
CHAPTER 30: INFRINGEMENT NOTICES	347
CHAPTER 31: ENFORCEABLE UNDERTAKINGS	350
PART 8: ENFORCEMENT - CRIMINAL	354
CHAPTER 32: CIVIL CONCEPTS, CRIMINAL LIABILITY	354
CHAPTER 33: ONUS OF PROOF	357
CHAPTER 34: RIGHT TO PROSECUTE	360
CHAPTER 35: PENALTIES	363
CHAPTER 36: SENTENCING GUIDELINES AND SUMMARY PROSECUTIONS	383
CHAPTER 37: CROWN LIABILITY	387
PART 9: PUBLIC ACCOUNTABILITY	392
CHAPTER 38: INTERNAL REVIEW OF DECISIONS	392
CHAPTER 39: EXTERNAL REVIEW OF DECISIONS	397
APPENDIX: TERMS OF REFERENCE	401
BIBLIOGRAPHY	403
TABLE OF CASES	412
TABLE OF LEGISLATION AND REGULATIONS	414

ABBREVIATIONS

ACA	<i>Accident Compensation Act 1985 (Vic)</i>
ACCI	Australian Chamber of Commerce and Industry
ACT Act	<i>Occupational Health and Safety Act 1989 (ACT)</i>
ALRC	Australian Law Reform Commission
Authority	Victorian WorkCover Authority
COAG	Council of Australian Governments
Compensation Act	<i>Accident Compensation Act 1985 (Vic)</i>
Cth Act	<i>Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)</i>
DGA	<i>Dangerous Goods Act 1985 (Vic)</i>
DPP	Director of Public Prosecutions (Vic)
DTF	Department of Treasury and Finance
DWG	designated work group
EP Act	<i>Environment Protection Act 1970 (Vic)</i>
EPSA	<i>Equipment (Public Safety) Act 1994 (Vic)</i>
ESA	<i>Electrical Safety Act 1998 (Vic)</i>
Falls RIS	Regulatory impact statement for the Occupational Health and Safety (Prevention of Falls) Regulations
HSC	Health and safety committee
HSE	Health and Safety Executive (UK)
HSR	health and safety representative
HSWG	Health and Safety Working Group
MHAC	Major Hazards Advisory Committee
MHF (Regulations)	Major Hazard Facilities (Regulations)
MSD	musculo-skeletal disorder
National Commission, NOHSC	National Occupational Health and Safety Commission
NSW Act	<i>Occupational Health and Safety Act 2000 (NSW)</i>
OCEI	Office of the Chief Electrical Inspector
OGS	Office of Gas Safety
OHS	occupational health and safety

OHSA, the Act	<i>Occupational Health and Safety Act 1985 (Vic)</i>
PIN	provisional improvement notice
Qld Act	<i>Workplace Health and Safety Act 1995 (Qld)</i>
Reference Group	Reference Group established by the Minister to oversee the review (see Chapter 1)
Review	The present review of OHSA
RIS	Regulatory impact statement
RTDGA	<i>Road Transport (Dangerous Goods) Act 1995 (Vic)</i>
SA Act	<i>Occupational Health, Safety and Welfare Act 1986 (SA)</i>
SDF	Safety Development Fund
SME	Small to medium-sized enterprise
Tas Act	<i>Workplace Health and Safety Act (Tas)</i>
THC, VTHC	Victorian Trades Hall Council
VCEA	Victorian Council of Employers Associations
VPLRC	Victorian Parliamentary Law Reform Committee
VWA	Victorian WorkCover Authority
WA Act	<i>Occupational Health, Safety and Welfare Act 1984 (WA)</i>
WAC	WorkCover Advisory Committee
WorkSafe	Victorian WorkCover Authority in its capacity as administrator of OHSA and related legislation

- (a) the sharing with employees of relevant information about occupational health, safety and welfare;
- (b) employees being given the opportunity to express their views and to contribute in a timely fashion to the resolution of occupational health, safety and welfare issues at their place of work; and
- (c) the views of employees being valued and taken into account by the employer.

921. The Queensland legislation also seeks to explain the concept of “consultation”:

“Consultation is about fostering cooperation and developing partnerships between government, employers and workers to ensure workplace health and safety.”⁴¹²

922. In my view, the OHS Act should state in clear terms what is expected of a person – whether an employer or an HSR - who is under an obligation to consult. It is possible to do this without prescribing how consultation is to be undertaken. What the legislation can do is identify the essential elements of consultation.

923. Consultation is not the same as, and does not require, consensus or agreement. What it must involve, however, is dialogue between the parties to the consultation. Dialogue means (at least):

- a two-way exchange of information and views;
- a consideration by the party required to consult of the views expressed by the other party; and
- those views being taken into account before action is taken, or a decision made.

924. I recommend that a provision along the following lines be introduced into Part III of the Act:

The purpose of consultation is for the employer:

- *to share with the workers information about occupational health and safety;*
- *to give workers the opportunity to express their views and to contribute in a timely fashion to:*
 - *the resolution of health and safety issues arising at their workplace; and*
 - *the making of decisions about matters that relate to their health, safety and welfare at their workplace;*
- *to take into account and value the views expressed and the contributions made by workers.*

⁴¹² Section 18 Queensland Act.

925. As I have said, the “form and manner” of consultation should be a matter for the particular workplace, within those general parameters. As the Robens Committee recognised, there must be flexibility in allowing employers and employees to develop consultative processes which are adapted to the needs of particular workplaces.
926. In my view, Part IV should facilitate the development of consultation procedures appropriate to the particular workplace. An employer should be required to negotiate and – if possible - agree with employees on a consultation procedure. Part III of the Act should include a provision as to how consultation could be undertaken – for example –
- (a) with a health and safety representative or representatives elected under Part IV of the Act;
 - (b) with a health and safety committee or committees established under Part IV; and/or
 - (c) in accordance with arrangements agreed between the employer and workers to enable the employer to comply with the duty to consult, which arrangements may involve the election by the workers of HSRs and/or the establishment of HSCs.⁴¹³
927. It should be noted that compliance with the consultation procedure agreed between the employer and workers would not automatically constitute compliance with the statutory duty to consult.

Resolution of workplace health and safety issues

928. Related to these obligations to consult is the existing requirement of workplace parties to negotiate in relation to -
- (a) the composition of designated work groups; and
 - (b) any variation of the composition of a designated work group;⁴¹⁴ and
 - (c) the resolution of workplace health and safety issues.⁴¹⁵
929. Part III of the OHSA contains the general duty provisions (ss.21-25). It also contains “provisions for dealing with health and safety issues”.
930. Section 26 bundles up issue resolution⁴¹⁶ with cease work directions.⁴¹⁷ The original Occupational Health and Safety Bill contemplated that an HSR would have the power

⁴¹³ See s.16 of the New South Wales Act.

⁴¹⁴ Sections 29(2) and (9) OHSA.

⁴¹⁵ Section 26 OHSA.

⁴¹⁶ Section 26(1).

⁴¹⁷ Section 26(2).